

BOARD OF EDUCATION OF THE MORRIS	:	
SCHOOL DISTRICT,	:	
	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
THE TOWN COUNCIL OF THE TOWN OF	:	DECISION
MORRISTOWN AND THE TOWNSHIP	:	
COMMITTEE OF THE TOWNSHIP OF	:	
MORRIS, MORRIS COUNTY,	:	
	:	
RESPONDENTS.	:	

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of \$1,401,203 made by governing bodies following voter rejection of proposed budget on April 19, 1994.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore \$454,063; however, this amount was ordered to be appropriated from surplus.

JANUARY 5, 1995

BOARD OF EDUCATION OF THE MORRIS :
SCHOOL DISTRICT, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

THE TOWN COUNCIL OF THE TOWN OF :
MORRISTOWN AND THE TOWNSHIP :
COMMITTEE OF THE TOWNSHIP OF :
MORRIS, MORRIS COUNTY, :

DECISION

RESPONDENTS. :

For Petitioner, Frederic J. Sirota, Esq. (Wiley, Malehorn & Sirota)

For Respondent Township Committee, John M. Mills, III, Esq. (Mills & Mills)

For Respondent Town Council, Herbert A. Vogel, Esq. (Vogel, Chait, Schwartz & Collins)

This matter was opened before the Commissioner of Education by the filing of a Petition of Appeal on June 14, 1994, by the Board of Education of the Morris School District (Board) appealing the reductions in the 1994-95 General Fund tax levy imposed by the Town Council of the Town of Morristown and the Township Committee of the Township of Morris (Communities) pursuant to the provisions of N.J.S.A. 18A:22-37, after defeat of the 1994-95 budget by the voters of the two communities. The reduction in the General Fund tax levy imposed by the Communities was in the amount of \$2,128,469, the above amount consisting of \$727,266 in reductions in appropriations

accepted by the Board in discussions with the Communities, \$901,203 of additional reductions in line item appropriations in contention by the Board and a \$500,000 reduction in the district's free balance to be added as revenue which is likewise opposed by the Board.

As a result of these reductions, the amounts in dispute before the Commissioner are summarized below:

Proposed Tax Levy
Adopted by the Board

\$37,964,014

Amount of Reduction
by Governing Bodies

\$2,128,469

Amount of Reduction in
Dispute Before Commissioner

\$1,401,203

Amount of Tax Levy
Certified by Governing Bodies

\$35,835,545

On July 5 and July 7, 1994, respectively, the Town of Morristown and the Township of Morris, respectively, filed Answers to the Petition of Appeal. Position Statements were filed by the Town of Morristown and the Board on July 25, 1994, and July 27, 1994, respectively. Responses to each other's Position Statements were filed on August 8, 1994, with the Board filing a final Summary on August 17, 1994, whereupon the record was closed.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the

determinations made under Account 013 above, particularly the determination rejecting the Board's \$2.8 million allocation of surplus for unused sick leave payments, the Commissioner finds that the \$454,063 restoration ordered by the within decision may appropriately be made by allocating additional amounts from surplus. In instances such as this where there is money available to be reallocated in order to fund a restoration, it would be a manifest injustice to the taxpayers not to so order. Consequently, the Commissioner directs the Board to appropriate from surplus amounts necessary to fund this restoration. The tax levy for General Fund purposes set by the Township of Morris and the Town of Morristown for the 1994-95 school year shall stand as certified.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

JANUARY 5, 1995

DATE OF MAILING - JANUARY 5, 1995

JOHN J. SPARACIO, JR., :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 NEW JERSEY DEPARTMENT OF : DECISION
 CORRECTIONS, :
 RESPONDENT. :
 _____ :

SYNOPSIS

Petitioner, former Assistant Supervisor of Education, alleged improper demotion and violation of his seniority rights regarding his reassignment as a teaching staff member for Department of Corrections. Petitioner contested his status on the seniority list and raised the issue of his military service credit.

ALJ held that the provisions of N.J.S.A. 18A:28-6, dealing with the tenure of teaching staff members who are transferred or promoted, do not apply to those categories of teachers who are given tenure by the provisions of N.J.S.A. 18A:60-1. Thus, petitioner did not obtain tenure in his former Teacher I position. ALJ determined that military service credit can be applied to any and all teaching staff members covered by any tenure provisions within Title 18A and, because petitioner first acquired tenure in his Assistant Supervisor of Education position, his military service credit gives petitioner a date of hire of October 13, 1986 in this position for purposes of computing his seniority. ALJ, therefore, found that the demotion of petitioner violated his seniority rights and was erroneous since respondent retained Assistant Supervisors with less seniority than petitioner. ALJ ordered petitioner restored to the position of Assistant Supervisor of Education together with back pay and benefits from the date of his demotion and that the calculation of seniority be corrected.

Commissioner adopted findings and determination in initial decision as his own and ordered petitioner restored and his seniority calculation adjusted in conformance with decision.

JANUARY 6, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 4652-93

AGENCY DKT. NO. 458-9/92

JOHN J. SPARACIO, JR.,

Petitioner,

v.

**NEW JERSEY DEPARTMENT
OF CORRECTIONS,**

Respondent.

Lisa Morowitz, Esq., for petitioner (Weissman & Mintz, attorneys)

Jayroe Wurst, Deputy Attorney General, for respondent (Deborah T. Poritz, Attorney General of New Jersey, attorney)

Record Closed: October 11, 1994

Decided: November 28, 1994

BEFORE JOSEPH F. MARTONE, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals from his demotion and reassignment as a teaching staff member for the Department of Corrections, alleging that this action is in violation of his seniority rights. The matter was transmitted to the Office of Administrative Law (OAL) on May 18, 1993, for hearing

as a contested case. It was assigned to the undersigned Administrative Law Judge (ALJ) on June 15, 1993, and was scheduled for hearing on November 30, 1993.

On July 16, 1993, attorney for petitioner filed a motion to amend the pleadings, and attorney for respondent responded to this motion on September 29, 1993. An Order was entered on October 5, 1993, permitting petitioner to amend his pleadings and providing respondent with the opportunity to respond. An Amended Verified Petition was filed on October 5, 1993, and an Answer to the Amended Petition was filed on October 28, 1993.

On November 30, 1993, the scheduled hearing date, the parties entered into negotiations which resulted in a tentative settlement, and they indicated that a written agreement embodying the terms of the settlement would be submitted within two weeks. On December 15, 1993, attorney for petitioner advised the ALJ that the settlement agreement could not be effectuated because petitioner had been transferred from the Department of Corrections to the Department of Human Services, which is not a party to these proceedings, and the settlement of petitioner's seniority rights claims required the Department of Human Services to take certain actions in order to comply with the terms of the settlement, which it has refused to do. By letter dated January 24, 1994, attorney for respondent indicated that he disagreed with the characterization of the settlement terms by attorney for petitioner.

By motion filed January 3, 1994, petitioner requested an order to add the Department of Human Services as a party-respondent. No opposition was submitted to this motion and by Order entered on January 20, 1994, petitioner was permitted to amend his pleadings to add the Department of Human Services as a party.

Through additional telephone conferences it was determined that this matter had not been and could not be settled, and that the sole issue to be resolved was petitioner's seniority based upon military service, which could be resolved on motion. Thereafter the parties filed a motion (Exhibits P-1, P-2, P-3 and P-4) and cross-motion (Exhibits R-1 and R-2) for summary decision regarding this particular issue and the record closed.

After reviewing the motion papers submitted by the parties, the ALJ decided to reopen the record and requested that counsel address the issue of whether the provisions of *N.J.S.A.* 18A:28-6 and -11.1 apply to teachers employed by the Department of Corrections or the Department of Human Services, or whether these provisions only apply to teaching staff members employed by a school district or a board of education. Following the submission of these additional legal arguments (Exhibits P-5, P-6, R-3 and R-4), the ALJ closed the record on October 11, 1994.

FACTUAL DISCUSSION

As is indicated by the similarity of the factual assertions set forth in counsels' letter briefs (Exhibit P-3 at 3-5; Exhibit R-2 at 1-3), and by the fact that the certification of petitioner (Exhibit P-2) was not disputed by respondent, the essential facts in this matter are not disputed.

Petitioner's certification (Exhibit P-2) indicates that he is a tenured teacher with the New Jersey Department of Human Services and he possesses teaching certificates from the New Jersey Department of Education with endorsements for Principal, Teacher of the Handicapped, School Administrator and Student Personnel Services. He was hired by the New Jersey Department of Corrections on July 4, 1987, as a Teacher I for Bayside State Prison. He served in the Teacher I position until September 24, 1988, when he was promoted to the position of Assistant Supervisor of Education at Bayside State Prison.

Prior to petitioner's promotion, he had served in the Teacher I position for approximately fourteen months and had not yet obtained tenure. On September 25, 1990, after two years of service in the position of Assistant Supervisor of Education, the Department of Corrections granted petitioner tenure as an Assistant Supervisor. On September 11, 1992, the petitioner was verbally notified that as a result of a department-wide layoff, he was to be demoted back to a Teacher I position at an undisclosed location. He was provided with a list of Department of Corrections Assistant Supervisors which was used to determine layoff rights (Exhibit P-2, Attachment 1). The first thirteen employees on the list were not demoted as a result of the reduction in force (Exhibit P-2, Attachment 2). Petitioner was ranked number 15 in order of seniority on the original list (Exhibit P-2, Attachment 1).

By letter dated September 13, 1992, petitioner was advised that effective October 5, 1992, he was being reassigned to the Bureau of Community and Residential Services for Camden/Atlantic Counties (Exhibit P-2, Attachment 3).

From September 14 to September 28, 1992, petitioner protested his status on the seniority list both verbally and in writing and raised the issue of his military service credit. Petitioner had served in the United States Army prior to joining the Department of Corrections.

On November 6, 1992, petitioner was provided with a revised seniority list which credited him with one year, eleven months, and eleven days of seniority for military service (Exhibit P-2, Attachment 4). His rank on the revised list was number 17 (Exhibit P-2, Attachments 4 and 5). Petitioner asserts in his certification (Exhibit P-2, paragraph 11) that according to the Department of Corrections he was given military service credit in his former Teacher I position, not in his Assistant Supervisor of Education position. Military service credit was not taken into account for purposes of determining layoff rights from his position as Assistant Supervisor of Education.

On December 15, 1992, a revised seniority list was promulgated by the Department of Corrections (Exhibit P-2, Attachment 6). Petitioner was still ranked number 17.

Petitioner's demotion to the Teacher I position did not initially affect his salary, but he will not get the collectively bargained salary upgrade given to Assistant Supervisors in the first pay period of the 1994 fiscal year.

In July 1993, as a result of the transfer of Juvenile Services from the Department of Corrections to the Department of Human Services, petitioner became an employee of the Department of Human Services.

It should be noted that petitioner does not challenge the military service credited to him in the amount of one year, eleven months, and eleven days. The sole issue in this matter is whether this military service should be credited to him as a Teacher I or as an Assistant Supervisor of Education.

LEGAL DISCUSSION AND ANALYSIS

Summary decision may be granted if the papers and discovery which have been filed, together with any affidavits, clearly show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5(b); *Templeton v. Glen Rock*, 11 *N.J. Super.* 1, 4 (App. Div. 1950). As was indicated above, there is no dispute as to the essential facts in this matter, and the sole issue to be decided is whether petitioner's period of military service was properly credited. Therefore, this case is able to be decided as a matter of law.

The position of petitioner is that because *N.J.S.A.* 18A:28-6 provides for an abbreviated period for tenure upon promotion as well as retroactive tenure and seniority rights in the employee's former position, petitioner obtained tenure in the Teacher I position and in the Assistant Supervisor of Education position simultaneously. Attorney for petitioner points out that *N.J.S.A.* 18A:28-6 provides that "the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member." Thus, petitioner argues that the two consecutive years petitioner served in the new Assistant Supervisor position, when aggregated with the one year he served in the former Teacher I position, entitled him to tenure in both the Teacher I position and the Assistant Supervisor position.

Petitioner then argues that *N.J.S.A.* 18A:29-11.1 provides that in computing the length of service for seniority purposes, full recognition of military service shall be given, except that the period of that service shall not be credited toward more than four years of employment or seniority credit. Attorney for petitioner contends that respondent's action in giving petitioner military service credit in his Teacher I position and not in his Assistant Supervisor position was erroneous. It is argued that unlike the factual scenario in *Howley v. Ewing Bd. of Educ.*, 6 *N.J.A.R.* 509 (1982), petitioner did not first attain tenure in his Teacher I position. Since petitioner's tenure was acquired in both positions simultaneously, it should be credited to the position petitioner held at the time. Petitioner argues that upholding respondent's construction of the statute by crediting the military service to petitioner's former position would contravene the

basic purpose of the military service credit and would not effectuate its legislative intent. Finally, petitioner asserts that if he had been granted military credit in the Assistant Supervisor category, he would not have been laid off.

In response, respondent argues that under the provisions of *N.J.S.A.* 18A:28-6 petitioner did not obtain tenure in both positions simultaneously, but first obtained tenure in his former Teacher I position. Respondent argues that petitioner obtained tenure in the Teacher I position after his employment for a total of two years, pursuant to *N.J.S.A.* 18A:28-6, and that the attachment of military service credit comes into being when a teacher first acquires tenure, citing *Lang v. Princeton Regional Sch. Dist. Bd. of Educ.*, 1979 *S.L.D.* 245. Further, respondent indicates in a footnote to its letter brief that even if the usual three-year period for obtaining tenure is applied, petitioner would still have become tenured in his former Teacher I position on July 5, 1990, prior to the date he acquired tenure as an Assistant Supervisor, September 25, 1990.

In addressing the additional issue raised by the ALJ of whether the provisions of *N.J.S.A.* 18A:28-6, -11.1 and -12 are even applicable to tenured teachers employed by the Department of Human Services or Department of Corrections, respondent argues that the tenure and seniority rights that apply to the petitioner are set forth in Title 18A, chapter 60, and that the provisions found at chapter 28 do not apply. Respondent points out that the Legislature provided separately for the rights attendant to a reduction in force for educators employed by school districts and for educators employed by the State. Respondent argues that it would be improper to interpret *N.J.S.A.* 18A:28-10 to apply to persons covered by *N.J.S.A.* 18A:60-1 because doing so would render *N.J.S.A.* 18A:60-1, superfluous and meaningless. Respondent also points out that the Legislature, in 1985, enacted legislation providing that teaching staff members should receive credit towards their seniority rankings for time served in the active military or naval service. *L.* 1985, *c.* 217, codified at *N.J.S.A.* 18A:28-11.1. This legislation specifically provided that it supplements chapter 28 of Title 18A of the New Jersey Statutes and amends *N.J.S.A.* 18A:28-12. Respondent points out that the Legislature did not include in that legislation separate statutory provisions providing that educators covered by *N.J.S.A.* 18A:60-1 would similarly be credited with time toward seniority for military service. By legislation adopted in 1986, *L.* 1986, *c.* 158, codified at *N.J.S.A.* 18A:60-1, the Legislature specifically provided for tenure rights to persons employed in teaching capacities by the Department of Corrections and Department of Human

Services. In response, petitioner points out that *N.J.S.A.* 18A:60-3 only permits a reduction in force when the reduction is due to the natural diminution of the number of students or pupils in the institution. Nevertheless, the statute and regulation have also been applied in circumstances where financial exigency leads to a layoff of teaching staff members who otherwise have tenure. *Sheffield v. Department of Human Services*, 93 *N.J.A.R.* 2d. (Vol. 4A) 26, 27 (Education); *O'Toole v. Forestal*, 211 *N.J. Super.* 394 (App. Div. 1986). Therefore, petitioner argues that chapter 28 of Title 18A has been extended to cover Department of Human Services or Department of Corrections tenured staff.

Into this rather confusing fray, I now add my own interpretation with the almost certain knowledge that my determinations will not be the last word in this matter.

I **HOLD** that the provisions of *N.J.S.A.* 18A:28-6, dealing with the tenure of teaching staff members who are transferred or promoted, do not apply to those categories of teachers who are given tenure by the provisions of *N.J.S.A.* 18A:60-1. *N.J.S.A.* 18A:28-6 contains references to "any such teaching staff member" and to "the employing board." Thus, *N.J.S.A.* 18A:28-6, when construed in light of the surrounding statutory provisions which are *in pari materia*, clearly refers to teaching staff members serving in any school district or under any board of education as specified by *N.J.S.A.* 18A:28-5. There is no way that this provision providing for tenure upon transfer or promotion can be properly interpreted to apply to transfers or promotions to those positions specified by *N.J.S.A.* 18A:60-1, including those in the departments of Corrections and Human Services.

This holding results in petitioner not having obtained tenure in his former Teacher I position.

I next turn to the issue of whether *N.J.S.A.* 18A:28-11.1, providing for military service credit for teaching staff members, applies to any position held by petitioner. Attorney for respondent supplied a copy of the original Assembly Bill number 3683 which was approved on June 29, 1985, as *L. 1985, c. 217* (Exhibit R-3 at Ra-1). It is significant that section 1, which is designated as a "new section," was not assigned a section number by the Legislature at the time of adoption, while section 2 was indicated by the Legislature to be amending *N.J.S.A.* 18A:28-12.

It is also significant to note that sections 1 and 2 of chapter 217 both contain the wording, "... except that the period of that service shall not be credited toward more than four years of employment or seniority credit." The duplication of this language in both sections of this legislation makes it clear that these two sections were not intended by the Legislature to follow each other, but were intended as separate provisions. Section 2 of chapter 217 was clearly and explicitly intended to add to and amend the provisions of section 12 of chapter 28, Title 18A. On the other hand, section 1 was not declared by the Legislature to be an addition or amendment to chapter 28, but was a general grant of military service credit to *all* teaching staff members. Section 1, by its terms, clearly applies to "every teaching staff member" who has served or shall hereafter serve in the active military or naval service. The fact that section 1 has been included in Chapter 28 of Title 18A as *N.J.S.A. 18A:28-11.1* should not be construed as expressing any intention on the part of the Legislature that its operation and effect is limited to teaching staff members in any school district or under any board of education. See *N.J.S.A. 1:1-5*, which specifically provides that no implication or presumption of a legislative construction is to be drawn from the classification and arrangement of the Revised Statutes. Therefore, I **HOLD** that section 1 of *L. 1985, c. 217 (N.J.S.A. 18A:28-11.1)* is not intended to apply solely to teaching staff members serving in any school district or under any board of education, as limited by *N.J.S.A. 18A:28-5*, but applies generally to *any and all* teaching staff members covered by any tenure provisions within Title 18A.

I now turn to the specific facts of this case for the purpose of applying the above-enunciated principles to this matter. It is clear that petitioner first acquired tenure in the position of Assistant Supervisor of Education at Bayside State Prison at the expiration of a period of employment of three consecutive calendar years. Since petitioner was promoted to that position on September 24, 1988, he acquired tenure three years later on September 24, 1991. Since it was in this position that petitioner first acquired tenure, the military service credit of one year, eleven months, eleven days authorized by *N.J.S.A. 18A:28-11.1* gives to petitioner a date of hire of October 13, 1986, for purposes of computing his seniority. This would rank him as number 12 in seniority on the list of Assistant Supervisors ranked in order of seniority (Exhibit P-2, Attachment 6). Since the thirteen most senior Assistant Supervisors were not laid off, demoted or otherwise reduced in rank, I **FIND** that the demotion of petitioner violated his seniority rights and was erroneous since respondent retained Assistant Supervisors of Education with less seniority

than petitioner. As a result, I **FIND** that petitioner is entitled to an Order granting summary decision in his favor restoring him to his former position as an Assistant Supervisor of Education together with back pay and benefits, and that petitioner is further entitled to have the calculation of his seniority corrected so as to comply with the foregoing.

DECISION AND ORDER

Based upon the foregoing, it is hereby **ORDERED** that summary decision is **GRANTED** in favor of petitioner and that he shall be restored to the position of Assistant Supervisor of Education together with back pay and benefits from the date of his demotion, and that the calculation of seniority to which petitioner is entitled shall be corrected so as to be consistent with this decision.


I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 28, 1994

DATE



JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

November 29, 1994

DATE



DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 02 1994

DATE



**ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW**

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APPENDIX

LIST OF EXHIBITS

For petitioner:

- P-1 Notice of Motion for Partial Summary Decision
- P-2 Petitioner's certification, dated January 24, 1994, with attachments
- P-3 Petitioner's letter brief, dated February 7, 1994
- P-4 Petitioner's letter reply, dated April 13, 1994
- P-5 Petitioner's letter brief, dated August 17, 1994
- P-6 Petitioner's letter reply, dated August 25, 1994

For respondent:

- R-1 Notice of Cross-Motion
- R-2 Respondent's letter brief, dated March 11, 1994
- R-3 Respondent's letter brief, dated August 17, 1994
- R-4 Respondent's letter reply, dated August 30, 1994

JOHN J. SPARACIO, JR., :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 NEW JERSEY DEPARTMENT OF : DECISION
 CORRECTIONS, :
 RESPONDENT. :
 _____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner agrees with the findings and conclusions of the Administrative Law Judge for the reasons clearly articulated in his initial decision.

Accordingly, the recommended decision of the Office of Administrative Law is adopted as the final decision in this matter. It is hereby ordered that petitioner be restored to the position of Assistant Supervisor of Education along with back pay and benefits from the date of his demotion. It is further ordered that the calculation of his seniority be adjusted to conform with this decision.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

JANUARY 6, 1995

DATE OF MAILING - JANUARY 6, 1995

3-95

IN THE MATTER OF THE CAP WAIVER :
 APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
 OF THE TOWNSHIP OF TEANECK, : DECISION
 BERGEN COUNTY. :
 _____ :

SYNOPSIS

Board appealed General Fund cap waiver in the amount of \$610,071 rejected by voters.

Upon review of the record, Commissioner determined to order the increase of \$610,071 in cap waiver monies, offset by a \$150,000 appropriation from surplus, for a total General Fund tax levy of \$41,964,220 for 1994-95 school year.

JANUARY 9, 1995

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
OF THE TOWNSHIP OF TEANECK, : DECISION
BERGEN COUNTY. :
_____ :

For Petitioner, Sidney A. Sayovitz, Esq. (Young, Dimiero
& Sayovitz)

This matter was opened before the Commissioner of Education on June 16, 1994, by way of the filing of a Petition of Appeal by the Board of Education of the Township of Teaneck (Board) seeking inclusion within the 1994-95 General Fund Tax Levy a cap waiver amount of \$610,071 defeated by the voters of the district at the annual school election held on April 19, 1994.¹ In addition to the defeat of the cap waiver, the voters also defeated the base budget.

The aforesaid cap waiver amount was submitted pursuant to the provisions of N.J.S.A. 18A:7D-28(f) which provides as follows:

Any school district may submit a proposal to raise the amount of tax levy necessary to exceed the maximum permissible net budget permitted by

¹ The total cap waiver request was for \$814,071 only \$610,071 of which was deemed necessary for a thorough and efficient system of education by the county superintendent. The Board did not appeal that determination by separate action. Board of Education of the Borough of Lincoln Park v. Borough Council of the Borough of Lincoln Park, Morris County, decided by the State Board of Education, December 2, 1992.

this section to the legal voters of the district for type II school districts without a Board of School Estimate and to the Board of School Estimate for those school districts with a Board of School Estimate as required during the school budget approval process pursuant to chapters 22 and 54 of Title 18A of the New Jersey Statutes and section 13 of P.L. 1971, c.271 (C.18A:46-41). The proposal to raise additional tax levy to exceed the maximum permissible net budget shall be in addition to the amounts required to be approved for each school district in accordance with chapters 22 and 54 of Title 18A of the New Jersey Statutes and section 13 of P.L. 1971 (C.18A:46-41). In the event that a school district's proposal to raise the tax levy to exceed the maximum permissible net budget is not approved in accordance with the budget approval process set forth in chapter 22 of Title 18A of the New Jersey Statutes for type II districts and for type I districts, chapter 54 of Title 18A of the New Jersey Statutes for county vocational school districts and section 13 of P.L. 1971, c.271 (C.18A:46-41) for county special services school districts, that disapproval shall be deemed final and shall not be subject to further review or appeal.

The Commissioner notes that the Bergen County Superintendent of Schools approved the above-cited cap waiver request on March 31, 1994, as being necessary for the provision of a thorough and efficient system of education after reviewing the entire budget in concert with the district and a Department of Education panel. The purpose of this review was to ascertain whether the amounts requested within the cap waiver request were necessary for a thorough and efficient system of education and whether they could be funded through reallocation within the base budget. Having determined that such amounts were necessary and that reallocations were not possible, the budget submitted to the voters was conditionally approved with the provision that should the cap waiver be rejected the district must file an appeal with the Commissioner. See, Administrative Agency Advice (AAA) 91-0036 (July 8, 1991).

The accounts and amounts which were approved for submission to the voters are set forth below:

<u>Account Title</u>	<u>Account Number</u>	<u>Dollar Amount</u>
Basic Skills: Pre-K- Tchr. Sal.	11-230-100-101	\$ 82,800
Basic Skills: Pre-K Aide Sal.	11-230-100-106	20,500
Transportation:		
Contract Services	11-000-270-511	16,700
Reg. Instr: Gr.9-12 Tch. Sal.	11-140-100-101	204,000
Tuition:		
Co. Vo. Tech Regular	11-000-100-563	32,000
Transp. Cont. Serv. Voc. Tech.	11-000-270-511	33,000
Elementary Instrumental Music:		
Teacher Salaries	11-120-100-101	59,000
Busing	11-000-270-512	5,000
Salaries, Profes. Staff (Forum)	11-000-218-104	59,000
Salaries, Secretarial (Forum)	11-000-218-105	25,000
Salaries, Summer (Forum)	11-000-218-104	5,000
Supplies (Forum)	11-000-218-600	500
Materials (Forum)	11-000-218-600	1,200
Misc. Servs., Teaneck (Forum)	11-000-218-592	300
Transpor: Contract Serv. Gr. 5	11-000-270-511	<u>66,071</u>
Total Amount		\$610,071

Pursuant to N.J.S.A. 18A:22-37, the Board and the Township Committee of the Township of Teaneck (Township) met to review the budget for purposes of arriving at a tax levy amount which would assume a level of funding sufficient for providing the constitutionally required thorough and efficient system of education. As a result of such meeting the Board and the Township agreed to a reduction of \$520,000 in the tax levy contained within the base budget, setting the levy at \$41,504,149. (See, Resolution of the Township of Teaneck 146-94 attached as an exhibit to the Board's Petition of Appeal.) Notwithstanding the reduction effectuated by the aforesaid resolution the Township acknowledged its support for the cap waiver of \$610,071 and by subsequent letter to the Director of Controversies and Disputes reiterated its support both for the cap waiver programs as well as its support for all the expenditures contained within the base budget. It is noted at this point that

the \$520,000 reduction in the General Fund Tax Levy was accomplished by an additional free balance appropriation by the Board without reductions of any account within the base budget. The Board contends that such free balance appropriation was made possible by a contract settlement with its teachers at an amount less than that which was appropriated for the 1993-94 school year. (See Board's Position Statement)

Upon defeat of the budget and cap waiver and the subsequent reduction in the General Fund Tax Levy agreed upon between the Township and the Board, the Bergen County Superintendent reviewed the reduction in the tax levy and determined that it could be sustained in light of the appropriation from free balance which was accomplished as set forth above.

Additionally, on December 16, 1994, the Commissioner notified the parties that, pursuant to N.J.A.C. 1:1-15.2, he intended to take official notice of the 1993-94 year-end district audit as it related to the amount of undesignated surplus available to the district.

Board's Position

The Board argues that the specific programs which are to be funded are all directed toward providing contract services and support to a diverse community such as Teaneck. To reduce or eliminate these programs, the Board contends will have an adverse effect upon the schools of the district.

The Board points out that the Board and the Township are united in their support of the program contained within the cap waiver. This, contends the Board, is further substantiated by the Township's agreement that no programs in the base budget could be

eliminated that would be funded through an additional appropriation from free balance.

The Board points out by way of an affidavit from Dr. Vincent Doyle that it carefully reexamine its base budget to determine whether reallocations could be effectuated. Dr. Doyle points out that every line item, wherein increases were made in excess of the district's permissible cap percent increase (4.88%), was scrutinized and determination made relative to whether further reductions could be made. (See, Dr. Doyle's affidavit as part of its Board's Position Statement for the rationale for the percent increase in these line items.)

Dr. Harold Morris, Teaneck Superintendent, by way of further affidavit attached to the Board's Position Statement elaborates upon the programs to be funded by the cap waiver amount. These programs include:

- a. A prekindergarten basic skills remediation program.
- b. Funds to maintain the district's current practice of emphasizing writing skills through maintaining a four period instructional day for English teachers which permits those teachers to cope with the additional burden produced through extensive writing experiences for students.
- c. A variety of science and math programs such as attendance at the Bergen County Academy of Math and Science, a High Tech Exploration Program, A Program for the Enrichment and Career Exploration in Math and Science and a Minority Access Program to encourage minority students to develop their potential in math and science.
- d. Transportation for fifth grade pupils, particularly minority students, who would be forced to walk through major thoroughfares.

- e. Continuance of an instrumental music position in order to maintain instrumental instruction for fourth graders.
- f. A youth services program for high school age students which stresses prevention, intervention, mediation and support for students in resolving conflicts amicably in a high school which is diverse in its population. (See affidavit of Dr. Harold Morris)

Finally, it should be noted that the Board raises a legal issue as to the applicability of the State Board of Education's decision in Board of Education of the Borough of Edgewater v. the Mayor and Council of the Borough of Edgewater, decided by the State Board of Education on July 6, 1994, to the matter considered by the Commissioner herein. The Board argues that the State Board in Edgewater directed the Commissioner to propose a new system for reviewing cap waivers so as to provide boards with notice as to what is expected of them. Since the Commissioner was directed to prepare said process by February 1995 and since he has not yet done so, it would be unfair to judge boards by the application of a new standard before regulations and instructions are in place. The Board concludes by pointing out that it in all respects followed the procedure in place by the Department of Education at the time of its application for a cap waiver and should not be denied on the basis of a new standard not yet formally established.

The Commissioner disagrees. The State Board of Education is the agency head and chief policy maker of the Department of Education. As such, any decision of that body becomes the final agency decision which the Commissioner is obligated to apply regardless of when that decision is rendered. Therefore, even though no specific regulations have been promulgated, the standard

of review is that established in Edgewater. Further, all boards and county superintendents, in submitting documentation, were advised by letter from the Acting Director of the Bureau of Controversies and Disputes to review their submissions in light of that decision; and the State Board's decision in Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, decided by the State Board July 6, 1993, which is cited by the Board in this matter, calls for the same type of review relative to possible reallocation within the base budget before determining that the amounts deemed necessary for a thorough and efficient system of education within the cap waiver are approved:

The power to direct such increase may properly be exercised only where an increase is necessary to enable the district to provide a thorough and efficient education. Upper Freehold, supra. Further, any increase must be limited to those amounts the district needs in order to provide a thorough and efficient education. Id. Consequently, it is necessary to assess the adequacy of the budget as advertised and to determine whether it is possible to reallocate amounts within that budget before directing any increase. (See AAA 91-0036, at 6, cited in Rutherford, supra)

Accordingly, after reviewing the within appeal based upon the record and circumstances known to or considered by the parties and county superintendent the time of their actions and filings on appeal, the Commissioner, on December 16, 1994, notified the parties that he intended to take official notice of the Board's 1993-94 year-end audit. The Commissioner reviewed the audit for the purpose of identifying whether the Board underestimated in its 1994-95 budget the amount of anticipated undesignated surplus, in the belief that it would be an injustice to the taxpayers not to order appropriation from surplus where possible.

Upon such review, the Commissioner finds and determines that \$150,000 of the district's undesignated surplus of \$1,628,914 can be used to partially fund the cap waiver amounts approved herein as necessary for a thorough and efficient system of education in the district. The Commissioner so holds notwithstanding the Board's arguments, in reply to notice of use of the audit, that all but \$534,640 of this money has already been expended or allocated for various purposes. In particular, the Commissioner notes that, in a year where the district is seeking monies through appeal of a defeated voter cap waiver, it is neither necessary nor appropriate to expend fully \$1,734,000 of the district's fund balance on the Board's comprehensive facility plan. The Commissioner further notes that the Board had, in its 1994-95 Budget Statement, budgeted \$1,415,935 for expenditures of the type noted in its reply submission, and that more than this amount remains after the \$150,000 appropriation directed by the Commissioner herein.

In other respects, notwithstanding the Board's objections to the application of the standard set forth in Edgewater, supra, the Commissioner finds that the Board's documentation contains demonstrated evidence of having examined its base budget for possible reallocation. Moreover, his independent review and the record provided with the Affidavit of the Bergen County Superintendent of Schools offers sufficient evidence for the Commissioner to conclude that the base budget and the amounts within the cap waiver provide, except as noted above, the minimum amount necessary for a thorough and efficient system of education. East Brunswick Township Board of Education v. East Brunswick Township Council, 48 N.J. 94 (1966); Board of Education of the Township of

Deptford v. Mayor and Council of the Township of Deptford, 116 N.J.
305 (1989).

Accordingly, the Bergen County Board of Taxation is directed to adjust the General Fund Tax Levy of the Teaneck Board of Education for the 1994-95 school year to reflect an increase of \$460,071 (\$610,071 in restorations less \$150,000 appropriation from surplus) consistent with the Commissioner's findings above for a total General Fund tax levy of \$41,964,220.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

JANAURY 9, 1995

DATE OF MAILING - JANUARY 9, 1995

4-95

IN THE MATTER OF THE CAP WAIVER :
 APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
 OF THE BOROUGH OF LODI, BERGEN : DECISION
 COUNTY. :
 _____ :

SYNOPSIS

Board appealed General Fund cap waiver in the amount of \$480,089 rejected by voters. Prior to appeal the Board accepted a reduction by the municipality of \$400,000 in the current expense tax levy.

Upon review of the record, Commissioner determined to order the increase of \$278,243 in cap waiver monies, offset by a \$150,000 appropriation from surplus, for a total General Fund tax levy of \$16,974,824 for 1994-95 school year which represents an amount within the maximum permissible General Fund budget.

JANUARY 9, 1995

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
OF THE BOROUGH OF LODI, BERGEN : DECISION
COUNTY. :
_____ :

William R. Nunno, Esq., for Petitioner.

This matter was opened before the Commissioner on June 7, 1994, through the filing of a Verified Petition of Appeal by the Board of Education of the Borough of Lodi (Board), wherein the Board sought to have included in the General Fund tax levy for the 1994-95 school year a cap waiver amount defeated by the voters at the annual school election based upon the following facts, which are uncontested:

1. In accordance with the conditions in N.J.S.A. 18A:7D-28 submitted its budget to the Bergen County Superintendent of Schools with a request for a cap waiver of \$664,992 which the Board of Education believed was necessary in order to provide a thorough and efficient education.

2. On April 4, 1994, the Bergen County Superintendent conditionally approved the 1994-95 school budget by reducing the thorough and efficient cap waiver proposal from \$664,992 to \$480,089. A provision was added indicating that the board seek a voter cap waiver in this amount.

3. The Board did not appeal the County Superintendent's determination of the amount requested for the provision of a thorough and efficient education.

4. On April 19, 1994, the Board held an election, in accordance with law, for the adoption of the proposed current expense tax levy in the amount of \$17,246,581 and cap waiver approval in the amount of \$664,992 for the 1994-95 school year.

5. The voters of the Borough rejected the current expense tax levy and cap waiver question proposed by the Board of Education at the annual school election.

6. On or about April 21, 1994, the Board provided the Borough a copy of the proposed school budget for the 1994-95 school year, pursuant to N.J.S.A. 18A:13-19 and N.J.S.A. 18A:22-37.

7. On May 12, 1994, a consultation was held between members of the Board, the Board Secretary, the Superintendent and the Mayor and Council of the Borough pursuant to N.J.A.C. 6:24-7.2(b)(2).

8. After the consultation, the Borough adopted a resolution reducing the 1994-95 current expense tax levy by \$400,000, certifying \$16,846,581 to the Bergen County Board of Taxation as the amount necessary to be raised for current expenses.

9. At a meeting on May 18, 1994, the Board, adopted a resolution accepting the reduction of \$400,000 in the 1994-95 current expense tax levy. The resolution also accepted the line items as directed by the Borough, subject to the approval of the Bergen County Superintendent of Schools and the State Department of Education. This approval was obtained based upon a determination of changed circumstances.

10. At a meeting on May 18, 1994, the Board adopted a resolution to appeal the rejected cap waiver question.

11. The Board, therefore requests cap waiver approval in the amount of of \$480,089 in that the budget of the district, at cap level, is insufficient to provide the resources necessary for a thorough and efficient education. The Borough does not contest the need for the cap waiver as evidenced by letter dated July 14, 1994, from Paul S. Barbire, Esq., Attorney for the Mayor and Council.

The cap waiver requested by the Board includes the following line items, all of which were determined by the County Superintendent to be essential for provision of a thorough and efficient education and unable to be funded by reallocation within the maximum permissible budget.

Account Title	Account No.	Cap Amount Conditionally Approved by County Supt. and Requested by the Board	Cap Amount Found Ineligible by County Supt. and Not Appealed by the Board
General Current Expenses			
Regular Program Instruction			
Grades 1-5 Salaries of Teachers			
	11-120-100-101	\$ 78,726	\$ 78,726
Grades 6-8 Salaries of Teachers			
	11-130-100-101	39,254	6,000
Grades 9-12 Salaries of Teachers			
	11-140-100-101	77,001	
School Sponsored Athletics Salaries			
	11-402-100-100	4,714	
Supplies & Materials			
	11-402-100-600	2,226	

Account Title	Account No.	Cap Amount Conditionally Approved by County Supt. and Requested by the Board	Cap Amount Found Ineligible by County Supt. and Not Appealed by the Board
Transfers to Cover Def.	11-402-100-930	\$ 560	
Undistr. Expend. Health Services Salaries	11-000-213-100		\$ 43,662
Undistr. Expend. Other support Salaries of Other Prof.	11-000-219-106	52,491	
Undistr. Expend. Student Trans. Contracted Services	11-000-270-512	2,295	
Undistr. Expend Business Social Security Contributions	11-000-290-220	23,057	10,850
Undistr. Expend. Business Unemployment Comp.	11-000-290-250	967	450
Other Employee Benefits	11-000-290-290	63,798	30,020
Capital Outlay Facilities Acquisition and Const. Construction Services	12-000-400-450	135,000	
Equipment Undistr. Exp. Oper. of Plant	12-000-260-730		<u>15,195</u>
Totals		\$480,089	\$184,903

Standard of Review

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 1989.)

Moreover, the Commissioner has the constitutional obligation to ensure that a school district budget is sufficient for the provision of a thorough and efficient education. Robinson v. Cahill, 69 N.J. 449 (1976) (Robinson V); Abbott v. Burke, 119 N.J. 287 (1990). In order to meet this duty, the Commissioner is charged with the responsibility to review defeated budgets which had been "conditionally certified" by the county superintendent subject to voter approval to exceed the statutory budget limitation (cap waiver). See Administrative Agency Advice (AAA) 91-0036 (July 8, 1991). Upon review the Commissioner may order an increase in those limited instances where it is necessary to meet the constitutional mandate. Districts must demonstrate both that particular amounts above the cap are necessary to provide a thorough and efficient

education and that reallocation within the permissible budget amount cannot be accomplished. Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, Bergen County, decided by the State Board of Education July 6, 1994; see AAA 91-0036, supra.

In this matter the Commissioner is concerned about the budgeting process of the Board. The original Board request for a cap waiver was conditionally approved by the County Superintendent predicated on the Board's representation that the original budget and the cap waiver request for \$664,992 was an absolute need to achieve a thorough and efficient system of education. The Commissioner has reviewed the rationale for accepting the budget reductions set forth by the Borough. With the exceptions of the settlement of the teachers' contract and possibly the Blue Cross notification, it would appear that at least \$120,000 in costs could have been anticipated prior to submitting the budget tax levy to referendum. The Board should have also checked to assure that the original Blue Cross notification was not subject to change.

Mindful, then, of the balance to be applied in this standard of review with respect to the various line items contained in the cap waiver request, the Commissioner makes the following determination with respect to the cap waiver appeal before him.

Salary - Teachers

<u>Grades 1-5</u>	11-120-100-101	\$78,726
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The Board has requested \$78,726 in line account 11-120-100-101 to hire additional teachers. One art teacher would be used to relieve classroom teachers of the task of identifying

capable students in K-3 and developing specific learning experiences for them. Documentation was not provided describing the impact on students if such teacher were not hired.

A secondary task to be assigned to the new art teacher is the development of performance assessments and minimum levels of proficiency in art. The Board also indicates that the development of such an assessment is mandated in the monitoring of school districts. While this may be so, the development of assessment and proficiency levels would appear to be a "one time" task in any single school year and the Board has not presented documentation to justify the hiring of additional staff.

The Board also indicated that "Presently the classroom teacher identifies pupils in K-3 as particularly capable in the primary grades and develops specific learning experiences for them." (Emphasis added) Documentation did not include information as to why the current method would not satisfy the requirement to provide a thorough and efficient education. Absent such information the Commissioner must conclude the current practice is sufficient to satisfy constitutional requirements.

The Board, further, asserts that a Gifted/Talented teacher would be used to develop an enrichment component in the regular classrooms. A supporting reason given for the hiring of the additional teacher was the State requirement that gifted and talented students be identified and educational services and programs provided for any identified students. Documentation was not provided describing how the program would be integrated into the regular classroom or the estimated number of students that the district might be able to identify. It was also not clear whether

students have already been identified or whether the district was in process of identifying them. Documentation implies that, at present, the district does not have a program to identify and serve gifted and talented students, which would be inconsistent with State mandates.

The Board has not provided specific information concerning the number of students anticipated, the impact on the identification and servicing of such students and the nature of the program to be instituted if additional funds were available. Consequently, the Commissioner cannot conclude that these funds are essential for the provision of a thorough and efficient education or that the amounts sought were the minimal amounts necessary for the stated purposes.

<u>Grade 6-8</u>	11-130-100-101	\$39,254
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The Board requests a cap waiver approval of \$39,254 in line account number 11-130-100-101. The reason for this request is due to an enrollment increase of 31 students. Documentation was not provided indicating the grade or grades over which the number of increased students would fall or reasons why existing staff could not serve additional students.

In the absence of such documentation the Commissioner must deny the request for funding due to increased enrollment.

<u>Grades 9-12</u>	11-130-100-101	\$77,001
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The Board also requested \$77,001 to hire a full-time additional science teacher and to increase to full-time the part-time business education teacher in grades 9-12. The business education teacher is to allow the board to add a Marketing Education course, reinstate Accounting 2, Steno 2, and add additional Data

Processing sections. No documentation was provided supporting the assertion that increasing this position to full-time is essential for the provision of a thorough and efficient education.

The additional full-time teacher would be used to add additional science sections as required. Again no documentation was offered indicating the expected number of additional science sections required or the number of students expected in Advanced Physics. Absent such documentation, the Commissioner is unable to conclude that the Board has demonstrated the necessity for the additional full time position.

<u>Athletic Program Deficits</u>	11-402-100-100	\$4,714
	11-402-100-600	\$2,226
	11-402-100-930	\$ 560

The Board request for \$4,714 in account 11-402-100-100; \$2,226 in account 11-402-100-600 and \$560 in account 11-402-100-930 in order to comply with the requirements of Title 9 by implementing a Girls Soccer Team in addition to the present Boys Soccer Team is approved. The Commissioner adopts, as his own, those reasons advanced by the Board and restores the requested amounts.

<u>Student Support Services</u>	11-000-219-106	\$52,491
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The board requests \$52,491 in account 11-000-219-106 for an additional school psychologist to counsel 315 classified students. The Board asserts that the additional psychologist will assist in counseling disaffected students at the middle and high school level, provide for more manageable case loads and assure the presence of a bilingual child study team member to meet the needs of the bilingual special education population. The Commissioner adopts, as his own, those reasons advanced by the Board and restores the funds requested.

Student Transportation
Services

11-000-270-512

\$2,295

The Board's request for \$2,295 in account number 11-000-270-512 for additional transportation services is approved. The Board asserts that the additional services will be provided to the Girls Soccer Team. The Commissioner adopts, as his own, those reasons advanced by the Board.

Employee Benefits

11-000-290-220

\$23,057

11-000-299-250

\$ 967

11-000-290-290

\$63,798

Petitioner's request for approval for line account numbers 11-000-290-220, 11-000-270-250, 11-000-290-290 in the amounts of \$23,057, \$967 and \$63,798, respectively, are reduced by \$1,802, \$75 and \$4,988. The percentages for the approval are at the same rate as calculated by the Board. The amounts approved by the Commissioner are \$21,255 for Social Security Contribution - 11-000-290-220, \$892 for Unemployment Compensation - 11-000-290-250, and \$58,810 for Other Employee Benefits - 11-000-290-290.

Facilities Acquisition
and Construction Service

12-000-400-450

\$135,000

Petitioner's request for an increase in account number 12-000-400-450 in the amount of \$135,000 is approved. The funds are to replace the 21-year-old school boilers as part of the district's five-year maintenance plan. The Commissioner adopts, as his own, those reasons advanced by the Board.

The account and amounts under appeal, and as determined by the Commissioner in this matter, are as follows:

Account Title No.	Account	Amount Under Appeal	Amount Not Approved	Approved by Commissioner
General Current Expenses				
Regular Program Instruction				
Grades 1-5 Salaries	11-120-100-101	\$ 78,726	\$ 78,726	
Grades 6-8 Salaries	11-130-100-101	39,254	39,254	
Grades 9-12 Salaries	11-140-100-101	77,001	77,001	
School Sponsored Athletics				
Salaries	11-402-100-100	4,714		4,714
Supplies & Materials	11-402-100-600	2,226		2,226
Transfers to Cover Def.	11-402-100-930	560		560
Undistr. Expend. Other Support				
Salaries Other Professional	11-000-219-106	52,491		52,491
Student Trans.	11-000-270-512	2,295		2,295
Business				
Social Security Contribution	11-000-290-220	23,057	1,802	21,255
Unemployment Compensation	11-000-290-250	967	75	892
Other Employee Benefits	11-000-290-290	63,798	4,988	58,810
Capital Outlay Facilities Acquisition & Constr.				
Construction	12-000-400-450	<u>135,000</u>	<u> </u>	<u>135,000</u>
Totals		\$480,089	\$201,846	\$278,243

After reviewing the within appeal based upon the record and circumstances known to or considered by the parties and county superintendent at the time of their actions and filings on appeal, the Commissioner, on December 16, 1994, notified the parties that he intended to take official notice of the Board's 1993-94 year-end audit. The Commissioner reviewed the audit for the purpose of

identifying whether the Board underestimated in its 1994-95 budget the amount of anticipated undesignated surplus, in the belief that it would be an injustice to the taxpayers not to order appropriation from surplus where possible.

Upon such review, the Commissioner finds and determines that \$150,000 of the district's undesignated surplus of \$889,346 can be used to partially fund the cap waiver amounts approved as necessary for a thorough and efficient system of education in the district. The Commissioner specifically rejects the Board's contention, in response to notification regarding use of the audit, that transfers of \$41,600 for textbook purchase, \$64,534 for school nurses and \$313,109 for payment to retirees for accumulated unused sick leave have reduced the audited surplus so as to preclude reallocation, as these items can be, and should have been, planned for in budgeting without resort to surplus; the Commissioner accepts, however, the expenditure of \$122,400 for emergency roof repairs as a factor to be considered in determining the amount of surplus available for reallocation. Notwithstanding such consideration, the Commissioner notes that, even accepting in full the Board's arguments regarding subsequent expenditures, the amount of surplus remaining after such expenditures (\$347,703) is nearly twice the amount (\$180,486) projected by the Board in its 1994-95 Budget Statement.


In summary, upon review of the documentation submitted on this matter, the Commissioner finds and determines that of the \$480,089 in cap waiver monies sought by petitioner, \$278,243 are essential to provide a thorough and efficient educational system and that, after designation of \$150,000 in surplus to partially fund this amount, a further reallocation of funds within the district's

maximum permissible budget is not possible (Board of Education of the Borough of Rutherford v. Mayor and Council of Rutherford, Bergen County, decided by the State Board of Education, July 7, 1993.)

Accordingly, the Bergen County Board of Taxation is directed to make the necessary adjustments as set forth below to reflect a total of \$16,974,824 to be raised in tax levy for General Fund purposes by the Borough of Lodi for the 1994-95 school year, representing an amount which falls within the maximum permissible General Fund budget.

	<u>General Fund</u>
Tax Levy Certified by Council	\$16,846,581
Cap Waiver Amount Ordered by Commissioner after appropriation of surplus	<u>128,243</u>
Total	\$16,974,824

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

JANUARY 9, 1995

DATE OF MAILING - JANAURY 9, 1995

5-95

IN THE MATTER OF THE CAP WAIVER :
 APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
 OF THE BOROUGH OF BERLIN, CAMDEN : DECISION
 COUNTY. :
 _____ :

SYNOPSIS

Board appealed General Fund cap waiver in the amount of \$127,527 rejected by voters.

Upon review of the record, Commissioner determined to order the increase of \$127,527 in cap waiver monies, offset by a \$50,000 appropriation from surplus for a total General Fund tax levy of \$2,775,772 for 1994-95 school year.

JANUARY 9, 1995

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
OF THE BOROUGH OF BERLIN, CAMDEN : DECISION
COUNTY. :
_____ :

For Petitioner, Michele Gibson, Esq. (Harvey C. Johnson,
P.C.)

This matter was opened before the Commissioner of Education on June 13, 1994, by way of the filing of a Petition of Appeal by the Board of Education of the Borough of Berlin (Board) seeking inclusion within the 1994-95 General Fund Tax Levy of a cap waiver in the amount of \$127,527, a request for which was submitted to the voters of the district at the annual school election held on April 19, 1994. In addition to defeating the cap waiver, the voters also defeated the base budget. The cap waiver question presented to the voters for their approval was for a total amount of \$177,527, \$50,000 of which was deemed by the county superintendent not to be essential for a thorough and efficient system of education. The aforesaid cap waiver amount was submitted to the voters pursuant to the provisions of N.J.S.A. 18A:7D-28(f) which provide as follows:

Any school district may submit a proposal to raise the amount of tax levy necessary to exceed the maximum permissible net budget permitted by this section to the legal voters of the district for type II school districts without a Board of

School Estimate and to the Board of School Estimate for those school districts with a Board of School Estimate as required during the school budget approval process pursuant to chapters 22 and 54 of Title 18A of the New Jersey Statutes and section 13 of P.L. 1971, c.271 (C.18A:46-41). The proposal to raise additional tax levy to exceed the maximum permissible net budget shall be in addition to the amounts required to be approved for each school district in accordance with chapters 22 and 54 of Title 18A of the New Jersey Statutes and section 13 of P.L. 1971 (C.18A:46-41). In the event that a school district's proposal to raise the tax levy to exceed the maximum permissible net budget is not approved in accordance with the budget approval process set forth in chapter 22 of Title 18A of the New Jersey Statutes for type II districts and for type I districts, chapter 54 of Title 18A of the New Jersey Statutes for county vocational school districts and section 13 of P.L. 1971, c.271 (C.18A:46-41) for county special services school districts, that disapproval shall be deemed final and shall not be subject to further review or appeal.

In addition to the aforesaid defeated cap waiver submitted under N.J.S.A. 18A:7D-28(f), the Commissioner approved a cap waiver in the amount of \$109,275 pursuant to N.J.S.A. 18A:7D-28(e) which was included within the base budget as prescribed by the above-cited statute.¹ The amounts so approved by the

¹ e. A board of education of a school district which: (1) for the two years prior to the prebudget year, has had an annual average increase in the district's resident enrollment which is greater than two percent; or (2) between the prebudget year and the year prior to the prebudget year, has had an increase in the district's local cost for special education pupils which is greater than five percent; or (3) during the 1990-91 school year but prior to April 1, 1991, has entered into a lease purchase agreement, may apply to the Commissioner of Education for a waiver of the expenditure limitation established pursuant to this section. A board of education of a school district that sends pupils and pays tuition to a special needs district may apply to the Commissioner of Education for a waiver of the expenditure limitation established pursuant to this section. Any waiver granted by the Commissioner pursuant to this subsection shall not be included in the question on excess expenditures which is to be submitted to the voters of the district pursuant to subsection f. of this section.

Commissioner were based upon increases in general enrollment and special education enrollment as prescribed by statute.

The Commissioner notes that the Camden County Superintendent of Schools approved the N.J.S.A. 18A:7D-28(f) cap waiver request of \$177,257 to be submitted to the voters on March 30, 1994, \$127,527 of which was deemed as being necessary for the provision of a thorough and efficient (T&E) system of education, after reviewing the entire school budget to determine whether reallocations within the base budget could be accomplished. Having determined that such reallocations were not possible, and after further review by a panel consisting of three coordinating county superintendents and representatives of the Division of Finance within the Department of Education, the Camden County Superintendent of Schools conditionally approved the budget for submission to the voters with provision that should the cap waiver request be rejected the district must file an appeal with Commissioner of Education. See Administrative Agency Advice (AAA) - 91-0036 (July 8, 1991).

The accounts and the amounts which were approved for T&E submission to the voters and are the basis of this appeal are set forth below:

<u>Account</u>		<u>Amount</u>
11-120-100-101	Basic Skills Teacher	\$ 27,782
11-190-100-106	Instructional Assistant	8,640
11-130-100-101	Instructional Music Teacher	29,039
11-402-100-100	Athletic Coaches Salaries	16,700
11-402-100-600	Transportation (Athletics)	4,500
11-402-100-600	Athletic Equipment	2,000
11-402-100-800	League & Officials Fees	5,500
11-000-222-100	Library Assistant	25,000
11-000-290-290	Employee Benefits	<u>8,366</u>
	Total	\$127,527

Upon defeat of the base budget and the cap waiver request, the Board and the Borough Council of the Borough of Berlin (Borough) met April 27, 1994, pursuant to the provisions of N.J.S.A. 18A:22-37 for purposes of consultation and to arrive at a tax levy sufficient to provide a thorough and efficient system of education. As a result of said consultation, the Borough adopted a resolution reducing the original tax levy of \$2,747,267 by some \$49,222 and fixing the 1994-95 school tax levy at \$2,698,045. The Board agreed to the aforesaid reduction based upon changed circumstances which it alleges permitted it to acquiesce without harm to its ability to provide a thorough and efficient system of education. The changed circumstances permitting the aforesaid reduction are as follows:

<u>Account</u>		<u>Amount</u>
11-000-260-100	Retirement and Non-replacement of a custodian	\$11,903
11-000-290-100	Retirement of Business Admin. & hiring at a lower salary	9,780
11-000-290-290	Custodians benefits	8,137
11-000-290-290	Lesser Cost of Benefits	<u>19,402</u>
	Total	\$49,222

Upon defeat of the budget and the cap waiver and the subsequent reduction of the General Fund Tax Levy agreed upon between the Board and the Borough, the Camden County Superintendent of Schools reviewed the reductions and the changed circumstances set forth above and determined that they could be sustained without impacting the ability of the district to provide a thorough and efficient system of education.

Board's Position

Initially, the Board argues that its budget and cap waiver represent the minimum amount necessary to provide a thorough and efficient system of education. It points out that it has already

eliminated an administrative position, reduced health benefits, eliminated support positions and a summer school program, and reduced special education costs by 10%.

As the result of the foregoing actions on its part, the Board contends it cannot further reallocate in order to provide for the items within the cap waiver which are necessary for the provision of a thorough and efficient system of education. Moreover, the Board has specifically related each item to a specific T&E outcome process or Berlin 2000 goal as established by the community.

The amounts contained within the waiver request are for the following:

1. Retention of an existing position which provides assistance to students experiencing academic difficulties as well as providing instruction for the academically talented.
2. Retention of an existing position in the area of instrumental music which, if eliminated, would end the entire program.
3. The provision of three part-time instructional assistants to replace one full-time assistant to meet the demands of increased enrollment and provide assistance in classes exceeding the district's maximum class size.
4. Provision of stipends for athletic coaches whose positions are provided for by negotiated agreement.
5. For provisions of transportation, athletic equipment and fees for officials.
6. To retain an existing position of library assistant and expand it to include computer support services.

Commissioner's Decision

The Commissioner initially notes the cap waiver appeal is unopposed by the Borough of Berlin. The Commissioner has reviewed


the papers and exhibits submitted by the Board, as well as the affidavit of the Camden County Superintendent of Schools, submitted as part of the record in this matter. Further, the Commissioner has reviewed the budget beyond the reduction made by the Borough. Additionally, on December 16, 1994, the Commissioner notified the parties that, pursuant to N.J.A.C. 1:1-15.2, he intended to take official notice of the 1993-94 year-end district audit as it related to the amount of undesignated surplus available to the district.

Upon such review, the Commissioner finds that \$50,000 of the district's undesignated surplus of \$200,106 can be appropriated to offset the restorations ordered herein, as notwithstanding the additional expenditures noted in the Board's submission in reply to notification regarding use of the audit, the amount remaining after the \$50,000 appropriation is still more than the amount budgeted by the district (\$134,210) to accommodate expenses of the type noted in the Board's submission. The Commissioner does, however, conclude that further reallocation is not possible and that the items contained within the cap waiver are necessary for the provision of a thorough and efficient system of education. (See Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, decided by the State Board of Education July 7, 1993, and Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater, decided by the State Board of Education June 6, 1994.

Accordingly, the Camden County Board of Taxation is directed to adjust the General Fund Tax Levy of the Berlin Board of

Education for the 1994-95 school year to reflect an increase of \$77,527 (\$127,527 restoration less \$50,000 appropriation from surplus), which results in a total General Fund tax levy of \$2,775,772, consistent with the Commissioner's findings above.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

JANUARY 9, 1995

DATE OF MAILING - JANUARY 9, 1995

6-95

IN THE MATTER OF THE SPECIAL :
SCHOOL ELECTION OF THE BOARD : COMMISSIONER OF EDUCATION
OF EDUCATION OF THE TOWNSHIP : DECISION
OF STAFFORD, OCEAN COUNTY. :
_____ :

JANUARY 9, 1995

Elections - Special - Budget

Summary of Commissioner's Decision

In the Matter of the Special School Election of the Board of
Education of the Township of Stafford, Ocean County

Petitioning Board appealed special election budget referendum
defeat.


Due to duplicate docketing, matter was withdrawn.

OAL DKT. NO. EDU 9254-94

IN THE MATTER OF THE SPECIAL :
SCHOOL ELECTION OF THE BOARD : COMMISSIONER OF EDUCATION
OF EDUCATION OF THE TOWNSHIP : DECISION
OF STAFFORD, OCEAN COUNTY. :
_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal, in that this matter reflects an inadvertent duplicate docketing, and the underlying dispute has been resolved by concurrent Commissioner decision under Dkt. No. EDU 8883-94. Consequently, this matter is no longer deemed to be a dispute before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

JANUARY 9, 1995

DATE OF MAILING - JANUARY 9, 1995

RONALD DILZER, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

KAREN SWEET, BOARD MEMBER, :
BOARD OF EDUCATION OF THE TOWN- :
SHIP OF READINGTON, HUNTERDON :
COUNTY, :

DECISION

RESPONDENT. :

_____ :

RONALD DILZER, : STATE OF NEW JERSEY
Petitioner : SCHOOL ETHICS COMMISSION
v. :
KAREN SWEET, : DECISION
Respondent : COMPLAINT NO.: C04-94

PROCEDURAL HISTORY:

This complaint was filed by the president of the Readington Education Association, Ronald Dilzer, against Karen Sweet and Karen McCullough, two Readington school board members. At its June 23, 1994 meeting, the Commission dismissed the complaint against respondent Karen McCullough for lack of probable cause and made a probable cause determination against Karen Sweet on N.J.S.A. 18A:12-24(b) and (e). After determining that there were no material facts in dispute, the Commission issued a letter dated June 27, 1994 directing each party to submit briefs, and reply briefs to the Commission for a final decision. The parties were then notified that the matter would be considered at the Commission's September 22, 1994 meeting. A final decision on this matter was rendered on that date, finding that respondent violated N.J.S.A. 18A:12-24(b). The Commission recommends to the Commissioner of Education that a censure be imposed as the appropriate penalty.

BACKGROUND

School board member, Karen Sweet admittedly solicited signatures for a board of education candidate's petition, from teachers and other registered voters employed in a school within their district. Several staff members reportedly questioned the appropriateness of this solicitation by notifying the vice president of the Readington Education Association. In her brief and reply brief, Mrs. Sweet disagrees that the Commission found no factual disputes since it is not clear whether she directed the "all call" over the school intercom system. She also argues that she was among friends in the school and therefore, did not use her official position to gain unwarranted privileges.

Mrs. Sweet further argues that while the complainants say that her action created the potential for a violation, it was not a violation. The complainant argues that the School Ethics Law is based upon that objective standard as to how the public might reasonably perceive an action and that in and of itself means that the law considers the potential of a school official's actions.

Mrs. Sweet further argues that there is no law that prohibits her actions but that the First Amendment and New Jersey Constitution protect them. The complainant argues that the School Ethics Law prohibits these actions and that the Constitution does not protect an individual who is trying to exert undue influence on those who work for her. In her answer, Karen Sweet denies the accuracy of the complaint and states that the complainant is unaware of the accuracy because he was not in the school at the time of the alleged incident. She then admits that she did assist an interested candidate in obtaining signatures because that candidate was too busy to carry out these responsibilities herself. She admits that she asked several teachers, and secretaries employed in the district to sign this petition.

APPLICABLE LAW:

N.J.S.A. 18A:12-24(b) states:

No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages, or employment for himself, members of his immediate family or others;

N.J.S.A. 18A:12-24(e):

No school official or member of his immediate family...shall solicit or accept any gift, favor, loan, political contribution, service, promise of future employment, or other thing of value, based upon an understanding that the gift, favor, loan, political contribution, ...or other thing of value was given or offered for the purpose of influencing him, directly or indirectly, in the discharge of his official duties. This provision shall not apply to the solicitation or acceptance of contributions to the campaign of an announced candidate for elective public office, if the school official has no knowledge or reason to believe that the campaign contribution, if accepted, was given with the intent to influence the school official in the discharge of his official duties.

DECISION:

The School Ethics Act prohibits school officials from using their official positions to gain unwarranted privileges for themselves and others. N.J.S.A. 18A:12-24(b). In the instant case, board member Karen Sweet admittedly solicited signatures for the petition of a school board candidate. This is a fact not disputed and the substance of Mrs. Sweet's violation. This Commission did not believe that there were factual disputes as Mrs. Sweet contends because issues as to who directed the "all call" are not significant to this determination. Mrs. Sweet admits she solicited the signatures in the school from school employees. The issue for the Commission was whether Mrs. Sweet used her official position to obtain signatures for Mrs. Illes, in the school in violation of N.J.S.A. 18A:12-24(b). The Commission believed that this did occur whether or not Mrs. Sweet intended to convey that perception. Employees in the school could reasonably feel intimidated, coerced, and threatened by the mere fact that a board member had made this request. Additionally, Mrs. Sweet's request created a perception that she was using her official position to gain signatures, thereby using her official position to achieve an unwarranted privilege for another candidate for school board.

In the Scannella v. Scudillo case, C14-93, the School Ethics Commission found that a school board member violated the School Ethics Act by selling goods to school district employees since those employees were under her supervision as a school board member. The Commission found that the public could reasonably perceive that Mrs. Scudillo was using her supervisory position to achieve an unwarranted advantage by having district employees purchase products manufactured by her employer, and that the public could perceive that the board member would view district employees who purchased her product more favorably than those who had not.

A similar analysis was applied in this case. The mere asking for signatures of district employees on school property could be construed by some district employees to be a threat to their jobs if they failed to cooperate. The Commission finds that the benefit to the board member or another was implied by virtue of the solicitation.

The law also says that a board member may not solicit any favor based upon an understanding that the favor was given or offered for the purpose of influencing him directly or indirectly in the discharge of his official duties. The Commission has construed section 24(e) strictly, stating that a board member may not accept any hospitality items from vendors or potential vendors of a school board. The reason for this strict interpretation is also grounded in perception. See, Policy Guideline #1.

The Commission did not find that Mrs. Sweet acted in violation under section 24(e). In her briefs, Mrs. Sweet argues that she did not violate this section by soliciting signatures. The Commission agrees. The Commission did not find that her actions were violative of N.J.S.A. 18A:12-24(e) by soliciting signatures for a school board candidate. The violation occurred because Mrs. Sweet, a board member, used her official position to gain access to the school and to school district employees for another's benefit. This is a violation of N.J.S.A. 18A:12-24(b), however, her actions do not prove a violation of N.J.S.A. 18A:12-24(e).

SANCTION:

THE SCHOOL ETHICS COMMISSION RECOMMENDS TO THE COMMISSIONER OF EDUCATION THE CENSURE OF READINGTON BOARD OF EDUCATION MEMBER, KAREN SWEET.

For the above-stated reasons, the School Ethics Commission finds that board member Karen Sweet violated the School Ethics Act under N.J.S.A. 18A:12-24(b) and recommends that the Commissioner impose the penalty of censure for this violation. The Commission reasoned that this penalty is appropriate since the board member did not act in order to achieve a personal or financial gain by her actions. Nonetheless, her actions created a perception that she violated the public trust. Intentionally or not, her actions had the effect of imposing undue influence on district employees. The Commission wants it known that such actions violate the School Ethics Act. Therefore, the Commission finds that censure is the appropriate penalty.

RONALD DILZER,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
KAREN SWEET, BOARD MEMBER,	:	
BOARD OF EDUCATION OF THE TOWN-	:	DECISION
SHIP OF READINGTON, HUNTERDON	:	
COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

The initial decision of the School Ethics Commission, together with recommended sanction adopted by the Commission, have been reviewed. This matter comes before the Commissioner of Education to impose a sanction, pursuant to N.J.S.A. 18A:12-29(c), upon Respondent Karen Sweet (Sweet), member of the Board of Education of the Township of Readington (Board), based upon a finding by the School Ethics Commission that respondent violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq.

BACKGROUND

After finding probable cause of a violation of the School Ethics Act by Karen Sweet, the School Ethics Commission determined not to transmit this matter to the Office of Administrative Law, inasmuch as the Commission found that no material facts were in dispute, and an evidentiary hearing was, therefore, not warranted. At its meeting on September 22, 1994, the Commission determined that Sweet violated the School Ethics Act, N.J.S.A. 18A:12-24(b), by virtue of her solicitation of signatures for a board candidate's nominating petition from

teachers and other registered voters employed in a school within the district. The Commission recommends censure as the appropriate penalty for the violation. After the issuance of the Commission's decision, the parties were provided an opportunity to submit comments to the record regarding the decision and the proposed sanction for the Commissioner's consideration in his determination of an appropriate penalty herein. Comments on behalf of Respondent Sweet were filed on October 13, 1994 and a reply comment on behalf of the petitioner was filed on November 14, 1994.

CONCLUSIONS OF LAW

The School Ethics Commission found that Sweet's admission that she solicited signatures for the nominating petition of a school board candidate was determinative. The Commission found such solicitation to be an undisputed fact.¹ On the basis of this finding, the Commission concluded that Sweet violated N.J.S.A. 18A:12-24(b), which prohibits school officials from using their official positions to gain unwarranted privileges for themselves and others.² The Commission further determined that Sweet was not, however, in violation of N.J.S.A. 18A:12-24(e). The Commission noted,

The issue ***was whether Mrs. Sweet used her official position to obtain signatures for Mrs. Illes, in the school in violation of N.J.S.A. 18A:12-24(b). The Commission believed that this did occur whether or not Mrs. Sweet intended to convey that perception. Employees in the school could reasonably feel intimidated, coerced, and threatened by the mere fact that a board member had made this request. Additionally, Mrs. Sweet's request

¹ In the instant case, the Commission found no factual disputes since Board member Karen Sweet admittedly solicited signatures for the nominating petition of a school Board candidate, which, the Commission maintained, was the substance of the violation herein.

² N.J.S.A. 18A:12-24(b) states: "No school official shall use of attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others."

created a perception that she was using her official position to gain signatures, thereby using her official position to achieve an unwarranted privilege for another candidate for school board.

(School Ethics Commission Decision at p. 2)

The Commission argued that the benefit attributed to Sweet “***was implied by virtue of the solicitation.” (Id. at p. 3) Accordingly, the Commission recommended that the Commissioner impose the penalty of censure for the violation, reasoning “***that this penalty is appropriate since the board member did not act in order to achieve a personal or financial gain by her actions. Nonetheless, her actions created a perception that she violated the public trust.” (Id.)

COMMENTS TO THE COMMISSION’S DECISION

Comments submitted by Respondent Sweet urge that the conclusions of the School Ethics Commission are unsupported in the record. Specifically, respondent contends that the record is “barren” with respect to evidence that she “advertised or used her school board position in connection with requesting signatures on the petition,” as well as evidence that the teachers she approached “***felt threatened, intimidated or coerced in any way.” (Respondent’s Comments at p. 2) Respondent argues that

***The Commission misread the statute and instead of reviewing the record to evaluate the subjective reasons surrounding the actions of the school board member, it reached outside the record to speculate about the possible reactions of the teachers and the “perception” that might have been created by [her] conduct. (Id.)

The factual determinations rendered by the Commission, respondent asserts, do not evidence that she actually used or attempted to use her position to gain unwarranted privilege. Instead, respondent warrants, the record was “bare” as to any facts which established such a violation.

Respondent further argues that, since her actions did not constitute a violation of law or regulation, to hold her accountable would violate traditional notions of due process and fair play. (Id. at p. 4) In this regard, respondent contends that, while knowledgeable about

N.J.S.A. 18A:12-24(b) violations, she did not know that her actions constituted such a violation. Therefore, respondent continues, that to publicly censure her for something she had no opportunity to know was wrongful “***is equal to the police issuing someone a parking ticket when there was never any indication that parking in the area was prohibited.” (Id.)

Respondent next argues that the Commission should not have permitted itself to be used as a means of retribution in a labor dispute between a board and a union. (Respondent’s Comments at p. 5) Here, respondent asserts that the record demonstrates that, at the time petitioner filed his complaint with the School Ethics Commission, he was president of the local teacher’s association, said association being “engaged in a bitter contract dispute with the Board over salary and other issues.” (Id.) Thus, respondent concludes, petitioner used the School Ethics Commission as a weapon in this battle.

Finally, respondent argues that the Commission’s decision to censure her, as compared to issuing a reprimand, is harsh and inappropriate. (Id.) Such a sanction, respondent contends, is unfair and without basis. Respondent concludes,

If [she] did violate the School Ethics Act, her violation was minimal at best. [She] did not intend to threaten, coerce or intimidate any school staff. No one was actually threatened, coerced or intimidated, and [she] gained no personal advance through her actions. Her dedication as a responsible member of the school board, interested in seeing a more competitive school board election, certainly should deserve something much less than a public censure.” (Id. at p. 6)

In his reply comments, petitioner argues that the decision of the School Ethics Commission clearly sets forth findings of fact and the basis for its decision. As to the Commission’s observation that respondent’s actions ‘created a perception that she violated the public trust,’ petitioner asserts that, “[i]ntentionally or not, her actions had the effect of imposing undue influence on district employees.” (Petitioner’s Comments at pp. 1-2)

COMMISSIONER'S DETERMINATION

Upon a thorough review of the record in this matter, including the Commission's decision and arguments advanced by the parties, the Commissioner determines that respondent's repeated and uncontested assertions as to her lack of intent, and as to lack of evidence of coercion, are relevant to his obligation to fairly render a determination of the appropriate sanction in this matter, notwithstanding the Commission's finding that respondent's mere request for the signatures would necessarily create the perception that she was using her official position to achieve an unwarranted privilege. (School Ethics Commission Decision at p. 2)

Accordingly, the Commissioner declines to accept the Commission's recommendation that censure is the appropriate penalty in this matter since censure calls for formal public action read into the record of the School Ethics Commission rebuking the school official who was determined to have violated the School Ethics Act. (N.J.A.C. 6:3-9.2) Rather, the Commissioner finds that, in light of respondent's consistent claims that she did not intend to threaten, coerce or intimidate school staff, and the lack of evidence on record to counter such claims, or to indicate that her actions had this effect, reprimand is the appropriate penalty to be imposed in this matter, said penalty to consist of a letter from the Commission rebuking respondent for having breached the standards of conduct prescribed by N.J.S.A. 18A:12-21 et seq. (N.J.A.C. 6:3-9.2)

IT IS hereby ORDERED that Karen Sweet be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

NOVEMBER 17, 1995
DATE OF MAILING NOVEMBER 17, 1995

IN THE MATTER OF THE SPECIAL :
SCHOOL ELECTION OF THE BOARD : COMMISSIONER OF EDUCATION
OF EDUCATION OF THE TOWNSHIP : DECISION
OF STAFFORD, OCEAN COUNTY. :
_____ :

SYNOPSIS

Petitioning Board appealed special election budget referendum defeat. Board had sought additional monies to eliminate a recently discovered deficit stemming from 1992-93 and 1993-94 budget years.

ALJ concluded that the Board established its need for the restoration of \$427,000 in order to eliminate deficit without compromising current provision of a thorough and efficient system of education (T & E). Request for \$43,000 for interest and legal fees, however, was denied as no testimony or documentation was adduced at hearing to support this need. ALJ ordered Board of Taxation to certify amount of \$427,000 in the 1994-95 current expense tax levy for purposes of eliminating the 1993-94 deficit.

Commissioner concurred with the ALJ that the amount of the Board's pending deficit must be restored to its current expense budget in order to ensure T & E. Commissioner corrected amount of actual deficit to be \$385,409, rather than \$427,000, based on district's 1993-94 audit report. Commissioner also concurred that no evidence was presented to warrant restoration of \$43,000 for interest and legal fees. Commissioner directed Board of Taxation to make necessary adjustment to certify for deficit elimination purposes an additional amount of \$385,409 in the 1994-95 tax levy.

JANUARY 9, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8883-94

AGENCY DKT. NO. 282-7/94

**IN THE MATTER OF THE
SPECIAL ELECTION OF THE
BOARD OF EDUCATION OF
THE TOWNSHIP OF STAFFORD,
OCEAN COUNTY**

Howard Butensky, Esq., for the Board of Education (Kelly, Butensky, Pepe and Van Keuren, attorneys)

Annemarie Williams, Esq., for the Township of Stafford (Gilmore and Monahan, attorneys)

Record Closed: October 21, 1994

Decided: November 28, 1994

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, the Board of Education of Stafford Township (Board), seeks an order from the Commissioner of Education (Commissioner) that a supplemental tax of \$470,000 be certified to

the Ocean County Board of Taxation for the 1994-95 current expense tax levy for the purpose of eliminating current expense deficits incurred during the 1992-93 and 1993-94 budget years.

On June 28, 1994, the Board scheduled a special election, pursuant to *N.J.S.A.* 18A:14-3, to raise additional monies for its current expenses which had been in deficit. The proposition was defeated at the polls. On July 6, 1994, the Board, through its attorney, filed a Petition of Appeal before the Commissioner. The Township of Stafford filed its Answer to the Petition on September 2, 1994, and issue was joined. On September 15, 1994, the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, on an expedited basis, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The hearing was held on October 12, 1994, at the Stafford Township Municipal Court, Manahawkin, New Jersey. The record remained open until October 21, 1994, for the receipt of additional documents from the Board and to provide counsel for the Township the opportunity for review.

FINDINGS OF FACT

Based upon the testimony and other evidence adduced at the hearing, and having given fair weight thereto; I **FIND** the following **FACTS** in this matter:

Stafford Township Board of Education operates an elementary school district with grades kindergarten through six (K-6) in three school buildings. Its Intermediate School, housing grades four through six, commenced operation in September 1990. The school district pupil enrollment has increased by approximately 200 between September 1990 and September 1994. In September 1990, there were 1,206 pupils enrolled as compared with 1,400 in September 1994.

In developing its annual school budgets since the 1989-90 budget year, the Board has applied its unexpended appropriations (surplus) to its budgets to provide tax relief to its taxpayers. For the 1989-90 budget, it applied \$420,000; for the 1990-91 budget, \$993,000; and, for the 1991-92 budget, \$670,000.

The school district is organized under unit control; *i.e.*, The Superintendent of Schools functions as the Board's chief administrative officer with all subordinates reporting to the

Superintendent. The Board Secretary reports directly to the Board. However, the School Business Administrator reports to the Superintendent.

In or about October 1993, the Board's School Auditor, David Pawlishak, advised the Board that its 1992-93 current expense budget was over expended in the amount of \$162,555.96. As a consequence of its application of surplus to its budget for the past three years, there were no unexpended appropriations to apply to the deficit.

The deficit occurred as a result of the Board's Secretary/School Business Administrator's failure to reconcile the board's revenues with its expenditures. In addition to the identified deficit for fiscal year (FY) 1992-93 in the amount of \$162,555.96, the Secretary/School Business Administrator failed to account for a shortfall in Tuition Receivable from FY 1992-93, along with a Food Service program budget shortfall totaling \$15,000, which made a total of \$197,555.96 unavailable for FY 1993-94.

The Board Secretary/School Business Administrator, who was required to use the New Jersey Department of Education's (NJDOE) GAAP Technical Systems Manual, should have detected the deficit in or about April 1993. He did not. Rather, he reported to the Board each month that the school district was financially healthy.

Following the Board's annual audit by David Pawlishak in October 1993, Mr. Pawlishak reported the deficit of \$162,555.96 to the Board. The Board's Superintendent of School immediately advised the Ocean County (Acting) Superintendent of Schools of the deficit, in accordance with *N.J.A.C. 6:20-2A.10*. The Board immediately formulated and implemented a corrective action plan.

On November 18, 1993, the Board accepted the resignation of Board Secretary/School Business Administrator, Vincent Mento. On January 13, 1994, the Board employed Enrico Siano as its Board Secretary/School Business Administrator.

In preparing the 1994-95 school budget, Mr. Siano advised the Board in February 1994 that the deficit cumulated to an amount of \$500,000 for its 1993-94 current expense budget.

Also, the Board's preliminary 1994-95 budget CAP was in excess of \$1,000,000. As a consequence, the Board enacted the following cost cutting measures; the elimination of one administrative position through attrition (a principal who retired was not replaced), eliminated one fourth grade teacher, one sixth grade teacher, one computer laboratory teacher, one speech therapist, one teacher of gifted and talented, one art teacher and one music teacher. Nine full-time non-professional positions were eliminated which included; one receiving clerk, three custodians, two secretaries, one building mechanic, one nurse assistant and one teacher assistant. In addition, 12 part-time positions were eliminated including: eight cafeteria-playground aides, two school bus drivers, one transportation assistant and one library aide.

The Board projects its deficit to be \$427,000 for its 1994-95 budget as follows:

\$210,000 from its 1992-93 budget year.

\$46,000 shortfall in special education payments from other school districts for the 1993-94 budget year.

\$171,000 shortfall in salary accounts for 1993-94 budget year.

\$43,000 interest on promissory notes to be issued in anticipation of taxes and legal fees.

It, therefore, requests that \$470,000 for its 1994-95 current expenses be restored.

In the event the requested supplemental tax is not granted, the Board has proposed certain budget reductions to meet the \$427,000 deficits as follows:

A reduction of \$202,750 in the Instruction appropriation account which would eliminate four teacher positions; i.e., one each in Grades 1, 2, 3, and 5. This would cause class size to increase upwards of 30 to 33 pupils per class, violating the Board's policies concerning class size. This reduction would affect supplies for gifted and talented pupils, field trips for all pupils, workshops for teachers, a guidance counselor and two school secretaries.

A proposed reduction of \$121,600 in Administration would eliminate attendance at administrative workshops by Board members and school administrators. This proposal would also delay the Board's attempt to upgrade all of its computer software to meet the GAAP requirements. In the event all of the 13 personnel reductions were to take effect, the Board's health benefits program would reflect a reduction of \$107,150 of the total reduction of \$121,650 under Administration.

With regard to Special Services, the Board's proposal would reduce these accounts by \$72,600 with the elimination of one preschool handicapped teacher and two teacher assistants. In addition, one teacher assistant for the emotionally disturbed pupils would be eliminated together with the elimination of one teacher assistant for perceptually impaired pupils.

Under Plant Operations, the Board proposes the elimination of two custodian positions which would result in a \$30,000 reduction. This, however, would jeopardize the Board's ability to provide proper safety for all of its pupils and, further, jeopardize its efforts to maintain the appropriate cleanliness of all its school buildings and grounds.

The results of the special election held by the Board on June 28, 1994, to raise the additional sum of \$470,000 through a supplemental tax for current expenses was 327 voting in favor of the question and 909 voting against the question.

DISCUSSION AND CONCLUSIONS

The Township of Stafford offered no witnesses at the hearing. Notwithstanding, the Township argues that the Board's finances were grossly mismanaged with no internal controls or checks and balances to monitor Business Administrator Mento's conduct. The Township contends that even when the deficit was discovered, nothing was done to correct the situation. Rather, the Board continued to expend monies beyond its revenues.

The Township argues that it would be unfair for the Commissioner to now impose a supplemental tax upon the taxpayers after the board's proposal has been defeated at the polls.

The Township asserts that the Board is responsible for its own actions and misconduct and, therefore, should live with the consequences.

The Board concedes that its herein appeal is out of the ordinary. However, it cites the New Jersey constitutional mandate to provide a thorough and efficient program of free public education to all of its pupils (N.J. Const., Art VIII, Sec. IV.1.). The requested restoration of monies to its current expense budget is just to provide for a minimum level of education.

The Board contends that it now has procedures in place which will prevent a similar occurrence of a deficit in the future. It has established internal and external controls in compliance with NJDOE and its auditor's recommendations to account for its revenues and control the appropriations and expenditures.

The Board also argues that the Commissioner has acted affirmatively under similar circumstances where a local board of education has experienced a deficit and an additional tax levy was rejected by the electorate at a special election. *Board of Education of the City of Union City v. Mayor and Commissioners of the City of Union City, Hudson County*, 1989 S.L.D. ____ (Acting Commissioner's Decision, May 18, 1989). In *Union City*, the Board had a revenue shortfall of \$460,717, projected to grow to \$641,780 for the 1988-89 budget. The Union City Board adopted a resolution to place a special question on the ballot, requesting an additional tax levy of \$460,717 to offset the projected deficit as authorized by *N.J.S.A.* 18A:22-40. The measure was defeated at the polls and the board, thereafter, appealed to the Commissioner for the restoration of the funds. The Commissioner found and determined that it was necessary for the Union City Board to have sufficient funds to meet its constitutional mandate to provide a thorough and efficient system of education for the 1988-89 school year and granted the board's request. The Commissioner grounded his determination in *Union City* on his prior ruling in *In the Matter of the Annual School Election Held in the Red Bank Regional High School District, Monmouth County*, 1981 S.L.D. ____ (decided May 7, 1981). The Commissioner also cites his decision in *In the Matter of the Special Public Question submitted at the Annual School Election held in the Township of Maple Shade, Burlington County*, 1986 S.L.D. _____, (decided May 30, 1986) where he authorized a supplemental tax certification in the amount of \$234,251, due to a

shortfall in the Maple Shade Board's 1985-86 current expenses and which was defeated at the polls.

Having carefully considered the entire record in this matter, I **CONCLUDE**, based upon the Commissioner's prior decisions, that the board herein has established its need for the restoration of \$427,000 due to a shortfall in anticipated revenues.

The Board has failed to demonstrate, by a preponderance of the credible evidence, the need for the requested \$43,000, for interest on promissory notes and legal fees. No testimony nor documentation was adduced at the hearing to support this proposition. I **CONCLUDE**, therefore, that the requested \$43,000 be eliminated from the amount requested to be restored.

ORDER

Accordingly, it is **ORDERED** that the Ocean County Board of Taxation certify the amount of \$427,000 forthwith in the 1994-95 current expense tax levy of the Board of Education of the Township of Stafford for purposes of eliminating the 1993-94 deficit.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Nov. 28, 1994
DATE

Lillard E. Law ALJ
LILLARD E. LAW, ALJ

12/1/94
DATE

Receipt Acknowledged:

Hope R. Blackburn
DEPARTMENT OF EDUCATION

DEC 02 1994
DATE

Mailed to Parties:
Jeff S. Mann
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

slf

WITNESSES

On behalf of the Petitioner:

John Buyarski
Robert Gray, Jr.
Enrico D. Siano

On behalf of the Respondent:

None

DOCUMENTS IN EVIDENCE

On behalf of the Petitioner:

- P-1 Budget Projection, July 1, 1993 through June 30, 1994
- P-2 Letter, July 22, 1994 to Buyarski from Rielly
- P-3 I.D. only
- P-4 Letter, August 8, 1994 to Blackburn from Rielly
- P-5 Letter, July 27, 1994 to Rielly from Buyarski, with attachments

On behalf of the Respondent:

- R-1 Letter, August 9, 1994, to Muzyka from Van Camp with attachments

OAL DKT. NO. EDU 8883-94

IN THE MATTER OF THE SPECIAL :
SCHOOL ELECTION OF THE BOARD : COMMISSIONER OF EDUCATION
OF EDUCATION OF THE TOWNSHIP : DECISION
OF STAFFORD, OCEAN COUNTY. :
_____ :

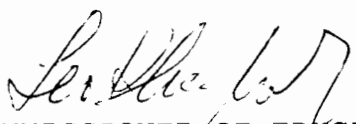
The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by the Township of Stafford pursuant to the provisions of N.J.A.C. 1:1-18.4. No reply was filed by the Board of Education.

In its exceptions, the Township urges affirmance of the ALJ's finding that no evidence was proffered to support the Board's contention that it required \$43,000 over and above the amount of the actual deficit to cover the costs of related interest and legal fees. The Township also urges the Commissioner to take notice of the Board's letter of November 21, 1994 to the ALJ advising that the Board's 1993-94 audit, accepted by the Board on November 17, 1994, reveals the actual deficit (as opposed to the projected deficit, upon which the original petition was based) to be in the amount of \$385,409 rather than \$427,000. (This letter was filed with the Office of Administrative Law on November 23, 1994, subsequent to the closing of the record upon which the ALJ based his decision.)

Upon review, the Commissioner concurs with the ALJ that the amount of the Board's pending deficit must be restored to its current expense budget in order to ensure the district's continuing ability to provide for a thorough and efficient system of education (T & E). In so doing, the Commissioner is guided by the constitutional mandate for T & E and prior Commissioner decisions rendered as a result of similar circumstances as set forth by the ALJ at pages 6-7 above. The Commissioner further notes the Board's compliance with Department of Education and auditor recommendations regarding internal and external controls developed to ensure that there will be no recurrence of the present situation. The Commissioner also concurs, however, that no evidence was presented that would warrant restoration of any amount over and above that of the actual deficit.

Accordingly, the initial decision of the Office of Administrative Law, ordering The Ocean County Board of Taxation to forthwith make the necessary adjustment in the 1994-95 General Fund tax levy, is affirmed for the reasons expressed therein, with the modification that the additional amount to be certified for deficit elimination purposes shall be reduced to \$385,409 consistent with the district's 1993-94 audit report.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

Note: The instant matter was inadvertently docketed twice for hearing at the Office of Administrative Law; consequently, the identical dispute under OAL Dkt. No. EDU 9254-94 has been withdrawn by concurrent Commissioner decision.

JANUARY 9, 1995

11-95

IN THE MATTER OF THE TENURE :
HEARING OF DR. JOHN HOLCROFT, :
SCHOOL DISTRICT OF THE TOWNSHIP : COMMISSIONER OF EDUCATION
OF EASTAMPTON, BURLINGTON : DECISION
COUNTY. :
_____ :

JANUARY 11, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. EDU 2707-94

AGENCY DKT. NOS. 25-2/94

**IN THE MATTER OF THE TENURE HEARING
OF DR. JOHN HOLCROFT, SCHOOL DISTRICT
OF THE TOWNSHIP OF EASTAMPTON,
BURLINGTON COUNTY.**

Stephen J. Mushinski,¹ Esq., attorney for the Board of Education of the School District of Eastampton Township

Margaret C. Murphy, Esq., attorney for respondent Dr. John Holcroft

Robert M. Schwartz, Esq., attorney for respondent Peter Granaldi

Record Closed: October 26, 1994

Decided: December 1, 1994

BEFORE **DANIEL B. MCKEOWN, ALJ**, t/a:

John Holcroft (respondent) is the superintendent of schools, with tenure, and a middle school principal in the Eastampton Township School district operated by the seven member Board

It is noted that Stephen J. Mushinski, Esq., became counsel of record after tenure charges were filed in this case by the board. It is he who, on behalf of the board, in conjunction with Margaret C. Murphy, Esq., who has been counsel of record for respondent since the matter began, successfully negotiated the Agreement discussed here.

of Education of Eastampton Township (Board). On February 8, 1994, the then sitting Board determined to certify charges of unbecoming conduct, other just cause and insubordination against respondent to the Commissioner of Education for determination under the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10, *et seq.* Respondent was not suspended from his duties under either title. The charges were received at the Department of Education February 14, 1994, after which the matter was transferred March 22, 1994 to the Office of Administrative Law as a contested case under the provisions of *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13. Respondent denies the specific and general allegations and he filed a counter-claim against the Board for, among other claims, harassment, intimidation, vexatious litigation, and unlawful interference with his duty. Respondent also claims by way of affirmative defenses, among others, that the Board abused its authority and acted in bad faith. On March 22, 1993, respondent filed a three count amended petition of appeal in which he alleges the Board (1) unlawfully reduced his salary which issue has been heard and decided in respondent's favor, (2) violated his due process rights under *N.J.S.A.* 18A:25-7 and (3) improperly appointed a "consultant" to perform his duties as superintendent in violation of *N.J.S.A.* 18A:17-20.

At the same meeting the Board also determined to certify similar charges against its elementary school principal, Peter Granaldi (or principal), a subordinate of respondent Holcroft. The charges against Granaldi were received February 15, 1994, by the Commissioner and, subsequently, transferred to the Office of Administrative Law along with the charges against respondent Holcroft. The tenure charges against respondent Holcroft and Granaldi were initially assigned to Jeff S. Masin, ALJ, but were reassigned this judge at or near the time Judge Masin was named Acting Director of the Office of Administrative Law.

Prior to the reassignment Judge Masin did grant motions to consolidate both cases for purposes of the then anticipated plenary hearing on the charges and to consolidate for purposes of hearing the remaining counts against the Board contained within the petition of appeal filed by respondent. (See Order of Consolidation and Order Severing Charges, OAL DKT. NOS. EDU 2707-94 & 2708-94 and EDU 8107-92 & 8108-92, April 26, 1994).

On October 25, 1994, counsel to the parties in the Holcroft tenure case submitted a Settlement Agreement, fully signed by the parties, which they say is in the public interest and fully

disposes of all issues in present dispute. The parties seek the approval of the Agreement by the Commissioner of Education as a full and final disposition of this case.

For the reasons which follow, this initial decision recommends that the Commissioner of Education accept the Settlement Agreement as a full and final disposition of *In the Matter of the Tenure Hearing of Dr. John Holcroft, School District of the Township of Eastampton, Burlington County*, OAL Dkt. No. EDU 2707-94, Agency Dkt. No. 25-2/94, so that respondent and the Board may devote their full attention, energy, and resources to the real public interest of providing their pupils the opportunity for a thorough and efficient program of education.

An analysis of the terms of the proposed Settlement Agreement must be made in light of the State Board of Education standards for approving such agreements in tenure cases. (See *In re Tenure Hearing of Frank Cardonick, Brooklawn Borough Board of Education*, 1982 S.L.D. ___ (August 4, 1982)). It is appropriate to briefly discuss the tenure charges and specifications which allege respondent, as the superintendent of schools, engaged in conduct which separately constitutes not only harassment of employees, but sexual harassment of female employees, and that respondent engaged in what is called a "cover-up" and ostensibly tolerated similar conduct by the elementary school principal. In *Cardonick, supra*, the State Board held as follows:

We believe a proposed tenure settlement or a withdrawal of tenure charges with its attendant (terms and conditions should be submitted to the Commissioner of Education for his prior scrutiny and approval. The proposed tenure settlement or withdrawal should be accompanied by supporting documentations as to the nature of the charges, circumstances justifying the settlement, consent or authorization by the Board of Education and the teacher to the proposed agreement, the Administrative Law Judge's findings that the teacher entered into the agreement with a full understanding of his rights, and that the agreement is consistent with the public interest. (See *N.J.A.C. 1:1-17.1(b), (c)*) . . .

Sexual harassment is a form of unlawful discrimination. Discrimination based on gender is "peculiarly repugnant in a society which prides itself on judging each individual by his or her merits. *Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587, 600 (1993). The charge of sexual harassment is a serious matter. It should not be made nor, once made, taken lightly by either the

charging party or the accused; both the Commissioner and State Board of Education give careful scrutiny to such matters. Unlawful harassment based on gender is contrary to the public policy of this State. It is essential that this proposed settlement and attendant circumstances be reviewed in some detail to insure the interest of the public is preserved. Therefore, it is necessary to determine that the standards announced by the State Board of Education for the approval of tenure charge settlements are met.

The primary actors in this dispute are former Board presidents Walter Stark, who served during 1992-93 and perhaps, before that time as a Board member; David Blew, who served during 1993-94; and, respondent Holcroft who has been employed in this school district in one professional capacity or another for the past 22 years.

CHARGES AND SPECIFICATIONS

The charges and specifications stated by Board president Blew and as certified to the Commissioner against respondent are reproduced in full:

Charge One

Unbecoming Conduct Specifications

1. Engaging in a course of conduct, directed to district employees under his supervision, while functioning in his capacity as the Superintendent of Schools, which was improperly harassing in nature.
2. Engaging in a course of conduct, directed to district employees under his supervision, while functioning in his capacity as the Superintendent of Schools, which constituted improper sexual harassment.
3. Refusing to cooperate with the Board of Education during the Board's attempted investigation of employee complaints concerning the Respondent's behavior.
4. Failing and refusing to properly supervise a district administrative staff member in the carrying out of that district administrative staff member's assigned duties both as a district

building principal and/or as the district's affirmative action officer.

5. Inappropriate and unacceptable refusal to comply with Board of education directives and Board of education requests, to investigate allegations of unbecoming conduct engaged in by a district building principal with respect to district employees under that building principal's supervision.
6. Improperly covering up actions of a district administrative staff member which constituted the improper harassment and/or improper sexual harassment of district employees under the supervision of said district administrative staff member.
7. Responding in a misleading or untruthful manner when questioned by the Board of education's designated representatives concerning circumstances which gave rise to the proceeding charges.
8. Failure to properly supervise the district school business administrator and other staff with respect to the financial operations of the district.
9. Failure and refusal to provide the Board of Education with accurate and correct financial information as necessary for the Board to carry out its proper functions with respect to the districts financial management.

Charges Two and Three

Just Cause: Insubordination

Specifications

- 1-9 [This specification merely repeats each and every foregoing specification]
10. [Based on the repetition of each and every specification above, the Board alleges respondent's conduct also constitutes just cause and insubordination to have discipline imposed upon him by the Commissioner.]

STATEMENT OF EVIDENCE ON UNBECOMING CONDUCT

1

CHARGES ONE THROUGH SEVEN

The statement of Evidence and included documents relied upon by the Board for charges one through seven are physically weighty and address matters as early as the 1985-86 academic year through the 1993-94 year which are ostensibly within the purview of responsibility of a superintendent of schools. Documents suggest that a pivotal time in the history of this litigation occurred when the Board was unsuccessful in its attempt to have the Department of Education “investigate” the alleged improper conduct of respondent regarding complaints entertained by Board president Stark from one present and two or more former nontenure employees whose employment was either terminated or not renewed by the Board. On April 16, 1993 the Board requested the New Jersey Division on Civil Rights (or Division) to conduct an investigation of alleged harassment by respondent and by principal Granaldi. The Board points out in the letter that despite an earlier request to the Department of Education, which was refused because it did not conduct investigations of the type requested, and the Board’s own unsuccessful effort to investigate the unspecified charge of harassment, it still did not know whether the superintendent was engaging in wrongful conduct and that it, through omission, did not want to be accused of acquiescing in such conduct if its suspicions against respondent were eventually proven true. In support of the Board’s request to the Division, and as included in its Statement of Evidence filed with the Commissioner in support of the present charges, an affidavit executed by Board president Stark, with attachments, was included. The Division did not conduct the requested investigation into the unspecified charge of harassment.

The affidavit and the documents attached by the Board to its letter request to the Division shall be examined because they are essentially the same documents it used to determine probable cause existed to credit the evidence in support of the charges presently before the Commissioner of Education.

In the affidavit president Stark attests as follows:

- On October 27, 1992 respondent denied receiving any complaints regarding alleged, but it is noted unspecified, harassment;

- That respondent did not answer the question put to him on an uncertain date whether he received correspondence within the preceding two months on “any personnel complaints or matter”:
- That respondent denied receiving correspondence from any employee in the preceding two months regarding any personnel matter and that even if he had he was not certain he could lawfully turn it over to the Board’

These four attestations apparently refer to Charges 3, 5, 6 and 7 regarding the alleged failure of respondent to cooperate with the Board in its investigation of his conduct, refusal to comply with its directives, a cover-up of certain conduct and answering questions in an untruthful or misleading manner.

Documents referred to in the Statement of Evidence, including other portions of Stark’s affidavit would tend to show Stark, as Board president, had sometime in October 1992 received communication from sources “concerning alleged harassment” which, he attests, was to have been made by current and former employees, all of whom are female. Stark attests that on October 27, 1992, he asked respondent if “he had received any such complaints against any employee of the school district which should be brought to the Board’s attention. [Respondent] assured me that there had been no such complaints to his knowledge and specifically he responded that there were none of which he was aware.” Stark attests that he then asked respondent whether he received any correspondence from any employee during the past two months concerning any personnel complaints or matters. Respondent was then to have stated “Tell me what this question is in reference to, and I’ll respond to your question.” Respondent was then ordered by the Board, presumably upon the urging of Stark, to give it, through Stark, any and all correspondence received from any employee within the past two months regarding any personnel matter by 4 p.m. the following day.

Respondent replied that he had received no communication from any employee within the past two months with “an indication of carbon copy to the Board . . .” Stark persisted, however. Respondent replied he did not intend to be insubordinate but he did not desire to violate what he considered to be the law as announced by the Commissioner in Horner v. Kingsway Regional High School District, 1990 S.L.D. - - - (1990) regarding a Board’s legitimate access to personnel

files only when such files are relevant to specific employment action to be taken. Respondent suggested that the apparent dispute between him and Stark be taken to the Commissioner for resolution. It was at or about this point that Stark attempted to have the Department of Education “investigate” alleged but unspecified harassment.

This apparent dispute between Stark and respondent forms the factual basis for the second count of respondent’s amended petition against the Board. He alleges that because Board members refused to divulge the specifics of their inquiry, while directing him to appear at various meetings to discuss the alleged complaints, his right to due process under *N.J.S.A. 18A:25-7* was violated and that the Board violated his rights as superintendent under *N.J.S.A. 18A:17-20*.

Stark attests in his affidavit as follows that he had earlier requested the Department of Education to conduct an investigation only to be told by the Department’s Burlington County Superintendent of Schools that it does not conduct investigations of the type requested; that he had requested the Department to investigate “allegations” against respondent and principal Granaldi of harassment and of a “cover-up” of such harassment if, indeed, it would find that allegations of harassment were ever made to the superintendent. (Affidavit, paragraph eight). He also says that on February 17, 1993 the Board conducted its own “fact-finding” meeting which, upon order of the Board, was attended by respondent who was represented by counsel.

According to notes of the fact-finding meeting which were to have been taken and prepared by former Board counsel, the main topic of discussion was one potential complainant against respondent, a teacher who had met with a committee of the Board before the meeting began with respondent and counsel. It appears that it is this teacher upon whom the Board relies as their chief complaining witness, and who had or has a dispute with principal Granaldi. She maintained a type of running diary regarding perceived slights, injustices, and confrontations she received from or had with principal Granaldi and upon which the Board relies.

The teacher’s diary (see Attachment D, pages 3 through 19 of the Board’s Statement of Evidence) reveals that the dispute between she and Granaldi began September 17, 1992 when the teacher was late arriving at the school building in the morning and, having arrived late, engaged in conversation outside the school building with another person before entering the building to

assume her duties. The teacher did not care for the manner, method, mode or timing of Granaldi's reproach of lateness or her decision to engage in conversation before entering the school to greet her students. The teacher writes that she was "outraged", and rendered "incapable" of remaining for the entire day to complete her assigned duties. Consequently, the teacher says, she asked a secretary at lunch time, whom she says "could see that I was visibly upset", for an absence request form and left school for the day.

The teacher memorialized the above in a memorandum dated September 21, 1992 to respondent Superintendent and requested she "not be charged for this time." The teacher characterized the memorandum as a "grievance" and "testimony to unprofessional and insensitive behavior on the part of [the principal toward her] on Thursday, September 17, 1992." Perhaps president Stark was making reference to this memorandum during his questioning of respondent.

The teacher records that she met with the principal on September 21, 1992 and her 'grievance' was discussed as not being properly filed under the existing Agreement, that her request of having one-half sick day restored to her was met with "cynicism" by the principal, that she was reminded her presence was required at a staff meeting after school that day which she believed she should not have to attend, that after school that day while the principal and staff were waiting to start the meeting he called for her presence over the school intercom system. Teacher writes that the manner in which she was paged by the principal and his greeting when she arrived at the meeting site was, in her view, harassment.

The teacher writes that on September 22 the principal told her he would allow time off for an emergency as she received in the past, but not to leave school early as she did September 17 and that she was accused of having "ghost-written" a letter complaint from a secretary alleging he used vulgar language during a telephone conversation. Teacher writes in conclusion to this entry:

With finger waving, and head shaking back and forth, and staring at me as though he was in a hypnotized state he kept repeating "I never sleep, I never sleep. I never sleep . . ." As I drove home I felt a sense of fear of this man [the principal] and decided that I should have the locks changed on my home."

The teacher records that she was late September 24 reporting back from lunch. Apparently she was due back at 12:10; she reported back at 12:37. Teacher reports the principal “bellowed” at her that she was late so others could hear.

According to a document referenced in the Statement of Evidence filed by the Board, the principal wrote to the teacher on September 24, 1992.

* * *

On Thursday, September 17, you arrived for work at 8:20, having failed to alert the school that you would be delayed.

On Thursday, September 24, you did not report back from lunch until 12:37, again having failed to alert the school that you would be delayed. A check of the sign out sheet revealed that you had already signed out for the day, and not until the office checked with the middle school were we aware that you were still in the district. (In response to the inquiry of your whereabouts and the cause for our delay you advised Mrs. H. * * * that you had a meeting with Dr. Holcroft [respondent]. Upon my * * * discussing this matter with him he advises me that you had not been with him at all.) * * *

Teacher records in the diary that she intended to convey that she went to the superintendent’s office, without a prior appointment, in an effort to meet with him.

Subsequent entries by the teacher show that on October 1 when the principal asked her about goals and volunteers and she told him to speak to the superintendent, that she perceived the request as “another excuse [for the principal] to call [her] to task. On October 8 teacher records that the principal used “his gruff and demanding tone” asking whether she had yet arranged the meeting with the superintendent she wanted regarding the principal’s September 24 memorandum; that after the principal then arranged the meeting for October 15, teacher asked the superintendent to cancel it; the superintendent agreed to cancel the meeting if she would meet the principal to talk; that when she met with the principal to discuss the September 24 meeting and mentioned the “climate” the principal created, he “bellowed”; that she walked out of the meeting; that she, the principal, and the superintendent met on October 20 at her request and that she walked out of that meeting as well because the principal kept “. . . interrupting and rehashing and blaming . . .”

Entries in the diary for the end of October and beginning of November 1992 show that the local union called a meeting after school for teachers of the first grade who appear to have filed complaints against the teacher. The diary reads as follows:

October 29, 1992 - There was a meeting after school called by the union due to complaints leveled by the first grade teacher. My personal feeling was that they were put up to it as I recall how he had destroyed people in the past. Also the fact that the union had been called in made no sense since this had never happened. It was my feeling that [the principal] wasn't satisfied that he had harassed (sic) me enough. As soon as the meeting started, [the principal] walked over to each person there and very ceremoniously gave each one a piece of candy, ignoring me very obviously. Two of the teachers offered me theirs

November 2, 1992 - I entered the elementary building [the principal] stood directly in front of me and absolutely ignored me while he said "Good Morning" to everyone else by name. The secretary kept her head down and ignored me also.

November 3, 1992 - I saw my Doctor who proscribed (sic) medication for my nerves.

On December 3, 1993, which in the context of the entire diary appears to be more correctly 1992, the diary records that after a meeting with first grade teachers conducted by teacher which was attended by principal he asked her how she thought the meeting went. After responding to the question, teacher records principal repeated ". . . five times "Very Good", each time with greater anger and emphasis in his voice as he leaned menacingly toward me."

Entries for December 7 and 15 reveal that the principal told teacher that none of the teachers shall attend a workshop she arranged because he knew nothing about the workshop and that despite a need for testing a new pupil which was called to her attention because testing was her responsibility, teacher reports a disagreement with principal and that the new pupil had lost a day of school because of the absence of testing due to her absence from school.

Teacher's entry for December 21, the year of which I believe to be more accurately 1992, is reproduced here in full:

I was in the trailer monitoring the first day of the Writing to Read goal with the parent volunteers. [The principal] entered the trailer, greeted [Dr. A.], went over to the aid (sic) and put his arm on her shoulder and asked "How was your weekend?" ignoring my presence. Soon after, he left.

As I was leaving the building later that morning [the principal] called me over to the side of the hallway and asked how my mother was doing. Thinking this a friendly gesture I responded. Then he asked "How's Dianne's mom?" Shocked that he would ask a question about someone he had met only once more than a year ago, I responded casually that she was still in the nursing home and coming along fine. Then he asked "How's Dianne?" "Fine" was my answer. The question stirred my memory of the statement he made in September as he shook his finger close to my face: "I never sleep. I never sleep."

On January 11, 1993, teacher records what appears to be a disagreement with the principal regarding the testing of four children and when the tests were to be administered by her; on January 14 teacher records the principal taking issue with her regarding her arranging for teachers in his school to attend workshops without his prior knowledge or approval and characterizes his manner of speech on two separate occasions as "patronizing smile/smirk", as in the principal asking the question "Do you understand" (patronizing smile/smirk); and, under date of January 15 teacher writes of having submitted a report of the above to the superintendent only to have caused the removal of the very same report from the superintendent's desk when he left his office.

The diary relates that on January 27, 1993 the superintendent met with teacher to discuss a textbook budget; however, she wants to discuss the principal. Superintendent is "distant and disinterested" and that perhaps her "hysteria" caused superintendent some concern. Superintendent suggests she control her responses to principal; she screams at superintendent. She compares principal's conduct with domestic violence. Superintendent says teacher not "lily-white" - Teacher leaves office - slams door - returns and tells superintendent her physician tells her to take two week leave of absence - Superintendent wants medical verification.

Other documents in the Board's Statement of Evidence in support of the charges against respondent (the superintendent) include a memorandum to file from the Board president regarding

a meeting he had October 26, 1992 with two former Board employees at one of their homes. One who was employed during 1991-92 complained that the principal had inquired of her church activities, religious background and what her husband did for a living; that the principal was to have asked her to sign a petition against another employee; staff members were to have left his office in tears and of being advised by others not to get on the wrong side of him. The other, who had been employed in 1985-86, complained that she had filed "sexual harassment charges" against the principal with the superintendent. "the county, and state" but nothing was ever done; that the principal sat close to her during observations; that he yelled at staff and kids at close proximity; that he commented on her old car, that she did not wear enough make-up, and that she was overweight. The Board did not include a copy of the purported "sexual harassment charges" which were to have been filed.

Another document relied upon the Board is a memorandum of Board president Stark regarding a meeting during November 1991 between the Board and a teacher whose employment contract was not renewed for 1991-92. The referenced meeting may have been the required opportunity to be heard afforded nontenure teachers whose employment is not continued. The teacher was to have complained that the principal just fired her one day without prior notice. But, even after this November meeting the Board affirmed whatever action had earlier been taken against the teacher regarding her employment.

Another matter on which the Board appears to place great weight in its Statement of Evidence in support of the charges is another nontenure teacher who was employed for 1992-93 and, it appears, was offered reemployment for 1993-94. The Statement of Evidence makes clear that respondent did not recommend reemployment for 1993-94 but the Board overrode respondent's recommendation and offered reemployment. The documents also show that before the teacher's performance began under the 1993-94 contract, respondent recommended on August 3, 1993 that the notice of termination clause be exercised in her contract. It is not known whether the Board adopted the recommendation to terminate the teacher's employment contract.

There are documents in the Statement of Evidence which tend to support valid concern regarding this teacher's performance especially during April, May and June of 1992-93 year and even earlier in the year. These memoranda show a basis for concern of the teacher's tendency to

misspell words such as “their” for “there”, “straightening” for “strengthening” “repertoire” for “repertoire”, as well as some concern over the teacher’s ability to properly use the possessive form of adjectives. Another memorandum addresses the teacher’s asserted failure to submit lesson plans as required and of class organization. One memorandum suggests that this teacher audio-tape recorded her questioning and answers received from one of her pupils regarding a telephone conversation his mother had earlier had with the school principal. When confronted at a meeting, the teacher was to have admitted the recording and agreed to turn over the recording to the principal and the parent. The teacher was excused from the meeting to retrieve the recording from her car in the parking lot. When teacher failed to return to the meeting and was subsequently paged by the principal, she stated that she destroyed the recording because she determined its existence was making the parent “uncomfortable”.

II CHARGES EIGHT AND NINE

The specifications to these charges allege that respondent failed to “properly” supervise the school business administrator and that he, respondent, failed to provide the Board with “accurate and correct financial information as necessary” to properly perform its function regarding district financial management. Respondent says the Board failed to heed the information he provided, that it knowingly failed to perform its duty to properly budget actual costs for the operation of the district, and refused for several months to appoint a qualified individual to the vacant position of school business administrator.

I have searched the Board’s documentary evidence referenced in its Statement of Evidence to find some basis upon which these charges were filed. Neither Charge Eight nor Nine on their face, nor the specifications thereto, nor the documents referenced in the Statement of Evidence which are purportedly the good faith basis upon which the Board found probable cause to credit the evidence, nor Stark’s affidavit, disclose the basis upon which those two charges were certified. There is no disclosure as to the nature of the alleged failure to provide so-called proper supervision of the school business administrator, nor is there an allegation that the administrator was supervised by respondent, nor is there any disclosure as to what incorrect information was to have been intentionally provided it by respondent.

STATEMENT OF EVIDENCE ON JUST CAUSE AND/OR INSUBORDINATION

The Board certified a total of ten charges in these categories separate and apart from the foregoing charges of unbecoming conduct. In reality, however, these charges, their specifications, and the Statement of Evidence and documents referenced therein, are identical in their substantive allegations of misconduct as contained within the charges of unbecoming conduct. It is apparent that the Board alleges that if the conduct alleged to have been engaged in by respondent does not constitute unbecoming conduct, then such conduct constitutes either just cause and/or insubordination for the Commissioner to impose some discipline upon him under *N.J.S.A.* 18A:6-10, The Tenure Employees Hearing law.

ANALYSIS

LAW

While the 1993-94 Board of Education found probable cause to credit the evidence against respondent, it is well within the authority of the present 1994-95 Board to assess, in good faith, the strength and/or weaknesses of its competent, credible evidence to prove the truth of the charges and to have entered negotiations with respondent for purposes of settlement. In *Cardonick, supra*, the State Board of Education recognized that:

The New Jersey courts have looked with great favor upon the voluntary resolution of litigation through settlement. [Citations omitted] As a general principle, and without considering the toll of human resources, the settlement of lawsuits in good faith can be said to save time, money and proof problems. School Boards, in their efforts to conserve public funds, no less than private parties, have been encouraged by the state and federal courts to carefully consider equitable settlement possibilities. (Slip opinion, at p. ___)

Nevertheless, the State Board also cautions that Boards of education “must act in the public interest, lawfully, constitutionally, reasonably and in accordance with duly enacted rules and regulations of the Commissioner of Education and State Board of Education.” (Id).

In this case, the Board in the proposed Settlement Agreement acknowledges its present belief “that there is an absence of evidence to support the charges. . .” and that “the prosecution of these charges will divert substantial amounts of money, time and key staff resources from the true mission of the district. . .” (Paragraph Six, Background section of proposed Agreement). Having reviewed the charges, the Statement of Evidence and related documents which purportedly support the charges, the decision of this Board to settle the case is to be encouraged.

Three of the most significant charges against respondent are general harassment of employees, sexual harassment of female employees, and improperly covering up similar-conduct by a subordinate. Justice Garibaldi, writing for the Court in *Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. at 601, noted:

Sexual harassment jurisprudence generally divides sexual harassment cases into two categories. Quid pro quo sexual harassment occurs when an employer attempts to make an employee's submission to sexual demands a condition of his or her employment. It involves an implicit or explicit threat that if the employee does not accede to the sexual demands, he or she will lose his or her job, receive unfavorable performance reviews, be passed over for promotions, or suffer other adverse employment consequences. Hostile work environment sexual harassment, by contrast, occurs when an employer or fellow employees harass an employee because of his or her sex to the point at which the working environment becomes hostile.

While a party who charges unlawful harassment need not prove an overt sexual act, an element which must be shown is that the alleged harassing conduct occurred based on gender. Without reaching findings of fact on truth or falsity, the proofs reasonably anticipated to be presented to support charges of unlawful harassment against respondent based on the Statement of Evidence and included documents appear to be unavailable.

FINDINGS

The so-called teacher's diary which was presented in some detail shows a teacher who claims harassment but who reported late for her duties on at least two separate occasions and left her duties early on at least one occasion and/or because she is either paged to report to a meeting

awaiting her presence to start and which she had already been reminded of earlier in the day to attend but who felt she should not have to attend or the manner of greeting from the principal when she finally reported to the meeting. The diary shows a teacher who claims the manner of candy distribution by the principal constitutes harassment, or the failure of the principal and secretary to say "good morning" but being shocked when the principal asks "How's Diane". The diary shows a teacher who walks out of meetings with both the principal and the superintendent, while acknowledging her own hysteria. Nothing in the diary suggests whatever friction may have existed or exists between teacher and superintendent is based on the fact teacher is female. Not even teacher, who is capable at writing observations or recollection of past events, asserts anywhere in the diary superintendent treated her differently because of her gender. One would have to stretch logic to conclude that teacher's comparison of principal's alleged conduct as recorded in her own words was akin to domestic violence as being a basis for a claim of harassment based on gender by respondent. I **FIND** that establishing the truth of the charges against respondent regarding harassment, sexual harassment or a so-called "cover-up" of such conduct would be a formidable challenge for the Board.

Such a challenge to prove charges of unlawful discrimination by sexual harassment against respondent would not be lessened by the consideration of former president Stark's memoranda regarding the three former teachers, all of who are female and all of whom were employed, but no one of whom acquired tenure. Only the teacher who was employed in 1985-86 was to have claimed to Stark who then prepared the particular memorandum which the Board includes in its Statement of Evidence, that the principal engaged in sexual harassment against her. According to Stark's memorandum, the teacher filed such a claim in 1985-86 with the superintendent, "the county and state" but that nothing was every done thereby implicating the superintendent. Even if the assertion turned out to be true that a complaint was filed by this teacher in 1985-86, that does not make the allegations which would be contained therein true. It must be borne in mind, for purposes of this proceeding, that that teacher is not presently making the allegation against respondent; it is former president Stark who claims that the teacher told him that she filed the complaint in 1985-86. The other two teachers do not claim different based on gender.

Four charges allege respondent engaged in unbecoming conduct or insubordination and/or other just cause to justify the imposition of some discipline on the bases of former president

Stark's questioning of him regarding grievances or complaints received, respondent's denial of having received such complaints, Stark's persistence ostensibly on behalf of the Board, respondent's disclaimer of having received any such communication with any reference to "copy to the Board", the Board's order to respondent to appear at a meeting to discuss complaints it was to have received but without advising respondent the nature of the complaints, or persons who made such complaints, and respondent's answers provided the Board at the meeting which was held. When these charges, the Statement of Evidence and attached documents are considered against respondent's claim that his due process rights were violated under *N.J.S.A. 18A:27-5* the task of the Board in proving the truth of the charge, I **FIND** would be formidable.

It is difficult to determine the relative strengths and weaknesses of the Board's projected proofs in support of charges eight and nine because it cannot be determined on the record developed thus far exactly what the charges are. "Proper supervision" is an elusive characterization of what A says B should have done. But, without specificity of what it is that A says B should have done but failed to do and therefore B engaged in unbecoming conduct, insubordination or other just cause sufficient to impose discipline, it is virtually impossible to assess the relative strengths of the Board's case. If the relative strengths of the Board's case cannot be determined here, the issue becomes how does respondent intelligently defend against these charges. I **FIND** the Board's task in proving the truth of these charges and just cause of insubordination, would be formidable.

The efforts of the present Board to settle this case with respondent is encouraged so that both parties may devote their energy, talent, and resources to their true task of providing their pupils with a thorough and efficient program of education.

SETTLEMENT TERMS

The six essential terms of the proposed Settlement include the joint withdrawal and dismissal, with prejudice, by both parties of the tenure charges, the answer, separate defenses and counterclaims presently before the Commissioner. Upon dismissal of the charges by the Commissioner, respondent shall withdraw with prejudice the remaining counts of his amended

petition before the Commissioner and agree that they shall continue to abide by state and federal law governing Affirmative Action, as well as the rules and regulations of the State Board of Education. They mutually agree to bring complaints directly to each other, if and when received, and to honor the basic right of the accused to respond and to correct whatever problem may exist as identified and agreed to by both sides. Finally, the parties agree that all personnel in the Board's employ shall report to respondent except as may otherwise be provided by law.

CONCLUSION

Based on the record in this case, and having considered society's interest in the nature of the charges, the interests of the Board, the interests of respondent and of the school district as a whole, the likelihood of whether the charges may be supported by proofs reasonably anticipated to be offered at hearing, the terms of the proposed Agreement including the absence of an exchange of public funds for services not rendered, and the consistency of the Agreement with existing law, I **CONCLUDE** that the proposed Settlement Agreement, which was freely entered into by the parties with full knowledge of their rights and each of whom are represented by competent counsel, is a full, fair, lawful and final disposition of the issues presented in this case.

With respect to *In the Matter of the Tenure Hearing of Peter Granaldi, School District of the Township of Eastampton, Burlington County*, OAL DKT.NO. EDU 2708-94, Agency Dkt. No. 26-2/94, which Judge Masin previously consolidated with this case on April 26, 1994, I **CONCLUDE** that the Consolidation Order must be rescinded in order to dispose of this matter by initial decision without the need to wait for the final disposition of the tenure charges of the Granaldi case. The Granaldi tenure case currently remains open.

ORDER

The parties are ordered to further comply with the Settlement Agreement as attached and is set forth therein.

For the reasons set forth above, I further **ORDER** the Order of Consolidation dated April 26, 1994, be rescinded, thus, separating the cases of Dr. John Holcroft and Peter Granaldi.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 1, 1994

DATE

Daniel B. McKeown

DANIEL B. MCKEOWN, ALJ, t/a

DECEMBER 6, 1994

DATE

Receipt Acknowledged:

Hope R. Blackburn

DEPARTMENT OF EDUCATION

DEC 09 1994

DATE

Mailed to Parties:

Jeff S. Mason

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

slf

RECEIVED
OCT 25 1994

David Holcroft

STEPHEN J. MUSHINSKI, ESQ.
110 Marter Avenue, Suite 411
Moorestown, New Jersey 08057
(609) 866-9582
Attorney for Eastampton
Township Board of Education

IN THE MATTER OF THE TENURE) BEFORE THE COMMISSIONER
HEARING OF DR. JOHN R. HOLCROFT,) OF EDUCATION OF THE
SCHOOL DISTRICT OF TOWNSHIP OF) STATE OF NEW JERSEY
EASTAMPTON, BURLINGTON COUNTY)
) AGENCY DOCKET NO.
) 25-2/94
) OAL DOCKET NO.
) 02707-94S
) 02708-94S
) (Consolidated)
) SETTLEMENT AGREEMENT

BACKGROUND

1. Dr. John R. Holcroft ("Holcroft") filed a Petition (OAL Docket No. EDU 8107-92S and EDU 8108-92S [consolidated]) against the Eastampton Township Board of Education on or about September 21, 1992, which was amended on or about March 22, 1993.

2. The Eastampton Township Board of Education ("Board") filed tenure charges against Holcroft on February 10, 1994, which charges are currently pending before the Commissioner of Education ("Tenure Charges").

3. On March 7, 1994 Holcroft filed an Answer, Separate Defenses and Counterclaim with respect to said tenure charges ("Responsive Pleadings").

4. A hearing was held on April 27, 1994, with respect to Count One of Holcroft's Petition and the Administrative Law Judge and the Commissioner of Education found in favor of Holcroft. Counts Two and Three of Holcroft's Amended Petition were consolidated with the Tenure Charges [OAL Docket Nos. 2707-94S and 2708-94S (Consolidated)]. Only the Tenure Charges, Answer, Separate Defenses and Counterclaim and Counts Two and Three of Holcroft's Amended Petition are the subject of this Settlement Agreement. Holcroft's Petition, Count One, shall not be the subject of this Settlement Agreement.

5. The Board and Holcroft have met and have held discussions with regard to matters alleged in the Tenure Charges and the Counterclaim. Holcroft and Board acknowledge that allegations exist regarding the occurrence of certain events which have been delineated in the Tenure Charge, while Holcroft denies knowledge of these allegations at the time of the filing of the Tenure Charges. The parties have determined it to be in their respective best interests to resolve the above referenced matters and come to an agreement with respect to the obligations, duties and responsibilities of the Board and Holcroft regarding certain aspects of the operation of the School district, and the roles and responsibilities of the Board and the Superintendent.

6. Based upon these understandings, and recognizing that, when the Board certified these charges, it did not suspend Holcroft; and based on its present belief that there is an absence of evidence to support the charges, and further based on its belief that the prosecution of these charges will divert substantial amounts of money, time and key staff resources from the true mission of the district, the parties have agreed to resolve this matter under and subject to the terms as outlined in this Settlement Agreement.

AGREEMENT

The parties to this Agreement, intending to be legally bound, agree as follows:

1. The Board and Holcroft shall make application to the Commissioner of Education to withdraw and dismiss the Tenure Charges and the Answer, Separate Defenses and Counterclaim with prejudice.

2. Upon dismissal of the Tenure Charges by the Commissioner, Holcroft shall withdraw Counts Two and Three of his Amended Petition with prejudice.

3. The Board and Holcroft shall continue to abide by N.J.S.A. 18A:25-7 and N.J.S.A. 18A:17-20 and Affirmative Action laws, rules and regulations and Holcroft and Board shall bring complaints directly to each other, when and if received. The Board shall then give the person accused the opportunity to respond regarding the complaint and will give

the Superintendent the opportunity to correct the problem, if the Board and the Superintendent agree that, in light of all the facts, a problem exists.

4. The Board shall confer and discuss directly with Holcroft any complaints brought against Holcroft by staff members of the school district. Following these discussions, the Board shall give Holcroft a reasonable amount of time to correct any problems, if they are determined to exist.

5. The Board and Holcroft agree to abide by any existing policies concerning the chain of command in its interactions with staff members of the school district.

6. The Board agrees that all personnel in the district, including consultants, shall report to Holcroft, unless required by statute to report to the Board directly. Nothing in this paragraph 6 shall abrogate the First Amendment Rights of the personnel in the district as outlined in relevant Case Law.

WHEREAS, Holcroft and the Board have reviewed this Settlement Agreement and have consulted with their respective attorneys; and

WHEREAS, the Superintendent has approved of the terms and conditions of this Settlement Agreement; and

WHEREAS, this Settlement Agreement has been approved by a vote of the Members of the Board of Education of the Eastampton Township School District at its meeting of

September 27²⁰⁰⁰, 1994, and has been made a part of the minutes of that meeting;

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

BOARD OF EDUCATION OF THE EASTAMPTON TOWNSHIP SCHOOL DISTRICT

Attest:

By: [Signature]
David Bradford, Board President

[Signature]
Thomas Reynolds, Board Secretary

Witness:

[Signature]
DR. JOHN R. HOLCROFT
Superintendent

[Signature]


DENISE WHIPPLE
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Nov. 16, 1997

IN THE MATTER OF THE TENURE :
HEARING OF DR. JOHN HOLCROFT, :
SCHOOL DISTRICT OF THE TOWNSHIP : COMMISSIONER OF EDUCATION
OF EASTAMPTON, BURLINGTON : DECISION
COUNTY. :
_____ :

The record and initial decision including a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) In addition, the Commissioner approves the rescission of the Consolidation Order of In the Matter of the Tenure Hearing of Peter Granaldi, School District of the Township of Eastampton, Burlington County, OAL Dkt. No. EDU 2708-94, Agency Dkt. No. 26-2/94 with the matter herein.

The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

JANUARY 11, 1995

DATE OF MAILING - JANUARY 11, 1995

12-95

IN THE MATTER OF THE TENURE :
HEARING OF RAMIRO CUBAS, SCHOOL : COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF UNION : DECISION
CITY, HUDSON COUNTY. :
_____ :

JANUARY 11, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1908-94

AGENCY DKT. NO. 16-1/94

**I/M/O of the Tenure Hearing of Ramiro Cubas
and the Board of Education of the County of
Union County, Hudson County**

Louis C. Rosen, Esq., for petitioner
(Patino-Treat & Rosen, attorneys)

Gregory T. Syrek, Esq., for respondent
(Bucceri & Pincus, attorneys)

Record Closed: November 28, 1994

Decided: December 1, 1994

BEFORE IRENE JONES, ALJ:

This matter was transmitted to the Office of Administrative Law on February 28, 1994, for determination as a contested case, pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The parties have agreed to a settlement and have prepared a Memorandum of Agreement indicating the terms thereof, and a Stipulation of Dismissal which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

BUCCHERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(201) 773-5665
Counsel for Respondent

Nov 9 12 55 PM '94

IN THE MATTER OF RAMIRO CUBAS:
AND THE BOARD OF EDUCATION :
OF THE CITY OF UNION CITY, :
HUDSON COUNTY. :

BEFORE THE COMMISSIONER
OF EDUCATION/OFFICE OF
ADMINISTRATIVE LAW

AGENCY REF. NO. 16-1/94
O.A.L. DOCKET NO. EDU 01908-94N

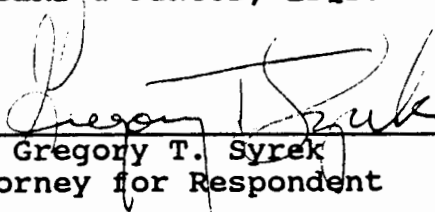
STIPULATION OF DISMISSAL

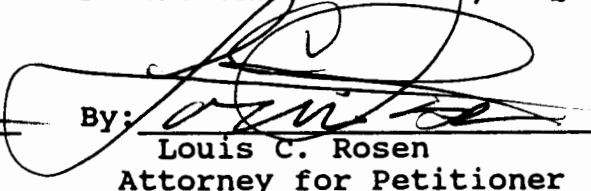
The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed with prejudice and without costs against either party.

Dated:

BUCCHERI & PINCUS, ESQS.

PATINO-TREAT & ROSEN, ESQS.

By: 
Gregory T. Syrek
Attorney for Respondent

By: 
Louis C. Rosen
Attorney for Petitioner

MEMORANDUM OF AGREEMENT

077-111-111
Nov 20 9 14 AM '94

This Agreement is made this 17th day of November, 1994, by and between the Union City Board of Education, with offices at 3912 Bergen Turnpike, Union City, New Jersey 07087, hereinafter referred to as the "Board,"

AND

Ramiro Cubas, whose home address is 1503 Palisade Avenue, Union City, New Jersey 07087, hereinafter referred to as "Cubas," and the Union City Education Association.

WITNESSETH:

WHEREAS, Cubas is a maintenance employee employed by the Board and has been so employed since October, 1991; and

WHEREAS, on or about December 9, 1993, Cubas was suspended without pay, effective December 15, 1993, pending the investigation of charges against him; and

WHEREAS, on or about January 12, 1994, tenure charges were filed against Cubas; and

WHEREAS, the tenure charges were certified to the Commissioner of Education on or about January 28, 1994; and

WHEREAS, Cubas and the Union City Education Association filed a grievance and demand for arbitration over the suspension without pay of Cubas; and

WHEREAS, in lieu of proceeding with the tenure charges in accordance with the Tenure Employees' Hearing Law, and the arbitration proceeding bearing PERC Docket No. AR-94-536, the Board, Cubas and the Association desire to enter into an agreement stipulating the terms of Cubas' separation from his employment as a maintenance employee with the Board.

NOW, THEREFORE, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly noted below, it is hereby agreed:

1. Cubas will submit an irrevocable letter of resignation from all employment with the Board effective on February 18, 1995, or the date of the approval of the terms of this Agreement by the Commissioner of Education, whichever is sooner. This letter of resignation will be accepted by the Board.

2. The Board agrees to withdraw, with prejudice, the tenure charges against Cubas, bearing Agency Docket No. 16-1/94 and O.A.L. Docket No. EDU 01908-94N.

3. The Association agrees to withdraw, with prejudice, the demand for arbitration it filed, bearing Public Employment Relations Commission Docket No. AR-94-536.

4. The Board agrees to continue to pay Cubas his full salary for three and one-half months, commencing on November 3, 1994. His salary will terminate on February 18, 1995.

5. All continued salary payments made to Cubas pursuant to this Agreement shall be paid in the normal course of business, net of normal payroll deductions for State and Federal income taxes.

6. The Board and Cubas agree that the settlement of the charges brought by the Board is justified for the following reasons:

(a) The charges made by the Board against Cubas are based primarily on allegations of absenteeism and tardiness, which do not have an overriding public interest in issuing a decision on the merits;

(b) The resignation of Cubas can result in an economic saving to the Board in that Cubas' salary will terminate. If the charges were fully litigated, Cubas would be entitled to salary until at least the issuance of the decision of the Commissioner of Education. Given the number of witnesses for both the petitioner and respondent, the possible need for the scheduling of additional hearing dates and the normal timetable for such matters, the Commissioner's decision might not be issued until the late spring of 1995 or afterwards.

(c) The parties will not be required to undergo the time and substantial expense of further litigation.

(d) If fully litigated, this case would require the testimony of numerous employees of the Board, both for the Board and for Cubas. Such testimony would disrupt the managerial process in the Board.

(e) The public interest would best be served by resolving the present controversy.

7. The Board and Cubas acknowledge that the terms of this Agreement are contingent upon the review and approval of both the Office of Administrative Law and the Commissioner of Education. In the event that either agency disapproves of the terms of settlement, this Agreement shall be null and void and the parties shall return to the same positions which they held prior to this settlement.

8. The Board shall approve the terms of this Agreement in the manner prescribed by law at its next scheduled Board meeting.

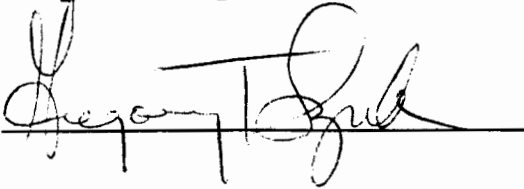
9. The Association shall approve this Agreement in the manner prescribed by its rules, by-laws or other procedural requirements.

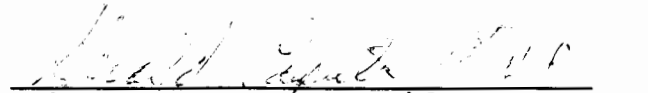
10. The parties recognize that each has been represented by legal counsel of his or its own choosing and that each signs this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

11. This Agreement shall be subject to the laws of the State of New Jersey.

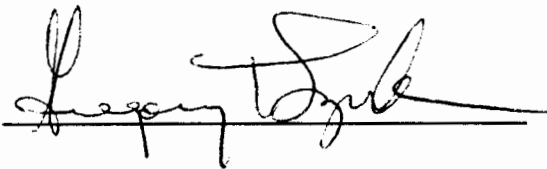
12. All terms of this Agreement are deemed material. This document may not be altered, amended or modified or revoked except by an instrument executed in writing by the parties.


15. The undersigned representatives of the Board and the Association hereby acknowledge that they have been duly authorized by the Board and the Association, respectively, to sign this Agreement and to bind the Board and the Association, respectively, to its terms.




Gerald Caputo, Vice President
Union City Education Association

Dated: 11/10/94



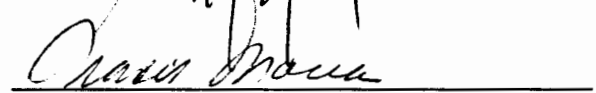


Ramiro Cubas

Dated:

11/9/94





Union City Board of Education

Dated:

11/17/94

RAMIRO CUBAS
1503 PALISADE AVENUE
UNION CITY, NEW JERSEY 07087

November , 1994

Carl Johnson, Board Secretary
Union City Board of Education
3912 Bergen Turnpike
Union City, NJ 07087
Jersey City, NJ 07305

Re: Letter of Resignation

Dear Mr. Johnson:

I hereby resign from my employment as a maintenance employee employed by the Union City Board of Education effective February 18, 1995, or the date on which the Commissioner of Education approves the Agreement with the Board. This resignation is expressly conditioned upon the approval of the Memorandum of Agreement dated November , 1994, between the Board and myself by the Office of Administrative Law and the Commissioner of Education and shall be null and void if the terms of that Agreement are not so approved. This resignation is otherwise irrevocable.

Respectfully submitted,


Ramiro Cubas

/lg

IN THE MATTER OF THE TENURE :
HEARING OF RAMIRO CUBAS, SCHOOL : COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF UNION : DECISION
CITY, HUDSON COUNTY. :
_____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

JANUARY 11, 1995

DATE OF MAILING - JANUARY 11, 1995

DHP #457-94

SB # 12-95

IN THE MATTER OF THE DISQUALI- :
 FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
 MENT OF VINNIE RANSELL. : DECISION

_____ :

Decided by the Deputy Commissioner of Education,
January 24, 1995

Decided by the State Board of Education, April 5, 1995

For the Petitioner-Appellant, Balk, Oxfeld, Mandell &
Cohen (Randi Doner, Esq., of Counsel)

For the Respondent-Respondent, Geraldine Callahan,
Deputy Attorney General (Deborah T. Poritz,
Attorney General of New Jersey)

Vinnie Ransdell (hereinafter "petitioner"), who was employed as a clerical employee in the East Orange school district, was disqualified by the Office of Criminal History Review of the Department of Education from continued employment in the State's schools when a fingerprint search conducted pursuant to N.J.S.A. 18A:6-7.1 et seq. revealed that he had been arrested for possession of cocaine on September 23, 1989, and had subsequently pleaded guilty to such charge. Petitioner sought to overturn his disqualification on the basis of rehabilitation.

JUNE 7, 1995

In a letter decision dated January 24, 1995, the Deputy Commissioner of Education upheld the disqualification,¹ stating that

[w]hile you have submitted several letters of support which indicate that you have made significant progress in your rehabilitation efforts, including a letter from your probation officer, I nonetheless conclude that insufficient time has transpired since your conviction to demonstrate clear and convincing evidence of rehabilitation.

The Deputy Commissioner informed petitioner that such determination "does not preclude you from requesting a rehabilitation determination when sufficient time has transpired to demonstrate that you have fully rehabilitated yourself in accordance with N.J.S.A. 18A:6-7.1."

On February 10, 1995, the petitioner filed a notice of appeal to the State Board of Education. However, when petitioner did not file a supporting brief, the State Board dismissed the appeal for failure to perfect.

By letter dated April 12, counsel for petitioner requested that the appeal be reinstated for consideration on the merits, indicating that she had submitted a letter brief to the

¹ We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws..." N.J.S.A. 18A:4-34.

Deputy Commissioner on February 15 to support the appeal. By letter dated April 24, the Counsel to the State Board advised counsel for petitioner that the Legal Committee of the State Board had determined to consider her request as a motion for clarification/reconsideration. In response to petitioner's motion, the Deputy Attorney General representing the Office of Criminal History Review² advised us that the parties had agreed to have this matter remanded to the Commissioner in light of the Commissioner's agreement to consider petitioner's February 15th letter as a motion for reconsideration. The parties subsequently executed and submitted to the State Board an order consenting to a remand to the Commissioner for a hearing on the issue of rehabilitation.

In view of the circumstances, we grant petitioner's motion for reconsideration and to reinstate his appeal. However, we find the record in this matter to be such that, given our authority as the ultimate administrative decision-maker and fact-finder in school matters, In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), certif. den., 121 N.J. 615 (1990); Dore v. Bedminister Tp. Bd. of Ed., 185 N.J.

² The Office of Criminal History Review was apparently not represented in the proceedings before the Deputy Commissioner and was not served with notice of the appeal to the State Board. Upon the filing of the appeal, Counsel to the State Board notified the Attorney General's Office by letter of February 16, 1995, that an appeal had been taken in the matter, and transmitted a copy of the record. A Deputy Attorney General was then assigned to appear as attorney of record in the appeal.

Super. 447, 452 (App. Div. 1982), we need not remand for determination of the substantive issue raised. Our review of the record has eliminated any question that petitioner has demonstrated clear and convincing evidence of his rehabilitation.

N.J.S.A. 18A:6-7.1 provides, in pertinent part:

e. Notwithstanding the provisions of this section, an individual shall not be disqualified from employment or service under this act on the basis of any conviction disclosed by a criminal record check performed pursuant to this act if the individual has affirmatively demonstrated to the Commissioner of Education clear and convincing evidence of his or her rehabilitation. In determining whether an individual has affirmatively demonstrated rehabilitation, the following factors shall be considered:

1. The nature and responsibility of the position which the convicted individual would hold;
2. The nature and seriousness of the offense;
3. The circumstances under which the offense occurred;
4. The date of the offense;
5. The age of the individual when the offense was committed;
6. Whether the offense was an isolated or repeated incident;
7. Any social conditions which may have contributed to the offense;
8. Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have had the individual under their supervision.

(Emphasis added.)

As set forth above, the Deputy Commissioner determined that petitioner had failed to demonstrate clear and convincing evidence of his rehabilitation. His determination was predicated on his conclusion that "insufficient time" had transpired since petitioner's "conviction." However, while N.J.S.A. 18A:6-7.1(e) includes "the date of the offense" as one factor that must be considered, it also requires that all pertinent circumstances, including "any evidence of rehabilitation," be adequately addressed.³

The only arrest and conviction revealed by petitioner's criminal history review was for possession of cocaine in September 1989, when he was 20-years-old. Petitioner's submission to the Commissioner shows that the sentencing judge had concluded at that time that petitioner was

entitled to probation because the mitigating factors substantially outweigh he [sic] aggravating factors. This is his first conviction; he has no history of delinquency and has led a law abiding life prior to his offense. His conduct was the result of circumstances unlikely to recur and his character and attitude indicate he is unlikely to commit another offense and will respond well to probation. He is a high school graduate with a long steady employment

³ We note that the statute specifies "date of the offense" (emphasis added), rather than the date of conviction, as indicated by the Deputy Commissioner. Moreover, although the Deputy Commissioner indicated that petitioner was "convicted on September 23, 1989," the record indicates that he was, in fact, arrested on that date.

history. He is not a drug dealer. However, because he is a drug abuser, there is a risk he will commit another offense and the need to deter him and others from so doing.

Urinalysis, consisting of eight random urine screens conducted during a two-year period commencing in January 1992, revealed no evidence of drug use.⁴ Further, since his arrest, the petitioner has completed a business school program as a computerized office specialist, with a cumulative grade point average of 3.5. There have been no further arrests.

Petitioner's submission to the Commissioner includes a letter from his supervisor in East Orange stating that petitioner was "mature minded, responsible...punctual, diligent" and "an excellent worker." His supervisor from a temporary position with AT&T during 1992 described petitioner as an "excellent employee"

⁴ We note that such urinalysis was a condition of probation imposed by the U.S. District Court for the District of New Jersey as the result of charges lodged against petitioner in 1992 for embezzlement of U.S. Treasury Checks. Although a conviction on such charges does not appear in petitioner's criminal history review record check, the record before us includes a letter submitted by petitioner from his probation officer indicating that he had satisfactorily completed a two-year probationary term imposed as a result of those charges.

While we recognize that any conviction on these charges may have been expunged from petitioner's record, given the probation report entered into the record by petitioner, we have explored this offense to the extent possible to assure ourselves that it would not alter the result herein. We have taken official notice of the criminal complaint dated August 16, 1991 in that matter, which alleges that petitioner on two occasions in 1987 caused the Internal Revenue Service, his employer at that time, to issue him a duplicate salary payment in the amount of \$344.29, and that he subsequently endorsed both the original and the replacement checks. We recognize that such offense does not constitute a crime which would disqualify petitioner from employment under N.J.S.A. 18A:6-7.1 and that it occurred prior to the drug conviction which formed the basis for his disqualification. Since no evidentiary hearing was conducted below, this matter was neither explored nor addressed. Based upon our review, however, we are satisfied that it does not alter the determination herein.

who "clearly displayed a willingness to perform work assignments at a standard higher than expectation."

While the gravity of petitioner's offense is evident, examination of the circumstances indicates that further penalization of this individual is neither a just result nor warranted under the terms of the statute. Given the uncontradicted evidence that petitioner submitted for the record, including his successful efforts to acquire vocational training and experience, the recommendation of his supervisors and the fact that random urinalysis conducted over a two year period subsequent to his drug conviction showed no evidence of drug use, we conclude that petitioner has convincingly demonstrated his rehabilitation under N.J.S.A. 18A:6-7.1(e). Moreover, as required by that provision, we have considered the "nature and responsibility" of the position petitioner held within the public school system. In this respect, we stress that the employment from which petitioner was disqualified was clerical, and that such employment does not include the responsibility for the care, supervision or instruction of students.

Accordingly, for the reasons expressed herein, we find that petitioner has demonstrated clear and convincing evidence of his rehabilitation pursuant to N.J.S.A. 18A:6-7.1(e). We

therefore reverse the decision of the Deputy Commissioner disqualifying petitioner from service in the schools of New Jersey.

June 7, 1995

Date of mailing _____

(SB) 12-95

DHP # 457
SB #12-95

IN THE MATTER OF THE DISQUALIFI- :
CATION FROM SCHOOL EMPLOYMENT OF : STATE BOARD OF EDUCATION
VINNIE RANSELL. : DECISION
_____ :

Decided by the Commissioner of Education, January 24, 1995

For the Petitioner-Appellant, Balk, Oxfeld, Mandell &
Cohen (Randi Doner, Esq. of Counsel)

For the Respondent-Respondent, Nancy Kaplen, Deputy
Attorney General (Deborah T. Poritz, Attorney
General of New Jersey)

On January 24, 1995, the Deputy Commissioner of Education affirmed the determination of the Department's Office of Criminal History Review disqualifying Vinnie Ransdell (hereinafter "petitioner") from school employment following a criminal history check conducted pursuant to N.J.S.A. 18A:6-7.1. The Deputy Commissioner determined that insufficient time had transpired since petitioner's criminal conviction to demonstrate clear and convincing evidence of rehabilitation.

On February 10, 1995, the petitioner filed a notice of appeal to the State Board of Education. Pursuant to N.J.A.C. 6:2-1.11(a), petitioner's brief in support of the appeal was due by March 2, 1995, 20 days after the appeal was filed. Petitioner, however, failed to file a brief by that date. By letter dated March 6 from the Counsel to the State Board, petitioner's counsel

April 5, 1995

was notified of her failure to file a brief in support of the appeal and advised that this matter was being referred to our Legal Committee for consideration of petitioner's failure to perfect the appeal. Petitioner's counsel has still failed to file an appeal brief. Nor has she at any time requested an extension of time for such filing or provided any explanation for the delay.

The State Board of Education therefore dismisses the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a).

April 5, 1995

Date of mailing APR 05 1995

13-95

LORETTA KLAHRE, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN- : DECISION

SHIP OF ASBURY PARK, MONMOUTH :

COUNTY, :


RESPONDENT. :

JANUARY 11, 1995

LORETTA KLAHRE, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN- : DECISION
SHIP OF ASBURY PARK, MONMOUTH :
COUNTY, :
RESPONDENT. :
_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

JANUARY 11, 1995

DATE OF MAILING - JANUARY 11, 1995

14-95

ANGELINA PARINELLI RIEMANN,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWN-	:	DECISION
SHIP OF EDISON, MIDDLESEX COUNTY,	:	
	:	
RESPONDENT.	:	
	:	


JANUARY 11, 1995

OAL DKT. NO. EDU 9850-94

ANGELINA PARINELLI RIEMANN, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN- : DECISION
SHIP OF EDISON, MIDDLESEX COUNTY, :
RESPONDENT. :
:

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

JANUARY 11, 1995

DATE OF MAILING - JANUARY 11, 1995

(SB) 14-95

DHP # 404-94
SB # 14-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF ERNEST L. GOVAN. : DECISION
_____ :

Decided by the Deputy Commissioner of Education,
January 24, 1995

For the Petitioner-Appellant, Ernest L. Govan, pro se

For the Respondent-Respondent, Pamela B. Katten, Deputy
Attorney General (Deborah T. Poritz, Attorney
General of New Jersey)

The State Board of Education grants the request of the parties to remand this matter to the Commissioner of Education for a hearing in order to provide the petitioner with an adequate opportunity to establish a record in support of his contention that he has satisfied the statutory standard for rehabilitation.¹ Given the circumstances, we direct that such hearing and a final

¹ We note that the Office of Criminal History Review was apparently not represented in the proceedings before the Deputy Commissioner and was not served with notice of the appeal to the State Board. Upon the filing of the appeal, Counsel to the State Board notified the Attorney General's Office by letter of March 8, 1995 that an appeal had been taken in the matter, and transmitted a copy of the record. A Deputy Attorney General was then assigned to appear as attorney of record in the appeal.

JUNE 7, 1995

determination by the Commissioner be rendered on an expedited basis, and that such determination considers all pertinent circumstances under the factors set forth in N.J.S.A. 18A:6-7.1, including "any evidence of rehabilitation." See Wolffbrandt v. New Jersey State Department of Education, decided by the State Board, July 1, 1992.

We stress that petitioner has the burden on remand of establishing his rehabilitation by clear and convincing evidence.

We retain jurisdiction.

June 7, 1995

Date of mailing JUN 09 1995

(SB) 14-95

DHP # 404-94
SB # 14-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF ERNEST L. GOVAN. : DECISION

Decided by the Deputy Commissioner of Education, January 24, 1995

Remanded by the State Board of Education, June 7, 1995

Decided by the Assistant Commissioner of Education, October 6, 1995

For the Petitioner-Appellant, Ernest L. Govan, pro se

For the Respondent-Respondent, Pamela B. Katten, Deputy Attorney
General (Deborah T. Poritz, Attorney General of New Jersey)

On June 7, 1995, we remanded this matter to the Commissioner of Education for an expedited hearing in order to provide petitioner, who had been disqualified from employment in the State's schools pursuant to N.J.S.A. 18A:6-7.1, with an adequate opportunity to establish a record in support of his contention that he had satisfied the statutory standard for rehabilitation. We retained jurisdiction.

In accordance with that remand, an Assistant Commissioner conducted a hearing on July 14, 1995 and rendered her decision on October 6, 1995, upholding

2/7/96

petitioner's disqualification.¹ Petitioner has not filed an appeal from that decision. Pursuant to our retention of jurisdiction, the Commissioner transmitted the file back to us on October 11, 1995.

After a review of the record, we are satisfied that the Commissioner fully complied with the terms of the State Board's remand. Accordingly, we dismiss the appeal.

Donald C. Addison, Jr., Wendel E. Daniels and Thomas P. McGough abstained.

February 7, 1996

Date of mailing FEB 09 1996

¹ We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws...." N.J.S.A. 18A:4-34.

15-95

IN THE MATTER OF ROSE ANDREWS, :

BOARD OF EDUCATION OF THE TOWN- : COMMISSIONER OF EDUCATION

SHIP OF UNION, HUNTERDON COUNTY. : DECISION

:

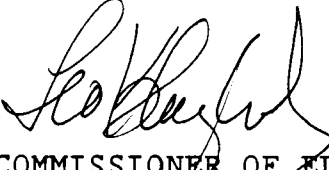
JANUARY 11, 1995

OAL DKT. NO. EDU 10454-94

IN THE MATTER OF ROSE ANDREWS, :
BOARD OF EDUCATION OF THE TOWN- : COMMISSIONER OF EDUCATION
SHIP OF UNION, HUNTERDON COUNTY. : DECISION
:

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

JANUARY 11, 1995

DATE OF MAILING - JANUARY 11, 1995

(SB) 15-95

DHP #417-94
SB # 15-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF LAYMON J. JACKSON, JR. : DECISION

_____ :

Decided by the Deputy Commissioner of Education,
January 30, 1995

For the Petitioner-Appellant, Laymon J. Jackson, pro se

For the Respondent-Respondent, Geraldine Callahan,
Deputy Attorney General (Deborah T. Poritz,
Attorney General of New Jersey)

Laymon J. Jackson, Jr. (hereinafter "petitioner"), who was employed as a custodian in the Plainfield school district, was disqualified by the Office of Criminal History Review of the Department of Education from continued employment in the State's schools when a fingerprint search conducted pursuant to N.J.S.A. 18A:6-7.1 et seq. revealed that he had been convicted of armed robbery in 1972 and possession of heroin in 1990. In a letter from the manager of the Office of Criminal History Review, petitioner was advised that he could appeal such determination to the Commissioner of Education and that, if his appeal was based

JUNE 7, 1995

on rehabilitation, he would be "notified by the Commissioner as to your qualification or the need for a hearing date to afford you the opportunity to present witnesses and additional documentation as to why you believe you have been rehabilitated." Petitioner filed an appeal to the Commissioner, seeking to overturn his disqualification on the basis of rehabilitation.

In a letter decision dated January 30, 1995, the Deputy Commissioner of Education,¹ without a hearing, upheld the disqualification, finding that, while petitioner had made progress towards rehabilitation, insufficient time had transpired since petitioner's most recent conviction to allow him to find clear and convincing evidence of rehabilitation.

On March 3, 1995, petitioner filed the instant appeal with the State Board of Education. He also requested that the Deputy Commissioner provide him with a hearing on the issue of rehabilitation. On March 6, the Deputy Commissioner granted petitioner's motion for reconsideration and advised him that a hearing would be scheduled. Nonetheless, petitioner indicated that he also wished to proceed with his appeal before the State

¹ We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws...." N.J.S.A. 18A:4-34.

Board. His brief in support of such appeal is predicated on his failure to receive a hearing. The Deputy Attorney General representing the Office of Criminal History Review² thereupon filed a motion to dismiss the appeal or, in the alternative, to stay it pending a hearing.

After a review of the record, we deny the motion to dismiss the appeal, but remand this matter to the Commissioner for a hearing in order to provide the petitioner with an adequate opportunity to establish a record in support of his contention that he has satisfied the statutory standard for rehabilitation. Given the circumstances, we direct that such hearing and a final determination by the Commissioner be rendered on an expedited basis, and that such determination consider all pertinent circumstances under the factors set forth in N.J.S.A. 18A:6-7.1, including "any evidence of rehabilitation." See Wolffbrandt v. New Jersey State Department of Education, decided by the State Board, July 1, 1992. We stress that petitioner has the burden on remand of demonstrating his rehabilitation by clear and convincing evidence. We note, in addition, that the statute

² The Office of Criminal History Review was apparently not represented in the proceedings before the Deputy Commissioner and was not served with notice of the appeal to the State Board. Upon the filing of the appeal, Counsel to the State Board notified the Attorney General's Office by letter of March 8, 1995, that an appeal had been taken in the matter, and transmitted a copy of the record. A Deputy Attorney General was then assigned to appear as attorney of record in the appeal.

expressly requires consideration of the "date of the offense" (emphasis added), rather than the date of conviction as cited by the Deputy Commissioner in his January 30 decision.

We retain jurisdiction.

June 7, 1995

Date of mailing JUN 09 1995

DHP #417-94
SB # 15-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF LAYMON J. JACKSON, JR. : DECISION
_____ :

Decided by the Deputy Commissioner of Education, January 30, 1995

Remanded by the State Board of Education, June 7, 1995

Decided by the Assistant Commissioner of Education, August 7, 1995

For the Petitioner-Appellant, Laymon J. Jackson, pro se

For the Respondent-Respondent, Geraldine Callahan, Deputy Attorney
General (Deborah T. Poritz, Attorney General of New Jersey)

On June 7, 1995, we remanded this matter to the Commissioner of Education for an expedited hearing in order to provide petitioner, who had been disqualified from employment in the State's schools pursuant to N.J.S.A. 18A:6-7.1, with an adequate opportunity to establish a record in support of his contention that he had satisfied the statutory standard for rehabilitation. We retained jurisdiction.

In accordance with that remand, an Assistant Commissioner conducted a hearing on July 14 and rendered her decision on August 7,¹ upholding petitioner's

¹ We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly

DEC. 6, 1995

disqualification. Petitioner has not filed an appeal from that decision. Pursuant to our retention of jurisdiction, the Commissioner transmitted the file back to us on September 6.

After a review of the record, we are satisfied that the Commissioner fully complied with the terms of the State Board's remand. Accordingly, we dismiss the appeal.

December 6, 1995

Date of mailing DEC 08 1995

includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws...." N.J.S.A. 18A:4-34.

16-95

MICHAEL KUCYK, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN- : DECISION
SHIP OF MARLBORO, MONMOUTH :
COUNTY, :
RESPONDENT. :
_____ :

JANUARY 11, 1995

MICHAEL KUCYK,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWN-	:	DECISION
SHIP OF MARLBORO, MONMOUTH	:	
COUNTY,	:	
	:	
RESPONDENT.	:	
	:	
_____	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

JANUARY 11, 1995

DATE OF MAILING - JANUARY 11, 1995

DHP #380-94
SB # 16-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF ABDUL H. ALI. : DECISION
_____ :

Decided by the Deputy Commissioner of Education,
January 24, 1995

For the Petitioner-Appellant, Abdul H. Ali, pro se

For the Respondent-Respondent, Arlene G. Lutz, Deputy
Attorney General (Deborah T. Poritz, Attorney
General of New Jersey)

The State Board of Education grants the request of the parties to remand this matter to the Commissioner of Education for a hearing in order to provide the petitioner with an adequate opportunity to establish a record in support of his contention that he has satisfied the statutory standard for rehabilitation.¹ Given the circumstances, we direct that such hearing and a final

¹ We note that the Office of Criminal History Review was apparently not represented in the proceedings before the Deputy Commissioner and was not served with notice of the appeal to the State Board. Upon the filing of the appeal, Counsel to the State Board notified the Attorney General's Office that an appeal had been taken in the matter, and transmitted a copy of the record. A Deputy Attorney General was then assigned to appear as attorney of record in the appeal.

JUNE 7, 1995

determination by the Commissioner be rendered on an expedited basis, and that such determination considers all pertinent circumstances under the factors set forth in N.J.S.A. 18A:6-7.1, including "any evidence of rehabilitation." See Wolffbrandt v. New Jersey State Department of Education, decided by the State Board, July 1, 1992.

We stress that petitioner has the burden on remand of establishing his rehabilitation by clear and convincing evidence.

We retain jurisdiction.

June 7, 1995

Date of mailing JUN 09 1995

DHP #380-94
SB # 16-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF ABDUL H. ALI. : DECISION
_____ :

Decided by the Deputy Commissioner of Education, January 24, 1995

Remanded by the State Board of Education, June 7, 1995

Decided by the Assistant Commissioner of Education, August 7, 1995

For the Petitioner-Appellant, Abdul H. Ali, pro se

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney
General (Deborah T. Poritz, Attorney General of New Jersey)

On June 7, 1995, we remanded this matter to the Commissioner of Education for an expedited hearing in order to provide petitioner, who had been disqualified from employment in the State's schools pursuant to N.J.S.A. 18A:6-7.1, with an adequate opportunity to establish a record in support of his contention that he had satisfied the statutory standard for rehabilitation. We retained jurisdiction.

In accordance with that remand, an Assistant Commissioner conducted a hearing on July 14 and rendered her decision on August 7,¹ upholding petitioner's

¹ We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly

DEC. 6, 1995

disqualification. Petitioner has not filed an appeal from that decision. Pursuant to our retention of jurisdiction, the Commissioner transmitted the file back to us on September 6.

After a review of the record, we are satisfied that the Commissioner fully complied with the terms of the State Board's remand. Accordingly, we dismiss the appeal.

December 6, 1995

Date of mailing DEC 08 1995

includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws...." N.J.S.A. 18A:4-34.

DHP #380-94
SB # 16-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF ABDUL H. ALI. : DECISION
_____ :

Decided by the Deputy Commissioner of Education, January 24, 1995

Remanded by the State Board of Education, June 7, 1995

Decided by the Assistant Commissioner of Education, August 7, 1995

Decided by the State Board of Education, December 6, 1995

For the Petitioner-Appellant, Abdul H. Ali, pro se

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney
General (Deborah T. Poritz, Attorney General of New Jersey)

On January 24, 1995, the Deputy Commissioner of Education affirmed the determination of the Department's Office of Criminal History Review disqualifying the petitioner from school employment after a criminal history check conducted pursuant to N.J.S.A. 18A:6-7.1 revealed convictions for possession of narcotic equipment in 1986 and for possession of cocaine in 1987.¹ The record review also indicated that there

¹ We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly

2/7/96

was an active bench warrant against petitioner arising from his failure to appear in court to answer charges arising from a 1989 arrest for possession of narcotic equipment.

On June 7, 1995, we granted the parties' request to remand this matter to the Commissioner for a hearing in order to provide petitioner with an adequate opportunity to establish a record in support of his contention that he had satisfied the statutory standard for rehabilitation. We retained jurisdiction.

In accordance with that remand, an Assistant Commissioner conducted a hearing on July 14 and rendered a decision on August 7 upholding petitioner's disqualification.² The Assistant Commissioner concluded that petitioner had failed to demonstrate his rehabilitation by clear and convincing evidence. Petitioner did not file an appeal from that decision.

Pursuant to our retention of jurisdiction, the Commissioner transmitted the file back to us on September 6. On December 6, following careful review of that file, we dismissed the appeal, finding that the Commissioner had fully complied with the terms of our remand.

Petitioner has filed the instant request for reconsideration of our decision of December 6, alleging that he had misunderstood the appeal procedure.

We deny petitioner's request. While we are mindful of petitioner's pro se status in these proceedings, our review of the file, including the tape recording made of his

includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws...." N.J.S.A. 18A:4-34.

² See, n.1, supra.

hearing before the Assistant Commissioner, indicates that he was expressly informed in clear language, both at the hearing and in the Assistant Commissioner's decision, that the proper course for him to follow if he was not satisfied with the Assistant Commissioner's decision was to file an appeal from that decision to the State Board. The Assistant Commissioner notified petitioner at the conclusion of his hearing that "once you finally get a written decision from us, should it be a decision that you're not happy with, you have another route of appeal and that's to the State Board of Education." Tape recording of hearing, 7/14/95. When petitioner indicated some confusion, the Assistant Commissioner took the time to explain to him that she was acting on behalf of the Commissioner, not the State Board, and that the State Board was "above" the Commissioner. Id. That information was reiterated in the Assistant Commissioner's written decision, which expressly instructed petitioner that "[a]n appeal of this decision may be made to the State Board of Education pursuant to N.J.A.C. 6:2-1.1 et seq." Assistant Commissioner's Decision, slip op. at 1. Given the clear and repeated instructions which were provided to petitioner by the Assistant Commissioner, we decline to reconsider this matter solely on the basis of petitioner's alleged misunderstanding of the appeal process.

We reiterate that, in rendering our decision of December 6, 1995, we carefully reviewed the file to ensure that the Commissioner had fully complied with the terms of our remand, and were satisfied that he had done so. Moreover, in so doing, we also carefully reviewed the court documents submitted to us by petitioner indicating that the bench warrant arising from the 1989 narcotic equipment charge had been lifted on

September 20, 1995.³ These documents, however, also revealed that petitioner had pleaded guilty at that time to the charge which had given rise to the warrant. Based upon such review, we dismissed the appeal. Petitioner has submitted nothing with his instant request that would call into question that determination.

In sum, we find nothing in petitioner's request for reconsideration that would alter our decision of December 6 or warrant reconsideration thereof. Consequently, we deny his request.

Donald C. Addison, Jr., Wendel E. Daniels and Thomas P. McGough abstained.

February 7, 1996

Date of mailing FEB 09 1996

³ The Assistant Commissioner advised petitioner at his hearing held on July 14, 1995 that if the outstanding bench warrant was resolved prior to her decision, she would consider such information along with all other evidence presented in determining whether petitioner had affirmatively demonstrated his rehabilitation. No assurances of any kind were made to petitioner that resolution of that particular warrant would alter the result in this matter. We note, moreover, that the bench warrant was not resolved until September 20, 1995, after the Assistant Commissioner had rendered her decision in this matter.

(SB) 17-95

DHP #511-94
SB # 17-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF GREGORY A. LAWRENCE. : DECISION

_____ :

Decided by the Deputy Commissioner of Education,
February 10, 1995

For the Petitioner-Appellant, Lake & Schwartz (Robert
M. Schwartz, Esq., of Counsel)

For the Respondent-Respondent, Arlene G. Lutz, Deputy
Attorney General (Deborah T. Poritz, Attorney
General of New Jersey)

The State Board of Education grants the request of the
parties to remand this matter to the Commissioner of Education
for a hearing in order to provide the petitioner with an adequate
opportunity to establish a record in support of his contention
that he has satisfied the statutory standard for rehabilitation.¹

¹ We note that the Office of Criminal History Review was apparently not represented in the proceedings before the Deputy Commissioner and was not served with notice of the appeal to the State Board. Upon the filing of the appeal, Counsel to the State Board notified the Attorney General's Office by letter of March 15, 1995 that an appeal had been taken in the matter, and transmitted a copy of the record. A Deputy Attorney General was then assigned to appear as attorney of record in the appeal.

JUNE 7, 1995

Given the circumstances, we direct that such hearing and a final determination by the Commissioner be rendered on an expedited basis, and that such determination considers all pertinent circumstances under the factors set forth in N.J.S.A. 18A:6-7.1, including "any evidence of rehabilitation." See Wolffbrandt v. New Jersey State Department of Education, decided by the State Board, July 1, 1992. We also correct the Deputy Commissioner's statement that petitioner's school employment had been as a teacher's aide. The record reflects that he had actually been employed in a custodial position.

We stress that petitioner has the burden on remand of establishing his rehabilitation by clear and convincing evidence.

We retain jurisdiction.

June 7, 1995

Date of mailing JUN 09 1995

DHP #511-94
SB # 17-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF GREGORY A. LAWRENCE. : DECISION

Decided by the Deputy Commissioner of Education, February 10, 1995

Remanded by the State Board of Education, June 7, 1995

Decided by the Assistant Commissioner of Education, October 3, 1995

For the Petitioner-Appellant, Lake & Schwartz (Robert M. Schwartz, Esq.,
of Counsel)

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney
General (Deborah T. Poritz, Attorney General of New Jersey)

On June 7, 1995, we remanded this matter to the Commissioner of Education for an expedited hearing in order to provide petitioner, who had been disqualified from employment in the State's schools pursuant to N.J.S.A. 18A:6-7.1, with an adequate opportunity to establish a record in support of his contention that he had satisfied the statutory standard for rehabilitation. We retained jurisdiction.

2/7/96

In accordance with that remand, an Assistant Commissioner conducted a hearing on July 14, 1995 and rendered her decision on October 3, 1995,¹ finding that petitioner had demonstrated his rehabilitation by clear and convincing evidence. Pursuant to our retention of jurisdiction, the Commissioner transmitted the file back to us on October 11, 1995.

After a review of the record, we are satisfied that the Commissioner fully complied with the terms of the State Board's remand. Thus, pursuant to the Assistant Commissioner's decision, petitioner is qualified for school employment, and we dismiss the appeal.

Donald C. Addison, Jr., Wendel E. Daniels and Thomas P. McGough abstained.

Maud Dahme opposed.

February 7, 1996

Date of mailing FEB 09 1996

¹ We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws...." N.J.S.A. 18A:4-34.

18-95

BOARD OF EDUCATION OF THE BOROUGH :
 OF NEW PROVIDENCE, :
 PETITIONER, :
 V. :
 BOROUGH OF NEW PROVIDENCE, :
 UNION COUNTY, :
 RESPONDENT. :

COMMISSIONER OF EDUCATION
 DECISION

JANUARY 13, 1995

OAL DKT. NO. EDU 5279-90


BOARD OF EDUCATION OF THE BOROUGH	:	
OF NEW PROVIDENCE,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	
V.	:	DECISION
BOROUGH OF NEW PROVIDENCE,	:	
UNION COUNTY,	:	
RESPONDENT.	:	

The record of this matter, which involves a budget dispute originally filed in 1990, and the notice of withdrawal forwarded to this agency by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed.

Upon review of the withdrawal in light of the standards for settlement of school budget disputes as set forth in prior decisional law and subsequently codified in N.J.A.C. 6:24-7.3, the Commissioner notes that the Union County Superintendent of Schools has found the agreed-upon restoration of \$145,500 to the 1990-91 current expense school budget (of \$433,280 originally in dispute) to be adequate for provision of a thorough and efficient system of education. Therefore, the Commissioner approves the withdrawal and no longer deems this matter to be in controversy before him.

Accordingly, the Union County Board of Taxation is directed to make any adjustment necessary to reflect the increase to the 1990-91 current expense levy agreed upon by the parties.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

JANUARY 13, 1995

DATE OF MAILING - JANUARY 13, 1995

DHP #361-94
SB # 18-95

IN THE MATTER OF THE DISQUALIFI- :
CATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF MICHAEL TAYLOR. : DECISION ON MOTIONS
_____ :

Decided by the Deputy Commissioner of Education, February 7, 1995

For the Petitioner-Appellant, Bucceri & Pincus (Sheldon H. Pincus, Esq., of Counsel)

For the Respondent-Respondent, Geraldine Callahan, Deputy Attorney General (Deborah T. Poritz, Attorney General of New Jersey)

Michael Taylor (hereinafter "petitioner"), who was employed as a teacher by the Linden school district, was disqualified from continued employment in the State's schools by the Office of Criminal History Review (hereinafter "respondent") of the Department of Education when a fingerprint search conducted pursuant to N.J.S.A. 18A:6-7.1 et seq. revealed that he had been convicted of resisting arrest and assault on an officer in North Carolina in 1977. Petitioner, acting pro se, sought to overturn his disqualification on the basis of rehabilitation.

In a letter decision dated February 7, 1995, the Deputy Commissioner of Education, stressing the high degree of trust required of teachers and noting a number of

Nov. 1, 1995

non-disqualifying offenses, upheld the disqualification, finding that petitioner had not demonstrated his rehabilitation by clear and convincing evidence.¹

Petitioner moved for a stay of that determination and, on March 30, 1995, the Deputy Commissioner granted petitioner's motion.

The petitioner, now represented by counsel, has filed the instant appeal to the State Board.² Petitioner argues that the record does not reveal whether his conviction for resisting arrest and assault on an officer involved "the use of force which results in bodily injury," as required by N.J.S.A. 18A:6-7.1(c)(2) in order for simple assault to be regarded as a disqualifying offense. Consequently, petitioner contends, there was no disqualifying offense in this instance. In the event that such conviction is found to be disqualifying, petitioner requests that this matter be remanded to the Commissioner for a hearing in order to afford him adequate opportunity to demonstrate his rehabilitation.

Petitioner has also filed a motion to supplement the record on appeal, pursuant to N.J.A.C. 6:2-1.9, with his motion to the Commissioner for a stay, the Deputy Commissioner's decision granting the stay, a letter from the manager of the Office of Criminal History Review to the Superintendent of the Linden Board of Education regarding

¹ We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws...." N.J.S.A. 18A:4-34.

² The Office of Criminal History Review was apparently not represented in the proceedings before the Deputy Commissioner. Upon the filing of the appeal, Counsel to the State Board notified the Attorney General's Office that an appeal had been taken in the matter, and transmitted a copy of the record. A Deputy Attorney General was then assigned to appear as attorney of record in the appeal.

petitioner's disqualification and a letter from the Superintendent to petitioner terminating his employment.

Respondent has filed a motion to remand this matter to the Commissioner for consideration of petitioner's argument, which was not raised below, regarding whether he had been convicted of a crime which subjects him to disqualification from school employment under N.J.S.A. 18A:6-7.1. Petitioner opposes a remand for such purpose, contending that the Deputy Commissioner's decision should be reversed as a matter of law.

After a thorough review of the record, we grant the respondent's motion to remand this matter to the Commissioner for consideration of petitioner's contention that his conviction for resisting arrest and assault on an officer was not a disqualifying offense.

N.J.S.A. 18A:6-7.1 provides that a school system shall not employ any teaching staff member unless the employer has first determined that no criminal history record information exists on file which would disqualify that person from being employed in such a position. That statute further provides, in pertinent part:

An individual other than a school bus driver shall be disqualified from employment or service under this act if the individual's criminal history record check reveals a record of conviction of any of the following crimes and offenses:

c. (1) A crime or offense involving the use of force or the threat of force to or upon a person or property including; armed robbery, aggravated assault, kidnapping, arson, manslaughter and murder; or

(2) A simple assault involving the use of force which results in bodily injury; or

d. In any other state or jurisdiction, a conviction involving conduct which, if committed in New Jersey, would constitute any of the crimes or disorderly persons offenses described in this section of this act. (Emphasis added.)

Inasmuch as petitioner's convictions occurred in North Carolina, it is necessary initially to determine whether his underlying conduct would have constituted a disqualifying offense had it occurred in New Jersey. N.J.S.A. 18A:6-7.1(d). Although assault is included in the statute, the issue raised by petitioner on appeal results from the distinction drawn in the statute between simple and aggravated assault. While any conviction for aggravated assault involving the use or threat of force is regarded as disqualifying, N.J.S.A. 18A:6-7.1(c)(1), a conviction for simple assault is disqualifying only if it involves "the use of force which results in bodily injury." N.J.S.A. 18A:6-7.1(c)(2).

In this case, the record does not specify the particular provisions of North Carolina's criminal code under which petitioner was convicted of resisting arrest and assault on an officer.³ Nor is there any indication as to petitioner's underlying conduct. Consequently, we are unable to determine on this record whether such conviction involved conduct that would constitute a crime in New Jersey and, if so, what specific offense would be involved and whether it would be disqualifying under N.J.S.A. 18A:6-7.1.

Given the fact that petitioner's criminal record includes an assault conviction and that the Deputy Commissioner considered this case without resort to the proper statutory standard,⁴ we find it necessary to remand this matter to the Commissioner for further proceedings in order to determine whether petitioner was convicted of a crime which would disqualify him from school employment in New Jersey. In the event it is

³ We note that the criminal record review indicates only that the charges were misdemeanors.

⁴ While we recognize that petitioner, acting pro se, did not allege before the Deputy Commissioner that his convictions in North Carolina were not disqualifying, N.J.S.A. 18A:6-7.1 is clear concerning the analysis required of convictions occurring in another state. Moreover, the Deputy Commissioner did not take into account the differentiation in the statute between simple and aggravated assault.

determined that petitioner was convicted of a disqualifying offense, we direct the Commissioner to conduct a hearing in order to provide petitioner with an adequate opportunity to establish a record in support of his contention that he has satisfied the statutory standard for rehabilitation. Under the circumstances, we direct that such hearing and a final determination by the Commissioner be rendered on an expedited basis, and that such determination considers all pertinent circumstances under the factors set forth in N.J.S.A. 18A:6-7.1, including "any evidence of rehabilitation." See Wolffbrandt v. New Jersey State Department of Education, decided by the State Board, July 1, 1992. We stress that petitioner has the burden on remand of demonstrating his rehabilitation by clear and convincing evidence.

Inasmuch as those items with which petitioner seeks to supplement the record are already part of the record on appeal, see N.J.A.C. 6:2-1.8(a), we deny his motion to supplement.

We therefore set aside the decision of the Deputy Commissioner and remand this matter to the Commissioner for further proceedings in conformity with our decision herein.

November 1, 1995

Date of mailing NOV 03 1995

19-95

IN THE MATTER OF THE TENURE :
 HEARING OF R. SCOTT MC INTYRE, :
 BOARD OF EDUCATION OF THE NORTH : COMMISSIONER OF EDUCATION
 HUNTERDON-VOORHEES REGIONAL HIGH : DECISION
 SCHOOL DISTRICT, HUNTERDON :
 COUNTY. :

SYNOPSIS

Board certified charges of unbecoming conduct against tenured high school teacher by virtue of his arrest for possession of less than fifty grams of marijuana.

ALJ found that respondent was guilty of unbecoming conduct but that the one incident, when compared to his contributions to the school and his good evaluations, did not compel the conclusion that the only legitimate penalty was loss of tenure and termination. ALJ directed that petitioner be returned to his teaching position, but that in recognition of the seriousness of his offense, he forfeit 120 days' salary withheld from him by virtue of his suspension without pay. ALJ further directed that award of salary and adjustment increments for 1994-95 school year was within the discretion of the Board.

Commissioner concurred with the ALJ's finding that respondent was guilty of unbecoming conduct but modified the initial decision with respect to respondent's penalty. Commissioner found that possession of a controlled dangerous substance by an educator, absent mitigating circumstances, was sufficiently flagrant conduct to warrant dismissal. (In re Tordo, In re Sammons, and Redcay v. State Board of Education) Commissioner ordered respondent dismissed as of the date of this decision and the matter forwarded to the State Board of Examiners for further appropriate action.

JANUARY 13, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1394-94

AGENCY DKT. NO. 390-11/93

**IN THE MATTER OF THE TENURE
HEARING OF R. SCOTT MCINTYRE,
BOARD OF EDUCATION OF NORTH
HUNTERDON-VOORHEES REGIONAL
HIGH SCHOOL DISTRICT**

Russell J. Schumacher, Esq., for petitioner (Rand, Algeier, Tosti & Woodruff, attorneys)

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

Record Closed: October 27, 1994

Decided: November 23, 1994

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

On November 18, 1993, the North Hunterdon-Voorhees Regional High School District Board of Education filed tenure charges with the Commissioner of Education against R. Scott McIntyre, respondent.

The charges allege conduct unbecoming a teaching staff member based on an arrest for possession of less than fifty grams of marijuana. *N.J.S.A. 2C:35-10*.

The matter was transmitted to the Office of Administrative for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13. After notice, a prehearing conference was held on April 14, 1994, by telephone. Among other things, it was agreed that the Board would move, *in limine*, concerning admissibility of certain evidence. The Board so moved and the respondent timely filed responsive papers.

On September 13, 1993, the respondent was arrested by a Raritan Township police officer. The officer pulled over McIntyre's vehicle at approximately 1:00 a.m. The officer observed beer containers in the vehicle. The officer had McIntyre perform various sobriety tests, which McIntyre passed to the officer's satisfaction.

Following the sobriety test, McIntyre returned to his vehicle and opened the passenger side door. The officer detected the odor of burnt marijuana in the car. He also observed a clear plastic film container partly wedged in the car seat. Upon inspection, the officer found a small quantity of raw marijuana. Following this observation, the officer proceeded to pat down McIntyre for suspected controlled dangerous substances. The officer discovered rolling papers and a plastic bag containing marijuana in the respondent's right breast jacket pocket. The substances found in the film container and in the plastic bag tested positive for marijuana.

In a January 5, 1994 decision, the Honorable John E. Weinhofer, JMC, held that the officer did not have reasonable cause to pat down McIntyre for possession of controlled dangerous substances. The court held that the pat down was not incidental to and part of an ongoing warrantless search. The evidence was suppressed.

The Board argued that evidence of possession should be admitted in this matter because the exclusionary rule does not apply to administrative proceedings. The Board cited several cases supporting its position.

The petitioner urged that the New Jersey and United States Constitutional prohibitions against illegal searches and seizures apply in administrative proceedings. The Board's argument

misperceived the nature of the tenure removal proceedings, their impact on the respondent's ability to work and the purpose of Fourth Amendment to the United States Constitution.

On July 11, 1994, I issued an order granting the Board's motion to admit all evidence previously suppressed by the Raritan Township Municipal Court. I further **ORDERED** that the matter proceed to hearing on September 21, 22 and 23, 1994.

On September 21, 1994, hearing was scheduled to commence in the Lebanon Township Municipal Court. All parties were present. The parties submitted a joint stipulation of thirteen facts and twenty-three documents that were placed in evidence by consent. The parties then submitted the matter for summary decision.

FACTUAL AND EVIDENTIARY BACKGROUND

The following facts were stipulated on the record on September 21, 1994:

1. R. Scott McIntyre (hereinafter "Respondent") was initially employed by Petitioner as a Chemistry teacher at North Hunterdon High School effective September 1, 1990.
2. The Petitioner renewed Respondent's employment for the 1991-92, 1992-93 and 1993-94 school years.
3. Effective at the commencement of the 1993-94 school year, Respondent attained tenure.
4. During the 1990-91, 1991-92 and 1992-93 school years, the Respondent received consistently favorable evaluations, including several which described his performance as "excellent" for a teacher with his level of experience in the District.
5. On Monday, September 13, 1993, at approximately 1:00 a.m., Respondent was arrested by Officer Nicholas Buck of Raritan Township Police Department and charged with possession of a controlled dangerous substance, specifically marijuana. (Copy of the report filed by Officer Buck was entered into evidence as Exhibit P-1).

6. The Raritan Township Police Department submitted to the State Police Forensics/Science Bureau, two (2) specimens obtained by Officer Buck which were in the possession of the Respondent and which were suspected to be marijuana.

7. A certified lab report of the State Police . . . indicates that one of the above referenced specimens was determined to contain 6.29 grams of marijuana. (Copy of this lab report was entered into evidence as Exhibit P-2).

8. Certified laboratory report of the State Police indicates that the other specimen submitted was determined to contain a trace of marijuana. (Copy of this lab report was entered into evidence as Exhibit P-3).

9. The Respondent does not dispute the results of the drug analysis performed by the State Police.

10. The Petitioner certified tenure charges of conduct unbecoming against the Respondent based upon the allegation of Dr. Thomas Finnegan, Principal at North Hunterdon High School, that Respondent possessed a control dangerous substance, and, thereby, violated public trust and setting an example unbecoming a teaching staff member entrusted with the education of impressionable students. The charges were filed with the Commissioner of Education on November 18, 1993.

11. By Order of the Honorable John E. Weinoffer, J.M.C., dated January 5, 1994, the criminal charges of possession of marijuana and operating a motor vehicle while in the possession of marijuana were dismissed based upon a finding by Judge Weinoffer that the evidence was obtained pursuant to an illegal search.

12. Petitioner filed a motion in limine in the Office of Administrative Law to admit the evidence of Respondent's possession of marijuana in the tenure hearing. The motion was opposed by Respondent.

13. By Order dated July 11, 1994, the Honorable Bruce R. Campbell, A.L.J., granted the Petitioner's motion to admit all evidence of Respondent's possession of marijuana.

In addition, the Board submitted the Raritan Township Police Department investigation report and two New Jersey State Police certified laboratory reports. The respondent submitted various documents showing extracurricular assignments, observations and evaluations.

ARGUMENTS

Board's Arguments

The Board maintains McIntyre violated a public trust and set an example unfitting a teaching staff member entrusted with the education of impressionable students. His conduct constitutes conduct unbecoming a teaching staff member as that term is contemplated in statute.

The Legislature has mandated that the public schools establish instructional programs in the nature of drugs, alcohol, tobacco, anabolic steroids and controlled dangerous substances as defined at *N.J.S.A. 24:21-2*. Marijuana is identified as a controlled dangerous substance. The possession of it violates the State's criminal code. The Comprehensive Drug Reform Act, *N.J.S.A. 2C:35-1* through *-35*, places emphasis on protecting children from the dangers of illegal drugs.

The Commissioner has recognized the teachers hold positions of public trust and that their conduct is the subject of great scrutiny. They are role models whether they choose to be or not. *Tenure hearing of Jacque L. Sammons, 1972 S.L.D. 302.*

Possession of a controlled dangerous substance constitutes conduct unbecoming a teaching staff member and subjects a teaching staff member to penalty pursuant to the Tenure Employees Hearing Law, *N.J.S.A. 18A:6-10* through *-25*. In a long line of cases regarding possession of marijuana, the fact that possession occurred off school premises has had no bearing on the determination that the possession, in and of itself, constitutes unbecoming conduct. The fact that criminal charges against the respondent were dismissed does not diminish his violation of the public trust.

The appropriate penalty for the respondent is dismissal. The courts of New Jersey have recognized a strong policy about the concern of drugs in the public schools. Possession of marijuana has been determined to be sufficient to support a finding that a teacher is unfit to teach. The Board distinguishes the present case from *Tenure hearing of Robert P. Valenti, 1990 S.L.D.*

410. In that matter, the Commissioner affirmed the ALJ's determination that a penalty less than dismissal was appropriate. The ALJ cited in support of the lesser penalty the fact that Valenti had been employed for twenty years. The respondent in this case had just commenced his fourth year of teaching. Administrators and teachers testified that Valenti was a valued member of the staff. The respondent presented no testimony on his own behalf, nor did he present any witnesses in support of reinstating him.

The Board submits that because the petitioner smoked and transported marijuana in his vehicle, he is unfit to continue his teaching duties. Any penalty less than dismissal will lead students to believe that one may use or possess marijuana without adverse consequences. When the respondent undertook his teaching career, he began subject to strict standards of conduct that must control his personal and professional life.

Respondent's Arguments

The respondent concedes the facts set forth above and based on the stipulated facts and applicable law, requests reinstatement with loss of four months' pay previously withheld by the Board. McIntyre argues that *Tenure hearing of Robert P. Valenti*, 1990 S.L.D. 410, is dispositive of this matter. Valenti was convicted of possessing one hand-rolled marijuana cigarette and an additional 2.5 grams of marijuana, a disorderly persons offense. In the present case, McIntyre was not convicted.

As does McIntyre, Valenti had an otherwise unblemished record and was an excellent teacher. The Commissioner stated, among other things,

Respondent contends while drug use cannot be condoned, it cannot be ignored that in this case there was no evidence of actual use, that it was clear that he was not the initiator, that it was an isolated instance and that there was no evidence deduced that he has a drug problem. Respondent cites other Commissioner of Education cases dealing with the issue of an arrest and conviction for events which occurred outside of school and which reflected a single incident in an otherwise unblemished record by a dedicated teacher. He includes among them: **In the Matter of the Tenure Hearing of Martin Lieb, School District of the Town of West Orange,**

Essex County, decided by the Commissioner July 1, 1985; In the Matter of the Tenure Hearing of Jude Martin, Township of Union Beach, Monmouth County, decided by the Commissioner September 2, 1987; In the Matter of the Tenure Hearing of Richard M Pappa, School District of the Township of Old Bridge, Middlesex County, decided by the Commissioner March 14, 1988; In the Mater of the Tenure Hearing of Greg W. Molinaro, School District of the Township of Parsippany-Troy Hills, Morris County, decided by the Commissioner June 26, 1989 and In the Matter of the Tenure Hearing of Richard Ramage, School District of the Township of Woodbridge, Middlesex County, decided by the Commissioner July 22, 1980.

In all the above cases, respondent claims, the Commissioner found that the matter did not touch upon or affect the respondent's ability to teach or interact with members of the school community. Respondent submits that these cases should guide the Commissioner in assessing a penalty for the unbecoming conduct established by his actions. He submits there is overwhelming evidence of mitigation including his lengthy years of service, his exemplary and unblemished record, his enthusiastic dedication to his job and the single isolated nature of the event. These circumstances, coupled with his contention that there is absence of evidence that he cannot serve as role model among those students with whom he comes in contact in the future, lead respondent to urge the Commission to adopt the ALJ's recommended penalty.

In *Valenti*, the Commissioner penalized the respondent four months' pay and two months' pay because of causing a delay in the Office of Administrative Law hearing, a circumstance that does not obtain in McIntyre's case.

In addition, the Commissioner invoked for one year the loss of Valenti's increment.

The result reached in *Valenti*, above, must be compared to *Tenure hearing of Bonnie Lott*, 93 *N.J.A.R.* 2nd. (EDU) 516. Removal was ordered in *Lott* because of a conviction and the nature of the offense (*Lott* grew marijuana in her backyard), and the quantity of marijuana involved, more than 50 grams.

Based on these cases, the respondent respectfully requests that he be ordered to forfeit 120 days' pay only, but be reinstated.

DETERMINATION

The record demonstrates and I **FIND** that McIntyre possessed marijuana on September 13, 1993 in Raritan Township. I further **FIND** that the offense McIntyre committed constitutes conduct unbecoming a teaching staff member. See, *Valenti*, above.

This one act, when compared with the respondent's contributions to the school and his uniformly good evaluations does not compel the conclusion that loss of tenure and termination is the only legitimate penalty. The Commissioner, and therefore I, must weigh all the circumstances.

The Legislature within the last ten years has increased the amount of marijuana a person may possess and still be deemed a disorderly person rather than a criminal. It seems fair to infer from that that the Legislature does not view marijuana use as particularly heinous. Further, McIntyre's offense was not committed on school property and involved no student, teacher or school administrator. And, despite the lack of testimony on the issue, the record shows that McIntyre is a good teacher. Good teachers are not easily replaced. *Valenti*, above. This determination does not excuse or minimize McIntyre's offense. When viewed as a whole, however, the matter is more apposite to *Valenti* than *Lott*.

The respondent has professionally embarrassed himself. He appears aware of this and is contrite. He will have to work long and hard to reestablish his reputation among his peers. He also knows that one further misstep could be fatal to his career as a teacher. Where others are merely competent, he will have to be exemplary. The respondent is quite aware that his every act will be subject to close scrutiny by his peers and the community at large.

Accordingly, I **DIRECT** that the petitioner be returned to his teaching position, but that in recognition of the seriousness of his offense, he forfeit 120 days' salary withheld from him by virtue of his suspension without pay. I further **DIRECT** that the award, or not, of salary and adjustment increments for the 1994-95 school year, shall remain within the sound discretion of the

North Hunterdon-Voorhees Regional High School District Board of Education. It is **ORDERED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

23 NOVEMBER 1994
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

11/23/94
DATE

Hope R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 02 1994
DATE

Jeff S. Marin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cae

LIST OF EXHIBITS

On behalf of Petitioner:

- P-1 Investigation Report, Raritan Township Police Department, September 13, 1993
- P-2 New Jersey State Police Certified Laboratory Report No. 210489C, December 7, 1993
- P-3 New Jersey State Police Certified Laboratory Report No. 210099C, November 15, 1993

On behalf of Respondent:

- R-1 Letter, Appel to McIntyre, September 8, 1993, with attachment
- R-2 Letter, Finnengan to McIntyre, July 1993
- R-3 Letter, McIntyre to Hopek, June 18, 1993
- R-4 Teacher Annual Performance Report, 1992-1993, June 8, 1993
- R-5 Evaluation Report Form, March 10, 1993
- R-6 Evaluation Report Form, January 21, 1993
- R-7 Evaluation Report Form, March 25, 1993
- R-8 Evaluation Report Form, December 2, 1992
- R-9 Letter, Finnengan to McIntyre, September 2, 1992
- R-10 Teacher Annual Performance Report, 1991-1992, June 12, 1992
- R-11 Evaluation Report Form, March 17, 1992
- R-12 Evaluation Report Form, October 23, 1991
- R-13 Evaluation Report Form, April 9, 1991
- R-14 Evaluation Report Form, January 3, 1991
- R-15 Evaluation Report Form, November 7, 1990
- R-16 Teacher Annual Performance Report, 1990-1991, April 9, 1991
- R-17 Evaluation Report Form, February 20, 1991
- R-18 Teacher of Physical Science Certificate (copy), issued August 1990
- R-19 Letter, Majewski to McIntyre, July 18, 1990
- R-20 Letter, McIntyre to Neumann, undated, with attachment

IN THE MATTER OF THE TENURE :
HEARING OF R. SCOTT MC INTYRE, :
BOARD OF EDUCATION OF THE NORTH : COMMISSIONER OF EDUCATION
HUNTERDON-VOORHEES REGIONAL HIGH : DECISION
SCHOOL DISTRICT, HUNTERDON :
COUNTY. :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The Board filed timely exceptions pursuant to N.J.A.C. 1:1-18.4. Reply exceptions were also timely filed by respondent.

Urging that respondent should be dismissed from his tenured position, the Board initially excepts to the ALJ's determination that no student, teacher or school administrator was involved in this matter. Rather, the Board asserts, respondent's unbecoming conduct "will reach into the classroom and impede the School District's efforts" to implement its required substance awareness program. (Board's Exceptions, at p. 2) In support of its position, the Board refers to a press release from the U.S. Department of Health and Human Services, and a statement from the U.S. Department of Education urging schools to maintain their prevention efforts in light of recent statistics showing increasing drug use among youth. Respondent opposes the use of these data, having had no opportunity to cross-examine the Board on the material contained in both documents.

The Board further avers there is no testimony or other evidence on the record to support the ALJ's determinations that good teachers are not easily replaced, and that Respondent McIntyre was contrite in view of the events which flowed from his conduct. The Board asserts, therefore, that such determinations should have no bearing on the ALJ's conclusion of law. Respondent counters that the ALJ properly concluded "from his own common experience" that, as a teacher of Advanced Placement Chemistry, he could not easily be replaced. (Respondent's Reply Exceptions, at p. 2)

Finally, the Board recasts its argument as briefed for the ALJ that Valenti, supra, is not dispositive in this matter. The Commissioner determines that the issues raised by this exception were fully and fairly considered by the ALJ, and they need not be reiterated herein.

Upon careful and independent review of the record,¹ the Commissioner concurs with the ALJ's findings that the respondent in this matter was in possession of marijuana on September 13, 1993² and is guilty of conduct unbecoming a teaching staff member. However, the Commissioner is not persuaded that In re Valenti,

¹ The press release from the U.S. Department of Health and Human Services and supporting statement from the U.S. Department of Education were dated December 12, 1994 and first submitted with petitioner's exceptions. The Commissioner recognizes respondent's objection to those documents and notes that neither was employed in rendering this decision.

² charges were dismissed by court order upon a finding that the evidence was obtained pursuant to an illegal search. By order dated July 11, 1994 from the Office of Administrative Law (OAL), the Board was granted its motion to admit all evidence of respondent's possession of marijuana in the administrative proceedings. The Commissioner notes that respondent filed before him for Interlocutory Review of said OAL order; review was denied pursuant to N.J.A.C. 1:1-14.10.

supra, is determinative in the instant matter. In Valenti, it was established that respondent was an integral member of the school community for 20 years.³ A principal, teacher and guidance counselor, all employees of the board, attested to his exemplary record as a teacher, and to his rapport with his students. Id., at 411 and 412. Importantly, in that case, the Commissioner noted that the board did not specifically except to the ALJ's determination that Valenti should not be dismissed. Rather, the board requested a more stringent penalty than the forfeiture of 120 days' salary. By contrast, respondent herein was commencing his fourth year of employment with the Board, and presented no evidence of an exemplary career in the district, no witnesses in support of his reinstatement, nor testimony on his own behalf. (Initial Decision, at p. 6) Additionally, the Board in the instant matter staunchly maintains its position that Respondent McIntyre should be dismissed based upon the ALJ's finding of unbecoming conduct. (Board's Exceptions, at pp. 9, 10)

With respect to the appropriate penalty to be imposed, it is recognized that a determination of fitness for a particular position in a school system requires a balancing of interests. In the Matter of the Tenure Hearing of Arlene Dusel, 1978 S.L.D. 526, 531 Where unfitness for a position in a school system is evidenced

³ The ALJ notes with respect to Valenti's career in the district, "***He has taught diverse subjects***. He has been a tennis coach, cross country coach and head basketball coach. He has been involved in intramural sports, adult basic education, and student council. He has been an advisor to the school paper and the yearbook. He has served on the curriculum and discipline committees. He has participated in programs aimed at students, teachers, board members, administrators and parents***. In 1989 he was nominated to be 'teacher of the year.' The nomination was withdrawn when he was arrested." (In re Valenti, supra, at 411)

by a single instance of misconduct, as in this case, that instance must be "sufficiently flagrant." Redcay v. State Board of Education, 130 N.J.L. 369, 371, 33 A.2d 120, 122 (Sup. Ct. 1943); aff'd 131 N.J.L. 326 (E. & A. 1944)

The Commissioner recognizes that teachers hold a position demanding public trust (In the Matter of the Tenure Hearing of Jeffrey Wolfe, School District of the Township of Randolph, Morris County, 1980 S.L.D. 721, 724, citing In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County, 1974 S.L.D. 97, 98) and that "[a]s one of the most dominant and influential forces in the lives of the children," teachers are held to a higher standard of conduct (In re Sammons, supra, at 321).

Further, the Commissioner is cognizant that the Legislature has assigned to the school districts of New Jersey a fundamental role in the prevention and intervention of substance use and abuse among students (see N.J.S.A. 18A:40A-1 et seq.), that the State Board of Education has promulgated regulations to guide and encourage the substance awareness policies, programs and procedures of local districts (see N.J.A.C. 6:29-6), that this state is committed to addressing the problem of substance use and abuse among young people, and

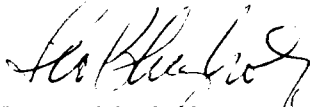
***that the maintenance of an education environment free from negative influences that encourage the use of drugs is an inherent part of that commitment. (Alfredo Arocha and Lazaro Gonzalez v. Board of Education of the Hudson County Area Vocational-Technical School District, decided by the State Board of Education April 3, 1985, Slip Opinion, at p. 6)

The Commissioner therefore determines that, with respect to the possession of controlled dangerous substances by an educator,

analyses which consider quantity or measure shades of misconduct are inappropriate. Furthermore, the Commissioner declines to support the inference "that the Legislature does not view marijuana use as particularly heinous." (Initial Decision, at p. 8) Inasmuch as the educators of this state serve as role models, they are required to set a good example for the children entrusted to them. In re Sammons, supra, at 321 Teachers mold the habits and attitudes of their pupils, and these pupils learn "***not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher." In re Tordo, supra, at 99 The Commissioner has noted that, "***This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." In re Sammons, at 321 The Commissioner, therefore, finds that possession of a controlled dangerous substance by an educator, absent mitigating circumstances, which he determines do not exist herein, is sufficiently flagrant conduct to warrant dismissal.

Accordingly, the Commissioner adopts in part the initial decision of the administrative law judge, and modifies the initial decision with respect to respondent's penalty for the reasons expressed above. Respondent is hereby dismissed from his tenured position with the Board as of the date of this decision, and this matter will be forwarded to the State Board of Examiners for action as it deems appropriate pursuant to N.J.A.C. 6:11-3.6.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

JANUARY 13, 1995

DATE OF MAILING - JANUARY_13,_1995

19-95

EDU #1394-94
C # 19-95
SB # 13-95

IN THE MATTER OF THE TENURE :
HEARING OF R. SCOTT MC INTYRE, :
BOARD OF EDUCATION OF THE NORTH :
HUNTERDON-VOORHEES REGIONAL :
HIGH SCHOOL DISTRICT, HUNTERDON :
COUNTY. :

STATE BOARD OF EDUCATION
DECISION

Decided by the Commissioner of Education, January 13,
1995

For the Petitioner-Respondent, Rand, Algeier, Tosti &
Woodruff (Russell J. Schumacher, Esq., of Counsel)

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

The decision of the Commissioner of Education
dismissing respondent from his tenured employment is affirmed for
the reasons expressed therein. In addition, we fully agree with
the determination of the Administrative Law Judge (ALJ) rejecting
respondent's contention that evidence of his possession of
marijuana, which was suppressed in the criminal proceedings

JUNE 7, 1995

against him, was not admissible in this matter.¹ As the ALJ pointed out in his decision on motion in limine, a ruling barring the use of evidence in a criminal matter does not prevent its subsequent admission in an administrative hearing, including tenure revocation proceedings. In the Matter of the Tenure Hearing of Dusel, decided by the Commissioner, 1978 S.L.D. 526, supplemental decision by the Commissioner, 1979 S.L.D. 153, aff'd by the State Board, 1979 S.L.D. 155.

Maud Dahme abstained.

June 7, 1995

Date of mailing JUN 09 1995

¹ We note that the Commissioner denied respondent's request to consider this issue on an interlocutory basis. Nor did he address it in his final decision.

(SB) 19-95

DHP #477-94
SB # 19-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF BRUCE JACKSON. : DECISION
_____ :

Decided by the Deputy Commissioner of Education,
January 24, 1995

For the Petitioner-Appellant, Madnick, Milstein, Mason,
Weber, Farnsworth & Collazo (Jesus A. Collazo,
Esq., of Counsel)

For the Respondent-Respondent, Pamela B. Katten, Deputy
Attorney General (Deborah T. Poritz, Attorney
General of New Jersey)

The State Board of Education grants the request of the
parties to remand this matter to the Commissioner of Education
for a hearing in order to provide the petitioner with an adequate
opportunity to establish a record in support of his contention
that he has satisfied the statutory standard for rehabilitation.¹

¹ We note that the Office of Criminal History Review was apparently not represented in the proceedings before the Deputy Commissioner and was not served with notice of the appeal to the State Board. Upon the filing of the appeal, Counsel to the State Board notified the Attorney General's Office by letter of March 15, 1995 that an appeal had been taken in the matter, and transmitted a copy of the record. A Deputy Attorney General was then assigned to appear as attorney of record in the appeal.

JUNE 7, 1995

Given the circumstances, we direct that such hearing and a final determination by the Commissioner be rendered on an expedited basis, and that such determination considers all pertinent circumstances under the factors set forth in N.J.S.A. 18A:6-7.1, including "any evidence of rehabilitation." See Wolffbrandt v. New Jersey State Department of Education, decided by the State Board, July 1, 1992.

We stress that petitioner has the burden on remand of establishing his rehabilitation by clear and convincing evidence.

We retain jurisdiction.

June 7, 1995

Date of mailing JUN 09 1995

20-95

BOARD OF EDUCATION OF THE
BOROUGH OF RAMSEY, BERGEN
COUNTY,

PETITIONER,

V.

WILLIAM HORNEFF,

RESPONDENT.

:
:
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:
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:
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:

COMMISSIONER OF EDUCATION

DECISION

JANUARY 17, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7280 -94

AGENCY DKT. NO. 43-3/94

**BOARD OF EDUCATION OF THE BOROUGH
OF RAMSEY,**

Petitioner,

v.

WILLIAM HORNEFF,

Respondent.

Robert M. Jacobs, Esq., for petitioner
(Winne, Banta, Rizzi, Hetherington, attorneys)

William Horneff, pro se

Record Closed: December 7, 1994

Decided: December 8, 1994

BEFORE **MUMTAZ BARI-BROWN, ALJ:**

The parties have agreed to a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Dec. 9, 1994
DATE:

Mumtaz Bari-Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged

12/15/94
DATE:

Hope R. Blackburn
DEPARTMENT OF EDUCATION

DEC 19 1994
DATE:

Mailed to Parties:
Jeff M...
SUPERVISOR AND JUDGE
OFFICE OF ADMINISTRATIVE

MBB:cb

WINNE, BANTA, RIZZI
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THOMAS J. CANGIALOSI, JR. +
THOMAS P. MONAHAN, JR.
CAROLYN GERACI FROME
GARY S. REDISH +

WALTER G. WINNE (1889-1972)
HORACE F. BANTA (1895-1985)
BRUCE F. BANTA (1932-1983)

ARTHUR J. SIMPSON, JR. +
C. THEODORE MURPHY + *
COUNSELLORS AT THE FIRM
BRUCE R. ROSENBERG
CRAIG L. LEVINSOHN +
LINDA M. CORONATO +
DOREEN E. WINN +
KATHY VOSKIAN GAMBINO +
SCOTT K. McCLAIN*
DAVID L. SCHER +

* CERTIFIED CIVIL TRIAL ATTORNEY
+ MEMBER NEW YORK BAR ALSO
Δ MEMBER FLORIDA BAR ALSO
* MEMBER PENNSYLVANIA BAR ALSO

OFFICE
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December 2, 1994

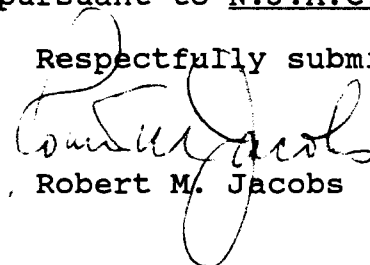
The Honorable Mumtaz Bari-Brown
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: Board of Education of the Borough of Ramsey vs. Horneff
O.A.L. Docket No. EDU 07280-94N

Dear Judge Bari-Brown:

This office represents the Petitioner in the above-captioned matter which is presently scheduled for hearing before Your Honor on December 7, 1994. I previously advised Your Honor's chambers that the matter has been settled. In connection therewith, I am enclosing the original of a fully executed Settlement Agreement. Based upon the foregoing, request is hereby made that the Petition in this matter be withdrawn pursuant to N.J.A.C. 1:1-19.2.

Respectfully submitted,



Robert M. Jacobs

RMJ/bd
Enclosure

cc: William Horneff

SETTLEMENT AGREEMENT

THIS AGREEMENT is entered into the *10th* day of *November*, 1994, between the RAMSEY BOARD OF EDUCATION, ("the Board") and WILLIAM HORNEFF, ("Horneff").

A. The Board has instituted an action before the Commissioner of Education of the State of New Jersey, under O.A.L. Docket Number EDU 07280-94N, against Horneff, alleging entitlement to the sum of \$6,825.00, together with interest thereon, in connection with tuition on account of attendance in the Ramsey Public Schools during the 1992-93 school year of W.H, the son of Horneff.

B. The Board and Horneff have agreed to resolve their differences with regard to the claims set forth in said matter.

C. In exchange for the mutual obligations, covenants, agreements and stipulations contained herein, the Board and Horneff agree as follows:

1. Horneff shall pay to the Board, upon the execution of this Agreement, a lump sum of \$5,800.00, which payment shall be in full satisfaction of any and all claims which were asserted or which could have been asserted by the Board against Horneff in connection with the attendance of W.H., the son of Horneff, in the Ramsey Public Schools during the 1992-93 school year.

2. The within Settlement Agreement shall constitute a Release by the Board of Horneff with respect to any and all claims which were asserted or which could have been asserted in connection with the attendance of W.H. in the Ramsey Schools during the 1992-93 school year.

3. Upon execution of this Agreement, and upon the receipt by the Board of the payment referred to above, the Board shall formally withdraw the Petition filed under Docket No. EDU 07280-94N with prejudice.

4. This agreement was entered into freely and voluntarily by the parties.

RAMSEY BOARD OF EDUCATION

Robert J. Marsettalli
Witness

By: Deborah Denara
, President

WILLIAM HORNEFF


Witness

William Horneff

BOARD OF EDUCATION OF THE	:	
BOROUGH OF RAMSEY, BERGEN	:	
COUNTY,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
WILLIAM HORNEFF,	:	
	:	
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


 COMMISSIONER OF EDUCATION

JANUARY 17, 1995

DATE OF MAILING - JANAURY 17, 1995

DHP #439-94
SB # 20-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF ELOISE WIGGS. : DECISION
_____ :

Decided by the Deputy Commissioner of Education,
January 30, 1995

For the Petitioner-Appellant, Essex-Newark Legal
Services (Carleton A. Lewis, Esq., of Counsel)

For the Respondent-Respondent, Arlene G. Lutz, Deputy
Attorney General (Deborah T. Poritz, Attorney
General of New Jersey)

The State Board of Education grants the request of the
parties to remand this matter to the Commissioner of Education
for a hearing in order to provide the petitioner with an adequate
opportunity to establish a record in support of her contention
that she has satisfied the statutory standard for
rehabilitation.¹ Given the circumstances, we direct that such

¹ We note that the Office of Criminal History Review was apparently not represented in the proceedings before the Deputy Commissioner and was not served with notice of the appeal to the State Board. Upon the filing of the appeal, Counsel to the State Board notified the Attorney General's Office that an appeal had been taken in the matter, and transmitted a copy of the record. A Deputy Attorney General was then assigned to appear as attorney of record in the appeal.

Aug. 2, 1995

hearing and a final determination by the Commissioner be rendered on an expedited basis, and that such determination considers all pertinent circumstances under the factors set forth in N.J.S.A. 18A:6-7.1, including "any evidence of rehabilitation." See Wolffbrandt v. New Jersey State Department of Education, decided by the State Board, July 1, 1992. Petitioner has the burden on remand of establishing her rehabilitation by clear and convincing evidence.

We stress, in addition, that the statute expressly requires consideration of the "date of the offense" (emphasis added), rather than the date of conviction relied upon by the Deputy Commissioner in his decision. Moreover, although the Deputy Commissioner found that petitioner's arrest and conviction in 1991 on charges of receiving stolen property "strongly offsets the attestations of rehabilitation," we note that petitioner's submissions regarding her rehabilitation all relate to her conduct subsequent to that offense.

We retain jurisdiction.

August 2, 1995

Date of mailing ~~_____ AUG 04 1995 _____~~

(SB) 20-95

DHP #439-94
SB # 20-95
DHP #463-96

IN THE MATTER OF THE DISQUALIFI- :
CATION FROM SCHOOL EMPLOYMENT : STATE BOARD OF EDUCATION
OF ELOISE WIGGS. : DECISION

Decided by the Deputy Commissioner of Education, January 30, 1995

Remanded by the State Board of Education, August 2, 1995

Decision on remand by the Commissioner of Education, October 21, 1996

For the Petitioner-Appellant, Essex-Newark Legal Services (Carleton A. Lewis,
Esq., of Counsel)

On August 2, 1995, we granted the request of the parties to remand this matter to the Commissioner of Education for a hearing in order to provide petitioner, who had been disqualified from employment in the State's schools as a custodian following a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1, with an adequate opportunity to establish a record in support of her contention that she had satisfied the statutory standard for rehabilitation. We retained jurisdiction.

In accordance with our remand, the Commissioner transmitted this matter to the Office of Administrative Law. On August 28, 1996, following a hearing, the Administrative Law Judge ("ALJ") rendered a decision in which she concluded that petitioner had established her rehabilitation. On October 21, 1996, the Commissioner rejected the ALJ's recommended decision, concluding that petitioner had not

10/1/97

demonstrated her rehabilitation by clear and convincing evidence. Accordingly, he upheld petitioner's disqualification.

Pursuant to the State Board's retention of jurisdiction, the Commissioner transmitted the file back to us in August 1997. No appeal has been filed from the Commissioner's decision of October 21, 1996.

After a review of the record, we are satisfied that the Commissioner complied with the terms of our remand and provided petitioner with an adequate opportunity to establish a record in support of her contention that she had satisfied the statutory standard for rehabilitation. Accordingly, pursuant to the Commissioner's decision, petitioner is disqualified from school employment, and we dismiss this matter.

October 1, 1997

Date of mailing OCT 03 1997

BOARD OF EDUCATION OF THE BOROUGH :
OF ELMWOOD PARK, BERGEN COUNTY, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

DONNA FARRELL, :

DECISION

RESPONDENT. :

SYNOPSIS

Teacher of the Handicapped (respondent) contested Board's application to suspend her certificate pursuant to N.J.S.A. 18A:26-10. Board contended that respondent ceased to perform her duties before the expiration of the term of her employment and, thus, was guilty of unprofessional conduct. Order to show cause was issued on December 15, 1993.

ALJ found that the Board did not seek suspension by the Commissioner until more than eight months after the triggering event of respondent's failure to report to work after March 12, 1993. Therefore, in applying the 90-day rule and finding no evident basis for relaxation of the rule, the ALJ concluded that the order to show cause in operation in this matter should be dismissed.

Commissioner adopted findings and determination in initial decision. Order to show cause was dismissed as untimely.

JANUARY 17, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 529-94
AGENCY DKT. NO. 4-1/94

**BOARD OF EDUCATION OF
ELMWOOD PARK, BERGEN COUNTY,**

Petitioner,

v.

DONNA FARRELL,
Respondent.

Matthew P. DeMaria, Esq., for petitioner

Louis P. Bucceri, Esq., for respondent
(Bucceri & Pincus, attorneys)

Record Closed: October 5, 1994

Decided: November 17, 1994

BEFORE DIANA C. SUKOVICH, ALJ:

PROCEDURAL HISTORY

On December 15, 1993, the Commissioner of the State Department of Education (Department) issued an order to show cause (OSC), upon motion of the Elmwood Park School District (District or petitioner), to Donna Farrell (Farrell or respondent). Respondent filed a response to the OSC on January 6, 1994. The Department transmitted the matter to the Office of Administrative Law on January 20, 1994 for determination as a contested case pursuant to *N.J.S.A. 52:14F-1 to -13*.

A telephone conference was conducted on April 14, 1994. At that time, deadlines for the completion of discovery and for the filing of an anticipated motion to

dismiss on behalf of respondent were scheduled. At the request of the parties, these deadlines were subsequently extended.

Respondent filed a motion to dismiss on August 31, 1994. The parties subsequently requested and were granted extensions for the filing of a reply by petitioner to September 30, 1994; and a response by respondent, to October 6, 1994. The District filed a reply in opposition to the motion on September 30, 1994. Respondent filed a response thereto on October 5, 1994, on which date the record was closed.

NATURE OF THE CASE

This matter involves a breach of contract by respondent alleged by petitioner. Respondent was employed by the District on September 1, 1992. Her last date of employment with petitioner was March 12, 1993. The parties do not dispute that pursuant to the terms of her contract, her last day of work should have been April 10, 1993. Petitioner thereafter moved for the issuance of an order to show cause by the Department directing respondent to show cause why her teaching certificate should not be suspended, pursuant to *N.J.S.A. 18A:26-10*, for unprofessional conduct. As referenced hereinabove, the Department issued an order to show cause on December 15, 1993.

Respondent moves for dismissal based upon argued failure by petitioner to comply with the requirements of *N.J.A.C. 6:24-1.2(c)*. More specifically, Farrell argues that the District's actions resulting in the issuance of the OSC were not taken within a mandated time period, that the pertinent regulation applies in the current matter and should be strictly construed, and that there are no mitigating circumstances for relaxation of the regulation.

Petitioner argues that the regulation in question does not apply to proceedings such as this one and that if it does, there are mitigating circumstances, and it should

not be strictly construed. For the reasons hereinafter discussed, I am persuaded that respondent's motion should be granted.

FINDINGS OF FACT

A motion for summary decision may be granted if the papers and any discovery demonstrate that no genuine issue exists regarding any material fact and that the moving party is entitled to prevail as a matter of law. A motion for summary decision may be served with supporting affidavits. A decision may be rendered if the papers and discovery, in addition to any affidavits, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. In order to prevail, an adverse party must, by responding affidavit, set forth specific facts demonstrating that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not do so, summary decision, if appropriate, shall be granted. *N.J.A.C. 1:1-12.5.*

Petitioner and respondent both filed exhibits in support of their positions. The content of these documents are not in dispute.

Based upon a review of the entire record, I **FIND** the following to be **FACTS**.

Farrell was employed by petitioner on September 1, 1992 as a teacher of the handicapped at the Elmwood Park Memorial High School. Respondent subsequently submitted a letter of resignation dated February 9, 1993. On February 23, 1993, the Board of Education (Board) accepted respondent's resignation effective April 10, 1993, or sooner if a replacement could be found. At some point subsequent to submitting her letter of resignation, Farrell advised her supervisor, Carmen A. Garfole (Garfole), the District's director of special services, that Farrell planned to terminate her employment on March 12, 1993.

By memorandum dated March 1, 1993 to Farrell, Garfole informed respondent that Garfole had been advised by Melindo A. Persi (Persi), petitioner's Superintendent

of Schools, that Farrell's last date of employment with the District would be April 10, 1993 and that respondent had indicated to Garfole that Farrell intended to be absent on March 2, 3, 4, and 5, 1993. Garfole concluded that such absences would be unauthorized, that Garfole expected respondent to report to work on the dates indicated, and that a failure to do so would result in a recommendation that respondent's salary for the dates in question be withheld.

By memorandum dated March 12, 1993, Garfole advised Farrell of petitioner's position that respondent's contractual obligations to the District extended until April 10, 1993; that Farrell was expected to report to duty on March 15, 1993, a Monday; that a failure to do so would be considered a breach of contract; and that such failure would result in a recommendation by Garfole to Persi to petition the State Board of Education (State Board) to revoke respondent's teaching license. The memorandum referenced a March 11, 1993 discussion between Garfole and Farrell, during which respondent apparently advised Garfole that Farrell intended to terminate her employment with the District on March 12, 1993, and Garfole stated the District's position.

Persi advised Board members of the status of the situation by memorandum dated March 12, 1993, noting that Farrell's salary was withheld for March 2, 3, 4, and 5, 1994 because of absences and that respondent, despite communications from Garfole, appeared intent on leaving employment with the District on March 12, 1993.

By memorandum dated June 1, 1993, Persi advised the Bergen County Superintendent of Schools, Dr. Anthony C. Scalzo (Scalzo), of the situation and recommended that the State Board consider the suspension of Farrell's teaching certificate. The June 1, 1993 memorandum showed a copy being sent to petitioner's counsel. Persi subsequently inquired of Scalzo, by letter dated June 17, 1993, of the status of this recommendation.

Scalzo advised Persi, by letter dated June 22, 1993, that Persi's communication regarding Farrell's certification had been forwarded to the Department's Office of the Assistant Commissioner, and that in order for the Department's Bureau of

Controversies and Disputes (Bureau) to complete its review, petitioner's counsel would have to complete an OSC and forward such to the Department for the Commissioner's signature. This letter also noted that after the Department's Commissioner (Commissioner) had signed and mailed the order, Farrell would have 20 days to reply thereto and that in the absence of such reply, a default order would be issued by the Commissioner. The letter referenced sample orders to show cause and default orders transmitted therewith.

On July 22, 1993, the Board voted to direct its counsel to file a petition with the Commissioner for revocation of Farrell's certification. Persi advised counsel of this action by memorandum dated July 23, 1993, forwarding a copy of the pertinent file and requesting that action be taken expeditiously.

Persi executed an affidavit on November 15, 1993, which affidavit was filed with the Department in support of a motion for an OSC on approximately December 7, 1993. An OSC was issued by the Commissioner on December 15, 1993. An unsigned copy of the OSC, as well as of Persi's affidavit, were served on Farrell by letter dated December 3, 1993 by petitioner's counsel. A certified copy of the executed OSC was served on respondent by letter dated December 20, 1993 by petitioner's counsel.

DISCUSSION

The Commissioner has general jurisdiction to hear and determine controversies and disputes arising under the school laws. *N.J.S.A. 18A:6-9*. The school laws address suspension of teaching certificates because of wrongful cessation of performance of duties.

Any teaching staff member employed by a board of education who, without the consent of the Board, ceases to perform his/her duties before the expiration of the term of his/her employment shall be deemed guilty of unprofessional conduct. The Commissioner may, upon receiving notice thereof, suspend the teacher's certificate for a period not exceeding one year. *Id.* at § 26-10. *N.J.A.C. 6:11-3.8*. The issuance of

an order to show cause by the Commissioner in situations involving action to suspend a teacher's certificate for wrongful cessation of duties is appropriate. *N.J.A.C. 6:24-3.1(a)*. This procedure is not in lieu of a contested case hearing. *Ibid.*

In order to initiate a contested case for the Commissioner's determination of a controversy or dispute arising under the school laws, a petitioner shall serve a copy of a petition upon each respondent. *Id.* at § 1.2(a). The applicable regulation sets forth time limitations pertinent to the filing and service of petitions:

The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. *Id.* at § (c).

The 90-day rule applies when a school district is the petitioning party. *West New York Board of Education v. Lydia Gilmartin*, 1990 S.L.D. 619 (*Gilmartin*). The Commissioner has also held that the 90-day rule applies to actions brought by local school districts pursuant to *N.J.S.A. 18A:26-10* for the issuance of an order to show cause to suspend a teacher's certificate because of an alleged failure of the teacher to provide 60-days notice of resignation, as required by contract.¹ *Board of Education, Pinelands Regional School District v. Rhonda Rehm*, 1986 S.L.D. 606.

The 90-day rule applies if the action in question is not based on a statutory entitlement. *North Plainfield Educ. Ass'n. v. Bd. of Educ.*, 96 N.J. 587 (1984) (*North Plainfield*). *Gilmartin, supra*. The court in *North Plainfield* held that teachers' petitions for salary credit for time spent on sabbaticals were barred by the 90-day rule. Interpreting applicable statutes, the court concluded that the increments were not based on a statutory entitlement because they were subject to annual performance

¹ Any teaching staff member under tenure of service desiring to relinquish his/her position shall give the employing board at least 60 days written notice of such intention, unless the board approves of a release on shorter notice. A teacher who fails to give such notice is deemed to be guilty of unprofessional conduct. The Commissioner may suspend his/her certificate for not more than one year. *N.J.S.A. 18A:28-8*.

evaluations. In reaching this conclusion, the court contrasted credits for military service, which credits were deemed to be statutory entitlements.²

The statute of limitations reflected in *N.J.A.C. 6:24-1.2* is to be strictly applied. *Gordon v. Passaic Township Bd. of Educ.*, 1985 S.L.D. 1929, aff'd, No. A-3294-84T7 (App. Div. May 27, 1986), certif. denied, 105 N.J. 534 (1986). *Dennis Moreland v. Passaic Bd. of Educ.*, 3 N.J.A.R. 276 (1983). However, the rule may be relaxed or dispensed with in any case where strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice. *N.J.A.C. 6:24-1.15*.

Argued public interest, *i.e.*, the expenditure of public funds, is not grounds for relaxing the rule. In addition, a delay in initiating the action in question because of a filing in the wrong forum or argued internal error, in the absence of an indication of misrepresentation of the other party, does not justify a waiver. *Gilmartin, supra*. An application for relief to a county superintendent also does not toll the time for initiating a proceeding. *Robert Ellis v. Bd. of Ed., Bergenfield*, OAL DKT. NO. EDU 135-81 (Aug. 19, 1981), adopted by the Commissioner of Education (October 5, 1981) (*Ellis*).

CONCLUSIONS

It is clear that the 90-day rule applies to the action by petitioner for issuance of the OSC which was directed to respondent. I am not persuaded in this respect by petitioner's argument that it is not applicable because a violation of *N.J.S.A. 18A:26-10* is conceded and the Board's consequent entitlement to a suspension remedy is clear.

Respondent contends that petitioner breached an agreement with Farrell allowing her to leave her employment earlier by failing to diligently pursue a replacement. Allegations in this respect were not referenced in the motion papers. In addition, as respondent argues, there is no automatic right of a local school board to a one-year suspension of a teacher's certificate even if no defense exists to a lack of

² The applicable statute provides that individuals who served in the active military unit or naval service of the United States or of New Jersey shall be entitled to receive equivalent years of employment credit. *N.J.S.A. 18A:29-11* (emphasis added).

proper notice of resignation. *N.J.S.A. 18A:26-10* is discretionary. The *Pinelands* decision makes clear that the 90-day rule applies to actions brought to suspend certificates pursuant to *N.J.S.A. 18A:26-10*. An administrative agency's interpretation of a statute that it is charged with enforcing is entitled to due deference. *In Re Bridgewater Township*, 95 *N.J.* 235, 244 (1984). In any event, in contrast to credit for military service, there is no statutory entitlement to suspension of a certificate because of a lack of proper advance notice of resignation.

It is clear that the triggering event in the current matter was Farrell's failure to work after March 12, 1993. The Board's pleadings were not filed with the Department until December 7, 1993, more than eight months later. Pursuant to the applicable statutory and regulatory provisions, the Board was required to file for a certification penalty with the Commissioner, not the county superintendent. In any event, petitioner did not act to seek suspension by the Commissioner until more than five months subsequent to the County Superintendent's letter of June 22, 1993.

Petitioner does not address the reasons for the delays and for filing with the county superintendent in its motion papers. However, as discussed hereinabove, the filing of an application for relief to a county superintendent does not toll the time for filing a matter with the Commissioner. *Ellis, supra*. Even if it did, the fact that petitioner did not file with the Commissioner within 90 days of the June 22, 1993 letter argues against adoption of petitioner's position in this respect.

There is no evident basis for relaxing the application of the 90-day rule in this case. As noted hereinabove, even the expenditure of public funds, a situation not implicated in the current matter, will not result in waiver or relaxation of the rule. Nor does filing the matter in the wrong forum nor internal errors. The motion papers do not support a conclusion that any action by Farrell resulted in delays.

As respondent argues, the fact that legal counsel was available to the Board, and the fact that petitioner subsequently did not act after receiving explicit instructions from the county superintendent, also argue in support of respondent's position. Finally,

it is noted that the motion papers do not evidence communications from petitioner to respondent from March to December 1993 pertaining to the filing of the proceeding, until the blank order to show cause was issued.

I **CONCLUDE** that *N.J.A.C. 6:24-1.2(c)* is applicable to the current matter, that it should not be waived nor relaxed in this case, and that petitioner did not file with the Department to initiate the issuance of an OSC to respondent until more than 90 days after Farrell's failure to work after March 12, 1993. I therefore **CONCLUDE** that the OSC in question in this matter should be **DISMISSED**.

ORDER

It is hereby **ORDERED** that the OSC issued by the Department to respondent on December 15, 1993 be and is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 17, 1994
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

11/21/94
DATE

Receipt Acknowledged:
Hope R. Blackburn
DEPARTMENT OF EDUCATION

DEC 13 1994
DATE
amr

Mailed to Parties:
Jeff J. Masini
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

BOARD OF EDUCATION OF THE BOROUGH :
OF ELMWOOD PARK, BERGEN COUNTY, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

DONNA FARRELL, :


DECISION

RESPONDENT. :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that the Board's action with respect to filing for the issuance of an order to show cause in the instant matter was untimely pursuant to the requirements of N.J.A.C. 6:24-1.2(c) for the reasons clearly articulated in the initial decision. The Commissioner further agrees that there is no evident basis for relaxation of the 90-day rule in this matter.

Accordingly, the order to show cause issued by the Department to respondent on December 15, 1993 is hereby dismissed.


COMMISSIONER OF EDUCATION

JANUARY 17, 1995

DATE OF MAILING - JANUARY 17, 1995

22-95

BOARD OF EDUCATION OF THE BOROUGH :
 OF ROSELLE, :

PETITIONER, :

V. :

MAYOR AND COUNCIL OF THE BOROUGH :
 OF ROSELLE, UNION COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of \$950,000 made by governing body following voter rejection of proposed budget on April 19, 1994.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore \$456,516 for a total General Fund tax levy of \$14,856,205 for 1994-95 school purposes.

JANUARY 17, 1995

BOARD OF EDUCATION OF THE BOROUGH :
OF ROSELLE,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH
OF ROSELLE, UNION COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

Schwartz, Simon, Edelstein, Celso & Kessler, for Petitioner
Gary S. Goodman, Esq., for Respondent

This matter was opened before the Commissioner on June 20, 1994, through the filing of a Petition of Appeal of a defeated budget by the Board of Education of the Borough of Roselle (Board) pursuant to the provisions of N.J.A.C. 6:24-7.4. The Board sought restoration, on the grounds of necessity for a thorough and efficient education, of reductions by the Mayor and Council of the Borough of Roselle (Borough) following voter rejection on April 19, 1994, of the Board's proposed General Fund tax levy for the 1994-95 school year. Subsequent to the defeat, the Board and Borough, pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)(2), consulted on the defeated budget and the Borough reduced the General Fund tax levy by \$950,000. Consequently, the monies in contention in this matter are as set forth below:

Proposed Tax Levy
Adopted by Board of Education

General Fund \$15,349,689

Amount of Reduction
by Governing Body

General Fund \$950,000

Amount of Tax Levy
Certified by Governing Body¹

General Fund \$14,399,689

Amount of Reduction in
Dispute Before Commissioner

General Fund \$950,000

On July 8, 1994, the Borough submitted its Answer to the Petition. Position Statements were received from both parties on August 22, 1994. The Board filed its Response on September 1, 1994 and its Summation on September 6, 1994. The Borough Summation was filed on September 9, 1994.

The specific reductions in the General Fund tax levy are as follows:

<u>Account Number</u>	<u>Title</u>	<u>Rationale</u>	<u>Reduction</u>
11-000-290-290	Other Employee Benefits	Monthly billings annualized to show amount required	\$120,429
11-000-100-568	Tuition-State Facilities	No expenses during prior year	97,940
11-000-270-890	Transportation - Miscellaneous	Expenses annualized and increased for current year	102,816
11-000-240-103	Salaries - Principals/ Assistants	Expenses annualized and increased for current year	51,004
11-000-260-890	Operations and Maintenance - Miscellaneous	No expenditures in 1993-94	44,430
11-000-222-104, 105, 110	Education Media - Salaries	Expenses annualized and increased for current year	70,000

¹ The Borough included a Local Tax Levy - Capital Reserve Increase item in the amount of \$119,831. The amount, however, was not included on the A4F form and was not included on the county abstract of ratables.

<u>Account Number</u>	<u>Title</u>	<u>Rationale</u>	<u>Reduction</u>
11-000-222-300	Education Media - Purch. Prof. Services	Minor expenses in 1993-94	\$ 60,000
11-230-100-800	Basic Skills - Other Objects	No expenditures in 1993-94	63,230
11-402-100-800	Sch. Athletics - Other Objects	Minor expenditures in 1993-94	7,180
11-401-100-610	School Spons. Activities - Supplies	Minor expenditures in 1993-94	56,125
11-403-100-100, 600, 800	Latch Key	No expenditures in 1993-94	34,814
11-217-100-101	Supplementary Inst. - Salaries	No expenditures in 1993-94	97,143
11-000-290-250	Unemployment Compensation	Provides sufficient amount for district	26,695
11-402-100-520	Sch. Athletics - Insurance	Provides adequate insurance for activities in budget	20,000
11-230-100-101	Basic Skills - Salaries	Provides for increase over 1993-94 expenditures	98,194
		TOTAL	<u>\$950,000</u>

There are several issues raised by the parties in this matter that must be addressed prior to the review of the specific line item reductions. The Board claims that the Borough is in violation of the requirements of N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.1 et seq. because it did not provide in its resolution the detailed reasons supporting the line item reductions. The Borough states that it could not provide the detailed statement of reasons for reductions because necessary budgetary detail was withheld during deliberations and that information received by the Borough was both inadequate and incorrect. The Board responds that the

1994-95 school budget was based on what it believed was an accurate 1993-94 budget and that it has just learned that this is not the case. The Borough statement of reasons for the reductions was submitted with its Answer to the Petition of Appeal.

The issue of a municipality's failure to submit reasons with the certification of reductions has been addressed and resolved by both the New Jersey Supreme Court and the State Board of Education (Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305 (1989), and Board of Education of the Township of Rochelle Park v. Mayor and Council of the Township of Rochelle Park, Bergen County, decided by the State Board of Education July 1, 1992). These decisions make it unquestionably clear that a municipality is obligated to provide a statement of reasons for its reductions "contemporaneously with its certification of budget cuts" (Deptford, at 320) and that this requirement is not satisfied by providing reasons in the answer to an appeal. In such a situation, the State Board has determined that "a failure to fulfill that requirement shifts the burden of proof in proceedings before the Commissioner." (Rochelle Park Slip Opinion, at p. 4) Moreover, the Commissioner "is entitled to invoke a heavy presumption against the educational validity of the proposed budget cuts." (Deptford, at 320) This does not, however, automatically result in full restoration of the budget reductions. The review of the budget and determination by the Commissioner must be premised on the provision of funds to satisfy the constitutional mandate for a thorough and efficient education.

A second issue in this matter is the request by the Board that, due to the recent discovery that the 1993-94 school district

budget has been overexpended by approximately \$650,000, the review of the appealed budget be based on the total needs of the district rather than on the individual line items. Of particular concern in this request is the very significant overexpenditure of the prior year school budget. That problem, however, will be addressed under N.J.A.C. 6:20-2.12 when the 1993-94 audit is completed. The appeal of the reductions in the 1994-95 budget must be reviewed and determined by the Commissioner for the individual line items in question. Since all other line items in the budget have not been contested, reduced, or defended, they are not included in this review procedure.

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction is imposed by the

governing body is necessary for the provision of a thorough and efficient system of education.

Mindful, then, of the balance to be applied in this standard of review, the Commissioner makes the following determination with respect to the reduction in the General Fund tax levy effectuated by the Borough.

11-000-290-290	Other Employee Benefits	\$120,429
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The Borough states that its reduction was based on annualizing the monthly billings to determine the amount required for 1994-95. The Board states that these funds are necessary for contractual obligations to provide health insurance for its employees and that this line item was underbudgeted in 1993-94. Since funds must be provided for legal and contractual obligations the Commissioner orders the restoration of \$120,429.

11-000-100-568	Tuition-State Facilities	\$97,940
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The Borough states that this reduction is based on its understanding that there were no expenditures for this line item in 1993-94. The Board states that this line item is for state-mandated expenditures for pupils placed in state-operated facilities. The amount in the budget proposed by the Board is the district obligation for tuition for state facilities. The Commissioner orders the restoration of \$97,940.

11-000-270-890	Transportation - Miscellaneous	\$102,816
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The Borough states that this reduction was based on the amount it determined was necessary by annualizing the expenditures and providing an increase for 1994-95. The Board states that the budgeted amount of \$661,755 for 1993-94 was insufficient and that

the \$782,985 budgeted for 1994-95 is essential. The Board, in presenting these figures, is discussing the total transportation account, and not just the Miscellaneous line item reduced by the Borough. However, the Board cites a necessary amount of \$782,985, yet the budget document submitted had a total figure of \$902,816. Thus, even with the reduction certified by the Borough, the Board will have \$800,000, slightly more than it states is necessary. The Commissioner, therefore, sustains the reduction of \$102,816.

11-000-240-103	Salaries - Principals/Assistants	\$51,004
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The Borough again states that the reduction was based on annualizing expenditures for 1993-94 and increasing for 1994-95. The Borough states that "all current staff levels are to remain the same." (Borough's Answer, Ex. A) The Board argues that the funds proposed in the budget are essential to maintain the present staff. It should be noted that, although this reduction is specified by both parties as 11-000-240-103, they are both referring to the sum of that line item plus 11-000-240-104. The Borough states that the \$1,000,000 certified after the reduction is the "actual monies expended plus an allowance for raises." (Borough's Position Statement, at p. 2) It does not specify the amount of expenditures or allowance for raises. It does emphasize, however, that there should be no reduction in staff. Based on the lack of detail provided by the Borough, the commitment to maintain the present staff, and the Board's testimony that the budgeted funds in its proposed budget are necessary to maintain the staff, the Commissioner orders the restoration of \$51,004.

11-000-260-890	Operations and Maintenance - Misc.	\$44,430
11-000-222-300	Ed. Media - Purch. Prof. Services	60,000
11-230-100-800	Basic Skills - Other Objects	63,230
11-401-100-610	School Spons. Activities - Supplies	56,125

For each of these line items, the Borough bases its reduction on either no or minor expenditures in 1993-94. For each of these line items, the Board states that the monies cannot be justified for the specific account but are necessary to provide a sufficient total budget. As noted above, the standard of review must be restricted to the line items in dispute. Based on the facts presented, the Commissioner sustains the reductions of \$44,430, \$60,000, \$63,230, and \$56,125.

11-000-222-104, 105, 110 Education Media - Salaries \$70,000

The Borough again bases its reduction on annualizing expenditures for 1993-94 and increasing for 1994-95. The Borough makes the general statement with its reasons for reductions that there should be no positions eliminated by the reductions. The Board states that the full amount of the 1993-94 budget was spent and that the amount proposed in its budget is necessary to maintain present staff and the library program. Based again on the lack of detail provided by the Borough, the commitment to maintain the present staff, and the Board's testimony that the budgeted funds in its proposed budget are necessary to maintain the staff, the Commissioner orders the restoration of \$70,000.

11-402-100-800 School Athletics - Other Objects \$7,180

The Borough bases this reduction on what it states are minor expenditures in 1993-94. The Board states that these funds are used for co-curricular activities, various dues, and costs for officials associated with school activities. It should be noted that fees for officials should be recorded in 11-402-100-500, not 11-402-100-800. It is also noteworthy that neither party presented any specific detail as justification for the position. Based on the fact that the reduction still provides funds for this line item and

that some of the needs cited by the Board are not appropriate for this line item, the Commissioner sustains the reduction of \$7,180.

11-403-100-100, 600, 800 Latch Key \$34,814

The Borough totally removed this account from the budget based on the fact that there were no expenditures during 1993-94. The Board states that the program was implemented because of community request and need. It states that a portion of the program could be self-sustaining but a total cut is unwarranted. Although there is strong justification for "latch key" programs in our current societal framework, the provision of such a program is not essential to a thorough and efficient education. The Commissioner sustains the reduction of \$34,814.

11-217-100-101 Supplementary Inst. - Salaries \$97,143

The Borough totally removed the salaries for this account based on the fact that there were no expenditures in 1993-94. The Board states that the discontinuance of its summer school program necessitates the provision of adequate supplementary services to its student body. Again, neither party presents any detailed documentation for its position. However, full educational services, including supplementary instruction, are required for the provision of a thorough and efficient education. The Commissioner orders the restoration of \$97,143.

11-000-290-250 Unemployment Compensation \$26,695

The Borough states that the amount certified after the reduction provides sufficient funds for the district. The Board states that a reduction in force, being utilized by the Board, would generate a greater demand for unemployment benefits. The Borough's position provides no detail, but the Board's position lacks

credibility regarding any reduction in staff. The supporting documentation submitted with the budget statement lists the number of budgeted positions in 1993-94 and any increases or decreases reflected in the 1994-95 budget. There are no changes, increases or decreases, listed for 1994-95. The Board also, in the budget statement, estimates an increasing student enrollment which would not indicate the necessity for a reduction in staff. Based on the information presented, the Commissioner sustains the reduction of \$26,695.

11-402-100-520 School Athletics - Insurance \$20,000

The Borough states that the amount certified after the reduction provides for "adequate" insurance for the limited activities in the budget. The Board states that most of this line item is used to purchase insurance for athletic teams and that the entire area of insurance was underbudgeted in 1993-94. Since it is essential for a Board to have sufficient insurance for all athletic teams, and, since the Borough did not specify the amount it considered to be adequate, the Commissioner accepts the testimony of the Board and orders the restoration of \$20,000.

11-230-100-101 Basic Skills - Salaries \$98,194

The Borough states that the reduction does provide for an increase in the budget according to the expenses incurred in 1993-94. The Board states that this "account" cannot be completely justified but is necessary for the overall budget. Again, funds cannot be restored to a line item to allow transfer to other line items. The Commissioner, therefore, sustains the reduction of \$98,194.

Thus, for the reasons set forth above, the Commissioner determines to restore \$456,516 and sustains \$493,484 of the reduction in the General Fund tax levy appealed herein, as summarized by the chart below:

<u>Account Number</u>	<u>Title</u>	<u>Sustained</u>	<u>Restored</u>
11-000-290-290	Other Employee Benefits	\$- 0 -	\$120,429
11-000-100-568	Tuition-State Facilities	- 0 -	97,940
11-000-270-890	Transportation - Misc.	102,816	- 0 -
11-000-240-103	Salaries - Principals/Asst.	- 0 -	51,004
11-000-260-890	Operations and Maintenance - Miscellaneous	44,430	
11-000-222-104, 105, 110	Ed. Media - Salaries	- 0 -	70,000
11-000-222-300	Ed. Media - Purchase Prof. Services	60,000	- 0 -
11-230-100-800	Basic Skills - Other Objects	63,230	- 0 -
11-402-100-800	School Athletics - Other Objects	7,180	- 0 -
11-401-100-610	School Spons. Activities - Supplies	56,125	- 0 -
11-403-100-100, 600, 800	Latch Key	34,814	- 0 -
11-217-100-101	Supplementary Inst. - Salaries	- 0 -	97,143
11-000-290-250	Unemployment Compensation	26,695	- 0 -
11-402-100-520	School Athletics - Insurance		20,000
11-230-100-101	Basic Skills - Salaries	<u>98,194</u>	<u>- 0 -</u>
	TOTALS	\$493,484	\$456,516

In addition, by letter dated December 16, 1994, the Commissioner notified the parties that he intended to take official notice of the 1993-94 year-end audit as it relates to the amount of anticipated undesignated surplus. The Commissioner's review has confirmed the Board's position that the district has no available surplus.

Accordingly, the Union County Board of Taxation is directed to make the necessary adjustments as set forth below to reflect a total of \$14,856,205 to be raised in tax levy for General Fund purposes by the Borough of Roselle for the 1994-95 school year.


Tax Levy Certified By Township
Restored by Commissioner

General Fund

\$14,399,689
456,516

TOTAL \$14,856,205

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

JANUARY 17, 1995

DATE OF MAILING - JANUARY 17, 1995

23-95.

BOARD OF EDUCATION OF THE BOROUGH :
OF RED BANK,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH
OF RED BANK, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of \$284,705 made by governing body following voter rejection of proposed budget on April 19, 1994.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore \$154,689, but directed that this amount be funded by appropriation from surplus.

JANUARY 17, 1995

BOARD OF EDUCATION OF THE BOROUGH :
OF RED BANK, :

PETITIONER, :

V. :

MAYOR AND COUNCIL OF THE BOROUGH :
OF RED BANK, MONMOUTH COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

For Petitioner, Malachi J. Kenney, Esq. (Kenney, Gross,
McDonough & Stevens)

For Respondent, Richard T. O'Connor, Esq.

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed on June 3, 1994, by the Board of Education of the Borough of Red Bank (Board) seeking restoration of a reduction in the General Fund tax levy in the amount of \$284,705 which was imposed by the Mayor and Council of the Borough of Red Bank (Borough) after defeat of the budget by the voters of the district on April 19, 1994. As a result of these reductions, the amounts in dispute are summarized below:

<u>Proposed Tax Levy Adopted By Board of Education</u>	<u>Amount of Tax Levy Certified by Governing Body</u>
\$7,078,779	\$6,744,074
<u>Amount of Reduction by Governing Body</u>	<u>Amount of Reduction in Dispute Before Commissioner</u>
\$334,705	\$284,705

On June 16, 1994, the Borough filed its Answer to the Petition of Appeal pursuant to the provisions of N.J.A.C. 6:24-7.6

and 7.7. On July 26, 1994, the Board filed its written submission in support of the Petition of Appeal and the Borough filed its position statement on August 16, 1994. Rebuttals were filed on August 23 and August 26 by the Board and Borough, respectively. The Borough filed a final affidavit on September 22, whereupon the record was closed.

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction is imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

In the instant matter, the Borough, upon defeat of the 1994-95 budget by the electorate, did confer with the Board as required by N.J.S.A. 18A:22-37 and established a General Fund tax

levy to be used for school purposes. The aforesaid General Fund tax levy was established by imposing the following line item reductions.

<u>Account</u>	<u>Description</u>	<u>Amount</u>
11-000-218-104	Other Support Services for Students	\$39,149

Rationale: Eliminate Substance Awareness Coordinator. Similar referral services can be provided by Municipal Drug and Alcohol Alliance Program at no cost to school system. D.A.R.E. program to continue through municipal police department.

<u>Account</u>	<u>Description</u>	<u>Amount</u>
11-213-100-101	Instruction Grades 1-5	\$134,980

Rationale: 1. Eliminate In-School Suspension Program in primary school (one staff position). Central Administration Personnel to assume discipline services, i.e. - Principal, Student Assistance Advisor.

2. Reduce regular teaching staff by two. One in Grade 4, one in Grade 5. Class size remains under 25. Current services withdrawing students from classroom results in teachers conducting classes of lower totals than enrollment figures imply.

<u>Account</u>	<u>Description</u>	<u>Amount</u>
11-213-100-101	Resource Center Salaries	\$ 34,016

Rationale: Eliminate one resource room in Middle School. Maintain a level of one resource center at each grade level.

<u>Account</u>	<u>Description</u>	<u>Amount</u>
11-000-219-104	Child Study Prof. Salaries	\$ 28,560

Rationale: Eliminate part-time psychologist. Duties can be transferred to Child Study Director.

<u>Account</u>	<u>Description</u>	<u>Amount</u>
11-000-290-290	Employee	\$ 48,000
11-000-290-250	Benefits	
11-000-290-241		
11-000-290-220		

Rationale: Benefits for six staff positions.

<u>Account</u>	<u>Description</u>	<u>Amount</u>
	Budget Fund Balance	Increase by \$50,000 to a total surplus appropriation of \$138,767

Rationale: The advertised budget retains \$552,009 as unappropriated surplus. This is excessive for the financial exposure of the Board of Education and this adjustment would appropriate \$50,000 from this surplus. The remaining unappropriated surplus would be \$502,009.

COMMISSIONER'S DETERMINATION

Initially, it is to be noted that the Board concedes the additional appropriation from surplus of \$50,000 and it is, thus, not a part of the reductions in dispute in this matter. The arguments of the parties as contained in their filings and the Commissioner's determination account by account are set forth below:

<u>Account</u>		<u>Reduction</u>
11-000-218-104	Substance Awareness Counselor	\$39,149

The Borough argues that this position, which was established in recent years as a result of a grant and now must be locally financed, can be eliminated with the functions of addressing drug and alcohol problems being assured through the Family Life curriculum, guidance counselors, the school nurse, school social worker and psychologist. The Borough offers the additional services of the municipality's D.A.R.E. Program and the Drug and Alcohol Alliance Community Services Coordinator without charge.

The Board contends that in order to receive the grant establishing this position, it conducted a survey of drug and alcohol use by students. It reports the results revealed a pattern of drug and alcohol use by pupils at very early ages. (See Exhibit Q in Superintendent's Certification.) In rebuttal to the offer of municipal services, the Board defines the duties of the Substance Awareness Coordinator (SAC) in Exhibit R of the Superintendent's Certification and points out that the SAC conducted 491 individual counseling sessions, 13 initial assessments of students, 67 crisis intervention counseling sessions, 4 suicide assessments in addition to staff training sessions and family counseling sessions. As for the D.A.R.E. Program and the Municipal Drug and Alcohol Alliance services offered by the Borough, the Board contends that while helpful, these organizations are not equipped to provide the full-time services offered by the SAC.

The Commissioner, after consideration of the respective positions of the parties, finds and determines that the Board has successfully demonstrated the need for its substance awareness counselor and that, given the pernicious and destructive impact that drug and alcohol abuse have upon the children of our society, the providing of services directed toward meeting the needs of these children is necessary for the provision of a thorough and efficient education. The Commissioner directs the restoration of the \$39,149 for this position. (See N.J.S.A. 18A:7A-5(e) and N.J.A.C. 6:29-6.3.)

<u>Account</u>	<u>Reduction</u>
11-000-219-104 School Psychologist	\$28,560

The Borough argues for the elimination of a part-time psychologist, contending such elimination does not violate any

statutory requirement since the Board already employs a Director of Child Study Services who is a certified school psychologist and who could assume the duties of the part-time psychologist as a member of the mandated Child Study Team. It likewise contends that the other duties of the part-time psychologist can be assumed by other members of the Child Study Team. (See Borough Position Statement, at p. 14.)

The Board points out that statute (N.J.S.A. 18A:46-1 et seq.) and regulation (N.J.A.C. 6:28-1 et seq.) require the services of a school psychologist as part of the Child Study Team structure. The Board contends that the part-time psychologist has a case load of 42 pupils for whom she provides counseling, conducts parent conferences, reviews progress and provides support services. (See Exhibit B of Superintendent's Certification.) It is the Board's contention that the Director of Child Study Services cannot assume the tasks of the part-time psychologist and at the same time perform the duties required of her in a job description including the supervision and evaluation of 13 staff members and the Child Study Team. (See Board's Position Statement at pp. 21-23 and Exhibit C of Superintendent's Certification.)

Further, the Board argues that it has recently negotiated a collective bargaining agreement which reduces the Director's position to a 10-month position, thereby adding to the task of that individual by requiring her to carry out designated duties over a lesser time span.

The Commissioner, after careful review of the arguments set forth by the parties, finds that the services of the part-time psychologist are required by the district in order to provide the programs and supportive services mandated by N.J.S.A. 18A:7A-5(e).

In so doing, the Commissioner notes that the number of staff necessary to provide such services varies from district to district, provided the minimal services of a Child Study Team are available. In the instant matter, despite the relatively small size of the district, the Commissioner is convinced that the case load of the part-time psychologist and the overall volume of classified students justify the continuance of this position and prevent the Director of Special Services from both carrying out the duties of supervision of the total program and assuming the role of the psychologist for the Child Study Team. Therefore, the Commissioner directs the restoration of the \$28,560 for the position of part-time psychologist.

<u>Account</u>		<u>Reduction</u>
11-213-100-101	Teacher/In-School Suspension Program	\$54,980

The Borough argues that in-school suspension in the primary grades is damaging to pupils and fails to address their needs. The Borough contends that removal from class results in isolating children from the classroom, reinforces poor behavior and causes children to fall behind in their studies.

The Borough argues that most behavioral problems should be handled in the classroom with seriously disruptive children being handled by the Principal and Student Assistant Advisor. It further contends that despite the existence of the in-school suspension program for several years, it does not seem to have had a positive effect on either student behavior or the learning environment as reflected in the poor test results achieved by Red Bank pupils.

The Board asserts that it has adopted a "prevention of failure" strategy aimed at children in the primary school. This

program, it asserts, is in keeping with its overall strategy to provide additional educational support wherever required. The Board contends that this program is consistent with N.J.S.A. 18A:7A-5(c), (d) and (e) by providing a learning environment conducive to education and teaching self-governance and responsibility. This, the Board asserts, is accomplished by disciplining the child while allowing that child to continue his/her academic progress.

The Board points out that the in-school suspension program consists of two aspects, a time-out room for minor problems and in-school suspension for more serious infractions. It notes that in-school suspension is not a substitute for classroom discipline which is the basic mode of applying discipline. (See Board's Position Paper, at pp. 25 and 26 for fuller description.)

The Board points out that in 1992-93 and 1993-94 there were approximately 1,600 instances where children were sent to the holding room and over 100 instances of in-school suspension. (See Superintendent's Certification Exhibit H, paragraph 42.)

Finally, the Board contends that assigning an acting-out student to out-of-school suspension sends a message that school is not important and that by misbehavior one gets a free holiday. This, argues the Board, is clearly less desirable than in-school suspension, which combines disciplinary action with continued instruction.

The Commissioner has carefully considered the arguments of the parties, as well as those services required to provide a thorough and efficient system of education. In light of such consideration, the Commissioner concludes that a thorough and efficient system of education requires the provision of support

services to enhance the student's ability to profit from education being offered. Surely, disruptive students coming from environments where little parental discipline takes place can profit from a program that provides structure and continuance of educational services.

As to the Borough's assertion that the existence of such program has had no effect on improved behavior or test scores, the Commissioner finds such judgment to be premature and unsubstantiated since no study has been conducted on those children who have gone through the program. It appears that the Borough's perception is based upon a continued high level of referral, but does not consider whether there is or is not a high rate of recidivism.

Consequently, the Commissioner directs the restoration of \$54,980 for the position of in-school suspension teacher.

<u>Account</u>	<u>Reduction</u>
11-213-100-101 Classroom Teachers Grades 1-5	\$80,000

The Borough calls for the elimination of two teaching positions budgeted by the Board, namely one fourth grade teacher and one fifth grade teacher. The Borough points out that the Board projects 93 students for grade 5 and 65 students for grade 4. With the reductions imposed, there will be four teachers rather than five at grade 5, and three teachers rather than four at grade 4.

The Borough disputes the Board's contention of increasing school population arguing instead that the Borough's population is stable.

The Borough seeks to counter the Board's position that a high level of disadvantaged Latino and African-American students (70%) and a 70% free lunch population require maintenance of small

classes by pointing out the low level of achievement of pupils in the district's schools, as well as at Red Bank Regional High School, and the large numbers of parents who chose to send their children to private and parochial schools.

The Borough asserts that, despite a favorable pupil-to-teacher ratio and high per-pupil expenditures, the district's pupils do not fare well educationally.

The Board contends that it has identified the fourth grade as a period of time during which standardized test scores for pupils begin to drop off and, therefore, a grade level where additional instruction is necessary. The Board asserts it has developed a comprehensive plan for more intensive instruction at the fourth grade level to remediate the problem of declining test scores.

Finally, the Board asserts that it has the managerial authority to staff the schools in the manner it determines necessary to provide a thorough and efficient education.

In rendering a determination relative to this line item, the Commissioner notes that the Board in its final summation has provided him with a copy of the actual enrollments as of September 16, 1994, at grades 4 and 5, as opposed to projected enrollments as contained in earlier documents. (See Affidavit of September 21, 1994.) This Board document points out an actual enrollment of 63 at grade 4 (-2) and 84 at grade 5 (-9). This would result in an average class size of 21 at grade 5 if there were to be four teachers as proposed by the Borough, and an average class size of 21 at grade 4 with three teachers if the reduction were to stand.

Based upon an average class size of 21, the Commissioner concludes that the Board has not successfully demonstrated that the

elimination of the two teaching positions contemplated by it at grades 4 and 5 would prevent the Board from providing these pupils with a thorough and efficient system of education. The Commissioner does not agree that a board has the unrestricted managerial authority to staff its schools in the manner it determines when its budget has been defeated. Under such circumstances, its authority is strictly limited to demonstrating that the staffing it contemplates is necessary to provide a thorough and efficient education, which it has not done in this instance. Consequently, the \$80,000 reduction in this account is sustained.

<u>Account</u>	<u>Reduction</u>
11-213-100-101 Resource Room Teacher Middle School	\$34,016

The Borough points out that the district employs five resource room teachers for approximately 50 students at its middle school. It contends that appropriate scheduling could accommodate these students over 24 periods available each day with four teachers rather than the current five.

The Borough contends that four teachers could provide 120 classes per week, and since the documentation provided to it establishes that very few of the pupils are taking all their subjects of Language Arts, Reading and Math, the needs of the district could be met with one fewer teacher.

The Board points out that N.J.S.A. 6:28-4.3(d) prescribes the number of students who can be instructed by teachers in a resource room at a given time. Additionally, Individual Educational Plans (IEPs) require that resource room teachers provide instruction to pupils in regular classrooms. Because of these special

circumstances, it is not possible to divide the number of pupils into the number of classroom periods available in a given day. (See Superintendent's Certification, at pp. 10-12.)

Based upon the arguments presented by the parties and the evidence documented by the Board, the Commissioner determines that the fifth resource room teacher is not essential for the provision of a thorough and efficient education within the requirements of State law and regulation. First, there is some confusion as to whether the number of students served is 58 which would result in a teacher-pupil ratio of 1:11.6 or 50 which would result in a ratio of 1:10. Both, however, are below the state average for resource centers of 1:13.5. Second, the Board has presented no evidence to indicate that the scheduled pupils have extraordinary needs as to require 1:1 instruction. Finally, the Commissioner concurs with the Borough that four teachers could provide the services for these students given certain scheduling changes. These changes, for example, may include creating departmentalized programs and using the NI class for more seriously disabled pupils or converting it to a resource center. Moreover, Department of Education regulations permit larger class size in most of the grades at the middle school level as compared to that permitted in elementary grades.

The Commissioner concludes that the Board has not successfully demonstrated that the elimination of the position would prevent the Board from providing the students with a thorough and efficient system of education. Consequently, the \$34,016 reduction in this account is sustained.

<u>Account</u>		<u>Reduction</u>
11-000-290-290	Employee Benefits	\$48,000
11-000-290-250		
11-000-290-241		
11-000-290-220		

The employee benefits reductions are predicated upon the reduction of six staff positions imposed by the Borough. Inasmuch as the Commissioner has restored four of the six positions at issue in this matter, he directs restoration of \$32,000 and sustains \$16,000 in reductions.

Recapitulation

<u>Account</u>		<u>Sustained</u>	<u>Restored</u>
11-000-218-104	Substance Awareness Counselor		\$ 39,149
11-000-219-104	School Psychologist		28,560
11-213-100-101	In-School Suspension Teacher		54,980
11-213-100-101	Teachers/Grades 4&5	\$80,000	
11-213-100-101	Resource Room Teacher	34,016	
11-000-290-290	Employee Benefits	16,000	32,000
11-000-290-250			
11-000-290-241			
11-000-290-220			
	TOTALS	\$130,016	\$154,689

After reviewing the within appeal based upon the record and circumstances known to, or considered by, the governing body at the time it acted to reduce the budget which is the subject of this appeal, the Commissioner, on December 16, 1994, notified the parties that he intended to take official notice of the Board's 1993-94 year-end audit. The Commissioner reviewed the audit for the purpose of identifying whether the Board underestimated in its 1994-95 budget the amount of anticipated undesignated surplus, in the belief that it would be an injustice to the taxpayers not to order appropriation from surplus where possible.


Upon such review, the Commissioner finds and determines that \$154,689 of the district's undesignated surplus of \$458,873 can be used to fund the restorations approved herein as necessary for a thorough and efficient system of education in the district. The Commissioner specifically rejects the Board's contention, in response to notification on use of the audit, that transfers of \$30,700 and \$23,576 for change orders relating to roofing and heating projects and \$4,018 for environmental testing have reduced the audited surplus so as to preclude reallocation, as these items can be, and should have been, planned for in the district's budgeting and bonding processes without resort to surplus. Moreover, while the Commissioner accepts the expenditure of \$41,808 for unanticipated special education tuition/transportation and appropriation of \$23,000 to compensate for lost special education income as appropriate uses of surplus, the amount of funds remaining after reallocation (\$304,184) is sufficient for the needs identified and consistent with prudent fiscal planning for other needs of this type.

In light of the foregoing, the Commissioner directs that \$154,689 in reductions are to be restored to the 1994-95 school budget for the Borough of Red Bank, but that these are to be funded by appropriation from surplus so that the total tax General Fund tax levy for the 1994-95 school year shall stand as certified by the Borough.

IT IS SO ORDERED.

JANUARY 17, 1995

DATE OF MAILING - JANUARY 17, 1995


COMMISSIONER OF EDUCATION

DHP #415-94
SB # 23-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF JEROME A. TAYLOR. : DECISION

Decided by the Deputy Commissioner of Education, February 7, 1995

For the Petitioner-Appellant, Jerome A. Taylor, pro se

For the Respondent-Respondent, Geraldine Callahan, Deputy Attorney
General (Deborah T. Poritz, Attorney General of New Jersey)

On February 7, 1995, the Deputy Commissioner of Education affirmed the determination of the Department's Office of Criminal History Review disqualifying Jerome A. Taylor (hereinafter "petitioner") from school employment as a security guard following a criminal history check conducted pursuant to N.J.S.A. 18A:6-7.1.¹ The Deputy Commissioner determined that petitioner had failed to demonstrate his rehabilitation by clear and convincing evidence.

On March 16, 1995, the petitioner filed a notice of appeal to the State

¹ We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws..." N.J.S.A. 18A:4-34.

SEPT. 6, 1995

Board of Education.² On April 19, upon review of the circumstances surrounding that filing, our Legal Committee determined that the appeal had been timely filed, and petitioner was notified by letter dated April 26 from the Counsel to the State Board that his brief in support of the appeal was due by May 17. Petitioner, however, failed to file a brief by that date. By letter dated May 30, petitioner was notified of his failure to file a brief in support of the appeal and advised that this matter was being referred to our Legal Committee for consideration of his failure to perfect the appeal. Given his pro se status, petitioner was again notified in a letter dated July 10 of his failure to file. He was thereupon given until July 28 to file a written explanation as to why he should not be disqualified from school employment. Petitioner has still failed to file an appeal brief or written explanation. Nor has he at any time requested an extension of time for such filing or provided any explanation for the delay.

The State Board of Education therefore dismisses the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a).

September 6, 1995

Date of mailing _____

SEP 08 1995

² The Office of Criminal History Review was apparently not represented in the proceedings before the Deputy Commissioner. Upon the filing of the appeal, Counsel to the State Board notified the Attorney General's Office that an appeal had been taken in the matter, and transmitted a copy of the record. A Deputy Attorney General was then assigned to appear as attorney of record in the appeal.

DHP #415-94
SB # 23-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF JEROME A. TAYLOR. : DECISION
_____ :

Decided by the Deputy Commissioner of Education, February 7, 1995

Decided by the State Board of Education, September 6, 1995

For the Petitioner-Appellant, Jerome A. Taylor, pro se

For the Respondent-Respondent, Geraldine Callahan, Deputy Attorney
General (Deborah T. Poritz, Attorney General of New Jersey)

On September 6, 1995, the State Board of Education dismissed petitioner's appeal in this matter from a decision of the Deputy Commissioner of Education upholding his disqualification from school employment following a criminal history check conducted pursuant to N.J.S.A. 18A:6-7.1. That decision was based on petitioner's failure to perfect his appeal by filing a brief in support of the appeal. N.J.A.C. 6:2-1.12(a). Petitioner has now filed a motion for reconsideration of that decision, alleging that his address had changed and that, as a result, he had not received our letters.

After a careful review of the record, we deny petitioner's motion. In his notice of appeal to the State Board dated March 16, 1995, petitioner expressly provided his new

DEC. 6, 1995

address on Park Boulevard in Camden, which was then used on all correspondence to him during the pendency of that appeal.¹ Although petitioner contends that his address had changed, he does not provide a new address or offer any other details. In addition, we note that the return address written on the envelope petitioner used to file his instant motion for reconsideration is the same Park Boulevard address provided in his notice of appeal. Moreover, when the Counsel to the State Board wrote to petitioner at his Park Boulevard address on September 19, 1995 to advise him of the necessity to file written argument on his motion, petitioner responded by letter dated September 26, in which he expressly acknowledged receipt of the September 19 letter.

Consequently, we find no merit in petitioner's contention, and we deny his motion for reconsideration.

December 6, 1995

Date of mailing DEC 08 1995

¹ We note that our Legal Committee had determined that petitioner's notice of appeal, although filed more than 30 days after the filing date of the Commissioner's decision, had been filed in a timely manner in that the Deputy Commissioner's decision had been mailed to his former address.

24-95

IN THE MATTER OF THE TENURE :
HEARING OF NANCY HYNES, SCHOOL :
DISTRICT OF THE CITY OF : COMMISSIONER OF EDUCATION
ELIZABETH, UNION COUNTY. :
DECISION

JANUARY 17, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 0882-94

AGENCY DKT. NO. 9-1/94

**SCHOOL DISTRICT OF THE CITY OF
ELIZABETH, UNION COUNTY,**

Petitioner,

v.

NANCY HYNES,

Respondent.

Vito A. Gagliardi, Jr., Esq., for petitioner
(Riker, Danzig, Scheerer, Hyland & Perretti, attorneys)

Arnold S. Cohen, Esq., for respondent
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: November 21, 1994

Decided: November 28, 1994

BEFORE: **ARNOLD SAMUELS, ALJ:**

On January 19, 1993 the petitioner, school district of the City of Elizabeth, Union County, filed a certificate of determination and written charges against the respondent, pursuant to *N.J.S.A. 18A:6-11* and *N.J.A.C. 6:24-5.1 et seq.*, seeking her dismissal from her tenured position, or reduction in salary, because of alleged unbecoming conduct, insubordination and mental incapacity. The respondent filed an answer with the Commissioner of Education on January 24, 1994.

On January 31, 1994 the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case, pursuant to *N.J.S.A. 52:14F-1 to 13*.

A prehearing conference was held on May 26, 1994, and a prehearing order was entered, defining and limiting the issues to be decided, fixing hearing dates, providing for discovery and regulating other procedural aspects of the forthcoming hearing, which was scheduled for six days in November 1994.

In October 1994 the petitioner filed a motion to compel the respondent to submit to a psychiatric examination pursuant to *N.J.S.A. 18A:16-2*. Papers in opposition to the motion were filed by the respondent and oral argument was scheduled. Additional hearing dates were also scheduled in December 1994.

The parties appeared on November 9, 1994 to begin the hearing, deal with the pending motion and discuss other procedural matters. The parties and counsel also conferred on that day for purposes of settlement, and an agreement was reached.

The settlement terms were placed on the record, and the respondent testified, under oath, that she voluntarily and knowingly accepted and agreed to the terms. In addition, the respondent stated that she entered into the agreement with full understanding of her rights, after being advised by counsel of the Commissioner's duty to refer tenure determinations to the State Board of Examiners for possible revocation of certificate, pursuant to *N.J.A.C. 6:11-3.6*.

A written agreement, confirming the settlement in detail, reciting the testimony given by the respondent at the time she accepted the agreement and confirming all of the foregoing, was filed in the OAL on November 21, 1994. A copy of the stipulation of settlement, signed by the respondent and by counsel for both parties, is attached hereto and made a part hereof. In addition, a resolution of the City of Elizabeth Board of Education accepting the settlement, with the understanding that it is subject to the

approval of the Commissioner of Education, is also attached hereto and made a part hereof.

I have reviewed the record and the settlement terms, and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.
3. The agreement conforms with the settlement standards set forth in *In re Cardonick*, decided by the Commissioner of Education on April 7, 1982, affirmed by the State Board of Education on April 6, 1993, 1990 S.L.D. 842, 846.

It is **CONCLUDED** that the respondent entered into the agreement with full understanding of her rights, and the agreement is consistent with the public interest. In addition, the respondent was advised of the Commissioner's duty, pursuant to *N.J.A.C. 6:11-3.6*, to refer tenure determinations to the State Board of Examiners for possible revocation of certificate.

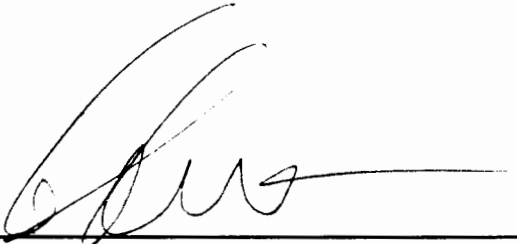
I further **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved, subject to acceptance by the Commissioner of Education. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.


Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 29, 1994
DATE



ARNOLD SAMUELS, ALJ

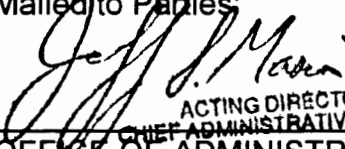
Nov. 30, 1994
DATE

Receipt Acknowledged:


DEPARTMENT OF EDUCATION

DEC 14 1994

DATE

Mailed to Parties:


**ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**
OFFICE OF ADMINISTRATIVE LAW

al

BALK, OXFELD, MANDELL AND COHEN
50 COMMERCE STREET
NEWARK, NEW JERSEY 07102
(201) 642-0161
Attorneys for Respondent

Filed
11/21/94
EAL

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY

IN THE MATTER OF THE TENURE
HEARING OF:

NANCY HYNES, SCHOOL DISTRICT
OF THE CITY OF ELIZABETH,
UNION COUNTY,

OAL DOCKET NO: EDU-00882-94N
AGENCY DOCKET NO: 9-1/94

STIPULATION OF SETTLEMENT

The parties to the above-matter have agreed to an amicable resolution of this litigation. The resolution is based upon agreement as to the following:

1. The respondent, Nancy Hynes, is a tenured teacher employed by the Petitioner, School District of the City of Elizabeth, Union County ("Elizabeth Board of Education").

2. In December 1993, Linda G. King, Secretary, School Business Administrator, filed tenured charges against the respondent with the petitioner, which charges were subsequently certified to the Commissioner of Education in January 1994. The charges consisted of allegations that respondent has engaged in corporal punishment and/or inappropriate physical intervention against the students under her care, has been insubordinate to the administration of the Alexander Hamilton Middle School, was insubordinate in failing to complete a psychological examination, which had been ordered pursuant to N.J.S.A. 18A:16-2, and is suffering from mental incapacity, which represents a danger to her own health and safety and to the health and safety of the students with which she comes

in contact.

3. The respondent admits that on October 20, 1992 she had an incident with a student. On that date, Ms. Hynes states that a student, L.W., was causing a disruption in her class. The school Vice-Principal, James Wilson, entered the class and tried to calm the student. At the time that the Vice-Principal entered the room, all the students were sitting and listening to the lesson aside from L.W., who was standing and yelling at her desk. After Mr. Wilson left, L.W. approached Ms. Hynes and pushed her. Ms. Hynes states she did not touch the student. Instead, Ms. Hynes filed a disciplinary report at the main office of school. The student in question came in front of the classroom toward the desk of Ms. Hynes, and approached her from behind the desk when she pushed her. Before approaching Ms. Hynes, the student made a number of threats of bodily harm to Ms. Hynes.

4. On or about November 12, 1992, Ms. Hynes admits that she had a discussion with Vice-Principal, Phyllis Garelick. Ms. Hynes states that she had car problems on November 12, 1992, and also had an appointment immediately after school. She told Ms. Garelick that because of this she could not speak with her. Rather than continue the conversation at a later date, Ms. Garelick continued to talk. When Ms. Hynes calmly told her she would prefer not to speak on that day, Ms. Hynes states that Ms. Garelick lost her temper and yelled at Ms. Hynes. Ms. Hynes never yelled at Ms. Garelick. She admits that she spoke about cultural differences between people. She made no reference to a "black student." Rather, she named a particular student who threw a match at her.

5. Ms. Hynes was ordered by the Elizabeth Board of Education to undergo a complete psychiatric examination pursuant to N.J.S.A. 18A:16-2. Ms. Hynes did report to Dr. Harold Smelson; when he referred her to Dr. Howard Paul for psychological testing, she admits that she declined to fully comply.

6. Ms. Hynes met with Dr. Paul on February 9, 1993, as per the Board's recommendation. When she met with him, she was told that she had to take a psychological test. However, at that point, she had not received Dr. Smelson's report. She said that she would not go for any further testing until she saw Dr. Smelson's report. She left the meeting. When she ultimately received Dr. Smelson's report, it was obvious to Ms. Hynes that Dr. Smelson's report was factually inaccurate and provided no basis for sending her for further psychological evaluation. Dr. Paul told Ms. Hynes that he was going to give her psychological testing pursuant to the request of Dr. Smelson.

7. Ms. Hynes states that she was evaluated by Dr. Harry Murphy, who found that she was in the normal range of moods, that she was not in need of psychological help or psychological testing and that she could function appropriately as a teacher. Based on Dr. Smelson's report, and the statements of Dr. Murphy, she did not go for further testing with Dr. Paul.

8. Based on the hearing of this matter being scheduled for November 21, 22, 23, 30 and December 8 and 22, 1994, and allowing time for the filing of post-hearing briefs, as well as forty-five days each for the decision of the Administrative Law Judge and the

Commissioner of Education, the Respondent would receive her full salary through at least June 30, 1995, if this case proceeded to a hearing.

9. The Respondent understands that the Commissioner of Education has the right to review this settlement, and may accept or reject it. The Respondent understands the Commissioner has the right to refer the decision to the State Board of Examiners, to review whether or not the Respondent's teaching certificate should be revoked.

Based upon the above factual agreement, the parties hereby agree to resolve this matter on the following basis:

1. Nancy Hynes hereby resigns her position of employment as a teacher with the Elizabeth Board of Education, effective June 30, 1995;

2. The Board of Education will withdraw the tenure charges in this matter;

3. The respondent will receive her current rate of pay, with normal deductions (including health and pension), and health benefits through the date of her resignation;

4. Ms. Hynes will receive \$10,000 in back pay, with all normal deductions (including health and pension), which had been withheld pursuant to N.J.S.A. 18A:6-14. Any payment that Ms. Hynes made directly for Washington National Health Insurance coverage will not be deducted;

5. This agreement will be confidential;

6. If the Board is contacted by a potential employer for a

reference, it will offer its standard reference, which includes dates of employment, positions held, and that Ms. Hynes resigned for personal reasons;

7. The Board will remove from Ms. Hynes' personnel file all reference to psychiatric treatment and all medical reports relating to psychiatric treatment;

8. Ms. Hynes' medical record with the Board will be kept confidential pursuant to N.J.S.A. 18A et seq;

9. The terms of this agreement will not be presented in the public portion of any Board meeting;

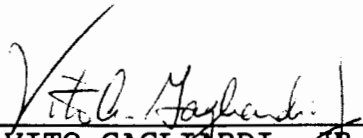
10. Other than the facts set forth in the facts presented above, this agreement shall not constitute an admission or denial by either party of any of the remaining factual allegations of the tenure charges against the Respondent; nor shall this settlement have any precedential value with regard to any of the remaining allegations;

11. The terms of this agreement shall not be effective until such time as the Board of Education has officially voted on acceptance of this agreement. Counsel for the Board of Education shall immediately communicate to the Administrative Law Judge in writing when the Board of Education has either approved or denied approval of this agreement; and

12. The terms of this agreement are expressly conditioned upon the review and approval of the Commissioner of Education. In the event the approval of the agency head is not given, the terms of this agreement shall be void and have no force and effect

whatsoever.

DATED: 11-17-94




VITO GAGLIARDI, JR.



ARNOLD S. COHEN

DATED: 11/15/94



NANCY HYNES

DATED: 11/15/94

BOARD OF EDUCATION
Elizabeth, New Jersey

RESOLUTION
STIPULATION OF SETTLEMENT

WHEREAS, this Board is currently the petitioner in a matter captioned In The Matter of The Tenure Hearing of N.H., OAL Docket No. EDU-882-94N, Agency Docket No. 9-1/94; and

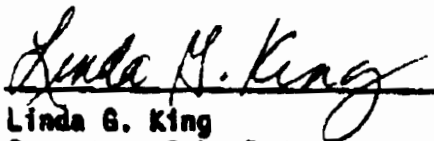
WHEREAS, through counsel, the parties to this action have reached a proposed settlement; and

WHEREAS, the Board understands that this proposed settlement is subject to review by the Administrative Law Judge and contingent upon the approval of the Commissioner of Education,

IT IS HEREBY RESOLVED THAT this matter be and hereby is amicably resolved pursuant to the Stipulation of Settlement negotiated by counsel, and may be executed by Board Attorney on behalf of the Board.

Elizabeth, New Jersey
November 16, 1994
681-8

TRUE COPY PRESENTED AND ACCEPTED AT THE BOARD MEETING OF NOVEMBER 16, 1994.



Linda G. King
Secretary-School Business Administrator

BOARD OF EDUCATION

November 16, 1994

ROLL CALL	AYE	NAY	ABSTAIN
MR. ALVA	/		
MR. BURKETT	/		
MS. COLE	/		
MR. ESTRADA	/		
MRS. KOLZAPPEL 2	/		
MRS. POCK 1	/		
MRS. SAN PEDRO	/		
MR. SULLIVAN	/		
MR. VENERO	/		

IN THE MATTER OF THE TENURE :
HEARING OF NANCY HYNES, SCHOOL :
DISTRICT OF THE CITY OF : COMMISSIONER OF EDUCATION
ELIZABETH, UNION COUNTY. :
: DECISION
: _____ :

The record and the initial decision rendered by the Office of Administrative Law in the form of a joint stipulation of settlement have been reviewed.

After a careful and independent review of the full record of this matter and the terms of the proposed settlement agreement, the Commissioner is compelled to reject such agreement as it is currently structured as he cannot be satisfied by the present record that the proposed settlement meets the Cardonick standards for settlement of tenure matters (In re Cardonick, decided by the Commissioner April 7, 1982, affirmed State Board of Education April 6, 1983, 1990 S.L.D. 842, 846).

Initially, although the proposed agreement provides that respondent agrees to resign her teaching position effective June 30, 1995 (provision #1), it is unclear whether it is contemplated that she resume her instructional duties during this period. Given the serious nature of the charges filed by the Board in this matter (i.e., allegations of corporal punishment and/or inappropriate physical intervention against students), the Commissioner cannot

approve any agreement which may envision respondent's unconditioned return to the classroom.

Additionally, although the parties may agree between themselves to keep the specific terms of a settlement agreement confidential, they cannot seek to bind the Commissioner or, for that matter, any other individual to provision #5 which requires that "[t]his agreement will be confidential." In this connection, the parties must also remember that the Commissioner's decision in this matter is a public record.

Further, it is noted that settlement term #6 specifies:

If the Board is contacted by a potential employer for a reference, it will offer its standard reference, which includes dates of employment, positions held, and that Ms. Hynes resigned for personal reasons.

While the Board is not specifically required to provide publicly the reasons for separation, it must make such information available upon request, pursuant to Executive Order No. 11 (1974), which states, in pertinent part, that the following information be public:

a. An individual's name, title, position, salary, payroll record, length of service in the instrumentality of government and in the government, date of separation from government service and the reason therefor; and the amount and type of pension he is receiving;

b. Data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but in no event shall detailed medical or psychological information be released***.

Moreover, the Commissioner cannot sanction terms in a settlement that would infringe in any way on the right of the Board to be fully forthcoming in responding to any inquiries that might

arise concerning respondent's employment with the Board. See, e.g., John Salsberg v. Board of Education of the Town of Boonton, Morris County, decided by the Commissioner May 11, 1989.

Accordingly, the proposed settlement is rejected for the reasons expressed herein. The Commissioner hereby remands this matter to the Office of Administrative Law for further settlement negotiations consistent with the concerns expressed herein. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to a plenary hearing on the merits.

IT IS SO ORDERED.

JANUARY 17, 1995


ACTING COMMISSIONER OF EDUCATION

DATE OF MAILING - JANUARY 17, 1995

147-95-R
(24-95)

IN THE MATTER OF THE TENURE	:	
HEARING OF NANCY HYNES,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION ON REMAND
ELIZABETH, UNION COUNTY.	:	
_____	:	

MAY 8, 1995



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 0742-95

OAL DKT. NO. EDU 0882-94 (on Remand)

AGENCY DKT. NO. 9-1/94

**SCHOOL DISTRICT OF THE CITY
OF ELIZABETH, UNION COUNTY,**

Petitioner,

v.

NANCY HYNES,

Respondent.

Vito A. Gagliardi, Jr., Esq., for petitioner
(Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Arnold S. Cohen, Esq., for respondent
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: March 12, 1995

Decided: March 20, 1995

BEFORE: ARNOLD SAMUELS, ALJ:

This matter involves the settlement of a contested case before the Office of Administrative Law (OAL) that was remanded by the Commissioner of Education in a decision dated January 17, 1995. The relevant details were set forth in the initial decision/settlement, OAL Dkt. No. EDU 882-94, decided November 28, 1994, and in the decision and remand of the Commissioner of Education dated January 17, 1995. Both of the above decisions are incorporated herein by reference. This decision amends the prior disposition of the matter.

The Commissioner's comments in his decision and order of remand dealt with several aspects of the settlement agreement:

First, the Commissioner noted that, although respondent agreed to resign her teaching position effective June 30, 1995, it was unclear whether it was contemplated that she would resume her instructional duties during the period of time prior to that date.

Secondly, although the parties agreed between themselves to keep the terms of the settlement agreement confidential, they did not express recognition of the fact that the Commissioner's decision is a public record.

Third, the agreement provided that if the board is contacted by a potential employer for reference, it would offer its standard reference, including dates of employment, positions held and a statement that the petitioner resign for personal reasons. However, this provision did not note that, while the board is not specifically required to provide the reasons for separations publicly, it must make such information available upon request, pursuant to Executive Order No. 11 (1974). The Commissioner further stated that he could not sanction terms in the settlement that would infringe in any way on the right of the board to be fully forthcoming in responding to any inquiries that might rise concerning respondent's employment with the board.

The agreement was accordingly remanded to the Office of Administrative law, either for revision of the settlement in a manner that would be consistent with his concerns or for plenary hearing on the merits, if such a modification could not be reached.

After consultation by and between counsel, it was decided that a revision of the settlement agreement to reflect the foregoing factors could be accomplished. A revised agreement, signed by the parties, was then filed in the Office of Administrative Law on March 12, 1995. A copy of the revised stipulation of settlement is attached hereto and made a part hereof.

The parties have agreed to settle this matter and have prepared the attached revised stipulation of settlement, indicating the terms of settlement.

I have reviewed the record and the revised terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law. The revised agreement conforms with the *Cardonic* standards and with the concerns of the Commissioner of Education, as set forth in his January 17, 1995 decision.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 20, 1995

DATE

[Signature]

ARNOLD SAMUELS, ALJ

3/29/95

DATE

Receipt Acknowledged:
[Signature]

DEPARTMENT OF EDUCATION

MAR 29 1995

DATE

al

Mailed to Parties:
[Signature]
DEPARTMENT OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW JUDGE

BALK, OXFELD, MANDELL AND COHEN
50 COMMERCE STREET
NEWARK, NEW JERSEY 07102
(201) 642-0161
Attorneys for Respondent

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BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY

IN THE MATTER OF THE TENURE
HEARING OF:

NANCY HYNES, SCHOOL DISTRICT
OF THE CITY OF ELIZABETH,
UNION COUNTY

OAL DOCKET NO: EDU-00742-95N
AGENCY DOCKET NO: 9-1/94

STIPULATION OF SETTLEMENT

The parties to the above-matter have agreed to an amicable resolution of this litigation. The resolution is based upon agreement as to the following:

1. The respondent, Nancy Hynes, is a tenured teacher employed by the Petitioner, School District of the City of Elizabeth, Union County ("Elizabeth Board of Education").

2. In December 1993, Linda G. King, Secretary, School Business Administrator, filed tenured charges against the respondent with the petitioner, which charges were subsequently certified to the Commissioner of Education in January 1994. The charges consisted of allegations that respondent has engaged in corporal punishment and/or inappropriate physical intervention against the students under her care, has been insubordinate to the administration of the Alexander Hamilton Middle School, was insubordinate in failing to complete a psychological examination, which had been ordered pursuant to N.J.S.A. 18A:16-2, and is suffering from mental incapacity, which represents a danger to her own health and safety and to the health and safety of the students which she was in

contact.

3. The respondent admits that on October 20, 1992 she had an incident with a student. On that date, Ms. Hynes states that a student, L.W., was causing a disruption in her class. The school Vice-Principal, James Wilson, entered the class and tried to calm the student. At the time that the Vice-Principal entered the room, all the students were sitting and listening to the lesson aside from L.W., who was standing and yelling at her desk. After Mr. Wilson left, L.W. approached Ms. Hynes and pushed her. Ms. Hynes states that she did not touch the student. Instead, Ms. Hynes filed a disciplinary report at the main office of school. The student in question came in front of the classroom toward the desk of Ms. Hynes, and approached her from behind the desk when she pushed her. Before approaching Ms. Hynes, the student made a number of threats of bodily harm to Ms. Hynes.

4. On or about November 12, 1992, Ms. Hynes admits that she had a discussion with Vice-Principal, Phyllis Garelick. Ms. Hynes states that she had car problems on November 12, 1992, and also had an appointment immediately after school. She told Ms. Garelick that because of this she could not speak with her. Rather than continue the conversation at a later date, Ms. Garelick continued to talk. When Ms. Hynes calmly told her she would prefer not to speak on that day, Ms. Hynes states that Ms. Garelick lost her temper and yelled at Ms. Hynes. Ms. Hynes never yelled at Ms. Garelick. She admits that she spoke about cultural differences between people. She made no reference to a "black student." Rather, she named a

particular student who threw a match at her.

5. Ms. Hynes was ordered by the Elizabeth Board of Education to undergo a complete psychiatric examination pursuant to N.J.S.A. 18A:16-12. Ms. Hynes did report to Dr. Harold Smelson; when he referred her to Dr. Howard Paul for psychological testing, she admits that she declined to fully comply.

6. Ms. Hynes met with Dr. Paul on February 9, 1993, as per the Board's recommendation. When she met with him, she was told that she had to take a psychological test. However, at that point, she had not received Dr. Smelson's report. She said that she would not go for any further testing until she saw Dr. Smelson's report. She left the meeting. When she ultimately received Dr. Smelson's report, it was obvious to Ms. Hynes that Dr. Smelson's report was factually inaccurate and provided no basis for sending her for further psychological evaluation. Dr. Paul told Ms. Hynes that he was going to give her psychological testing pursuant to the request of Dr. Smelson.

7. Ms. Hynes states that she was evaluated by Dr. Harry Murphy, who found that she was in the normal range of moods, that she was not in need of psychological help or psychological testing and that she could function appropriately as a teacher. Based on Dr. Smelson's report, and the statements of Dr. Murphy, she did not go for further testing with Dr. Paul.

8. Based on the hearing of this matter being scheduled for November 21, 22, 23, 30 and December 8 and 22, 1994, and allowing time for the filing of post-hearing brief, as well as forty-five

days each for the decision of the Administrative Law Judge and the Commissioner of Education, the Respondent would receive her full salary through at least June 30, 1995, if this case proceeded to a hearing.

9. The Respondent understands that the Commissioner of Education has the right to review this settlement, and may accept or reject it. The Respondent understands the Commissioner has the right to refer the decision to the State Board of Examiners, to review whether or not the Respondent's teaching certificate should be revoked.

Based upon the above factual agreement, the parties hereby agree to resolve this matter on the following basis:

1. Nancy Hynes hereby resigns her position of employment as a teacher with the Elizabeth Board of Education, effective June 30, 1995, and she will not resume her instructional duties during the period through June 30, 1995;

2. The Board of Education will withdraw the tenure charges in this matter;

3. The respondent will receive her current rate of pay, with normal deductions (including health and pension), and health benefits through the date of her resignation;

4. Ms. Hynes will receive \$10,000 in back pay, with all normal deductions (including health and pension), which had been withheld pursuant to N.J.S.A. 18A:6-14. Any payment that Ms. Hynes made directly for Washington National Health Insurance coverage will not be deducted;

5. Hynes and the Elizabeth Board of Education agree to keep the terms of this settlement confidential. They recognize that the Commissioner's Decision in this matter is a public record.

6. If the Board is contacted by a potential employer for a reference for Ms. Hynes, it will make the following information available upon request, pursuant to Executive Order No. 11 (1974), which states, in pertinent part, that the following information be public:

a. An individual's name, title, position, salary, payroll record, length of service in the instrumentality of government and in the government, date of separation from government service and the reason therefore, and the amount and type of pension he is receiving;

b. Data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but in no event shall detailed medical or psychological information be released.

7. The Board will remove from Ms. Hynes' personnel file all reference to psychiatric treatment and all medical reports relating to psychiatric treatment;

8. Ms. Hynes' medical record with the Board will be kept confidential pursuant to N.J.S.A. 18A et seq.

9. The terms of this agreement will not be presented in the public portion of any Board meeting;

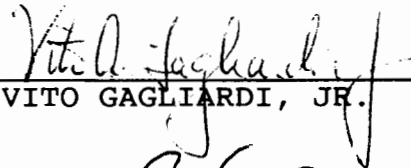
10. Other than the facts set forth in the facts presented above, this agreement shall not constitute an admission or denial by either party of any of the remaining factual allegations of the tenure charges against the Respondent, nor shall this settlement have any precedential value with regard to any of the remaining

allegations;

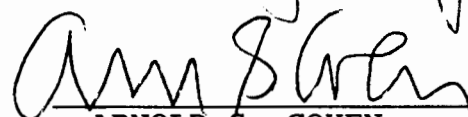
11. The terms of this agreement shall not be effective until such time as the Board of Education has officially voted on acceptance of this agreement; and

12. The terms of this agreement are expressly conditioned upon the review and approval of the Commissioner of Education. In the event the approval of the agency head is not given, the terms of this agreement shall be void and have no force and effect whatsoever.

DATED: 3-10-95




VITO GAGLIARDI, JR.



ARNOLD S. COHEN

DATED: 3/2/95



NANCY HYNES


DATED: 3/2/95

OAL DKT. NO EDU 0742-95 (EDU 0882-94 On Remand)

IN THE MATTER OF THE TENURE :
HEARING OF NANCY HYNES, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION ON REMAND
ELIZABETH, UNION COUNTY. :
_____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

MAY 8, 1995

- 5 -

DATE OF MAILING MAY 9, 1995

DHP #456-94
SB # 24-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOYMENT : STATE BOARD OF EDUCATION
OF STEPHANIE SAMPSON. : DECISION

_____ :

Decided by the Commissioner of Education, January 24, 1995

For the Petitioner-Appellant, Stephanie Sampson, pro se

For the Respondent-Respondent, Arlene G. Lutz, Deputy
Attorney General (Deborah T. Poritz, Attorney General
of New Jersey)

The State Board of Education grants the request of the parties to remand this matter to the Commissioner of Education for a hearing in order to provide the petitioner with an adequate opportunity to establish a record in support of her contention that she has satisfied the statutory standard for rehabilitation.¹ Given the circumstances, we direct that such hearing and a final determination by the Commissioner be rendered on an expedited

¹ We note that the Office of Criminal History Review was apparently not represented in the proceedings before the Deputy Commissioner and was not served with notice of the appeal to the State Board. Upon the filing of the appeal, Counsel to the State Board notified the Attorney General's Office that an appeal had been taken in the matter, and transmitted a copy of the record. A Deputy Attorney General was then assigned to appear as attorney of record in the appeal.

June 5, 1995

basis, and that such determination considers all pertinent circumstances under the factors set forth in N.J.S.A. 18A:6-7.1, including "any evidence of rehabilitation." See Wolffbrandt v. New Jersey State Department of Education, decided by the State Board, July 1, 1992. Petitioner has the burden on remand of establishing her rehabilitation by clear and convincing evidence.

We stress, in addition, that the statute expressly requires consideration of the "date of the offense" (emphasis added), rather than the date of conviction relied upon by the Deputy Commissioner in his decision.

We retain jurisdiction.

July 5, 1995

Date of mailing JUL 07 1995

DHP #440-94
SB # 25-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOYMENT : STATE BOARD OF EDUCATION
OF RALPH MC CULLOUGH. : DECISION
_____ :

Decided by the Deputy Commissioner of Education,
February 7, 1995

For the Petitioner-Appellant, Ralph McCullough, pro se

For the Respondent-Respondent, Pamela B. Katten, Deputy
Attorney General (Deborah T. Poritz, Attorney
General of New Jersey)

The State Board of Education grants the request of the
parties to remand this matter to the Commissioner of Education
for a hearing in order to provide the petitioner with an adequate
opportunity to establish a record in support of his contention
that he has satisfied the statutory standard for
rehabilitation.¹

¹ We note that the Office of Criminal History Review was apparently not represented in the proceedings before the Deputy Commissioner and was not served with notice of the appeal to the State Board. Upon the filing of the appeal, Counsel to the State Board notified the Attorney General's Office that an appeal had been taken in the matter, and transmitted a copy of the record. A Deputy Attorney General was then assigned to appear as attorney of record in the appeal.

July 5, 1995

Based upon our review of the submissions made by petitioner to the Deputy Commissioner, we find that petitioner has shown significant evidence of rehabilitation on that basis alone. Those submissions reveal that petitioner has actively pursued both academic and vocational training since his last arrest in 1987. He received his State-issued GED high school diploma in December 1993 and successfully completed training in microcomputer repair. He also began a full-time program in office automation.² The record indicates no further arrests since 1987. We note, in addition, that petitioner was disqualified from employment as a school custodian, a position which does not include responsibility for the care, supervision or instruction of students. Additional evidence of rehabilitation on remand may include such information as counseling received or the recommendation of persons who have had petitioner under their supervision. See N.J.S.A. 18A:6-7.1(e).

Given the circumstances, we direct that the hearing and a final determination by the Commissioner be rendered on an expedited basis, and that such determination considers all pertinent circumstances under the factors set forth in N.J.S.A. 18A:6-7.1, including "any evidence of rehabilitation." See

² We note that his appeal brief indicates successful completion of that program.

Wolffbrandt v. New Jersey State Department of Education, decided by the State Board, July 1, 1992. Petitioner has the burden on remand of establishing his rehabilitation by clear and convincing evidence.

We retain jurisdiction.

July 5, 1995

Date of mailing JUL 07 1995

(SB) 25-95

DHP #440-94
SB # 25-95
DHP # 24-96

IN THE MATTER OF THE DISQUALIFI- :
CATION FROM SCHOOL EMPLOYMENT : STATE BOARD OF EDUCATION
OF RALPH MC CULLOUGH. : DECISION

Decided by the Deputy Commissioner of Education, February 7, 1995

Remanded by the State Board of Education, July 5, 1995

Decision on remand by the Commissioner of Education, January 18, 1996

For the Petitioner-Appellant, Ralph McCullough, pro se

For the Respondent-Respondent, Pamela B. Katten, Deputy Attorney
General (Deborah T. Poritz, Attorney General of New Jersey)

On July 5, 1995, we remanded this matter to the Commissioner of Education for a hearing in order to provide petitioner, who had been disqualified from employment in the State's schools as a custodian following a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1, with an adequate opportunity to establish a record in support of his contention that he had satisfied the statutory standard for rehabilitation. Based upon our review of the submissions which had been made by petitioner to the Deputy Commissioner, we found that petitioner had shown significant evidence of rehabilitation on that basis alone. We retained jurisdiction.

6/5/96

In accordance with our remand, the Commissioner transmitted this matter to the Office of Administrative Law, where a hearing was held on November 14, 1995. On November 30, 1995, the Administrative Law Judge ("ALJ") rendered an initial decision in which he concluded that petitioner had demonstrated his rehabilitation by clear and convincing evidence. The ALJ characterized petitioner as a "success story" who had made "enormous strides" since his drug-related convictions in 1987.

On January 18, 1996, the Commissioner adopted the ALJ's recommended decision, finding petitioner to be qualified for school employment. Pursuant to our retention of jurisdiction, the Commissioner transmitted the file back to us.

After a review of the record, we are satisfied that the Commissioner fully complied with the terms of our remand. Thus, pursuant to the Commissioner's decision, petitioner is qualified for school employment as a custodian, and we dismiss the appeal.

June 5, 1996

Date of mailing JUN 07 1996

26-95

IN THE MATTER OF THE TENURE :
 HEARING OF PAUL KAISER, BOARD :
 OF EDUCATION OF THE UNION COUNTY :
 REGIONAL HIGH SCHOOL DISTRICT :
 NO. 1, UNION COUNTY. :

COMMISSIONER OF EDUCATION
 DECISION

JANUARY 17, 1995

IN THE MATTER OF THE TENURE :
HEARING OF PAUL KAISER, BOARD :
OF EDUCATION OF THE UNION COUNTY : COMMISSIONER OF EDUCATION
REGIONAL HIGH SCHOOL DISTRICT : DECISION
NO. 1, UNION COUNTY. :

For the Board, Jeffrey A. Bennett, Esq.

For the Respondent, Paul Kaiser, Pro Se

This matter having been opened before the Commissioner of Education on November 17, 1994 through certification of tenure charges of incapacity, incompetency, unbecoming conduct and other just cause against respondent, a tenured teaching staff member of the Board of Education of the Union County Regional High School District No. 1; and

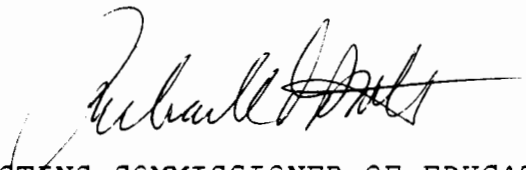
The Commissioner having directed respondent on November 22, 1994 and December 12, 1994, and again by letter sent both regular and certified mail on December 21, 1994, to file an answer to the tenure charges against him; and

Respondent having failed as of this date to comply with the directive of the Commissioner, so that each count of the charges against him is deemed to be admitted*; now therefore

*In that summary judgment in this matter is granted pursuant to N.J.A.C. 6:24-1.4(e), the Board's Motion for Summary Decision, filed after the expiration of the respondent's 10-day response to the Commissioner's letter dated December 21, 1994, is hereby rendered moot.

IT IS ORDERED this 17th day of January, 1995 that summary judgment shall be granted to the Board and Paul Kaiser shall be dismissed from his tenured position as a teaching staff member in the district's employ as of the date of this order.

IT IS FURTHER ORDERED that, pursuant to N.J.A.C. 6:11-3.7, this matter shall be referred to the State Board of Examiners for review and action as it deems appropriate.


ACTING COMMISSIONER OF EDUCATION

JANUARY 17, 1995

DATE OF MAILING - JANUARY 18, 1995

27-95

MARYELLEN REID, :
PETITIONER, :
V. :
BOARD OF EDUCATION OF THE TOWN- :
SHIP OF MAHWAH, BERGEN COUNTY, : COMMISSIONER OF EDUCATION
RESPONDENT, : DECISION
AND :
BURTON N. SEITLER, :
INTERVENOR-RESPONDENT. :

SYNOPSIS

Petitioner, rified school psychologist, contended Board had no legitimate justification to eliminate a position which, in turn, led to her being rified.

ALJ found that intervenor's seniority far exceeded that of petitioner and Board's action with respect to the RIF was not arbitrary, capricious or unreasonable. Thus, intervenor was entitled to the position; petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

JANUARY 18, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11870-93

AGENCY DKT. NO. 379-11/93

MARYELLEN REID,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH,

BERGEN COUNTY,

Respondent,

and

BURTON N. SEITLER,

Intervenor-Respondent.

William A. Massa, Esq., for petitioner

(Schiller, Vyzas, Squeo & Hartnett, attorneys)

Mark G. Sullivan, Esq., for respondent

(Sullivan & Sullivan, attorneys)

Gregory T. Syrek, Esq., for intervenor-respondent

(Bucceri and Pincus, attorneys)

Record Closed: December 5, 1994

Decided: December 9, 1994

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

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law by the Department of Education as a contested case on December 14, 1993, following the filing of a verified petition of appeal by Maryellen Reid in which she maintained that her tenure and seniority rights were violated when, in 1993, the respondent Mahwah Board of Education (Board or respondent) determined to replace her as an .8 school psychologist (four days per week) with another psychologist whose seniority allegedly was less than her own. Reid demanded reinstatement to her position, back pay, interest, and other relief. The Board's answer asserted that Reid's seniority was not superior to that of the psychologist who it maintained in employment - Dr. Burton N. Seitler.

At the direction of the undersigned Administrative Law Judge notice of the pendency of the action was provided to Seitler and a consent order permitting his intervention was entered. On April 11, 1994, I convened a telephone prehearing conference and counsel agreed that the following issues were to be resolved:

- (1). Does petitioner, by virtue of her tenure and seniority, have a superior claim to the 4/5th psychologist position now held by the intervenor?;
- (2). Is the petition time-barred by virtue of *N.J.A.C.6:24-1.2?*;
- (3). Is the respondent Board estopped from asserting that intervenor has a superior entitlement to the 4/5th position of school psychologist and, if so, to what relief is petitioner entitled should such an estoppel be found to exist?;
- (4). Was the Board's action in failing to appoint petitioner to the 4/5th school psychologist position arbitrary, capricious or unreasonable and, if so, to what relief is she entitled?

A plenary hearing concluded on September 12, 1994. Briefs have been submitted and the following constitutes my initial decision.

JOINT STIPULATION OF FACTS

At the outset of the hearing counsel agreed to a joint stipulation of facts (Exhibit J-1) to which they attached a variety of pertinent documents (Exhibits J-2 through J-9). Those stipulated facts are as follows:

- (1). The petitioner, Maryellen Reid, was first employed by Mahwah as a school psychologist for the 1987-88 school year.
- (2). She became a tenured employee effective September 1, 1990, and continued to serve as a member of the child study team.
- (3). In May 1993 the Mahwah School Board decided to abolish the position held by Dr. Seitler.
- (4). On July 27, 1993, a letter was written to petitioner by Assistant Superintendent Salkin, a copy of which letter is attached hereto [to the Joint Stipulation] as Exhibit J-6.

TESTIMONY

A. **FOR PETITIONER**

Oral testimony on behalf of the petitioner was offered exclusively by Ms. Reid. She began her employment as a school psychologist in Mahwah in September 1987, and was employed there continuously until the end of June 1993 when she was "rified." Over the course of her six years of employment by the Mahwah Board petitioner's work week gradually increased from two days to four days. Between January 1991 and June 1993, her last two years, she had been a 4/5th or .8 employee.

Sometime during May 1993, Reid learned informally that Seitler's one day per week position was to be abolished (Exhibit J-3). Seitler worked at Mahwah High School as an "in-school counselor" but was not a member of any child study team. Reid did not immediately perceive the abolition of Seitler's one day per week position to be a "threat" to her employment since she considered their functions to be completely different. Also, Reid was informed in an "unofficial" manner by a secretary that Seitler did not expect to remain employed in Mahwah if his one-day per week position was eliminated.

Nevertheless on June 4, 1993, Stuart D. Salkin, Mahwah's Assistant Superintendent of Schools, informed Reid, both orally and in writing (Exhibit J-4), that since Seitler had greater seniority in the district than Reid he would be retained in employment and Reid would have to be terminated. Salkin told her, however, that the Board was "unhappy" over the prospect of Reid's termination and was going to try to "work something out." However, as of June 30, 1993, petitioner had heard nothing further and she assumed the Board would take action officially to terminate her at its July 7, 1993 meeting. However, that evening a message was left for her on her home answering machine from Salkin to the effect that he had "good news" for her. Reid called Salkin back the next morning and learned that the Board had taken no action the previous evening with respect either to the abolition of Seitler's position and/or the termination of her employment (Exhibit J-5). Indeed, Salkin led her to believe, she said, that she should not pursue other employment opportunities since she likely would be returning to Mahwah in September.

However, in late July 1993 petitioner received another letter from Salkin informing her that she would be terminated by official Board action on September 1 (Exhibit J-6.) Petitioner called Salkin and he confirmed that Seitler, not she, would be remaining in employment and that Seitler had threatened to sue the Board if he were not appointed to the school psychologist position which previously had been held by Reid. The official termination of petitioner's employment took place on September 1, when the Board passed a resolution to that effect and on September 7 she was informed of the action by letter from the Superintendent of Schools (Exhibit J-9).

While employed in Mahwah as a school psychologist on an .8 basis during 1992-93, the petitioner was paid \$39,124. (Exhibit J-8) In 1993-94, and again this school year, she is employed as a part-time school psychologist in another school district. In 1993-94 she earned \$13,600 and this year she will earn \$13,900. She does not receive any medical or dental benefits.

On cross-examination, petitioner revealed that although she originally decided to turn down an employment offer when Salkin advised her in early July 1993 that she likely would be returning to the district, she eventually did accept another job beginning in September 1993. Also, with respect to her telephone conversation with Salkin on July 8, 1993, petitioner insisted he clearly led her to believe she would be coming back to work in Mahwah in September, although she never received any written confirmation to that effect. Thus, when Reid received the letter of July 27, 1993, advising that she would not be employed (Exhibit J-6), she was upset and confused by it.

Finally, Reid noted that there had been a special services department reorganization early in the 1992-93 school year and her child study team had been relocated from the high school to a separate building. She also agreed that prior to 1987 Seitler had been a full member of a child study team, but over time he cut back to one day per week before she even began her employment in 1987.

B. FOR THE BOARD

Testimony on the Board's behalf was presented by Assistant Superintendent Salkin. He insisted that when he spoke to Reid on July 8, 1993, he told her only that the Board had not taken any action the previous evening and that, "things appear to be as they were." He could not recall telling her that she definitely would return to work in September.

On cross-examination, Salkin agreed there was a resolution introduced at the July 7 meeting proposing termination of the petitioner, but that a second to that

resolution was withdrawn (Exhibit J-5). According to Salkin, the reasons for the Board's decision to abolish Seitler's one day per week psychologist position were two-fold: (a) electoral defeat of the 1993-94 school budget and consequent municipal council cuts; and (b) a belief that there was no longer a need as a result of the reorganization for the "in-school counselor" position at the high school. However, Salkin conceded there was a belief that with the abolition of his one day per week position Seitler would chose not to continue in employment in Mahwah..

C. TESTIMONY FOR SEITLER

Seitler testified that he has been employed as a school psychologist in Mahwah since September 1969 and has performed a variety of services in that capacity (Exhibit J-7). He worked full-time from 1969-70 until 1980-81 when he began to reduce his number of workdays from five to three, then to two and finally to one day per week. There also were changes in the grade level responsibilities which he had.* Last year, with the child study team reorganization, he rejoined the child study team on a 4/5th basis to replace Reid.

Seitler also recalled having a discussion with Reid after he was advised in May 1993 that his one day per week position would be abolished and that he would be reassigned to the high school to be a member of the child study team. Seitler said he told Reid at that time that he felt badly about the consequence of the change (Reid would have to be terminated because of Seitler's greater seniority), but he was going to insist on recognition of his tenure and seniority rights to the position. He also pointed out that although he disagreed personally with the soundness of the Board's decision to abolish the one day per week in-school counselor position which he held, and that he sent a memorandum to Salkin to that very effect (Exhibit J-2), that staffing change was the Board's decision to make. However, once the decision was made he determined that he would invoke his superior seniority rights and remain in employment on a more active basis - four days per week.

* There is some question as to Seitler's precise employment status in 1979-80 when he was paid by the Ramapo-Indian Hills District, but "assigned" to Mahwah (Exhibit J-7). However, in terms of his years of service viz-a-viz Reid, the interruption is not relevant.

Seitler, like Salkin, observed that elimination of his one day per week position resulted from the defeat of the 1993-94 school budget and the conclusion by the administration that there was no longer any need for a school psychologist to function as he did - one day per week, as a counselor. Although Seitler reiterated that professionally he was not in favor of the change, he insisted that at no time did he indicate in any formal way to anyone in authority that he did not intend to remain employed in Mahwah if his one day per week position was abolished. To the contrary, both orally and in writing he took the consistent position that on the basis of his tenure and seniority as a certified school psychologist in Mahwah dating back to 1969, he had a superior entitlement to the four day per week position held by Reid.

FINDINGS OF FACT

Having reviewed the testimony and the documentary evidence in this case I herewith make the following express Findings of Fact in addition to those contained in the Joint Stipulation:

- (1). As set forth on her employment record card (Exhibit J-8) the petitioner's service as a school psychologist in Mahwah beginning in 1987-88 was as follows:
 - (a) 1987-88, 2/5th service at the high school;
 - (b) 1988-89, 2/5th then 3/5th;
 - (c) 1989-90, 3/5th then 4/5th;
 - (d) 1990-91, 3/5th then 4/5th;
 - (e) 1991-92, 4/5th; and
 - (f) 1992-93, 4/5th
- (2) Intervenor Seitler's employment in Mahwah as set forth on his employment record card (Exhibit J-7) was as follows:
 - (a) 1969-70, full time at both the high school and elementary school;
 - (b) 1970-71, full time at both the high school and elementary school;
 - (c) 1971-72, full time at both the high school and elementary school;
 - (d) 1972-73, full time at both the high school and elementary school;

- (e) 1973-74, full time at both the high school and elementary school;
 - (f) 1974-75, full time at both the high school and elementary school;
 - (g) 1975-76, full time at both the high school and elementary school;
 - (h) 1976-77, full time at both the high school and elementary school;
 - (i) 1977-78, full time at both the high school and elementary school;
 - (j) 1978-79, full time at both the high school and elementary school.
- (3) For the 1979-80 school year the intervenor's position was abolished but he was employed by the Ramapo-Indian Hills School District and assigned to perform his school psychologist services in the Mahwah School District (Exhibits J-7).
- (4) Beginning in 1980-81 intervenor again worked as a full-time school psychologist for and in Mahwah at both the high school and at the elementary school and he continued in that capacity in 1981-82 (Exhibit J-7).
- (5) Beginning in 1982-83 and continuing through the 1983-84 school year, intervenor worked 4/5th as a school psychologist at the high school and the elementary school (Exhibit J-7).
- (6) In 1984-85 and 1985-86 intervenor worked 3/5th as a school psychologist at the high school and elementary school.
- (7) In 1986-87 intervenor worked 2/5th as a school psychologist at the high school and at the elementary school. (Exhibit J-7).
- (8) Between 1987-88 and 1992-93 intervenor worked 1/5th as a school psychologist either at the high school and the elementary school or exclusively at the high school (Exhibit J-7).
- (9) Beginning in 1993-94 and continuing to date intervenor has worked 4/5th as a school psychologist at the high school and at the elementary school (Exhibit

J-7).

- (10) At the annual school election held in April 1993 the proposed Mahwah school budget was rejected by the electorate and subsequent to that action intervenor was advised that his 1/5th position would be abolished (Exhibit J-2).
- (11) Soon thereafter, intervenor sent a memorandum to Assistant Superintendent Salkin wherein he declared his intention to exercise his rights to any other school psychologist position in the district to which his tenure and seniority entitled him (Exhibit J-2).
- (12) By letter dated June 4, 1993, petitioner was advised by Salkin that she would not be employed in Mahwah for the 1993-94 school year because of Seitler's superior entitlement to the remaining school psychologist position (Exhibit J-4).
- (13) Although the Board was scheduled to take action formally at its meeting of July 7, 1993, to terminate petitioner in her employment, the motion to do so was withdrawn (Exhibit J-5).
- (14) By letter dated July 27, 1993, petitioner was again formally notified that she would not be employed for the 1993-94 school year (Exhibit J-6).
- (15) On September 1, 1993, the Board took formal action terminating petitioner in her employment and she was notified of this action by letter dated September 7, 1993 (Exhibit J-9). At the time the Board formally acted to terminate petitioner it also agreed to provide her with sixty days pay in the nature of a "severance."
- (16) In both the 1993-94 and 1994-95 school years petitioner was employed as a school psychologist in another school district on a two days per week basis at a salary of \$13,600 during 1993-94 and \$13,900 during 1994-95. She does not receive any medical or dental benefits in this employment.

DISCUSSION

The issues to be determined as set forth in the prehearing order included whether the petition was time-barred pursuant to *N.J.A.C. 6:24-1.2*. Since the Board's answering brief apparently concedes that Reid's petition was filed in timely fashion that separate defense has been withdrawn and will not be addressed.

The major issue, of course, concerns the propriety of the Board's reduction in force action leading to petitioner's loss of her employment. Therefore, a comparison must be made of the respective years of service devoted by petitioner and Seitler to their school psychologist positions. It is clear from that comparison that Seitler indeed has greater seniority than does Reid when the standards for determining seniority are applied to their respective employment histories. See *N.J.A.C. 6:3-5.1*. As set forth at page 10 of intervenor's brief, petitioner's total seniority is .8 of a year at the elementary level and 3.8 years at the secondary level. By comparison, Seitler's seniority for the period of his employment in Mahwah totals 16.4 years both at the elementary level and at the secondary level. Thus, it is undeniable that intervenor's seniority far exceeds that of petitioner. The remaining question, therefore, is whether there is some intervening factor either statutory or otherwise, which ought to interrupt what normally would be the application of the seniority principles to the benefit of Seitler.

According to petitioner, despite the superior length of Seitler's service "on paper," a distinction should be drawn in her favor in light of his employment on a 1/5th basis for the entire time Reid worked on a 4/5th basis. No authority is cited for that novel proposition and none has been found by me. So long as both were employed in the same category the calculation must be purely mathematical. To open up the inquiry to alleged qualitative differences based upon days worked per week would introduce unacceptable uncertainties and cannot be tolerated.

A major argument advanced by petitioner both at the hearing and in her post-hearing brief is her claim that the Board should be "estopped" from denying her entitlement to the 4/5th school psychologist position since her "involvement" with the

day-to-day Mahwah child study team activities was substantial during the six year period of her employment, whereas intervenor's "involvement" played only a "very minor part" in light of his more varied professional activities. The tenure laws, she asserts ought to be designed to protect persons like her who dedicate their professional lives to particular institutions and systems rather than to persons, like Seitler, whose "attachment" to Mahwah had become so "limited and tenuous." According to petitioner this is a factor which provides an "equitable" basis for relief since it would appear that beginning in 1987-88 Seitler essentially had determined to abandon any intention to have full or nearly full-time school employment, having reduced his workload in Mahwah to one day per week. As petitioner summarizes in her brief, the Commissioner should look to the "realities of what is best for the school children of Mahwah and reject the Board's robot-like application of tenure and seniority."

The Board, in response, notes that the novel estoppel argument advanced by Reid finds no support in statutory or case law. Moreover, estoppel is a doctrine which is rarely invoked against governmental entities in light of the public interest involved. See, e.g., *W. V. Pangborne v. N.J. Department of Trans.*, 116 N.J. 543, 553 (1989); *O'Malley v. Department of Energy*, 109 N.J. 309, 316 (1987); *Juliano v. Ocean Gate Borough*, 214 N.J. Super. 503 (Law Div. 1986); *Garcia v. Snedeker*, 199 N.J. Super. 254, (App. Div. 1985). Thus, in this case the petitioner should not have labored under any misapprehension with respect to whether or not her employment in Mahwah would be continued for the 1993-94 school year, especially after she received Salkin's July 27, 1993 letter. While arguably Reid may have continued to hope that some sort of accommodation would be worked out between Seitler and herself, she knew or should have known that Seitler's seniority clearly was superior to her own and no realistic expectation of employment was in the offing absent some sort of major change in Seitler's expressed intention to invoke his superior claim to remain in employment in Mahwah.*

* Although it appears that Seitler may have continued to leave the impression that he would give up employment in Mahwah after all (see Board's brief, pp. 9-10), his formal, official position was to the contrary

Finally, the Board and Seitler argue that petitioner also has failed to demonstrate that the Board's action in determining to implement a reduction in force in the school psychologist position was arbitrary, capricious or unreasonable. Faced with a budget defeat, the need to attempt to conserve its financial resources, and a judgment that it no longer needed the 1/5th psychologist position, the Board saw fit to make the personnel change. Whether, in retrospect, the Board action saved any money is not relevant so long as there is no competent proof that the decision was taken in bad faith or was the product of some malevolent motive. The Board's exercise of discretion is entitled to a presumption of correctness and even if I, as an administrative law judge or, indeed, the Commissioner, disagree with its soundness, the Legislature has vested this sort of decision-making in the Board. Even the exercise of bad judgment, if innocent, is not sufficient to set the employer's decision aside. See, e.g., *Maywood Board of Ed. v. Maywood Education Association*, 168 N.J. Super. 45 (App. Div. 1979).

Accordingly, I agree totally with the positions taken by the Board and Seitler. In light of the Findings of Fact it is clear that the Board's actions (a) abolishing the 1/5th school psychologist's position held by Seitler; (b) terminating the employment of petitioner and; (c) appointing Seitler to the 4/5th position previously held by Reid were proper and will not be set aside. Seitler's seniority patently was superior to Reid's and entitled him to appointment to the position he now holds.

CONCLUSION

I therefore **CONCLUDE** for the reasons set forth herein that the verified petition of appeal should be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

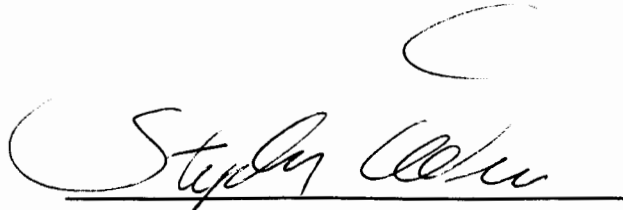
This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton,**


New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 9, 1994
DATE


STEPHEN G. WEISS, ALJ

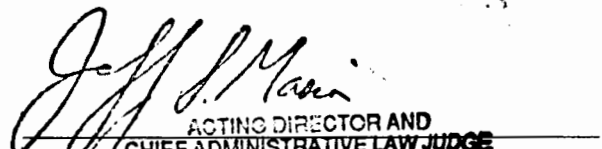
Receipt Acknowledged:

12/2/94
DATE


DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 16 1994
DATE


ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mh

APPENDIX

A. WITNESS LIST

For Petitioner:

Maryellen Reid

For Respondent (Mahwah Board of Education):

Stewart D. Salkin

For Intervenor-Respondent:

Burton N. Seitler

B. EXHIBIT LIST

- J-1 Joint Stipulation of Facts
- J-2 Memorandum from Seitler to Salkin, May 18, 1993
- J-3 Extract of minutes of Mahwah Board of Education meeting, May 19, 1993
- J-4 Letter from Salkin to Reid, June 4, 1993
- J-5 Extract of minutes of Mahwah Board of Education meeting, July 7, 1993
- J-6 Letter from Salkin to Reid, July 27, 1993
- J-7 Employee record card, Burton N. Seitler
- J-8 Employee record card, Maryellen Reid

J-9 Letter from H. Murray Blueglass, Superintendent, to Maryellen Reid, September 7, 1993

I-1 Letter from James D. Evergetis, Superintendent, to Burton Seitler, April 26, 1979

MARYELLEN REID,	:	
	:	
PETITIONER,	:	
	:	
V.	:	
	:	
BOARD OF EDUCATION OF THE TOWN-	:	
SHIP OF MAHWAH, BERGEN COUNTY,	:	COMMISSIONER OF EDUCATION
	:	
RESPONDENT,	:	DECISION
	:	
AND	:	
	:	
BURTON N. SEITLER,	:	
	:	
INTERVENOR-RESPONDENT.	:	
_____	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and replies thereto of both respondent Board and intervenor were timely filed in accordance with N.J.A.C. 1:1-18.4. Petitioner additionally submitted a reply to the reply exceptions of the Board and intervenor. As N.J.A.C. 1:1-18.4 makes no provision for the submission of replies to reply exceptions, these cannot be considered in the Commissioner's determination herein.

The Commissioner determines that petitioner's exceptions essentially recast and reiterate her arguments advanced before the Administrative Law Judge (ALJ) which the Commissioner determines were fully considered and addressed in the initial decision and need not be herein repeated.

Upon a careful and independent review of the record in this matter including the exceptions and replies of the parties, the

Commissioner concurs with the findings and conclusion of the ALJ that petitioner has failed to establish that the Board's exercise of its statutory authority pursuant to N.J.S.A. 18A:28-9 with respect to the reduction in force action leading to petitioner's loss of employment was arbitrary, capricious or unreasonable.

Accordingly, the recommended decision of the Office of Administrative Law is adopted as the final decision in this matter for the reasons clearly articulated therein and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

JANUARY 18, 1995

DATE OF MAILING - JANUARY 18, 1995

EDU #11870-93

C # 27-95

SB # 11-95

MARYELLEN REID, :

PETITIONER-APPELLANT, :

V. :

BOARD OF EDUCATION OF THE :
TOWNSHIP OF MAHWAH, BERGEN :
COUNTY, :

STATE BOARD OF EDUCATION

DECISION

RESPONDENT-RESPONDENT, :

AND :

BURTON N. SEITLER, :

INTERVENOR-RESPONDENT. :

Decided by the Commissioner of Education,
January 18, 1995

For the Petitioner-Appellant, Schiller, Vyzas, Squeo &
Hartnett (William A. Massa, Esq., of Counsel)

For the Respondent-Respondent, Sullivan & Sullivan
(Mark G. Sullivan, Esq., of Counsel)

For the Intervenor-Respondent, Bucceri & Pincus
(Gregory T. Syrek, Esq., of Counsel)

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

May 3, 1995

Date of mailing MAY 05 1995

DHP # 12-95
SB # 27-95

IN THE MATTER OF THE DISQUALIFI- :
CATION FROM SCHOOL EMPLOYMENT : STATE BOARD OF EDUCATION
OF REGINALD WILLIAMS. : DECISION
_____ :

Decided by the Deputy Commissioner of Education, February 28, 1995

For the Petitioner-Appellant, Reginald Williams, pro se

For the Respondent-Respondent, Pamela B. Katten, Deputy Attorney
General (Deborah T. Poritz, Attorney General of New Jersey)

The decision of the Deputy Commissioner of Education upholding petitioner's
disqualification from employment as a school bus driver following a criminal history
record review conducted pursuant to N.J.S.A. 18A:39-19.1 is affirmed for the reasons
expressed therein.

November 1, 1995

Date of mailing NOV 03 1995

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
OF THE BOROUGH OF AUDUBON PARK, : DECISION
CAMDEN COUNTY. :
_____ :

SYNOPSIS

Board appealed General Fund cap waiver in the amount of \$200,933 rejected by voters.

Upon review of the record, Commissioner determined to order the increase of \$200,933 in cap waiver monies for a total General Fund tax levy of \$538,765 for the 1994-95 school year.

JANUARY 20, 1995

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
OF THE BOROUGH OF AUDUBON PARK, : DECISION
CAMDEN COUNTY. :
_____ :

For Petitioner, Michael D. Markey, Esq. (Capehart & Scatchard, P.A.)
For Respondent, Joseph M. Nardi, III, Esq.

This matter was opened before the Commissioner of Education on July 19, 1994, through the filing of a Petition of Appeal by the Board of Education of the Borough of Audubon Park (Board), seeking inclusion within the 1994-95 General Fund Tax Levy of a cap waiver in the amount of \$200, 933. This amount, submitted to the voters of Audubon Park pursuant to N.J.S.A. 18A:7D-28(f), had been rejected by them at the annual school election on April 19, 1994.

On March 30, 1994, the Camden County Superintendent of Schools had approved the Board's cap waiver request as being necessary for the provision of a thorough and efficient system of education (T & E), after reviewing the entire proposed school budget to determine whether further reallocation could be accomplished within the base budget so as to obviate the need for a cap waiver. Having determined that no such reallocation was possible, the County Superintendent approved the budget for submission to the voters of the district on the condition that, should the budget or cap waiver question be rejected, the district

must file appropriate appeals with the Commissioner of Education. See Administrative Agency Advice (AAA) 91-0036 (July 8, 1991).

The line-item amount approved for submission to the voters as a T & E cap waiver was as follows:

<u>Account Title</u>	<u>Account Number</u>	<u>Dollar Amount</u>
Tuition to Other LEAs - Regular	11-000-100-561	\$200,933
Total Amount of T & E Cap Waiver:		\$200,933

At the annual school election, in addition to defeating the Board's cap waiver question, the voters of the district also defeated the Board's General Fund Budget proposition, which had included within it a \$543 cap waiver approved by the Commissioner pursuant to N.J.S.A. 18A:7D-28(e) based on increased enrollment. Pursuant to N.J.S.A. 18A:22-37, the Mayor and Council of Audubon Park (Borough) reviewed the defeated budget, determined not to make any reductions and accordingly certified to the Camden County Board of Taxation a tax levy amount of \$337,832 as had been proposed by the Board.

An answer to the instant cap waiver petition was filed by the Borough on August 26, 1994. Subsequently, position statements were filed by both parties, as was a reply by the Borough to the Board's position statement. In addition, the record of this matter includes the affidavit and supporting documents of the County Superintendent dated August 2, 1994, which served to attest to the process of review and analysis that led to his conclusion, and that of the Department of Education's Cap Waiver Review Panel, that the requested cap waiver funds were both necessary for T & E and unable

to be reallocated from within the base budget. Further, as the parties were notified on December 16, 1994, the record was augmented by official notice of the Board's 1993-94 year-end audit for the purpose of identifying whether the Board underestimated in its 1994-95 budget the amount of anticipated undesignated surplus; no comments regarding this issue were received from the parties. Official notice was also taken of the tuition bill which is the subject of the instant cap waiver request when that document was submitted by the County Superintendent on November 29, 1994. On December 30, 1994, the expiration date for submission of comments in response to the County Superintendent's tuition bill submission, the record of this matter was closed.

Board's Position

In its papers, the Board argues that a cap waiver of \$200,933 is necessary in order for the Board to pay a regular tuition bill of \$883,425 to the Audubon School District for education of Audubon Park's approximately 135 students, Audubon Park being a non-operating school district with no schools of its own. Specifically, the Board must satisfy a bill for 7 Kindergarten students at \$3,790 each for a total of \$26,530; 54 students in grades 1-5 at \$6,128 each for a total of \$330,912; 31 students in grades 6-8 at \$6,025 each for a total of \$186,775; 29 students in grades 9-12 at \$6,842 each for a total of \$198,418; 2 perceptual impaired students at \$9,720 each for a total of \$19,440; 1 pre-school handicapped student at \$8,408, 5 secondary resource room students at \$9,884 each for a total of \$49,420; and 6 ele-

mentary resource room students at \$10,587 each for a total of \$63,522; for a grand total of \$883,425 in estimated charges. The Board argues that, because Audubon Park is a non-operating district and has no real budget apart from tuition payments to Audubon, there is no possibility of reallocation so as to obviate the need for a cap waiver.

Borough's Position

The Borough contends that the Board has not met its burden of demonstrating that the requested cap waiver funds are necessary for provision of T & E. In support of its contention, the Borough relies on the following statement within the above-referenced affidavit of the County Superintendent:

[The reallocation analysis performed using standard department procedure] was the basis upon which we determined that we would not recommend [that] any reallocation of appropriations, increase in revenue or additional appropriation of fund balance be made in the base budget to the Department's Cap Waiver Review Panel (the Panel). We further determined that the budget reflected maintenance of and was sufficient to provide a thorough and efficient education. (Emphasis supplied by Borough)

The Borough interprets this statement as meaning not that reallocation was not possible, but that no relocations were recommended because the base budget was sufficient in and of itself for the district to provide T & E. This being the case, no cap waiver is necessary and the Board cannot meet the standard established by Edgewater, infra, and Rutherford, infra, for the Commissioner to order such a waiver where the voters have rejected it. The Borough further argues that, even setting aside the

County Superintendent's statements, the Board made no showing that the funds requested were necessary for T & E or that attempts were made to reallocate so as to obviate the need for a waiver.

Commissioner's Determination

Upon review and consideration of the papers filed by the parties, together with the affidavit and supporting documents of the County Superintendent, the Commissioner concludes that the tax levy of \$337,832 certified by the Borough, together with the \$200,933 cap waiver requested herein, in fact represents the minimal amount necessary for provision of a thorough and efficient system of education in the Audubon Park school district.

The Commissioner rejects the Borough's contention that the County Superintendent found the Board's base budget sufficient without further waiver, as that contention relies on a single statement taken out of context and is belied by the very fact of the Board's budget having been approved subject specifically to the condition that the Board obtain a cap waiver either through voter acceptance or appeal to the Commissioner. The Commissioner further rejects the Borough's contention that the Board did not meet applicable standards for granting of a cap waiver, as examination of the Board's budget shows the amount of the tuition bill at issue to exceed the Board's entire General Fund Budget of \$809,170 absent a cap waiver, and further shows that reallocation within the budget's few non-tuition accounts, which represent pupil transportation costs and modest administrative and maintenance appropriations, would be impossible. (In this

context, the Commissioner also notes that, as indicated above, the Borough reviewed this base budget pursuant to N.J.S.A. 18A:22-37 and identified no area which could be reduced while still permitting the district to provide for T & E.) Thus, the Commissioner is satisfied that the amount of cap waiver monies requested herein is both fully necessary for purposes of T & E and unable to be derived from further reallocation within the base budget or by appropriation from the Board's undesignated surplus of \$47,709. (Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, Bergen County, State Board decision July 7, 1993, and Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater, Bergen County, State Board decision July 6, 1994)

Accordingly, the Camden County Board of Taxation is directed to make the necessary adjustments to reflect an additional \$200,933, for a total of \$538,765, to be raised in tax levy for General Fund purposes of the Audubon Park Board of Education for the 1994-95 school year.

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

JANUARY 20, 1995

DATE OF MAILING- JANUARY 20, 1995

29-95

IN THE MATTER OF THE CAP WAIVER :
 APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
 OF THE NEW HANOVER SCHOOL : DECISION
 DISTRICT, BURLINGTON COUNTY. :
 _____ :

SYNOPSIS

Board appealed General Fund cap waiver in the amount of \$208,869 rejected by voters.

Upon review of the record, Commissioner determined to order the increase of \$208,869 in cap waiver monies for a total General Fund tax levy of \$806,820 for the 1994-95 school year.

JANAURY 20, 1995

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
OF THE NEW HANOVER SCHOOL : DECISION
DISTRICT, BURLINGTON COUNTY. :
_____ :

For Petitioner, Dennis C. Germano, Esq. (Hulse & Germano)

This matter was opened before the Commissioner of Education on May 25, 1994, through the filing of a Petition of Appeal by the Board of Education of the School District of New Hanover (Board), seeking inclusion within the 1994-95 General Fund Tax Levy of a cap waiver in the amount of \$208,869. This amount, submitted to the voters of the Township of New Hanover and the Borough of Wrightstown pursuant to N.J.S.A. 18A:7D-28(f), had been rejected by them at the annual school election on April 19, 1994.

On April 11, 1994, the Burlington County Superintendent of Schools had approved the Board's cap waiver request as being necessary for the provision of a thorough and efficient system of education (T & E), after reviewing the entire proposed school budget to determine whether or not further reallocation could be accomplished within the base budget so as to obviate the need for a cap waiver. Having determined that no such reallocation was possible, the County Superintendent approved the budget for submission to the voters of the district on the condition that, should the budget or cap waiver question be rejected, the district must file appropriate appeals with the Commissioner of Education. See Administrative Agency Advice (AAA) 91-0036 (July 8, 1991).

The line-item amount approved for submission to the voters as a T & E cap waiver was as follows:

<u>Account Title</u>	<u>Account Number</u>	<u>Dollar Amount</u>
Tuition to Other LEAs - Regular	11-000-100-561	\$208,869
Total Amount of T & E Cap Waiver:		\$208,869

At the annual school election, in addition to defeating the Board's cap waiver question, the voters of the district also defeated the Board's General Fund Budget proposition. Pursuant to N.J.S.A. 18A:22-37, the governing bodies of the Township of New Hanover and the Borough of Wrightstown reviewed the defeated budget and, by resolutions dated May 4, 1994, certified to the Burlington County Board of Taxation a tax levy amount of \$597,951, which represented a reduction of \$26,000 from the tax levy of \$623,951 proposed by the Board. Appeal of this reduction was made to the Commissioner by way of a petition filed on May 16, 1994, but subsequent changes in circumstance led the Board to accept the reduction in the belief that it could still provide for T & E. Upon review of the reduced budget by the County Superintendent and assurances from him that it was sufficient for T & E contingent on pursuit of cap waiver funds concurrently on appeal, by letter decision dated November 23, 1994, the Commissioner approved the Board's withdrawal of its base budget appeal and directed continuation of proceedings on the cap waiver question. During the course of such proceedings, neither governing body elected to participate in the appeal, and in the Board's various filings, it was represented without opposition

that neither governing body objected to the Board's cap waiver appeal.

In addition to the petition and subsequent position statement filed by the Board, the record of this matter includes the affidavit and supporting documents of the County Superintendent dated July 29, 1994, which served to attest to the process of review and analysis that led to his conclusion, and that of the Department of Education's Cap Waiver Review Panel, that the requested cap waiver funds were both necessary for T & E and unable to be reallocated from within the base budget. Further, as the parties were notified on December 19, 1994, the record was augmented by official notice of the Board's 1993-94 year-end audit for the purpose of identifying whether the Board underestimated in its 1994-95 budget the amount of anticipated undesignated surplus. Upon receipt of the parties' comments regarding the audited surplus on December 22, 1994, the record of this matter was closed.

Board Position

In its papers, the Board argues that a cap waiver of \$208,869 is necessary in order for the Board to pay a regular tuition bill of over \$450,000 to the Bordentown Regional High School District for education of New Hanover's grade 9-12 students; specifically, the Board must satisfy a bill for 57 students at \$8,020 each plus \$5,675.20 in 1991-92 adjustments, for a total of \$462,815.20, an amount more than anticipated due to an increase in high school enrollment. Moreover, \$52,531 of the

Board's cap Waiver request is a direct result of the district having allocated this amount from its base budget to surplus at the direction of the County Superintendent and the Cap Waiver Review Panel in order to maintain a sufficient level of surplus. (This representation is corroborated by the affidavit of the County Superintendent, and examination of the district's 1993-94 audit shows that the Board would have been left with less than \$200 undesignated surplus had the recommended allocation not been made.)

In terms of ability to reallocate further, the Board notes that it operates a K-8 district consisting of one class per grade, so that class sizes cannot be increased to accomplish savings. It further notes that the number of high-risk pupils in the district militates against further decreasing student support services. Finally, the Board observes that its budget was carefully reviewed by two governing bodies which could only identify \$26,000 in possible cuts, and even these were due to circumstances which had changed since initial development of the proposed budget. Moreover, the County Superintendent's affidavit indicates that the original cap waiver under discussion following the above-mentioned reallocation to surplus was \$244,843, and that this amount was reduced to \$209,917 by further reallocation within the base budget made possible by the district's reorganization of its basic skills program and elimination of one basic skills teacher. (Discovery of a calculation error led to the amount being further reduced to \$208,869, the final amount requested of the voters and at issue on appeal.)

Commissioner's Determination

Upon review and consideration of the papers filed by the Board in conjunction with both its base budget and cap waiver appeals, together with the affidavit and supporting documents of the County Superintendent, the Commissioner concludes that the tax levy of \$597,951 certified by the governing bodies, together with the \$208,869 cap waiver requested herein, in fact represents the minimal amount necessary for provision of a thorough and efficient system of education in the New Hanover school district. The Commissioner is satisfied that the amount of cap waiver monies requested herein is both fully necessary for T & E and unable to be derived from further reallocation within the base budget or by appropriation from the Board's audited undesignated surplus of \$52,693. (Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, Bergen County, State Board decision July 7, 1993, and Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater, Bergen County, State Board decision July 6, 1994)

Accordingly, the Burlington County Board of Taxation is directed to make the necessary adjustments to reflect an additional \$208,869, for a total of \$806,820 to be raised in tax levy for General Fund purposes of the New Hanover Board of Education for the 1994-95 school year.

IT IS SO ORDERED.

JANUARY 20, 1995

ACTING


COMMISSIONER OF EDUCATION

DATE OF MAILING- JANUARY 20, 1995

(SB) 29-95

DHP #10-95
SB #29-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF JAMES A. COX, JR. : DECISION
_____ :

Decided by the Deputy Commissioner of Education, February 28, 1995

For the Petitioner-Appellant, James A. Cox, Jr., pro se

For the Respondent-Respondent, Geraldine Callahan, Deputy Attorney
General (Deborah T. Poritz, Attorney General of New Jersey)

The State Board of Education grants the request of the parties to remand this matter to the Commissioner of Education for a hearing in order to provide the petitioner with an adequate opportunity to establish a record in support of his contention that he has satisfied the statutory standard for rehabilitation.¹ Given the circumstances, we direct that such hearing and a final determination by the Commissioner be rendered on an expedited basis, and that such determination considers all pertinent circumstances under the factors set forth in N.J.S.A. 18A:6-7.1, including "any evidence of rehabilitation." See Wolffbrandt v. New Jersey State Department of Education,

¹ We note that the Office of Criminal History Review was apparently not represented in the proceedings before the Deputy Commissioner. Upon the filing of the appeal, Counsel to the State Board notified the Attorney General's Office that an appeal had been taken in the matter, and transmitted a copy of the record. A Deputy Attorney General was then assigned to appear as attorney of record in the appeal.

SEPT. 6, 1995

decided by the State Board, July 1, 1992. Such review must also include a determination as to whether any criminal history record information pertaining to petitioner exists on file in the Federal Bureau of Investigation, see N.J.S.A. 18A:6-7.1, in that such information is not included in the record before us. The proceedings on remand should also include determination of the disposition of petitioner's February 1991 arrest for possession of marijuana. We stress, in addition, that N.J.S.A. 18A:6-7.1 expressly requires consideration of the "date of the offense" (emphasis added), rather than the date of conviction or sentencing relied upon by the Deputy Commissioner in his decision.

Petitioner has the burden on remand of establishing his rehabilitation by clear and convincing evidence.

We retain jurisdiction.

September 6, 1995

Date of mailing SEP 08 1995

(SIB) 29-95

DHP #10-95
SB #29-95
DHP # 1-96

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF JAMES A. COX, JR. : DECISION ON REMAND
_____ :

Decided by the Deputy Commissioner of Education, February 28, 1995

Remanded by the State Board of Education, September 6, 1995

Decision on remand by the Commissioner of Education, January 2, 1996

For the Petitioner-Appellant, James A. Cox, Jr., pro se

For the Respondent-Respondent, Geraldine Callahan, Deputy Attorney
General (Peter Verniero, Attorney General of New Jersey)

On September 6, 1995, we granted the request of the parties to remand this matter to the Commissioner of Education for a hearing in order to provide petitioner, who had been disqualified from employment in the State's schools as a substitute teacher following a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1, with an adequate opportunity to establish a record in support of his contention that he had satisfied the statutory standard for rehabilitation. We retained jurisdiction.

In accordance with our remand, the Commissioner transmitted this matter to the Office of Administrative Law for a hearing. Petitioner failed to appear at the hearing

Nov. 5, 1997

scheduled for November 29, 1995. Consequently, on December 2, 1995, the Office of Administrative Law sent petitioner a notification of nonappearance and provided him ten days to submit an explanation for his nonappearance. On January 2, 1996, after petitioner failed to file an explanation, the Commissioner deemed the case to no longer be contested and dismissed it with prejudice.

Pursuant to the State Board's retention of jurisdiction, the Commissioner transmitted the file back to us in August 1997. No appeal has been filed from the Commissioner's decision of January 2, 1996.

After a review of the record, we are satisfied that the Commissioner complied with the terms of our remand and provided petitioner with an adequate opportunity to establish a record in support of his contention that he had satisfied the statutory standard for rehabilitation. Accordingly, pursuant to the Commissioner's decision, petitioner is disqualified from school employment, and we dismiss this matter.

November 5, 1997 **NOV 07 1997**
Date of mailing _____

LITTLE FERRY BOARD OF EDUCATION, :

PETITIONER, :

V. :

MAYOR AND COUNCIL OF THE BOROUGH OF LITTLE FERRY, BERGEN COUNTY, :

RESPONDENT. :

AND :

IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BOARD OF EDUCATION OF THE BOROUGH OF LITTLE FERRY, BERGEN COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of \$671,824 made by governing body following voter rejection of proposed budget on April 19, 1994.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore \$462,636.

Board also appealed General Fund cap waiver in the amount of \$121,141 rejected by voters.

Upon review of the record, Commissioner determined to order the increase of \$63,343 in cap waiver monies for a total General Fund tax levy of \$7,293,451 for 1994-95 school year.

LITTLE FERRY BOARD OF EDUCATION, :
 PETITIONER, :
 V. :
 MAYOR AND COUNCIL OF THE BOROUGH :
 OF LITTLE FERRY, BERGEN COUNTY, :
 RESPONDENT. : COMMISSIONER OF EDUCATION
 : DECISION
 AND :
 IN THE MATTER OF THE CAP WAIVER :
 APPEAL OF THE BOARD OF EDUCATION :
 OF THE BOROUGH OF LITTLE FERRY, :
 BERGEN COUNTY. :

Stanley Turitz, Esq. (Ferrara, Turitz, Harraka & Goldberg)
 for petitioner

John J. Langan, Jr., Esq. and J.S. Lee Cohen, Esq.
 (DeCotiis, Fitzpatrick & Gluck) for respondent

This consolidated matter was opened before the Commissioner of Education on June 15, 1994, through the filing of a Petition of Appeal of a defeated school budget by the Board of Education of the Borough of Little Ferry (Board) pursuant to the provisions of N.J.A.C. 6:24-7.1 et seq., and a Petition of Appeal of the Board's defeated cap waiver. Answers to the aforesaid petitions were filed by the Mayor and Council of the Borough of Little Ferry on July 5 and July 7, 1994, respectively.

The respective parties filed position papers and responses to same relative to both the budget and cap waiver petitions. Further, as a result of the decisions issued by State Board of

Education in Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, 94 N.J.A.R. 2d (EDU) 6 and Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater (decided by the State Board of Education, July 6, 1994), wherein the State Board ruled that the decisions in defeated voter cap waiver appeals must determine whether reallocations within the district's maximum permissible budget are possible and whether and to what extent the specific programs at issue are essential in order to enable the district to provide a thorough and efficient system of education, the parties were informed of the need to supplement the record to document the reallocation and cap waiver review conducted by the county superintendent pursuant to N.J.S.A. 18A:7D-27. The County Superintendent was directed to submit a sworn affidavit setting forth an explanation and documentation of that review, including the basis for concluding that (1) reallocation within the district's maximum permissible budget was not possible and (2) the specific programs at issue were necessary to provide a thorough and efficient system of education. The governing body and the Board were provided the opportunity to respond to the affidavit an opportunity to which both parties availed themselves. In addition, the Commissioner, on December 16, 1994, notified the parties that he intended to take official notice of the 1993-94 year-end audit to determine whether the district had underestimated its anticipated undesignated surplus.

On April 19, 1994, the voters of the Borough of Little Ferry defeated the Board's General Fund tax levy and proposed cap waiver which had been approved by the Bergen County Superintendent

and a Department of Education Review Committee as being necessary for the provision of a thorough and efficient system of education.

The specific line items for the thorough and efficient cap waiver were as follows:

<u>Account Title</u>	<u>Account No.</u>	<u>Amount</u>
Teachers Salaries Pre-K & K	11-110-100-101	\$ 19,435
Teachers Salaries 1-5	11-120-100-101	60,306
Teachers Salaries 6-8	11-130-100-101	19,141
Custodian Salaries	11-000-260-100	19,435
Other Employee Benefits	11-000-290-290	<u>2,824</u>
Total Amount		\$121,141

Subsequent to the defeat of the budget by the voters, the Board and Council, pursuant to the provisions of N.J.S.A. 18A:22-37, consulted on the defeated budget whereupon the Council reduced the basic budget General Fund Tax Levy by \$671,824. Below summarized are the amounts in dispute before the Commissioner.

<u>Proposed Tax Levy</u> <u>Adopted by Board of Education</u>		<u>Amount of Tax Levy</u> <u>Certified by Governing Body</u>	
General Fund	\$7,439,296	General Fund	\$6,767,472
Cap Waiver	\$ 121,141	Cap Waiver	\$ -0-

<u>Amount of Reduction</u> <u>by Governing Body</u>	
General Fund	\$671,824
Cap Waiver	-0-

<u>Amount of Reduction in</u> <u>Dispute before Commissioner</u>	
General Fund	\$671,824
Cap Waiver	\$121,141

DEFEATED BUDGET

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey

requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature, pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).) In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the specific line item reduction imposed by the governing body is necessary for the board in order to provide a thorough and efficient system of education.

The specific line item reductions and the reasons for such reductions, as contained in the Council's Resolution 98 dated May 18, 1994, are set forth below:

<u>Account</u>	<u>Amount</u>
11-110-100-101 Instruction - Preschool/Kindergarten	\$9,153

The recommended reduction is based upon the Board's request for one (1) additional kindergarten teacher, for a total of five (5) kindergarten teachers. The budget for 1994-95 may be reduced by \$9,153. This represents the amount overbudgeted, assuming the new position is hired at the base level of the salary guide, for a salary of \$29,249.

11-120-100-101 Instruction - Grades 1-5	\$60,264
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The recommended reduction is based upon the budget requirement necessary to provide salaries for existing personnel. The Board

requested one (1) additional teacher for the fifth grade. However, this request was not substantiated by the projected enrollment for 1994-95 and, therefore, is not being provided for in the proposed budget. It is also recommended that the budget for substitute teachers be reduced by \$10,000 for 1994-95.

11-130-100-101 Instruction - Grades 6-8 \$30,907

The recommended reduction is based upon the proposal that the Board of Education consolidate its physical education classes from three (3) sections to two (2) sections. Through this consolidation, a teaching position can be eliminated.

11-190-100-610 General Supplies \$50,000

The recommended reduction is based upon the projected expenditures for 1993-94, with a provision for a 33% increase.

11-204-100-101 Special Education Instruction -
 Salaries of Teachers - Neurologically
 Impaired (NI) \$29,249

The recommended reduction is based upon the detail provided by the Board stating that the position and salary requests for this account for the 1994-95 budget is overstated by \$29,249.

11-218-100-101 Special Education Instruction -
 Salaries of Teachers - Speech
 Instruction \$20,000

The recommended reduction is based upon the 1993-94 salary requirements whereby the excess funds required by the Speech salaries are being allocated to Other State and Federal Project account funds.

11-219-100-101 Special Education Instruction -
 Salaries of Teachers - Home
 Instruction \$2,000

The recommended reduction is based upon providing funds necessary for two (2) full-time home instruction positions.

11-000-100-565 Tuition to CSSV & Regional Day
 School - Special \$90,000

The recommended reduction is based upon projected expenditures for 1993-94, with provisions for a 7% increase.

11-000-213-100 Undistr. Expend. - Health Services -
 Salaries \$20,250

The recommended reduction is based upon the proposal that the Board replace a full-time nursing position with a part-time nurse, providing coverage for three (3) hours per day, five (5) days per week.

11-000-219-104	Undistr. Expend. - Other Support Student - Special Salaries of Other Prof. Staff	\$20,000
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The recommended reduction is based upon the 1993-94 salary requirements, whereby the excess funds required by the Speech salaries are being allocated to Other State and Federal Project account funds.

11-000-219-390	Undistr. Expend. - Other Support Student - Special Other Purchased Prof. Services	\$17,000
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The recommended reduction is based upon the 1993-94 projected expenditures, providing for no increase in the 1994-95 budget.

11-000-222-100	Undistr. Expend. Media/Library Salaries	\$5,001
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The recommended reduction is based upon the detailed position in salary requirements submitted by the Board. This account appears to be overstated for 1994-95.

11-000-222-600	Undistr. Expend. - Educ. Media/Library Supplies and Materials	\$10,000
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The recommended reduction is based upon the 1993-94 projected expenditures, providing for no increase in the 1994-95 budget.

11-000-230-100	Undistr. Expend. - Supp. Serv. Gen. Admin. Salaries	\$36,000
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The recommended reduction is based upon the proposal that the Board eliminate the current full-time position for computer services. This position would be replaced with a \$5,000 stipend to be offered to a teacher to serve as a computer coordinator.

11-000-230-600	Undistr. Expend. - Supp. Gen. Admin. Supplies and Materials	\$4,000
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The recommended reduction is based upon 1993-94 projected expenditures, with a provision for a 50% increase.

11-000-230-340	Undistr. Expend. - Supp. Serv. Gen. Admin. Purchased Tech. Service	\$25,000
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The recommended reduction is based upon 1993-94 projected expenditures, with a provision for a 12% increase.

11-000-240-103	Undistr. Expend. - Supp. Serv. School Admin. Salaries - Principals	\$70,565
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The recommended reduction is based upon a proposal that the Board eliminate one (1) principal position. The responsibility presently performed by the principal would be assumed by the Superintendent, who would serve as both Superintendent and principal.

11-000-240-105	Undistr. Expend. - Supp. Serv. School Admin. Salaries - Sec. and Clerical Asst.	\$15,937
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The recommended reduction is based upon a proposal that one (1) secretarial position be eliminated. It is the Board's representation that this secretary provides only photocopying services; it is recommended that existing personnel assume this responsibility.

11-000-260-420	Undistr. Expend. - Operation of Plant Serv. Cleaning, Repair & Maintenance	\$25,000
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The recommended reduction is based upon 1993-94 projected expenditures, with a provision for a 25% increase.

11-000-260-590	Undistr. Expend. - Operation of Plant Serv. Misc. Purchased Services	\$5,000
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The recommended reduction is based upon 1993-94 projected expenditures, with a provision for a 45% increase.

11-000-260-620	Undistr. Expend. - Operation of Plant Serv. Energy	\$33,000
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The recommended reduction is based upon 1993-94 projected expenditures, with a provision for a 30% increase.

11-000-270-511	Undistr. Expend. - Student Transportation Vendors	\$70,000
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The recommended reduction is based upon 1993-94 projected expenditures, with a provision for a 10% increase.

11-000-270-513	Undistr. Expend. - Student Transportation Joint Agreement	\$5,000
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The recommended reduction is based upon 1993-94 projected expenditures, with a provision for a 90% increase.

11-000-290-100	Undistr. Expend. - Bus and Support Services Salaries	\$4,498
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The recommended reduction is based upon the detailed position in salary requirements provided by the Board for the year 1994-95. This account appears to be overbudgeted on this requirement.

11-000-290-250	Undistr. Expend. - Bus. and Support Services-Unemployment Compensation	\$14,000
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The recommended reduction is based upon the school district's actual expenditures for unemployment claims for prior years.

GRAND TOTAL	\$671,824
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COMMISSIONER'S DETERMINATION

The Commissioner has carefully reviewed the evidence and arguments submitted by the parties in support of their respective positions. The Commissioner's review of the arguments relative to line item reductions and his conclusions on each are set forth below:

<u>Account</u>	<u>Reduction</u>
11-110-100-101 Teachers Salaries - Preschool-K	\$9,153

The Borough argues that the Board has overbudgeted this account by the above amount since the minimum starting salary for the proposed additional kindergarten teacher is \$29,249, as indicated by the salary guide contained within the collective bargaining agreement set forth in the Board's Appendix B.

The Board points out that the difference between the minimum salary to be paid to the additional kindergarten teacher and the amount by which the Borough reduced this account represents monies budgeted for substitute teachers. The Board points out that the contract provides each teacher with a maximum of eleven (11) sick days and three (3) personal days per year, at a cost of \$75 per day for substitutes. The Board has budgeted at what it contends is 77% of its maximum potential exposure for substitutes. (See Page 1 of Board's position statement.)

The Commissioner has considered the arguments of the parties and determines that the Board has effectively documented its need for the additional kindergarten teacher to provide for classes of under 25 pupils as required by regulation, and has likewise

justified its need for the funds cut by the Borough in this account. The \$9,153 in this account is restored as being necessary to provide a thorough and efficient system of education.

<u>Account</u>	<u>Reduction</u>
11-120-100-110 Instruction - Grades 1-5	\$60,264

The Borough argues that there is no substantiation for an additional fifth grade teacher as requested by the Board based upon the projected enrollment of 93 students in fifth grade for the 1994-95 school year. The Borough also contends that the Board has failed to provide substantiation that the number of students will increase by 10 over the 83 enrolled in grade 4 in 1993-94.

The Board argues that even if one were to concede to the Borough's projection as to grade 5 enrollment for 1994-95, a fourth teacher would be needed at the fifth grade level for 1994-95 in order to effectuate the Board policy of keeping class size to a maximum of 25 since there were only three fifth grade sections in 1993-94. (See Appendix G of Board's Position Statement)

The Board further reiterates its argument that this account also includes funds set aside for salaries for substitute payments for 24.6 teachers at an estimated six (6) days per teacher at \$75 per day (See Appendix G of Board's Position Statement)

The Commissioner notes that the Borough's subsequent arguments in its response to the Board Position Statement take issue with the Board's determination to add two additional positions at grades 1 and 2 when, the Borough contends, enrollment for 1994-95 shows a reduction of six students in grades 1-5.

The Commissioner, upon review of the arguments and the documentation determines that the \$60,264 reduction in this account

be restored. Despite the Borough's contention of a loss of six students in overall enrollment for grades 1-5, the distribution of pupils over those grade levels as indicated by Appendix G is consistent with the Board's policy of keeping class size to a maximum of 25 per class.

<u>Account</u>	<u>Reduction</u>
11-130-100-101 Instruction Grades 6-8	\$30,907

The Borough argues that the Board can consolidate physical education classes and thereby eliminate one physical education teacher without impairing the Board's ability to provide a thorough and efficient system of education.

The Board contends that it must maintain three physical education teachers and one health teacher in order to meet the mandates of N.J.S.A. 18A:35-5 through 7 and N.J.A.C. 6:8-7.1 of 150 minutes of health and physical education per week, as well as to meet its own policy and contractual obligations. (See Board's Position Statement, at pp. 9-10)

Health and physical education instruction being consistent with the provision of a thorough and efficient system of education, the Commissioner finds the Borough's assertion that consolidation is possible in this area to be arbitrary in nature. The Commissioner directs the restoration of \$30,907 reduction in this account.

<u>Account</u>	<u>Reduction</u>
11-190-100-610 General Supplies	\$50,000

The Borough argues that the nine month actual expenditures and three month projected expenditures amounted to \$78,081 in 1993-94. It contends that even allowing for a 33% increase in 1994-95 would bring the budgeted amount to \$103,848, some \$50,000 less than the appropriation of \$154,739 sought by the Board.

The Board contends that its budgeting process is zero based rather than a projection from previous year's spending. It further contends that its needs derive directly from increased enrollment and increased prices. It sets its spending plan in Appendix T of its position statement.

The Commissioner has carefully considered the Board's spending plan in relation to its responsibility to provide a thorough and efficient system of education, as well as its previous expenditures for supplies. While the Commissioner notes that the spending plan is quite detailed, he further notes that no attempt is made by the Board to demonstrate how its needs for 1994-95 are so much in excess of its actual expenditures in 1993-94.

Consequently, the Commissioner sustains the reduction in supplies in this account in the amount of \$50,000.

<u>Account</u>	<u>Reduction</u>
11-214-100-101 Special Education Instruction - Salaries of Teachers - NI	\$29,249

The Borough predicates this reduction on what it contends was the Board's originally recommended appropriation of \$174,581 which it subsequently increased to \$203,780.

The Board contends that the increase in this budgeted amount is due to the creation of an additional section of neurologically impaired students made possible by the opening of a new school addition in September of 1994. The Board contends that this new class section of NI pupils would have been opened earlier had space been available. The Board points to state regulations which limit such classes to eight students with an age range not to exceed three years from youngest to oldest. In support of its

position, the Board offers a certification from the school principal of the number of NI pupils for 1994-95 as part of Exhibit M of its Position Paper.

The Commissioner has considered the above referenced documentation, as well as the Borough's contention that the 1994-95 NI roster contains only three pupils more than those listed for 1993-94. Notwithstanding the Borough's argument, the Commissioner notes that 25 pupils in three classes as of June 1994 already exceeds the regulated maximum of eight per class, without consideration of the age gap between pupils or the possibility of additional pupils through further classification of local children or students from outside the district. Providing for the special needs of pupils requires additional educational services as an essential part of a system of thorough and efficient education. The Commissioner, therefore, directs the restoration of the \$29,249 in this account. (See N.J.S.A. 18A:7A-5)

<u>Account</u>	<u>Reduction</u>
11-218-100-101 Salaries Teachers - Speech	\$20,000

The Borough contends that this reduction will have no impact upon a thorough and efficient system of education. It argues monies are available from other sources, as has been true in the past. The Borough further contends that at least \$16,905 is available in state and federal project funds elsewhere in this budget.

The Board points out that its budget in this area is for one speech teacher whose salary is \$58,090, of which \$41,185 is included in this account. The balance of that salary is provided for by grants totaling \$16,905 which is included on the revenue side of the budget.

The Commissioner finds that the Borough's argument is without merit in that the budgeted amount for speech services would be short by the \$16,905 which the Borough cut. Speech services being consistent with the thorough and efficient mandate of N.J.S.A. 18A:7A-5, the Commissioner directs the restoration of \$20,000 in this account.

<u>Account</u>		<u>Reduction</u>
11-219-100-101	Special Education - Teachers Salaries Home Instruction	\$2,000

The Borough contends that the amount remaining after this reduction would still permit the Board to retain two full-time home instructors, a number which is sufficient to meet the Board's need.

The Board argues that it is obligated to provide home instruction for any of over 1,000 pupils. It contends that it cannot anticipate its needs in this area.

In as much as the burden in this matter rests with the Board to demonstrate its absolute need, the Commissioner finds that the Board has not met its burden. The \$2,000 reduction in this account is sustained.

<u>Account</u>		<u>Reduction</u>
11-000-100-565	Tuition CSSV & Regional Day School	\$90,000

The Borough argues that the Board's practice in this area is arbitrary and capricious in that its 1993-94 expenditures in this account were only \$25,120; yet, the Board budgeted \$116,972 for 1994-95, a claimed 365% increase.

The Board asserts that it is obligated to pay the tuitions of all the pupils whose individual education plans (IEP's) call for placement in the CSSV or Regional Day School. The Board points out

that, for 1994-95, that roster of eligible students is 17 and it is therefore legally obligated to meet that responsibility. (See Exhibit P of Board's Position Statement)

Notwithstanding the arguments presented by the Borough, the roster of pupils scheduled for placement in this account and the tuition amounts clearly support the Board's budgeted amount. The Commissioner directs the restoration of the \$90,000 reduction in this account.

<u>Account</u>	<u>Reduction</u>
11-000-213-100 Undistr. Expend. - Health Serv.	\$20,250

The Borough contends that there exists no need for three full-time nurses for two schools. The Borough proposes that the Board retain two full-time nurses and employ or "reduce one of its positions to a" part-time nurse for three hours per day.

The Board points out that it employs two full-time nurses and a health educator who is also certified as a school nurse. The Board contends that the health educator is already overcommitted in her full-time schedule and that health education is a statutory and regulatory mandate.

The Commissioner, after careful consideration of the arguments relative to this account, concludes that the Board has not demonstrated that the reduction of one of its nurses to part-time would impair its ability to provide a thorough and efficient education. A separate full-time health educator is not mandated by either statute or regulation. Further, the Board may exercise other options available to it under law and regulation to provide the mandated health education. The \$20,250 reduction in this account is sustained.

<u>Account</u>		<u>Reduction</u>
11-000-219-104	Undistr. Expend. Other Support Services - Salaries	\$20,000

The Borough contends this reduction will not impact upon a thorough and efficient education and that other sources of revenue are available in this area if application is made.

The Board points out that these services are for compensation of its Child Study Team which is mandated by law and regulation. To reduce the budget in this account would, in the Board's view, reduce its ability to provide for students with special needs.

The Commissioner finds the Borough's action in this area to be entirely without foundation or reasonable explanation. Child Study Services being clearly within the mandated requirements of a thorough and efficient education, the Commissioner restores the \$20,000 in this account.

<u>Account</u>		<u>Reduction</u>
11-000-219-390	Other Purchased Professional Services	\$17,000

The Borough contends that this account rose from \$16,342 in 1993-94 to \$33,570 in 1994-95 without justification.

The Board contends it is obligated to purchase services in this area of the budget pursuant to evaluation needs and contracted obligations to teachers. The Board argues that costs are dictated by specific needs and not by prior year expenditures. (See Board's Position Statement, at 24 and Exhibit Q.)

The Commissioner notes the objection of the Borough to the Board's providing of information to justify the Board's position not made available to the Borough at the time of the Borough's determination. Notwithstanding the exception raised by the Borough, the Commissioner directs the restoration of the \$17,000 in this

account based upon the documentation provided by the Board which demonstrates its need to provide the purchased special services required for the provision of a thorough and efficient education.

<u>Account</u>	<u>Reduction</u>
11-000-222-100	\$5,001

The Borough contends that the Board's own salary guide for 1994-95 shows a recommended budget of \$48,612, yet the Board proposes a budget of \$53,013.

The Board points out that the additional \$5,000 is the salary of an aide who relieves the librarian, a special subject area teacher, when the librarian is teaching a class.

After careful consideration of the Board's arguments relative to this account, the Commissioner determines that the Board has not met its obligation to demonstrate the absolute need of the aide in this area. No indication is provided as to what the special area of instruction is that is provided by the librarian, or why schedules could not be adjusted to provide full library coverage for all pupils. The Commissioner sustains the \$5,001 reduction in this account.

<u>Account</u>		<u>Reduction</u>
11-000-222-600	Library Supplies & Materials	\$10,000

The Borough contends this account is overbudgeted. It seeks to maintain expenditures at 1993-94 levels.

The Board contends it budgeted the same amount as actually expended in 1993-94, rather than the budgeted amount.

The Commissioner, upon examination of the Board's rationale, finds it insufficient to justify the appropriation amount requested for 1994-95. No explanation is provided as to actual needs and costs. The \$10,000 reduction in this account is sustained.

<u>Account</u>		<u>Reduction</u>
11-000-230-100	Support Services - Gen. Admin.	\$36,000

The Borough proposes the elimination of a full-time computer services position which was newly created in 1993-94, which it contends is a non-teaching position and non-essential for a thorough and efficient education. The Borough posits that a more economical course for a small district like Little Ferry would be a stipended position. It further contends that, prior to 1993-94, the Board provided a thorough and efficient system of education without such a position.

The Board argues that it employs a clerical employee to carry out the duties of this position. The Board further contends that it has over 50 personal computers and as many drives, along with printers and peripheral devices, including a Merlin phone system and a Horym system to maintain and operate. The individual whose position the Borough proposes to eliminate is responsible for keeping these systems operating.

Upon full consideration of the arguments presented, the Commissioner concludes the requirements of a thorough and efficient system of education are not static and cannot necessarily be defined by past standards and positions. Technological aides have become increasingly necessary for the provision of a thorough and efficient educational program. The Commissioner, therefore, directs the restoration of the \$36,000 for the maintenance of this position.

<u>Account</u>		<u>Reduction</u>
11-000-230-600	Gen. Admin. - Supplies and Materials	\$4,000

The Borough argues that the Board's proposed budget of \$12,000 in this area represents a 127% increase, which is both unreasonable and unsubstantiated.

The Board contends that it budgeted the same amount as last year, based upon expenditures of \$8,468, as of May 31, 1994.

The Commissioner, upon consideration of the arguments, determines that the Board has failed to meet its burden of demonstrating the absolute necessity for the full amount in this account. The \$4,000 reduction is sustained.

<u>Account</u>		<u>Reduction</u>
11-000-230-340	Purchased Technical Services	\$25,000

The Borough contends that the amount budgeted is unreasonable and unsubstantiated. It challenges the Board's assertion that it must purchase GAAP software since the GAAP system was implemented as of July 1, 1993, and such software would already have been purchased. The Borough also challenges the need for a new facilities plan in that the Board recently completed a new addition onto its schools.

The Board argues that it must purchase materials for implementing GAAP (\$14,000), as well as consultative services for upgrading its five-year Facilities Plan (\$20,000) and collective bargaining services at \$20,000.

After careful consideration, the Commissioner finds merit in the Borough's argument in that the Board does not account for what services were purchased from the \$23,595 expended in 1993-94,

nor does it refute the Borough's contentions relative to the GAAP software. In light of the above, the Commissioner sustains the \$25,000 reduction in this account.

<u>Account</u>	<u>Reduction</u>
111-000-240-103 Gen. Admin. Salaries Principals	\$70,565

The Borough argues for the elimination of a principal's position with the responsibility for school administration being assumed by the Superintendent.

The Board points out the N.J.A.C. 6:8-3.2(b) mandates that every school building must have the services of a full-time principal, unless a waiver is obtained from the Commissioner upon recommendation of the chief school administrator.

The Commissioner, pursuant to the provisions of N.J.A.C. 6:8-3.2(b), determines that in the absence of a recommendation for a waiver, each of the district's two schools is mandated to have the services of a full-time principal. The \$70,565 reduction in this account is therefore restored.

<u>Account</u>	<u>Reduction</u>
11-000-240-105 Sup. Serv. Admin. Sec. and & Clerical Assistant	\$15,937

The Borough proposes the elimination of one secretarial position given its claim that the position to be eliminated provides only photocopying services which it contends could be assumed by other personnel.

The Board claims that only three secretary clerical positions provide support services for the entire district. Cutting back services in this area would necessitate negotiations to change job descriptions of persons who would be required to assume the duties of the replaced clerical assistant.

The Commissioner has given careful consideration to the positions of the parties. Based upon such consideration, the Commissioner concludes that the Board has failed to demonstrate that its ability to provide those clerical services consistent with a thorough and efficient system of education would be impaired beyond remedy. The \$15,937 reduction in this account is sustained.

<u>Account</u>	<u>Reduction</u>
11-000-290-100 Business & Support Serv. Salaries	\$4,498

The Borough contends the Board contradicts its own salary guide which shows a recommended budget of \$98,071, but proposes a budget of \$102,569.

The Board's documentation on page 43 of its Position Statement demonstrates the difference between the salary schedules and the amount budgeted as consisting of funds for substitutes and overtime. The \$4,498 reduction is restored.

<u>Account</u>	<u>Reduction</u>
11-000-290-250 Bus. & Support Services Unemployment Compensation	\$14,000

The reduction in this account, avers the Borough, is consistent with actual claims in prior years.

The Board claims it must budget for carryover staff, new staff and a rate change expected in January 1995.

The Commissioner determines that the Board has failed to demonstrate the actual need for the amount budgeted over previous year's expenditures. (See Borough's Response page 6) The reduction \$14,000 is sustained.

<u>Account</u>		<u>Reduction</u>
11-000-260-420	Operation of Plant Services Cleaning, Repair & Maintenance	\$25,000

The Borough argues that the Board plans to increase this account by 50% without substantiation. The Borough proposes what it contends is a more reasonable 25% increase.

The Board's approved maintenance plan for 1994-95, including vendor quotations, totals \$218,950, for which its budgeted \$141,000 leaves it \$77,950 underfunded. (See Exhibit V)

The Commissioner, upon consideration of the position of the parties, concludes that the Board has failed to prioritize and demonstrate the absolute necessity in regard to pupil, health, safety and welfare of the projects it set forth in its five-year plan. Having failed to demonstrate which projects could not be justified without seriously placing pupils and staff in jeopardy, the Commissioner finds a 25% increase set by the Borough as consistent with the provision of a thorough and efficient system of education. The \$25,000 reduction in this account is sustained.

<u>Account</u>		<u>Reduction</u>
11-000-260-590	Operation of Plant Purchased Services	\$5,000

The Borough contends that no substantiation is provided for a 150% increase in this account and, therefore, proposes a 45% increase which it deems more reasonable.

The Board refers again to its maintenance program set forth in Exhibit V.

The Commissioner finds the Board's sparse explanation to be insufficient to demonstrate its need for the \$5,000 by which this account was reduced. The Commissioner directs the sustaining of the \$5,000 reduction in this account.

<u>Account</u>	<u>Reduction</u>
11-000-260-620 Operation of Plant Energy	\$33,000

The Borough contends the increase of 73% in this account was without substantiation until the Board presented its engineering study. The Borough contends a 30% increase is reasonable.

The Board points out that it budgeted for a completely renovated HVAC system and a 15-room addition for its Memorial School. It offers as its justification for its increase an energy study conducted by a professional engineer. (See Exhibit V)

The Commissioner has considered the documentation presented by the Board and concludes that it does not clearly justify the entire increase sought by the Board. The \$33,000 reduction in this account is sustained.

<u>Account</u>	<u>Reduction</u>
11-000-270-511 Student Transportation Vendors	\$70,000

The Borough contends this account was increased 67% without substantiation. It proposes a 10% increase over 1993-94.

The Board contends all transportation is accounted for by contracts with vendors submitted in approved form to the Department of Education.

The Commissioner notes that the Board on page 41 of the Position Statement documents the cost by destinations. In light of the Board's evidence, the Commissioner directs the restoration of the \$70,000 in this account.

<u>Account</u>	<u>Reduction</u>
11-000-270-513 Student Transportation Joint Agreement	\$51,000

The Borough alleges that the Board's appropriation increases this account by 174% without substantiation. The Borough proposes a 90% increase.

The Board substantiates its budgeted amount with a copy of the contract for joint transportation of students with the Moonachie School District to Bergen County Vocational School. The \$5,000 in this account is restored.

Recapitulation

<u>Account</u>	<u>Sustained</u>	<u>Restored</u>
11-110-100-101	\$ -0-	\$ 9,153
11-120-100-101	-0-	60,264
11-130-100-101	-0-	30,907
11-190-100-610	50,000	-0-
11-214-100-101	-0-	29,249
11-218-100-101	-0-	20,000
11-219-100-101	2,000	-0-
11-000-100-565	-0-	90,000
11-000-213-100	20,250	-0-
11-000-219-104	-0-	20,000
11-000-219-390	-0-	17,000
11-000-222-100	5,001	-0-
11-000-222-600	10,000	-0-
11-000-230-100	-0-	36,000
11-000-230-600	4,000	-0-
11-000-230-340	25,000	-0-
11-000-240-103	-0-	70,565
11-000-240-105	15,937	-0-
11-000-290-100	-0-	4,498
11-000-290-250	14,000	-0-
11-000-260-420	25,000	-0-
11-000-260-590	5,000	-0-
11-000-260-620	33,000	-0-
11-000-270-511	-0-	70,000
11-000-270-513	-0-	5,000
	<u>\$209,188</u>	<u>\$462,636</u>

In summary, the Commissioner finds and determines that of the \$671,824 reduction in the General Fund Tax Levy for the 1994-95 school year by the Borough of Little Ferry, \$209,188 has been sustained. The Commissioner further finds that the remaining amount of \$462,636 is essential to enable the Board to provide a thorough and efficient system of education.

It is therefore ordered that the Bergen County Board of Taxation increase the local school tax levy of the 1994-95 school year in Little Ferry by \$462,636.

CAP WAIVER

In setting forth its position with respect to the cap waiver monies in the amount of \$121,141, the Board relies on the fact that the cap waiver was thoroughly scrutinized by the County Superintendent and a Department of Education Cap Waiver Panel and approved as being necessary for a thorough and efficient system of education. Further, the Board relies on the fact that both the County Superintendent and the Cap Review Panel determined that no further reallocation in the base budget could be accomplished, and that the budget itself was conditionally approved for submission to the voters with the proviso that the Board must appeal should the cap waiver be rejected. The clear implication of the Board's position is that the cap waiver must be approved since the representatives of the Commissioner had already determined the necessity for the funds in question prior to submission.

The Borough points out that the Cap Waiver approval process of the Department of Education does not raise this matter to the level of being res judicata. The Borough further points out that the State Board of Education in Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater (decided by the State Board of Education, July 6, 1994), concluded that:

The fact that the County Superintendent had designated [cap waiver] moneys as necessary for a thorough and efficient education when he

"conditionally approved" the District's budget and directed that a cap waiver question be presented to the voters does not insulate those amounts from review by the Commissioner. [Slip. op. at 19].

In commenting on the Commissioner's restoration of reductions made by the Borough of Edgewater in light of the voters's defeat of the cap waiver, the State Board of Education in Edgewater stated:

In short, the Commissioner's decision established a budget which, despite voter defeat of the proposal made pursuant to N.J.S.A. 18A:7D-28(f) exceeds the "maximum permissible budget" allowed by the statutes. The Commissioner directed that the additional amounts be added to the District's budget without a determination either of whether it was possible to make reallocations within the Board's base budget or whether the voter requested cap waiver amounts were needed in their entirety in order for the District to provide a thorough and efficient education. To permit this result, given defeat of the proposal made to the voters pursuant to N.J.S.A. 18A:7D-28(f) would be to contravene the express terms of that statutory provision without the assurance that the Commissioner needed to do so in order to fulfill her constitutional obligations. [Edgewater, slip op. at 20].

The State Board directed that:

...the Commissioner determine whether, or to what extent, the specific items which the [local] Board sought to fund with the voter requested cap waiver amounts are in fact essential in order to enable the Board to meet its constitutional obligations. [Edgewater, slip op. at 20].

In reaching his conclusion relative to the merits of this matter, the Commissioner is guided by the direction set forth by the State Board in Edgewater and, therefore, sets forth his determination regarding the cap waiver items below:

<u>Account</u>	<u>Amount</u>
11-110-100-101 Teachers Salaries Pre-K&K	\$19,435

The Commissioner notes that he has already reached the conclusion within the base budget that this additional position is necessary for the provision of a thorough and efficient system of education. He notes that part of the monies for the addition of this position were budgeted within the base budget, and part within the cap waiver request. The Commissioner, based upon his review of the base budget, is confident that further reallocation within that budget cannot be accomplished without doing injury to the Board's ability to provide a thorough and efficient system of education. He therefore directs that \$19,435 be added to the base budget as set forth above.

<u>Account</u>	<u>Amount</u>
11-120-100-101 Teachers Salaries 1-5	\$60,306

The Commissioner notes that the three positions he approved in the base budget result in the district being \$24,767 short in providing for teachers salaries at grades 1-5. (See Board's Position Statement at p. 5). Having determined that further reallocation within the base budget cannot be achieved, the Commissioner directs that an additional \$24,767 be added to the General Fund Tax Levy.

<u>Account</u>	<u>Amount</u>
11-130-100-101 Teachers Salaries 6-8	\$19,141

The Commissioner notes that the above account is \$3,606 in deficit, even with the \$19,141 requested cap waiver. Having determined that further reallocation within the base budget cannot be accomplished without endangering the ability of the district to

provide a thorough and efficient system of education, the Commissioner directs the addition of \$19,141 to the General Fund Tax Levy.

<u>Account</u>	<u>Amount</u>
11-000-260-100 Custodian Salaries	\$19,435

The Commissioner notes that the Board has provided no documentation to support the inclusion of this amount in the cap waiver. Consequently the Commissioner denies the inclusion of this amount in the tax levy.

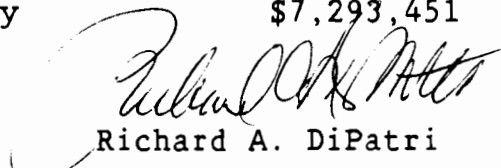
<u>Account</u>	<u>Amount</u>
11-000-290-290 Other Employee Benefits	\$2,824

The Board has failed to provide a written justification for this amount. The Commissioner denies the inclusion of \$2,824 in the General Fund Tax Levy.

In summary, the Commissioner has determined that \$63,343 of the \$121,141 requested in the voter cap waiver is necessary for the provision of a thorough and efficient system of education and pursuant to Edgewater, supra he has concluded that that amount cannot be accommodated by further reallocation within the base budget. The Commissioner therefore directs the Bergen County Board of Taxation to stake a further tax levy of \$63,343 for support of the Little Ferry Public Schools for the 1994-95 school year. The Commissioner's findings are set forth below:

Tax Levy Certified by Council	\$6,767,472
Restored By Commissioner (Defeated Budget)	462,636
Cap Waiver Ordered by Commissioner	<u>63,343</u>
 Total General Fund Tax Levy	 \$7,293,451

IT IS SO ORDERED.


Richard A. DiPatri

JANUARY 23, 1995

ACTING COMMISSIONER OF EDUCATION

DATE OF MAILING - JANUARY 23, 1995

EEC #9466-93 and #12136-93 (consolidated)
SEC # 1
SB # 30-95

IRVINGTON MUNICIPAL COUNCIL, :

COMPLAINANT-RESPONDENT, :

V. :

MICHAEL STEELE, :

RESPONDENT-APPELLANT, :

AND :

BOARD OF EDUCATION OF THE TOWN OF IRVINGTON, ESSEX COUNTY, :

RESPONDENT. :

STATE BOARD OF EDUCATION
DECISION ON MOTION

Decided by the Commissioner of Education, March 9, 1995

For the Complainant-Respondent, Junius W. Williams, Esq.

For the Respondent-Appellant, Riker, Danzig, Scherer, Hyland & Perretti (James S. Rothschild, Jr., Esq., of Counsel)

For the Respondent Board of Education of the Town of Irvington, Schwartz, Simon, Edelstein, Celso & Kessler (Nicolas Celso, III, Esq., of Counsel)

For the Respondent School Ethics Commission, Arlene G. Lutz, Deputy Attorney General (Deborah T. Poritz, Attorney General of New Jersey)

Inasmuch as we find that the Appellant's application fails to meet the standards that would entitle him to relief

JUNE 7, 1995

under Crowe v. De Gioia, 90 N.J. 126 (1982), we deny his motion for a stay of the Commissioner's decision of March 9, 1995.

June 7, 1995

Date of mailing JUN 09 1995

EEC #9466-93 and #12136-93 (consolidated)
SEC # 1
SB # 30-95

IRVINGTON MUNICIPAL COUNCIL, :

COMPLAINANT-RESPONDENT, :

V. :

MICHAEL STEELE, :

RESPONDENT-APPELLANT, :

AND :

BOARD OF EDUCATION OF THE TOWN OF IRVINGTON, ESSEX COUNTY, :

RESPONDENT. :

STATE BOARD OF EDUCATION
DECISION ON MOTION

Decided by the Commissioner of Education, March 9, 1995

Decision on motion by the State Board of Education,
June 7, 1995

For the Complainant-Respondent, Junius W. Williams, Esq.

For the Respondent-Appellant, Riker, Danzig, Scherer,
Hyland & Perretti (James S. Rothschild, Jr., Esq.,
of Counsel)

For the Respondent Board of Education of the Town of
Irvington, Schwartz, Simon, Edelstein, Celso &
Kessler (Nicolas Celso, III, Esq., of Counsel)

For the Respondent School Ethics Commission, Arlene G.
Lutz, Deputy Attorney General (Deborah T. Poritz,
Attorney General of New Jersey)

July 5, 1995

On April 10, 1995, Michael Steele (hereinafter "appellant") filed a brief and appendix with the State Board of Education in support of his appeal from a final determination of the Commissioner of Education dated March 9, 1995 suspending him from his position as school business administrator for the Board of Education of the Town of Irvington as the result of his violations of the School Ethics Act. The appeal brief included a reference to a certification dated March 27, 1995 by counsel for appellant, a copy of which was included in the appendix. The School Ethics Commission filed the instant motion to suppress both the certification in the appendix and that section of appellant's brief which makes reference to that document, contending that it was not properly part of the record on appeal. In his brief in opposition to the motion, appellant maintains that the controverted certification was part of the record. In the alternative, he requests that the record be supplemented.

We agree with the Ethics Commission that the certification by appellant's counsel is not part of the record on appeal. N.J.A.C. 6:2-1.8. Although such document was submitted to the Commissioner by appellant as part of a response to the Ethics Commission's brief in opposition to his motion for a stay, the Commissioner expressly rejected that submission, finding no regulatory authority therefor. Consequently, it was not

considered by the Commissioner or included in the record before him.

We also deny appellant's request to supplement the record, finding the certification of his counsel not material to the issues on appeal or necessary for a fair determination of this matter. N.J.A.C. 6:2-1.9.

Consequently, we grant the Ethics Commission's motion, and will not consider the certification of appellant's counsel in our review of this matter. However, inasmuch as we do not find the single reference in the brief to such document to be so pervasive as to imperil our fundamental responsibility to render a fair determination on the merits, see Pineland Learning Center, Inc. v. New Jersey State Board of Education, decided by the State Board, October 2, 1991, we do not find it necessary to suppress the entire section of appellant's brief which includes reference to the certification of appellant's counsel, as the Ethics Commission urges. Rather, we suppress only that paragraph in the brief which includes a citation to such document. Moreover, we find that the certification and the reference thereto in the brief can readily be disregarded in reviewing the merits of this appeal and that its presence in the appendix will not impair the review process to the extent that preparation of a revised brief or appendix would be warranted.

Given our disposition of this motion, we direct that counsel for the School Ethics Commission now respond to the substance of the underlying appeal by filing her answering brief within ten days of this decision.

July 5, 1995

Date of mailing JUL 07 1995

EEC #9466-93 and #12136-93 (consolidated)
SEC # 1
SB # 30-95

IRVINGTON MUNICIPAL COUNCIL, :

COMPLAINANT-RESPONDENT, :

V. :

MICHAEL STEELE, :

STATE BOARD OF EDUCATION

RESPONDENT-APPELLANT, :

DECISION

AND :

BOARD OF EDUCATION OF THE TOWN :
OF IRVINGTON, ESSEX COUNTY, :

RESPONDENT. :

Decided by the Commissioner of Education, March 9, 1995

Decision on motion by the Commissioner of Education, March 31, 1995

Decision on motion by the State Board of Education, June 7, 1995

Decision on motion by the State Board of Education, July 5, 1995

For the Complainant-Respondent, Junius W. Williams, Esq.

For the Respondent-Appellant, Riker, Danzig, Scherer, Hyland & Perretti
(James S. Rothschild, Jr., Esq., of Counsel)

For the Respondent Board of Education of the Town of Irvington, Schwartz,
Simon, Edelstein, Celso & Kessler (Nicolas Celso, III, Esq., of
Counsel)

For the Respondent School Ethics Commission, Arlene G. Lutz, Deputy
Attorney General (Deborah T. Poritz, Attorney General of
New Jersey)

SEPT. 6, 1995

This is an appeal both from the determination made by the School Ethics Commission on December 19, 1994, that Appellant Michael G. Steele had violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq., by his employment as the School Business Administrator for the Irvington School District at the same time as he was serving as the mayor for the Township of Irvington, and from the determination made by the Commissioner of Education on March 9, 1995, that the appropriate sanction for this violation was to suspend Steele from his position as School Business Administrator for one year. We affirm both determinations.¹

As detailed in the Administrative Law Judge's (ALJ) Initial Decision, the responsibilities with which Steele was entrusted as School Business Administrator encompassed budgeting and financial planning, purchasing and supply management and accounting. As the chief financial officer for the District, Steele played a pivotal role in developing the District's budget. As a Type I school district, the amount to be appropriated to fund the Irvington public school system was determined by the Board of School Estimate. By statute and regulation, the mayor of a Type I school district not only serves on the Board of School Estimate, but is its presiding officer. N.J.S.A. 18A:22-1; N.J.A.C. 6:3-1.1.

Moreover, as mayor of a municipality constituting a Type I school district, Steele had appointed all seven members of the district board of education by July 1993,

¹ We note that this matter initially also involved a separate complaint filed against the Irvington Board that by permitting Steele to remain in his position as School Business Administrator while serving as mayor, the Board had violated the School Ethics Act. As detailed in the decisions below, the School Ethics Commission sustained that complaint and the Commissioner of Education determined that a public reprimand was the appropriate sanction for the Board's conduct. The Board did not appeal either determination to the State Board.

when he returned to the District following a leave the Board had granted him to enable him to serve as School Business Administrator for another school district. Consequently, when he returned to resume his employment with the Irvington Board, Steele was employed by a district board composed entirely of members he had appointed.

Given these facts, we fully concur with the ALJ that:

...Steele's activity as mayor [was] in "substantial conflict" with the proper discharge of his duties as school business administrator. N.J.S.A. 18A:12-24(a). Certainly his responsibilities as mayor regarding appointment of school board members and review of the district's budget "might reasonably be expected to impair his objectivity or independence of judgment," N.J.S.A. 18A:12-24(c), and "prejudice his independence of judgment in the exercise of his official duties," N.J.S.A. 18A:12-24(d). When appointing Board Members, it would be difficult for Steele to remain oblivious to the impact of his choices on his salary as school business administrator. Likewise, when advising the Board on budgetary matters as school boards administrator, it would be unlikely for Steele to remain uninfluenced by his participation on the board of school estimate.

Initial Decision, at 12.

In short, we find that there is a fundamental incompatibility between serving as both the School Business Administrator in a Type I school district and as the mayor of the municipality which constitutes that Type I school district, and that Steele violated the School Ethics Act by holding both positions. His arguments that N.J.S.A. 18A:6-8.4 somehow alters this result are entirely without merit. The terms of that statute permit certified personnel to hold elective municipal office; they do not authorize

high level school administrators to act in violation of the School Ethics Act by participating in activities that are in conflict with the duties of their positions within the public education system.

Similarly, Steele can not rely on the Appellate Division's decision in Schulman v. O'Reilly-Lardo, et al., 226 N.J. Super. 262 (App. Div. 1988) to legitimize his conduct. That case, which was decided before the School Ethics Act was enacted, involved a school nurse and not a high level school administrator expressly subject to the School Ethics Act. Furthermore, the situation was not the same as the one here. Nor can Steele rely on his tenure status to avoid the consequences of the fact that under the School Ethics Act, serving as both the mayor and School Business Administrator for a Type I school district presents an inherent and pervasive conflict of interest. N.J.S.A. 18A:12-30.

We agree with the Commissioner of Education that a year's suspension from his position as School Business Administrator is the appropriate sanction to impose on Steele under the circumstances. In this, we stress the importance of both insuring that Steele will not be serving a board he appointed when he resumes his employment as School Business Administrator and of imposing a sanction which will impress upon him the seriousness with which we view conflicts of interest such as the one here. In this respect, we reject Steele's contention that his responsibilities under the law were somehow clouded by advice given him by two private law firms prior to the enactment of the School Ethics Act. We find this argument to be disingenuous given

that Steele did not seek legal advice after the School Ethics Act became effective and that the School Ethics Commission had twice provided advice that his employment as School Business Administrator while serving as mayor presented a conflict in violation of the School Ethics Act.

S. David Brandt and Corinne Mullen opposed.

September 6, 1995

Date of mailing SEP 07 1995

BOARD OF EDUCATION OF THE BOROUGH :
OF MILLTOWN,

PETITIONER,

V.

BOROUGH COUNCIL OF THE BOROUGH :
OF MILLTOWN, MIDDLESEX COUNTY,

RESPONDENT,

AND

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION :
OF THE BOROUGH OF MILLTOWN, :
MIDDLESEX COUNTY, :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of \$201,210 made by governing body following voter rejection of proposed budget on April 19, 1994.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore \$104,610.

Board also appealed General Fund cap waiver in the amount of \$229,005 rejected by voters, but erroneously included by the governing body in the General Fund tax levy.

Upon review of the record, Commissioner determined to order the increase of \$229,000 in cap waiver monies for a total General Fund tax levy increase of \$104,610 for 1994-95 school year.

BOARD OF EDUCATION OF THE BOROUGH :
OF MILLTOWN, :

PETITIONER, :

V. :

BOROUGH COUNCIL OF THE BOROUGH :
OF MILLTOWN, MIDDLESEX COUNTY, :

COMMISSIONER OF EDUCATION

RESPONDENT, :

DECISION

AND :

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION :
OF THE BOROUGH OF MILLTOWN, :
MIDDLESEX COUNTY, :

For Petitioner, Anthony B. Vignuolo, Esq. (Borrus, Goldin,
Folley, Vignuolo, Hyman & Stahl)

For Respondent, Charles V. Booream, III, Esq.

This consolidated matter was opened before the Commissioner of Education on June 16, 1994, through the filing of a Petition of Appeal of a defeated school budget by the Milltown Board of Education (Board) and the filing of a Petition of Appeal of its defeated cap waiver. Answers to the Petitions of Appeal regarding the defeated school budget and the defeated cap waiver were filed by the Council of the Borough of Milltown (Council) on July 1, 1994.

Position Statements were filed by the respective parties regarding the defeated budget and by the Board above in reference to the cap waiver appeal. Further, as a result of the State Board

decision of July 7, 1993, in Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, (wherein the State Board ruled that in defeated voter cap waiver appeals, the Commissioner must determine whether both reallocations within the district's maximum permissible budget are possible and if, and to what extent, the specific programs at issue are essential in order to provide a thorough and efficient system of education), the county superintendent of Middlesex County was directed to file an affidavit articulating and documenting the budget reallocation review process pursuant to N.J.S.A. 18A:7D-27. The county superintendent was also requested to set forth the basis for concluding that reallocation within the base budget was not possible, and that the monies included within the cap waiver were necessary for the provision of a thorough and efficient system of education. The parties were provided 20 days within which to file responses to the county superintendent's sworn affidavit.

The county superintendent's affidavit and supporting documentation were filed on August 8, 1994, and the Borough filed a response on September 8, 1994.

On April 19, 1994, the voters of the Borough of Milltown defeated the Board's General Fund tax levy and a proposed cap waiver which had been approved by the Middlesex County Superintendent of Schools and a Department of Education Review Panel as being necessary for the provision of a thorough and efficient system of education.

The specific line item accounts for the T&E cap waiver were as follows:

<u>Account</u>	<u>Amount</u>
11-000-100-561 Undistributed Ex-Inst. Tuition	\$208,040
11-000-270-511 Undistributed Ex-Student Transportation	20,965
Total Cap Waiver Amount	<u>\$229,005</u>

Subsequent to the defeat of the budget and cap waiver by the voters of the district, the Board and Council, pursuant to the provisions of N.J.S.A. 18A:22-37, met to consult on the defeated budget whereupon the Council reduced the General Fund tax levy by \$201,210 for support of the base budget. In addition to the reduction of the General Fund Tax Levy imposed by the base budget, the Council erroneously certified a General Fund Tax Levy to the Middlesex County Board of Taxation which included within the certification the cap waiver amount of \$229,005. This action was outside the scope of the Council's authority since only the Commissioner has the legal authority to authorize appropriations above and beyond the maximum permitted budget. The net effect of the Council's unauthorized action was to certify an amount for the General Fund tax levy which was actually in excess of the General Fund tax levy of \$6,039,872 necessary for support of the base budget as submitted to the voters. The Board, in its Petition of Appeal of the reduction in the General Fund tax levy to support the base budget, contributed to the confusion by indicating that the Board's proposed General Fund tax levy was \$6,268,877 which also included the \$229,005 cap waiver. The correct figures in dispute are set forth below:

Proposed Base Budget General Fund Tax Levy	\$6,039,872
Less Reductions imposed by Council in Base Budget	<u>201,210</u>
	\$5,838,662
Amount of General Fund Tax Levy Certified by Council	\$6,067,667
Less Amount Inappropriately Certified by Council	<u>229,005</u>
	\$5,838,662

Amount in Dispute Base Budget	201,210
Amount of Cap Waiver	229,005
Total Amount to be Decided by Commissioner	\$ 420,215

As a result of the unauthorized action by the Council in this matter, the Commissioner will only consider the Council's \$201,210 reduction in the base budget as part of the budget appeal in this consolidated matter. The cap waiver proposal of \$229,005 will be reviewed separately by the Commissioner to determine whether reductions in the cap waiver proposal can be made through reallocations within the base budget and whether the items contained within the cap waiver are necessary for the provision of a thorough and efficient education.

STANDARD OF REVIEW

In rendering judgment in budget appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature, by way of statutory scheme, has delegated the responsibility for providing a thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budget reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item has been reduced by the

governing body is necessary for the provision of a thorough and efficient system of education.

The specific line item reductions are set forth below as contained within Borough of Milltown Borough Council Resolution R 94175.

1994-1995 SCHOOL BUDGET
RECOMMENDED REDUCTION BY
BOROUGH COUNCIL

<u>LINE ITEM</u>	<u>AMOUNT</u>
268	\$ 2,000.00
269	10,000.00
103	17,210.00
603	2,000.00
604	1,500.00
692	2,500.00
699	1,000.00
742	<u>35,000.00</u>
TOTAL	\$71,210.00

1994-1995 SCHOOL BUDGET
RECOMMENDED INCREASE BY
BOROUGH COUNCIL

<u>LINE-ITEM</u>	<u>AMOUNT*</u>
012	\$130,000.00
TOTAL	\$130,000.00

*appropriation from Free Balance

The Commissioner notes that no reasons for the specific line item reductions imposed by the Council were provided at the time of the certification, nor were specific reasons included within the Council's Answer to the Board's Petition of Appeal. The Council's Answer to each specific line item reduction merely denied the Board's individual obligation that the reductions would result in an inability to provide a thorough and efficient system of education.

The New Jersey Supreme Court decided in Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305, 314 (1989), that the Commissioner may infer "...a heavy presumption against the educational validity..." of a governing body's budget reduction when the specific reasons for each individual reduction are not provided at the time the reductions are certified to the county board of taxation. The later the reasons are provided, the greater the presumption of arbitrariness the Commissioner may infer.

Notwithstanding the above, the Commissioner also notes that Deptford, supra, admonishes the Commissioner not to automatically restore the reductions even when the governing body fails to provide reasons at the time of certification. The Commissioner in this matter, therefore, takes note of the Council's tardiness in setting forth any specific reasons for its reductions until its Position Statement, but will consider those reasons within the framework of the standard imposed by Deptford, supra.

Commissioner's Determination

Below are the positions of the parties by individual line item account and the Commissioner's determination for each line item account.

<u>Line Item</u>	<u>Account</u>	<u>Reduction</u>
268	11-190-100-610 General Supplies	\$2,000

The reduction in this account was imposed by the Council based upon its representation that the municipality would assume responsibility for snow plowing and lawn cutting.

The Board argues that the Council has confused general services with teaching supplies. The Board contends that saving to be accrued from the municipality assuming the responsibility for

cutting grass and plowing snow cannot be scheduled as contended by the Council since these are regular duties of employed custodians other than cutting grass or clearing snow. Further, the Board contends that to the date of the filing of the Position Statement no grass cutting has been assumed by the municipality.

The Commissioner has reviewed the arguments presented and notes the confusion created by both parties. The Board designates this account for teaching supplies yet responds more specifically to the Council's arguments regarding cutting grass and plowing snow which are services and not supplies. Neither side having successfully put forth a rational argument, the Commissioner imposes the standard of review relative to who bears the burden in this matter. The Commissioner determines that the \$2,000 reduction is sustained.

<u>Line Item</u>	<u>Account</u>		<u>Reduction</u>
269	11-190-100-640	Textbooks	\$10,000

The Council argues that, since the Board has indicated that the Department of Education has already cut \$20,000 from an originally proposed appropriation which included \$30,000 for math texts, the Board is unable to buy all of the texts, and, therefore, the \$10,000 balance remaining could be further reduced.

The Board argues that the funds in this account are necessary to adhere to its five-year curriculum plan approved by the Department of Education, since its current mathematics textbooks date from 1981 and 1984. The Board claims that it plans to introduce new textbooks a few grades at a time. To deprive the Board of the \$10,000 by which this account was reduced, it asserts, would thwart its five-year textbook replacement plan.

Textbook replacement is a necessary part of an ongoing practice of curriculum planning and implementation; the continuance of an orderly and prudent policy of textbook renewal is necessary for the provision of a thorough and efficient system of education. Further, the Council's position lacks logic in that it argues that if all texts cannot be purchased at once, then none should be purchased at all. The Commissioner rejects said logic and directs the restoration of the \$10,000 in this account.

<u>Line Item</u>	<u>Account</u>	<u>Reduction</u>
103	Capital Projects	\$17,210

The Council contends that the projects in this account include \$8,610 to install playground equipment, \$7,600 to repair and refurbish a ball field and \$1,000 to construct a fence. It argues that the Borough has already removed the old equipment and provided excavation to install the new equipment. The Council also contends that the Borough has already resurfaced the infield and refurbished the outfield of the baseball field in question. The Council also avers that it has agreed to provide the materials and manpower to install the needed fence.

The Board responds to the assertion of the Council by indicating that the remedial work done by the Borough on the ball field was temporary, not long-term, and primarily for the benefit of the recreation of the adults of the community. The Board further argues that the \$8,610 is for additional capital improvements to the playground site, namely for repaving the playground, and is over and above the cost of the equipment and the Borough's excavation. The Board contends that the New Jersey Insurance Group, the Board's liability carrier, has surveyed the Board's premises and recommended the additional capital improvements.

The Commissioner, after carefully considering the arguments of the parties, determines that the Board has established its need for restoration of the \$8,610 for resurfacing the playground for safety reasons. As to the ball field improvements, the Board has failed to demonstrate how the short term improvements it acknowledges differ from the long-term improvements it seeks. Further, the Board presents no rebuttal to the offer of the Borough to supply material and manpower to build its fence. The Commissioner, therefore, sustains the reductions of \$7,600 and \$1,000 for the ball field and fence building.

<u>Line Item</u>	<u>Account</u>	<u>Reduction</u>
603	11-401-100-100 Co-curricular Salaries	\$2,000

The Council contends the \$5,000 original increase in this account over 1993-94 was too high and, thus, reduced the increase by \$2,000.

The Board points out that its expenditures for 1993-94 in this account were \$25,056 and, thus, the account is underbudgeted for 1994-95 with the Council's cuts. The Board contends that when the Council was questioned as to which activities for students should be curtailed, it could not answer. The Board further argues that it has not yet settled contract negotiations which include salaries for co-curricular activities.

Upon review of the positions of the parties, the Commissioner concludes that the Council's actions relative to this account are clearly arbitrary and not based upon any sound reasoning. The Commissioner, therefore, restores the \$2,000 in this account.

<u>Line Item</u>	<u>Account</u>		<u>Reduction</u>
604	11-401-100-500	Purchase Services Co-curricular	\$1,500

The Council indicates that this account showed an increase of \$2,000 over 1993-94. Its reduction of \$1,500 leaves an increase of \$500 in this account.

The Board argues that the Council mistakenly assumed that the increase in this account involved purchases of additional trophies and awards. The Board points out that graduation expenses include the rental of chairs and other equipment from vendors made necessary by previous defeats of budget referenda.* Graduation expenses also include provision of copies of the Constitution of the United States and the Declaration of Independence.

The Board further avers that this account includes expenses for orientation and transportation of eighth grade pupils who will be attending the Spotswood High School.

The Commissioner finds the services rendered from this account to be an integral part of providing for a thorough and efficient system of education. He further finds the actions of the Council in this area to be arbitrary in that no real attempt was made to determine what the increases were designed to fund. The \$1,500 reduction in this account is restored.

<u>Line Item</u>	<u>Account</u>		<u>Reduction</u>
692	11-000-230-331	Legal Services	\$2,500

The Council reduced this amount by \$2,500 based upon its belief that the increase in legal fees for negotiating a new collective bargaining agreement was unnecessary.

* The Board has erroneously included graduation expenses in this account. Graduation expenses should be included under school administration.

The Board contends that the \$15,500 which remains after the Council's reduction already has been reduced to \$6,212 by the August 31, 1994 Budget Summary. The Board further contends its actual expenditure in 1993-94 was \$23,807, and that it is presently engaged in a lawsuit involving employee termination. The Board further contends that it must begin to seek legal assistance in negotiations due to the anticipated climate of the 1994-95 negotiations.

Upon consideration of the rationale presented by the parties, the Commissioner finds the Board has established its need for the amounts reduced by Council. The assurance of legal assistance is necessary to the district's ability to provide a thorough and efficient system of education. The \$2,500 reduction is restored.

<u>Line Item</u>	<u>Account</u>	<u>Reduction</u>
699	11-000-230-890 Miscellaneous Services	\$1,000

The Council's \$1,000 reduction is based upon what it perceives as the Board's failure to provide detailed explanation as to the cost of conferences and training of Board members.

The Board alleges that the costs in this account involve mandatory School Board dues and elections inservice training of new board members. Additionally, it includes conferences and other miscellaneous expenses.

The Board contends the increase is made necessary by the requirements for new board members to attend conferences which were not known when the budget was made, and in order to print election ballots in Spanish and English. Dues increases, as well as

increases in printing costs and legal advertisements, have, according to the Board, resulted in higher costs.

The Commissioner finds that the Board's reliance upon the necessity to train newly elected board members as an explanation for increases to be disingenuous. Failure to delineate specific training requirements in a specific manner further weakens the Board's position. The \$1,000 reduction is sustained.

<u>Line Item</u>	<u>Account</u>	<u>Reduction</u>
742	11-000-290-290 Other Employee Benefits	\$35,000

The Council contends that the Board failed to provide Council with details of employee benefits. The Council further contends that it uses the same insurance carrier as the Board, which has informed the Council of a rate reduction as of July 1, 1994. The Council based its reduction upon decreases in the insurance rates and assurances from the Board that further staff reductions would be necessary, thus reducing cost of employee benefits.

The Board contends that its proposed budget increase is based upon the actual projected number of employees in the health benefits plan and anticipated increases in premiums. The Board avers that its insurance costs for worker's compensation will increase due to a substantial claim which was paid by the present carrier during the 1993-94 year.

Upon review of the Board's position, the Commissioner notes that the Board, while claiming notification of increased costs in both health benefits and worker's compensation offers no documentation to support and position. In light of the burden of proof which prevails in budget determinations, the Commissioner sustains the \$35,000 reduction in this account.

<u>Account</u>	<u>Amount</u>
012 Unappropriated Free Balance	\$130,000

The Council, in addition to its reductions imposed in the Board's appropriation accounts, seeks a further appropriation of \$130,000 into the revenues from unappropriated free balance. The Council arrived at this figure because \$130,000, when added to the amount already appropriated into revenues by the Board, would result in the Board having appropriated 93% of its surplus into the budget. The Council argues that, since it has appropriated 93% of its surplus into its budget, the Board should do no less.

The Board counters by pointing out that such an additional appropriation would result in reducing its available surplus to \$27,000, an amount which it contends is well below the 3% of the Board's overall budget of \$7,800,000 which it asserts the New Jersey Department of Education recommends for a reasonable surplus to meet contingencies. In this regard, the Board points out that it already is short in its Child Study Team and Special Education placement accounts due to unanticipated referrals. The Board contends that, unlike the Council, it does not have the resources for generating a surplus and cannot be held to the same percentage of surplus appropriation as the Council.

The Commissioner, on December 16, 1994, notified the parties that he intended to take official notice of the 1993-94 year-end district audit to determine whether the district underestimated in its 1994-95 budget the amount of undesignated surplus.

Upon review of the arguments set forth by the parties and the 1993-94 year-end audit, the Commissioner determines to sustain

\$50,000 of the reallocation and restore \$80,000. This will not jeopardize the Board's ability to provide a thorough and efficient system of education.

Recomputation

<u>Line Item</u>	<u>Account</u>	<u>Sustained</u>	<u>Restored</u>
268	11-190-100-610	\$ 2,000	- 0 -
269	11-190-100-640	- 0 -	\$ 10,000
103		8,600	8,610
603	11-401-100-100	- 0 -	2,000
604	11-401-100-500	- 0 -	1,500
692	11-000-230-331	- 0 -	2,500
699	11-000-230-890	1,000	- 0 -
742	11-000-290-290	35,000	- 0 -
	012	50,000	80,000
	Totals	\$96,600	\$104,610

CAP WAIVER

In setting forth its position with respect to the cap waiver amount, the Board relies upon the assertion that its cap waiver request was thoroughly scrutinized by the Middlesex County Superintendent and the Department of Education Review Panel. The county superintendent in her affidavit indicates that the Board's original cap waiver request was for \$550,071. (See county superintendent's affidavit at p. 2) By virtue of the process of review imposed by the Department of Education and reallocations, the final cap waiver was approved by the county superintendent at \$229,005.

The Commissioner notes that the Council by virtue of its erroneous inclusion of the cap waiver amount in its certification and further failure to raise specific objection to the cap waiver request has, in fact, tacitly acknowledged its belief that the amounts requested are necessary to enable the Board to provide a thorough and efficient system of education.

Upon review of the county superintendent's affidavit and his own review of the base budget for purposes of determining further reallocation, the Commissioner concludes that the base budget cannot be further reduced without impeding the district's ability to provide a thorough and efficient system of education. Further, the Commissioner concludes that the two accounts, student transportation and tuition, which are underbudgeted are areas which must be fully funded in order to ensure the district's ability to provide all its students which the opportunities consistent with a thorough and efficient education. Therefore, the Commissioner directs that the \$229,005 cap waiver be approved.


As previously noted, the Council in establishing the General Fund tax levy reduced the Board's requested General Fund tax levy amount by \$201,210 but erroneously included the \$229,005 cap waiver proposed in its certification to the Middlesex County Board of Taxation setting that levy at \$6,067,667. In light of the Commissioner's determination herein, the Middlesex County Board of Taxation is directed to set the levy in accordance with the figures as set forth below:

Proposed General Fund Tax Levy	\$6,039,872
Less reductions imposed by council	201,210
	<u>\$5,838,662</u>
Plus Restorations by Commissioner to Base Budget	104,610
	<u>\$5,943,272</u>
Plus Cap Waiver	229,005
	<u>\$6,172,277</u>
Less erroneous certification by council Amount by which 1994-95 General Fund tax levy is to be increased	6,067,667
	<u>\$ 104,610</u>

IT IS SO ORDERED.

JANUARY 24, 1995

DATE OF MAILING - JANUARY 24, 1995


 Richard A. DiPatri
 ACTING COMMISSIONER OF EDUCATION

SB #31-95

IN THE MATTER OF THE CAP WAIVER :
 APPEAL FOR THE BOARD OF EDUCATION :
 OF THE HOPEWELL VALLEY REGIONAL : STATE BOARD OF EDUCATION
 SCHOOL DISTRICT, MERCER COUNTY. : DECISION
 _____ :

Decided by the Acting Commissioner of Education,
March 20, 1995

For the Appellant, Martinez & Jennings (Robert P. Martinez,
Esq., of Counsel)

This appeal challenges a decision made by the Acting Commissioner of Education which granted \$648,405 of the request of the Board of Education of the Hopewell Valley Regional School District pursuant to N.J.S.A. 18A:7D-28(e) to exceed its maximum permissible budget for 1995-96 by \$1,418,637. The Acting Commissioner's determination to grant a waiver of an amount that was \$770,232 less than the amount the Board had requested was based on review of the District's proposed budget as it had been submitted for approval. In reviewing the budget, the Acting Commissioner increased anticipated revenues by \$75,000, reallocated \$360,055 from surplus and \$112,000 from instruction and benefits. He also made reallocations in basic skills and homebound instruction, and reductions in guidance services, media services and energy costs.

The Board contends that the Acting Commissioner should have granted its application in full, asserting that the Commissioner did

April 5, 1995

not have the authority to reduce that amount. It argues that it was entitled to the full amount of the waiver it asked for because it met the criteria specified in N.J.S.A. 18A:7D-28(e) for applying for such a waiver and because the State Board had not promulgated any additional criteria. The Board further argues that reduction of its waiver amount limits it to providing a minimal level of a thorough and efficient education and that it makes review of its budget by the voters and the governing body under N.J.S.A. 18A:22-37 meaningless. It also contends that the State Board's regulations entitle it to maintain a three percent free balance and that the Commissioner's determination reduces its free balance to below three percent.

In addition to the above legal arguments, the Board asserts that the Acting Commissioner's decision is arbitrary and capricious, claiming that the Acting Commissioner was not familiar with circumstances in the District that required it to budget as it did. The Board urges that consideration of these circumstances mandates that the Acting Commissioner's judgment be set aside and that its determination be sustained, which would allow it to increase its budget as it requested.

We find the Board's arguments to be entirely without merit. Even cursory reading of N.J.S.A. 18A:7D-28(e) clearly shows that the terms of that provision do not automatically entitle a district board to any waiver, let alone a waiver for the specific amount it requests when it applies. N.J.S.A. 18A:7D-28(e) provides:

A board of education of a school district which:
(1) for two years prior to the prebudget year, has had an annual average increase in the district's resident enrollment which is greater than two percent; or (2) between the prebudget

year and the year prior to the prebudget year, has had an increase in the district's local cost for special education pupils which is greater than five percent; or (3) during the 1990-91 school year but prior to April 1, 1991, has entered into a lease purchase agreement, may apply to the Commissioner of Education for a waiver of the expenditure limitation established pursuant to this section....Any waiver granted by the commissioner pursuant to this subsection shall not be included in the question on excess expenditures which is to be submitted to the voters of the district pursuant to subsection f. of this section.

(Emphasis added.)

Under the terms of this provision, a district whose enrollment has increased more than 2% or whose costs for special education have increased more than 5%, may apply to the Commissioner for a waiver of its budget limitation. Even here, the statute is permissive rather than mandatory, and a district meeting the criteria is not required to apply for a waiver.

Nor do the terms of the statute require that the Commissioner grant a waiver, either in full or in part, to a district which meets the statutory criteria for applying. There is no ambiguity in the language of the statute. The criteria specified therein represent prerequisites for applying for a waiver rather than a mandate that the Commissioner automatically increase the district's spending level.

This is consistent with the statutory framework. N.J.S.A. 18A:7D-28(a) bases a district's maximum budget for the current year on its budget for the previous year. This limits the rate at which the District is permitted to increase its spending in the current year. If the budget for the previous year had been the minimal amount necessary for the district to provide a thorough and

efficient education, an increase in enrollment, for example, might well automatically require an increase in the district's maximum budget the next year in order to enable the district to provide a minimally thorough and efficient education. However, under the system currently in place, a district's budget for the year does not represent the minimal amount a district needs to provide a constitutionally adequate education. Thus, the need for increasing the maximum budget in subsequent years is not automatic.

Where the conditions specified in the statute are presented, the district is afforded the opportunity to apply for a waiver if it needs one. At that point, the Commissioner must determine whether those conditions have changed circumstances in the district so that it is necessary to increase the district's maximum permissible budget. The judgment which the Commissioner must make is whether such an increase is necessary, and, if so, the amount required, in order for the district to be able to provide a thorough and efficient education to its students. Cf. East Windsor Reg'l Bd. of Ed. v. State Bd. of Ed., 172 N.J. Super 547, 552 (App. Div. 1980). Given the statutory framework, no other construction is possible. The fact that the State Board of Education has not established by regulation exactly what constitutes a thorough and efficient education can not confer on a district an absolute right to exceed its maximum budget once it meets the statutory prerequisites to request to do so.

This conclusion does not limit the quality of the education which the district can provide to one that is merely minimally adequate in constitutional terms. As stated, the amount of a district's maximum permissible budget does not represent a

determination of the minimum amount necessary to provide a thorough and efficient education. Generally, it is well in excess of that amount.

Moreover, under N.J.S.A. 18A:7D-28(f), any district can seek voter approval to exceed its maximum permissible budget in a given year for any purpose. Hence, no district is deprived of the opportunity to enhance its programs as much as it wants so long as its voters approve. The distinction between the two kinds of expenditure limitations is that a waiver granted by the Commissioner pursuant to N.J.S.A. 18A:7D-28(e) is automatically incorporated into the rate at which the district's budget is permitted to grow in future years. Under N.J.S.A. 18A:7D-28(f), the increased budget growth accrues to the district only for the year for which the voters approved the additional expenditures, and it does not act to automatically inflate the budgets for future years.

We find no merit to the contention that our regulations entitle any school district to retain a 3% surplus. N.J.A.C. 6:20-2A.11(a) provides in pertinent part that:

A district board of education requesting to exceed the permissible rate of increase pursuant to N.J.S.A. 18A:7D-28 shall appropriate all available general fund free balance in excess of three percent of the general fund budget for the budget year such request is made.

While we believe that it is generally prudent for a district board to retain three percent in unrestricted free balance, i.e., surplus, nothing in this regulation confers an entitlement to retain any surplus. Nor is such a legal entitlement granted by any other provision of the education laws.

In this case, we see no risk that reduction of this District's surplus will leave it with insufficient funds to meet any

unexpected circumstances it may confront this year. The record demonstrates that, in reviewing the District's request, the Commissioner and his representatives focused on this particular district's history of underestimating its surplus and of retaining excess surplus over the course of several years. We find that these amounts were sufficiently large to justify a conclusion that the District could allocate additional funds to support its operations this year without putting itself in a precarious position.

The Board concedes this by its justification for retaining a large surplus. As delineated in its brief, it wants to distribute its excess surplus over several years so as to prevent the tax rate from fluctuating. This may or may not be a legitimate objective,¹ but it has no relation to the educational needs of the District for this year. Moreover, because these funds are unencumbered, there is no guarantee that the district will ultimately use any of those funds as it plans.

Similarly, the record fails to support the Board's claim that the Acting Commissioner was not familiar with the circumstances in the District which required it to budget as it proposed. All the circumstances which the Board delineates in this appeal were set forth in the documents submitted to the Commissioner by the District itself either initially or on request from the Commissioner's representatives. The fact that the Acting Commissioner made judgments about those circumstances with which the Board does not agree does not make his determinations arbitrary. Nor has the Board

¹ Such practice may tend to obscure from the voters an accurate picture of the budget which is really necessary to provide an adequate education.

demonstrated to us that it can not provide a thorough and efficient education without increasing the amount of its expenditure limitation beyond the amount of the waiver granted it by the Acting Commissioner.

Therefore, for the reasons set forth in this opinion, the State Board of Education affirms the Acting Commissioner's decision.

April 5, 1995

Date of mailing APR 05 1995

32-95

BOARD OF EDUCATION OF THE TOWNSHIP OF EASTAMPTON, :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 TOWNSHIP COUNCIL OF EASTAMPTON, : DECISION
 BURLINGTON COUNTY, :
 RESPONDENT. :

IN THE MATTER OF THE CAP WAIVER :
 APPEAL OF THE BOARD OF EDUCATION :
 OF THE TOWNSHIP OF EASTAMPTON, :
 BURLINGTON COUNTY. :

Board appealed General Fund tax levy reductions in the amount of \$271,300 made by governing body following voter rejection of proposed budget on April 19, 1994.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore \$57,396.

Board also appealed General Fund cap waiver in the amount of \$213,904 rejected by voters.

Upon review of the record, Commissioner determined to order the increase of \$182,794 in cap waiver monies for a total General Fund tax levy of \$2,230,542 for 1994-95 school year.

JANUARY 23, 1995

BOARD OF EDUCATION OF THE TOWN-	:	
SHIP OF EASTAMPTON,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	
	:	DECISION
TOWNSHIP COUNCIL OF EASTAMPTON,	:	
BURLINGTON COUNTY,	:	
	:	
RESPONDENT.	:	
	:	
IN THE MATTER OF THE CAP WAIVER	:	
APPEAL OF THE BOARD OF EDUCATION	:	
OF THE TOWNSHIP OF EASTAMPTON,	:	
BURLINGTON COUNTY.	:	
_____	:	

Steven J. Mushinski, Esq. for Petitioner

John E. Harrington, Esq., for Respondent

This consolidated matter was opened before the Commissioner on June 20, 1994, through the filing of a Verified Petition of Appeal of a controversy which has arisen pursuant to the authority vested in the Commissioner by N.J.S.A. 18A:6-9 to hear and determine controversies under the school laws of the State and in accordance with the Attorney General Opinion No. 91-0036 (1991) by reasons of the following facts:

1. Petitioner is the Board of Education of the Township of Eastampton in the County of Burlington, New Jersey ("Board") and is required by the Constitution and statutes of New Jersey to provide a thorough and efficient system of education.

2. On or about March 24, 1994, the Board submitted its proposed budget for the 1994-95 school year to the Burlington County Superintendent of Schools, along with a cap waiver request of

\$137,648 for enrollment increases and \$182,987 for special education cost increases.

3. The Board also requested a Voter Cap waiver in the amount of \$213,904.

4. The Commissioner approved a cap waiver request of \$320,635 for enrollment and special education cost increases. On March 30, 1994, the County Superintendent notified the Board that the 1994-95 school year budget had been conditionally approved subject to the advertisement of a Voter Cap waiver proposal in the amount of \$213,904.

5. On April 19, 1994, at the annual election, the Board submitted a General Fund Budget tax levy proposal in the amount of \$2,047,748 to the voters of the School District pursuant to N.J.S.A. 18A:22-23 and a cap waiver in the amount of \$213,904.

At said election the voters rejected the General Fund tax levy as well as the voter cap waiver.

6. Within the time provided for by statute, the Board delivered its proposed school budget to the Township Council of Township of Eastampton (Township).

7. On May 19, 1994, the Township, after consultation with the Board, passed resolution No. 1994-47 certifying that \$1,990,352 was, in the judgment of the Township Council, necessary to provide a thorough and efficient system of education in the district. However, in computing the tax certification, the Township erroneously combined the General Fund and voter cap waiver for a total tax levy base of \$2,261,652. (This amount included the \$2,047,748 of General Fund tax levy and the \$213,904 for the voter cap waiver.) The net effect of the resolution and subsequent

certification of taxes was that the General Fund budget and the cap waiver amount were \$271,300 less than the combined amounts originally proposed by the Board. (Since the tax levy reduction commingled both the regular budget appropriations and the voter cap waiver requests, the Commissioner will combine the two areas for purposes of this appeal, will address the cap appeal first, and will treat the difference as a disputed amount separate from the cap appeal.)

8. On May 23, 1994, the Board adopted a resolution authorizing an appeal of the \$271,300 tax reduction to the Commissioner of Education on the grounds that the amount certified by the Township would not be sufficient to provide a thorough and efficient system of education.

<u>Proposed Tax Levy by Board</u>		<u>Amount of Tax Levy Certified by Governing Body</u>	
General Fund	\$2,047,748	General Fund	\$1,990,352
Cap Waiver	213,904	Cap Waiver	
<u>Amount of Reduction by Governing Body</u>		<u>Amount in Dispute Before Commissioner</u>	
General Fund	\$ 271,300	General Fund	\$ 271,300
Cap Waiver		Cap Waiver	

The Township made the reduction in the amounts for the reasons specified as follows:

<u>Account</u>		<u>Amount</u>
11-110-100-101	Preschool/Kindergarten Salaries	\$ 8,228
11-120-100-101	Grades 1-5 Salaries	66,572
11-130-100-101	Grades 6-8 Salaries	46,620
11-230-100-101	Salaries of Teachers	32,000
11-000-222-100	Salaries	31,275
11-000-260-100	Salaries	10,100

Reason: Amount appropriated is in excess of total compensation proposed for staff

<u>Account</u>	<u>Amount</u>
11-000-219-320 Child Study Team	\$ 11,523
Reason: Overbudgeted, i.e., double salary for the same person	
11-000-260-610 General Supplies	5,000
Reason: No substantiation for increase	
11-401-100-100 Extracurricular Activities	5,199
11-401-100-500	1,850
11-401-100-800	3,500
Reason: No substantiation for increase, i.e., double appropriation	
11-120-100-730 Equipment	26,643
11-130-100-730	22,890
Reason: Amount already in referendum	

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the

amount by which a specific line item reduction is imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Moreover, the Commissioner has the constitutional obligation to ensure that a school district budget is sufficient for the provision of a thorough and efficient education. Robinson v. Cahill, 69 N.J. 449, 463 (1976) (Robinson V); Abbott v. Burke, 119 N.J. 287 (1990). In order to meet this duty, the Commissioner is charged with the responsibility to review defeated budgets which had been "conditionally certified" by the county superintendent, subject to voter approval to exceed the statutory budget limitation (cap waiver). See Administrative Agency Advice (AAA) 91-0036 (July 8, 1991). Upon review, the Commissioner may order an increase in those limited instances where it is necessary to meet the constitutional mandate. Districts must demonstrate both that particular amounts above the cap are necessary to provide a thorough and efficient education, and that reallocation within the permissible budget amount cannot be accomplished. Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, Bergen County (decided by the State Board of Education July 6, 1994); see AAA 91-0036, supra.

In addition, the Commissioner has reviewed the budget beyond the reduction made by the Borough. Moreover, on December 16, 1994, the Commissioner notified the parties that, pursuant to N.J.A.C. 1:1-15.2, he intended to take official notice of the 1993-94 year-end district audit as it related to the amount of

undesigned surplus available to the district. Upon such review, the Commissioner determined that the undesigned surplus was less than 1%.

Mindful then of the balance to be applied in this standard of review with respect to the various line items contained in the cap waiver request, the Commissioner makes the following determination with respect to the consolidated petition of appeal before him:

Because of the erroneous commingling of the regular and voter tax levies, cap waiver issues will be considered and deducted from the total Township revision. The balance of \$57,396 will be considered as an appeal of the regular budget tax levy as a salary revision.

The cap waiver amounts under appeal in this matter are as follows:

<u>Account</u>		<u>Amount</u>
11-130-100-101	Regular Programs - Instruction Grades 6--8 Salaries of Teachers	\$46,620

The request of the Board is approved, based only on the potential elimination of a reading specialist in the middle school. The Board's argument that class sizes would be increased ignores the enrollment cap waiver. The Council's position that salary accounts were overbudgeted based on their review is difficult to accept in the absence of the specific study referred to.

<u>Account</u>		<u>Amount</u>
11-190-100-610	General Supplies	(\$ 7,916)

The request of the Board is denied. The Board has had an approved increase in the budget for enrollment increases.

<u>Account</u>	<u>Amount</u>
11-000-260-610 General Supplies	\$ 2,242

The request of the Board is approved due to the additional square feet of space.

<u>Account</u>	<u>Amount</u>
11-190-100-640 Textbooks	(\$ 2,422)

The request of the Board is denied. Textbook purchases should be accommodated within the cap waiver allowance for increased enrollment.

<u>Account</u>	<u>Amount</u>
11-230-100-101 Salaries of Teachers	\$32,000

The request of the Board is approved. English as a second language is a program that is consistent with state requirements for a thorough and efficient system of education.

<u>Account</u>	<u>Amount</u>
11-000-222-100 Salaries	\$31,275
	Disallowed (<u>18,000</u>)
	Allowed \$13,275

The request of the Board is approved for \$13,275 since the base budget apparently includes the \$18,000 budgeted for the non-certified person.

<u>Account</u>	<u>Amount</u>
111-000-260-100 General Supplies	\$10,000

The request of the Board is approved, due the additional square feet of space.

<u>Account</u>		<u>Amount</u>
11-000-290-290	Other Employee Benefits	\$18,436
	Disallowed	(2,772)
	Allowed	\$15,664

The request of the Board is approved except for the percentage of benefit costs for the \$18,000 disallowed in account 11-000-222-110.

<u>Account</u>		<u>Amount</u>
12-120-100-730	Equipment	\$26,643
12-130-100-730		\$26,400
12-000-400-450		\$ 9,950

The requests of the Board are approved based on the additional square feet of space and the need to repair unsafe areas. The Commissioner is persuaded to restore these amounts based on the representation of the Board that the equipment in question was not included as part of the bond referendum. Both requests are consistent with requirements for a thorough and efficient system of education.

<u>Account</u>		<u>Amount</u>
11-230-100-101	Township revision over the Cap Waiver	\$57,396

Since the Township combined the separate T&E waiver and the tax levy for the regular capped budget they, in effect, funded the regular budget by the amount of the cap waiver (\$213,904). The amount over the waiver amount is \$57,396. Township arguments were generally too broad or, in the case of salaries, did not provide sufficient information in the form of the study referred to for the Commissioner to sustain the Township position. The additional amount over the cap waiver is approved for Salary purposes.

In summary, upon review of the documentation submitted on this matter, the Commissioner finds and determines that \$57,396 of

the revisions recommended by Council is essential to provide a thorough and efficient educational system and \$182,794 of the original cap waiver request are also essential and that a further reallocation of funds within the districts maximum permissible budget is not possible (Board of Education of the Borough of Rutherford v. Mayor and Council of Rutherford, Bergen County, decided by the State Board of Education, July 7, 1993.)

Accordingly, the Burlington County Board of Taxation is directed to make the necessary adjustments as set forth below to reflect a total of \$2,230,542 to be raised in tax levy for General Fund purposes for the 1994-95 school year as per the following calculations.

	<u>General Fund</u>
Tax Levy Certified by Council	\$1,990,352
Ordered by Commissioner:	
Restoration Council Reductions	\$ 57,396
Cap Waiver Approval	<u>182,794</u>
Total Commissioner Decision	<u>240,190</u>
Total Taxes to Be Raised for 1994-95 School Year	\$2,230,542

IT IS SO ORDERED.

[Signature]
Richard A. DiPatri

ACTING COMMISSIONER OF EDUCATION

JANUARY 23, 1995

DATE OF MAILING - JANUARY 23, 1995

IN THE MATTER OF THE CAP WAIVER :
 APPEAL FOR THE BOARD OF EDUCATION : STATE BOARD OF EDUCATION
 OF HOLMDEL TOWNSHIP, MONMOUTH : DECISION
 COUNTY. :
 _____ :

Decided by the Commissioner of Education, March 20, 1995

For the Appellant, Reussille, Mausner, Carotenuto, Bruno & Barger (Martin N. Barger, Esq., of Counsel)

This matter was initiated by a request to the Commissioner of Education pursuant to N.J.S.A. 18A:7D-28(e) by the Board of Education of Holmdel Township to exceed its maximum permissible budget for 1995-96 by \$943,060. The Acting Commissioner approved \$660,008 of the request, and denied \$283,052.

On appeal, the District is seeking modification of the Acting Commissioner's determination so as to increase the amount awarded. The District maintains that any denial should be limited to the amount of \$34,063.

On April 3, 1995, the Commissioner acknowledged that a technical error had been made in this matter with respect to budgeted tuition payments for special education tuition. He requested that we enter this fact on the record before us and increase the amount of the District's waiver by \$25,171.

After careful review, the State Board of Education affirms the Acting Commissioner's determination granting approval to the

April 5, 1995

District to exceed its maximum permissible budget. In so doing, we stress that the District was required to demonstrate to us that an increase beyond its maximum permissible budget was required in the amount it requested in order for the District to be able to provide a thorough and efficient education. In the Matter of the Cap Waiver Appeal for the Board of Education of the Hopewell Valley Regional School District, decided by the State Board, April 5, 1995; cf. Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, decided by the State Board, July 6, 1994.

After reviewing the documentation, we are not convinced that it is necessary for the District to increase its maximum budget beyond the amount of the increase approved by the Acting Commissioner as modified herein.

April 5, 1995

Date of mailing APR 05 1995

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
OF THE TOWNSHIP OF BRANCBURG, : DECISION
SOMERSET COUNTY :
_____ :

SYNOPSIS

Board appealed General Fund cap waiver in the amount of \$861,327 rejected by voters.

Upon review of the record, Commissioner determined to order the increase of \$0 in cap waiver monies for a total General Fund tax levy of \$16,118,133 for 1994-95 school year.

JANUARY 24, 1995

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
OF THE TOWNSHIP OF BRANCHBURG, : DECISION
SOMERSET COUNTY :
_____ :

John E. Collins, Esq. (Carroll & Weiss), for Petitioner
Cheryl J. Bereschak, Esq. (Woolson, Sutphen, Anderson
and Nergaard), for Respondent

This matter was opened before the Commissioner of Education on June 29, 1994, by way of a Petition of Appeal filed by the Board of Education of the Borough of Branchburg (Board) seeking approval by the Commissioner of a Thorough and Efficient (T&E) cap waiver of \$861,327 which was defeated by the voters of the district at the annual school elections held on April 19, 1994. An Answer to the above-cited Petition of Appeal was filed by the Township Committee (Township) of the Township of Branchburg in July 7, 1994. Position Statements were filed on July 20 and 27, 1994 by the Board or Township, respectively. Replies to the respective Position Statements were filed by each of the parties on August 5, 1994 whereupon no further papers being filed, the record was officially closed.

The Commissioner notes that in addition to the defeat of the cap waiver by the voters of the district, the proposed school budget was also defeated, which resulted in a determination by the

Township to reduce the proposed General Fund tax levy, after consultation with the Board pursuant to N.J.S.A. 18A:22-37, by \$260,216, thus reducing the General Fund tax levy certified to the Somerset County Board of Taxation to \$16,118,133. Based upon the General Fund tax levy reduction, the Board appealed to the Commissioner for restoration of same. However, due to altered circumstances occasioned by an Appellate Division stay of the 1994-95 interest payments on the Board's lease-purchase plan, the Board reallocated the \$231,451 intended for such interest payments to fund programs reduced by the Township in its certification, and withdrew its budget appeal. Based upon advice of the Somerset County Acting Superintendent of Schools recommending approval of the withdrawal of the budget appeal contingent upon going forward in the cap waiver appeal, the Commissioner approved the withdrawal of the budget appeal leaving only the cap waiver appeal before him. (See Commissioner's letter of October 31, 1994.)

The sole account for which the waiver in this matter is being sought is 11-000-000-100-561-01-102, entitled Tuition Regular in the amount of \$861,327.

STANDARD OF REVIEW

The Commissioner's authority to grant cap waivers stems from his obligation to assure that each school district has sufficient funding available to it to provide a thorough and efficient system of education. (See Administrative Agency Advice (AAA) 91-0036 dated July 8, 1991.)

In order to direct an increase in the maximum permissible budget under N.J.S.A. 18A:7D-28(f) in the face of a defeat of such

cap waiver request by the voters of the district, the Commissioner must determine that the base budget does not contain the minimum amount necessary for the provision of a thorough and efficient system of education, and that no reallocations are possible within the framework of that budget. Further, upon so determining, the Commissioner may only grant such cap waiver upon determining that the items within the cap waiver are essential for the provision of a thorough and efficient system of education. (See Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater decided by State Board July 6, 1994.)

COMMISSIONER'S DETERMINATION

Set forth below are the respective positions of the parties and the determination of the Commissioner.

The Board's initial argument sets forth the fact that its entire budget was scrutinized by the Acting Somerset County Superintendent of Schools and both the budget and the cap waiver were approved as being necessary for the provision of a thorough and efficient system of education. The cap waiver in this matter consists of \$861,327 which the Board contends is necessary to cover a shortfall of that amount in its tuition account for providing high school education for the pupils of the district. The Board alleges the following tuition obligations:

Somerville High School (447 at \$8,820)	\$3,942,540
Adjustment to 1991-92	214,492
Hunterdon Central H.S. (3 agricultural students)	<u>31,392</u>
Total Tuition	\$4,188,424

Since it claims to have only been able to budget \$3,327,097, the \$861,327 represents the minimum necessary to provide a thorough and efficient system of education.

The Township argues that a review of the budget reveals that the tuition appropriation for 1994-95 is less than that for 1993-94 (\$4,263,161), as opposed to \$4,188,424 thus indicating a cap waiver is not needed. The Township alleges that if the tuition has not put the budget over cap, then another factor must be responsible. The Township identifies this factor as the Board's lease-purchase proposal.

It is the Township's contention that the \$1,704,400 in proposed appropriations for principal and interest on the lease purchase proposal puts the Board's budget over cap. The Township alleges that a lease-purchase transaction is not grounds for a T&E cap waiver. It further contends that even if it were determined to be essential to a T&E education, sufficient funds exist within the budget because of the Appellate Division's stay. The Township further alleges that the current budget contains funds for two semi-annual interest payments of \$704,700 each, and a principal payment of \$295,000 totaling \$1,704,700. Because of the stay, asserts the Township, the principal payment and at least one interest payment will not be paid, leaving almost one million dollars available to the Board to meet its tuition obligations.

The Board counters in its reply that the placing of \$861,327 into a tuition cap waiver was accomplished at the recommendation of the Somerset County School Business Administrator. It further alleges that N.J.A.C. 6:22A-1.2(k)

requires that lease purchase funds must be placed in the base budget, thus requiring that the tuition amount be in a cap waiver.

The Board alleges that while it is aware that the Appellate Division's stay reduces the amount to be paid by the Board toward its lease-purchase agreement, it cannot reduce its 1994-95 appropriation for such purpose by the full amount, lest it be required to seek an even larger cap waiver in 1995-96. The Board further argues that by adopting its present course of action of maintaining a payment schedule of two interest payments and one principal payment, it saves the taxpayers \$688,000 over the term of the lease purchase. The Board further points out that pursuant to that above payment schedule, its savings were \$231,451 which it appropriated to fund program previously deemed essential by the Acting Somerset County Superintendent but which were reduced by the Township upon defeat of the budget.

In an affidavit from Ingrid Keller, School Business Administrator, attached to the Board's reply, Ms. Keller points out that the Board expects that the State Board of Education will rule on the Township's appeal of the Commissioner's approval of the lease purchase agreement, and thus anticipates the right to its certificates of participation in October of 1994. The Board's payment schedule outlined above has been established in anticipation of the State Board's ruling. In further defense of the Board's decision, Ms. Keller refers to Exhibit A (attached) which posts the payment schedule proposed by the Board, and Exhibit B (see attached) which posts the payment schedule delaying payment until 1995-96. The difference between the two indicates a greater cost of \$688,000 if the current payment schedule as outlined in Exhibit A is not maintained.

The Township's reply to the Board's Position Statement emphasizes the standard which the Commissioner must apply pursuant to Edgewater, supra. It contends that any increase without a solid factual basis that no reallocations are possible would controvert the terms of the statute and State Board decisions. Thus, the Township argues the Board has not met its burden of proof since it believes that funds within the budget can be reallocated. It therefore urges the Commissioner to reject the waiver.

The Commissioner has carefully considered the arguments of the parties. The Commissioner has also reviewed, in detail, the affidavit of the Somerset County Superintendent in recommending approval of the T&E cap waiver and indicating the reduction of the original cap waiver request by \$246,000. Finally, the Commissioner has independently reviewed the budget for purposes of determining whether such budget is the less than the minimal amount necessary for the provision of a thorough and efficient system of education or whether further reallocations may be made.

At this point, even if the certificates of participation (COPs) were issued immediately, the first payment could be arranged to occur in fiscal year 1995-96. The Commissioner determines, therefore, in light of the changed circumstances articulated herein, the cap waiver amounts are not essential to the provision of a thorough and efficient system of education.

IT IS SO ORDERED.



Richard A. DiPatri

ACTING COMMISSIONER OF EDUCATION

JANUARY 24, 1995

DATE OF MAILING - JANUARY 24, 1995

IN THE MATTER OF THE CAP WAIVER :
 APPEAL FOR THE BOARD OF EDUCA- :
 TION OF EDISON TOWNSHIP, : STATE BOARD OF EDUCATION
 MIDDLESEX COUNTY. : DECISION

Decided by the Commissioner of Education, March 20, 1995

For the Appellant, Wilentz, Goldman & Spitzer (Gordon J. Golum, Esq., of Counsel)

This matter was initiated by a request to the Commissioner of Education pursuant to N.J.S.A. 18A:7D-28(e) by the Board of Education of Edison Township to exceed its maximum permissible budget for 1995-96 by \$2,932,361. The Acting Commissioner approved \$1,030,612 of the request, and denied \$1,901,749.

On appeal, the District is seeking modification of the Acting Commissioner's determination so as to increase the amount awarded.

After carefully reviewing the documentation, including that provided to the County Superintendent as well as the submissions on appeal, the State Board of Education affirms the Acting Commissioner's determination granting approval to the District to exceed its maximum permissible budget by \$1,030,612 pursuant to N.J.S.A. 18A:7D-28(e) and denying it approval to further exceed its permissible budget by an additional \$1,901,749. In so doing, we stress that the District was required to demonstrate to us that an

APRIL 5, 1995

increase beyond its maximum permissible budget was required in the amount it requested in order for the District to be able to provide a thorough and efficient education. In the Matter of the Cap Waiver Appeal for the Board of Education of the Hopewell Valley Regional School District, decided by the State Board, April 5, 1995; cf. Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, decided by the State Board, July 6, 1994.

The submissions here, including the lengthy certification prepared by the District's Superintendent in support of the appeal, have failed to convince us that it is necessary for the District to increase its maximum budget beyond the amount of the increase approved by the Acting Commissioner.

Anne Dillman recused herself from consideration of this case.

April 5, 1995

Date of mailing APR 05 1995

CITY COUNCIL OF THE CITY OF :
PATERSON, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

STATE-OPERATED SCHOOL DISTRICT :
OF THE CITY OF PATERSON, PASSAIC :
COUNTY, :

DECISION

RESPONDENT. :

SYNOPSIS

City appealed General Fund tax levy certified by State District Superintendent \$44,700,074 for the 1994-95 school year.

Upon review of the appeal herein to determine whether City demonstrated that specific line item reductions exceeded the amount necessary to provide a thorough and efficient system of education in the district, Commissioner determined to order specific line item reductions of \$748,897 and reallocations in the amount of \$4,900,000 for a total General Fund Tax Levy for the 1994-95 school year of \$39,051,177.

JANUARY 24, 1995

CITY COUNCIL OF THE CITY OF :
PATERSON, :
 :
 PETITIONER, :
 :
 V. :
 :
 STATE-OPERATED SCHOOL DISTRICT :
 OF THE CITY OF PATERSON, PASSAIC :
 COUNTY, :
 :
 RESPONDENT. :
 _____ :

COMMISSIONER OF EDUCATION
DECISION

Susan E. Champion, Esq., for Petitioner
Russell J. Schumacher, Esq. (Rand, Algeier, Tosti &
Woodruff), for Respondent

This matter was opened before the Commissioner by way of a
Petition of Appeal filed on May 1, 1994, by the City Council of the
City of Paterson (City) seeking reduction of the General Fund tax
levy for school purposes in the City of Paterson of \$10,000,224. On
May 16, 1994, the State-Operated School District of the City of
Paterson (District) filed its Answer to the Petition of Appeal.
Position Statements were filed by the parties on September 15, 1994,
with replies to the aforesaid Position Statements being filed on
September 30, 1994. No further papers being filed, the record was
officially closed upon expiration of the time for filing of
summaries.

Pursuant to N.J.S.A. 18A:7A-52(a) the State district
superintendent of a State-operated school district is required to
"...fix and determine the amount of money necessary to be

appropriated for the ensuing school year and shall certify the amounts to be raised by special district tax for school purposes... to the county board of taxation and the amount or amounts so certified shall be included in the taxes assessed, levied and collected in the municipality or municipalities comprising the district."

Unlike other budget appeal processes in the State of New Jersey, it is the municipality which must appeal the determination of the amount necessary to be raised for school purposes setting forth those specific line items which it believes can be reduced without obstructing the district's ability to provide a thorough and efficient system of education. Based upon the statutory language summarized above, the City proposed the following tax levy reduction:

<u>Proposed Tax Levy Certified By State District Superintendent</u>		<u>Amount of Tax Levy Certified by Governing Body</u>	
General Fund	\$44,700,074	General Fund	\$-0-*
 <u>Amount of Reduction in Dispute Before Commissioner</u>			
Current Expense	\$10,000,224		

*Paterson School District is under State takeover and provisions do not provide for City Council certification.

In rendering judgment relative to budget appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education and makes the Commissioner of Education and the State Board of Education responsible for ensuring its implementation.

However, by way of statutory scheme established for State-operated school districts, the Legislature has authorized the State district superintendent to fix and determine the amount of tax levy necessary for the provision of a thorough and efficient system of education.

Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17, 22-37 and N.J.S.A. 18A:7A-52(a) has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies or, as in the instant matter, an appeal of a municipality seeking a reduction in the tax levy certified by a State district superintendent of a State-operated school district. (See also Board of Education of the Township of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the "Commissioner must determine the amount necessary for the district to provide a thorough and efficient educational program including the implementation of the plan to correct deficiencies." N.J.S.A. 18A:7A-52(a). In so doing, the standard is "whether the City has demonstrated that the certification of the State Superintendent is in excess of that required to provide for a thorough and efficient education." Mayor and Council of the City of Jersey City v. State-Operated School District of Jersey City, 92 N.J.A.R. 2d(EDU) 474, 475.

In furtherance of this duty, the Commissioner, on December 16, 1994, notified the parties that, pursuant to N.J.A.C.

1:1-15.2, he intended to take official notice of the 1993-94 year-end district audit as it relates to the amount of undesignated surplus available to the district. Additionally, recognizing his special statutory responsibility towards a state-operated district to provide funds for a thorough and efficient education while permitting the implementation of its plan to correct deficiencies, the Commissioner, on January 12, 1995, notified the parities that he intended to take official notice of the 1993-94 year-end audit to also consider the amount of outstanding encumbrances and the educational improvement plan (EIP) balance from 1993-94 reserved for future projects. The district responded to these notices by requesting that the Commissioner not take this official notice. In addition, the Commissioner grants the District's request that he recognize that the City has obtained tax relief from the Department of Community Affairs since the inception of the state takeover.

In the instant matter, the City petitioned the Commissioner seeking reduction of the following specific line items for the reasons set forth below:

<u>Line Item</u>	<u>Account Number</u>	<u>1994-95 Appropriate</u>	<u>Revised Appropriate</u>	<u>Reduction¹</u>
Salaries Gr. 1-5	11-120-100-101	\$24,394,832	\$23,157,260	\$1,237,260

Comment: Revised figure calculated using actual 1993-94 expenditures figure with actual number of staff and including a reasonable salary increase.

Gen. Supplies	11-190-100-610	\$2,948,001	\$2,533,836	\$414,165
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Comment: Revised figure is \$422,306 over 1993-94 projected expenditure.

¹ The City proposed a reduction in this account of "\$1,237,260 bringing the total proposed appropriation from \$24,294,832 to \$23,157,260." The reduction, however, would result in a revised appropriation of \$23,157,572.

<u>Line Item</u>	<u>Account Number</u>	<u>1994-95 Appropriat.</u>	<u>Revised Appropriat.</u>	<u>Reduction</u>
Other Objects	11-190-100-800	\$297,896	\$244,404	\$53,492
Comment	Revised appropriation represents a 20% increase over 1993-94 projected expenditures.			
Salaries, Sp. Ed.	11-201-100-101	\$362,680	\$334,148	\$28,532
Comment:	Revised figure calculated using actual 1993-94 expenditures figure with actual number of staff and including a reasonable salary increase.			
Other Salaries for Instruction	11-201-100-106	\$208,622	\$174,592	\$34,030
Comment:	Revised figure calculated using actual 1993-94 expenditures figure with actual number of staff and including a reasonable salary increase.			
Salaries, Sp. Ed. NI.	11-204-100-101	\$483,076	\$330,560 ²	\$156,516
Comment:	Revised figure calculated using actual 1993-94 expenditures figure with actual number of staff and including a reasonable salary increase.			
Other Salaries for Instruction	11-204-100-106	\$313,046	\$187,239	\$125,807
Comment:	Revised figure calculated using actual 1993-94 expenditures figure with actual number of staff and including a reasonable salary increase.			
Salaries, Sp. Ed. Pl.	11-205-100-101	\$1,416,396	\$1,361,185	\$55,211
Comment:	Revised figure calculated using actual 1993-94 expenditures figure with actual number of staff and including a reasonable salary increase.			
Salaries, Sp. Ed. AH.	11-207-100-101	\$257,587	\$224,587	\$33,000
Comment:	Revised figure calculated using actual 1993-94 expenditures figure with actual number of staff and including a reasonable salary increase.			

² The City proposes a reduction in this account of \$156,516 for a revised appropriation of \$330,560. The actual revised appropriation would be \$326,560.

<u>Line Item</u>	<u>Account Number</u>	<u>1994-95 Appropriat.</u>	<u>Revised Appropriat.</u>	<u>Reduction</u>
Other Salaries for Instruction	11-207-100-106	\$124,911	\$83,135	\$41,776
Comment: Revised figure calculated using actual 1993-94 expenditures figure with actual number of staff and including a reasonable salary increase.				
Salaries, Sp. Ed. CH.	11-208-100-101	\$305,522	\$290,081	\$15,441
Comment: Revised figure calculated using actual 1993-94 expenditures figure with actual number of staff and including a reasonable salary increase.				
Other Salaries	11-208-100-106	\$200,983	\$168,728	\$32,255
Comment: Revised figure calculated using actual 1993-94 expenditures figure with actual number of staff and including a reasonable salary increase.				
General Supplies	11-208-100-610	\$14,540	\$6,322	\$8,218
Comment: Revised appropriation represents a 20% increase over 1993-94 projected expenditures.				
Salaries Sp.	11-209-100-101	\$390,388	\$360,958	\$29,430
Comment: Revised figure calculated using actual 1993-94 expenditures figure with actual number of staff and including a reasonable salary increase.				
Salaries, Sp. Ed. MH.	11-212-100-101	\$681,068	\$560,937	\$120,131
Comment: Revised figure calculated using actual 1993-94 expenditures figure with actual number of staff and including a reasonable salary increase.				
General Supplies	11-212-100-610	\$21,340	\$13,332	\$8,008
Comment: Revised figure represents a 45% increase over 1993-94 projected expenditures.				
Other Salaries	11-216-100-106	\$404,864	\$376,813	\$28,051
Comment: Revised figure is in excess of 1993-94 projected expenditures.				
Salary-Speech	11-218-100-101	\$1,464,418	\$1,272,258	\$192,160
Comment: Revised figure is in excess of 1993-94 projected expenditures.				

<u>Line Item</u>	<u>Account Number</u>	<u>1994-95 Appropriat.</u>	<u>Revised Appropriat.</u>	<u>Reduction</u>
Salary Basic Skills	11-230-100-101	\$12,414,151	\$11,115,023	\$1,299,1
Comment: Revised figure calculated using actual 1993-94 expenditures figure with actual number of staff and including a reasonable salary increase.				
Other Salaries	11-230-100-106	\$2,597,013	\$1,745,368	\$851,645
Comment: Revised figure calculated using actual 1993-94 expenditures figure with actual number of staff and including a reasonable salary increase.				
General Supplies	11-230-100-610	\$72,275	\$47,480	\$27,795 ³
Comment: 1994-95 Appropriation represents a 60% increase over 1993-94 projected expenditures while revised figure is in excess of 1993-94 projected expenditure.				
General Supplies	11-240-100-610	\$302,738	\$202,903	\$99,835
Comment: From the 1993-94 budget amount of \$282,500, only \$184,457 has been spent to date. Thus the line item is over budget based on this year's anticipated expenditures.				
Co-Curr. Acct. Supp.	11-402-100-600	\$290,700	\$243,470	\$47,230
Comment: Revised appropriation is in excess of 1993-94 projected expenditure.				
Health Salaries	11-000-213-100	\$2,469,217	\$2,263,753	\$205,464
Comment: Revised figure calculated using actual 1993-94 expenditures figure with actual number of staff and including a reasonable salary increase.				
Salary, Res.Sch.	11-213-100-101	\$2,717,888	\$2,348,548	\$369,340
Comment: Revised figure calculated using actual 1993-94 expenditures figure with actual number of staff and including a reasonable salary increase.				
Salary-Pre-Sch.	11-216-100-101	\$369,048	\$329,811	\$39,237
Comment: Revised figure calculated using actual 1993-94 expenditures figure with actual number of staff and including a reasonable salary increase.				

³ The City proposes a reduction in this account of \$27,795 "reducing the total appropriation from \$72,275 to \$47,480." The reduction, however, would result in a revised appropriation of \$44,480.

<u>Line Item</u>	<u>Account Number</u>	<u>1994-95 Appropriat.</u>	<u>Revised Appropriat.</u>	<u>Reduction</u>
Salaries Other Professionals	11-000-219-104	\$4,862,140	\$4,242,678	\$619,462
Comment: Revised figure calculated using actual 1993-94 expenditures figure with actual number of staff and including a reasonable salary increase.				
Purch. Prof. Ed. Serv.	11-000-219-320	\$99,845	\$28,492	\$71,353
Comment: 1994-95 Appropriation represents a 320% increase over 1993-94 projected expenditures while revised figure is 20% over 1993-94 projected expenditure.				
Salary-Supv. of Inst.	11-000-221-102	\$3,081,524	\$2,739,782	\$341,742
Comment: Revised figure calculated using actual 1993-94 expenditures figure with actual number of staff and including a reasonable salary increase. Revised appropriation reflects elimination of three supervisory positions as per page 30 of 1994-95 Budget.				
Salaries Sectl. & Cler. Asst.	11-000-221-105	\$476,090	\$338,205	\$137,885
Comment: Revised figure calculated using actual 1993-94 expenditures figure with actual number of staff and including a reasonable salary increase.				
Suppl. & Mat.	11-000-221-600	\$352,822	\$34,064	\$318,758
Comment: 1994-95 Appropriation represents a 1600% increase over 1993-94 projected expenditures while revised figure represents a 73% increase over 1993-94 projected expenditures.				
Library Supp.	11-000-222-600	\$651,812	\$300,000	\$351,812
Comment: From the 1993-94 budget amount of \$540,758 only \$264,151 has been spent to date. Thus, the line item is over budget based on last year's expenditures.				
Salaries General Admin.	11-000-230-100	\$2,017,693	\$1,922,221	\$95,472
Comment: Revised figure calculated using actual 1993-94 expenditures figure with actual number of staff and including a reasonable salary increase and the elimination of one position in 1994-95 budget.				

<u>Line Item</u>	<u>Account Number</u>	<u>1994-95 Appropriat.</u>	<u>Revised Appropriat.</u>	<u>Reduction</u>
Other Pur. Prof.	11-000-230-339	\$281,000	\$100,000	\$181,000
Comment: 1994-95 appropriation represents an increase of 245% over 1993-94 projected expenditures while revised figure represents a 23% increase over 1993-94 projected expenditures.				
Sal. Prin./A.P.	11-000-240-103	\$6,103,652	\$6,000,818	\$102,834
Comment: Revised figure calculated using actual 1993-94 expenditures figure with actual number of staff and including a reasonable salary increase.				
Other Objects	11-000-240-800	\$300,709	\$100,000	\$200,709
Comment: From the 1993-94 budget amount of \$428,583, only \$87,135 has been spent to date. Thus, the line item is over budget based on last year's expenditures.				
Salary Oper. & Maint.	11-000-260-100	\$9,875,674	\$8,855,185	\$1,020,489
Comment: Revised figure calculated using actual 1993-94 expenditures figure with actual number of staff and including a reasonable salary increase.				
Misc. Purch. Serv.	11-000-260-590	\$446,600	\$373,312	\$73,288
Comment: Revised figure is \$62,218 over 1993-94 projected expenditures.				
General Supplies	11-000-260-610	\$432,442	\$362,607	\$69,835
Comment: Revised appropriation is in excess of 1993-94 projected expenditures.				
Energy	11-000-260-620	\$3,564,191	\$2,935,079	\$629,112
Comment: Revised appropriation is in excess of 1993-94 projected expenditures.				
Salary Bus.	11-000-290-100	\$1,569,213	\$1,397,097	\$172,116
Comment: Revised figure calculated using actual 1993-94 expenditures figure with actual number of staff and including a reasonable salary increase. Revised appropriation reflects elimination of two positions as per 1994-95 budget.				

<u>Line Item</u>	<u>Account Number</u>	<u>1994-95 Appropriat.</u>	<u>Revised Appropriat.</u>	<u>Reduction</u>
Miscellaneous Expenditures	11-000-290-890	\$61,200	\$0	\$61,200

Comment: No expenditures for item in 1993-94 budget nor any spent to date. Therefore no reasonable basis to include in 1994-95 budget.

TOTAL REDUCTIONS: \$10,000,224

COMMISSIONER'S DETERMINATION

The City submits that the proposed reductions which it has set forth in its Petition of Appeal and its Position Statement will not adversely affect the ability of the District to provide a thorough and efficient system of education. The City iterates that its proposed reductions were made with full consideration of the fact that Paterson is a special needs district as statutorily defined by the Quality Education Act. Notwithstanding such recognition on the City's part, it points out that the City of Paterson like other urban centers also has special needs and must concern itself with providing services to its citizens in addition to meeting its school needs. Considering these needs, argues the City, does not constitute political or inappropriate concerns.

The District points out the burden of proof which prevails in budgetary appeals involving a State-operated school district. The District argues that it is the burden of the governing body to demonstrate that the appropriations established by the State district superintendent are in excess of the amount necessary to provide a thorough and efficient system of education. It further points out that continuing inequities in the funding of special needs districts led the New Jersey Supreme Court in Abbott v. Burke, 119 N.J. 287 (1990) to direct the Legislature to devise a funding

formula which would permit greater expenditures for special needs districts so that such districts might reach the same level of average expenditures as the most affluent districts. The District further points out that the Quality Education Act was passed in order to provide for such increased expenditures so that the special needs districts of the state could meet their constitutional mandate of providing a thorough and efficient system of education. The position of the Court was reiterated in Abbott by Abbott v. Burke, 136 N.J. 444 (1994).

The Commissioner has carefully reviewed the documents submitted and considered the arguments presented by the parties in support of their respective positions. The Commissioner notes that the City's position relative to its recommended reductions may generally be reduced to two broad categories, namely recommended deductions in salary accounts and recommended reductions in general supplies, purchased services and miscellaneous accounts. Within each of the broad categories indicated above, the rationale for each of the line item reductions are essentially identical. Therefore, the Commissioner will, for reasons of brevity and to avoid repetitious arguments, consider the arguments of the parties relative to these categories collectively, unless otherwise indicated, and render his judgment.

Below are set forth the line item accounts, the amounts of recommended reductions in the salary accounts, the arguments of the parties relative to such accounts and the Commissioner's findings:

<u>Account Number</u>		<u>Recommended Reduction</u>
11-120-100-101	Salaries Teachers Grades 1-5	\$1,237,260
11-201-100-101	Salaries of Teachers Special Education	28,532

<u>Account Number</u>		<u>Recommended Reduction</u>
11-201-100-106	Other Salaries for Instruction	34,030
11-204-100-101	Salaries of Teachers	156,516
11-204-100-106	Other Salaries for Instruction Neurologically Impaired	125,807
11-205-100-101	Salaries of Teachers Perceptually Impaired	55,211
11-207-100-101	Salaries of Teachers Auditorily Handicapped	33,000
11-207-100-106	Other Salaries for Instruction Special Education	41,776
11-208-100-101	Salaries of Teachers Communication Handicapped	15,441
11-208-100-106	Other Salaries for Instruction Com- munication Handicapped	32,255
11-209-100-101	Salaries of Teachers Emotionally Disturbed	29,430
11-212-100-101	Salaries of Teachers Multiply Handicapped	120,131
11-216-100-106	Other Salaries for Instruction Pre- School Handicapped	28,051
11-218-100-101	Salaries of Teachers - Speech	192,160
11-230-100-101	Salaries of Teachers - Basic Skills	1,299,128
11-230-100-106	Other Salaries for Inst. Basic Skills	851,645
11-000-213-100	Salaries Health Services	205,464
11-213-100-101	Salaries Resource Rooms	369,340
11-216-100-101	Salaries Pre-School Handicapped	39,237
11-000-219-104	Salaries Other Professional Staff	619,462
11-000-221-102	Salaries Supervisors	341,742
11-000-221-105	Salaries Secretarial and Clerical	137,885
11-000-230-100	Salaries General Administrative	95,472
11-000-240-403	Salaries Principals and Vice Principals	102,834

<u>Account Number</u>		<u>Recommended Reduction</u>
11-000-260-100	Salaries Operation and Maintenance	1,020,489
11-000-290-100	Salaries, Business & Other Support Services	<u>172,116</u>
	Total Recommended Reduction In Salaries	\$7,384,414

Essentially the City argues that its proposed reductions in all salary line item accounts are based upon 1993-94 actual expenditures plus 4.5% for salary increases over the 1993-94 amount. The City argues that increases of that magnitude are reasonable in light of what it believes to be stable enrollment, which makes additions to staffing unnecessary.

The City further argues that an article in USA Today of August 22, 1994, cites a study by the Educational Research Service of Arlington, Virginia which said that the average increase for all public school employees was 3.2% but only 0.9% in school systems with more than 25,000 students. Since Paterson's enrollment is slightly less than 25,000 the City contends that a reasonable salary increase should be closer to the 0.9% figure rather than the 3.2% figure.

In several of the salary accounts, the City points out that actual expenditures for 1993-94 resulted in unexpected balances yet increases in those accounts have been projected for 1994-95. Finally, the City argues that its use of a 4.5% figure for anticipated salary increases is in line with salary increases received by other school district employees in the Paterson geographic area.

The District argues that its salary needs are determined through the process of collective bargaining and thus the

determination of the City that a 4.5% increase is "reasonable" is arbitrary. The District observes that it must budget an adequate amount to ensure a sufficiency of funds to meet its salary needs at the conclusion of the bargaining process.

In an affidavit submitted as part of its Position Statement, Frank Pepe, District Business Administrator, contends that salary appropriations are based upon the actual number of anticipated employees for the 1994-95 school year. He further points out that these salary accounts include not only straight salary but, also, include funds for productivity compensation as part of the existing contract as well as allocation for costs of substitutes and class coverage compensation.

Pepe concludes his position by stating that the district cannot reveal the amount budgeted for salary increases but contends that it is a reasonable amount. He argues that failure to budget a sufficient amount in these accounts would result in the necessity to transfer monies into teacher salary accounts and thus, impact upon other programs in a negative manner.

The Commissioner has carefully considered the positions presented by the parties relative to the reductions recommended by the City in the salary accounts. Based upon such review and consideration, the Commissioner concludes that the position of the City is overly simplistic in the manner in which it calculated the District's salary needs. Even if one were to conclude that a salary increase of 4.5% is reasonable, to limit the flexibility of the District to that precise amount is imprudent in a process which is not determined solely by managerial will. Further, as pointed out

by the District, the monies appropriated in the salary accounts are not limited solely to the number of employees times a fixed percentage of increase. The City allows no funds for payment of substitutes or the movement which normally occurs on the salary guide as employees move from one educational level of the guide to another. In light of the foregoing, the Commissioner finds and determines that the City has failed to meet its burden of demonstrating that the funds appropriated by the district in the above listed 26 salary accounts exceed that which is necessary to provide a thorough and efficient system of education to the pupils of the Paterson School District and he directs that the \$7,384,414 appropriated in these accounts be sustained.

The City has proposed reductions in General Supplies and purchased professional services in the programs and amounts listed below:

<u>Account Number</u>		<u>Proposed Reduction</u>
11-190-100-610	General Supplies - Regular Programs	\$414,165
11-190-100-800	Other Objects - Regular Programs	53,492
11-208-100-610	General Supplies - Communication Handicapped	8,218
11-212-100-610	General Supplies - Multiple Handicapped	8,008
11-230-100-610	General Supplies - Basic Skills	27,795
11-240-100-610	General Supplies - Bilingual	99,835
11-402-100-600	General Supplies - Co-Curricular Activities	47,230
11-000-219-320	Purchase Professional Education Serv.	71,353
11-000-222-600	Supplies and Materials - Improvement of Instructional Services	318,758

<u>Account Number</u>		<u>Proposed Reduction</u>
11-000-222-600	Supplies and Materials - Library	351,812
11-000-230-339	Purchase Other Professional Services	181,000
11-000-240-800	Other Objects - School Administration	200,000
11-000-260-590	Miscellaneous Purchased Services	73,288
11-000-260-610	General Supplies - Operation and Main- tenance of Plant	<u>69,835</u>
		\$1,925,498

The reductions in the above accounts proposed by the City are based upon the actual 1993-94 expenditures for each of the above cited line item accounts. On an item by item basis the City contends that the increased appropriations contained in the 1994-95 budget as certified by the State district superintendent far exceed the amounts actually expended in 1993-94. The City likewise questions the significant number of encumbrances found throughout the budget at the end of the 1993-94 school year. It questions whether such encumbrances were actually for supplies to be used during the 1994-95 school year. It also questions the justification for the large increases in appropriations in these accounts for the 1994-95 school year.

The District argues that as a State-operated district it was advised by the Passaic County Superintendent of Schools and the Assistant Commissioner of Education for Finance, both of whom approved the budget as consistent with providing a thorough and efficient system of education. Business Administrator Pepe contends that every effort was expended to minimize the impact of the District budget upon local taxpayers. Pepe argues that proof of this prudence is demonstrated by the fact that the 1994-95 budget

increased by only 2.15% over the revised 1993-94 budget and is \$8,786,407 under the maximum permitted budget cap imposed by the State of New Jersey.

Pepe argues for the District that the City budget appeal rationale is its conclusion that the District has overbudgeted based solely upon a review of the District's expenditures for specific line items in 1993-94 as of April 1, 1994. Pepe argues that previous Commissioners' decisions have found such conclusions to be unfounded. Pepe asserts that Paterson, a large district, has occasion to make numerous line item transfers throughout the year, therefore, previous year spending in any single account is not an accurate indicator of Paterson's needs for the 1994-95 school year.

The Commissioner has carefully reviewed and considered the arguments of each of the parties in reference to the reductions in the area of supplies and purchased services recommended by the City in this appeal. As the Commissioner has previously pointed out in his decision involving the City of Paterson and the Paterson School District in 1993-94:

*** (G)iven this district's history of educational inadequacy and fiscal mismanagement which resulted in our decision to order creation of a state-operated district we found that the historical spending patterns of this particular district cannot be used to conclude that amounts in its 1991-92 budget have been over-budgeted. Rather, in reviewing this district's budget, we must be particularly attentive to whether the district financial resources will be sufficient to enable it to meet the educational needs of its students.***

Paterson City Council v. State-Operated District of the City of Paterson, 94 N.J.A.R. 2d (EDU) 98, 102 citing, Mayor and Council of City of Jersey City v. State-Operated School District of the City of

Jersey City, 92 N.J.A.R. 2d (EDU) 474. Once again the Commissioner must point out as he did in the 1993-94 decision involving the same parties that the Supreme Court of the State of New Jersey found in Abbott v. Burke, 119 N.J. 287 (1990) that there are 30 special needs districts in this State where there has existed a severe state of fiscal underfunding. Further, N.J.S.A. 18A:7D-1 et seq., better known as the Quality Education Act, seeks to provide a funding mechanism for special needs districts to achieve an expenditure level which seeks to reach a point within five years that will be equal to the average expenditures of the most affluent districts.

Nevertheless, even considering that the budget as proposed by the State district superintendent is over \$8 million below its maximum permitted cap and approximately only 2% greater than its 1993-94 budget, upon independent review, the Commissioner finds that certain amounts in the following accounts are not essential and are unnecessary to provide a thorough and efficient system of education. These accounts, therefore, may be partially reduced, as follows:

11-000-222-600--Library Supplies/Materials

Original 94/95	Revised 94/95	Reduction
\$651,812	\$545,027	\$106,785

11-000-230-339--Other Purchased Professional Services

Original 94/95	Revised 94/95	Reduction
\$281,000	\$147,000	\$134,000

11-000-260-590--Miscellaneous Purchased Services

Original 94/95	Revised 94/95	Reduction
\$446,000	\$337,888	\$108,112

11-000-310-930--Deficit For Food Service

93/94	Original 94/95	Revised 94/95	Reduction
\$400,000	\$400,000	\$200,000	<u>\$200,000</u>

	TOTAL	\$548,897
- 18 -		

The Commissioner also notes that as the District itself points out, its special status as a State-operated school district permits the City to seek tax relief from the Division of Local Governing Services in the Department of Community Affairs if the tax rate as a result of the local fair share required to support the school budget subjects the City to a burden beyond its ability to assume. (See N.J.S.A. 18A:7A-52(b)) Consequently, the Commissioner accepts, only in part the recommendations of the City and determines that \$548,897 be removed from the appropriations as certified by the State district superintendent.

In addition, upon independent review, the Commissioner determines that the district does, in fact, have \$3,854,137 in outstanding encumbrances. This is an excessive amount of outstanding encumbrances found throughout the budget, as was asserted by the City. Consequently, the Commissioner determines that the City has met its burden of proof as to this issue and determines that \$600,000 of outstanding encumbrances be cancelled.

<u>Account</u>	<u>Reduction</u>
11-000-260-620 Energy	\$629,112

The City argues that the District's admission that it has already been required to transfer \$512,796 from this account to cover expenses in other accounts is proof of the District's practice of overbudgeting this and other accounts.

The District contends that the increase in this account is justified by increased utilization of buildings during after-school hours, higher costs due to conversion from oil to gas necessitated by the need to remove underground oil tanks as required by law and expanded exterior lights installed to enhance safety.

The Commissioner, upon review of the respective positions of the parties finds that the City has met, in part, its burden of demonstrating that the district does not require this amount of expenditure in this account. The Commissioner finds, however, that the full reduction proposed by the City is too drastic and orders a reduction in the amount of \$200,000.

<u>Account</u>	<u>Reduction</u>
11-000-290-890 Miscellaneous Expenditures	\$61,200

The City proposed the reduction of this entire account since no such line item expenditure existed for such an account in 1993-94.

The District points out that the funds in this account were previously in other accounts but have been transferred to the above account because of the requirements of GAAP that the cost of professional organization dues for business division administrators be budgeted in this account.

The Commissioner finds the actions of the City relative to this account to be arbitrary and capricious and therefore, its recommended reduction of \$61,200 is rejected.

Furthermore, the Commissioner, in recognition of his responsibility for scrutinizing the budget of a State-operated district has determined that the District has an unexpended EIP balance from 1993-94 in the amount of \$3,558,187, of which at least \$1,800,000 is for duplicate items which may be reallocated within the budget.

Finally, the record establishes that the District's undesignated fund balance is \$4,563,806, \$2,500,000 of which the

Commissioner determines is not essential to the provision of a thorough and efficient system of education and which is hereby ordered to be reallocated.

In conclusion, the Commissioner finds and determines that the City of Paterson has met in its burden to demonstrate that the portions of the amount budgeted by the State-Operated School District of the City of Paterson were not necessary to provide a thorough and efficient education. The Commissioner therefore finds and determines that for the 1994-95 school year the School District of Paterson is in need of General Fund tax levy as specified below:

<u>Account</u>	<u>Reduction</u>
11-000-222-600 Library Materials	\$ 106,785
11-000-230-339 Other Purchased Prof. Services	134,000
11-000-260-590 Misc. Purchased Services	108,112
11-000-260-620 Energy	200,000
11-000-310-930 Deficit for Food Service	<u>200,000</u>
	748,897
	<u>Reallocation</u>
1993-94 Outstanding Encumbrances	\$ 600,000
1993-94 Duplicate Unexpended EIP Funds	1,800,000
1993-94 Undesignated Fund Balance	<u>2,500,000</u>
	\$ 4,900,000
Total	\$ 5,648,897
General Fund Tax Levy Certified by State District Superintendent	\$44,700,074
Less Reductions and Reallocation	<u>5,648,897</u>
Total 1994-95 General Fund Tax Levy	\$39,051,177

IT IS SO ORDERED.

JANUARY 24, 1995

DATE OF MAILING - JANUARY 24, 1995


 COMMISSIONER OF EDUCATION

35-95
~~39-95~~

BOARD OF EDUCATION OF THE TOWN-	:	
SHIP OF WARREN,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
TOWNSHIP COMMITTEE OF THE TOWN-	:	DECISION
SHIP OF WARREN, SOMERSET COUNTY,	:	
	:	
RESPONDENTS.	:	
	:	
_____	:	

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of \$357,400 made by governing body following voter rejection of proposed budget on April 19, 1994.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore \$90,000 for a total General Fund tax levy of \$11,488,728 for 1994-95 school purposes.

JANUARY 26, 1995

BOARD OF EDUCATION OF THE TOWN-	:	
SHIP OF WARREN,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
TOWNSHIP COMMITTEE OF THE TOWN-	:	DECISION
SHIP OF WARREN, SOMERSET COUNTY,	:	
	:	
RESPONDENTS.	:	
	:	

David B. Rubin, Esq., (Rubin, Rubin, Malgran, Kaplan & Kuhn) for Petitioner

John E. Coley, Jr., Esq., (Binona, Cohen, Kungman, Coley, Yaspin, Bernstein & Di Francesa, P.A.), for Respondent

This matter was opened before the Commissioner on June 15, 1994, through the filing of a Petition of Appeal by the Township of Warren Board of Education (Board), of a defeated budget pursuant to the provisions of N.J.A.C. 6:24-7.4. The Board sought restoration, on the grounds of necessity for a thorough and efficient education, of reductions made by the Township Committee of the Township of Warren (Committee) following voter rejection on April 19, 1994, of the Board's General Fund tax levy for the 1994-95 school year. Subsequent to the defeat, the Board and Borough, pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)(2), consulted on the defeated budget. The Borough reduced the General Fund tax levy by \$357,400. Consequently, the monies in contention in this matter are set forth below:

Proposed Tax Levy
Adopted by Board of Education

General Fund \$11,756,128

Amount of Reduction
By Governing Body

General Fund \$357,400

Amount of Tax Levy
Certified By Governing Body

General Fund \$11,398,728

Amount of Reduction In Dispute
Before the Commissioner

General Fund \$357,400

On June 30, 1994, the Committee submitted its Answer to the Petition. Position Statements were filed by both the Board and the Committee on August 1, 1994. The Committee submitted the School District Budget Statement on August 16, 1994. Responses to the Statements were filed by both the Board and the Committee on August 19, 1994, and Summations were received from both parties on September 2, 1994.

The proposed General Fund tax levy included an approved Commissioner's cap waiver of \$821,785. As a result of the State Board of Education's July 7, 1993 decision in Board of Education of the Borough of Rutherford v. Mayor and Council of Rutherford and the July 6, 1994 decision in Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater, wherein the State Board ruled that the review of budgets with cap waivers must include both a determination of whether reallocation within the district's maximum permissible budget is possible if, and to what extent, the specific programs at issue are essential for the provision of a thorough and efficient system of education, the county superintendent and a cap waiver review panel in the Department of Education reviewed the budget and reached the determination for the approved cap waiver.

The specific reductions in the General Fund tax levy are as follows:

<u>Account Number</u>	<u>Title</u>	<u>Rationale</u>	<u>Reduction</u>
11-000-218-104	Other Sup. Serv. Guidance	Postpone new guidance course	\$10,000
11-000-221-102	Imp. of Inst. Serv.- Curriculum	Maintain present curriculum specialist status	1,400
11-000-221-320	Purchase Curriculum Service	Reduce number of proposed workshops using outside contractors	1,500
11-000-221-610*	Staff Dev. Room Supp.	Reduce amount of supplies and spread to succeeding year	2,000
11-000-222-340	Library-Purchase Service	Delay purchase-hold to 1993-94 level	3,500
11-000-222-600	Library-Supplies	Delay purchase-hold to 1993-94 level	13,500
11-000-223-610**	Computer Supplies	Phase in purchase of software over a period of years	5,000
11-000-260-100	Custodian/Maintenance Service	Eliminate proposed part-time secretary	11,000
11-000-260-300	Cust/Maint. Purchase Professional Serv.	Archit. services funded in two categories	4,000
11-000-260-420	Clean/Repair/Maint. Service	Defer construction of lavatory partitions, office and conf. room	17,500
12-120-100-730	Equip. - Gr. 1-5	Spread cost of proposed computer labs over a period of years	50,000
12-000-240-730	Building Level Equip.	Delete purchase of new copier for middle school and use existing equipment	12,000

*Township resolution had 11-000-221-320.

**This line item included in 11-000-221-XXX in advertised budget.

<u>Account Number</u>	<u>Title</u>	<u>Rationale</u>	<u>Reduction</u>
11-000-240-103	School Admin.- Salaries	Reduce amount by one principal to four principals since district only has four principals	\$80,000
12-000-400-450	Capital Projects		
	Central Sch.-Library, A/C	Defer projects another year	16,000
	Mt. Horeb Sch.-A/C	Defer projects another year	2,000
	ALT Sch.-New Windows	Defer projects another year	90,000
	Woodland Sch.-A/C A/C	Defer projects another year	8,000
	Maint. Area Fencing	Defer projects another year	8,000
	Maint. Garage-Close one bay	Defer projects another year	10,000
11-402-100-600	Athletics-Supplies	Maintain purchases at 1993-94 budget level	2,000
12-000-260-730	Operation/Maintenance Equipment	Purchase two of proposed three floor scrubbers	3,000
11-000-290-600	Business Office Supplies	Maintain level of purchases to 1993-94 level	1,000
11-190-100-610	Regular Inst.- Supplies	Reduce amount for computer software and purchase over period of time	6,000
		TOTAL	\$357,400

The Board in its documents argues that there should be full restoration of the reduction certified by the Borough because it has already been determined with the review for the Commissioner's cap waiver that all the funds are essential for a thorough and efficient education. The Commissioner, however, must, thoroughly review the

documents presented on appeal and issue a determination on the funds required for a thorough and efficient education pursuant to N.J.S.A. 18A:22-37 et al. (see discussion at page 6, infra).

Another issue that must be addressed prior to determination in this matter is the position of the Board that the Committee abdicated its responsibility to review the budget for educational necessity and imposed reductions only to mollify the voters. The Board alleges that the reasons for the reductions as submitted by the Committee are "deficient." It is noted that the Committee resolution on the reductions does state that "the voters..., by the rejection of the school budget, instructed the Township Committee to reduce said budget." This position is obviously not consistent with the intent of statute and code for a review of the defeated budget by the municipal governing body to determine the amount needed for a thorough and efficient educational system. It is also noted, however, that the Committee resolution also states the "importance of avoiding deductions in educational instruction and program areas" and that the reductions were based on "(1) deferring or reducing in scope capital projects; (2) purchasing items over longer periods of time; and (3) maintaining current staffing level." These statements do convey an understanding of responsible budget review. The Commissioner, therefore, accepts and considers the positions presented by both parties in this matter.

The Board also cites as a financial hardship the additional costs which will result from the newly elected board not agreeing to the grade level allocation plan on which the 1994-95 budget was based. This issue, however, does not directly bear on the matters

under appeal herein and may not color the Commissioner's determinations on those matters.

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature, pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37, has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item has been reduced by the governing body is necessary for the provision of a thorough and efficient system of education.

Mindful, then, of the balance to be applied in his review, the Commissioner makes the following determination with respect to the reduction in the General Fund tax levy effectuated by the Committee.

11-000-218-104	<u>Other Support Services-Guidance</u>	<u>\$10,000</u>
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The Committee bases this reduction on postponing the new guidance counselor position at the elementary school level and

having the Board continue with services from the Morris-Union Consortium. The Board states that the employment of a full-time elementary counselor is only an increase of one day per week because it would replace three days per week that have been provided by the Child Study Team and one day a week by contracted services. The critical factor in the determination on this item, however, is that the more extended guidance services are not required for elementary school students by the mandate for a thorough and efficient education. The Commissioner sustains the reduction of \$10,000.

11-000-221-102 Imp. of Inst. Services-Curriculum \$1,400

The Committee bases this reduction on maintaining the present curriculum status. The Board states that the funds are necessary for development and revision of curriculum, the need for which is particularly acute this year in order to prepare for monitoring. The Board also mentions the possible need to transfer funds (\$20,000) from this account to the instructional account for teacher salaries. The continuing development of curriculum is absolutely essential in the provision of a thorough and efficient education. However, the need for funds in other accounts is not a valid argument for the restoration of funds. The reduction certified by the Committee still provides funds in excess of that budgeted and projected for expenditure in 1993-94 according to budget documents presented. Based on the data presented, the Commissioner sustains the reduction of \$1,400.

11-000-221-320 Purchased Curriculum Services \$1,500

The Committee bases this reduction on decreasing the number of proposed new workshops using outside contractors. The Board does not address this item separately but includes it in the general

argument for funds for curriculum development. The funds in this line item after the reduction certified by the Committee are more than twice the projected expenditures for 1993-94, as shown in budget documents presented. The Commissioner sustains the reduction of \$1,500.

11-000-221-610 Staff Development Room Supplies \$2,000

The Committee bases this reduction on decreasing the purchase of supplies in 1994-95 and spreading the purchase over time to encompass the succeeding year. Again, the Board does not address this item separately but includes it in the general argument for curriculum development needs. According to the budget documents presented, no funds were budgeted for this item in 1993-94, and the reduction certified by the Committee still provides \$4,000 of the \$6,000 proposed by the Board. The Commissioner sustains the reduction of \$2,000.

11-000-222-340 Library-Purchased Services \$3,500

The Committee bases this reduction on delaying purchases and holding expenditures to the 1993-94 level. The Board states that such a reduction would provide no funds in this line item and that the monies are needed for computer hardware and software service agreements. It is certainly essential that educational materials and equipment be properly maintained. The Commissioner orders restoration of the \$3,500.

11-000-222-600 Library Supplies \$13,500

The Committee again bases this reduction on delaying purchases and holding expenditures to the 1993-94 level. The Board states that the additional funds budgeted for this line item are for the purchase of new library books and software necessary because of

extensive "weeding" of the libraries last summer. The Board specifies the allocation per school and the number of books planned for purchase at an estimated unit price. The provision of appropriate materials in a school library is a valid educational concern. Based on the facts presented, the Commissioner orders restoration of the \$13,500.

11-000-223-610 Computer Supplies \$5,000

The Committee bases this reduction on phasing in the purchase of software over a period of years. The Board states that this is the second year of a three to five year plan to incorporate technology into the district educational program. The Board submits a detailed list of planned purchases for each of the four schools in the district. The Board's position to provide technological supplies is a valid one and the multi-year plan is a fiscally reasonable one. The Commissioner orders restoration of the \$5,000.

11-000-260-100 Custodial/Maintenance Salaries \$11,000

The Committee eliminates the funds for a proposed part-time secretary and recommends maintaining the existing level of secretarial services. The Board states that the Supervisor of Buildings and Grounds has considerable administrative responsibility and has been requesting secretarial help for five years. The request for a full-time secretary was reduced to a half-time position. Although sufficient support staff is essential to the proper and effective operation of a school district, the Board has functioned without this position to this date and only cites as a problem the "inordinate amount of time" spent by the business office on transportation and facilities. The Commissioner sustains the reduction of \$11,000.

11-000-260-300 Custodial/Maint. Purchase Prof. Services \$4,000

The Committee states that these funds for architectural services are also in another line item and need not be funded in two categories. The Board states that the funds in the two line items are for different services. In its Position Statement, the Board states, "It may be possible to accept this reduction." In the Board Response, however, a list of services included in this line item is presented in what appears to be a defense for restoration. Based on the Board's Position Statement and the fact that the amount certified after the reduction by the Committee greatly exceeds the amount budgeted and projected for expenditures in 1993-94 according to the budget documents presented, the Commissioner sustains the reduction of \$4,000.

11-000-260-420 Clean/Repair/Maintenance Services \$17,500

The Committee bases the reduction on the deferral of specific projects - lavatory partitions, office and conference room renovations, and pavement resealing. The Board, in its Position Statement, acknowledges that they could accept the Committee's "compromise proposal," but that doing so would put more pressure on subsequent budgets. However, as with the above item, the Board in its Response defends the proposed projects as necessary and appears to be requesting restoration of funds. In the budget documents presented, the itemized list of projects included in this line item has a total for the three items cited by the Committee for deferral greater than the amount reduced. Also, the amount certified by the Committee after the reduction is greater than the amount budgeted and projected for expenditures in 1993-94. Based on these facts and

the Board's Position Statement, the Commissioner sustains the reduction of \$17,500.

12-120-100-730 Equipment - Grades 1-5 \$50,000

The Committee states that this reduction is possible with the spreading of the cost of proposed computer labs over a period of years. The Board states that the project cannot be completed in a "piecemeal" way because it is not possible to provide a computer lab in one school and not in another. The Board also states that sufficient equipment, twenty-four (24) computers per lab plus teacher equipment, must be provided at each site. Although this is a major expenditure, the provision for technological equipment and instruction is vital in this age of advancing technology, and the Board's concerns regarding equitable opportunities and equipment for all students are valid. Based on these facts, the Commissioner orders restoration of the \$50,000.

12-000-240-730 Building Level Equipment \$12,000

The Committee bases this reduction on deleting the purchase of a new copier for the middle school and utilizing the existing equipment. The Board states that they are already sacrificing on the purchase of equipment and that copier replacement has been kept to a minimum. The Board also states that a new copy center was instituted in the district last year and that the volume of copies requires this equipment. Although such equipment is important, the Board has not cited any detriment to the educational program which would result from the deferral of this purchase. The Commissioner sustains the reduction of \$12,000.

11-000-240-103 School Administration - Salaries \$80,000

The Committee bases this reduction on providing salaries

for four (4) principal positions since the district only has four (4) principals. The Board states that these funds were budgeted for the possible "buy out" of an administrator but that the individual voluntarily left with reimbursement for unused sick leave and earned vacation leave. The Board states that the balance of these funds after that reimbursement are necessary for other litigation and underbudgeted special education tuition. Again, it must be stressed that the Board cannot plead for the restoration of funds because of the need in other areas. Also, the employee benefits provided to the resigning administrator should be recorded in account 11-000-290-290, Other Employee Benefits, and not to this salary item. Accordingly, the Commissioner sustains the reduction of \$80,000.

12-000-400-450 Capital Projects

Central Sch.-Library, A/C	\$16,000
Mt. Horeb School - A/C	2,000
ALT School - New Window	90,000
Woodland School - A/C	8,000
Maintenance Area Fencing	8,000
Maintenance Garage - Close one Bay	10,000

The Committee bases this reduction on the deferral of these projects to another year. The Board, in its Position Statement, acknowledges the possible deferral of the air conditioning at Mt. Horeb and Woodland Schools, the air conditioning (\$6,000 of the total reduction) at Central School, and the fencing in the maintenance area. The Board continues in that Position Statement that the library shelving at Central School must be replaced for safety, efficiency and supervisory reasons and that the 30-year old carpeting there must also be replaced. They also state that the new windows at the A.L. Tomaso School are overdue because the present

ones are energy inefficient and adversely affect teachers and students. The Board states that closing in the bay at the maintenance area would provide a secure storage area for supplies and vehicles. In the Board's Response, they confirm the elimination of the air conditioning project at Woodland School, and they state that the air conditioning projects at both Mt. Horeb School and Central School and the window replacement at A.L. Tomaso School are in a proposed referendum. In that document, however, they cite the need for both the fencing and bay closing at the maintenance area. The Commissioner agrees that the library shelving and carpeting at Central School must be replaced for safety reasons as indicated by the Board and, therefore, orders the restoration of \$10,000 for this portion of the Central School reduction. The Commissioner further determines that the closing in of the bay in the maintenance area can be deferred with no detriment to thorough and efficient education and sustains that reduction of \$10,000. Based on the Board's acceptance for deferral and the inclusion of the items in the proposed referendum, the Commissioner sustains these reductions as follows - Central School air conditioning - \$6,000, Mt. Horeb School air conditioning - \$2,000, Woodland School air conditioning - \$8,000, A.L. Tomaso School windows - \$90,000, maintenance area fencing - \$8,000.

11-402-100-600	Athletics - Supplies	\$2,000
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The Committee bases this reduction on maintaining the purchase of athletic supplies at the 1993-94 budget level. The Board states that this is not reasonable, because they are adding a program, boys' baseball, which was only partially underwritten by the Board in 1993-94, and extra curricular activities at the Middle

School. In a district with increasing enrollment, the appropriate provision of supplies for existing programs is essential. The Committee's reason for reduction considers neither the increasing enrollment nor increasing costs. The Commissioner orders the restoration of the reduction of \$2,000.

12-000-260-730 Operation/Maintenance Equipment \$3,000

The Board accepts this reduction of \$3,000 for the deferral of the purchase of one floor scrubber. The Commissioner therefore sustains the reduction.

11-000-290-600 Business Office Supplies \$1,000

The Board accepts this reduction for business office supplies. The Commissioner sustains the reduction of \$1,000.

11-190-100-610 Regular Inst. - Supplies \$6,000

The Committee bases this reduction on a decrease in the purchase of computer software which should be purchased over a period of time. The Board states that the funds budgeted for instructional supplies, including computer software, are essential, particularly with the district's increasing enrollment. The Commissioner determines that the provision of sufficient supplies is essential for a thorough and efficient education and orders restoration of the \$6,000.

Thus, for the reasons set forth above, the Commissioner determines to restore \$90,000 and sustain \$267,400 of the reduction in the General Fund tax levy appealed herein, as summarized by the chart below:

<u>Account Number</u>	<u>Title</u>	<u>Sustained</u>	<u>Restored</u>
11-000-218-104	Other Support Serv.-Guidance	\$10,000	\$-0-
11-000-221-102	Imp. of Inst. Serv. Curric	1,400	-0-

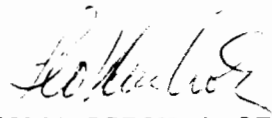
<u>Account Number</u>	<u>Title</u>	<u>Sustained</u>	<u>Restored</u>
11-000-221-320	Purchase Curriculum Services	1,500	-0-
11-000-221-610	Staff Dev. Room Supplies	\$2,000	\$-
11-000-222-340	Library - Purchase Services	-0-	3,500
11-000-222-600	Library - Supplies	-0-	13,500
11-000-223-610	Computer Supplies	-0-	5,000
11-000-260-100	Custodian/Maintenance Salaries	11,000	-0-
11-000-260-300	Cust/Maint. Purch Prof. Services	4,000	-0-
11-000-260-420	Clean/Repair/Maintenance Services	17,500	-0-
12-120-100-730	Equipment - Grades 1-5	-0-	50,000
12-000-240-730	Building Level Equipment	12,000	-0-
11-000-240-103	School Administration Salaries	80,000	-0-
12-000-400-450	Capital Projects -		
	Central Sch.-Library, A/C	6,000	10,000
	Mt. Horeb School - A/C	2,000	-0-
	ALT School - New Window	90,000	-0-
	Woodland School - A/C	8,000	-0-
	Maintenance Area Fencing	8,000	-0-
	Maintenance Garage-Close one Bay	10,000	-0-
11-402-100-600	Athletics - Supplies	-0-	2,000
12-000-260-730	Operation/Maintenance Equipment	3,000	-0-
11-000-290-600	Business Office Supplies	1,000	-0-
11-190-100-610	Regular Inst. - Supplies		6,000
	TOTALS	\$267,400	\$90,000

After review of the record as set forth above, on December 16, 1994, the parties to this matter were notified that the Commissioner would be taking official notice of the Board's 1993-94 year-end audit for the purpose of identifying whether the Board underestimated in its 1994-95 budget the amount of anticipated undesignated surplus; no objection to such consideration was raised by the parties. Upon such consideration, the Commissioner is satisfied that no portion of the monies restored herein may be funded by allocation of surplus rather than increased tax levy.

Accordingly, the Somerset County Board of Taxation is directed to make the necessary adjustments as set forth below to reflect a total of \$11,488,728 to be raised in tax levy for General Fund purposes by the Township of Warren for the 1994-95 school year.

	<u>General Fund</u>
Tax Levy Certified by Committee	\$11,398,728
Restored by Commissioner	<u>90,000</u>
TOTAL	\$11,488,728

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

JANUARY 26, 1995

DATE OF MAILING - JANUARY 26, 1995

BOARD OF EDUCATION OF THE	:	
BOROUGH OF ELMWOOD PARK,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
MAYOR AND COUNCIL OF THE BOROUGH	:	DECISION
OF ELMWOOD PARK, BERGEN COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of \$100,000 made by governing body following voter rejection of proposed budget on April 20, 1994.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore \$70,561 for a total General Fund tax levy of \$12,850,791 for 1994-95 school purposes.

JANUARY 26, 1995

BOARD OF EDUCATION OF THE	:	
BOROUGH OF ELMWOOD PARK,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
MAYOR AND COUNCIL OF THE BOROUGH	:	DECISION
OF ELMWOOD PARK, BERGEN COUNTY,	:	
	:	
RESPONDENT.	:	
	:	
_____	:	

Glenn T. Leonard, Esq., for Petitioner

John A. Spizziri, Sr., Esq., for Respondent

This matter was opened before the Commissioner of Education on June 17, 1994, through the filing of a Petition of Appeal by the Elmwood Park Board of Education (Board) pursuant to the provisions of N.J.A.C. 6:24-7.4. The Board sought restoration, on the grounds of necessity for a thorough and efficient education, of reduction by the Mayor and Council of the Borough of Elmwood Park (Borough) following voter rejection on April 19, 1994, of the Board's proposed General Fund tax levy for the 1994-95 school year. Subsequent to the defeat, the Board and Borough, pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)(2), consulted on the defeated budget and the Borough reduced the General Fund tax levy by \$100,000. Consequently, the monies in contention in this matter are as set forth below:

Proposed Tax Levy
Adopted By Board of Education

General Fund \$12,880,230

Amount of Reduction
By Governing Body

General Fund \$100,000

Amount of Tax Levy
Certified by Governing Body

General Fund \$12,780,230

Amount of Reduction In Dispute
Before the Commissioner

General Fund \$100,000

On July 18, 1994, the Borough submitted its Answer to the Petition. The Board filed a Position Statement on August 8, 1994. The Borough submitted a letter in lieu of Position Statement on August 15, 1994, and advised that the Borough's resolution certifying the reductions and its Answer to the Petition constitute the "full position" of the Borough. The Board submitted a Response on August 30, 1994.

The proposed General Fund tax levy included an approved Commissioner's cap waiver of \$286,491. As a result of the State Board of Education's July 7, 1993, decision in Board of Education of the Borough of Rutherford v. Mayor and Council of Rutherford and the July 6, 1994, decision in Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater, wherein the State Board ruled that the review of budgets with cap waivers must include a determination on whether or not reallocation within the district's maximum permissible budget is possible and whether and to what extent the specific programs at issue are essential for the provision of a thorough and efficient system of education, the county superintendent was directed to submit a sworn affidavit setting forth an explanation and documentation of that review. The county superintendent's affidavit with supported documentation was

received on July 22, 1994, with an amended affidavit submitted on August 4, 1994.

The Board in its documents argues that there should be full restoration of the reduction certified by the Borough because the Commissioner's cap waiver review determined that all the funds are essential for a thorough and efficient education. The State Board in Edgewater, supra, however determined that the Commissioner must, in a matter of appeal, thoroughly review the documents presented and issue a determination on the funds required for a thorough and efficient education.

In addition, after reviewing the appeal based upon the record and circumstances known to or considered by the governing body at the time it acted to reduce the budget which is the subject of this appeal, the Commissioner, on December 16, 1994, notified the parties that he intended to take official notice of the Board's 1993-94 year-end audit. The Commissioner reviewed the audit for the purpose of identifying whether the Board underestimated the amount of anticipated undesignated surplus in its 1994-95 budget.

The specific reductions in the General Fund tax levy made by the Borough are as follows:

<u>Account Number</u>	<u>Title</u>	<u>Reduction</u>
11-190-100-610	Undist. Instruction General Supplies	\$ 26,311
Rationale: 1993-94 revised budget plus 5%		
11-401-100-100	School Sponsored Activities - Salaries	4,760
Rationale: Actual 1993-94 salaries plus 5%		
11-402-100-500	School Sponsored Athletics - Purchase Services	\$ 13,000
Rationale: 1993-94 expenditures plus 5%		

<u>Account Number</u>	<u>Title</u>	<u>Reduction</u>
11-000-100-562	Tuition to Other LEA's In State - Special	13,950
Rationale: 1993-94 rate plus 9%		
11-000-100-566*	Tuition to Private Schools for the Handicapped	5,164
Rationale: Confirmed rate per student at CP Center in Clifton at \$32,500 for 1994-95		
11-000-221-600	Undist. Expend. - Improvement of Instructional Services	9,493
Rationale: 1993-94 revised budget plus 5%		
11-000-230-339	General Admin. - Purchase Prof. Serv.	10,300
Rationale: 1993-94 revised budget plus 5%		
11-000-290-290	Business Support Serv. -Other Employee Benefits	<u>20,000</u>
Rationale: No retirees for incentive plan in 1994-95		
TOTAL		\$102,978

Since the reduction to the General Fund Tax Levy in dispute herein is \$100,000, it is obvious there is a difference of \$2,978 between that tax levy reduction and the total of the individual items as listed, above. After the review and determination on each item, an adjustment in the amount of the difference will be made to provide agreement between the reduced items and the tax levy reduction.

Another issue that must be addressed prior to determination in this matter is the objection raised by the Borough, in its letter in lieu of a Position Statement, regarding the Board's appointment of a high school principal on May 24, 1994, which was after the

* The Borough listed this reduction to account 11-000-100-567; the correct account is 11-000-100-566.

Borough resolution certifying the reduction in the tax levy. The Borough states that a savings of \$75,000 could have been effected if this appointment had not been made. This issue will not be an item in this matter since it is not related to the reductions certified by the Borough and the presence of a principal in a school is required, with few exceptions, by N.J.A.C. 6:8-3.2(b).

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature, by way of statutory scheme, has delegated the responsibility for providing a thorough and efficient system to local boards of education. Additionally, the Legislature, pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37, has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item has been reduced by the governing body is necessary for the provision of a thorough and efficient system of education.

Mindful, then, of the balance to be applied in the standard of review, the Commissioner makes the following determinations with

respect to the reductions in the General Fund Tax Levy effectuated by the Borough.

<u>Account</u>	<u>Amount</u>
11-190-100-610 Undist. Inst.-General Supplies	\$26,311

The Borough bases this reduction on the provision of a five percent (5%) increase over the 1993-94 revised budget as of April 30, 1994.

The Board argues that this reduction is arbitrary, capricious and unreasonable because it merely utilizes an encumbered amount with a percent of increase and provides no reasons for the reduction. The Board also states that the amount did not reflect the actual expenditures for the 1993-94 school year. It is noted that, although the Borough resolution refers to a five percent (5%) increase to the "revised budget appropriations at April 30, 1994", no figures are presented, and the reduction certified by the Borough provides less funds for this line item than in the 1993-94 revised budget as advertised for the election. The Board cites specific expenditures for the line item which they state are essential for the provision of a thorough and efficient education. Based on the facts presented, the Commissioner orders restoration of the \$26,311.

<u>Account</u>	<u>Amount</u>
11-401-100-100 School Sponsored Activities-Salaries	\$4,760

The Borough bases this reduction on the provision of a five percent (5%) increase to the 1993-94 encumbered salaries. The Board, again, claims that this method of reduction is arbitrary, capricious and unreasonable. The Board states that the existing positions require an amount of \$37,527 for 1994-95 and that new positions for the high school and newly created middle school will

require an additional \$5,082, for a total of \$42,609, which is slightly above the budgeted figure of \$42,280. It is certainly required under the mandate for a thorough and efficient education that proper staffing be provided for essential programs. The advisors cited by the Board as new positions for co-curricular activities, however, are not essential to a thorough and efficient education, and the Board has presented no further rationale. The Commissioner, therefore, sustains the reduction of \$4,760.

<u>Account</u>	<u>Amount</u>
11-402-100-500 School Sponsored Athletics - Purchased Serv.	\$13,000

The Borough bases this reduction on providing a five percent (5%) increase over the projected 1993-94 expenditures. The Board again challenges the method of calculation for reduction and the lack of reasons. The Board states that expenditures in 1993-94 were reduced because of severe budget restrictions and, therefore, a full athletic program was not provided. In listing the obligations for this line item, the Board includes a contractual salary of \$15,990 for an athletic trainer. Although athletics are unquestionably an integral part of high school programs, these activities and an athletic trainer are not essential to the provision of a thorough and efficient education. The Board acknowledges adjustments made in 1993-94 to reduce expenditures in this area. Based on the information presented, the Commissioner sustains the reduction of \$13,000.

<u>Account</u>	<u>Amount</u>
11-000-100-562 Tuition to Other LEA's in State-Special	\$13,950

The Borough states that the supporting documentation for

the budget appropriations includes three (3) students to be sent to a district at the same amount as four (4) students in 1993-94. The Borough reduces this amount by applying the 1993-94 rate plus a nine percent (9%) increase for three (3) students at the specific district and reducing the other tuition amounts to a nine (9%) increase over 1993-94. The Board again states that the methodology utilized by the Borough to reduce this account is arbitrary, capricious and unreasonable and totally devoid of sound educational reasons. The Board argues that the area of special education tuition has had unanticipated dramatic increases in the district and formed part of the basis for the cap waiver approved by the Commissioner for 1994-95. The provision of special education programs is indisputably essential to a thorough and efficient education and the calculation of budgeted amounts must include sufficient funds for unanticipated placements and/or services. The Borough's reduction was not presented with any specific knowledge of rates, but was instead based on figures arbitrarily determined by them. The Commissioner orders restoration of the \$13,950.

<u>Account</u>	<u>Amount</u>
11-000-100-566 Tuition to Private Schools-Handicapped	\$5,164

The Borough states that it has made this reduction by confirming the rate paid per student to a private school for two (2) students and determined that amount to be less than budgeted by the Board. The Board's arguments are the same as recorded for the prior item. On this item, however, the Borough has been very specific regarding the rate and reason for reduction. Moreover, the Borough provides sufficient funds to meet the district's obligation for this item. In addition, the Board does not challenge the specific

tuition rate cited by the Borough. The Commissioner sustains the reduction of \$5,164.

<u>Account</u>		<u>Amount</u>
11-000-221-600	Undist. Expenditures - Improvement of Instructional Services	\$9,493

The Borough bases this reduction on the provision of a five percent (5%) increase over the 1993-94 revised budget appropriations as of April 30, 1994. The Board, again, challenges the method of reduction and absence of reasons. The Board also states that the figures used by the Borough were not for the whole 1993-94 year but included encumbrances only as of April 30, 1994. The Board, however, in its statement on the necessity for these funds, lists an expenditure of \$12,900 for software and equipment for an in-house computer-generated K-12 report card system. Although this equipment and software may be desirable and provide some benefits to the district, it is not essential to a thorough and efficient education. The Commissioner sustains that reduction of \$9,493.

<u>Account</u>		<u>Amount</u>
11-000-230-339	General Admin. - Purchased Professional Services	\$10,300

As with the other items, the Borough bases this reduction on the provision of a five percent (5%) increase over the 1993-94 revised budget appropriations. The Board lists the specific fees included in this line item for contracts with the district architect/engineer and auditor. Based on the general position of the Borough and the specific detail presented by the Board on contractual obligations, the Commissioner orders restoration of the \$10,300.

<u>Account</u>		<u>Amount</u>
11-000-290-290	Business Support Services - Other Employee Benefits	\$20,000

The Borough states that this reduction is possible because there will be no retirees in 1994-95. The Board states that they had advised the Borough that there were no retirees in 1993-94, not 1994-95, and that there will be forty-nine (49) employees eligible for early retirement in 1995. The Board lists the negotiated contractual benefits for retirees and non-retirees. Based on the detail presented by the Board and the obligation of boards of education to meet legal and contractual obligations, the Commissioner orders restoration of the \$20,000,

Thus, for the reasons set forth above, the Commissioner determines to restore \$70,561 and sustain \$29,439 of the reductions to the General Fund tax levy appealed herein, as summarized by the chart below:

<u>Account Number</u>	<u>Title</u>	<u>Sustained</u>	<u>Restored</u>
11-190-100-610	Undist. Inst. General Supplies		\$26,311
11-401-100-100	School Spons. Act.-Salaries	\$4,760	
11-402-100-500	School Spons. Athletics - Purchased Services	13,000	
11-000-100-562	Tuition to Other LEA's - Special		13,950
11-000-100-566	Tuition to Promote Schools - Handicapped	5,164	
11-000-221-600	Undist. Exp. - Imp. of Inst. Services	9,493	
11-000-230-339	General Admin. - Purchased Prof. Services		10,300
11-000-290-290	Business Sup. Services - Other Employee Benefits		20,000
	TOTALS	\$32,417	\$70,561
	CORRECTION FOR ERROR*	- 2,978	
	TOTALS	\$29,439	\$70,561

*See page 4 above.

Accordingly, the Bergen County Board of Taxation is directed to make the necessary adjustments as set forth below to reflect a total of \$12,850,791 to be raised in tax levy for General Fund purposes by the Borough of Elmwood Park for the 1994-95 school year.

	<u>General Fund</u>
Tax Levy Certified By Borough	\$12,780,230
Restored by Commissioner	<u>70,561</u>
TOTAL	\$12,850,791

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

JANUARY 26, 1995

DATE OF MAILING - JANUARY 26, 1995

IN THE MATTER OF THE CAP WAIVER :
 APPEAL FOR THE BOARD OF EDUCA- :
 TION OF HILLSIDE TOWNSHIP, : STATE BOARD OF EDUCATION
 UNION COUNTY. : DECISION
 _____ :

Decided by the Commissioner of Education, March 20, 1995

This matter was initiated by a request to the Commissioner of Education pursuant to N.J.S.A. 18A:7D-28(e) by the Board of Education of Hillside Township to exceed its maximum permissible budget for 1995-96 by \$639,227. The Acting Commissioner approved \$160,227 of the request, and denied \$479,000.

On appeal, the District is seeking modification of the Acting Commissioner's determination so as to increase the amount awarded. The District specifically challenges the amount of \$267,000 denied by the Acting Commissioner.

After careful review, the State Board of Education affirms the Acting Commissioner's determination granting approval to the District to exceed its maximum permissible budget by \$160,227 pursuant to N.J.S.A. 18A:7D-28(e) and denying it approval to further exceed its permissible budget by an additional \$479,000. In so doing, we stress that the District was required to demonstrate to us that an increase beyond its maximum permissible budget was required in the amount it requested in order for the District to be able to

April 5, 1995

provide a thorough and efficient education. In the Matter of the Cap Waiver Appeal for the Board of Education of the Hopewell Valley Regional School District, decided by the State Board, April 5, 1995; cf. Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, decided by the State Board, July 6, 1994.

After reviewing the documentation, we are not convinced that it is necessary for the District to increase its maximum budget beyond the amount of the increase approved by the Acting Commissioner.

April 5, 1995

Date of mailing APR 05 1995

KEYPORT TEACHERS ASSOCIATION, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE BOROUGH :
OF KEYPORT, MONMOUTH COUNTY, :

RESPONDENT. :

AND :

ATLANTIC CITY EDUCATION :
ASSOCIATION AND ATLANTIC CITY HEAD :
CUSTODIANS ASSOCIATION, :

PETITIONERS, :

V. :

BOARD OF EDUCATION OF THE CITY OF :
ATLANTIC CITY, ATLANTIC COUNTY, :

RESPONDENT. :

_____ :

COMMISSIONER OF EDUCATION

DECISION ON MOTION

JANUARY 25, 1995

KEYPORT TEACHERS ASSOCIATION, :
 PETITIONER, :
 V. :
 BOARD OF EDUCATION OF THE BOROUGH :
 OF KEYPORT, MONMOUTH COUNTY, :
 RESPONDENT. : COMMISSIONER OF EDUCATION
 AND :
 DECISION ON MOTION
 ATLANTIC CITY EDUCATION :
 ASSOCIATION AND ATLANTIC CITY HEAD :
 CUSTODIANS ASSOCIATION, :
 PETITIONERS, :
 V. :
 BOARD OF EDUCATION OF THE CITY OF :
 ATLANTIC CITY, ATLANTIC COUNTY, :
 RESPONDENT. :

For Movant-Respondent Atlantic City Board of Education,
George G. Frino, Esq.

For Respondents-Petitioners Keyport Teachers Association and
Atlantic City Education Association and Atlantic City
Head Custodians Association, Richard A. Friedman, Esq.
(Zazzali, Zazzali, Fagella & Nowak)

For Respondent Keyport Board of Education, Salvatore Perillo,
Esq. (Perillo and Rosenberger)

This matter was opened before the Commissioner of
 Education on January 11, 1995, by the Atlantic City Board of
 Education, by way of a Motion for Stay of the Commissioner's
 decision dated October 17, 1994. In that decision, the
 Commissioner had found the program of insurance provided to the
 petitioning education associations by the respondent boards of
 education to be in violation of law, but had made no express
 directive as to immediate cessation of the boards' plans.

The Commissioner's decision was duly appealed to the State Board of Education, where it is pending as of this date. In addition, on or about January 3, 1995, the Atlantic City petitioners moved for enforcement of the Commissioner's decision in Superior Court; that action is likewise pending. Petitioner Keyport opted not to join in the enforcement action.

A reply to the Board's Motion for Stay was filed on behalf of the Atlantic City petitioners on January 17, 1995. No papers were filed by the respondent Keyport Board of Education.

In its moving papers, the Atlantic City Board argues that it should not be compelled to terminate its participation in the insurance plan at issue (the so-called "Siracusa Plan"), on grounds that "enormous financial hardship" would befall the district as a result of the "astronomical" cost increases associated with such termination. Turning to the specific criteria governing grant of a stay, the Board contends that it is merely seeking maintenance of the status quo in a case where careful treatment of complex and unsettled issues by the Courts is required. It argues that absent a stay, irreparable harm will result due to the district's not having budgeted for cost increases associated with termination of the Siracusa Plan and obtaining of another carrier, and due to there being insufficient time for the district to explore cost-efficient alternatives to Siracusa, as its obligations to taxpayers properly demand; this harm is all the more egregious, the Board avers, in that it will ultimately prove to have been unnecessary when the Commissioner's

decision is reversed on appeal. The Board further contends that the law underlying this matter is unsettled, and that it is likely to succeed on the merits of its appeal as demonstrated by the cogency of its arguments. Finally, the Board finds the equities of this matter to be on its side, as petitioners will remain fully covered by viable health insurance if the status quo is maintained, while the Board and taxpayers will suffer irreparable harm if it is not.

In reply, petitioners dispute the Board's contention regarding its likely success on the merits, arguing that, to the contrary, the law is neither unsettled nor unclear, and it is plainly adverse to the Board's position. They further dispute the Board's contention that it will suffer immediate and irreparable financial harm if a stay is not granted, as no proof of such contention is offered and the Board's claims of cost-savings through the Siracusa Plan are both unsubstantiated and erroneous, as set forth in prior proceedings and herein; moreover, there is nothing extraordinary or insurmountable about the process of seeking to procure new insurance coverage. Finally, petitioners claim the equities lie in its favor, as the Board has persisted in its adherence to the Siracusa Plan in the face of established law to the contrary, letters of disapproval from both the Department of Education and the Department of Insurance, the ALJ's decision against it (issued in July 1994) and, now finally, the Commissioner's decision.

Upon review of the arguments of the parties herein, the Commissioner's decision at issue, and the standards for grant

of emergent relief as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), the Commissioner finds no compelling basis for grant of a stay and declines to so order, except to the extent indicated below.


Initially, the Commissioner declines to endorse respondent's view of a stay in this matter as mere maintenance of the status quo; to the contrary, the insurance arrangement respondent seeks to continue runs counter to a long-established prohibition, dissolution of which, if it is to occur at all, must await either a new interpretation by the Courts or legislative action to amend controlling statute.

Further, the financial harm claimed by the Board should a stay not be granted is established neither on this record nor the record of the Commissioner's decision at issue. Moreover, to the extent that the Board will be harmed by its purported lack of comparable alternatives for insurance coverage, that harm is of its own making in that it failed to explore such alternatives notwithstanding its participation in a program that was, at the very least, vulnerable to legal challenge, and eventually the subject of a formal dispute.

Nonetheless, the Commissioner recognizes that to require immediate termination of the Board's participation in the Siracusa plan could be sufficiently disruptive so as to compromise both efficient district operations and the Board's ability to make a responsible choice as to alternative coverage. Therefore, the Commissioner permits the Board to continue its participation in

the Siracusa plan through the end of the 1994-95 school year, but directs the Board in the meantime to explore, acquire and properly budget for a legally permissible plan to take effect at the beginning of the fiscal year (July 1, 1995) for which school budgets are now being prepared pursuant to law.

Accordingly, IT IS ORDERED this 25TH day of January 1995, that respondent Atlantic City Board of Education's Motion for Stay is DENIED, except to the extent noted above, and that the Commissioner's decision of October 17, 1994 shall stand in full force and effect unless or until reversed on appeal pursuant to N.J.S.A. 18A:6-25.


COMMISSIONER OF EDUCATION

JANUARY 25, 1995

DATE OF MAILING - JANUARY 26, 1995

IN THE MATTER OF THE CAP WAIVER :
 APPEAL FOR THE BOARD OF EDUCA- :
 TION OF WARREN TOWNSHIP, : STATE BOARD OF EDUCATION
 SOMERSET COUNTY. : DECISION

Decided by the Commissioner of Education, March 20, 1995

For the Appellant, Buttermore, Mullen, Jeremiah & Phillips
(William J. Jeremiah, Esq., of Counsel)

This matter was initiated by a request to the Commissioner of Education pursuant to N.J.S.A. 18A:7D-28(e) by the Board of Education of Warren Township to exceed its maximum permissible budget for 1995-96 by \$724,779. The Acting Commissioner approved \$306,112 of the request, and denied \$418,667.

On appeal, the District is seeking modification of the Acting Commissioner's determination so as to increase the amount awarded. The District specifically challenges the amount of \$156,000 denied by the Acting Commissioner.

After careful review, the State Board of Education affirms the Acting Commissioner's determination granting approval to the District to exceed its maximum permissible budget by \$306,112 pursuant to N.J.S.A. 18A:7D-28(e), and, in addition, modifies that decision so as to increase the amount of the District's request approved by the Acting Commissioner by an additional \$40,000 in

APRIL 5, 1995

order to employ one more additional full-time teacher. We find that the District requires four additional full-time teachers, rather than the three found necessary by the Commissioner in order to provide a thorough and efficient education. In so doing, we stress that the District was required to demonstrate to us that an increase beyond its maximum permissible budget was required in the amount it requested in order for the District to be able to provide a thorough and efficient education. In the Matter of the Cap Waiver Appeal for the Hopewell Valley Regional School District, decided by the State Board, April 5, 1995; cf. Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, decided by the State Board, July 6, 1994.

While district boards of education have no legal entitlement to retain any surplus, it is prudent for them to retain a sufficient surplus to enable them to meet any unexpected circumstances. Hopewell Valley, supra. In this case, the record reflects that the District's surplus is seriously low, and we were aware of this in arriving at our decision in this matter.

After reviewing the documentation, we are not convinced that it is necessary for the District to increase its maximum budget beyond the amount of the increase approved by the Acting Commissioner, except as otherwise indicated herein.

April 5, 1995

Date of mailing APR 05 1995

38-95M

J.D. and K.D. on behalf of their :
minor child, M.D., :

PETITIONERS, :

V. :

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF MIDDLETOWN, MONMOUTH :
COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION ON MOTION

JANAURY 26, 1995

J.D. and K.D. on behalf of their :
minor child, M.D., :

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF MIDDLETOWN, MONMOUTH :
COUNTY, :

DECISION ON MOTION

RESPONDENT. :

For the Board of Education, Kalac, Newman, Lavender &
Campbell (Peter P. Kalac, Esq.)

For Petitioners, Herbert D. Hinkle, Esq.

This matter has come before the Commissioner on December 19, 1994 by way of Notice of Motion with accompanying Affidavit filed by Respondent Board of Education of the Township of Middletown (Board), seeking a stay of the Commissioner's decision rendered in the above-captioned matter on October 31, 1994. In support of its claim that a stay should issue pending review of this case before the State Board of Education, the Board's Affidavit essentially presents a recitation of its factual allegations in this matter and concludes with the assertion that if the requested stay is not granted it will be required to make a payment of public funds which it avers the Federal District Court of Pennsylvania has ruled is the obligation of the Pennsylvania School District rather than one of this Board.

On December 27, 1994, Petitioners filed a letter brief in opposition to the Board's Motion for Stay. Petitioners argue that

it is well settled that a stay shall issue only under the most exceptional circumstances, See Glassboro v. Gloucester Bd. of Ch. Freeholders, 98 N.J. 186 (1984) (court considers merits of appeal and whether irreparable harm will result without a stay). Petitioners contend that the Board advances no basis for a stay but rather re-presents arguments previously raised and rejected by the Commissioner and, in any event, stands to incur merely a monetary loss which is insufficient grounds for a stay.

Upon careful review of the papers submitted by the parties, and under the legal standards that apply to an assessment of whether a stay of the Commissioner's decision should be issued (See Crowe v. DeGioia, 90 N.J. 126 (1982)), the Board's motion is hereby denied. In so deciding the Commissioner finds that the Board has failed to address any of the necessary criteria set forth in Crowe, i.e., it has made no showing that it will suffer any irreparable harm from complying with the Commissioner's decision in this matter, that it will prevail on the merits of the appeal before the State Board, or that a balancing of the equities and hardships to the parties militate in favor of it rather than the petitioning parents herein, who seek to ensure uninterrupted necessary services to their special needs child.

Accordingly, IT IS ORDERED this _____^{25TH} day of January, 1995, that the instant Motion for Stay is DENIED and that the Commissioner's decision of October 31, 1994 shall stand in full force and effect unless or until reversed on appeal pursuant to N.J.S.A. 18A:6-25.

JANUARY 26, 1995

DATE OF MAILING- JANUARY 26, 1995


COMMISSIONER OF EDUCATION

IN THE MATTER OF THE CAP WAIVER :
 APPEAL FOR THE BOARD OF EDUCA- :
 TION OF WALL TOWNSHIP, MONMOUTH : STATE BOARD OF EDUCATION
 COUNTY. : DECISION
 _____ :

Decided by the Commissioner of Education, March 20, 1995

For the Appellant, Kalac, Newman, Lavender & Campbell
(Peter P. Kalac, Esq., of Counsel)

This matter was initiated by a request to the Commissioner of Education pursuant to N.J.S.A. 18A:7D-28(e) by the Board of Education of Wall Township to exceed its maximum permissible budget for 1995-96 by \$767,998. The Acting Commissioner denied that request in full.

On appeal, the District is seeking modification of the Acting Commissioner's determination denying its request.

After careful review, the State Board of Education affirms the Acting Commissioner's determination denying approval to the District to exceed its maximum permissible budget by \$767,998 pursuant to N.J.S.A. 18A:7D-28(e). In so doing, we stress that the District was required to demonstrate to us that an increase beyond its maximum permissible budget was required in the amount it requested in order for the District to be able to provide a thorough and efficient education. In the Matter of the Cap Waiver Appeal for the Board of Education of the Hopewell Valley Regional School District, decided by the State Board, April 5, 1995; cf. Board of

April 5, 1995

Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, decided by the State Board, July 6, 1994.

After reviewing the documentation, we are not convinced that it is necessary for the District to increase its maximum budget.

Bonnie Green abstained.

April 5, 1995

Date of mailing APR 05 1995

39-95

BOARD OF EDUCATION OF THE BOROUGH :
 OF SOUTH RIVER, :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 MAYOR AND COUNCIL OF THE BOROUGH : DECISION
 OF SOUTH RIVER, MIDDLESEX COUNTY, :
 RESPONDENT. :

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of \$967,453.83 made by governing body following voter rejection of proposed budget on April 20, 1994.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district. Commissioner determined to restore \$406,053.83 for a total General Fund tax levy of \$10,520,265 for 1994-95 school purposes.

JANUARY 26, 1995

BOARD OF EDUCATION OF THE BOROUGH :
OF SOUTH RIVER, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

MAYOR AND COUNCIL OF THE BOROUGH :
OF SOUTH RIVER, MIDDLESEX COUNTY, :

DECISION

RESPONDENT. :

Robert A. Blanda, Esq., for Petitioner

Frank J. Paprota, Esq., for Respondent

This matter was opened before the Commissioner on June 15, 1994, through the filing of a Petition of Appeal of a defeated budget by the Borough of South River Board of Education (Board) pursuant to the provisions of N.J.A.C. 6:24-7.4. The Board sought restoration, on the grounds of necessity for a thorough and efficient education of reductions by the Mayor and Council of the Borough of South River (Borough) following voter rejection on April 19, 1994, of the Board's proposed General Fund tax levy for the 1994-95 school year. Subsequent to the defeat, the Board provided to the Borough the budgetary documents required under N.J.S.A. 18A:22.37 and N.J.A.C. 6:34-7.2(b)(1).

On May 11, 1994, the Borough reduced the Current Expense portion of the General Fund tax levy by \$967,453.83. Consequently, the monies in contention in this matter are as set forth below:

Proposed Tax Levy
Adopted by Board of Education

General Fund \$10,658,166.00

Amount of Reduction
by Governing Body

General Fund \$967,453.82

Amount of Tax Levy
Certified by Governing Body

General Fund \$9,690,712.18

Amount of Reduction in Dispute
Before the Commissioner

General Fund \$967,453.82

The Board in its Petition of Appeal claims that the Borough did not consult with the Board pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)(2), that the Borough illegally ordered an increase in the appropriated fund balance, and that the Borough did not provide proper supporting reasons for its reduction in the budget for 1994-95 as required by N.J.A.C. 6:24-7.2(b)(4). The Borough submitted its Answer to the Petition on June 30, 1994, and denies these allegations by the Board. Position Statements were received by both parties on July 20, 1994. The Position Statement for the Borough was submitted by Robert A. Morrison of Hodulik and Morrison, P.A., auditor for the Borough. The Board, in its Response filed on August 1, 1994, objected to this filing "on behalf of the Respondent" by the auditor and cited N.J.A.C. 6:24-7.8(a)(1) and (3) as the requirement for Position Statements to be filed by the governing body with affidavits by individuals filed "in addition to its written position." The Borough Response, submitted on August 1, 1994, included the Response of the Borough attorney and a certified affidavit from the Borough auditor. The Board Summation was filed on August 8, 1994.

The specific reductions in the General Fund (Current Expense) tax levy are as follows:

<u>Account Number</u>	<u>Title</u>	<u>Reduction</u>
11-110-100-101	Preschool/Kindergarten Salaries of Teachers	\$4,422.90

<u>Account Number</u>	<u>Title</u>	<u>Reduction</u>
11-120-100-101	Grades 1-5 Salaries of Teachers	42,438.42
11-130-100-101	Grades 6-8 Salaries of Teachers	74,819.74
11-140-100-101	Grades 9-12 Salaries of Teachers	75,826.33
11-190-100-106	Other Salaries for Instruction	25,969.90
22-304-100-101	Special Ed-N.I. Salaries of Teachers	(75,182.00)
11-204-100-106	Special Ed-N.I. Other Salaries for Instruction	1,449.06
11-205-100-101	Special Ed-P.I. Salaries of Teachers	232,917.21
11-205-100-106	Special Ed-P.I. Other Salaries for Instruction	(18,996.60)
11-209-100-101	Special Ed-E.D. Salaries of Teachers	81,982.63
11-209-100-106	Special Ed-E.D. Other Salaries for Instruction	19,383.06
11-213-100-101	Special Ed-RR/RC Salaries of Teachers	(224,304.67)
11-213-100-106	Special Ed-RR/RC Other Salaries for Instruction	(18,830.70)
11-215-100-101	Special Ed-P.H. Salaries of Teachers	2,310.18
11-215-100-106	Special Ed-P.H. Other Salaries for Instruction	(15,064.35)
11-218-100-101	Special Ed-S.I. Salaries of Teachers	37,013.57
11-219-100-101	Special Ed-H.I. Salaries of Teachers	(3,810.84)
11-230-100-101	Basic Skills/Remedial Salaries of Teachers	40,211.84
11-240-100-101	Bilingual Ed. Salaries of Teachers	14,420.57
11-401-100-100	Cocurricular Activities Salaries	5,078.14
11-402-100-100	Athletics Salaries	(8,983.68)
11-403-110-100	Other Inst. Programs Salaries	430.61
11-800-330-100	Community Service Programs Salaries	192.48
11-000-211-100	Attendance & Social Work Salaries	542.11
11-000-218-104	Health Services Salaries	7,860.08
11-000-218-104	Other Support Services Salaries of Other Prof. Staff	55,463.00
11-000-218-105	Other Support Services Salaries of Sec. & Cler.	1,231.88
11-000-219-102	Other Support Services Salaries of Prof.	(80,592.75)
11-000-219-104	Other Support Services Salaries of Other Prof.	112,955.58
11-000-219-105	Other Support Services Salaries of Sec. & Cler.	8,666.04
11-000-221-102	Imp. of Instruction Salaries of Super- visors	(18,855.03)
11-000-221-105	Imp. of Instruction Salaries of Sec. & Cler.	(8,628.64)
11-000-222-104	Ed. Media Center/Library Salaries	13,001.96
11-000-230-100	General Administration Salaries	149,326.93
11-000-230-104	General Administration Treas. Salaries	(89,460.00)
11-000-230-105	General Administration Sec. Salaries	(62,567.56)
11-000-240-103	School Administration Principals Salaries	2,893.23
11-000-240-105	School Admin. Salaries of Sec. & Cler.	(13,907.04)
11-000-260-110	Operations & Maint. Salaries	34,722.73
11-000-270-108	Pupil Transportation Salaries	12,027.60
11-000-290-100	Business Services - Salaries	181,483.66

<u>Account Number</u>	<u>Title</u>	<u>Reduction</u>
11-000-290-104	Business Services - Salaries Admin. Prof.	(72,843.75)
11-000-290-105	Business Services - Salaries Sec.	(<u>120,960.00</u>)
	Total	\$406,053.83

Reason: The review of 1994-95 salary lines compared to 1993-94 with increase indicated in excess of \$166,054 in 1994-95. Also reduced additional \$240,000 for retirement savings.

11-000-290-241	Other Retirement Cont. Regular	\$177,000.00
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Reason: Provided only \$10,000 for Public Employees Retirement Systems payments and reduced all other appropriations in this line item as not valid or legal.

11-000-290-290	Other Employee Benefits	\$25,600.00
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Reason: Reduced cost of medical coverage from anticipated increase of 15% to 13%.

11-000-290-250	Unemployment Compensation	\$70,000.00
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Reason: Eliminated all funds in this line item because balance in fund is self-sufficient.

10-303	Fund Balance	\$288,800.00
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Reason: A review indicates the fund balance was underestimated.

	Total	<u>\$967,453.83</u>
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It would seem prudent at this time prior to the determination on the reductions to address the other issues noted above that were raised by the Petitioner. The Board claims that the Borough did not consult on the budget as required by statute and code. The Borough denies this allegation. A review of the documents submitted indicates that there was never a meeting of the

full membership of both parties, that a scheduled joint meeting was cancelled by the Borough, and that a meeting scheduled by the Middlesex County Superintendent of Schools was not attended by the Borough representatives. There was some individual contact, primarily between the Borough auditor and Board school business administrator. A joint meeting of the Finance Committees of both parties was held on May 3, 1994. Statute and code clearly call for consultation between both parties to ensure the determination of a tax levy sufficient to provide a thorough and efficient education. It would seem from the documents presented that there was no joint review of the budgetary data or cooperative dialogue between the parties.

The Board also alleges that the Borough illegally ordered an increase in the appropriated fund balance. The Board cites the form in N.J.A.C. 6:24-7.5(c) as proof that such action is contrary to law. The Board further notes that the Borough did not advise the Board as to how this money is to be used, e.g., applicable line items, in the 1994-95 school budget. The Board is incorrect on both points. Case law decisions have supported the right of a governing body to consider the possibility of other revenue, specifically fund balance, to reduce taxes but maintain a thorough and efficient education. The Board's position regarding the applicable line items for this money is irrelevant, since appropriations were not effected by this action.

The third general claim by the Board is that the Borough did not proffer supporting reasons for its reduction in the 1994-95 budget. The Petition of Appeal filed by the Board included, as Exhibit C, a document listing the "Line Item Changes and Supporting

Reasons." It must be noted, however, that it is not clear as to whether or not this document is part of the Borough resolution dated May 18, 1994, or a separate item added to the resolution after the formal action. The Board does acknowledge receiving these reasons with the resolution on May 19, 1994.

It is apparent that the procedures for budget dispute resolution were neither understood nor followed in this matter. The New Jersey Supreme Court and the State Board of Education, however, have reaffirmed in a number of decisions that the review and determination by the Commissioner in defeated budget appeals should not be based on procedural grounds alone, but should be premised on whether the budget satisfies the constitutional standard for a thorough and efficient education, whether the municipality was mindful of appropriate educational considerations at the time they were made and whether educational goals will be jeopardized. Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305 (1989); Board of Education of the Township of Rochelle Park v. Mayor and Council of the Township of Rochelle Park, Bergen County, decided by State Board of Education July 1, 1992.

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide

appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See, also, Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction is imposed by the governing body is necessary for the provision of a thorough and efficient system of education. Additionally, on December 16, 1994, the Commissioner notified the parties that, pursuant to N.J.A.C. 1:1-15.2, he intended to take official notice of the 1993-94 year-end district audit as it related to the amount of undesignated surplus available to the district.

Mindful, then, of the balance to be applied in the standard of review, the Commissioner makes the following determination with respect to the reduction in the General Fund (Current Expense) tax levy effectuated by the Borough.

<u>10-303</u>	<u>Fund Balance</u>	<u>\$288,800</u>
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The Borough bases its increase in appropriated fund balance to reduce the tax levy on its belief that the Board underestimated its available free balance as of June 30, 1994, and that the increased appropriation will still provide the Board with a greater surplus than they listed in the budget document. The Board does not dispute the Borough's claim of a fund balance greater than anticipated but cites a bid of \$91,125 for required asbestos repair/removal that would reduce the available surplus, a reduction of

\$150,000 in purchase orders used in the Borough's calculations that was only reduced because of the failure of the Borough to provide the \$423,500 restored in taxes on appeal for 1993-94, and the general needs of the district to meet requirements cited in an OEE0 review and a facilities evaluation plus legal obligations. Commission specifically rejects the Board's contention, in response to notification on use of the audit, that transfers totalling \$49,550 for ADA Compliance, \$240,000 for change orders relating to roofing and \$181,000 for underground oil storage tank compliance have reduced the audited surplus so as to preclude sustaining this allocation, as these items can be, and should have been planned for in the district's budgeting and bonding processes without resort to surplus. The Commissioner's review of the 1993-94 year-end audit establishes that the district has underestimated the amount of undesignated surplus. Even considering the specific enumerated contingencies, the Commissioner finds that the \$288,800 appropriation may be offset by the amount of undesignated surplus available. Consequently, the Borough's reduction is sustained.

Various Acct. #	Salary Accounts	\$406,053.82
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The Borough certified this total decrease to the budgeted salary accounts on the basis that the 1994-95 salary lines with projected increases over 1993-94 had an excess of \$166,054 (rounded off in Borough documents from \$166,053.82) plus the possibility of an additional reduction of \$240,000 for retirement savings. The Board states that the salary line changes certified by the Borough cannot be substantiated and do not accurately reflect the district's projected needs for 1994-95. The Board points out that the Borough, in applying their review process to every salary line item, restored

monies to salary lines where the Board had not budgeted any funds and reduced other salary line items by amounts greater than the proposed budgeted amount. The Borough acknowledges that the procedure they used did show individual line items for 1994-95 but did not invalidate the total result. The Borough adds that they could not reconcile the information given to them because they received no names or reclassification. The Board did, however, provide a list of positions with individual 1993-94 and 1994-95 salaries. Notwithstanding the requirements of N.J.A.C. 6:24-7.2(b)(4) which requires that the specific line item reductions must be identified with the supporting reason for each such reduction, the generalized procedures used by the Borough not only do not address this requirement but also appear to be totally arbitrary. The additional and apparently unnecessary funds allocated for some line items and reductions, greater than the amount budgeted for some other line items, do not provide a logical rationale for budgetary adjustments. The Board has certified that 1993-94 retirements are reflected in the 1994-95 proposed budget and that they have no knowledge at this time of planned retirements during 1994-95. Based on these facts and the documents presented, the Commissioner orders the restoration of the \$406,053.82 reduction.

11-000-290-241 Other Retirement Contributions Regular \$177,000

The Borough states that the monies in this line item for 1993-94 were to pay retirement benefits to the retiring superintendent. They question the legality of that appropriation for this line item and state that, in the absence of information on any expenditure for this account that meets the definition of the account, reduce the line item to \$10,000, the amount due for the

New Jersey Public Employee Retirement System. The Board states that funds are also budgeted in this line item to meet contractual obligations with teachers and administrators and for administrators for unused vacation days or retirement. The Board states that this line item has \$50,000 for benefits for the assistant superintendent who has retired. It must be noted that these contractual benefits should not be budgeted in this line item, 11-000-290-241, but should be in 11-000-290-290. Concern about the incorrect budgeting is also compounded by the fact that this line item has more than doubled from the 1993-94 budget to the 1994-95 proposal. The Board has not documented the need for the funds in this line item and has stated that they are not aware of any planned retirements in 1994-95, though the school business administrator states there may be two individual retirements. A Board certainly must meet contractual obligations, but the Board in this matter has not validated the need for these funds. The Commissioner sustains the reduction of \$177,000.

<u>11-000-290-290</u>	<u>Other Employer Benefits</u>	<u>\$25,600</u>
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The Borough bases this reduction on the provision of a thirteen percent (13%) increase in health insurance premiums and not the fifteen percent (15%) the Board states it needs. The Board argues that a quote by its agent confirms the need for the fifteen percent (15%) increase. Since this line item will have an increase over 1993-94 of greater than eighteen percent (18%) with the reduction certified by the Borough, the Commissioner sustains the reduction of \$25,600.

<u>11-000-290-250</u>	<u>Unemployment Compensation</u>	<u>\$70,000</u>
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The Borough reduces this line item on the basis that the

balance in the fund is sufficient to meet any potential needs for 1994-95 and that these 1994-95 appropriations are not necessary. The Board states that the funds are necessary because of the potential for termination of position and layoffs. According to the information presented, the fund has a balance of more than \$200,000 and expenditures, based on past experience, the balance should not equal even half that amount. Also, the district records increasing enrollment in the budget document which would seem to negate the prospect of termination of positions. Based on the data presented, the Commissioner sustains the reduction of \$70,000.

Thus, for the reasons set forth above, the Commissioner determines to restore \$694,853.82 and sustain \$272,600 of the reduction in the General Fund (Current Expense) tax levy appealed herein as summarized by the chart below:

<u>Account Number</u>	<u>Title</u>	<u>Restored</u>	<u>Sustained</u>
10-303	Fund Balance	\$ - 0 -	\$288,800
Various	Salary Accounts	406,053.83	
11-000-290-241	Other Retirement Cont.	- 0 -	\$177,000
11-000-290-290	Other Employee Benefits	- 0 -	25,600
11-000-290-250	Unemployment Compensation	- 0 -	70,000
	Totals	\$406,053.83	\$561,400

Accordingly, the Middlesex County Board of Taxation is directed to make the necessary adjustments as set forth below to reflect a total of \$10,096,766.01 to be raised in tax levy for General Fund purposes by the Borough of South River for the 1994-95 school year.

	<u>General Fund Current Expense</u>	<u>Capital Outlay</u>
Tax Levy Certified by Borough	\$9,403,307.18	\$287,405.00
Restored by Commissioner	<u>406,053.83</u>	<u>- 0 -</u>
Total	\$9,809,361.01	\$287,405.00
Total thus for General Fund	\$10,096,766.01	
IT IS SO ORDERED.		



COMMISSIONER OF EDUCATION

JANUARY 26, 1995

DATE OF MAILING - JANUARY 26, 1995

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION :
OF THE BOROUGH OF MOONACHIE, :
BERGEN COUNTY, :

AND

BOARD OF EDUCATION OF THE BOROUGH :
OF MOONACHIE, BERGEN COUNTY, :
PETITIONER, :
V. :
DR. ANTHONY SCALZO, BERGEN COUNTY :
SUPERINTENDENT OF SCHOOLS, NEW :
JERSEY STATE DEPARTMENT OF :
EDUCATION, :
RESPONDENT. :

COMMISSIONER OF EDUCATION
DECISION

SYNOPSIS

In consolidated matters, Board appealed General Fund cap waiver in the amount of \$310,734 rejected by voters, \$277,684 of which had been approved by the County Superintendent as necessary for a thorough and efficient system of education and \$33,050 of which had been not approved.

Upon review of the record, Commissioner determined to order an increase of \$277,684 in cap waiver monies for a total General Fund tax levy of \$3,766,588 for the 1994-95 school year.

FEBRUARY 1, 1995

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION :
OF THE BOROUGH OF MOONACHIE, :
BERGEN COUNTY, :

AND

BOARD OF EDUCATION OF THE BOROUGH : COMMISSIONER OF EDUCATION
OF MOONACHIE, BERGEN COUNTY, :
PETITIONER, : DECISION
V. :
DR. ANTHONY SCALZO, BERGEN COUNTY :
SUPERINTENDENT OF SCHOOLS, NEW :
JERSEY STATE DEPARTMENT OF :
EDUCATION, :
RESPONDENT. :

For the Board of Education, Christopher M. Hartwyck, Esq.
(Hartwyck and Slowinski)

For the State, Arlene G. Lutz, DAG (Deborah T. Poritz,
Attorney General)

This matter was opened before the Commissioner of Education on June 16, 1994, through the filing of a Petition of Appeal by the Board of Education of the Borough of Moonachie (Board), seeking inclusion within the 1994-95 General Fund Tax Levy of a cap waiver in the amount of \$310,734. This amount, submitted to the voters of Moonachie pursuant to N.J.S.A. 18A:7D-28(f), had been rejected by them at the annual school election on April 19, 1994.

On March 31, 1994, the Bergen County Superintendent of Schools had approved \$277,684 of the Board's cap waiver request as being necessary for the provision of a thorough and efficient system of education (T & E), after reviewing the entire proposed

school budget to determine whether further reallocation could be accomplished within the base budget so as to obviate the need for a cap waiver. Having determined that no such reallocation was possible, the County Superintendent approved the budget for submission to the voters of the district on the condition that, should the budget or cap waiver question be rejected, the district must file appropriate appeals with the Commissioner of Education. See Administrative Agency Advice (AAA) 91-0036 (July 8, 1991). The remaining \$33,050 was found not to be necessary for provision of T & E, and therefore not subject to appeal to the Commissioner in the event the cap waiver question was rejected by the voters.

The cap waiver line-item amounts approved for submission to the voters as necessary for T & E were as follows:

<u>Account Title</u>	<u>Account Number</u>	<u>Dollar Amount</u>
Current Expense Accounts:		
Regular Programs Instruction:		
Other Salaries/Instruction	11-190-100-106	\$ 14,000
General Supplies	11-190-100-610	29,684
Textbooks	11-190-100-640	5,000
Undistributed Expenditures - Educational Media/Library:		
Salaries	11-000-222-100	35,000
Purchases Prof./Technical	11-000-222-300	500
Supplies & Materials	11-000-222-600	11,000
Other Objects	11-000-222-800	1,000
Undistributed Expenditures - Operation/Maintenance of Plant:		
Purchased Prof./Technical	11-000-260-300	12,000
Cleaning, Repair, Maintenance	11-000-260-420	14,000
Liability Insurance	11-000-260-520	15,000
General Supplies	11-000-260-610	15,000
Energy	11-000-260-620	50,000
Other Objects	11-000-260-800	3,000
Undistributed Expenditures - Food Services:		
Supplies & Materials	11-000-310-600	1,000
Transfer to Cover Deficit	11-000-310-930	5,000

Capital Outlay Accounts:

Equipment:

Grades 1-5	12-120-100-730	4,300
Grades 6-8	12-130-100-730	4,500
Undistributed Expenditures -		
Student Support Serv. Spec.	12-000-219-730	3,500
Undistributed Expenditures -		
General Administration	12-000-230-730	2,000
Undistributed Expenditures -		
Operation of Plant Services	12-000-260-730	8,200
Undistributed Expenditures -		
Noninstructional Serv.	12-000-300-730	20,000
Facilities Acquisitions and Construction Services:		
Construction Services	12-000-400-450	24,000

Additional Current Expense Appropriation	\$211,184
Additional Capital Outlay Appropriation	<u>66,500</u>
Total Amount of T & E Cap Waiver:	\$277,684

The cap waiver line-item accounts not approved as necessary for T & E were as follows:

<u>Account Title</u>	<u>Account Number</u>	<u>Dollar Amount</u>
Regular Programs Instruction:		
Other Objects	11-190-100-800	\$ 4,500
School-Sponsored Co-Curricular Activities Instruction:		
Salaries	11-140-100-100	6,750
Supplies & Materials	11-140-100-600	1,800
Undistributed Expenditures-Other Support Service-Special:		
Salaries/Professional	11-000-219-104	20,000
Total Amount Not Approved as T & E:		\$ 33,050

At the annual school election, in addition to defeating the Board's cap waiver question, the voters of the district also defeated the Board's General Fund Budget proposition. Pursuant to N.J.S.A. 18A:22-37, the Mayor and Council of Moonachie (Borough) reviewed the defeated budget, determined not to make any reductions and accordingly certified to the Bergen County Board of

Taxation a tax levy amount of \$3,488,904 as had been proposed by the Board. Consequently, no budget appeal was filed. In response to service by the Board and subsequent notice by the Department of Education of its opportunity to participate in cap waiver appeal proceedings, the Borough elected not to contest the appeal, and the Board was reminded via telephone conference of its obligation to submit a position statement in support of the requested cap waiver line items notwithstanding the Borough's determination not to contest the appeal.

With its initial petition, the Board had included a request to have its appeal deemed timely filed, together with a certification from the Board attorney explaining the extreme personal circumstances that led to his inability to file the petition until June 16, 1994. Within the petition itself, the Board also indicated its intent to appeal the entirety of the line-item amounts in its cap waiver request, not only those approved as necessary for T & E by the County Superintendent. Accordingly, by letter dated July 6, 1994, the Acting Director of the Bureau of Controversies and Disputes advised the Board that the June 16 petition was in fact timely filed, as it was received well within the 30-day time period following certification of the school tax levy by the governing body on May 19, 1994, the deadline set by regulation for filing of budget appeals and applied by the Department for submission of cap waiver appeals as well. The Board was also advised, however, that should it wish to appeal the non-T & E portion of its cap waiver request, a separate

petition naming as respondent the County Superintendent of Schools, who had made the non-T & E determinations in dispute, needed to be filed and served on the Deputy Attorney General (DAG), and that such petition would then be consolidated with the Board's T & E cap waiver appeal for determination by the Commissioner.

On August 4, 1994, as requested by the Department as part of proceedings for all cap waiver appeals, the County Superintendent filed his affidavit and supporting documents attesting to the process of review and analysis that led to his conclusion, and that of the Department of Education's Cap Waiver Review Panel, that, with the exception of the items noted above, the requested cap waiver funds were both necessary for T & E and unable to be reallocated from within the base budget. Via telephone conference, the Board was again reminded of its obligation to submit a position statement for the T & E portion of its appeal, as none had been received by mid-August and the appeal could not be decided absent such a statement, notwithstanding that it was uncontested by the Borough. By early November, despite further reminders, no position statement had been filed.

Then, on November 7, 1994, the Board filed a petition contesting the non-T & E portion of the cap waiver request, naming the County Superintendent as respondent and serving the Deputy Attorney General as required by the Bureau in its July 6, 1994 letter. Together with this petition was filed the Board's position statement on all items in the cap waiver request, T & E

and non-T & E alike. In a letter appended to this filing, the Board Attorney stated that the enclosed petition and statement of position had been sent via UPS to all parties on August 30, 1994, but, as he subsequently learned was true of all packages taken from his building location on that date, had not been delivered.

In response to the Board's petition, on December 8, 1994, the State filed a Motion to Dismiss the non-T & E portion of the appeal, i.e., that portion naming the County Superintendent as respondent, on grounds of untimely filing. The Board's reply in opposition to this motion was submitted on December 23, 1994.

In the interim, the parties were notified on December 16, 1994, that the record of this consolidated matter was to be augmented by official notice of the Board's 1993-94 year-end audit for the purpose of identifying whether the Board had underestimated in its 1994-95 budget the amount of anticipated undesignated surplus; no comments regarding this issue were received from the parties.

Upon review and consideration of these matters, the Commissioner finds that disposition of both petitions, including the Motion to Dismiss filed in conjunction with the non-T & E portion of the appeal, may be fairly effectuated at this point in proceedings through the single decision within. Accordingly, the Commissioner makes the following determinations.

T & E CAP WAIVER DETERMINATION

Upon his own independent review and consideration of the papers filed by the Board, together with the affidavit and

supporting documents of the County Superintendent, the Commissioner finds that the line items approved by the County Superintendent and Review Panel, and uncontested by the Borough, are necessary, both as to the nature of the expenditures and their amount, for provision of T & E. The Commissioner notes that the monies requested are expressly required for services and materials directly related to the instructional program and the basic safety and maintenance of school facilities. The Commissioner further notes that the Board's original cap waiver request was substantially larger than that finally submitted for panel and County Superintendent approval, and that, based on guidance provided by the County Superintendent and Review Panel, the Board actively sought to minimize the number and dollar amounts of items to be funded through cap waiver. Finally, the Commissioner notes that the County Superintendent and Review Panel undertook a thorough examination of the Board's base budget for possible reallocation prior to arriving at the amount ultimately approved for submission to the voters as a T & E cap waiver, and that the Borough reviewed this base budget pursuant to N.J.S.A. 18A:22-37 and determined that it was necessary to certify the full amount notwithstanding voter defeat. Thus, the Commissioner is satisfied that the cap waiver amounts at issue in this portion of the appeal are in fact the minimal amounts necessary for provision of T & E.

NON-T & E CAP WAIVER DETERMINATION

The first matter to be considered in this portion of the appeal is the question of the timeliness of the Board's filing.

In its Motion to Dismiss the petition, the State argues that the Board knew, on or about March 31, 1994, of the County Superintendent's determinations as to which items in its cap waiver request were necessary for provision of T & E, and that it further knew as of April 19, 1994, the date of the election, that its cap waiver request had been defeated by the voters; therefore, even taking the later, more generous, reckoning as the date of the Board's cause of action, pursuant to N.J.A.C. 6:24-1.2(c) the appeal should have been filed by July 18, 1994. Accordingly, the Board's petition must be deemed out of time even if the Board Attorney's (uncertified) statement that it was mailed on August 30, 1994 is accepted as true. Neither has the Board presented any basis on which relaxation of the rule would be warranted, as the Board clearly slept on its rights notwithstanding its claims that the funds at issue are essential for provision of T & E in the district.

In response to the State's motion, the Board counters that it did not sleep on its rights, and that, to the contrary, it expressly raised the non-T & E aspects of its cap waiver appeal in the petition filed on June 16, 1994, which was served on the County Superintendent as well as on the Borough, and which was filed as late as it was (albeit timely, as found by the Acting Director) only because of the Board Attorney's extenuating personal circumstances. There being no regulations or established practice on which to rely for the filing of an appeal of this type, the Board had no way of knowing, until receipt of the Acting

Director's July 6, 1994 letter, that the Department was requiring a separate petition actually naming the County Superintendent as respondent to be filed in order for a district to appeal the non-T & E portion of its cap waiver request by challenging the County Superintendent's determinations. Moreover, the Department's basis for imposing such a requirement is nowhere set forth, not even in the letter from the Acting Director; therefore, within the context of a Motion to Dismiss resting solely on a claim of untimeliness, there are no reasonable grounds to find that the petition filed on June 16, 1994 was not an acceptable filing for purposes of initiating an appeal of both the T & E and the non-T & E portions of the cap waiver.

Upon consideration of this issue, the Commissioner notes that there appears to be no reason why the Acting Director's July 6, 1994 request could not have been complied with prior to August 30, 1994, the date on which the petition ultimately filed on November 7, 1994 was purportedly mailed, or why it took nearly two months for the Board to recognize that its papers had not reached their designated recipients. However, the Commissioner concurs with the Board that, given the absence of regulation or established practice governing appeals of this type and in view of the fact that T & E is at issue, under the totality of particular circumstances herein, it would place form over substance to bar the Board from pursuing the full amount of its cap waiver appeal at this point in proceedings. Accordingly, the Commissioner will examine the Board's claims on their merits.

In turning to those claims, the Commissioner notes that, the Motion to Dismiss not having been previously decided, the State has not yet had an opportunity to answer the Board's allegations as to the County Superintendent's T & E determinations. However, for the reasons indicated, the Commissioner finds such answer unnecessary for disposition of this matter, and in the interest of expediency proceeds to line-item determinations as set forth below.

The line-items rejected by the County Superintendent but judged necessary by the Board for provision of T & E arise in three areas. First, the Board seeks \$4,500 for Regular Programs - Instruction (Account #11-190-100-800), contending that "Withholding of these funds will force the school to eliminate field trip programs and science labs for all grades, which supplement and enforce the students' classroom instruction. Field trips and labs provide the students with a more interesting, practical and hands-on method of observing and applying the lessons they read in their textbooks. Without these funds, students will have only a limited and non-experiential understanding of what school curriculums are designed to teach them." (Position Statement, Item No. 38)

While the Commissioner would certainly concur that field trips and science labs enhance the educational experience and are properly considered within the context of a district's T & E instructional program, the Board herein has made no specific showing as to the type of, or manner in which, programs will be

affected by lack of the requested funds, how such funds would actually be expended and what the precise impact on student learning will be if they are not. Neither has it shown to what extent it has availed itself of parental fees pursuant to N.J.S.A. 18A:36-21 et seq. in order to help fund field trips. Accordingly, even without opposing argument on behalf of the County Superintendent, the Commissioner is unable to find that the Board has met its burden of demonstrating that it cannot provide for T & E in the absence of the requested funds.

The Board then seeks \$6,750 and \$1,800 for staff salaries and supplies and materials for School-Sponsored Co-curricular Activities (Accounts #11-140-100-100 and #11-401-100-600, respectively), contending with regard to salaries that "Without these funds after school activities will most likely be halted or at the least very limited. Extracurricular activities are designed to provide challenging and fun alternatives to television or trouble-making for students after the academic portion of the school day. To ensure the success of these programs, and for legal liability purposes, adult supervision is required. These funds are necessary to compensate those teachers and instructors who are concerned with their students' activities in and outside of the classroom, and who dedicate their time and energy to the success of these after school programs." (Position Statement, Item No. 38). With respect to supplies, the Board avers that "After school activities can only accomplish what they have the means to accommodate. The

students involved in these programs need and deserve the equipment, supplies and materials which their programs require to make them fun, challenging and safe. Without these materials, the children will not have adequate facilities to satisfy their natural desires to have fun and at the same time learn." (Position Statement, Item No. 39)

As was the case with the Board's contention regarding field trips and science labs, while the Commissioner would generally concur that extracurricular activities enhance the educational experience, the Board herein has made no specific showing as to what programs will be affected by lack of the requested funds, how such funds would be expended and what the impact on the district's student body or educational system will be if they are not. Accordingly, even without rebuttal from the County Superintendent, the Board's arguments on their face fail to meet the burden of demonstrating that the Board cannot provide for T & E in the absence of the requested funds.

Finally, the Board seeks \$20,000 for expansion of psychologist services for the child study team (Account #11-000-219-104), arguing that "These funds are extremely important to ensure that the district keeps up with the growing number of student evaluations. The district has experienced a steady increase in special education students and the workload of the child study team has increased significantly. These funds would allow for the child study team to have the services of the psychologist available three days per week to ensure the progress

of each student and make sure that each student is receiving the attention that they deserve. The child study team will have more time to devote to each student, as well as increase the number of students which they can attend to. These individuals become especially important in determining the course of students who need special or just increased personal attention. Early detection of learning disorders or behavioral problems by these individuals can make school much more enjoyable and successful for these often overlooked students. Without the funds allocated for this line item, the students will be cheated out of the educational services that the law requires in order to ensure an equivalent educational experience." (Position Statement, Item No. 40)

Again, the Board has presented no specific information in support of its contention that the services otherwise provided and budgeted for in this area, while perhaps not rising to the level the Board would ideally like to offer, are not sufficient for provision of T & E; neither has it provided any documentation in support of its contention that there exist students in the district who will not, in the absence of the requested funds, receive the services to which they are entitled by law. Accordingly, once again, even without counterargument from the County Superintendent, the Board's position on its face fails to meet the burden of demonstrating that the Board cannot provide for T & E in the absence of the requested funds.


CONCLUSION

For the reasons set forth above, the Commissioner concludes that the tax levy of \$3,488,904 certified by the governing body, together with the \$277,684 T & E cap waiver requested herein, in fact represents the minimal amount necessary for provision of a thorough and efficient system of education in the Moonachie school district. The Commissioner is satisfied that the amount of cap waiver monies requested by the Board and approved by the County Superintendent is both fully necessary for T & E and unable to be derived from further reallocation within the base budget or by appropriation from the Board's audited undesignated surplus of \$118,134. The Commissioner further finds, however, that the Board has failed to meet its burden in demonstrating the necessity for those funds not approved by the County Superintendent, so that these may not be included in the tax levy adjustment to be made by the Board of Taxation as a result of this decision. (Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, Bergen County, State Board decision July 7, 1993, and Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater, Bergen County, State Board decision July 6, 1994)

Accordingly, the Bergen County Board of Taxation is directed to make the necessary adjustments to reflect an increase of \$277,684, for a total of \$3,766,588 to be raised in

tax levy for General Fund purposes of the Moonachie Board of Education for the 1994-95 school year.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

FEBRUARY 1, 1995

DATE OF MAILING - FEBRUARY 1, 1995

(SB) 40-95

DHP #432-94
SB # 40-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF EARL DAVIS. : DECISION
_____ :

Decided by the Deputy Commissioner of Education,
February 7, 1995

For the Petitioner-Appellant, Earl Davis, pro se

For the Respondent-Respondent, Arlene G. Lutz, Deputy
Attorney General (Deborah T. Poritz, Attorney
General of New Jersey)

Earl Davis (hereinafter "petitioner"), who was employed
as a school custodian in the Newark school district, was
disqualified by the Office of Criminal History Review of the
Department of Education from continued employment in the State's
schools when a fingerprint search conducted pursuant to N.J.S.A.
18A:6-7.1 et seq. revealed that he had been convicted of
possession of heroin in 1971 and possession of dangerous drugs in
1984. Petitioner sought to overturn his disqualification on the
basis of rehabilitation.

JUNE 7, 1995

In a letter decision dated February 7, 1995, the Deputy Commissioner of Education upheld the disqualification,¹ stating that petitioner's

many letters of support from school officials, a former employer, and friends do not specifically address your rehabilitation, but rather appear to be general letters of recommendation, based on your fine performance at work and on good character. Notwithstanding your own claims of rehabilitation, your appeal is such that I am not clearly and convincingly persuaded, as I must be by law, that you have demonstrated rehabilitation within the meaning of the statute.

The petitioner filed the instant appeal to the State Board of Education. The parties subsequently executed and submitted to the State Board an order consenting to a remand to the Commissioner for a hearing on the issue of rehabilitation.²

After a careful review, we find the record in this matter to be such that, given our authority as the ultimate administrative decision-maker and fact-finder in school matters,

¹ We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws...." N.J.S.A. 18A:4-34.

² The Office of Criminal History Review was apparently not represented in the proceedings before the Deputy Commissioner. Upon the filing of the appeal, Counsel to the State Board notified the Attorney General's Office that an appeal had been taken in the matter, and transmitted a copy of the record. A Deputy Attorney General was then assigned to appear as attorney of record in the appeal.

In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), certif. den., 121 N.J. 615 (1990); Dore v. Bedminister Tp. Bd. of Ed., 185 N.J. Super. 447, 452 (App. Div. 1982), we need not remand for determination of the substantive issue raised. Our review of the record has eliminated any question that petitioner has demonstrated clear and convincing evidence of his rehabilitation.

N.J.S.A. 18A:6-7.1 provides, in pertinent part:

e. Notwithstanding the provisions of this section, an individual shall not be disqualified from employment or service under this act on the basis of any conviction disclosed by a criminal record check performed pursuant to this act if the individual has affirmatively demonstrated to the Commissioner of Education clear and convincing evidence of his or her rehabilitation. In determining whether an individual has affirmatively demonstrated rehabilitation, the following factors shall be considered:

1. The nature and responsibility of the position which the convicted individual would hold;
2. The nature and seriousness of the offense;
3. The circumstances under which the offense occurred;
4. The date of the offense;
5. The age of the individual when the offense was committed;
6. Whether the offense was an isolated or repeated incident;
7. Any social conditions which may have contributed to the offense;
8. Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional

academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have had the individual under their supervision.

(Emphasis added.)

The record indicates that petitioner has successfully overcome the drug problems which apparently led to his series of arrests more than a decade ago. The senior vocational counselor for the State Department of Corrections program in which petitioner served for six months following his 1984 drug conviction indicates that petitioner was "responsible and dependable" and that he "attended weekly N.A. and A.A. meetings and remained alcohol and drug free while in our program." Petitioner has also actively pursued vocational training. His submissions to the Commissioner show that he attended evening classes at a vocational school and received his boiler operator license from the State of New Jersey in January 1992. There have been no further arrests since 1984.

The principal of the school in which petitioner had been employed praises him as a "competent and resourceful person. He eagerly accepts responsibility with the capacity to manage, make decisions, and set priorities with any task he performs. He provides assistance to staff members in his charge and has a good working relationship with colleagues and school administration."

A vice principal at the school characterizes petitioner as responsible and dependable, adding that petitioner had "always practiced good judgment and in my opinion handled his position of Head Custodian in a very fine manner." Another vice principal indicates that petitioner "consistently demonstrated his conscientiousness toward his job responsibilities. He was highly dependable, punctual and his work performance was highly satisfactory. I have found him to be a positive, honest, hard-working person whose work performance was highly satisfactory by any standards."

Petitioner's performance evaluations conducted by the principal are satisfactory in all categories and praise petitioner's performance as "exemplary," adding that he was a "conscientious employee who [took] great pride in the thoroughness of his assignments and supervision of his subordinates."

The president of a janitorial contractor for which petitioner was employed from 1985 through 1992 describes petitioner's work as "commendable" and "an asset to my company's operation." She indicates that petitioner "began as a cleaner and moved up the ranks to Lead Person, Contract Supervisor, Specialty Services Manager and Marketing Agent." Petitioner's supervisor in the maintenance company in which he was employed

from 1992 until he began his employment in the Newark school system attests to his "fine character, dependability and diligence." The president of that firm indicates that he would rehire petitioner in the capacity of supervisor, and the vice president commends petitioner as "very reliable and an excellent worker....If anyone has ever shown that people can be rehabilitated Mr. Davis has."

While the Deputy Commissioner found that the letters of support from petitioner's former employees and school officials did not specifically address his rehabilitation, "but rather appear to be general letters of recommendation, based on [his] fine performance at work," we stress that N.J.S.A. 18A:6-7.1(e) expressly requires consideration of "the recommendation of persons who have had the individual under their supervision" as evidence of rehabilitation.

While the gravity of petitioner's offenses is evident, under the circumstances, we find that further penalization of this individual, who has made great strides in rehabilitating himself, is neither a just result nor warranted under the terms of the statute. Given the uncontradicted evidence in the record, including the recommendations of his supervisors, and petitioner's successful efforts to acquire training and experience and to overcome his drug problems since his crimes

more than ten years ago, we conclude that he has convincingly demonstrated his rehabilitation under N.J.S.A. 18A:6-7.1(e). Moreover, as required by that provision, we have considered the "nature and responsibility" of the position petitioner held within the public school system. In this respect, we stress that petitioner was disqualified from employment as a school maintenance worker, a position which does not include responsibility for the care, supervision or instruction of students.

Accordingly, in view of our finding that petitioner has demonstrated clear and convincing evidence of his rehabilitation pursuant to N.J.S.A. 18A:6-7.1(e), we reverse the decision of the Deputy Commissioner disqualifying petitioner from service in the schools of New Jersey.

June 7, 1995

Date of mailing JUN 09 1995

BOARD OF EDUCATION OF THE TOWN-
SHIP OF COLTS NECK,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE TOWN-
SHIP OF COLTS NECK, MONMOUTH
COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of \$346,207 made by governing body following voter rejection of proposed budget on April 19, 1994.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore \$271,707. The Commissioner further ordered \$200,603 to be appropriated from surplus to partially fund the restoration for a total General Fund tax levy of \$5,651,543 for 1994-95 school purposes.

FEBRUARY 1, 1995

BOARD OF EDUCATION OF THE TOWNSHIP OF COLTS NECK,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE TOWNSHIP OF COLTS NECK, MONMOUTH COUNTY,

RESPONDENT.

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COMMISSIONER OF EDUCATION

DECISION

Vincent C. DeMaio, Esq. (DeMaio & DeMaio, Esqs.),
for Petitioner

Joseph L. Foster, Esq. (Ansell, Zaro, Bennett & Grimm),
for Respondent

This matter was opened before the Commissioner on June 6, 1994, through the filing of a Petition of Appeal by the Board of Education of the Township of Colts Neck (Board) seeking restoration, on the grounds of necessity for a thorough and efficient system of education, of the reduction imposed by the Mayor and Council of the Township of Colts Neck (Township) after defeat of the 1994-95 budget by the voters of Colts Neck at the annual school election held on April 19, 1994, based upon the following facts:

1. The Board had a maximum permitted net budget of \$6,146,711 (hereinafter referred to as "cap"). Due to a student enrollment increase in excess of 13%, the Board applied for a Commissioner's cap waiver of \$354,329. The cap waiver request was reduced by a reallocation of \$13,700 ordered by the Commissioner

following the cap waiver review process. The remaining cap waiver request of \$340,629 was granted by the Commissioner. This increased the Board's cap to \$6,487,340. Noncap revenues of \$134,000, federal project revenues of \$94,476, appropriated surplus of \$538,379 and debt service revenues of \$7,438 when added to the cap brought the total budget to \$7,261,633.

2. Pursuant to its legal obligation, the Board adopted a budget for the 1994-95 school year and submitted a tax levy amount of \$5,926,646 to the public at the April 19, 1994, school election. The tax levy question was defeated by the voters.

3. As a result of the defeat of the budget, it became the obligation of the governing body of the Township to consult with the Board and to certify to the Monmouth County Board of Taxation the amount to be raised by tax levy for the 1994-95 general fund, pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)(2).

4. On May 12, 1994, the Township adopted a resolution certifying that the amount to be raised by local taxation for the 1994-95 as \$5,580,439. This amount was \$346,207 less than the \$5,926,646 originally proposed by the Board for all accounts. The net effect of the reduced tax levy was to decrease the General Fund Budget from \$7,254,195 to \$6,907,925.

5. On May 18, 1994, the Board adopted a resolution authorizing an appeal of the \$346,207 tax reduction to the Commissioner of Education on the grounds that the amount certified by the Township would not be sufficient to provide a thorough and efficient system of education. Accounts and amounts in dispute in this matter are as follows:

Account Title	Account No.	Amount in Original Budget	Township Reduction
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General Current Expenses Regular

1. Conover Road Guidance Couns. Salaries	11-000-218-104- 10-0-21-43	\$ 91,139	\$ 35,600
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Reason: Savings are salary plus benefits. Rationale is that function can best be performed by classroom teachers with assistance from principals.

2. Child Study Team	11-000-219-104- 10-0-21-42	117,773	39,710
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Reason: Savings are from salary of .8 psychologist. Need to reorganize supervisory function. No proposed reduction in composition of CST. Position not needed.

3. Noninstructional Aides

Kindergarten	11-190-100-106- 10-0-21-60	139,300	15,000
Resource Room	11-213-100-106- 10-0-14-02	23,900	23,900

Reason: Savings are from salary and benefits by eliminating two kindergarten aides and two resources center aides. Redeploy existing aides to cover need.

4. Supplementary Instruction	11-213-100-101- 10-0-14-01	157,678	30,946
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Reason: Savings are from salary of two resource room teachers; each half time. Function can be managed without new personnel.

5. Director Curriculum Development Salary	11-000-221-102- 10-0-02-12	69,300	75,000
Curriculum Revision	11-000-221-104- 10-0-21-36	27,100	

Reason: Savings from elimination of Director of Curriculum position with benefits. Curriculum improvement and revisions can be done thoroughly and efficiently by principals and faculty.

6. Secretarial/ Clerical Special Svces.	11-000-219-105- 10-0-21-52	34,500	17,250
Curriculum Instruction	11-000-221-105- 10-0-21-54	25,420	12,725

Reason: Savings realized by elimination of half time child study team secretary and half time curriculum and instruction secretary. Secretarial needs can be fulfilled with existing staff.

7. Maintenance/ Custodian			
Salaries	11-000-260-100- 10-0-71-00	73,050	29,571
Health Benefits		939,830 ¹	24,505

Reason: Savings are from elimination of one position and benefits. Plant operation can be performed efficiently without position.

8. 26 Various Line Item Reductions ²		42,000	
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Reason: All reductions are based on prior years actual expenditures, unnecessary appropriations, or to achieve efficiencies within the Administration.

TOTALS \$346,207

Consequently, the monies in contention in this matter are as set forth, below:

<u>Proposed Tax Levy Adopted by Board of Education</u>	<u>Amount of Tax Levy Certified by Governing Body</u>
\$5,926,646	\$5,580,439

¹ Benefits were not consistently applied or defined in either the material presented by the Board or the Township. Total benefits have applied against the total of all benefits for the sake of brevity.

² Rather than detail the individual miscellaneous items the total has been treated as a single deduction for the Commissioner's purposes.

Amount of Reduction
by Governing Body

\$346,207

Amount of Reduction in
Dispute Before Commissioner

\$346,207

It is the Township's overall position that the reductions were made with the full awareness of its fiduciary responsibility to the taxpayers and its responsibility for not impairing the ability of the Board to provide a thorough and efficient education to the children of the district. In order to do this, the Township identified three K-8 peer districts with demographics the Township determined to be comparable.

The Board vehemently objects to the Township's methodology and asserts that the district's population is significantly higher than the peer districts and is growing as a result of Mount Laurel development. Moreover, the Board asserts that the requirements of the district bear no relationship to those of the other districts.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford

Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction is imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Moreover, the Commissioner has the constitutional obligation to ensure that a school district budget is sufficient for the provision of a thorough and efficient education. Robinson v. Cahill, 69 N.J. 449, 463 (1976) (Robinson V); Abbott v. Burke, 119 N.J. 287 (1990).

In this matter, the Commissioner is concerned about obvious contentious attitudes on the part of both the Board and the Township. The Legislature, in its wisdom, assigned the initial task of mitigating voter disapproval of school tax levies to the local governing body. The obvious purpose of providing such a mechanism was to permit local officials to review local needs and to come to a decision in the best interest of students in the district. Boards should view this as an opportunity to acquaint local officials with the unique needs of the children of the district and to take a second look at their requests in light of local property tax problems. Governing officials should view this as an opportunity to understand the local school function and to express their taxing concerns. Unless both parties approach this task with open minds and a willingness to understand the position of the other, the result can deteriorate into a hardening of positions at the expense of the children involved. Political needs and the need to justify

previous positions should take second place to the resolution of the financing problems of a constitutionally mandated service. In this case, it is obvious that issues have become personalized, making future cooperation much more difficult.

Mindful then of the balance to be applied in this standard of review with respect to the various line items contained in the cap waiver request, the Commissioner makes the following determination with respect to the cap waiver appeal before him:

Guidance Counselor

Salaries	11-000-218-104-10-21-43	\$35,600
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The Board's position is that a guidance person is needed as a result of the increased enrollment at Conover Road School. Currently, the principal is the only administrative staff person assigned to service the 520 students. The Board asserts that because of the increased enrollment and the lack of administrative and support help, it is necessary to have a full-time guidance counselor in order to meet the academic, social, emotional and behavioral needs of the children, and in order to comply with state regulations mandating that students be provided with a "Board-approved program of guidance and counselling services." N.J.A.C. 6:8-4.7(a)(3).

The Township asserts that the Conover Road Guidance Counselor position was new for the 1993-94 school year and is not necessary to serve the needs of the students. It is the Township's position that there is a guidance counselor assigned to the Cedar Drive School approximately one mile away who, with the assistance of the classroom teachers and the principal, can adequately perform the needed services. Moreover, the Board asserts, that in its

comparisons of this function in peer districts, none had a full-time guidance position within a K-4 structure.

After reviewing the initial positions and the subsequent rebuttals, the Commissioner determines that the Board has not established the necessity of adding this position in order to provide counseling services to students at Conover Road School. Consequently, the Commissioner sustains the \$35,600 reduction.

<u>Child Study Team</u>	11-000-219-104-10-21-42	\$39,710
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The Township asserts that a .8 psychologist position can be eliminated without changing the composition of the Child Study Team. It alleges that this area is currently over-staffed and further asserts that the district staffing exceeds that in peer districts.

The Board, in opposing these assertions, sets forth the reasons for maintaining both a Child Study Team chairperson and a school psychologist position in the district. The Board asserts that, in 1993-94, it eliminated the position of Director of Special Services in an effort to downsize administration. The Board further asserts that the district has a lower percentage of out-of-district placements than neighboring districts and maintains a Child Study Team which consists of a .8 school psychologist, a .6 Learning Disabilities Teachers/consultant and a .8 School Social Worker. The Commissioner determines that the \$39,710 be restored.

Noninstructional Aides

<u>Kindergarten</u>	11-190-100-106-10-0-21-60	\$15,000
<u>Resource Room</u>	11-213-100-106-10-0-14-02	23,900

The Board asserts that, as a result of increased enrollment and the lack of available space, it determined to consolidate the

number of kindergarten sections from five to four. This will increase the teacher/student ratios to 23+ to one.

The Township asserts that this reduction was of two new part-time kindergarten aides. The need for the aides can be met by redeploying existing noninstructional aides.

The Commissioner finds that the Board has failed to establish that these additional part-time positions are necessary for the provision of a thorough and efficient education. Consequently, the reduction of \$15,000 is sustained.

As to the Resource Room Aides, the Board asserts that these existing noninstructional special education aide positions assist special education students as part of the students' Individualized Educational Programs (IEPs). In absence of the aides, it would be necessary for the students to be placed in more restrictive environments. The Board asserts that these positions are necessary for the provision of a thorough and efficient education to the special education students and to comply with federal and state laws governing special education.

The Township asserts that the services provided through these positions can be met by redeploying existing aides. Moreover, the Township asserts that its peer analysis indicates that the Board employs more aides than any two of the four peer districts combined.

Upon independent review of the record, the Commissioner finds that the Board has not established that the amounts are necessary for the provision of a thorough and efficient education. The \$23,900 reduction is, therefore, sustained.

Supplemental Inst.

11-213-100-101-10-0-14-01

\$30,946

The Board's position is that the two half-time resource room teachers are necessary for the provision of a thorough and efficient education to special education students and are required in order to meet the requirements of the IEPs of individual students, in order to educate them in the least restrictive environment. Moreover, the Board asserts that special education services are not fungible and costs associated with disabled students may vary widely.

The Township asserts that the functions can be performed without additional personnel.

Upon independent review of the record, the Commissioner finds that the Board has established that the positions are necessary for the provision of a thorough and efficient education to special education students in the least restrictive environment. Consequently, the \$30,946 is restored.

The Commissioner approves the request of the Board and restores the \$30,946 reduction.

Curr. Dev.

11-000-221-102-10-0-02-12

\$75,000

Curr. Revsn.

11-000-221-104-10-0-21-36

The Board asserts that the salary attributed to the Director of Curriculum and Instruction, in addition to overseeing curriculum development, is assigned the administrative responsibilities for the Special Service Department. The Director is assigned numerous requirements to fulfill state mandates. The Board asserts that, unlike the peer districts' budget, Colts Neck budgets all the functions of the Director in the one line-item.

The Township asserts that the functions of the position of Director of Curriculum and Instruction can be done by principals and faculty.

The Township's arguments are based solely upon the comparison of the totals budgeted in peer districts. Nowhere is there a comparison of functions. The Board's position presents a convincing argument that the functions are necessary. The Commissioner directs the restoration of \$75,000.

The Commissioner approves the request of the Board and adopts the reasons advanced by the Board as his own.

Sec/Clerical

<u>Sp. Svces.</u>	11-000-219-105-10-0-21-52	\$17,250
<u>C&I</u>	11-000-221-105-10-0-21-54	12,725

The Township asserts that by reducing this line item it does not propose any reduction in current secretarial or clerical staff.

The Board asserts that it employs one full-time secretary for the special services department and one full-time secretary for the curriculum and instruction office. It sets forth the duties for each and maintains that the services are essential support necessary in assisting the district in meeting its obligations. The Commissioner approves the request of the Board and orders the \$17,250 and \$12,725 to be restored.

<u>Maintenance/ Custodian Salaries</u>	11-000-260-100-10-0-71-00	\$29,571
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The Board asserts that it must maintain its custodial and maintenance staff in light of its building additions and increased enrollment. The Commissioner determines that the \$29,571 be restored.

Health Benefits

\$24,505

The Commissioner approves this request as a consequence of the restoration of positions as set forth herein.

26 Various Line Reductions

\$42,000

The rationale provided by the Township for the various deductions contained in this section was not based on any analysis of need. While comparisons with prior years provides a valid beginning for a budget analysis, recommended reductions must be accomplished by specific reasons for the recommendation.

The Township also appeared to rely heavily on comparisons with nearby districts. Such comparisons are also a valid basis for the initial phases of a budget review. Comparisons, however, can not be the primary reasons for recommended reductions. Districts vary greatly based on student makeup, goals and community expectations. Such expectations are rarely based on programs in other nearby districts but rather on the historical provision of services.

The accounts and amounts under appeal and as determined by the Commissioner in this matter are as follows:

<u>Account Title No.</u>	<u>Account</u>	<u>Amount Sustained</u>	<u>Amount Restored</u>
General Current Expenses			
Regular Program			
Conover Road	11-000-218-104-		
Guidance Couns.	10-21-43	\$35,600	\$ -0-
Salaries			
Child Study T.	11-000-219-104- 10-21-42	-0-	39,710

Noninstructional Aides

Kindergarten	11-190-100-106- 10-0-21-60	\$15,000	-0-
Resource Room	11-213-100-106- 10-0-140-02	23,900	-0-
Suppl. Inst.	11-213-100-101- 10-0-14-01	-0-	30,946
Curr. Dev. and Curr. Revsn.	11-000-221-102- 10-0-02-12 11-000-221-104- 10-0-21-36	-0-	75,000
Sec/Clerical Sp. Svces.	11-000-219-105- 10-0-21-52	-0-	17,250
C&I	11-000-221-105- 10-0-21-54	-0-	12,725
Maintenance/Custodian			
Salaries	11-000-260-100- 10-0-71-000	-0-	29,571
Health Benefits		-0-	24,505
26 Various Line Item Reductions		<u>-0-</u>	<u>42,000</u>
TOTALS		\$74,500	\$271,707

In summary, upon review of the documentation submitted on this matter, the Commissioner finds and determines that \$271,707 of the funds sought by the Board are essential to provide a thorough and efficient educational system possible (Board of Education of the Borough of Rutherford v. Mayor and Council of Rutherford, Bergen County, (decided by the State Board of Education, July 7, 1993.))

After reviewing the within appeal, based upon the record and circumstances known to or considered by the governing body at the time it acted to reduce the budget which is the subject of this appeal, the Commissioner, on December 16, 1994, notified the parties that he intended to take official notice of the Board's 1993-94 year-end audit. The Commissioner reviewed the audit for the purpose


of identifying whether the Board underestimated in its 1994-95 budget the amount of anticipated undesignated surplus.

Upon such review, the Commissioner finds that \$200,603 of the district's undesignated audited surplus of \$503,965 can be appropriated to offset the restorations ordered herein. This determination considers the district's use of \$99,397 for placement of two homeless special education students at a cost of \$99,397 for tuition and transportation.

Accordingly, the Monmouth County Board of Taxation is directed to make the necessary adjustments as set forth below:

	<u>General Fund</u>
Tax Levy Certified by Council	\$5,580,439
Ordered by Commissioner	271,707
Surplus Reallocation	<u>-200,603</u>
TOTAL	\$5,651,543

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

FEBRUARY 1, 1995

DATE OF MAILING - FEBRUARY 1, 1995

42-95

BOARD OF EDUCATION OF THE BOROUGH :
OF BRADLEY BEACH, MONMOUTH COUNTY, :

PETITIONER, :

COMMISSIONER OF EDUCATION

V. :

DECISION

BOROUGH COUNCIL OF THE BOROUGH :
OF BRADLEY BEACH, MONMOUTH COUNTY, :

RESPONDENT. :

SYNOPSIS

Board appealed \$357,582 in line-item reductions made by Borough pursuant to N.J.S.A. 18A:22-37 following defeat of the proposed 1994-95 budget at the annual school election on April 19, 1994.

Commissioner directed restoration of \$251,438 in specified line-item accounts, but ordered \$150,000 of such restorations to be funded through appropriation of surplus rather than raising of additional tax levy. County Board of Taxation was directed to strike an additional levy of \$101,438 for General Fund purposes.

FEBRUARY 3, 1995

BOARD OF EDUCATION OF THE BOROUGH :
OF BRADLEY BEACH, MONMOUTH COUNTY, :

PETITIONER, :

V. :

BOROUGH COUNCIL OF THE BOROUGH :
OF BRADLEY BEACH, MONMOUTH COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

For Petitioner, Peter P. Kalac, Esq. (Kalac, Newman,
Lavender & Campbell)

For Respondent, Joseph P. Quinn, Esq. (Pringle & Quinn)

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed by the Board of Education of the Borough of Bradley Beach (Board) on June 16, 1994, seeking restoration of \$357,582 in reductions to the district's General Fund tax levy imposed pursuant to N.J.S.A. 18A:22-37 by the Borough Council of the Borough of Bradley Beach (Council) upon defeat of the budget by the voters on April 19, 1994. The Council filed its Answer to the Petition on July 7, 1994, and Position Statements were filed on July 27, 1994 and September 1, 1994 by the Board and Council, respectively. A response to the Council's Position Statement was filed by the Board on September 6, 1994. A further submission was filed by the Monmouth County Superintendent of Schools on August 3, 1994, setting forth the process by which the Board's proposed budget was reviewed for possible reallocations as

part of the procedure in granting the Board a Commissioner's cap waiver of \$141,300 authorized pursuant to the provisions of N.J.S.A. 18A:7D-28(e). Finally, on December 16, 1994, the parties to this matter were notified that the Commissioner would be taking official notice of the Board's 1993-94 year-end audit for the purpose of identifying whether the Board underestimated in its 1994-95 budget the amount of anticipated undesignated surplus. Upon receipt on December 20, 1994 of a filing by the Board objecting to such consideration and expiration of the designated time for comments by the Borough, the record of this matter was deemed closed.

The proposed tax levy adopted by the Board, the certification adopted by the Council and the amounts in dispute in this matter are as follows:

<u>Proposed Tax Levy adopted by District Board of Education</u>	<u>Amount of Tax Levy Certified by the Governing Body</u>
General Fund \$4,180,627	General Fund \$3,823,045
<u>Amount of Reduction by the Governing Body</u>	<u>Amount of Reduction Dispute Before the Commissioner</u>
General Fund \$357,582	General Fund \$357,582

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide

appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction is imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Below are listed the specific reductions imposed by the Council in its resolution dated May 18, 1994:

BE IT FURTHER RESOLVED, that the Mayor and Council recommend spending reductions in several areas including:

1. Increase Surplus	\$ 75,000.00
2. Supt. Increase	5,290.00
3. Bd. Office Assistance	27,213.00
4. Bd. Secretary/Bus. Mgr. Sal.	2,796.00
5. Adm./Secretary	1,868.00
6. Computer Assistant	21,190.00
7. Custodians	20,000.00
8. Repairs/Mtn.-Bldg/Equip.	25,000.00
9. Resource Room - Sal.	10,000.00
10. Textbooks	5,000.00
11. Social Workers	22,349.00
12. Psychologist	16,117.00
13. Learning Disability Teacher	20,000.00
14. Principal - Lease Purchase	92,145.00
15. Employees Health Benefits	4,500.00
16. Employees Dental/Prescriptions	1,500.00
17. Lunch Rm. Program	1,500.00
18. Social Security	6,114.00
TOTAL	\$357,582.00

BE IT FURTHER RESOLVED, that the Mayor and Council recommended freezing all salaries in the Administrative Offices and the elimination of a Computer Assistant, which is a reduction of

\$58,357.00. Social Workers were reduced from 4 days to 2 days a week, which is a reduction of \$22,349.00. Psychologist reduced from 4 days to 2 days a week, which is a reduction of \$16,117.00. Learning Disability Teacher reduced from 5 days to 3 days a week, which is a reduction of \$20,000.00. Group Insurance for employees, savings of \$6,000.00. Increasing Surplus Anticipated by \$75,000.00. Refinancing Lease Purchase Equipment over a five-year period, reduction of \$92,145.00. Repairs to the building, a reduction of \$25,000.00. Salaries for Teachers in the Resource Room, reduction of \$10,000.00 cut back to 1992-1993 standards. Lunchroom program and reduction of custodial staff, reduction of \$21,500.00. Miscellaneous-Other Expenses reduction of \$11,114.00.

COMMISSIONER'S DETERMINATION

Set forth below are the positions of the parties and the Commissioner's determinations as they relate to each specific reduction. Before dealing with the specific itemized reductions, the Commissioner takes note of the general arguments of the parties.

The Council points to the tiny size of both the Borough and the single-school district of approximately 400 pupils, grades K-8. It emphasizes its own program of austerity, which it adopted on July 1, 1992 to lessen the tax impact on its citizenry.

As part of that austerity program, the Council points out, it imposed salary reductions on the Mayor and Council, reduced the municipal work force and privatized certain services resulting in a decrease in expenditures of over \$250,000.

By way of contrast, the Council contends that the Board engaged in extravagant spending and has been oblivious to cost cutting measures. The Council contends that increases in the school budget for 1993-94 and 1994-95 resulted in a proposed \$800,000 increase over those two years and a 44.78 cent per hundred increase in the tax rate.

The Board for its part seeks to emphasize that it has considered the implication of its budget on the taxpayers of the district. It points out that, although it qualified for a cap waiver of \$218,156 in 1993-94, it only requested and received a \$77,575 waiver; and that in the 1994-95, it also qualified for a tax waiver greater than that which it requested.

The Board further points out that 44.78 cent increase in tax rate argued by the Council contains 28 cents from a 1993-94 reduction by the Council which was restored by the Commissioner but which had to be added to the 1994 tax rate because the restoration occurred too late to include it in the 1993 levy.

Finally, the Board argues that the Council's resolution approached the 1994-95 school budget solely from the perspective of the impact on the taxpayers and without regard to the Council's constitutional responsibility to strike a tax levy sufficient to ensure a thorough and efficient system of education.

In regard to the general arguments offered by the parties, the Commissioner notes that the Board is correct in its argument relative to the constitutional responsibility of the governing body in reaching a determination relative to the certification of a tax rate. However, the Commissioner further notes that the Supreme Court of New Jersey in reviewing reductions made by a governing body stated that "...the Commissioner cannot completely ignore the municipality's political concerns and indeed may not override them without some necessity strictly related to the constitutional mandate..." Board of Education of Deptford Township v. Mayor and Council of Deptford Township 116 N.J. 305 (1989), citation at 314.

Therefore, the Commissioner turns to an examination of the arguments of the parties in each individual area of reduction for purposes of applying the mandated constitutional test.

<u>Item</u>	<u>Reduction</u>
Surplus	\$75,000

The Council argues that, in light of the Board's representation that reductions in payments are anticipated in the Board's lease purchase agreement, the Board could accept the \$75,000 reduction in this account, which would be replenished upon the reduction anticipated. The Council further disputes the Board's argument of student transiency as a reason for maintaining a surplus, arguing that the district's listing indicates that despite transiency the student population has been consistent at 400 pupils.

The Board argues that it has already applied \$200,000 toward tax reduction in the 1994-95 budget. It also opines that, with a school building that is 84 years old, contingencies in the area of maintenance must be considered likely. It further argues that historical experience has dictated that tuition accounts have been under-budgeted due to transient students requiring special education placement. Finally, the Board argues that its surplus is between 3% and 7-1/2%, which it contends is the acceptable range permitted by statute.

Upon review of the arguments of the parties and the documenting evidence provided, the Commissioner notes that Exhibit A of the Business Administrator's affidavit indicated an estimated unappropriated free balance of \$348,175 as of June 30, 1994. The county superintendent's affidavit indicates that the year-end report

of the district indicated an additional free balance of \$239,850 over the Board's estimate. Therefore, even with the Board's appropriation of \$200,000 into the 1994-95 budget, its audited free balance as of June 30, 1994 was \$388,025 or 7.2% of its 1994-95 general fund budget. In light of the foregoing, the Commissioner determines that the further appropriation of \$75,000 into the 1994-95 budget will not prevent the district from having a sufficient contingency fund to ensure a thorough and efficient system of education. The \$75,000 reduction is sustained.

<u>Item</u>	<u>Reduction</u>
Superintendent's Salary	\$5,290
Board/Secretary/Business Manager	2,796
Administrative Secretary	1,868

The Council argues that a \$5,000 increase in the superintendent's salary is unwarranted on top of a \$5,000 increase in 1993-94 and a \$30,000 increase over the past four years. It presents similar arguments relative to the other two positions.

The Board argues that its budget provided for only a 4% to 5% increase for the superintendent, business manager and administrative secretary, which it contends is consistent with increases that have been agreed upon by other districts in Monmouth County.

The Commissioner has carefully considered the position of the parties. In light of the increased surplus indicated by the county superintendent and audit report, the Commissioner determines that the increases desired by the Board may be met by further appropriation from free balance without either impacting upon the Board's ability to provide a thorough and efficient system of

education or adding the cost of such increases to the tax levy. The reductions of \$5,290, \$2,796 and \$1,868 are sustained.

<u>Item</u>	<u>Reduction</u>
Board Office Assistant	\$27,213

The Council argues that this position may be eliminated due to the small size of the district.

The Board points out that the budgeted amount for this position is actually \$25,428 and not the amount indicated by the Council. It further contends that this is a position which has existed for 20 years. The individual, the Board argues, is in reality the secretary to the school business administrator.

The Commissioner upon review of the arguments finds the Council's actions in this area to be arbitrary and capricious and therefore directs the restoration of this amount of \$27,213. It would be difficult to imagine the business office of the district being capable of meeting its responsibilities without a secretary, particularly in view of the Commissioner's determination regarding the computer assistant which the Council also seeks to eliminate (see below).

<u>Item</u>	<u>Reduction</u>
Computer Assistant	\$21,190

The Council argues that no justification exists to create this new position in light of the \$800,000 increase in the budget over the past two years.

The Board argues that elimination of the board office assistant and the computer assistant would leave the business office with only the business administrator.

In light of the restoration of the board office assistant position, the Commissioner agrees with the Council that an additional person is not necessary to ensure competency and efficiency in the business office. The reduction of \$21,190 is sustained.

<u>Item</u>	<u>Reduction</u>
Custodian Salaries	\$20,000

The Council argues that custodial services needed by the Board could be accomplished more economically by utilizing in-house janitorial services. The \$20,000 reduction proposed in this account would, in the Council's view, permit retention of one custodian while utilizing outside contractors as needed.

The Board's position is based upon the age of its building and the constant need for maintenance and cleaning. The Board currently employs three persons at a combined salary of \$67,079. (Two-day and one-night custodians) A reduction of \$20,000, the Board argues, would require abolishing the lowest paid custodian earning \$15,738 and reducing the time of the next lowest paid by one-fifth leaving the district with less than two full-time custodians. While the Board acknowledges that privatization may possibly offer a better solution, it contends that such a course is currently impractical.

The Commissioner finds merit in the Council's recommendation regarding the investigation of utilizing outside custodial services; however, he also finds that such a solution is one to be considered for the 1995-96 budget, as it is not capable of immediate implementation during the middle of a budget year. In

light of the foregoing, the Commissioner concludes that the district's commitment to providing a clean, safe and healthful learning environment requires maintaining its proposed level of custodial services for 1994-95. The \$20,000 reduction is restored; however, the Board is directed to explore other options, including use of outside contractors, in developing its budget for 1995-96.

<u>Item</u>	<u>Reduction</u>
Repair/Maintenance of Equipment	\$25,000

The Council, while conceding the need for repairs, contends that the Board has anticipated extraordinary expenses which should be delayed until spending is under control. It argues that maintenance should be provided, but capital projects delayed.

The Board argues that its budget in this area contains \$55,000, \$20,000 of which has been allocated to the first phase of replacement of an antiquated fire alarm system. With the Council's reduction, the balance left to the district would be \$10,000 in an account in which expenditures for 1993-94 were \$46,000. The areas for which monies in this account are used are maintenance of lockers, plumbing and electrical work, refrigeration repair, boiler maintenance, screen and window repair, computer maintenance and many other areas.

The Commissioner concludes that the Council's rationale in this area is arbitrary and without consideration of the needs of a school district to repair and maintain its equipment and facilities. Further, the Council mistakenly considers this account to be directed toward capital projects rather than routine maintenance and repair. Maintenance of equipment and systems being

necessary to the offering of a thorough and efficient system of education, the Commissioner directs the restoration of the \$25,000 in this account.

<u>Item</u>	<u>Reduction</u>
Resource Room Salaries	\$10,000

The Mayor and Council argue that resource room services can be provided at a lesser cost due to budgetary concerns.

The Board points out that it maintains 2 full-time resource rooms to provide services to 51 mainstreamed but classified special education students. Reduction of salaries by \$10,000 would violate the tenure status of the teachers involved, and reduction of service time to accommodate reduced salaries would make it impossible to provide the needed services.

The Commissioner concludes that the Council's actions in this area are clearly arbitrary, having been made without consideration or knowledge of the services rendered by resource rooms and personnel involved in providing such services. Providing for the special needs of classified pupils being a mandated requirement of a thorough and efficient education, the Commissioner directs restoration of the \$10,000 in this account.

<u>Item</u>	<u>Reduction</u>
Textbooks	\$5,000

The Council contends a thorough and efficient education can be maintained with a reduction in new textbook purchases until the Board has "better control" of its finances.

The Board asserts that it is involved in a systematic updating of its textbooks, specifically the replacement of a science series copyrighted in 1984.

The Commissioner once again finds the Council's action to be entirely arbitrary and primarily motivated by non-educational considerations. The upgrading and maintenance of textbooks, and provision of books which are current, particularly in a rapidly changing discipline like science, is essential to ensuring that children statewide have equal access to the latest materials and content, and that they not be denied such access by capricious decisions to slash budgets. The \$5,000 in this account is restored.

<u>Items</u>	<u>Reduction</u>
Salaries Child Study Team	
a. Social Worker	\$22,349
b. Psychiatrist	\$16,117
c. LDTC	<u>\$20,000</u>
TOTAL	\$58,466

The Council contends that the Board's budget should not provide for full-time services in these areas. Instead, it argues that the work week for these positions should be reduced in order to bring spending under control.

The Board points out that the Social Worker and Psychiatrist who work 4 days per week would be reduced to 2 days per week were the Council's reduction to be imposed. Further, the LDTC who now works a full schedule would be reduced to a three-day week. The Board points out that it has 120 classified pupils among its total enrollment of 400. It opines that, any contention that this case load can be handled by a Child Study Team which is working only 40% of the time, is arbitrary and cannot be expected to meet the required level of services.

Once again the Commissioner must observe that the Council's actions are clearly based on noneducational concerns, and that he

cannot accept the Council's assertion that budgeting and tax considerations are a sufficient justification for reducing services which are mandated by law and unquestionably necessary for provision of T&E. The \$58,466 to maintain the services at 1993-94 levels is restored.

<u>Item</u>	<u>Reduction</u>
Principal/Lease Purchase Agreement	\$92,145

The Council argues that the Board should be looking to limit current expenditures; thus, while it concedes that the Board's plan to pay off its lease purchase debt within the next two years would save \$100,000, it argues that extending the time for paying off this debt would save current expenditures.

The Board points out that its lease purchase agreement for purchase of modular classrooms calls for payment of the fourth installment of a five-year plan, and that its Certificates of Participation were issued based upon this five-year program and are not subject to optional repayment. Even if this were not so, the Board contends that the cost of refinancing would be approximately \$35,000-\$40,000.

The Commissioner, upon review of the arguments presented, concludes that the Council's position ignores the Board's obligations under its lease purchase arrangement and would, moreover, lead to an ultimately greater burden on the taxpayer. The \$92,145 is restored.

<u>Items</u>	<u>Reduction</u>
Health Benefits	\$4,500
Employee Dental/Prescription	\$1,500
Luncheon Program	\$1,500
Social Security	\$6,114

The reductions in this area are predicated upon the elimination of positions recommended by the Council.

The Board points out the reductions for Health, Dental, Prescription and Social Security cannot be achieved if the positions involved are not eliminated. The reduction in the Lunch Program, argues the Board, is not designated as to where such reduction would occur. The Board presumes that it would come through a reduction in staff, which currently consists of two supervisors who order, prepare and serve the food and six aides who clean, supervise and assist in serving the food. The Board points out that 200 students, one-half of the total enrollment, qualify for free or reduced price lunches, thus requiring the full complement of employees.

The Commissioner, upon review of his prior determination relative to elimination or reduction of positions, determines that the amounts by which employee benefits were reduced (Health \$4,500; Dental and Prescription \$1,500; Social Security \$6,114) be restored, the amount affected by elimination of the Computer Assistant being both relatively small and difficult to segregate. Further, the Commissioner directs restoration of \$1,500 for the Lunch Program in that the Board has met its burden of demonstrating its need for the existing level of personnel to accommodate 200 students.

Summary

<u>Item</u>	<u>Sustained</u>	<u>Restored</u>
Surplus	\$ 75,000	\$ 0
Supt. Salary	5,290	0
Business Administrator Sal.	2,796	0
Administrative Secretary Sal.	1,868	
Business Office Asst.	0	27,213
Computer Asst.	21,190	0

<u>Item</u>	<u>Sustained</u>	<u>Restored</u>
Custodian Salaries	0	20,000
Repair/Maintenance	0	25,000
Resource Room Salaries	0	10,000
Textbooks	0	5,000
Child Study Team Salaries	0	58,466
Principal/Lease Purchase	0	92,145
Health Benefits	0	4,500
Dental/Prescription	0	1,500
Lunch Program	0	1,500
Social Security	0	6,114
	<hr/>	<hr/>
Total	\$106,144	\$251,438

Having made these determinations, the Commissioner turns generally to the question of the Board's level of surplus as indicated in the 1993-94 year end audit. Initially, the Commissioner notes that the Board has strenuously objected to use of this audit, alleging that such use is both unfair and improper, and relying on the State Board of Education's decision in Board of Education of the Township of Middletown v. Township Committee of the Township of Middletown, Monmouth County, decided March 2, 1994 as having established that budget disputes are to be resolved on the basis of the financial circumstances known to the governing body at the time it acted to reduce the budget. The Commissioner rejects this argument, noting that, notwithstanding that certain line items are found to be necessary for T&E, it would be manifestly unfair to consider raising tax levies to fund such items, contrary to express voter approval, when a board is holding surplus over and above a level sufficient to meet reasonable contingencies.

Upon review of the Board's surplus, the Commissioner notes that, of a projected fund balance of \$348,175 in its 1994-95 Budget Statement, the Board had appropriated \$200,000, leaving a projected surplus of \$73,175. However, upon audit, the amount of undesignated,


unreserved surplus stood at \$631,543. Therefore, even after appropriation of \$200,000 for the 1994-95 budget plus an additional \$75,000 as recommended by the Borough and sustained above, together with funding of \$9,954 in employee salary increases through surplus as likewise directed above, there remains \$346,589 in undesignated unreserved surplus. Therefore, the Commissioner directs that, of the \$251,438 restored by line-item determination above, \$150,000 be funded by appropriation from surplus rather than increased tax levy.

In light of the foregoing, the Commissioner directs the Monmouth County Board of Taxation to strike an additional General Fund tax levy of \$101,438 (\$251,438 in restorations, less \$150,000 appropriation from surplus) for support of the Bradley Beach Public Schools for the 1994-95 school year, so that the total tax rate for such purposes shall be \$3,924,483.

IT IS SO ORDERED.

FEBRUARY 3, 1995

DATE OF MAILING - FEBRUARY 3, 1995


COMMISSIONER OF EDUCATION

(SB) 42-95

DHP #28-95
SB #42-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOYMENT : STATE BOARD OF EDUCATION
OF ERNEST W. CHESTER, JR. : DECISION
_____ :

Decided by the Deputy Commissioner of Education,
March 2, 1995

For the Petitioner-Appellant, Ernest W. Chester, Jr.,
pro se

For the Respondent-Respondent, Geraldine Callahan,
Deputy Attorney General (Deborah T. Poritz,
Attorney General of New Jersey)

Ernest W. Chester, Jr. (hereinafter "petitioner"), who was employed as a teacher aide for a private/handicap school, was disqualified by the Office of Criminal History Review of the Department of Education from continued employment in the State's schools when a fingerprint search conducted pursuant to N.J.S.A. 18A:6-7.1 et seq. revealed that he had been arrested for "dangerous drugs" in 1989 and subsequently convicted.

June 5, 1995

Wolffbrandt v. New Jersey State Department of Education, decided by the State Board, July 1, 1992. We stress that petitioner has the burden on remand of demonstrating his rehabilitation by clear and convincing evidence.

We retain jurisdiction.

July 5, 1995

Date of mailing JUL 07 1995

(SB) 42-95

DHP #28-95
SB #42-95
DHP #58-96

IN THE MATTER OF THE DISQUALIFI- : STATE BOARD OF EDUCATION
CATION FROM SCHOOL EMPLOYMENT : DECISION
OF ERNEST W. CHESTER, JR. :

Decided by the Deputy Commissioner of Education, March 2, 1995

Remanded by the State Board of Education, July 5, 1995

Decision on remand by the Commissioner of Education, February 16, 1996

For the Petitioner-Appellant, Ernest W. Chester, Jr., pro se

For the Respondent-Respondent, Geraldine Callahan, Deputy Attorney
General (Deborah T. Poritz, Attorney General of New Jersey)

On July 5, 1995, we remanded this matter to the Commissioner of Education for a hearing in order to provide petitioner, who had been disqualified from employment in the State's schools as a teacher's aide following a criminal history review pursuant to N.J.S.A. 18A:6-7.1, with an adequate opportunity to establish a record in support of his contention that he had satisfied the statutory standard for rehabilitation. We retained jurisdiction.

In accordance with our remand, the Commissioner transmitted this matter to the Office of Administrative Law, where a hearing was held on November 22, 1995. On January 5, 1996, the Administrative Law Judge ("ALJ") rendered an initial decision in

4/3/96

which she concluded that petitioner had not demonstrated his rehabilitation by clear and convincing evidence. On February 16, 1996, the Commissioner adopted the ALJ's recommended decision upholding petitioner's disqualification from school employment and, pursuant to our retention of jurisdiction, transmitted the file back to us. Petitioner has not filed an appeal from that decision.

After a review of the record, we are satisfied that the Commissioner fully complied with the terms of our remand. Accordingly, we dismiss the appeal.

April 3, 1996

Date of mailing APR 08 1996

BOARD OF EDUCATION OF THE BLACK :
HORSE PIKE REGIONAL SCHOOL :
DISTRICT, CAMDEN COUNTY, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

MAYOR AND COUNCIL OF THE BOROUGH :
OF BELMAR, TOWNSHIP COMMITTEE OF :
THE TOWNSHIP OF GLOUCESTER, AND :
BOROUGH COUNCIL OF THE BOROUGH OF :
RUNNEMEDE, CAMDEN COUNTY, :

DECISION

RESPONDENT. :

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of \$1,426,226 made by governing body following voter rejection of proposed budget on April 19, 1994.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore \$223,162 for a total General Fund tax levy of \$10,454,778 for 1994-95 school purposes.

FEBRUARY 3, 1995

BOARD OF EDUCATION OF THE BLACK :
HORSE PIKE REGIONAL SCHOOL :
DISTRICT, CAMDEN COUNTY, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

MAYOR AND COUNCIL OF THE BOROUGH :
OF BELMAR, TOWNSHIP COMMITTEE OF :
THE TOWNSHIP OF GLOUCESTER, AND :
BOROUGH COUNCIL OF THE BOROUGH OF :
RUNNEMEDE, CAMDEN COUNTY, :

DECISION

RESPONDENT. :

For the Board of Education, John D. Wade, Esq. (Ferreri & Wade)

For the Borough of Bellmawr, Robert L. Messick, Esq.

For the Township of Gloucester, David F. Carlamere, Esq. (Carlamere, Rowan & Schemanski)

For the Borough of Runnemede, Michael P. Albano, Esq. (Ragonese & Albano)

This matter was opened before the Commissioner of Education on June 9, 1994 by the filing of a Petition of Appeal by the Black Horse Pike Regional Board of Education (Board) seeking restoration of reductions to the 1994-95 budget imposed by the governing bodies of the Borough of Bellmawr, the Township of Gloucester and the Borough of Runnemede (Governing Bodies) pursuant to the provisions of N.J.S.A. 18A:22-37. The aforesaid reductions and the amounts in dispute are set forth below:

Proposed Tax Levy
Adopted by the Black Horse Pike
Regional Board of Education

General Fund \$11,657,842

Amount of Reduction
in budget by Governing Body

General Fund \$ 1,426,226

Amount of Tax Levy
Certified by Governing Bodies

General Fund \$10,231,616

Amount of Reduction in
Dispute before Commissioner

General Fund \$ 1,426,226

Answers to the Petition of Appeal were filed by the three governing bodies on July 7, July 8, and August 23, 1994, respectively. On September 12, 1994, the Board filed its written statement of position, consisting of separate affidavits from the Superintendent of Schools, the Assistant Superintendent, the Business Administrator and the Director of Instruction. The Township of Gloucester and the Borough of Bellmawr filed Position Statements on August 11, 1994 and August 15, 1994, respectively. On December 16, 1994, the Commissioner notified the parties that he intended to take official notice of the 1993-94 year-end audit as it related to the amount of undesignated surplus available to the district. Upon receipt of replies to such notice, the record of this matter was deemed closed.

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary

reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction is imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

In the instant matter, the Governing Bodies, upon defeat of the 1994-95 budget by the electorate, conferred with the Board as required by N.J.S.A. 18A:22-37 and adopted resolutions establishing an identical General Fund tax levy to be used for school purposes. In all cases, the aforesaid General Fund tax levy was established by imposing the following line item reductions with accompanying rationale:

ADVERTISED REVENUES

Account 303¹ - Appropriated from Current Fund Balance

From: \$1,500,000 To: \$1,961,722

Rationale: Account 303: The Governing Bodies find after careful and thorough analysis of the previous three (3) audits and outstanding encumbrances that the School District will generate more surplus than it anticipates and can afford to budget additional surplus to offset the amount to be raised by local taxation. The Governing Bodies find that with this additional appropriation the

¹ The Governing Bodies listed this account as 012. The account number should be 303.

School District will still have an estimated Fund Balance of approximately \$1,500,000 remaining.

ADVERTISED EXPENDITURES

Account 11-190-100-340 - Purchased Technical Services:

From: \$6,000 To: \$3,500

Rationale: Account 11-190-100-340: The Governing Bodies maintain that the 1993-94 appropriation for Right-to-Know In-Service Program is sufficient and should be continued at the same funding level.

Account 11-190-100-440 - Rentals for Instructional Purposes:

From: \$80,860 To: \$65,860

Rationale: Account 11-190-100-440: The Governing Bodies maintain that this appropriation should remain at the 1993-94 level.

Account 11-190-100-610 - General Supplies for Instruction:

From: \$385,639 To: \$354,156

Rationale: Account 11-190-100-610: The Governing Bodies have determined through analysis that this account has increased 19.0% over the 1993-94 appropriation. The Governing Bodies recommend that this increase be limited to 10%.

Account 11-190-100-640 - Textbooks for Instruction:

From: \$160,798 To: \$148,304

Rationale: Account 11-190-100-640: Home Economics and Health and Physical Education has increased by 40% and 335% respectively over the 1993/94 appropriations. The balance of the appropriation has increased by 150% over last year's appropriation. The Governing Bodies find that the Home Economics and Health and Physical Education amounts should remain at the 1993-94 level while the other areas should be permitted to increase so as to provide for a thorough and efficient education.

Account 11-000-221-104 - Improvement of Instructional Services - Professional Staff Services:

From: \$62,528 To: \$22,528

Rationale: Account 11-000-221-104: The Governing Bodies maintain that this department should be able to operate at the 1993-94 budgetary level. The services of a new Staff Development Assistant should be postponed to a future budget.

Account 11-000-221-320 - Improvement of Instruction Services - Purchased Educational Services:

From: \$45,600 To: \$33,800

Rationale: Account 11-000-221-320: The Governing Bodies recommend that this account be held to a 10% increase above the 1993-94 level for all 8 services.

Account 11-000-230-330 - General Administration - Level Services:

From: \$60,000 To: \$55,000

Rationale: Account 11-000-230-330: The Governing Bodies maintain that this appropriation should be held to the 1993-94 level.

Account 11-000-230-339 - General Administration - Other Professional Services:

From: \$102,025 To: \$47,025

Rationale: Account 11-000-230-339: The Governing Bodies maintain that Architect Fees (\$55,000) should be part of the Capital Construction Cost and therefore included in the Capital Account.

Account 11-000-230-340 - Purchased Technical Services - Administration:

From: \$37,800 To: \$29,800

Rationale: Account 11-000-230-430: The Governing Bodies recommend that the increase of \$8,000 for elections be eliminated.

Account 11-000-230-530 - General Administration - Communications:

From: \$113,300 To: \$108,300

Rationale: Account 11-000-230-530: The Governing Bodies maintain that this appropriation should remain at the 1993-94 budgeted amount.

Account 11-000-230-580 - Travel and Related Expenses - District:

From: \$24,775 To: \$19,487

Rationale: Account 11-000-230-580: The Governing Bodies maintain that this appropriation should be reduced to 10% over the 1993-94 appropriation.

Account 11-000-230-800 - Miscellaneous Expenses - District:

From: \$41,777 To: \$37,277

Rationale: Account 11-000-230-800: The Governing Bodies maintain that a \$4,500 appropriation for miscellaneous expenses should be eliminated.

Account 11-000-240-580 - School Administration - Travel and Related Expenses:

From: \$17,952 To: \$12,000

Rationale: Account 11-000-240-580: The Governing Bodies maintain that the \$5,952 appropriated for the Supervisor's bargaining unit be eliminated.

Account 11-000-240-600 - School Administration - Supplies & Materials:

From: \$61,638 To: \$36,100

Rationale: Account 11-000-240-600: This appropriation has increased 300% over the 1993-94 appropriation (\$20,500). The Governing Bodies maintain that this increase should only be 176% over the 1993-94 appropriation.

Account 11-000-230-600 - Supplies and Materials - District:

From: \$5,950 To: \$0

Rationale: Account 11-000-230-600: This account appears to be duplicated in other areas of the budget. Based on this finding, the Governing Bodies recommend elimination of this appropriation.

Account 11-000-260-300 - Operation and Maintenance - Contracted Services for Plant Operation:

From: \$202,350 To: \$117,850

Rationale: Account 11-000-260-300: The Governing Bodies maintain that the increase of Right-To-Know services should be held to 100% and that gasoline contamination well costs should be eliminated. The Governing Bodies find that gasoline contamination well costs should be a capital item and that the Board should eliminate all gas pumps since it does not operate buses.

Account 11-000-260-610: Operation and Maintenance - Supplies and Materials:

From: \$269,190 To: \$198,290

Rationale: Account 11-000-260-610: The Governing Bodies maintain that this appropriation should be held to the 1993-94 level. In addition, a \$10,000 mathematical error was discovered in the 1994-95 total for ground supplies.

Account 11-000-260-420: Operation and Maintenance - Cleaning Repair & Maintenance Services:

From: \$151,950 To: \$141,950

Rationale: Account 11-000-260-4200: The Governing Bodies maintain that the \$10,000 appropriation for Roofing Services be eliminated since it appears elsewhere in the proposed budget.

Account 12-190-100-731: Capital Outlay - Regular Instruction:

From: \$55,599 To: 50,000

Rationale Account 12-190-100-731: The Governing Bodies maintain that this appropriation should be held to the 1993-94 budgeted level, particularly since there is insufficient detail to explain the proposed increase.

Account 12-000-219-732: Other Support Services - Special:

From: \$10,000 To: \$0

Rationale: Account 12-000-219-732: The additional two (2) copier machines appear to be a duplication in the proposed budget.

Account 12-000-400-450: Facilities Construction Services:

From: \$988,717 To: \$438,717

Rationale: Account 12-000-400-450: The Governing Bodies recommend that the two (2) all-weather tracks be deferred for other methods of funding.

TOTAL REDUCTION: \$1,426,226

COMMISSIONER'S DETERMINATION

Set forth below are the item-by-item positions of the parties to the dispute herein and the Commissioner's determination.

<u>Account</u>		<u>Reduction</u>
303	Appropriation from Free Balance	\$461,722

The Governing Bodies contend that their examination of the district's last three audit reports convinces them that additional appropriation from free balance of the amount indicated above will still leave the Board with a free balance of \$1,500,000, which they deem adequate to meet the district's contingency needs.

The Board argues that it needs to maintain a significant free balance to meet payroll and bills during the summer months. It

asserts that vendors require payment within 30 days during July and August or significant penalties are assessed. The Board asserts that the only monies available to it during the summer months are those from surplus. The Board further asserts that, despite the fact that N.J.S.A. 54:4-75 requires that the district receive 20% of the local tax levy within the first 40 days of the school year, the municipalities seldom respond in a timely manner. (See Affidavit of Raymond Heston, Business Administrator for July and August 1994 experience).

The Board further sets forth its experience relative to July and August expenditures since the 1991-92 school year as follows:

91-92	\$2,299,437
92-93	\$2,380,348
93-94	\$2,626,989

The Commissioner notes that the Board makes no argument as to the adequacy of its remaining free balance after the additional appropriation sought by the Governing Bodies; therefore, its sole justification for resisting such appropriation is its argument that the entire free balance is necessary to meet summer expenses. However, even using the Board's own testimony as to the payment schedule received from its constituent municipalities, those funds along with the remaining surplus would appear to provide an amount reasonably close to previous summer expenditures. It would thus appear that the Board's efforts should more properly be directed toward taking steps to ensure prompt payment pursuant to statute rather than seeking to retain a higher surplus amount for the purposes provided herein. In addition, upon review of the year-end audit, the Commissioner has confirmed the assertions of the

Governing Bodies as to the amount of surplus available and to its sufficiency even allowing for municipal reduction and expenditures claimed by the Board in response to use of the audit herein. Consequently, the Commissioner sustains the reallocation of \$461,722.

<u>Account</u>	<u>Reduction</u>
11-190-100-340 Purchased Technical Services	\$ 2,500

The Governing Bodies contend that no justification exists for the increase in Right-To-Know in-service.

The Board responds by asserting that N.J.S.A. 47:1A-1 et seq. requires that in-service be provided to all employees. The Board points out that it has hired a firm, Forum for Scientific Excellence, at a cost of \$5,000 to provide this service. Additionally it asserts that it has also hired a physician at \$1,000 to conduct required training of staff members on hard-to-handle bloodborne pathogens.

Upon consideration of the arguments and documentation provided by the Board, the Commissioner directs restoration of the \$2,500 in this account, having determined that meeting health and safety requirements is essential to providing a thorough and efficient system of education.

<u>Account</u>	<u>Reduction</u>
11-190-100-440 Rentals for Instructional Purposes	\$15,000

The Governing Bodies argue that expenditures in this area should be maintained at previous-year levels, a 20% increase being unjustified with only a 4% increase in enrollment.

The Board points out that the monies in this account are for rental of photocopiers used by professional staff for the duplication of instructional material. The Board asserts that as of

June 27, 1994, this account was \$40,980 over budget. It contends that a \$15,000 reduction would require the removal of one machine, leading to breakdowns and periods of unavailability.

Upon consideration of the arguments of the parties, the Commissioner concludes that photocopy availability is currently a significant technological requirement for the provision of a thorough and efficient system of education. The Board having demonstrated its costs in the previous year, the Commissioner directs the restoration of the \$15,000 in this account.

<u>Account</u>	<u>Reduction</u>
11-190-100-610 General Instruction Supplies	\$31,483

The Governing Bodies simply state that they believe the increase in this area should be limited to 10% since enrollment has only increased 4% over 1993-94.

The Board provides information as to the items to be purchased as instructional supplies. (See Affidavit of Business Administrator) It further argues that expenditures in this area fluctuate from year to year, and that the increase for 1994-95 is due to increased enrollment.

The Commissioner finds, after review of the positions of the parties, that the Board has failed to meet its burden of demonstrating that it cannot provide a thorough and efficient system of education with the reduced amount. It points to no compelling or specific rationale for the increase requested in this account. The \$31,483 reduction is sustained.

<u>Account</u>	<u>Reduction</u>
11-190-100-640 Textbooks	\$12,494

The Governing Bodies contend that a 60% increase over

1993-94 is not sustainable when enrollment has increased only 4%. They point out that Home Economics and Health and Physical Education expenditures have increased 450% and 335% respectively.

The Board points out that, for textbook purchase, its supervisors are awarded the same amount as previous years plus a slight increase and have the flexibility to designate monies at their discretion. The Board also asserts that the large increase in health and home economics is due to the need to replace texts in these areas.

The Commissioner has carefully reviewed the documentation presented by the Board to justify its expenditures. Based upon said review, the Commissioner finds that the Board has not sufficiently demonstrated that all increases for textbooks have been justified. The Commissioner also observes that the Board's practice of allotting funds based solely upon previous year's budget is both uneconomical and educationally unsound. The Board is directed to establish a logical process for planning textbook purchases, rather than continuing to rely on what appears on its surface to be a somewhat haphazard method. The reduction of \$12,494 is sustained.

<u>Account</u>	<u>Reduction</u>
11-000-221-104 Professional Staff Services	\$40,000

The Governing Bodies contend that the addition of a staff development assistant is unnecessary. They argue that the absence of such a person may produce a greater workload for the rest of the staff, but that this is a sacrifice which others are making in our society.

The Board argues that this is the third year in which the district has attempted to establish the position in question, but

been required to drop it during the budget reduction process. The Board argues that this position is designed to address a major area of weakness in its staff development program. The Board points out that over the years it has used exclusively outside consultants for staff development purposes, but that such a process has the significant weakness of lacking consistent and expert follow-up. The Board envisions utilizing one teacher in each high school as a half-time staff development assistant, so that the district may provide an ongoing, consistent program of professional growth for its teaching and administrative staff.

The Commissioner determines that the continued professional growth and development of staff members is an essential element in the implementation of a thorough and efficient system of education. He further concludes that the Board has demonstrated the benefits to be derived in its particular case from on-staff persons rather than outside consultants to provide such services. The \$40,000 in this account is restored.

<u>Account</u>	<u>Reduction</u>
11-000-221-320 Purchased Educational Services	\$11,800

The Governing Bodies argue that any increase should be limited to 10% due to there being only a 4% increase in enrollment.

The Board states that the allocations in this account cover a variety of expenditures including:

- a. In-Service Package from the New Jersey Principals and Supervisors Association (\$850)
- b. E.I.R.C. (\$750)
- c. Governor's Teacher of the Year (\$500)
- d. In-Service Programs for Teachers (\$5,000)

The balance of the requests in this account, the Board contends, are targeted for teacher in-service programs during the summer. The funds are utilized to pay small stipends to the teachers and to pay the consultants who present the programs. During the summer of 1994 the Board planned to offer the following:

- a. Three-day Instructional Theory into Practice
- b. One-day in HSPT Math
- c. Two-day Cooperative Learning

The Board contends that the reduction here imposed would result in the need to cancel one of these programs.

Having carefully considered the arguments presented, the Commissioner notes that \$33,800 remains in this account even after the recommended reduction, and that the Board has not demonstrated that T&E cannot be provided with a less ambitious program than the Board might ideally like to offer. Therefore, the Commissioner finds that the board has failed to meet its burden. The reduction of \$11,800 is sustained.

<u>Account</u>	<u>Reduction</u>
11-000-230-330 Legal Services	\$5,000

The Governing Bodies contend that expenditures for legal services should be maintained at the 1993-94 level.

The Board contends that previous experience has indicated that the amount budgeted has been insufficient.

The Commissioner has reviewed the documentation presented by the Board in support of its position. Based upon that review it is apparent that during the 1993-94 year the Board has made significant transfers from other accounts to meet legal service

needs. (See Exhibit N) The \$5,000 reduction in this account is, therefore, restored.

<u>Account</u>	<u>Reduction</u>
11-000-230-339 Other Professional Services	\$55,000

The Governing Bodies contend that the architect fees of \$55,000 which are included in this account should be part of Capital Construction Costs and therefore included in the Capital Account.

The Board points out that N.J.A.C. 6:22-1.3 requires a board to employ an architect to submit plans and specifications on its behalf to the Bureau of Facilities Planning in the Department of Education. The Board contends it has seven projects of a construction/maintenance nature planned for 1994-95 (See Exhibit P for list of projects and costs). The Board argues that architects are hired on an as-needed basis and not on retainer. It contends its 1993-94 budget was over-extended by \$77,838 in this account. (See Exhibit R) Finally, the Board challenges the assertion that architect's fees should be charged to the Capital Construction. The Board contends that Generally Accepted Accounting Procedures (GAAP), which is required to be used by state regulations, defines capital projects as those projects financed by bonds, capital grants or certificates of participation. General architect fees, it contends, are placed in Fund 12 Capital Outlay and funded with general revenue monies. (See Exhibit S)

After review of the Board's documentation, the Commissioner finds and determines that the Board has refuted the Governing Bodies' assertion and demonstrated the need to provide those architectural projects and services necessary to ensure health, safety and welfare which are an integral part of the providing of a

thorough and efficient system of education. He directs restoration of the \$55,000 in this account.

<u>Account</u>	<u>Reduction</u>
11-000-230-340 Purchased Technical Services- Administration	\$ 8,000

The monies involved in this account fund election expenses. The Governing Bodies contend the \$8,000 increase to meet election expenses is unnecessary and that the 1993-94 level of funding is sufficient.

The Board contends that it has recently created two new voting districts, increasing the cost of running its annual election. Further it argues that in the 1993-94 school year this account was insufficient to meet the costs of the election (See Exhibit U).

The Commissioner finds that the Board has met its burden. Mere limiting of an expenditure to previous year's budget without consideration of the reasons for an increase is arbitrary. The \$8,000 is restored.

<u>Account</u>	<u>Reduction</u>
11-000-230-530 General Administration Communications	\$5,000

The Governing Bodies merely contend that expenditures in this account should remain at current levels.

The Board points out that this account covers the cost of telephones and postage for the district office, as documented by Exhibit B attached to the Superintendent's affidavit. The Board further points out that the Department of Education will soon require all districts to install a separate line to establish a direct link to State computers for the purpose of filing reports.

The Commissioner has examined the documentation provided by the Board as to actual costs and noted that the 1993-94 account finished with a slight balance. The Commissioner therefore sustains the \$5,000 reduction in this account.

<u>Account</u>	<u>Reduction</u>
11-000-230-580 Travel - District	\$5,288

The Governing Bodies argue that discretionary spending of this nature should be reduced rather than increased. They have reduced the 1993-94 appropriation by 10%.

The Board points out that the monies in this account provide expenses for board members and district staff to attend local, county, state and national conferences. (See Exhibit C of Superintendent's Affidavit). The Board also points out that N.J.S.A. 18A:12-33 requires newly elected board members to attend training sessions of the New Jersey School Boards Association.

The Commissioner notes the specific requirement that newly elected board members are mandated to attend training. However, this mandate does not provide specific justification for the entire amount budgeted herein, nor does it demonstrate how all of the expenditures are related to a thorough and efficient system of education. The reduction of \$5,288 in this account is sustained.

<u>Account</u>	<u>Reduction</u>
11-000-230-800 Miscellaneous Expenses - District	\$4,500

The Governing Bodies contend that in difficult times miscellaneous type expenses should be decreased. The Board provides documentation for some of the expenses under this account. (See Exhibit B attached to Assistant Superintendent's Affidavit.)

The Commissioner's review convinces him that the Board has failed to demonstrate that all of its expenditures are necessary to provide a thorough and efficient system of education. The \$4,500 reduction is sustained.

<u>Account</u>		<u>Reduction</u>
11-000-240-580	Travel and Related Expenses - School Administration	\$5,952

The Governing Bodies argue that the \$5,592 allocated for the supervisor's bargaining unit should be eliminated.

The Board points out that its collective bargaining agreement with the Supervisor's unit provides for travel expenses of \$7,500 per year. (See Exhibit D and E of Assistant Superintendent's Affidavit.)

The Commissioner finds the determination of the Governing Bodies in this area to be arbitrary in that the Board is obligated to meet the requirements of its collective bargaining agreement. The \$5,952 is restored.

<u>Account</u>		<u>Reduction</u>
11-000-240-600	Supplies and Materials - School Administration	\$25,538

The Governing Bodies contend this account reflects a 300% increase over 1993-94. They argue that some of the items to be obtained from this account should be capitalized and others eliminated.

The Board asserts that this account contains monies for office supplies at each of the district's high schools, which supplies are required for communication between the Board, Superintendent, faculty and parents. In addition, the Board asserts

gasoline contamination costs should be eliminated and capitalized. Further, they contend that the Board should eliminate all gas pumps since the Board no longer operates buses.

The Board points out that N.J.S.A. 47:1A-1 et seq. requires employers to inform all employees of all hazardous materials with which they come in contact. The Board provides copies of the extensive reporting and inventory documents which must also be completed.

The Board points out that, while it no longer operates gas pumps, it has been required by the New Jersey Department Environmental Protection to undertake a number of remedial actions which are detailed in the affidavit of the Business Administrator at pages 14-16. The Board responds to the argument that these expenses be capitalized by pointing out that these are not projects involving bonds or other forms of borrowing; therefore, GAAP requires the expenses to be paid as a current expense.

The Commissioner has considered the documentation presented by the Board. While agreeing with the Board that the Governing Bodies misperceive the nature of capital projects and do not factor in the \$65,760 cost of the gasoline contamination project, he finds no specific documentation of why the remainder of the large increase in this account is necessary. In the absence of such documentation, the Commissioner restores \$65,760 while sustaining the remainder of the reduction in the amount of \$18,740.

<u>Account</u>		<u>Reduction</u>
11-000-260-610	Operation and Maintenance - Supplies and Materials	\$70,900

The Governing Bodies argue that expenditures in this account should be held to 1993-94 levels. They also indicate an error of \$10,000 in the area of ground supplies.

The Board concedes the mathematical error of \$10,000 in ground supplies. The Board delineates a number of projects on page 17 and 18 of the Business Administrator's Affidavit which are incorporated herein by reference.

The Commissioner, in reviewing the positions of the parties and the documents filed, finds no evidence provided by the Board to explain the increases in this account over the previous year's expenditures. In light of the foregoing, the Commissioner sustains the reduction of \$70,900 in this account.

<u>Account</u>		<u>Reduction</u>
11-000-260-420	Cleaning Repair and Maintenance Services	\$10,000

The Governing Bodies declare that the \$10,000 appropriation for roofing services appears elsewhere in the budget.

The Board denies that the appropriation for roofing services is duplicated in the budget. It points out that a \$2,000 expense in account 11-000-260-610 is for roof patching material to be used for minor roof repair and maintenance. The item in this account is for the cost of contracted services for roof repair.

The Commissioner finds the Board's response reasonable and justified in order provide for a safe learning environment. The \$10,000 in this account is restored.

<u>Account</u>		<u>Reduction</u>
12-190-100-731	Capital Outlay - Regular Instruction	\$5,599

The Governing Bodies contend that this account should be maintained at 1993-94 levels since there is insufficient detail to explain the increase.

The Board argues that the increase is justified by increased enrollment. It points out that 52% of the expenditures in this account are computer related.

The Commissioner, upon review of the Board's documentation, finds that the Board has failed to demonstrate how the amount by which this account has been reduced prevents it from providing a thorough and efficient system of education. The \$5,599 reduction is sustained.

<u>Account</u>		<u>Reduction</u>
12-000-219-732	Other Support Services - Special Ed.	\$10,000

The Governing Body contends that the two copy machines in this account appear to be duplications of machines in other accounts.

The Board contends that these copiers are not duplicative of other copiers in the budget. The Board points out that these copiers are needed in the special education offices of its two schools since the materials copied are by law confidential in nature. Use of the same copiers as those used by faculty for regular business would seriously jeopardize confidentiality. (See Exhibit EE).

The Commissioner, mindful of the large amounts of duplicating necessary to meet the needs of parents of classified students and of the concern for strict maintenance of confidentiality as required by statute and regulation, directs the restoration of the \$10,000 in this account.

<u>Account</u>	<u>Reduction</u>
12-000-400-450 Facilities Construction	\$550,000

The Governing Bodies recommended that two all-weather tracks be deferred for other methods of funding.

The Board argues that its present tracks are dilapidated cinder tracks which are in disrepair and are adversely affected by precipitation. These tracks are used by track and cross county teams as well as gym classes. The Board contends these tracks have been requested since 1990-91 and have been eliminated either to bring the budget under cap or to resolve budget disputes. The Board contends that most other high schools have replaced their cinder tracks with all weather tracks.

The Commissioner has carefully considered the arguments of the Board in regard to the desirability of replacing its cinder tracks with new all weather tracks. While sympathetic to the Board's position, the Commissioner cannot find that such a project is absolutely essential to the provision of a thorough and efficient system of education. The Commissioner sustains the reduction of \$550,000 in this account.


Recapitulation

<u>Account</u>	<u>Sustained</u>	<u>Restored</u>
303	\$ 461,722	\$ -0-
11-190-100-340	-0-	2,500
11-190-100-440	-0-	15,000
11-190-100-610	31,483	-0-
11-190-100-640	12,494	-0-
11-000-221-104	-0-	40,000
11-000-221-320	11,800	-0-
11-000-230-330	-0-	5,000
11-000-230-339	-0-	55,000
11-000-230-340	-0-	8,000
11-000-230-530	5,000	-0-
11-000-230-580	5,288	-0-
11-000-230-800	4,500	-0-

<u>Account</u>	<u>Sustained</u>	<u>Restored</u>
11-000-240-580	-0-	5,952
11-000-230-600	-0-	5,950
11-000-240-600	25,538	-0-
11-000-260-300	18,740	65,760
11-000-260-610	70,900	-0-
11-000-260-420	-0-	10,000
12-190-100-831	5,599	-0-
12-000-219-732	-0-	10,000
12-000-400-450	550,000	-0-
	<u>\$1,203,064</u>	<u>\$223,162</u>

In light of the foregoing, and finding that no further appropriation from surplus appears warranted to fund the restorations made, the Commissioner directs the Camden County Board of Taxation to make the necessary adjustments to reflect an increase of \$223,162 for support of the Black Horse Pike Regional School District for the 1994-95 school year so that the total General Fund tax levy for such purpose shall be \$10,454,778.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

FEBRUARY 3, 1995

DATE OF MAILING - FEBRUARY 3, 1995

BOARD OF EDUCATION OF THE BOROUGH :
OF HALEDON, PASSAIC COUNTY, :

PETITIONER-APPELLANT, :

V. :

PETER B. CONTINI, ASSISTANT
COMMISSIONER FOR FIELD SERVICES, :
NEW JERSEY DEPARTMENT OF :
EDUCATION, :

STATE BOARD OF EDUCATION

DECISION ON MOTION

RESPONDENT-RESPONDENT. :

Decided by the Assistant Commissioner of Education,
April 4, 1995

For the Petitioner-Appellant, Schwartz, Simon, Edelstein,
Celso & Kessler (Thomas Russo, Esq., of Counsel)

By application filed this morning with the State Board of Education, the Haledon Board of Education is seeking emergent relief from us today in the form of a determination that it needs more than the amount of the budget as established under N.J.S.A. 18A:7D-28(a) and (b) ("base budget"), which had been approved by the County Superintendent, in order for it to be able to provide a thorough and efficient education to its students in 1995-96. Consistent with the County Superintendent's approval of its base budget, the District had been planning to seek the additional funds by proposing to the voters pursuant to N.J.S.A. 18A:7D-28(f) that they raise the amount of the tax levy necessary so as to support additional expenditures for 1995-96.

After carefully considering the papers that have been filed by the District and the arguments of counsel, the State Board of Education denies the application. In so doing, we stress that there

April 5, 1995

is no question here that the County Superintendent reviewed the budget presented by the District and determined that the amount of that budget is adequate for the provision of a thorough and efficient education. Nothing presented to us by the District in support of its application for emergent relief shows that it needs to exceed that amount in order to meet its constitutional obligations for 1995-96. See Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, decided by the State Board, July 6, 1994, slip op. at 14-20.

April 5, 1995

Date of mailing APR 05 1995

44-95

J.S., ON BEHALF OF OF HIS MINOR :
CHILD, M.S., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE BOROUGH :
OF AUDUBON, CAMDEN COUNTY, :

RESPONDENT. :

_____ :

COMMISSIONER OF EDUCATION

DECISION

FEBRUARY 6, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5740-94

AGENCY DKT. NO. 152-5/94

J.S., on behalf of M.S.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
BOROUGH OF AUDUBON,
CAMDEN COUNTY,**

Respondent.

J.S., father of M.S., appearing pursuant to *N.J.A.C. 1:1-5.4(a)7*,
for petitioner

Stephen J. Mushinski, Esq., for respondent

Record Closed: November 21, 1994

Decided: December 13, 1994

BEFORE CAROL LASKIN, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) on June 13, 1994, for a hearing pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The parties have agreed to settle this matter and have prepared a settlement agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does

not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

December 13, 1994
DATE

Carol J. Laskin
CAROL LASKIN, ALJ

12/23/94
DATE

Receipt Acknowledged:

[Signature]
DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

njf

STEPHEN J. MUSHINSKI, ESQ.
Moorestown Office Center
110 Marter Avenue, Suite 411
Moorestown, NJ 08057
(609) 234-9582

Attorney for Respondent

JUSTIN M. SCIARRA, on	:	BEFORE THE COMMISSIONER OF
behalf of his child, M.S.,	:	EDUCATION OF NEW JERSEY
	:	
Petitioner,	:	Agency Docket No: 152-5/94
	:	
vs.	:	Civil Action
	:	
THE BOARD OF EDUCATION OF	:	STIPULATION OF SETTLEMENT
THE BOROUGH OF AUDUBON,	:	
	:	
Respondent.	:	
	:	

WHEREAS, Petitioner has filed a Petition of Appeal in the above matter alleging that his child, M.S., is entitled to a free education under N.J.S.A. 18A:38-1 within the Borough of Audubon School District;

WHEREAS, Respondent has denied that M.S. is entitled to a free education under the provision of N.J.S.A. 18a:38-1 et. seq.;

WHEREAS, Petitioner has indicated that he is making a good faith and bona fide effort to purchase a residence in the Borough of Audubon; and

WHEREAS, the Petitioner and Respondent have determined to amicably resolving the instant controversy, it is agreed by and between said parties as follows:

1. M.S. shall be permitted to remain as a student in the Borough of Audubon School District during the time that the

Petitioner is and continues to make a good faith and bona fide effort to purchase a home in the Borough of Audubon, but no later than the 31st day of December, 1994.

2. M.S. shall be subjected to all of the conditions and responsibilities of any tuition student within the Borough of Audubon School District. A pamphlet outlining the conditions and responsibilities of tuition students shall be forthwith forwarded to the Petitioner, by the Respondent.

3. Commencing with the month of January, 1995, Petitioner shall make tuition payments to the Borough of Audubon School District which shall represent repayment of tuition from November, 1993 through June, 1994 in the amount of \$5,000.00, and from September, 1994 through December, 1994 in the amount of \$2,736.80. The tuition reimbursement payments shall be payable over a one year period in monthly installments due the first day of each month. The amount of the monthly installments shall be adjusted in accordance with paragraph 4 herein.

4. In the event that the Petitioner purchases a residence within the Borough of Audubon in accordance with this Settlement Agreement then the Respondent shall waive the tuition reimbursement due and owing from September, 1994 through December, 1994 in the amount of \$2,736.80.

5. This Agreement shall not be construed as an admission of any violation of any law, rule or regulation by any party hereto.

6. Upon execution of this Agreement by all of the

parties, Petitioner shall withdraw its Petition of Appeal, without prejudice to his right to reinstate said complaint; and similarly without prejudice to the right of the Respondent to reinstate said Complaint in the event that Petitioner does not secure a residence within the Borough of Audubon on or before December 31, 1994.

FOR PETITIONER, JUSTIN M. SCIARRA
ON BEHALF OF M.S.



JUSTIN M. SCIARRA

10/20/94
Date

FOR AUDUBON BOARD OF EDUCATION



11/14/94
Date

J.S., ON BEHALF OF OF HIS MINOR :
CHILD, M.S., :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH :
OF AUDUBON, CAMDEN COUNTY, :

DECISION

RESPONDENT. :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.



COMMISSIONER OF EDUCATION

FEBRUARY 6, 1995

DATE OF MAILING - FEBRUARY 6, 1995

DHP #24-95
SB #44-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOYMENT : STATE BOARD OF EDUCATION
OF BRADLEY D. BUTLER. : DECISION
_____ :

Decided by the Deputy Commissioner of Education,
March 6, 1995

For the Petitioner-Appellant, Bradley D. Butler, pro se

For the Respondent-Respondent, Pamela B. Katten, Deputy
Attorney General (Deborah T. Poritz, Attorney
General of New Jersey)

The State Board of Education grants the request of the parties to remand this matter to the Commissioner of Education for a hearing in order to provide the petitioner with an adequate opportunity to establish a record in support of his contention that he has satisfied the statutory standard for rehabilitation.¹ Given the circumstances, we direct that such hearing and a final determination by the Commissioner be rendered

¹ We note that the Office of Criminal History Review was apparently not represented in the proceedings before the Deputy Commissioner and was not served with notice of the appeal to the State Board. Upon the filing of the appeal, Counsel to the State Board notified the Attorney General's Office that an appeal had been taken in the matter, and transmitted a copy of the record. A Deputy Attorney General was then assigned to appear as attorney of record in the appeal.

July 5, 1995

on an expedited basis, and that such determination considers all pertinent circumstances under the factors set forth in N.J.S.A. 18A:6-7.1, including "any evidence of rehabilitation." See Wolffbrandt v. New Jersey State Department of Education, decided by the State Board, July 1, 1992. Petitioner has the burden on remand of establishing his rehabilitation by clear and convincing evidence.

We stress, in addition, that the statute expressly requires consideration of the "date of the offense" (emphasis added), rather than the date of conviction relied upon by the Deputy Commissioner in his decision. Moreover, although the Deputy Commissioner observed that petitioner was convicted in September 1992, the record indicates that he was, in fact, arrested at that time.

We retain jurisdiction.

July 5, 1995

Date of mailing

JUL 07 1995

(SB) 44-95

DHP #24-95
SB #44-95
DHP #86-96

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOYMENT: STATE BOARD OF EDUCATION
OF BRADLEY D. BUTLER. : DECISION

Decided by the Deputy Commissioner of Education, March 6, 1995

Remanded by the State Board of Education, July 5, 1995

Decision on remand by the Commissioner of Education, March 8, 1996

For the Petitioner-Appellant, Bradley D. Butler, pro se

For the Respondent-Respondent, Pamela B. Katten, Deputy Attorney
General (Deborah T. Poritz, Attorney General of New Jersey)

On July 5, 1995, we remanded this matter to the Commissioner of Education for a hearing in order to provide petitioner, who had been disqualified from employment in the State's schools as a custodian following a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1, with an adequate opportunity to establish a record in support of his contention that he had satisfied the statutory standard for rehabilitation. We retained jurisdiction.

In accordance with our remand, the Commissioner transmitted this matter to the Office of Administrative Law, where a hearing was held on November 29, 1995. On January 29, 1996, the Administrative Law Judge ("ALJ") rendered an initial decision in which she concluded that petitioner had not demonstrated his rehabilitation by clear

6/5/96

and convincing evidence. On March 8, 1996, the Commissioner adopted the ALJ's recommended decision upholding petitioner's disqualification from school employment and, pursuant to our retention of jurisdiction, transmitted the file back to us. Petitioner has not filed an appeal from that decision.

After a review of the record, we are satisfied that the Commissioner fully complied with the terms of our remand. Accordingly, we dismiss the appeal.

June 5, 1996

Date of mailing **JUN 07 1996**

IN THE MATTER OF THE TENURE :
HEARING OF EILEEN JOHNSON, :
SCHOOL DISTRICT OF THE CITY OF :
NEWARK, ESSEX COUNTY :

AND :

EILEEN JOHNSON, :
PETITIONER, :

COMMISSIONER OF EDUCATION :
DECISION :

V. :
BOARD OF EDUCATION OF THE CITY :
OF NEWARK, ESSEX COUNTY, :

RESPONDENT. :

_____ :

FEBRUARY 6, 1995



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6758-93

AGENCY DKT. NO. 247-6/93

**IN THE MATTER OF THE TENURE HEARING
OF EILEEN JOHNSON, SCHOOL DISTRICT
OF THE CITY OF NEWARK, ESSEX COUNTY**

OAL DKT. NO. EDU 9073-92
AGENCY DKT. NO. 427-9/92

EILEEN JOHNSTON,
Petitioner,
v.

BOARD OF EDUCATION
OF THE CITY OF NEWARK,
Respondent.

Carolyn Ryan Reed, Esq., for petitioner-respondent
Newark Board of Education (Marvin L. Cormick, General Counsel, attorney)

John L. Schettino, Esq., for respondent-petitioner Eileen Johnston
(Giblin & Giblin, attorneys)

Record Closed: September 7, 1994

Decided: December 20, 1994

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

Statement of the Case

These two related matters involving the same parties have been consolidated for hearing together.

Docket No. EDU 6758-93 is a teacher tenure proceeding under *N.J.S.A. 18A:6-10 to -18.1*. Tenured teaching staff members hold employment in the public school system "during good behavior and efficiency." Petitioner Newark Board of Education ("Newark") has brought charges of unbecoming conduct against respondent Eileen Johnston ("Johnston"). Specifically, Newark accuses Johnston of various acts of misconduct, including one incident involving excessive use of force against a student and another incident involving use of inappropriate and crude language in the classroom. Basically, the outcome of this dispute depends on an assessment of the witnesses' credibility. If any of the tenure charges is sustained, the Commissioner of Education ("Commissioner") must determine whether dismissal or some lesser penalty is warranted.

Docket No. EDU 9073-92 is an appeal by Johnston from Newark's decision to withhold her 1992-93 salary increment under *N.J.S.A. 18A:29-14*. Here the roles are reversed. Johnston is the petitioner and Newark is the respondent. To prevail, Johnston must prove that Newark's action was patently arbitrary, without any reasonable basis or induced by improper motive.

Procedural History

On May 21, 1993, school administrators submitted proposed tenure charges, together with a sworn statement of supporting evidence, to Newark. At its meeting on June 23, 1993, Newark determined that there exists probable cause to credit the supporting charges and that the charges, if true, warrant some type of disciplinary

action. Accordingly, on June 25, 1993 Newark certified the tenure charges to the Commissioner. Johnston filed her answer on July 6, 1993. The Commissioner transmitted the matter to the Office of Administrative Law ("OAL") on July 19, 1993 for hearing as a contested case.

Meanwhile, Johnston had already appealed her increment withholding to the Commissioner on September 10, 1992. Newark had filed its answer on November 13, 1992. On November 19, 1992, the Commissioner had sent this matter to the OAL for hearing. By order entered on October 12, 1993, the OAL consolidated both cases into a single proceeding.

Subsequently, the OAL held seven days of hearing on February 22, 23 and 25, March 4 and 11, May 6, and June 1 and 2, 1994. When the Board had rested its case, the OAL dismissed two charges, dating back to 1988, for lack of proof. Both parties filed legal briefs on September 8, 1994.¹

Findings of Fact

(1) General Background Facts

Most of the background facts are undisputed. Eileen Johnston, age fifty, started working for the Newark public school district in September 1965 and has twenty-eight years of service. She has a master's degree in student personnel services and is certified in New Jersey to teach home economics and elementary education. During most of her career, she has taught home economics to students in sixth, seventh and eighth grades. In 1988-89 she taught chronically-ill children for one year at the Boylan

¹ On the last day of hearing, the parties appeared to have reached a tentative settlement of their dispute. After settlement negotiations broke down, the parties filed their briefs.

Street School, but left at her own request because she lacked the temperament "to deal with children who are sick or ill."²

Beginning in 1989-90, she was assigned to teach home economics to sixth graders at the Vailsburg Middle School. She remained in this position through 1990-91 and the first month of the 1991-92 school term, until an incident on October 9, 1991 which forms the basis for one of the tenure charges.³ As a result of this incident, Johnston was transferred to nonteaching duties in the central office for the remainder of the 1991-92 school year.⁴

At the outset of 1992-93, Johnston resumed her teaching duties at a new location, the Bergen Street School.⁵ She had not asked to be transferred from Vailsburg Middle School. Her transfer had been requested by Vailsburg's building principal, who questioned Johnston's physical fitness to perform her duties and had repeatedly recommended her reassignment "to a less demanding position." Within a period of six years, Johnston has been transferred on at least four separate occasions, an unusually high rate of turnover for a teacher in the Newark school system. Except for Boylan school, all the transfers were due to complaints about her performance by

² Recounting her reasons for seeking a transfer to another school, Johnston recalled that she had once wanted to become a nurse and had been told that she "would not make a good nurse, but would make a first class mortician." Johnston felt she did not have the proper disposition or training to teach a class of severely-disabled children.

³ According to Johnston, she did very little actual teaching in 1990-91. Instead, her classes "were taken away" from her on or about October 20, 1990 and she spent the remainder of the academic year "alone, in complete isolation" in an empty classroom at Vailsburg. Newark never offered any explanation of what she had done to deserve such treatment.

⁴ Newark must be strongly condemned for banishing Johnston to a nonteaching job in the central office without immediately bringing tenure charges and affording her the opportunity for a hearing. Johnston's unrefuted testimony indicates that at central office she sat around all day doing time reports and other routine clerical tasks.

⁵ In February 1993 the Bergen Street School was renamed and is now known as the William H. Brown Academy.

the top administrators of the various buildings to which she was assigned. Johnston taught home economics at the Bergen Street School for nearly seven months in 1992-93. On March 24, 1993, she was implicated in a second major incident, which led to her suspension from further duties and to the filing of the current tenure charges.

(2) Choking and Shaking a Student on October 9, 1991

There is conflicting evidence about exactly what happened on October 9, 1991 and whether Johnston was justified in using force to restrain a child who had left her classroom without permission.⁶

Inez Adams, a security guard stationed at Vailsburg Middle School on that date, heard "loud yelling and screaming" emanating from the vicinity of Johnston's classroom. The bell signaling the end of second period at 10:30 a.m. had just rung. As Adams looked down the hallway, she saw T.J., an eleven-year old boy, crying while he walked in her direction. He was by himself in the hallway, the other children having not yet left the classroom.. Suddenly, Johnston came out of her classroom and, running up behind the young boy, "grabbed him around his neck." By this time, Adams was only five or six feet away from the two of them and had an unobstructed view of the struggle. Adams observed Johnston "shaking" the little boy, and "choking him and pushing him down the hall". She also heard Johnston, who is white, say to the boy, who is black, "No one calls me a white bitch and gets away with it." When Adams instructed Johnston to let the boy go, Johnston didn't respond and continued shaking him. In order to stop the confrontation, Adams interposed her own body between Johnston and the child. When Adams "pushed her away from the child," Johnston did not resist..

⁶ Although the tenure charges mention only alleged verbal abuse and racial slurs on that date, the charges will be deemed amended to conform to the actual proofs introduced by both sides, which pertain to a physical confrontation with a student. See *N.J.A.C. 1:1-6.2*.

Afterwards, Adams cautioned Johnston that, "No matter how angry we are with the children, we don't have the right to hit them or abuse them in any way." Johnston responded by threatening to report Adams for insubordination. Adams also recalled Johnston complaining that she was "sick and tired of those kids, they never listen." While Adams earlier had heard "raised voices" coming from Johnston's classroom, she had no knowledge of what transpired immediately before the encounter in the hallway. Despite valiant efforts, defense counsel was unsuccessful in impeaching Adams' credibility. Adams' testimony that it took her about ten seconds to intervene is consistent with her description of where she was when Johnston accosted the child.

Much of Johnston's testimony dealt with what had previously happened in her classroom and was not directly relevant to the episode in the hallway. Apparently, this evidence was intended to show provocation and to explain why Johnston had chased the child down the hall. A fight had erupted between T.J. and another student in cooking class. Several boys, including T.J., stole brownies which belonged to other students from the refrigerator. At one point during the melee, T.J. ricocheted off Johnston's shoulder, throwing her off balance and "wrenching" her leg. (Johnston had been injured in 1989 in an unrelated attack by another student and wears a leg brace). Experiencing considerable pain, Johnston began to cry in front of the whole class. T.J. purportedly referred to her as "a white bitch" and ran out of the classroom.

Johnston conceded that she attempted to restrain T.J., although the details of her story differ substantially from Adam's version. In the first place, Johnston maintains that her class had already reassembled in the hallway and were waiting in line with their regular classroom teacher. However, she failed to call the teacher supposedly at the scene to corroborate her testimony. Although Johnston admitted that it was she who initiated physical contact, she denied putting her hands around the child's neck or choking him. Instead, she insisted that, approaching T.J. from the rear, she "gently" laid her hands on his back and pushed him. She also acknowledged that the guard

immediately intervened and told her to get her hands off the child. School records indicate that T.J. was sent to the nurse that same day, but do not disclose whether he required any treatment. Fortunately, the guard separated the two combatants before any serious damage was done.

I FIND that Johnston mistreated a young boy entrusted to her care by choking and shaking him and that such use of force was unnecessary under the circumstances. In evaluating credibility, the account given by the security guard is much more believable than the self-serving declarations of Johnston. Nothing on the record suggests any motive for the security guard to fabricate testimony against Johnston. On the other hand, Johnston's emphasis on the child's disrespectful behavior in the classroom lends credence to the view that Johnston became so angry that she lost her self-control when she later confronted him in the hall. One factor not evident from a mere recitation of facts, but readily apparent from her demeanor on the witness stand, is Johnston's hostile and embittered attitude toward her students. It is easier to picture her throttling a child who had crossed her than to imagine her gently nudging a recalcitrant child.

Even if her testimony is accepted, however, it is clear that Johnston grossly overreacted to the situation and had no right to push the child. By the time of the fray in the hallway, T.J. no longer posed a realistic threat to the safety of Johnston or anyone else. Indeed, if Johnston's rendition is accurate, the regular teacher had restored order and the children were quietly waiting in line. Thus, Johnston had no reason whatsoever to initiate physical contact with the child. The professional approach would have been to report T.J.'s misbehavior to the office for disciplinary action, which is exactly what the security guard advised Johnston to do at the time.

(3) Use of Inappropriate and Crude Language on March 24, 1993

A second incident involves accusations that , on March 24, 1993, Johnston was verbally abusive to the children in her class and rude to a teacher who sought clarification of the children's' complaints. In the early afternoon, Johnston was in charge of a seventh-grade sewing class, comprised of some twelve students, at Bergen Street School. Johnston was seated at her desk in the front of the room, grading work that the students had done. The students were sitting at long tables, arranged lengthwise in two rows, six students per row. While Johnston was meeting with individual students at her desk, the rest of the class was working on a sewing project at the tables. On this particular day, several children from another class happened to be preparing a luncheon in the back of the room.

One of her students, M.L., left her table, approached Johnston, and asked if she could use the mirror on the back of a locked cabinet door behind the teacher's desk. By that time, other students were already standing around Johnston's desk and M.L. had to wait her turn to ask her question. Despite minor variations in how the children interpreted her response, the evidence regarding Johnston's reply is remarkably consistent. M.L., who was closest to her teacher, testified that Johnston said , "No one wants to see your pussy face" and told her that she had an "ugly face." When repeating Johnston's language to her classroom teacher shortly after the occurrence, M.L. was embarrassed about using the "P-word" because, as the teacher explained at the hearing, the children "weren't allowed to curse in my class, so it was hard for her to tell me." Other children in the classroom substantially confirmed M.L.'s version of the event. S.G., seated at a table about four or five feet away, recalled Johnston as having said, "What do I want to look at your pussy face for?" Several of M.L.'s classmates were so upset by Johnston's language that they suggested M.L. tell her regular teacher about the incident. Stephanie Hairston, the teacher to whom the class returned immediately after the sewing lesson, asked all the students to write down their impressions while the event was still fresh in their minds. At least six students,

counting M.L. and S.G., mentioned that Johnston used the word "pussy" Three others indicated that Johnston had said "puss" or "puss face."

Johnston denied having used either derogatory term when speaking to a twelve-year-old child. In her defense, she maintained that there were too many students at her desk demanding attention. When M.L. asked her to open the cabinet, Johnston screamed at her to "Shut up, it's so noisy in here I can't even think." According to Johnston, she exclaimed, "See here, I'm not an octopus," meaning that she did not have enough arms to deal with them all at once. Admittedly, the noise level in the room was high. Indeed, one reason that M.L.'s testimony is so believable was her willingness to acknowledge that she and her friends were talking when they should have been working. None of the students present in the room, however, heard Johnston use the word "octopus."

As recounted by both M.L. and S.G., Johnston bent over to pick something up from the floor, muttering aloud that it was "too damn noisy" and that she was sick and tired of "these damn hoodlums." Again, Johnston flatly denied using the swear word "damn" or referring to the youngsters in her class as "hoodlums." Of the eleven children who gave written statements, however, six confirmed that Johnston told them that they were "hoodlums" and eight heard her use the expletive "damn." Five of the children indicated that she had combined the two terms and had called them "damn hoodlums." Apart from Johnston herself, no witness supported her version of the facts.

Johnston's credibility is further damaged by her effort to discredit M.L. and S.G. as failing students with a motive to lie. Both M.L. and S.G. are honors students who received top grades in other subjects. Their classroom teacher, Stephanie Hairston, described them as academically superior students with "the highest test scores." Moreover, the entire class was generally well-behaved and interested in learning. Johnston had never complained to Hairston, who was responsible for compiling report cards, that either child was causing trouble or in danger of failing home economics.

Mothers of both girls testified that Johnston had never sent home any warning notices or contacted them about any problems. Johnston herself did not produce any substantiating documentation that the two students were doing poorly in her class.

When the children related to her what had happened in home economics, Hairston visited Johnston's classroom in the hope of resolving the matter "teacher-to-teacher." Her actions are reminiscent of those taken by security guard Inez Adams, who intervened in order to protect another student from his own teacher. By this time, Johnston was teaching another class. Before Hairston could ask her to step out of the room to talk, Johnston became "irate" and "started yelling." In front of the other class, Johnston publicly accused Hairston's students of being "not disciplined," "stupid" and "loud." Since there were children in the room, Hairston decided to report the incident to the building principal and "walked out, leaving her screaming." During her testimony, Johnston admitted telling Hairston that her students were "a bunch of liars." She attempted to excuse her behavior by saying that Hairston had interrupted her in the middle of teaching.

Next morning, Johnston compounded the seriousness of the situation by her discourteous treatment of the two mothers, who had come to school to find out exactly what had happened in her class. M.L.'s mother did not automatically assume that Johnston had done anything wrong, she genuinely wanted "to hear her side." Similarly, S.G.'s mother, who is active in the PTA, had hoped that her daughter was mistaken and that it was all a misunderstanding. Initially, the mothers met privately with Johnston and the building principal in a conference room across from the home economics classroom. Frank Walters Jr., the building principal, testified that Johnston avoided his questions about the March 24th incident and that she switched the subject to her general concerns about the unruliness of her students and the adequacy of her lesson plans. Walters characterized the meeting as "unfruitful and unproductive." Johnston quickly became "irrational" and "defensive." More than once, Walters had to remind Johnston "not to yell at me and to lower her tone of voice." Peter Grimes, a

union representative who attended the conference at Johnston's request, remembered the conversation focusing on overall classroom discipline and Johnston asking how she could possibly teach "if no one will listen to me." Neither mother felt that her questions about the specific incident were being adequately answered. Ultimately, Johnston became incensed, refused to answer any more questions and, in Grimes' words, "got up from her chair and stormed out of the room."⁷ She retreated to her classroom where she closed the door behind her. When the two parents followed her and knocked on the door to keep the dialogue going, Johnston declined to talk to them and literally shut the door in their face

I FIND that overwhelming evidence establishes that Johnston ridiculed M.L. by referring to her ugly "puss" or "pussy" in order to embarrass her. Apparently Johnston meant to deprecate the physical appearance of a self-conscious preadolescent girl in the presence of her peers, which would have been destructive enough in itself. Due to her incredibly poor choice of words, however, many of the students, including the child to whom the comments were addressed, perceived Johnston's gratuitous remark as a vulgar reference to the female genitalia. This connotation made the situation even more mortifying for the young woman who was the brunt of her verbal attack. Johnston's claim that she used the word "octopus" is without support in the record and was plainly invented to cover up her totally unacceptable conduct.

Not content merely to belittle one child, Johnston disparaged the entire class by referring to the students collectively as "damn hoodlums." Such insulting language was uttered in public and loud enough so that most of the students in the room could hear her invective. Its impact was to convey the unmistakable impression that the teacher

⁷ Tempers flared when Walters apparently attributed Johnston's classroom difficulties to her alleged belief "that black children cannot learn." Although this was a legitimate topic for Walters to explore with Johnston, it should not have been raised in the emotionally-charged context of a parent-teacher conference. If anything, however, Johnston should have reacted by reassuring the parents of her fairness. Her hasty retreat without fully responding to the charge only served to reinforce the parents' worst suspicions.

disliked them personally and regarded them as nothing better than common criminals. Use of such contemptuous labels in speaking of an entire group of children reflects the same negative attitude which Johnston had also displayed when she told Hairston that her students were "stupid" and "a bunch of liars" or when she confided to Adams that she was "sick and tired of those kids." Moreover, her cursing set a poor example and undermined efforts to teach the children to treat each other with respect and dignity.

If Johnson had acknowledged her errors and apologized for her ill-considered remarks, it might still have been possible to salvage her professional reputation. Unfortunately, her disrespectful treatment of the parents and unwillingness to talk with them utterly destroyed any relationship she might have with these families.

(4) Insubordination Toward the Building Principal on March 26, 1993

A related charge is that on Friday March 26, 1993 Johnston "refused to follow administrative directives, became argumentative and defensive and resorted to inappropriate language." This additional development arose in the aftermath of the "puss" incident on March 24, 1993 and Johnston's discourteous behavior toward the concerned parents on March 25, 1993. As a result of Johnston's rudeness and intransigence, Frank Walters, the building principal, issued a written memorandum directing her to report to the assistant executive superintendent at the central office before the start of school on March 26, 1993. It is undisputed that Johnston did not comply with this directive, but went straight to her classroom as usual. What is controverted, however, is whether or not Johnston ever received prior notification of what she was supposed to do. The outcome depends whose testimony is more credible, the building principal or the teacher.

Walters stated that he had personally handed the memorandum to Johnston sometime in the afternoon of March 25 and also verbally informed her to report to

central office tomorrow morning. Johnson denied that Walters delivered the memorandum to her on March 25 or that there was any message waiting in her mail box when she arrived at work the next morning. As soon as Walters learned that Johnston was teaching her class on March 26, he went to her room and inquired why she was there. Johnston became agitated and yelled at him that if he did not let her go to the bathroom "you're going to have a mess to clean up all over this hallway. Walters characterized her manner of speech as "loud" and "vociferous." Later that morning, Johnston returned with her union representative and she accused Walters of picking on her. Union representative Peter Grimes said that Johnston seemed "dumbfounded" and claimed that she had never gotten the memorandum. Although Grimes indicated that notices to teachers in the school system are usually placed in the their mailboxes, he had no personal knowledge of what method Walters selected to communicate with Johnston on this particular occasion. Johnston went home on sick leave for the rest of the day and did not report to central office until the following Monday morning.

I FIND that Johnston received prior notice to report to the central office and knowingly refused to comply with this directive. In resolving the conflicting testimony, there is no reason to doubt the principal's solemn word that on March 25, 1993 he personally handed Johnston the memorandum and verbally instructed her to report to central office. Surely Johnston's unacceptable behavior toward the parents, which Walters had witnessed that very day, called for prompt and immediate referral of the incident to the central office. Once more, Johnston managed to make a bad situation even worse. Her offensive tone of voice and crude bathroom remark to her supervisor compounded the seriousness of her misconduct. By her own admission, she knew at least by Friday March 26, 1993 what she was supposed to do. Yet she displayed her complete contempt for authority by waiting until Monday before reporting to the central office.

(5) Miscellaneous Other Charges

Other tenure charges may be analyzed in less detail. Newark alleges that, on September 9, 1991, Johnston “made continuous reference to students as ‘barbarians’ and [to] the cultural differences of students” and “made verbal threats” to a vice principal. Mildred English, the vice principal who brought these complaints, admitted that she never actually heard Johnston call anyone “a barbarian,” but only heard her criticize the behavior of certain students “for acting like barbarians.” It seems, moreover, that this innocuous exchange took place privately between the two of them outside the presence of the students. Insofar as the Johnston’s supposed antipathy to cultural differences is concerned, English said that Johnston would not prepare certain ethnic foods in her classes. But Johnston explained that she was merely showing sensitivity to diverse religious beliefs, for instance, by not serving beef to Hindu students or pork to Jewish and Muslim students. Far from intending to downgrade other cultures, Johnston maintained that she was trying to teach appreciation for different heritages. English’s information derived from hearsay sources and she had no personal knowledge to refute Johnston’s claim.

Testimony regarding Johnston’s alleged verbal threats to the vice principal was equally elusive. Although Vice Principal English sincerely felt threatened, her underlying reasons were vague and nonspecific. Evidently, Johnston became upset because someone’s car was blocking her exit from the school parking lot. In an encounter with English on September 9, 1991, Johnston made incoherent statements about “knowing the license numbers” and expressed general unhappiness with her assignment. When Johnston put her hands on the desk and said something like, “There are only two of us present and it would be your word against mine,” English took this language as an implied threat against her. Johnston testified that she only wanted to obtain a list of teachers’ license plate numbers so she could talk to whoever had double-parked the car. Certainly the circumstances of this episode are ambiguous at

best, and there is no hard evidence that Johnston was contemplating to do any real harm.

Additionally, Newark charges that Johnston failed to maintain adequate classroom discipline, as evidenced by consistently poor performance ratings. Nobody questions Johnston's substantive knowledge of the content area which she teaches or her willingness to keep current in her field. Rather, Newark's criticism is directed toward Johnston's management techniques and her alleged inability to maintain control of her students. Newark's chief witness on this subject was Yvonne Goyins, a central-office supervisor responsible for evaluating all of the home economics teachers throughout the district.⁸ Goyins conducted classroom observations of Johnston over a four-and-a-half year period from October 1988 through March 1993. Every one of her formal written observation reports gave Johnston an overall rating of "satisfactory." Six out of eight observation reports, however, rated Johnston as "unsatisfactory" in a single category entitled "Consistently administers control with understanding, firmness, and consideration for the rights of others." Clearly Goyins believed that Johnston had a discipline problem exemplified by students not paying attention to their lessons and talking among themselves. In particular, Goyins noted that Johnston would ask students to quiet down but not follow through with consequences if they disobeyed her.

After each observation, Goyins would customarily sit down with Johnston and make specific suggestions on how to improve classroom control, such as planning a variety of meaningful hands-on activities to motivate students or posting a set of rules to which students would be expected to adhere. With remarkable candor, Goyins acknowledged that Johnston was "receptive" and "attempted to implement my suggestions." Significantly, Johnston made measurable progress in overcoming her

⁸ Newark's inefficient system for evaluating teacher performance contributed greatly to the weakness of its proofs on this score. Because Goyins evaluates some sixty teachers at fifty-three different schools, she only has an opportunity to observe Johnston's performance once or twice each year. But Goyins has much greater input into the evaluation process than do building administrators who deal directly with Johnston on a daily basis.

perceived weakness in this category. In September 1991, for example, Goyins rated Johnston as satisfactory in classroom management and advocated the use of various management techniques “for continued improvement.” In the most recent observation report, issued in March 1993, just three months before the bringing of tenure charges, Goyins again rated Johnston as satisfactory in this category. Other Board witnesses made isolated observations of Johnston’s difficulties in managing her class, but not enough to establish a permanent pattern. Vice principal Mildred English made a single written observation in which she commented on Johnston’s “very negative attitude” and her students’ low “level of enthusiasm or interest,” but this could simply have been an untypical bad day. August Alamo, the principal of Vailsburg Middle School, spoke of frequently having to intervene to preserve order in Johnston’s classes, but he too attempted no systematic evaluation of Johnston’s classroom performance.

I FIND that the proofs are insufficient to sustain the other charges brought against Johnston.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that Newark has sustained its tenure charge of unbecoming conduct against Johnston and that the appropriate penalty is dismissal.

Tenure protects teachers from arbitrary dismissal for “unfounded, flimsy or political reasons.” *Spiewak v. Rutherford Bd. of Educ.*, 90 N.J. 63, 73 (1982). It is designed to aid in the establishment of a “competent and efficient school system” by affording to teachers a measure of security in the ranks they hold after years of service. *Viemeister v. Prospect Park Bd. of Educ.*, 5 N.J. Super. 215, 218 (App. Div. 1949). Toward that end, N.J.S.A. 18A:6-10 provides that no tenured individual shall be dismissed or reduced in compensation “except for inefficiency, incapacity, unbecoming

conduct or other just cause." Additional procedural safeguards, including the right to a list of charges, a sworn statement of evidence, and an impartial hearing, are written into the law.

Teaching is a calling requiring "an unusually high degree of self-restraint and controlled behavior." Teachers represent "one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools[.]" *In re Tenure Hearing of Jacques L. Sammons*, 1972 S.L.D. 302, 321 (Comm'r June 12). Children are entitled to a supportive and nurturing classroom environment in which to develop their intellectual capacities and bolster their self-esteem. Adolescents are especially vulnerable to the influences of their teachers, who serve as role models and help to shape how youngsters actually view themselves. Constant negativity and insensitivity in dealing with students is a serious deficiency which constitutes conduct unbecoming a teacher. *In re Tenure Hearing of Ernest E. Gilbert*, 1982 S.L.D. 274, 326 (Comm'r April 5), *aff'd* 1982 S.L.D. 328 (St. Bd. Nov. 3). See *In re Tenure Hearing of John Birch*, 1978 S.L.D. 63 (Comm'r Feb 9), wherein a teacher was dismissed for displaying a negative attitude toward students, including making disparaging remarks about students in class. Being a teacher requires an intense dedication to civility and respect for people as human beings. *Morris Sch. Dist. v. Brady*, 92 N.J.A.R. 2d (Vol 4) 419 (Comm'r of Educ). Psychological damage from steady exposure to verbal abuse from a teacher may be longer lasting than the scars from physical abuse. *In re Tenure Hearing of Charles Courtney*, OAL Dkt. No. EDU 2889-91 (May 1, 1992).

Ample evidence demonstrates that Johnston was both physically and verbally abusive to the children entrusted to her care, using grossly excessive force in one instance and making hurtful and destructive comments in another instance. She was gratuitously mean and nasty not only to her students, but also to parents who sought her assistance, to administrators who tried to understand her motives, and to co-workers who dared to protect the children. On the record as a whole, it is painfully obvious that Johnston does not like her students very much and does not enjoy

teaching in the Newark school system. In short, Johnston lacks the temperament to succeed in her all-important role as a teacher. Her unrepentant attitude and unawareness of her shortcomings make it likely that similar incidents will be repeated if she remains in her present position.

Factors to be considered in assessing penalty include the nature and gravity of the offense; any extenuating or aggravating circumstances; and the effect on maintenance of discipline and the proper administration of the school system. *In re Fulcomer*, 93 N.J. Super. 404, 420-422 (App. Div. 1967). Courts recognize that a single instance of misconduct, if sufficiently flagrant, is enough to justify removal of an unfit teacher. *Redcay v. State Bd. of Educ.*, 130 N.J. L. 369 (Sup. Ct. 1943), *aff'd* 131 N.J.L. 326 (E. & A. 1944). Physical and mental mistreatment of children, in Johnston's case by an experienced teacher who ought to have known better, is a serious offense which no school district can tolerate. The gravity of Johnston's misconduct is aggravated by the surrounding context, including her disrespectful treatment of the parents, her insolent conduct toward school administrators, and her undisguised disgust for the children in her class. Under these circumstances, she should not be returned to the classroom where she can do more damage.

In light of the outcome on the tenure charges, it necessarily follows that Newark acted properly when it voted after the October 9, 1991 choking incident to withhold Johnston's salary increment for the 1992-93 school year. N.J.S.A. 18A:29-14 authorizes a local board of education to withhold a teacher's salary increment "for inefficiency or other just cause." Case law places the burden on the teacher to prove that the board's action was "patently arbitrary, without rational basis or induced by improper motives." *Kopera v. West Orange Bd. of Educ.*, 60 N.J. Super. 288, 294 (App Div. 1960). See also, *Princeton Reg. Sch. Dist. v. Campbell*, 93 N.J.A.R. 2d (Vol. 4A) 196,222, (Comm'r of Educ.). Since the facts justify termination of her employment in the district, it was reasonable for Newark to conclude that she did not deserve a salary increment for 1992-93.

Order

It is **ORDERED** that the tenure charge of unbecoming conduct is sustained.

It is further **ORDERED** that Eileen Johnston is dismissed from her tenured teaching position in the Newark public school district.

And it is further **ORDERED** that Johnston's request for restoration of her 1992-93 salary increment is denied.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Dec. 20, 1994
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

DEC 22, 1994
DATE

Receipt Acknowledged:
Hope R. Blackburn
DEPARTMENT OF EDUCATION

DEC 28 1994
DATE

Mailed to Parties:
Jeff J. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

1. Mildred English, vice principal at Vailsburg Middle School, Newark public school district
2. Inez Adams, security guard at Vailsburg Middle School, Newark public school district
3. Yvonne Goyins, central office supervisor, Newark public school district
4. August J. Alamo, principal at Vailsburg Middle School, Newark public school district
5. Gerard Moraño, director of the office of employment and technology, Newark public school district
6. Frank H. Walters, Jr., principal at William H. Brown Academy, Newark public school district
7. M.B., eighth grade student, William H. Brown Academy
8. E.B., mother of M.B.
9. Stephanie P. Hairston, seventh grade teacher, William H. Brown Academy, Newark public school district
10. Cornelius Martin, teacher of the handicapped, William H. Brown Academy, Newark public school district
11. S.G., eighth grade student, William H. Brown Academy
12. M.G., mother of S.G.
13. Theresa Garcia, director of health education and services, Newark public school district
14. Peter Grimes, Newark teachers' union representative
15. Eileen Johnston, home economics teacher, Newark public school district

List of Exhibits

No.	Description
P-1	Copy of memorandum to Ms. Johnston from Mildred E. English, dated September 9, 1991
P-2	Copy of memorandum to Ms. Eileen Johnston from Mildred E. English, dated September 10, 1991
P-3	Id. Copy of memorandum to Eileen Johnston from Mildred English, dated September 24, 1991
P-4	Copy of teacher observation report, dated October 20, 1988
P-5	copy of teacher observation report, dated February 7, 1989
P-6	Copy of teacher observation report, dated November 20, 1989
P-7	copy of teacher observation report, dated February 20, 1990
P-8	Copy of teacher observation report, dated March 12, 1990
P-9	Copy of teacher observation report, dated December 3, 1992
P-10	Copy of teacher observation report, dated March 4, 1993
P-11	Copy of memorandum to William Rock from Inez Adams, dated October 9, 1991
P-12	Copy of memorandum to Gerard J. Morano from August J. Alamo, dated April 11, 1990

- P-13 Copy of memorandum to Gerard J. Morano from August J. Alamo, dated May 17, 1990
- P-14 Copy of memorandum to Anzella K. Nelms from August J. Alamo, dated September 5, 1990
- P-15 Id. Copy of memorandum to Eileen Johnston from August J. Alamo, dated September 6, 1991
- P-16 Copy of memorandum to Eileen Johnston from August J. Alamo, dated September 9, 1991
- P-17 Copy of memorandum to Joseph G. Morano from August J. Alamo, dated September 11, 1991, with Exhibits P-1 and P-2 attached
- P-18 (a) Copy of memorandum to Joseph G. Morano from August J. Alamo, dated October 10, 1991
- (b) Copy of incident report, dated October 9, 1991
- P-19 Assignments of Eileen Johnston since the 1974-75 school year
- P-20 Copy of memorandum to Dr. Gene A. Foti from Gerard J. Morano, dated October 12, 1990
- P-21 Copy of memorandum to Eileen Johnston from Frank H. Walters, Jr., dated March 25, 1993, with attachments
- P-22 Copy of memorandum to Vivian K. Lampkin from Frank H. Walters, Jr., dated March 25, 1993, with attachments

- P-23 Copy of memorandum to Vivian K. Lampkin from Frank H. Walters, Jr., dated March 25, 1993
- P-24 Copy of memorandum to Eileen Johnston from Frank H. Walters, Jr., dated March 25, 1993
- P-25 Copy of memorandum to Vivian K. Lampkin from Frank H. Walters, Jr., dated March 26, 1993
- P-26 (a) Copy of memorandum to Vivian K. Lampkin from Frank H. Walters, Jr., dated March 31, 1993
- (b) Copy of memorandum to Frank H. Walters, Jr., from Stephanie Hairston, dated March 24, 1993
- (c) Copy of letter to Frank H. Walters, Jr. from Cornelius W. Martin, dated March 24, 1993
- P-27 Copy of report of medical examination by Dr. Tyrone Cabulu, dated January 18, 1991
- P-28 Copy of memorandum to A. Alamo from Theresa Garcia, dated March 1, 1991
- P-29 Copy of medical report by Dr. Andrea Birotte, orthopedic surgeon, dated March 11, 1991
- P-30 Copy of memorandum to Claude B. Craig from Theresa Garcia, dated March 12, 1991

- P-31 (a) Copy of home economics expense voucher for 1989-1990
- (b) Copy of home economics expense voucher for 1990-1991
- (c) Copy of home economics expense voucher for 1991-1992

- R-1 Copy of teacher observation report, dated September 23, 1991

- R-2 Copy of teacher observation report, dated September 30, 1991

- R-3 Copy of memorandum to Daniel Gutmore, Ph.D. from Gerard J. Morano, dated November 23, 1992

- R-4 Id. Copy of memorandum to Dr. Gene A. Foti from Joseph G. Morano, dated September 19, 1990

- R-5 Id. Copy of memorandum to Claude Craig from Gene A. Foti, Ed.D., dated October 12, 1990

- R-6 Id. copy of resolution of the Newark Board of Education, dated November 27, 1990

- R-7 Id. Copy of memorandum to Dr. Gene A. Foti from Claude B. Craig, dated May 6, 1991

- R-8 (a) Copy of medical report by Angelo Richard Bergamo, M.D., dated August 28, 1989
- (b) Copy of letter to Eileen from Sharon PannoZZo, dated October 11, 1989

- (c) Copy of medical report by Angelo Richard Bergamo, M.D., dated December 26, 1989
- (d) Copy of nurse's notes from August 8, 1989 to September 4, 1992
- R-9 (a) Copy of operator report and surgical pathology report from Montclair Community Hospital, dated August 18, 1989
- (b) Copy of operator report and surgical pathology report from Montclair Community Hospital, dated August 23, 1989
- (c) Copy of operator report and surgical pathology report from Montclair Community Hospital, dated October 16, 1989
- R-10 Copy of notes on office visits prepared by Frances Berlingeri, M.D., dated October 18, 1989
- R-11 Copy of employer's accident report, dated November 28, 1989
- R-12 Id. Copy of initial workman's compensation consultation report by Franklin Medical Associates, dated September 11, 1991
- R-13 Copy of medical report by R.V. Ballem, M.D., dated March 8, 1994
- R-14 Copy of notes by Franklin Medical Associates covering October 21, 1991 to December 18, 1991
- R-15 Id. Diagram of a classroom at Bergen Street School drawn by Eileen Johnston on May 6, 1994

IN THE MATTER OF THE TENURE :
HEARING OF EILEEN JOHNSON, :
SCHOOL DISTRICT OF THE CITY OF :
NEWARK, ESSEX COUNTY :
AND :
EILEEN JOHNSON, : COMMISSIONER OF EDUCATION
PETITIONER, : DECISION
V. :
BOARD OF EDUCATION OF THE CITY :
OF NEWARK, ESSEX COUNTY, :
RESPONDENT. :
_____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions of the Board were timely filed in accordance with N.J.A.C. 1:1-18.4. Respondent's exceptions, however, were untimely pursuant to this regulatory provision having been filed on January 17, 1995 in response to an initial decision mailed on December 28, 1994 and are, therefore, not considered herein.

The Board's exceptions urge the Commissioner to adopt the initial decision. Relying on testimony and its post hearing brief the board maintains that the nature and degree of respondent's misconduct requires her removal as a teacher in the district.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusion of

the Administrative Law Judge that the board has sustained its burden of proof with respect to its tenure charge of unbecoming conduct against respondent and that the appropriate penalty in this matter is respondent's dismissal from her tenured teaching position. The Commissioner further agrees that respondent's request for restoration of her 1992-93 salary increment must be denied.

Accordingly, the initial decision of the Office of Administrative Law is affirmed for the reasons well expressed therein. Respondent is hereby dismissed from her teaching position in the Newark public school district as of the date of this decision. This matter shall be transmitted to the State Board of Examiners pursuant to the requirements of N.J.A.C. 6:11-3.6 for action against respondent's certificate as it deems appropriate.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

FEBRUARY 6, 1995

DATE OF MAILING - FEBRUARY 6, 1995

EDU #9073-92 and #6758-93 (consolidated)

C # 45-95

SB # 5-96

IN THE MATTER OF THE TENURE HEARING OF :
EILEEN JOHNSTON, SCHOOL DISTRICT OF THE :
CITY OF NEWARK, ESSEX COUNTY, :

AND :

EILEEN JOHNSTON, :

RESPONDENT/PETITIONER-APPELLANT, : STATE BOARD OF EDUCATION

V. : DECISION ON MOTION

BOARD OF EDUCATION OF THE CITY OF :
NEWARK, ESSEX COUNTY, :

PETITIONER/RESPONDENT-RESPONDENT. :
_____ :

Decided by the Commissioner of Education, February 6, 1995

For the Petitioner/Respondent-Respondent, Gregory G. Johnson, Esq.

For the Respondent/Petitioner-Appellant, Rabner, Allcorn, Baumgart,
Ben-Asher & Tucker (David Owen, Esq., of Counsel)

On January 17, 1996, Eileen Johnston (hereinafter "appellant") filed the instant motion for leave to appeal out-of-time from a decision of the Commissioner of Education dated February 6, 1995 which dismissed her from her tenured employment for unbecoming conduct.

Appellant concedes that she is well beyond the 30-day filing period for appeals, but maintains that her former counsel, who represented her in the proceedings before the Commissioner, failed to notify her of the Commissioner's action. In a certification

3/6/96

included with her motion, appellant avers that she first learned of her dismissal from her union representative in September 1995.¹ She states that she then called her former counsel who advised her "for the first time" that she had been dismissed from her employment. He thereupon sent appellant a letter dated September 28, 1995 in which he indicated that he had written to her on January 11, 1995 advising her that the Administrative Law Judge ("ALJ") had "entered a decision sustaining the tenure charge of unbecoming conduct and ordering that you be terminated from your tenured teaching position in the Newark School District." His letter of September 28, 1995 included a copy of the ALJ's decision, which was dated December 20, 1994. Appellant contends that her former attorney never informed her of the Commissioner's February 6, 1995 decision adopting the ALJ's findings and conclusions or advised her that she could file an appeal to the State Board.

Upon careful review of the circumstances set forth in appellant's certification, and in consideration of the significance of the filing requirement with which she failed to comply, we deny appellant's motion.

Even accepting appellant's assertions as true, the record still indicates that she failed to file the instant motion for leave to appeal until January 17, 1996, more than three-and-a-half months after she acknowledges having received actual knowledge of her dismissal as a result of these proceedings. In her certification, appellant indicates that both her union representative and her former counsel advised her in September

¹ Appellant indicates that she had called her union representative in May 1995 to find out why she was no longer receiving paychecks.

1995 that she had been dismissed from her tenured employment and that her former counsel sent her a copy of the ALJ's December 20, 1994 decision recommending her dismissal on September 28, 1995.² Appellant's Certification, at 3.

Moreover, notwithstanding appellant's assertion that her former counsel failed to notify her of the Commissioner's February 6, 1995 decision adopting the ALJ's findings and conclusions, appellant does not contend that she filed the instant motion within 30 days after she did learn of that decision. We note further that the ALJ's December 20, 1994 recommended decision, which appellant acknowledges receiving from her former counsel in September 1995, expressly provided her with notice that the Commissioner was required to adopt, modify or reject the ALJ's recommendation within 45 days from the date thereof.

Pursuant to N.J.S.A. 18A:6-28, appeals to the State Board must be taken "within 30 days after the decision appealed from is filed." The State Board may not grant extensions to enlarge the time specified for appeal. N.J.A.C. 6:2-1.5(a). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6:24-1.2; N.J.A.C. 6:24-1.15, the time limit within which an appeal must be taken to the State Board is statutory, and, given the jurisdictional nature of the statutory time limit, the State Board lacks the authority to extend it. Mount Pleasant-Blythedale Union Free School District v. New Jersey Department of Education, Docket #A-2180-89T1, slip op. at 5 (App. Div. 1990).

² We note that the service list in the Office of Administrative Law in this matter included both appellant's former counsel and appellant personally at her home address.

In this case, the Commissioner's decision was rendered on February 6, 1995 and mailed to the parties on that date. Accordingly, pursuant to N.J.A.C. 6:2-1.4, the decision appealed from was deemed filed on February 9, 1995, three days after it was mailed to the parties. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6:2-1.3(a); N.J.A.C. 6:2-1.4(a), as computed under N.J.A.C. 6:2-1.4(b), appellant was required to file her notice of appeal to the State Board on or before March 13, 1995.

In Yorke v. Board of Education of the Township of Piscataway, decided by the State Board of Education, July 6, 1988, aff'd, Docket #A-5912-87T1 (App. Div. 1989), the Court upheld the dismissal of an appeal by the State Board where it found that the notice of appeal had been filed one day late by appellant's counsel, who alleged that he had misread or misunderstood the applicable regulations. The Court added that even if the statute could be construed to permit enlargement of the time for filing an appeal, the appellant therein had failed to establish good cause.

Thus, even if N.J.S.A. 18A:6-28 can be construed to provide us with the authority to enlarge the time limit for filing an appeal, we find no basis under the circumstances presented herein for granting appellant's instant motion for leave to appeal.

Wendel E. Daniels opposed.

March 6, 1996

Date of mailing MAR 08 1996

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46-95

IN THE MATTER OF THE TENURE	:	
HEARING OF IRVIN KOTKIN,	:	
FREEHOLD REGIONAL HIGH SCHOOL	:	COMMISSIONER OF EDUCATION
HIGH SCHOOL DISTRICT, MONMOUTH	:	DECISION
COUNTY.	:	

FEBRUARY 6, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO EDU 3694-93

AGENCY DKT. NO. 54-3/93

**SCHOOL DISTRICT OF THE
FREEHOLD REGIONAL HIGH
SCHOOL DISTRICT, MONMOUTH
COUNTY,**

Petitioner,

IRVIN KOTKIN,

Respondent.

**Malachi J. Kenney, Esquire, and Mary F. Hartnett, Esquire, for petitioner (Kenney,
Gross, McDonough & Stevens, attorneys)**

Robert M. Schwartz, Esquire, for respondent (Lake and Schwartz, attorneys)

Record Closed: September 12, 1994

Decided: December 22, 1994*

BEFORE M. KATHLEEN DUNCAN, ALJ:

The within matter was commenced on March 26, 1993 by the school district of the Freehold Regional High School District, Monmouth County (hereinafter petitioner) with the filing

* An extension of time for issuing the initial decision was requested and granted pursuant to N.J.S.A. 52:15B-10(c).

of tenure charges in accordance with the requirements of N.J.S.A. 18A:6-11 against Irvin Kotkin (hereinafter respondent). Petitioner certified three charges against respondent alleging conduct unbecoming a teaching staff member as follows:

CHARGE ONE

That the said Irvin Kotkin has engaged in improper and inappropriate touching and attempts to touch the bodies of female staff members employed by the Freehold Regional High School District.

CHARGE TWO

That the said Irvin Kotkin has made improper and inappropriate remarks to female staff members employed by the Freehold Regional High School District.

CHARGE THREE

That the said Irvin Kotkin has improperly and inappropriately addressed female staff members employed by the Freehold Regional High School District.

On April 8, 1993, respondent filed an answer in which he denied Charge One and Charge Three. An Amended Answer was filed on his behalf on April 14, 1993 in which all three charges were denied. On April 22, 1993 the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13.

A prehearing conference was conducted on June 30, 1993 at which time it was determined that the only issues for determination at hearing were whether any of the tenure charges were in fact true and if so, what were the appropriate sanctions/remedies? The hearing was scheduled for November 22, and 23, 1993 and December 7 and 8, 1993 at the Trenton office of the Office of Administrative Law. The hearing commenced as scheduled and continued on November 23; December 7 and 8, 1993, were preempted by an emergent matter on the judge's calendar and testimony in the within matter concluded on January 6, 1994. Thereafter the record remained

Emmerman confirmed in her testimony this description of Ms. L.'s demeanor as she was reporting the incidents that day. Both recalled that she had expressed concern about losing her job as a result of reporting these incidents.

Ms. F. was unable to be present at the hearing and the parties agreed to mark her deposition as evidence in lieu of her testimony. Concerning the several times respondent had addressed her on the telephone as "Hon" and "Babe," she had testified at her deposition:

I don't think he meant anything by it. I took a slight offense to it but I don't think he meant anything by it so I didn't let it bother me.

Although there were numerous, minor inconsistencies among the witnesses concerning specific dates or times or details of the incidents, of which respondent attempts to make much in his post-hearing written submissions, the discrepancies are merely the kinds of differences in detail anyone would normally expect when several different people report the same events a year and one-half after the fact. Accordingly, whether the first training session at Pine Street occurred in July or in August is insignificant; also insignificant is the date upon which Ms. L. first complained to Mr. DeGroot about respondent's behavior; obviously she could not have complained about it in July if it did not occur until August. Likewise inconsequential is the length of time Ms. Falkoff was absent from each session; none of the behavior would take more than a few seconds. I attribute any discrepancies among the testimony of petitioner's witnesses to the failure of recollection and the passage of time rather than to any conspiracy to give false testimony to get rid of respondent. Each of petitioner's witnesses was a candid, sincere and credible witness. The testimony of respondent and most of his witnesses, however, lacked the ring of truth. Ms. F., respondent's secretary of nineteen years, repeatedly responded "I can't recall" to the questions of both counsel. She denied having left either training session at the Pine Street building, when even respondent acknowledged that she had left the sessions upon occasion for either a cup of coffee or to use the rest room facilities. Respondent's attempt to explain away what Ms. McD. had observed in Ms. L.'s cubicle, *i.e.*, that he had rested his hand on the back of Ms. L.'s chair but did not touch her back, was not credible particularly since he indicated he had placed his arm in that location so he could lean forward to view the small computer screen. As noted by petitioner in its

post-hearing submissions, such a position would be extremely uncomfortable. Respondent's replies to the questions of the undersigned when he was asked for a distinction between addressing someone as "Babe," to which he readily admitted, and "Hon" or "Sweetheart", was likewise unpersuasive:

THE COURT: Mr. Kotkin, would you agree that if someone addressed a female staff, person, as hon or sweetheart that that would be inappropriate, and that the person would be justified in being offended?

THE WITNESS: Yes.

THE COURT: And you didn't think that that was true of the word 'babe'?

THE WITNESS: Not until January the 12th did I because I had used it quite frequently. But will I use it again? Absolutely not.

THE COURT: Well, how is babe different from hon or sweetie or dear?

THE WITNESS: When somebody had helped me with a project or had done something, I would say thank you, babe. Thanks very much, babe. And I did not think that it was considered to be an offensive word.

THE COURT: But you would say if you said the same thing, thank you, hon, or thank you, dear, that that would be offense, is that right?

THE WITNESS: I think it depends the way a person would take it. I consider myself as Mr. Kenney said, a warm person. And if someone said something like that to me, I would not take offense to it, Your Honor.

THE COURT: Well, do you know that that's not commonly accepted in the business community?

THE WITNESS: I do now.

THE COURT: But you didn't know that prior to January, 1993?

THE WITNESS: No.

Respondent insisted that he used the term "Babe" to address persons of both genders, and his witness Dr. James Hayden did respond "Yes" when asked whether respondent had ever addressed him as babe, so perhaps upon occasion he had used the word to address some of his male friends. There is a large distinction, however, between the inevitable and foreseeable impact of the word upon a female colleague or casual acquaintance who may be respondent's professional subordinate and the effect upon any male, particularly one who is respondent's friend. It is incredible to believe that any educated person after about 1980 would not be aware that the use of such terms to address women is condescending and demeaning at best. What effect the use of any of those terms by one man toward another might have, I can only speculate, but the effect, and undoubtedly the intent, would be vastly different.

Most curious, also, was respondent's repeated comments during the latter part of his testimony, after he had specifically denied all of the accusations, that "no harm was meant to anybody;" if the actions complained of did not occur, possible harm would not even be an issue. Finally, most incredible of all was respondent's explanation for his comments during his visit to Mr. DeGroot's office on the afternoon of January 12. According to respondent, all that had happened between Ms. L. and him earlier in the day had been a spontaneous gesture of appreciation to her for solving his computer problem, i.e., that he had grabbed her hand to shake it and had placed his other hand upon her right shoulder at which point she had "leaned back and she winced". Although he repeatedly denied on cross-examination that he viewed this wince as any indication of distaste or displeasure with his conduct, he also reiterated over and over that he had wanted to assure Ms. L. that nothing had been meant by his conduct and that it had been his intention to stop in to see her and tell her this after he dropped off the document at the Pine Street office, but he had been unable to do so because she was not there. The following exchange

between counsel for petitioner and respondent exemplifies his convoluted attempts to justify his conduct:

Q Mr. Kotkin, wasn't it your testimony less than 10 minutes ago that you did not construe Mrs. L.'s wince or her removal of her hand as a sign of distaste of hostility to what you had done?

A I did not, no. But I went to reassure her.

Q Why did you think she needed reassurance if she hadn't done anything to indicate to you dissatisfaction or displeasure with your conduct?

A Would you repeat that question?

Q Why would you need to reassure her if she hadn't done anything to indicate to your her dissatisfaction or displeasure with your conduct?

A Because I wanted her to know that there was no intent on my part to do anything to her.

Q Mr. Kotkin, you've said that seven times. And I will ask you an eighth time. Why did you think that reassurance was necessary if, by your own testimony, she didn't do anything to signify hostility, distaste, or displeasure with what you had done?

A. Because when she moved her shoulder and she winced back, I though that reassurance was necessary.

Q Why? Do you think, in fact, that the moving of her shoulder and wincing back indicating displeasure with what you had done?

A No.

Q No. Then why did she need to be reassured?

A Because it was important for her to know that there was no intent on anything to be done to her.

Q What do you mean by "no intent," Mr. Kotkin? No intent to do what?

A That nothing was meant by it other than my gratitude for a job that she had done.

Q Well, why did you think that she might have had a different perception of your conduct if, by your testimony, she gave no sign of displeasure or distaste?

A Because it bothered me as I was driving over to the Pine Street School.

Q Is it your testimony then upon thinking about what had occurred while driving over to Pine Street School, it occurred to you for the first time that this might have been a sign of distaste or displeasure?

A Yes.

Q I see. And did you, in fact, convey that concern to Ms. L. that she understand that there was no intent when you got over to Pine Street?

A No.

Q You didn't speak to her?

A No.

Q Why not?

A She wasn't there.

Q Did you hear Mr. DeGroot's testimony --

A Yes.

Q -- that you came into his office and attempted to speak to him while he was on the phone?

A Yes.

Q And you heard him testify that during a break in the conversation, he heard you say that there had been a misunderstanding with B.? Did you hear that?

A Yes.

Q And that he kind of waved you off and said he'd take care of it.

A Yes.

Q Do you recall that? And that tracks with your testimony and your recollection of events, doesn't it?

A Yes.

Q Fine. Did you also hear Mr. DeGroot testify that he shortly finished-up the phone call and then went out into the other room and spoke to B.L. about your visit?

A No, I don't remember that.

Q You don't remember. Did you hear Mr. DeGroot testify that he asked B.L. about what had happened based on your conversation that same afternoon?

A Yes, I did hear.

In fact, as is evident from both Ms. L.'s and Mr. DeGroot's testimony, Ms. L. was in the office when Mr. Kotkin went in to tell Mr. DeGroot about "a misunderstanding". A far more likely scenario is that respondent realized that he had "gone too far" that time and that Ms. L. was likely to complain to someone, probably her direct supervisor, Mr. DeGroot, and respondent wanted to see whether, in fact, that had happened.

"Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances . . ." Spagnuolo v. Bonnett, 16 N.J. 546, 554-555 (1954). Respondent's testimony satisfies neither of these conditions. His testimonial demeanor at trial was reflective of the attitude expressed numerous times in his testimony and throughout his

post-hearing written submissions that he, a twenty-six year employee with nineteen years' experience as a principal, ought to be believed as opposed to Ms. L. who had been employed less than one year as a computer operator, notwithstanding the fact that Ms. L.'s version was corroborated in one incidence directly by an eye witness, Ms. McD., and in others indirectly by simultaneous reports of the incident by Ms. L. to Ms. McD., Mr. DeGroot, Mr. Wasser and Dr. Emmerman. In addition, respondent could offer absolutely no reason why Ms. L. would fabricate these complaints. He had never complained about her work and in fact, he had been pleased with it. It is difficult to image what ulterior motive could have prompted Ms. L. in the context of the within proceedings where she has no prospect of monetary recovery to bring these charges falsely against respondent and to subject herself to the unpleasantness of cross-examination, to the possibility of humiliation by not being believed, etc., etc., etc. For all of the foregoing reasons, I **FIND** the facts to be as reported by Ms. L., Ms. McD. and Ms. F. Specifically, I **FIND** that on more than one occasion during training sessions in Ms. L.'s cubicle at the Pine Street administration building, respondent placed his hands on her shoulders, attempted to put his arm around her by draping it across her back and touching her opposite shoulder and that on January 12, 1993 he had held and squeezed her hand, placed his arm around her and placed his hand upon her thigh, upon which she recoiled and he said something to the effect, "You must come from a very cold family" and made a comment about her husband. I further **FIND** that on numerous occasions he addressed Ms. L. and Ms. F., and on one occasion Ms. McD. as "Babe" and on other occasions he addressed Ms. L. and Ms. F. as "Hon".

APPLICABLE LAW AND DISCUSSION

As in Matter of Seaman, 133 N.J. 67 (1993), the inquiry here is not whether respondent's behavior constituted sexual harassment as such. Thus, we also need not address whether the conduct complained of created a "hostile working environment" for the complainants. Lehmann v. Toys "R" Us, 1132 N.J. 587 (1993). The charges petitioner must prove herein are that respondent was guilty of conduct unbecoming a teaching staff member so as to require that his tenure in the school district be terminated, pursuant to N.J.S.A. 18A:6-10. As the court noted in Seaman, supra, although undoubtedly all forms of behavior that cross the legal threshold of sexual

harassment will constitute conduct unbecoming, many forms of offensive interpersonal behavior that would constitute conduct unbecoming, would not meet the legal definition of sexual harassment. Although the specific incidences of conduct in this matter are clearly not as egregious as those engaged in by Judge Seaman* nevertheless the charges of misconduct against respondent herein also equate with sexual harassment. By addressing female staff members as “Babe” and “Hon”, respondent deprived them of the dignity and respect with which they are entitled to be treated in the work place. As previously noted, to be addressed in such a fashion is demeaning and personally offensive. By repeatedly subjecting Ms. L. to his unconsented touching, he invaded her personal privacy, embarrassing her and upsetting her. Most offensive, of course, was the incident where he placed his hand upon her thigh and when she finally advised him that he was making her feel uncomfortable, he made his insulting remark about her “cold family” and reference to her husband. Much of what the Court had to say about Judge Seaman’s conduct concerning the nature of the offense and the effect upon the victim applies equally to the conduct in the within proceedings. The Court’s notation that one can be offended by certain conduct while still being reticent to report it for fear of losing one’s job, creating controversy, not being believed, not being supported, or generally making matters worse, certainly rings true in the within matter. Ms. L. was faced with the same three undesirable options faced by every victim of offensive remarks and unwanted touching, *i.e.*, to tolerate the harassment quietly, to oppose it and risk reprisals, embarrassment, etc., or to resign from her employment. Seaman, at 90. Ms. L. should be commended for her courage. Unfortunately, the only way to eradicate this type of conduct is for women and the legal system to announce loudly and with sanctions of consequence that this type of conduct will not be tolerated.

“Sexual harassment of women by men is among the most pervasive, serious, and debilitating forms of gender discrimination,” the Court in Seaman confirmed. *Id.* at 99. “We are

* Judge Seaman was found to have harassed his female law clerk by lifting her skirt and touching her knee, by lifting her skirt from the back and looking at her legs, by grabbing her hand and attempting to place it on his crotch, by remarking to her that he wished her pen was his penis, by asking her to repeat a dirty word to him, by advising her that were they to have sexual relations on his desk, he would be sure to avoid a crack on the desk that might scratch her and by bragging about his sexual prowess, among other things.

well aware that sexual harassment, like other forms of discrimination, debilitates its victims and has, as its ultimate effect, the continued subordination of women.” Id. at 100. The burden of proof for establishing claims before state agencies and contested administrative adjudications is a fair preponderance of the evidence. In re Polk License Revocation, 90 N.J. 550, 560 (1982). Unquestionably, petitioner has established by a preponderance of the believable evidence that respondent was guilty of conduct unbecoming a teaching staff member by his mistreatment of Ms. L. and also Ms. F. and Ms. McD.

The remaining issue, i.e., the appropriate remedy or sanction for respondent’s misconduct presents some difficulty simply because respondent resigned his teaching staff position with petitioner and retired under the Teachers’ Pension and Annuity Fund, effective August 1, 1994. Accordingly, a suspension without pay such as the one the Court felt appropriate to remediate Judge Seaman’s conduct, is not an option. Like Judge Seaman’s victim, respondent’s victim was particularly vulnerable since she was a new employee in the district and held a position well below respondent’s in the educational hierarchy. Like Judge Seaman, respondent never acknowledged his wrongdoing or expressed contrition but rather cast aspersions upon the truthfulness of his accusers and the motivations of the school administrators. Although it is true that this is the first time respondent has been found guilty of such misconduct, the reason may well relate to the fact that this is the first time another employee has had the audacity to challenge his behavior. Some meaningful sanction must be imposed to impress upon respondent the severity of his conduct and to warn all others who would disregard* “the imperative of public policy - the overriding social goal of achieving a society where all citizens are treated with respect regardless of gender”- (Seaman, at 101) that the Commissioner will not tolerate such behavior in the schools under his jurisdiction.

Petitioner’s September 12, 1994 response to respondent’s request for interlocutory review of the order denying the motion to dismiss noted that respondent was claiming that he was entitled to be compensated for 116 unused sick days and 22.5 unused vacation days remaining at

* “Disregard” is the appropriate word here because, as previously noted, it is inconceivable that educated persons are still unaware.

the time of his retirement. Petitioner's letter noted that it was not inclined to grant respondent's request for compensation but added that the Board's determination would not preclude respondent from pursuing the claim further. Accordingly, it is hereby **ORDERED** that respondent shall forfeit any monetary benefits which might remain due and owing to him for unused sick leave or unused vacation time or for any other claim against petitioner related to his previous employment.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Dec 22, 1994
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

DEC 22, 1994
DATE

Hope R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

Jeff S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 03 1995

DATE

OFFICE OF ADMINISTRATIVE LAW

cc

IN THE MATTER OF THE TENURE :
HEARING OF IRVIN KOTKIN, FREEHOLD :
FREEHOLD REGIONAL HIGH SCHOOL : COMMISSIONER OF EDUCATION
HIGH SCHOOL DISTRICT, MONMOUTH : DECISION
COUNTY. :
_____ :

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and the Board's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Respondent's exceptions advance arguments with respect to three facets of the initial decision - the Administrative Law Judge's (ALJ) factual findings, her use of Matter of Seaman, 133, N.J. 67 (1993) in determining his penalty herein, and her determination that the within tenure charges were not rendered moot by respondent's retirement. Initially, respondent argues that the ALJ appears to have functioned more as an advocate than a finder of fact in this matter by interpreting testimony of witnesses to support the conclusion which she apparently wanted to reach, allowing her to send a message to the "entire educational community." (See ALJ's August 12, 1994 Letter Order) He contends that "he has been chosen by this court to send its message, a message not based on the actual facts as they were presented, but rather as they were depicted by the court." (Respondent's

exceptions at p. 2) In this connection, respondent maintains that the ALJ gave undue credence to the testimony of the Board's witnesses, particularly that of B.L., interpreting such testimony in the most favorable possible light with no regard for discrepancies or contradictions therein while fully ignoring his credible testimony and that of those testifying on his behalf. Respondent makes extensive reference to specific testimony with respect to each of the charges which he contends supports this assertion.

In further support of his contention that the court herein molded the facts in this case to suit its purpose of writing a decision, respondent points to page 19 of the Initial Decision where the ALJ stated "while it was true that this was the first time respondent has been found guilty of such misconduct the reason may well relate to the fact that this is the first time another employee has had the audacity to challenge his behavior." He argues

[f]or the court to even infer that other incidents of this type may have occurred previously when no evidence, or even inference, was ever presented by anyone to even remotely suggest that such conduct had previously occurred, only illustrates the court's loss of objectivity...It is outrageous that the court, the finder of fact, took it upon itself without prompting from anyone and without any evidence from anyone - without any facts - to conclude that the reason no other charges may be found in respondent's prior 26 years of impeccable service is because no one had the courage of B.L. to come forward.

(Respondent's exceptions at p. 3)

Respondent next excepts to the ALJ's comparing of this matter to the Seaman, supra, case, contending that, even assuming the facts herein are as alleged by B.L., the two matters are in no way comparable in degree or in kind as the conduct in Seaman was

clearly deliberate, overtly sexual in nature, and objectionable to anyone with reasonable sensibilities which is not the case here.

Lastly, respondent argues that the ALJ erred in denying his motion to dismiss this case as moot as a result of his retirement. He maintains "...the tenure charges brought by the petitioner w(ere) inexorably linked to its employment relationship with the respondent. If the respondent was found to have exhibited conduct unbecoming, any penalty would have pertained to the respondent's continued employment with petitioner. Therefore, once the employment relationship had been severed, as it had been in August 1994, there ceased to be a reason to continue with this matter." (Respondent exceptions, pp. 13-14) Respondent further asserts that since the ALJ's denial of his motion in August 1994, B.L. has left petitioner's employ and he suffered another heart attack which required hospitalization. He urges that in light of his retirement and these subsequent occurrences, no harm would result to B.L. or petitioner if this matter were dismissed as moot based on changed circumstances.

In reply, the Board argues that respondent's allegations with respect to the existence of significant discrepancies and contradictions in testimony and his charge that the ALJ disregarded these, evidencing judicial bias are without foundation. It maintains that the testimony of B.L. describing the inappropriate actions of respondent was quite clear as was the testimony of the corroborating witnesses concerning B.L.'s contemporaneous, consistent descriptions of his behavior. The Board presents its explanations of each of the inconsistencies argued by respondent, along with cited portions of hearing transcripts, which it asserts

lead to the conclusion that such alleged inconsistencies were either non-existent or irrelevant in nature.

The Board further maintains that the ALJ's discussion regarding sending a message to the educational community, rather than evidencing bias on her part, is fully appropriate given the nature of this case. It posits that because "there is a dearth of case law providing definition for the statutory phrase "unbecoming conduct" in the context of sexual harassment creating a hostile working environment...the ALJ was correct in noting the importance of providing guidance in a relatively new but rapidly developing area of law." (Board's exceptions at p. 14).

Likewise, the Board urges that the ALJ's comments on page 19 of the initial decision were merely a recognition "of the dynamics of sexual harassment in the workplace, the kinds of embarrassment and fear of losing a job which have been repeatedly documented as reasons why women hesitate to make such complaints." (Board's exceptions at pp. 14-15). It contends that the ALJ neither found nor suggested that respondent had engaged in this type of behavior in the past but rather she just observed "that a previously clean record is not dispositive of innocence in these matters." (Board's exceptions at p. 15) The Board, therefore, urges that the record does not support allegations of bias on the part of the ALJ but, instead, contains substantial credible evidence supporting her findings and conclusions.

The Board next urges rejection of respondent's claim of improper reliance on Seaman, supra, in determining his penalty herein, pointing out that the ALJ clearly distinguished the behavior in this matter from that in Seaman, supra. (See Initial Decision at

p. 18) It further asserts that because there are relatively few cases dealing with sexual harassment in the workplace, the ALJ would have been remiss in ignoring this case.

Lastly, the Board maintains that a determination of mootness of these charges as a result of respondent's retirement is precluded since the within charges represent a novel issue, i.e., "whether, and to what extent, conduct which creates a hostile work environment for a female co-worker constitutes "unbecoming conduct" within the meaning of N.J.S.A. 18A:6-10 (Board's exceptions at p. 19), the respondent has a pending claim for unused sick and vacation days, and there is a need to prevent possible repetition of this conduct by respondent in another jurisdiction. The Board, therefore, urges the Commissioner to adopt the recommended initial decision in its entirety.

Upon a thorough and independent review of the record in this matter, including the extensive exception submissions of the parties and transcripts of the three days of hearings conducted at the OAL, the Commissioner concurs with the findings and conclusion of the ALJ that the Board has sustained its charges of unbecoming conduct against respondent. The Commissioner finds respondent's argument with respect to the ALJ's factual findings and his suggestion that such findings were colored by her own personal agenda to be totally without merit. The Commissioner is fully satisfied after his review that the ALJ's recitation of testimony is both accurate and thorough, that she carefully measured conflicts and inconsistencies in deciding which testimony to credit in reaching her factual findings and that the record contains substantial evidence to support such findings and conclusions.


The Commissioner next categorically rejects respondent's contention that his retirement, effective August 1, 1994, rendered the within charges moot requiring their dismissal, and he is not persuaded to the contrary by any of the "changed circumstances" which occurred subsequent to this retirement date. Charges of improper and inappropriate conduct are extremely serious in nature, and must be viewed in light of the Commissioner's concern and obligation regarding the safety and integrity of the schools statewide and the fact that an individual's retirement from one district does not necessarily preclude subsequent employment in other school districts of the state. Consequently, in matters of this nature, the Commissioner cannot permit an individual's retirement to effectively allow him to sidestep adjudication of such charges on their merits. Although the Commissioner does agree with respondent's exception argument that the behavior at issue herein does not rise to the level of egregiousness as that exhibited in Seaman, supra, such behavior was clearly demeaning and offensive and cannot and will not be considered de minimis or in any way be tolerated from a teaching staff member in the public schools of New Jersey.

Notwithstanding the above, while the Commissioner strongly believes that respondent should not be permitted to escape the consequences of his actions, he cannot agree with the ALJ's recommended penalty in this matter, i.e., respondent's forfeiture of monetary benefits which may remain due and owing him for unused sick leave and unused vacation time. The Commissioner finds and determines that respondent's entitlement to such benefits, whatever that entitlement may be, accrued to him at the time of his

retirement on August 1, 1994, at which time there had been no adjudication on the merits of the within charges. As such, the Commissioner finds no basis to "reach back" in the meting of a penalty. Rather, the Board herein is directed to make these charges and their resolution a part of respondent's permanent personnel file. Further, this matter will be transmitted to the State Board of Examiners for action as it deems appropriate with respect to respondent's teaching certificate.

Accordingly, the initial decision of OAL is adopted, as modified herein, as the final decision in this matter, and this case is hereby referred to the State Board of Examiners.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

FEBRUARY 6, 1995

DATE OF MAILING - FEBRUARY 6, 1995

47-95

NEW JERSEY DEPARTMENT OF EDUCA- :
TION, SCHOOL ETHICS COMMISSION, :

PETITIONER, :

V. :

MICHAEL J. DE BARTOLO, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

FEBRUARY 7, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EEC 7415-93

AGENCY REF. NO. CO7-93

**NEW JERSEY DEPARTMENT OF EDUCATION
SCHOOL ETHICS COMMISSION,**

Petitioner,

v.

MICHAEL J. DeBARTOLO

Respondent.

David E. Powers, Deputy Attorney General, for petitioner
(Deborah T. Poritz, Attorney General of New Jersey, attorney)

Peter J. Scandariato, Esq., for respondent
(Smith, Don, Alampi & D'Argenio, attorneys)

Record Closed: November 17, 1994

Decided: November 21, 1994

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

This matter was transmitted to the Office of Administrative Law by the School Ethics Commission on August 6, 1993 and pertains to an Order to Show Cause which was filed by the Commission requiring the respondent to demonstrate why he should not be found to have violated certain provisions of the New Jersey School Ethics Act, N.J.S.A. 18A:12-26(a)(1) and N.J.S.A. 18A:12-24(b).

A settlement conference was conducted by the undersigned Administrative Law Judge on September 23, 1993 at which time I was advised that the parties were discussing settlement of the dispute and that a Stipulation of Settlement would be

prepared. Thereafter the parties conferred with one another and reached agreement with respect to the terms and conditions of a settlement.

The Stipulation of Settlement which has been signed by counsel and by the respondent essentially provides that respondent agreed that he inadvertently had failed timely to file a full and complete financial disclosure statement on his 1993 financial disclosure statement form. The School Ethics Commission agrees to withdraw any allegation that respondent violated N.J.S.A. 18A:12-24 and it also agreed to recommend to the Commissioner that the appropriate penalty to be imposed for the inadvertent failure to file be a letter publicly reprimanding respondent for that conduct. The parties also have agreed that the settlement will not be used in any other proceeding and that the penalty recommendation which has been approved by the School Ethics Commission is subject to review by the Commissioner. Should the Commissioner decide to impose a different penalty more severe in its impact, then, and in that event, respondent has reserved the right to seek to have the matter reinstated at the Office of Administrative Law and to proceed as a contested case.

I have reviewed the record and the terms of the Stipulation of Settlement which is attached hereto and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby file my initial decision with the Commissioner of the Department of Education. The School Ethics Commission agrees to the terms of the initial decision as evidenced by the executed Stipulation of Settlement attached hereto.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

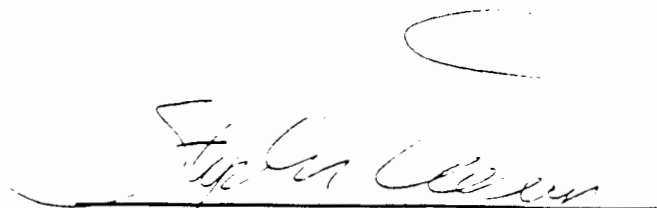
Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER**

OAL DKT. NO. EEC 7415-93

OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton,
New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be
sent to the judge and to the other parties.

November 21, 1994

DATE



STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

December 2, 1994

DATE

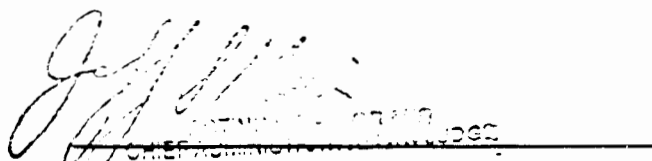


DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 14 1994

DATE



OFFICE OF ADMINISTRATIVE LAW

vmh

RECEIVED

Nov 17 11 39 AM '94

SMITH, DON, ALAMPI & D'ARGENIO
COUNSELLORS AT LAW
210 Sylvan Avenue
Englewood Cliffs, New Jersey 07632
(201) 947-4100

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

Attorneys for Respondent, Michael J. DeBartolo

		: BEFORE THE OFFICE OF
		: ADMINISTRATIVE LAW
		: :
IN THE MATTER OF MICHAEL J. DEBARTOLO	:	
	:	
	:	: OAL DOCKET NO. EEC-7415-93
	:	: :
	:	: SETTLEMENT AGREEMENT

WHEREAS, this matter was opened by the issuance by the School Ethics Commission of an Order to Show Cause pursuant to N.J.S.A. 18A:12-29(b) to respondent Michael J. DeBartolo to show cause why he should not be found in violation of the requirements of N.J.S.A. 18A:12-24 and respondent Michael J. DeBartolo having filed a response thereto, and

WHEREAS, counsel for the School Ethics Commission and respondent Michael J. DeBartolo have engaged in discovery, find that a settlement is in the best interest of the parties and have been authorized by their respective clients to enter into a Settlement Agreement,

NOW THEREFOR, the parties hereto agree as follows:

1. Respondent Michael J. DeBartolo agrees to withdraw his answer contesting the Order to Show Cause.

2. Respondent Michael J. DeBartolo agrees to accept the determination of the School Ethics Commission that he failed to timely file a full and complete financial disclosure statement by inadvertently failing to list on his 1993 financial disclosure statement certain rental property as an additional source of income.

3. The School Ethics Commission agrees to withdraw or dismiss any allegation that respondent violated any provision of N.J.S.A. 18A:12-24.

4. The School Ethics Commission further agrees to recommend to the Commissioner of Education that the appropriate penalty to be imposed in this matter is a public letter reprimanding respondent for his inadvertent failure to timely file a full and complete financial statement.

5. The parties hereto agree that this settlement may not be used in any proceeding other than in determining the appropriate penalty should respondent be found to have violated the provisions of N.J.S.A. 18A:12-24 et seq. by virtue of his conduct as a school official in matters other than those raised in this Order to Show Cause.

6. This settlement shall be effective on approval by the School Ethics Commission but subject to the Commissioner of Education's determining that the penalty recommended by the School Ethics Commission is appropriate.

7. Should the Commissioner of Education impose a penalty inconsistent with the terms of this Settlement, respondent Michael J. DeBartolo shall have the option of having this matter reinstated in the Office of Administrative Law and heard as a contested case.

BY: *Peter J. Scandariato* *November 17, 1994*
Peter J. Scandariato, Esq. Date
Attorney for Michael J. DeBartolo

BY: *D. Powers* *25 October 1994*
David Earle Powers, D.A.G. Date
Attorney for School Ethics Commission


I have read this Settlement Agreement, the terms of which have been fully explained to me and I have authorized my attorney to sign it on my behalf.

Michael DeBartolo *Nov 9 1994*
Michael J. DeBartolo Date

NEW JERSEY DEPARTMENT OF EDUCA-	:	
TION, SCHOOL ETHICS COMMISSION,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
MICHAEL J. DE BARTOLO,	:	DECISION
	:	
RESPONDENT.	:	
<hr/>		

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


 COMMISSIONER OF EDUCATION

FEBRUARY 7, 1995

DATE OF MAILING - FEBRUARY 7, 1995

DHP #460-94
SB # 47-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF GARY C. ROBINSON. : DECISION

_____ :

Decided by the Deputy Commissioner of Education,
January 24, 1995

For the Petitioner-Appellant, Gary C. Robinson, pro se

For the Respondent-Respondent, Arlene G. Lutz, Deputy
Attorney General (Deborah T. Poritz, Attorney
General of New Jersey)

The State Board of Education grants the request of the parties to remand this matter to the Commissioner of Education for a hearing in order to provide the petitioner with an adequate opportunity to establish a record in support of his contention that he has satisfied the statutory standard for rehabilitation.¹ Given the circumstances, we direct that such hearing and a final determination by the Commissioner be rendered on an expedited basis, and that such determination considers all pertinent

¹ We note that the Office of Criminal History Review was apparently not represented in the proceedings before the Deputy Commissioner and was not served with notice of the appeal to the State Board. Upon the filing of the appeal, Counsel to the State Board notified the Attorney General's Office that an appeal had been taken in the matter, and transmitted a copy of the record. A Deputy Attorney General was then assigned to appear as attorney of record in the appeal.

Aug. 2, 1995

circumstances under the factors set forth in N.J.S.A. 18A:6-7.1, including "any evidence of rehabilitation." See Wolffbrandt v. New Jersey State Department of Education, decided by the State Board, July 1, 1992. We note in that regard that the statute expressly requires consideration of the "date of the offense" (emphasis added), rather than the date of conviction relied upon by the Deputy Commissioner in his decision. Petitioner has the burden on remand of establishing his rehabilitation by clear and convincing evidence.

We stress, in addition, that, while the Deputy Commissioner regarded petitioner's conviction for simple assault to be a non-disqualifying offense, N.J.S.A. 18A:39-19.1, which applies specifically to school bus drivers, expressly includes "assault" as a disqualifying offense for individuals seeking employment as school bus drivers. Thus, in direct contrast to N.J.S.A. 18A:6-7.1, which sets forth the disqualifying offenses for employees other than school bus drivers, N.J.S.A. 18A:39-19.1 does not distinguish between simple and aggravated assault.

We retain jurisdiction.

August 2, 1995

Date of mailing AUG 04 1995

(SB) 47-95

DHP #460-94
SB # 47-95
DHPB #135-96

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF GARY C. ROBINSON. : DECISION
_____ :

Decided by the Deputy Commissioner of Education, January 24, 1995

Remanded by the State Board of Education, August 2, 1995

Decision on remand by the Commissioner of Education, April 8, 1996

For the Petitioner-Appellant, Gary C. Robinson, pro se

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney
General (Deborah T. Poritz, Attorney General of New Jersey)

On August 2, 1995, we remanded this matter to the Commissioner of Education for a hearing in order to provide petitioner, who had been disqualified from employment in the State's schools as a bus driver following a criminal history record review conducted pursuant to N.J.S.A. 18A:39-19.1 et seq., with an adequate opportunity to establish a record in support of his contention that he had satisfied the statutory standard for rehabilitation. We retained jurisdiction.

In accordance with our remand, the Commissioner transmitted this matter to the Office of Administrative Law, where a hearing was held on January 10, 1996. On February 21, 1996, the Administrative Law Judge ("ALJ") rendered an initial decision in which she concluded that petitioner had not demonstrated his rehabilitation by clear

2/10/96

and convincing evidence. On April 8, 1996, the Commissioner adopted the ALJ's recommended decision upholding petitioner's disqualification from school employment and, pursuant to our retention of jurisdiction, transmitted the file back to us. Petitioner has not filed an appeal from that decision.

After a review of the record, we are satisfied that the Commissioner fully complied with the terms of our remand. Accordingly, we dismiss the appeal.

July 10, 1996

Date of mailing JUL 12 1996

48-95

IN THE MATTER OF THE TENURE	:	
HEARING OF GERALD STRINCOSKI,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN-		DECISION
SHIP OF OLD BRIDGE, MIDDLESEX	:	
COUNTY.	:	
_____	:	

FEBRUARY 8, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5733-94

AGENCY DKT. NO. 74-4/94

**BOARD OF EDUCATION OF THE
TOWNSHIP OF OLD BRIDGE,
MIDDLESEX COUNTY,**

Petitioner,

v.

GERALD STRINCOSKI,

Respondent.

Francis X. Journick Jr., for petitioner (Wilentz, Goldman
& Spitzer, attorneys)

Gail Oxfeld-Kanef, Esq., for respondent (Balk, Mandell & Cohen, attorneys)

Record Closed: December 9, 1994

Decided: December 16, 1994

BEFORE CAROL LASKIN, ALJ t/a:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) on June 10, 1994, for a hearing pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The parties have agreed to settle this matter and have prepared a settlement agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does

not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Dec 16, 1994
DATE

Carol J. Laskin
CAROL LASKIN, ALJ/ta

12/29/94
DATE

Receipt Acknowledged:

Hope R. [Signature]
DEPARTMENT OF EDUCATION

JAN 05 1995
DATE

Mailed to Parties:
Jeff J. Marin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

njf

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
90 Woodbridge Center Drive
P.O. Box 10
Woodbridge, New Jersey 07095-0958
(908) 636-8000
Attorneys for Petitioner
Old Bridge Board of Education

NEW JERSEY OFFICE OF
ADMINISTRATIVE LAW
OAL DOCKET NO. EDU-05733-94S
AGENCY REF. NO. 74-4/94

-----X
THE BOARD OF EDUCATION OF :
THE TOWNSHIP OF OLD BRIDGE, : On Referral from the
MIDDLESEX COUNTY, : Commissioner of Education,
 : New Jersey Department
 : of Education
 :
Petitioner, :
 :
 :
v. :
 :
GERALD STRINCOSKI, : STIPULATION OF SETTLEMENT
 :
Respondent. :
 :
 :
-----X

The petitioner Board of Education of the Township of Old Bridge (the "Board") and the respondent Gerald Strincoski ("Strincoski") having conferred with respect to this matter and having mutually agreed upon certain terms by which this matter may be settled, such terms being set forth in this Stipulation of

Settlement, it is hereby stipulated and agreed by and between the Board and Strincoski as follows:

1. Strincoski shall and hereby does resign from the employ of the Board effective as of April 30, 1995. Until April 30, 1995, the Board shall continue to pay Strincoski his salary.

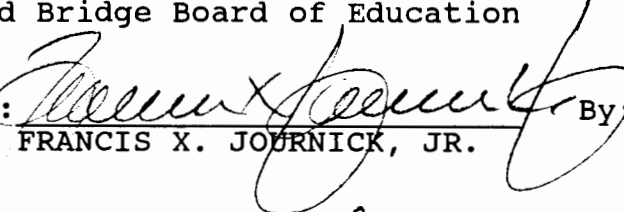
2. On and after April 30, 1995, in response to inquiries from any prospective employer of Strincoski, the Board shall supply such prospective employer only Strincoski's period of employment and rate of salary paid by the Board. The Board shall specifically make no comment concerning Strincoski's performance to such prospective employer.


3. Strincoski hereby waives all rights to continued employment or reemployment by the Board, including but not limited to any and all rights based on tenure and/or seniority and any and all rights to be recalled to employment by the Board or appear on any recall or other list of employees eligible for employment or reemployment by the Board. Strincoski also hereby waives and releases any and all claims, whether known or unknown, against the Board which arise out of or relate to his employment by the Board, including but not limited to claims for unpaid salary or other employment benefits. Similarly, the Board hereby waives and releases any and all claims, whether known or unknown, against Strincoski which arise out of or relate to his employment by the Board.

4. This Stipulation of Settlement is subject to and contingent upon approval by the Board, such approval to be in the form of a resolution adopted by the Board.

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
Attorneys for Petitioner
Old Bridge Board of Education

BALK, OXFELD, MANDELL & COHEN
Attorneys for Respondent
Gerald Strincoski

By: 
FRANCIS X. JOURNICK, JR.

By: 
GAIL OXFELD-KANEF

DATED: December 9, 1994

DATED: December 8, 1994

IN THE MATTER OF THE TENURE :
HEARING OF GERALD STRINCOSKI, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN- : DECISION
SHIP OF OLD BRIDGE, MIDDLESEX :
COUNTY. :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

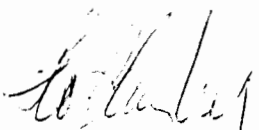
It is noted that Provision 2 of the Settlement Agreement states that in reply to inquiries from prospective employers the Board will supply only respondent's period of employment and rate of salary. The parties are hereby reminded that Executive Order No. 11 (1974), in pertinent part, requires that the following information be public:

An individual's name, title, position, salary, payroll record, length of service in the instrumentality of government and in the government, date of separation from government service and the reason therefor; and the amount and type of pension he is receiving.

With the understanding that such required disclosure would not be precluded by the settlement agreement before him, the Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and

adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

FEBRUARY 8, 1995

DATE OF MAILING - FEBRUARY 8, 1995

49-95

BENNY MARS,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
NEW JERSEY STATE INTERSCHOLASTIC	:	DECISION ON MOTION
ATHLETIC ASSOCIATION,	:	
	:	
RESPONDENT.	:	
_____	:	

FEBRUARY 9, 1995

BENNY MARS, :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 NEW JERSEY STATE INTERSCHOLASTIC : DECISION
 ATHLETIC ASSOCIATION, :
 RESPONDENT. :
 _____ :

For the Petitioner, James S. LaCorte, Esq. (La Corte Bundy & Varady)

For the Respondent, New Jersey Interscholastic Athletic Association (Steven P. Goodell, Esq.) Picco, Mack, Herbert

This matter was opened before the Commissioner of Education on January 12, 1995, by way of Petition of Appeal and Motion for Emergent Relief by counsel for Benny Mars seeking an order staying the decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) Eligibility Appeals Committee (EAC) on December 6, 1994, declaring petitioner ineligible to participate in interscholastic competition for the 1994-95 basketball season at Elizabethtown High School. The NJSIAA based its decision on age ineligibility as petitioner, who is a high school senior, reached the age of 19 on July 21, 1994. Article V section 4c of the NJSIAA bylaws provides that a student becomes ineligible for high school athletics if he attains the age of nineteen prior to September 1. Petitioner asserts that the NJSIAA erred by arbitrarily and capriciously interpreting its rules. Petitioner asserts that

irreparable harm will result from this decision because he will be unable to display his basketball ability to college recruiters unless he is permitted to participate in interscholastic competition, thus denying him his only opportunity to earn a scholarship to attend college.

Upon careful consideration of the briefs of counsel for the petitioner and of the respondent Association, the record and transcript of the NJSIAA proceeding, the requirements set forth in N.J.A.C. 6:24-1.5, and the standards for granting an application for emergent relief or a stay established by Crowe v. DeGioia, 90 N.J. 126 (1982), the Motion for Emergent Relief is hereby denied for the reasons expressed herein. The criteria set forth in Crowe, supra, dictate that emergent relief must be granted where the Petitioner establishes: a) irreparable injury; b) a substantial likelihood of success on the merits; or c) where the relative hardships are balanced against granting relief. I find that petitioners have failed to advance sufficient evidence to satisfy the Crowe, supra requirements.

Petitioner asserts that given his disadvantaged background, this year's basketball participation, which may lead to a college scholarship, is essential to his future development. Thus, to deny him an opportunity to compete in interscholastic competition this basketball season will deprive him of his only opportunity to attend college. (Petitioner's Brief at p. 2)

NJSIAA asserts that its Executive Committee did not act in an arbitrary or capricious manner, that the petitioner was provided with full and complete due process and that there is an adequate

basis for the NJSIAA decision. (See Respondent's Motion in Opposition to Application for Emergency Relief)

Upon careful consideration of these arguments, the Commissioner finds that the petitioner has failed to establish irreparable harm. As has been articulated in previous decisions involving student eligibility, the inability to play basketball is not irreparable injury. No student has a constitutional right to participate in interscholastic sports. "Participation is subject to eligibility requirements or other preconditions," and these requirements are "within the control of the NJSIAA subject to review and approval by the Commissioner of Education." Burnside v. NJSIAA, unpublished decision of the Appellate Division, November 15, 1984, Docket No. A-625-84T7. Board of Education of the City of Camden v. NJSIAA, 92 N.J.A.R. 2d. (EDU) 182, unpublished decision of the Appellate Division dated February 18, 1992 (Docket No. A-2802-91T2). Further, the Appellate Division has held that "participation in extra-curricular activities is not a fundamental right under the federal or state constitutions." See Camden, supra. Also See, Palmer by Palmer v. Merluzzi, 689 F. Supp. 400, 408-409 (D.N.J. 1988), aff'd 868 F.2d 90, 96 (3d Cir. 1989). Additionally, athletic participation is not a necessary component for a thorough and efficient education.

Petitioner's argument that since he is a "fairly good basketball player" and thus, may be able to earn a college scholarship if he is allowed to play, is based on speculation in that he has not established that if he were allowed to play that he would, in fact, receive a scholarship. Moreover, even if evidence were presented to show that Petitioner's basketball participation is

essential to a promised scholarship, this would not be sufficient to establish irreparable harm. See, W.S. on Behalf of P.S. v. New Jersey State Interscholastic Athletic Association, Agency Dkt. No. 413-10/94. Therefore, the Commissioner finds and determines that the petitioner has not demonstrated that he will suffer irreparable harm absent the grant of emergent relief in this matter.

Furthermore, the Commissioner finds that Petitioner has little likelihood of success on the merits. The NJSIAA is a voluntary association. In cases involving the Association, the Commissioner's scope of review is limited in that the law clearly states that, "the board, its faculty and students shall be governed by the rules and regulations of [the voluntary] association." N.J.S.A. 18A:11-3. Thus, the Commissioner of Education's standard of review is deferential in that he will not overturn the Association's decision where it is not arbitrary, capricious or unreasonable. B.C. v. Cumberland. Reg. Sch. Dist., 220 N.J. Super. 214, 231-232 (App. Div. 1987)

The Commissioner notes that in the present case Petitioner received a full hearing where he was represented by counsel, and his school principal and athletic director presented arguments on his behalf. The Committee made its decision not to allow Petitioner to play with full knowledge of the circumstances of his case--that he was held back in school several times, due to a difficult childhood. The NJSIAA did not determine that these conditions amounted to "truly extraordinary circumstances," within the meaning of the NJISAA Interpretive Guidelines set forth on page 60 of the NJSIAA Handbook, justifying the grant of a waiver of the age limitation for interscholastic competition.

Moreover, the Commissioner finds and determines that the three NJSIAA cases cited by the Petitioner, where students ineligible to participate in interscholastic sports pursuant to Article V section 4c of the NJSIAA bylaws have been allowed to participate, are clearly distinguishable from the present matter. Each of the cited cases involved students who were found by the NJSIAA to have been the victim of circumstances beyond their control such as deafness or a classification that would have made the student ineligible to participate at an earlier age and denying him the opportunity to play sports for eight semesters. In the present case, Petitioner's eligibility to participate in sports for eight semesters was not questioned (even if junior high school students in his district were not allowed to play basketball because of a district policy). Moreover, other than a claim of a "difficult childhood" which, unfortunately is a condition faced by a large number of young people, no evidence of a disability or handicap is present which caused him to be repeatedly held back in seventh grade. Moreover, assuming arguendo that the Commissioner accepted that the circumstances were beyond Petitioners control, the NJSIAA rules only make provisions for a waiver to be granted in a non-contact sport, not in a contact sport such as basketball. See, NJSIAA Handbook, p. 60.

The Commissioner finds that the petitioner was accorded due process in this matter and finds no other deficiency in the Association's findings which would compel a reversal of such findings. Therefore, he will not substitute his judgment for that of the Association, even when he might judge otherwise in a de novo

review. Dam Jin Koh and Hong Jun Kim v. NJSIAA, 1987 S.L.D. 259
The Commissioner, thus, concludes, that on the Motion for Emergent Relief, Petitioner has failed to demonstrate a likelihood of success on the merits of his claim.

With respect to the balancing of the equities in this matter, Petitioner argues that the relative hardship that would be visited upon him were the stay denied is greater than the hardship which the Association would suffer if the stay were granted. Petitioner argues that if he is ultimately ruled eligible to play, but the ruling is not made until the season is over and/or practically over, he will have been unjustly denied his one chance for a college education. Additionally, he states that the NJSIAA is a huge state organization so if he were allowed to play, it would not harm anyone. (Petitioner's Brief at p. 3) Conversely, the NJSIAA argues that the school would suffer a greater harm herein, in that the combined eligibility rules and guidelines of the NJSIAA provide that if any member school uses an ineligible player in an interscholastic game, it must forfeit that contest. NJSIAA Handbook, 1994-95, p. 52. NJSIAA further argues that safety is a paramount concern in a contact sport such as basketball and that the rules specifically do not allow 19-year-olds to play basketball as they are more physically mature than other students. NJSIAA Handbook, 1994-95, p. 60

Upon review of the equities, the Commissioner finds that Petitioner has not demonstrated that a balancing would weigh in his favor, nor has he shown that the public interest compels the granting of emergent relief. The Commissioner determines that Petitioner will continue to have the opportunity to pursue his

academic career, while NJSIAA will suffer a hardship if the stay is issued. The NJSIAA has determined that 19-year-olds are not eligible to participate in interscholastic sports. This rule was adopted not only for safety reasons, but also to preventing "red-shirting" i.e., the intentional holding back of a student in order to give him an extra year to mature to achieve a competitive advantage, and to encourage students "to satisfactorily complete their academic studies starting with the elementary school level." The issuance of a stay in a case without "truly extraordinary circumstances" would only result in a weakening of the NJSIAA rule to the point where it is meaningless. Additionally, Petitioner's school could be harmed if the student is allowed to play since his participation could result in game forfeiture if he is ultimately found to be an ineligible player.

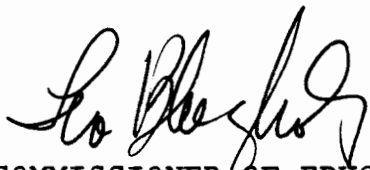
For the above stated reasons, the Commissioner finds that the Petitioner has failed to meet the criteria set forth in Crowe, supra, and accordingly, his request for emergent relief is denied.

Finally, the Commissioner finds that the record herein is sufficient to establish that NJSIAA's determination was not arbitrary, capricious or unreasonable. Therefore, in consideration of the fact that further consideration would not be likely prior to the end of basketball season, no purpose would be served by such proceedings. Accordingly, the petition is hereby dismissed.

IT IS SO ORDERED.

FEBRUARY 9, 1995

DATE OF MAILING - FEBRUARY 9, 1995


COMMISSIONER OF EDUCATION

DHP # 35-95
SB # 49-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF THOMAS M. MILLER. : DECISION
_____ :

Decided by the Deputy Commissioner of Education,
March 31, 1995

For the Petitioner-Appellant, Thomas M. Miller, pro se

For the Respondent-Respondent, Arlene G. Lutz, Deputy
Attorney General (Deborah T. Poritz, Attorney
General of New Jersey)

The State Board of Education grants the request of the
parties to remand this matter to the Commissioner of Education
for a hearing in order to provide the petitioner with an adequate
opportunity to establish a record in support of his contention
that he has satisfied the statutory standard for rehabilitation.¹
Given the circumstances, we direct that such hearing and a final

¹ We note that the Office of Criminal History Review was apparently not represented in the proceedings before the Deputy Commissioner and was not served with notice of the appeal to the State Board. Upon the filing of the appeal, Counsel to the State Board notified the Attorney General's Office by letter of April 13, 1995 that an appeal had been taken in the matter, and transmitted a copy of the record. A Deputy Attorney General was then assigned to appear as attorney of record in the appeal.

JUNE 7, 1995

determination by the Commissioner be rendered on an expedited basis, and that such determination considers all pertinent circumstances under the factors set forth in N.J.S.A. 18A:6-7.1, including "any evidence of rehabilitation." See Wolffbrandt v. New Jersey State Department of Education, decided by the State Board, July 1, 1992.

We stress that petitioner has the burden on remand of establishing his rehabilitation by clear and convincing evidence.

We retain jurisdiction.

June 7, 1995

Date of mailing JUN 09 1995

DHP # 35-95
SB # 49-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF THOMAS M. MILLER. : DECISION
_____ :

Decided by the Deputy Commissioner of Education, March 31, 1995

Remanded by the State Board of Education, June 7, 1995

Decided by the Assistant Commissioner of Education, August 7, 1995

For the Petitioner-Appellant, Thomas M. Miller, pro se

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney
General (Deborah T. Poritz, Attorney General of New Jersey)

On June 7, 1995, we remanded this matter to the Commissioner of Education for an expedited hearing in order to provide petitioner, who had been disqualified from employment in the State's schools pursuant to N.J.S.A. 18A:6-7.1, with an adequate opportunity to establish a record in support of his contention that he had satisfied the statutory standard for rehabilitation. We retained jurisdiction.

In accordance with that remand, an Assistant Commissioner conducted a hearing on July 14 and rendered her decision on August 7,¹ upholding petitioner's

¹ We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly

DEC. 6, 1995

disqualification. Petitioner has not filed an appeal from that decision. Pursuant to our retention of jurisdiction, the Commissioner transmitted the file back to us on September 6.

After a review of the record, we are satisfied that the Commissioner fully complied with the terms of the State Board's remand. Accordingly, we dismiss the appeal.

December 6, 1995

Date of mailing DEC 08 1995

includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws...." N.J.S.A. 18A:4-34.

BOARD OF EDUCATION OF THE GREATER :
 EGG HARBOR REGIONAL HIGH SCHOOL :
 DISTRICT, ATLANTIC COUNTY, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

DENNIS DI DONATO AND ELIZABETH : DECISION
 DI DONATO, PARENTS OF L.D. AND :
 N.D., :

RESPONDENTS. :

SYNOPSIS

Petitioning Board challenged residency of two students, L.D. and N.D., and sought accumulated tuition payments.

ALJ determined that respondents established a Mays Landing address for the students solely for the purpose of attending Oakcrest High School. Moreover, notwithstanding that their father was an employee of the Board, the Board was not aware that his daughters were attending Oakcrest High illegally. Further, respondents admitted submitting false affidavits. Thus, the Board was not estopped from seeking the tuition due and owing to it. ALJ ordered respondents to reimburse the Board for the tuition of L.D. for the period of September 1990 through June 1993 and the tuition of N.D. for September 1992 through June 1993.

Following review of the record and the full transcript of the depositions conducted in January 1995, the Commissioner adopted findings and determination in initial decision as his own and directed respondents reimburse the Board for tuition payments due and owing for L.D. and N.D.

FEBRUARY 10, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5858-93

AGENCY REF. NO. 65-4/93

**BOARD OF EDUCATION OF THE
GREATER EGG HARBOR REGIONAL
HIGH SCHOOL DISTRICT, ATLANTIC
COUNTY,**

Petitioner,

v.

**DENNIS DiDONATO AND ELIZABETH
DiDONATO, PARENTS OF L.D. AND N.D.,**
Respondents.

Louis Greco, Esq., for petitioner

Samuel J. Serata, Esq., for respondents

Record Closed: September 12, 1994

Decided: December 20, 1994

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Board of Education of the Greater Egg Harbor Regional High School District (Board) alleges that Dennis and Elizabeth DiDonato are residents of the City of Estell Manor, New Jersey and, therefore, their children, L.D. and N.D., have improperly attended the Board's Oakcrest High School. The Board seeks a ruling by the Commissioner of Education (Commissioner) declaring that respondents are obligated to pay the Board accumulated tuition

liability due and owing. The Board also seeks a declaratory ruling that respondents' children, L.D. and N.D., are not entitled to attend Oakcrest High School free of tuition payment and that the pupils are to be expelled from Oakcrest High School.

Respondents admit to have been and continue to be residents and domiciliaries of the City of Estell Manor, Atlantic County, New Jersey. Respondents contend, among other things, that the Board and/or its agents knew or had reason to know that while respondents were residents of the City of Estell Manor, their children, L.D. and N.D. resided with an aunt in a property owned by respondents within the Board's jurisdiction. Respondents therefore, contend that the doctrine of equitable estoppel is applicable to the instant matter and the Board is estopped from proceeding against respondents for the tuition payment.

This matter was transmitted from the Commissioner to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The hearing was held on February 14, 15, and April 4, 1994, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey. The parties were granted leave to submit post hearing memoranda and the hearing record closed on September 12, 1994. Extensions were granted in order to execute this initial decision.

FINDINGS OF FACT

Based upon the testimony and other evidence adduced at the hearing, and having given fair weight thereto; I **FIND** the following **FACTS** in this matter:

Respondent, Dennis DiDonato, is employed by the Board as a teacher of mathematics at the Board's Oakcrest High School, one of the two high schools operated by the Board. Respondent has served as an assistant and head football coach at the Oakcrest High School as well as its head wrestling coach.

At all times material to the instant matter, Dennis DiDonato and his wife, respondent Elizabeth DiDonato resided in the City of Estell Manor with their four daughters. Dennis DiDonato served on the Board of Education of the City of Estell Manor from 1989 to 1993.

Estell Manor Board of Education operates an elementary school with grades kindergarten through eight. Estell Manor is neither a constituent school district nor a sending school district of the herein Board. Rather, Estell Manor is a sending district to the Buena Regional School District

In or about 1990, Dennis DiDonato purchased real property, known as 27 Monmouth Drive, Mays Landing, Hamilton Township, Atlantic County, New Jersey. Mays Landing, Hamilton Township lies within the jurisdiction of the Board as a constituent school district. Dennis DiDonato permitted his married sister, Diane Hall, and her three children to reside in the Mays Landing property, in or about June 1990. Diane Hall's four year old child is handicapped with spina bifida. Diane Hall was having marital problems at that time.

In or about June 1990, respondents' daughter, L.D. graduated from Estell Manor Elementary School. In or about September 1990, L.D. was enrolled in the Oakcrest High School as a ninth grade pupil. On March 26, 1991, both respondents signed a sworn affidavit asserting that they were permanent residents in the City of Estell and their daughter, L.D., resided with Diane DiDonato Hall at 27 Monmouth Drive, Mays Landing, New Jersey. The affidavit also provided, in part, that:

3. I/We provide no support and will not assume personal obligations of the said child indefinitely and not only during school time. (P-1, 0006)

Respondents' testimony demonstrates that L.D. did not stay with Diane Hall five days per week. Dennis DiDonato would take L.D. from school on Friday afternoon to respondents' Estell Manor home for weekends and return her to school on Monday morning. Dennis DiDonato supplied L.D. with medical support through his health benefits with the Board. He also provided L.D. with spending money, clothing and deferred rent to Diane Hall.

In or about June 1992, respondents' daughter, N.D., graduated from Estell Manor Elementary School eighth grade. On June 11, 1992, Dennis DiDonato executed an affidavit which stated that he resided at R.R. 20, Box 256, Estell Manor and that N.D. resided at 6395 Monmouth Drive, Mays Landing with Diane DiDonato Hall. Dennis DiDonato also stated that he

provided no support for N.D. nor would he assume any personal obligations for N.D. N.D. started her attendance at Oakcrest High School in September 1992.

Respondent, Elizabeth DiDonato separated from her husband, respondent Dennis DiDonato, in or about 1993. At the time of the hearing, she was residing at 6395 Monmouth Drive, Mays Landing, New Jersey.

SUMMARY OF THE TESTIMONIAL EVIDENCE

Ralph Martin, Board Secretary/School Business Administrator, testified, among other things, that he prepared the invoices for the payment of L.D.'s and N.D.'s tuition, dated March 11, 1993. The total amount billed to respondents is \$22,278 for the school years 1990-91, 1991-92 and school year 1992-93 from September 1, 1992 to February 28, 1993. The amount of the invoice for N.D. is \$4,800 from September 1, 1992 to February 28, 1993, based upon the estimate of \$8,000 tuition for a full academic year. The tuition for the 1990-91 and 1991-92 school years have been audited and certified while the exact tuition amount for 1992-93 was to await the manual audit after the close of the fiscal year on June 30, 1994. Mr. Martin estimated the remainder of the 1992-93 school years tuition and the 1993-94 school year for L.D. and calculated the total tuition due and owing for L.D. to be \$31,552.

Andrea Mariner, the Board's Attendance Officer testified, among other things, that she investigated the DiDonato matter to ascertain whether or not L.D. and N.D. were bona fide residents of the school district. In her report, dated February 6, 1993 (R-2), stated among other things, that L.D.'s address on August 7, 1990, was 12 Monmouth Drive, Mays Landing; on July 1991, her address was 27 Monmouth Drive, Mays Landing; and the most recent address was 6395 Monmouth Drive, Mays Landing. Attendance Officer Mariner commenced her investigation of this latter address on July 16, 1992.

Ms. Mariner's investigation revealed that respondents' other daughter, N.D., was also enrolled at Oakcrest High School, rather than a Buena Regional High School for the 1992-93 school year. N.D.'s address was listed as 6395 Monmouth Drive, Mays Landing, the same address as L.D.'s (P-2).

Attendance Officer Mariner was able to determine that Diane Hall resided at 6395 Monmouth Drive, Mays Landing. However, she could not determine if respondents resided there. In her observation of the property, she stated:

... I have been unable to see the girls in question boarding the school bus in mornings nor depart from same, also I have called and their cousin told me the girls were home with their parents. This call was made on 12/7/92, 7:00 p.m. Other calls produced the same statement. (P-2)

On other occasions, Mariner observed L.D. and N.D. being driven to school in a private motor vehicle which, later, was identified as belonging to respondents. She opined that the only reason L.D. and N.D. used the property at 6395 Monmouth Drive, Mays Landing, was for the purpose of attending Oakcrest High School. (P-2) The record shows that the property known as 6395 Monmouth Drive, Mays Landing was transferred to Diane Hall listed in a publication dated Friday, October 15, 1993 (P-1, p.0026).

John E. Dugan, Superintendent of Schools, testified, among other things, that he first became aware that L.D. and N.D. were enrolled in the Board's schools when Attendance Officer Mariner brought it to his attention on February 6, 1993. After Dugan received Ms. Mariner's report (P-2), Dugan asked the Attendance Officer to continue the investigation. Subsequently, on February 17, 1993, Dugan had a conversation with Dennis DiDonato concerning his two daughters. Following his meeting with Superintendent Dugan, DiDonato met with the Board where respondent admitted he was supporting his two daughters while they both were attending the Board's Oakcrest High School.

Superintendent Dugan testified that officials of the school district rely upon the pupil registration form and sworn affidavits when the child is registered and admitted to its schools. He asserted that the Pupil Registration and Health Data form for L.D. appeared to indicate that both of her parents resided in the school district at 27 Monmouth Drive, Mays Landing (P-5). Dennis DiDonato's sworn affidavit, however, indicated that he resided at R.R. 20, Box 265, Estell Manor, and that N.D. resided at 6395 Monmouth Drive, Mays Landing, with Diane DiDonato Hall. (P-1, p.009).

Superintendent Dugan admitted that he was aware that respondent Dennis DiDonato was a member of the Estell Manor Board of Education. Dugan was also aware that Dennis DiDonato had been the Mayor of Estell Manor, and knew this fact when Dennis DiDonato was interviewed for a teaching position with the Board. Dugan admitted further that on March 26, 1991, he approved respondents' affidavit establishing legal residence for L.D. at 27 Monmouth Drive, Mays Landing, New Jersey (P-1, p.0006).

On September 2, 1992, Dugan accepted an affidavit executed by Diane DiDonato Hall, establishing the legal residence of N.D. (P-1,p.0010). The affidavit states that N.D. had resided with Ms. Hall since June 1992, at 6395 Monmouth Drive. Dugan believed Diane Hall to be the parent of N.D. The affidavit lists Dennis DiDonato as L.D.'s father whose address was R.R. 20, Box 265, Mays Landing, NJ (P-1, p. 0010). Subsequently, on October 26, 1992, Dugan wrote to Hall concerning N.D. where he stated the following:

The above named student was admitted to school in this District based upon an affidavit submitted by you indicating that he/she resides with you full-time and you are not receiving any money for his/her support.

It is anticipated that he/she will attend Oakcrest High School in 1992-93. It is your responsibility to notify me immediately if the conditions listed above have changed or will change in the future. (P-1, p.0013)

Superintendent Dugan testified that he did not have any communication with Dennis DiDonato prior to February 17, 1993, concerning this matter. On February 24, 1993, Dugan submitted a report to the Board which stated that Attendance Officer Mariner had investigated L.D. and N.D. and, among other things, believed that the two girls lived at the DiDonato residence in Estell Manor on weekends and in the summer months. Superintendent Dugan reported that he had met with Dennis DiDonato on February 17, 1993 to discuss the matter of L.D.'s and N.D.'s residency, where Dennis DiDonato said that:

- A. His daughters lived with Mrs. Hall to help her care for her young daughter who has spina bifida.

- B. Mrs. Hall had lived in Wildwood in a second floor apartment and had difficulty carrying her daughter. He bought a home for his sister in Mays Landing and in fact built an addition on it for his daughters to live in.
- C. The girls live there full time except when they go on family vacations. They come home only occasionally.
- D. The girls pay for their clothes through summer jobs.
- E. He declares the girls as dependents on his income tax and provides health insurance through his employer (GEHR).
- F. Earlier this year because the girls were late to school due to the bus coming very early, he started driving the girls and his niece to school. The bus now arrives later and he no longer drives them in the morning.
- G. Mrs. Hall provides food for the girls.
- H. Mrs. Hall misunderstood Mrs. Mariner's question when she said that Mr. DiDonato provided "necessities."
- I. Mrs. Hall's daughter Amy, age 14, who is a ninth grader at OHS this year is not available to assist her after school as she has a horse to take care of which is housed at another location.
(P-1, p.0016)

Superintendent Dugan's report further stated that because Mr. DiDonato reported the children as dependents for income tax purposes, provides health benefits, and the girls reside with him on weekends and in the summer, Dugan believed that L.D. and N.D. were not legal residents within the Board's school district (P-1, p.0016).

Dugan had Attendance Officer Mariner's report (P-2) when he met with Dennis DiDonato on February 17, 1993.

Superintendent Dugan testified that L.D.'s report executed an affidavit where they both swore they did not support L.D. Subsequently, on February 17, 1993, Dennis DiDonato admitted that he did, in fact, support both L.D. and N.D. while the two pupils resided with his sister, Diane DiDonato Hall. Hall also swore in her affidavit that she supported the DiDonato children gratis.

For these reasons, Dugan and the Board sought tuition payments for L.D. and N.D. from the DiDonato's as non-resident pupils.

Elizabeth DiDonato testified on her own behalf asserting, among other things, that when L.D. graduated from Estell Manor Elementary School eighth grade in June 1990, the plan was to have L.D. stay with Diane Hall to help Diane with her four year old child who suffers from spina bifida. She telephoned the Oakcrest High School to determine what was needed to register L.D. As instructed, Mrs. DiDonato went to the Oakcrest Guidance Office where a typed registration form was prepared. (P-5) She told the registrar that L.D. lived at 27 Monmouth Drive, Mays Landing. Elizabeth DiDonato also told the registrar that she was a Registered Nurse employed at the Atlantic City Medical Center. L.D. was admitted to the Board's Oakcrest High School as a ninth grade pupil commencing September 1990.

Elizabeth DiDonato testified she did not read the affidavit she and her husband executed on or about March 26, 1991, to establish L.D.'s residence with Diane Hall at 27 Monmouth Drive, Mays Landing. In particular, Elizabeth DiDonato stated she did not read paragraph No. 3 of the affidavit which provides that: "I/We provide no support and will not assume personal obligations of the said child indefinitely and not only during school time." (P-1, 006) She admitted that L.D. was provided with medical care, spending money, clothing and that rent on the property was deferred. Elizabeth DiDonato stated that the affidavit for L.D. was brought home for her signature because it was needed for L.D. to remain at Oakcrest. Her signature does not appear on the affidavit for N.D. (P-1, 0009).

Elizabeth DiDonato asserted that she would not have sent her children to Oakcrest High School if she knew she had to pay tuition. Rather, she would have sent the children to Holy Spirit High School.

At the time of the herein hearing, Elizabeth DiDonato testified that she separated from her husband, Dennis DiDonato, and had established residence within the Board's school district. In support of this testimony, she offered a driver license issued by the New Jersey Division of Motor Vehicles, a voter registration, a gas bill and an electric bill, all of which bore her name and the

address of 6395 Monmouth Drive, Mays Landing, New Jersey (P-1, 0027). She asserted she moved to this address in or about August 1993.

Dennis DiDonato testified, among other things, that while he served as an assistant football coach at Oakcrest High School, the head coach would meet parents and pupils from the communities of Estell Manor, Weymouth and Dorothy to recruit athletes for the high school. He asserted that the nonresident pupils would only be required to enroll and attend a vocational-agriculture course offered at the high school to be eligible to attend and participate in athletic events. He asserted that in about the 1984-85 school year, officials from Buena High School complained about pupils who should be attending its school were being diverted to Greater Egg Harbor schools. As a consequence, the practice was discontinued in the mid-1980's and the nonresident pupils had to return to their home school. There remains, however, a concern among the faculty and administration with the number of nonresident-affidavit pupils attending Oakcrest High School.

On cross-examination Dennis DiDonato admitted that his wife, Elizabeth DiDonato, did not want L.D. to attend Buena High School. In fact, they both wanted L.D. to attend Oakcrest because of her affiliation with the school and its pupils. He also admitted that the initial reason to have L.D. move in with his sister was for L.D. to attend Oakcrest, not to help Diane DiDonato Hall. He also testified that the intent to execute the affidavit for L.D. and N.D. was to avoid paying tuition.

DISCUSSION AND CONCLUSIONS

The controlling statute in this matter is found at N.J.S.A. 18A:38-1¹, which provides, in part, as follows:

Public schools shall be free to the following persons over five and under 20 years of age:

- (a) Any person who is domiciled within the school district;

¹ N.J.S.A. 18A:38-1 was amended pursuant to L. 1993, c. 380 Section 1, effective January 11, 1994.

(b) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not supporting the child, accompanied by documentation to support the validity of the sworn statement in proceedings before the commissioner, except that no child shall be denied admission during the pendency of any such proceedings before the commissioner, and the resident shall have the burden of proving by a preponderance of the evidence before the commissioner that the child is eligible for a free education under the criteria listed in this subsection. If in the judgment of the commissioner this evidence does not support the claim of the resident, he may assess the resident tuition for the student prorated to the time of the board's request for a sworn statement from the resident. Tuition shall be computed on the basis 1/180 of the total annual pupil cost to the local district multiplied by the number of days of ineligible attendance.

Respondents argue, among other things, that the Board failed to adhere to the requirements of the statute, N.J.S.A. 18A:38-1, because it did not require an affidavit of L.D.'s residence until March 12, 1991 of the 1990-91 school year. Nor was there a clear line of authority or admissions procedure for Oakcrest High School.

Respondents contend that the Board and Superintendent Dugan knew that Dennis DiDonato was a member of the Board of Education of the City of Estell Manor. Dennis DiDonato is employed by the Board and thus, his employment records reflect his residence which, he does not dispute, is outside of any constituent or sending district of the Board. His employment records also reflect that his two children involved in this matter are covered by the health benefits provided to him by the Board.

Respondents assert that their two children, L.D. and N.D., stayed at least five nights per week during the school year at the home owned by respondents and located within the Board's

school district. Respondents daughters stayed with Dennis DiDonato's sister, Diane DiDonato Hall, and assisted in the care of one of Mrs. Hall's children who suffers from spina bifida.

Respondents contend that they were led to believe, by Board personnel, that they were acting properly when they enrolled their two children at Oakcrest, and that their children were entitled to attend the school where their father was employed as a teacher. Respondents now claim that the Board is estopped from asserting its claim. Equitable estoppel operates to prevent a party from disavowing its previous conduct if such a repudiation would violate the demands of justice and good conscience. Carlsen v. Masters, Mates and Pilots Pension Plan Trust, 80 N.J. 334, 339 (1979); Connel v. American Funding Ltd., 231 N.J. Super. 409,416 (Ch. Div. 1987). Equitable estoppel can arise from any type of "conduct of a party, using that word in its broadest meaning as including his spoken or written words, his positive acts, and his silence or negative omission to do anything." State v. U.S. Steel Corp., 22 N.J. 341, 358 (1956), quoting from 3 Pomeroy on Equity Jurisprudence §802 (5th ed. 1941); Royal Association v. Concannon, 200 N.J. Super. 84, 92 (App. Div. 1985) (Landlord's express permission to allow tenant to obtain and keep dog was sufficient to bind landlord).

Respondents acknowledge that estoppel is not applied as readily against a governmental entity as against a private party, citing the Guidebook to Chancery Practice in New Jersey, Hon. William A. Dreier, J.A.D. (3rd ed. 1991). Notwithstanding, they claim that the Board failed to follow the statutory scheme and, thereby, leading respondents to believe their children were properly enrolled at Oakcrest High School. They assert that the signing of the affidavit was not such an act as would soil the hand of respondents, thereby barring the defense of estoppel. They contend, moreover, that their signing of the affidavits was merely a procedural formality and their belief was re-enforced by the failure of the Board's employees and agents to abide by the statute requiring further documentation and investigation once the affidavits were submitted.

Respondents argue that there is no real harm to the Board in applying the doctrine of estoppel, nor is there any paramount public policy to overcome. The Board simply did not follow the statute thereby misleading the respondents into allowing their children to remain enrolled in Oakcrest High School. Had respondents known what was involved, they would have had their

children attend Buena Regional High School for no tuition or Holy Spirit High School for approximately one-third of the tuition requested here.

In addressing the first issue to be resolved by this tribunal, it is clear that respondents and their children, L.D. and N.D., were not bona fide residents within the Board's school district. The record is clear that Dennis DiDonato and Elizabeth DiDonato were, at all times material, residents of the City of Estell Manor, which is neither a constituent nor a sending district with the Board. The record further demonstrates that on or about March 26, 1991, both Dennis and Elizabeth DiDonato executed a false affidavit on behalf of their daughter, L.D. Subsequently, on or about June 11, 1992, Dennis DiDonato executed a false affidavit on behalf of N.D.

With respect to the second issue as to whether the Board is estopped from denying L.D. and N.D. a free public education on the grounds that the Board knew, or should have known that L.D. and N.D. were not bona fide residents of its school district and respondents, therefore, relied upon this belief that the Board would provide a tuition free education, respondents have failed to demonstrate that the Board, or its agents, knew that either of respondents children were in its school illegally. The record clearly shows that it was not aware of their presence until August 1992, when Attendance Officer Andrea Mariner commenced her investigation of L.D. and N.D. Attendance Officer Mariner did not submit her report to Superintendent Dugan until February 6, 1993, wherein she concluded and opined that L.D. and N.D. only used the address within the Board's jurisdiction in order to attend Oakcrest High School.

Notwithstanding that Dennis DiDonato is an employee of the Board, he failed to show that the Board, Superintendent of School or Board Secretary were aware that his two daughters were attending Oakcrest High School under false colors. In the matter of I.P. v. Leonia Borough Board of Education, 63 N.J.A.R. 2d (EDU) 128, the parents of a nonresident pupil established a residence within the Leonia Board's school district solely for the purpose of providing a free public education for their child. The Commissioner sustained the ALJ's determination that the residence was illegal and ordered the parents to pay the required school tuition for the period attended.

Because of respondents' illegal activities, they cannot now claim the Board is estoppel from seeking the pupil tuition due and owing to it.

I **CONCLUDE** that the defense of equitable estoppel is not appropriate here, and, therefore, it is rejected.

I **CONCLUDE** that the Board has established, by a preponderance of the credible evidence, that the Mays Landing address established for L.D. and N.D. was for the sole purpose of attending Oakcrest High School.

I **CONCLUDE** that Dennis and Elizabeth DiDonato are responsible for the tuition of L.D. from the period September 1990 through June 1993.

I **CONCLUDE** that Elizabeth DiDonato has established that she has resided at the 6395 Monmouth Drive, Mays Landing, a property within the Board's jurisdiction, since on or about July 1993.

I **CONCLUDE** that Dennis and Elizabeth DiDonato are responsible for the tuition of N.D. from September 1992 through June 1993.

ORDER

Accordingly, it is **ORDERED** that Dennis and Elizabeth DiDonato reimburse the Board of Education tuition payments due and owing consistent with the conclusions above.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

20 December 1994
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

12/27/94
DATE

H. R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 03 1995
DATE

J. J. S. Main
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

PETITIONER

RALPH WAYNE MARTIN

ANDREA MARINER

JOHN E. DUGAN

RESPONDENTS

ELIZABETH DiDONATO

DENNIS DiDONATO

DOCUMENTS IN EVIDENCE

JOINT EXHIBITS

J-1 SWORN DEPOSITION TAKEN ON JANUARY 14, 1994

PETITIONER

P-1.1 OATH FOR SCHOOL BOARD MEMBERS DATED 4/19/89

P-1.2 CONTRACT FOR SALE OF REAL ESTATE DATED 5/12/90

P-1.3 AFFIDAVIT OF RESIDENCY DATED 3/12/91

P-1.4 AFFIDAVIT OF RESIDENCY DATED 3/26/91

P-1.5 OATH FOR SCHOOL BOARD MEMBERS DATED 4/22/92

P-1.6 REGISTRATION CARD DATED 5/15/92

P-1.7 AFFIDAVIT OF RESIDENCY DATED 6/11/92

P-1.8 AFFIDAVIT OF RESIDENCY DATED 7/21/92

P-1.9 PUPIL TRANSFER CARD DATED 8/24/92

P-1.10 REQUEST FOR TRANSCRIPTS DATED 9/14/92

P-1.11 LETTER FROM JOHN DUGAN TO DIANE HALL DATED 10/26/92

P-1.12 MOTOR VEHICLE DATA REGARDING DIANE HALL DATED 2/23/93

- P-1.13 MEMO TO BOARD FROM JOHN DUGAN DATED 2/24/93
- P-1.14 ADDITION TO MEMO TO BOARD DATED 2/93
- P-1.15 LETTER FROM JOHN DUGAN TO MR. & MRS. DiDONATO DATED 3/9/93
- P-1.16 LETTER FROM RALPH MARTIN TO LOUIS GRECO DATED 3/10/93 WITH
TUITION INVOICE ATTACHED
- P-1.17 LETTER FROM RALPH MARTIN TO LOUIS GRECO DATED 3/11/93
WITH REVISED TUITION INVOICE ATTACHED
- P-1.18 LETTER FROM LOUIS GRECO TO MR. & MRS. DiDONATO DATED 5/26/93
- P-1.19 DOCUMENT EVIDENCING TRANSFER OF REAL ESTATE DATED 10/15/93
- P-1.20 COPIES OF DOCUMENTS BEARING ADDRESS FOR ELIZABETH DiDONATO
- P-1.21 1993/1994 PRELIMINARY TAX BILL FOR 6395 MONMOUTH DRIVE
- P-1.22 UNDATED AND UNSIGNED HANDWRITTEN NOTES
- P-1.23 UNDATED AND UNSIGNED HANDWRITTEN NOTES
- P-2 LETTER, 2/6/93, RE: L.D. AND N.D. FROM ANDREA MARINER, ATTENDANCE
OFFICER
- P-3 HANDWRITTEN NOTE, RE: N.D.
- P-4 HANDWRITTEN NOTE, RE: L.D.
- P-5 PUPIL REGISTRATION - L.D.
- P-6 PUPIL REGISTRATION - N.D.
- P-7 PARENT AUTHORIZATION FOR PUPIL RECORDS
- P-8 LETTER, 2/11/93, TO MR. & MRS. DiDONATO, RE: L.D. AND N.D.
FROM JOHN DUGAN

RESPONDENT

- R-1 LETTER, 1/27/94 FROM SAMUEL SERATA, ESQ. TO LOUIS GRECO, ESQ.
- R-2 AFFIDAVIT OF SUPPORT

BOARD OF EDUCATION OF THE GREATER :
EGG HARBOR REGIONAL HIGH SCHOOL :
DISTRICT, ATLANTIC COUNTY, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
DENNIS DI DONATO AND ELIZABETH : DECISION
DI DONATO, PARENTS OF L.D. AND :
N.D., :
RESPONDENTS. :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Respondents' exceptions and the Board's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Respondents' exceptions recast and reiterate the arguments they previously proffered before the ALJ, which the Commissioner determines were fully and fairly considered and addressed in the initial decision. Essentially, they re-contend that the Board was aware that the parents of L.D. and N.D. resided in Estell Manor from the time of the children's admission to Oakcrest High School, that the children herein, at all times relevant to these proceedings, lived at 6395 Monmouth Drive, and that common fairness and justice dictate that the doctrine of equitable estoppel is applicable in this matter. Respondents additionally cite particular areas of testimony adduced at depositions of certain district personnel and Respondent Dennis DiDonato taken on January 14, 1995, which they contend support their arguments.

In reply, the Board urges

***while citing carefully excerpted portions of the testimony which favor a version of the facts supportive of his client, [the] exceptions document fails to also call to the Commissioner's attention the fact that both Mr. and Mrs. DiDonato admitted signing affidavits containing inaccurate and misleading information in order to obtain the entry of their daughters into the Oakcrest High School.


(Board's Reply Exceptions, at p. 1)

Upon a careful and independent review of the record in this matter, including the full transcript of the depositions conducted on January 14, 1995, the Commissioner finds respondents' exception arguments without merit. He concurs with the findings and conclusions of the Administrative Law Judge that respondents' children, L.D. and N.D., were not entitled to a free public school education in the Greater Egg Harbor Regional High School District, pursuant to the provisions of N.J.S.A. 18A:38-1, during the period September 1990 through June 1993 for the reasons clearly articulated by the ALJ in his initial decision. The Commissioner further agrees that, based on the record before him, the defense of equitable estoppel is not appropriate in this matter.

Accordingly, the initial decision of the Office of Administrative Law is adopted as the final decision in this matter. Respondents are hereby ordered to reimburse the Board tuition payments due and owing for L.D. for the period of September 1990 through June 1993 and those due and owing for N.D. for the period of September 1992 through June 1993.

IT IS SO ORDERED.

FEBRUARY 10, 1995


COMMISSIONER OF EDUCATION

DATE OF MAILING - FEBRUARY 10, 1995

EDU #5858-93
C # 50-95
SB # 21-95

BOARD OF EDUCATION OF THE :
GREATER EGG HARBOR REGIONAL :
HIGH SCHOOL DISTRICT, ATLANTIC :
COUNTY, :

PETITIONER-RESPONDENT, :

STATE BOARD OF EDUCATION

V. :

DECISION

DENNIS DI DONATO AND ELIZABETH :
DI DONATO, PARENTS OF L.D. AND :
N.D., :

RESPONDENTS-APPELLANTS. :

Decided by the Commissioner of Education, February 10, 1995

For the Petitioner-Respondent, Louis J. Greco, Esq.

For the Respondents-Appellants, Samuel J. Serata, Esq.

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

July 5, 1995

Date of mailing JUL 07 1995

DHP #466-94
SB # 50-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF RONALD N. TRISUZZI. : DECISION

Decided by the Deputy Commissioner of Education, March 31, 1995

For the Petitioner-Appellant, Ronald N. Trisuzzi, pro se

For the Respondent-Respondent, Geraldine Callahan, Deputy Attorney General (Deborah T. Poritz, Attorney General of New Jersey)

Ronald N. Trisuzzi (hereinafter "petitioner"), who was employed as a custodian at a private school for the emotionally handicapped, was disqualified by the Office of Criminal History Review of the Department of Education from continued employment in the State's schools when a fingerprint search conducted pursuant to N.J.S.A. 18A:6-7.1 revealed that he had been convicted of simple assault and possession of a controlled dangerous substance, 50 grams or less of marijuana, in 1990.

In a letter decision dated March 31, 1995, the Deputy Commissioner of Education¹ upheld the disqualification, finding that while petitioner had made "significant

¹ We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly

SEPT. 6, 1995

progress" in his rehabilitation, "too little time had lapsed" for him to be convinced of petitioner's rehabilitation.

Petitioner filed the instant appeal to the State Board of Education.²

After a thorough review of the record, we agree that petitioner's submissions to the Commissioner demonstrate significant progress towards rehabilitation. However, the limited record before us does not permit a determination as to whether petitioner has fully satisfied the statutory standard. Consequently, we find it necessary to remand this matter to the Commissioner for a hearing in order to provide petitioner with an adequate opportunity to establish a record in support of his contention that he has satisfied the statutory standard.³ We direct that such hearing and a final determination by the Commissioner be rendered on an expedited basis, and that such determination considers all pertinent circumstances under the factors set forth in N.J.S.A. 18A:6-7.1(e), including "any evidence of rehabilitation." See Wolffbrandt v. New Jersey State Department of Education, decided by the State Board, July 1, 1992.

We also modify the Deputy Commissioner's decision so as to clarify that the only disqualifying conviction indicated in the record is for possession of marijuana. Simple assault, unlike aggravated assault, is disqualifying only if it involves "the use of force which results in bodily injury." N.J.S.A. 18A:6-7.1(c). There is no indication of

includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws...." N.J.S.A. 18A:4-34.

² The Office of Criminal History Review was apparently not represented in the proceedings before the Deputy Commissioner. Upon the filing of the appeal, Counsel to the State Board notified the Attorney General's Office that an appeal had been taken in the matter, and transmitted a copy of the record. A Deputy Attorney General was then assigned to appear as attorney of record in the appeal.

³ Although petitioner was notified by the Office of Criminal History Review that he would be provided with a hearing if his appeal to the Commissioner was based on rehabilitation, no such hearing was provided.

bodily injury in this record. However, we do note that the convictions in the record appear to have arisen from a single incident. Consequently, petitioner's simple assault conviction could be relevant to the circumstances surrounding the disqualifying marijuana offense. See N.J.S.A. 18A:6-7.1(e). We stress, in addition, that N.J.S.A. 18A:6-7.1 expressly requires consideration of the "date of the offense" (emphasis added), rather than the date of conviction relied upon by the Deputy Commissioner in his decision.

Petitioner has the burden on remand of demonstrating his rehabilitation by clear and convincing evidence.

We retain jurisdiction.

September 6, 1995

Date of mailing SEP 08 1995

DHP #466-94
SB # 50-95
DHP # 76-96

IN THE MATTER OF THE DISQUALIFI- : STATE BOARD OF EDUCATION
CATION FROM SCHOOL EMPLOYMENT : DECISION
OF RONALD N. TRISUZZI. :

Decided by the Deputy Commissioner of Education, March 31, 1995

Remanded by the State Board of Education, September 6, 1995

Decision on remand by the Commissioner of Education, March 6, 1996

For the Petitioner-Appellant, Ronald N. Trisuzzi, pro se

For the Respondent-Respondent, Geraldine Callahan, Deputy Attorney
General (Deborah T. Poritz, Attorney General of New Jersey)

On September 6, 1995, we remanded this matter to the Commissioner of Education for a hearing in order to provide petitioner, who had been disqualified from employment in the State's schools as a custodian following a criminal history review conducted pursuant to N.J.S.A. 18A:6-7.1 et seq., with an adequate opportunity to establish a record in support of his contention that he had satisfied the statutory standard for rehabilitation. We retained jurisdiction.

In accordance with our remand, the Commissioner transmitted this matter to the Office of Administrative Law, where a hearing was held on December 18, 1995. On January 18, 1996, the Administrative Law Judge ("ALJ") rendered an initial decision in which he concluded that petitioner had demonstrated his rehabilitation by clear and

5/1/96

convincing evidence. On March 6, 1996, the Commissioner adopted the ALJ's recommended decision, finding petitioner to be qualified for school employment as a custodian. Pursuant to our retention of jurisdiction, the Commissioner transmitted the file back to us.

After a review of the record, we are satisfied that the Commissioner fully complied with the terms of our remand. Thus, pursuant to the Commissioner's decision, petitioner is qualified for school employment as a custodian, and we dismiss the appeal.

Margaret M. Bennett and Maud Dahme opposed.

May 1, 1996

Date of mailing MAY 03 1996

51-95

BOARD OF EDUCATION OF THE BOROUGH :
OF HADDONFIELD, CAMDEN COUNTY,

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

NEW JERSEY STATE INTERSCHOLASTIC : DECISION
ATHLETIC ASSOCIATION,

RESPONDENT. :

_____ :

SYNOPSIS

Petitioning Board sought reversal of determination of NJSIAA's Executive Committee (Committee) disqualifying the Haddonfield varsity girls' basketball team from State championship competition due to violation of Rule 2, Section 11, wherein coaches are prohibited from instructing student-athletes or conducting practice sessions during the off season.

Following review of the record, including transcript of Committee hearing, Commissioner adopted determination of NJSIAA disqualifying team from State championship. Commissioner found Board failed to bear its burden of persuading him that NJSIAA acted arbitrarily. Commissioner determined, as a member of its Association, the Board is bound by NJSIAA's rules, and elimination from any post-season championship competition is penalty for violation of Rule 2, Section 11. Petition was dismissed.

BOARD OF EDUCATION OF THE BOROUGH :
OF HADDONFIELD, CAMDEN COUNTY, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

NEW JERSEY STATE INTERSCHOLASTIC :
ATHLETIC ASSOCIATION, :

DECISION

RESPONDENT. :

For Petitioner, Joseph F. Betley, Esq.

For Respondent, Picco, Mack, Herbert, Kennedy, Jaffe,
Perrella & Yoskin (Michael J. Herbert, Esq., of
Counsel)

This matter has come before the Commissioner of Education by way of a Petition of Appeal and Motion for Emergent Relief filed by the petitioning Board (Haddonfield) on January 24, 1995 seeking a stay of the determination by the New Jersey State Interscholastic Athletic Association (NJSIAA) Executive Committee dated January 11, 1995, which affirmed the decision of the NJSIAA's Controversies Committee dated December 27, 1994, disqualifying the Haddonfield varsity girls' basketball team from the 1995 NJSIAA girls' basketball championships, and placing the team on probation for one year from October 1, 1994 as penalty for the coaches' violation of NJSIAA rules governing out-of-season activity. (See facts, infra.)

In addition to the Petition of Appeal and Motion for Emergent Relief filed on January 24, 1995, Haddonfield submitted a supplemental brief on January 26, 1995. Respondent NJSIAA submitted

its reply brief on January 30, 1995. It was determined that the Commissioner of Education would decide the merits of this matter on an accelerated schedule, thereby obviating the need to decide the Motion for Emergent Relief, since the seeding for the NJSIAA girls' varsity championships is to be compiled on February 9, 1995. The Commissioner will decide the merits of this matter under the standard of review articulated by the courts in reviewing an appeal for NJSIAA. That standard holds that the Commissioner will not substitute his judgment for that of the Association, even if he were to decide differently in a de novo hearing, where due process has been provided and where there is an adequate basis for the decision reached by the NJSIAA Committees. See, e.g., Dam Jim Koh and Hong Jun Kim v. NJSIAA, decided by the Commissioner February 3, 1987.

The relevant facts are as follows.

1. On October 1 and 2, 1994, three members of the Haddonfield Memorial High School varsity girls' basketball team participated in a pre-season event called the "ITZ Fall '94 Blue Chip Shootout" ("Shootout") at the Germantown Academy in Fort Washington, Pennsylvania.

2. The Shootout was an event designed to provide high school basketball players with high-profile exposure to college recruiters, "while competing against the best competition possible." ("Fall '94 Blue Chip Shootouts," NJSIAA's Brief, Exhibit 3)

3. On the Friday prior to the start of the Shootout, the coach of the Haddonfield varsity girls' basketball team, Tricia McCaffery, was asked by William McDonough, President of Sport Camps, Inc. and Director of the Shootout, to make herself available to

"coach" a team in the Shootout due to an unexpected vacancy. (Haddonfield's Brief, Exhibit A, Tr. 89-90) Prior to her arrival at the Shootout, Ms. McCaffery was unaware to which team she would be assigned.

4. Upon her arrival at the Shootout, Ms. McCaffery learned that she was assigned to a team known as the "Cardinals" to which one of the Haddonfield players was assigned.

5. During the Shootout, the Haddonfield freshman girls' basketball coach Joseph Castorina, was assigned to a team which played against a team to which a second Haddonfield player was assigned. The third Haddonfield player did not play on or against any team involving Ms. McCaffery or Mr. Castorina.

6. On October 17, 1994, Coach Tricia McCaffery wrote a letter to Mr. Boyd Sands at the NJSIAA informing him of a recent event "which may have been in violation of NJSIAA rules." (Haddonfield's Brief, Exhibit E) Also on October 17, 1994, Joseph S. Castorina wrote to Mr. Sands to similarly report what "may be in violation of NJSIAA rules." (Haddonfield's Brief, Exhibit E)

7. On October 21, 1994, Frank Panhuse, Haddonfield Athletic Director, after consultation with staff from NJSIAA, wrote to NJSIAA, "***reporting a verified out-of-season coaching violation by our varsity girl[s'] basketball coach, Trish McCaffery, her assistant coach, Joseph Castorina and three members of her team." (Haddonfield's Brief, Exhibit E) Mr. Panhuse further indicated:

It is our belief that these participants were in violation of the NJSIAA Rules and Regulations that deal with the out-of-season period as outlined on pages 71 and 72, Section 6, specifically under the clarification 2, "Coaches may attend a participatory camp or clinic merely as spectators, however, they may not be involved

in any way with their school's athletes." Although this was not a camp, nor a clinic, we believe the showcase tournament falls under this rule clarification.

(Haddonfield's Brief, Exhibit E)

8. The Haddonfield Board imposed suspensions upon both coaches, assessed fines and placed both coaches on probation.

9. Based upon the Haddonfield letters, on November 3, 1994, Mr. Sands wrote to Haddonfield Principal Joseph Serico issuing a decision on behalf of NJSIAA finding that both Ms. McCaffery and Mr. Castorina had violated NJSIAA Rule 2, Section 11 by virtue of their participation in the Shootout, and thereby disqualifying the Haddonfield varsity girls' basketball team from championship competition in 1995. (Haddonfield's Brief, Exhibit F)

10. On November 9, 1994, counsel for the Haddonfield Board wrote to counsel for NJSIAA to object to the finding of a violation of NJSIAA Rule 2, Section 11, without permitting Haddonfield the opportunity to be heard. Counsel for Haddonfield stated,

[I]t is our position that, notwithstanding Mr. Panhuse's characterization of the facts as a violation of NJSIAA rules, the Haddonfield Memorial High School coaches did not "instruct" their players at the "ITZ Fall '94 Blue Chip Shoot Out" in violation of NJSIAA Rule 2, Section 11
(Haddonfield's Brief, Exhibit G)

whereupon, NJSIAA scheduled an evidentiary hearing for December 13, 1994, before the Controversies Committee.

11. On December 13, 1994, the Controversies Committee conducted a hearing in this matter, receiving documentary evidence and hearing oral testimony.

12. In a written decision issued December 27, 1994, the Controversies Committee determined that both Ms. McCaffery and Mr. Castorina violated NJSIAA Rule 1, Section 6 and Rule 2, Section

11, and disqualifying the Haddonfield varsity girls' basketball team from the 1995 NJSIAA girls' basketball championships, and placing the team on probation for one (1) year from October 1, 1994.

13. By letter dated January 3, 1995, the Haddonfield Board appealed the December 27, 1994 decision of the Controversies Committee to the Executive Appeals Committee.

14. On January 11, 1995, the Executive Committee upheld the decision of the Controversies Committee.

THE RULES

The pertinent NJSIAA rules are as follows:

RULE 1. STUDENT-ATHLETE GUIDELINES FOR INTRAMURAL, RECREATION, CLUB, CAMPS/CLINICS PARTICIPATION AND "OPEN-GYM" PROGRAMS.

Section 6. Camps or Clinics. The NJSIAA does not restrict an individual's choice to attend any participatory camps or clinics; however, schools, school organizations, or school-related groups such as Booster Clubs may not assist the Student-Athletes' attendance at any camp or clinic during the out-of-season period; this includes providing uniforms, equipment, and funds related to the camp or clinic, including transportation; and coaches may not instruct their Student-Athletes.

CL 2. DURING THE OUT-OF-SEASON PERIOD, the NJSIAA does not restrict an individual's choice to attend a participatory camp or clinic; however, schools, school organizations, or school-related groups such as Booster Clubs may not assist the Student-Athletes' attendance at any participatory camp or clinic, this includes providing uniforms, equipment, and funds related to the camp or clinic, including transportation. Coaches may not be involved in any way with their Student-Athletes. Coaches may attend a participatory camp or clinic merely as spectators, however, they may not be involved in any way with their school's athletes, including being a clinician, when their school's

Student-Athletes attend that camp or clinic regardless of the format or the separation of stations at a clinic.

RULE 2. PROGRAM REGULATIONS

Section 11. Out-of-Season Period. Out-of-Season practice is not permitted under the direction of an instructor or coach, or student leaders. This eliminates any kind of equipment, except shoes as noted, under any form of instruction. The object of this explanation is to make clear the point that there shall be absolutely no practice during the out-of-season period for a particular sport. Any subterfuge or "sharp practice" shall be construed as a violation of this rule.

CL 1 B. School-Related Organizations

During the out-of-season period, the school, school organizations such as Booster Clubs, Fathers' Club, Varsity Club and the like may not assist the student-athlete during the out-of-season period or provide individually issued equipment, uniforms, transportation or funds related to camp or clinic attendance when same is of a participatory nature.

CL 2 A. Coaches/Student-Athletes

Coaches may not instruct their student-athletes during the out-of-season period; neither may they hold meetings nor any other way be involved with the student-athlete, including Open-Gym Programs. For Seniors, all rules apply through the last date of an interscholastic event for that school during the Spring Sports Season. When the same sport for Boys and Girls is conducted in different sports seasons, a student-athlete in that sport may not serve as manager of the team of the opposite sex and will be considered a violation of the out-of-season rule. Coaching staffs may not exchange supervisory duties with another school's staff, including a multiple high school district, in their sport to circumvent the out-of-season rule.

Question: From what point may a coach not be involved with a school's student-athlete?

Answer: From the day the coach is appointed to coach a particular sport to the start of practice of that sport the following year, except for the summer recess, i.e., the last day of school to the first day of school the following September.

CL 4 C. Non-School Teams

A member of a school's coaching staff or faculty may not be involved in any way with a non-school team on which there are team members who participated on the freshmen, junior varsity, or varsity team of the coach's high school team(s) in that sport until the day after the date of the latest scheduled date for NJSIAA Championships in the Spring Sports Season.

Penalty - Any school proved guilty of violating the above rules shall be placed on probation by the Association for not less than one year from the date of violation, and shall not receive championship recognition from this Association in that sport, or enter any championship games, matches, meets or tournaments sponsored by the Association in that sport. Conditions of probation are outlined by the Bylaws, Article X, Section 2.A. Probation.

(New Jersey State Interscholastic Athletic Association Handbook, 1994-95, Constitution, Bylaws, and Rules and Regulations.)

PETITIONER'S ARGUMENTS

Haddonfield outlines the following arguments as to the merits of its claim: 1) The NJSIAA rules do not suggest, by language or structure, that the mandatory penalty for violation of Rule 2, Section 11 applies to any other rule; 2) The NJSIAA rules violate due process and are arbitrary and capricious since they have no clear definitions; and 3) The NJSIAA's interpretation of its rules is arbitrary, capricious and unreasonable, and the application of this erroneous interpretation to the record has no factual or legal basis.

Haddonfield initially asserts that the formatting of the rules do not suggest that the mandatory penalty specified in Rule 2 applies to any rule other than Rule 2, Section 11. Haddonfield posits that the regulations instead suggest that Rule 1 and Rule 2 have difference foci; the focus of Rule 1 is the student-athlete, the focus of Rule 2 is the athletic program.

Highlighting the differences between Rules 1 and 2, as well as the weaknesses in those rules, Haddonfield argues that Rule 1, Section 6 deals with participatory camps or clinics; yet, there is no definition in the rule of "camps or clinics." Haddonfield continues:

All the rule says is that schools may not assist a student-athlete in attending a camp or clinic during the out-of-season period, and coaches may not instruct their student-athletes. The second clarification to the rule simply repeats the rule and adds that coaches may attend a participatory camp or clinic merely as spectators, however they may not be involved in any way with their student-athletes, including being a clinician, at the camp or clinic regardless of the format or the separation of stations at a clinic. There is no definition, standard, guideline, clarification or example of what is meant by "involved."

(Haddonfield's Brief, at p. 22)

Haddonfield further contends that use of the term "stations" in the clarification suggests an instructional basketball activity which does not resemble the Shootout.

Whereas, Haddonfield continues, Rule 2 deals with

inter alia, practices, scrimmages, and time periods for seasons. Section 11 under Rule 2 prohibits out-of-season practice.***

Clarification 2 under Rule 2, Section 11 states that coaches "may not instruct their student-athletes during the out-of-season period; neither may they hold meetings nor any other way be involved with the student-athlete..." As in Rule 1, Section 6, no definition, standard, guideline, clarification or example is given as

to the meaning of "instruct" or "involved with."*** There is no mention of the term coaching or the phrase "out-of-season coaching" or "coaching functions." These concepts are not stated in the rules, regulations, Constitution or Bylaws. (Haddonfield's Brief, at pp. 23-24)

Citing Brown v. City of Newark, 113 N.J. 565, 577 (1989), Haddonfield next avers that the NJSIAA rules are vague, overly broad and ambiguous, and thus violate fundamental standards of due process. (Haddonfield's Brief, at p. 24) Haddonfield argues, "No coach or player could reasonably understand the rules pertaining to out-of-season practice and adjust his or her conduct accordingly in an effort to comply." (Id.)

In advancing its argument that the rules violate due process, Haddonfield outlines perceived ambiguity in those rules. Haddonfield contends, inter alia, the "clarifications" are merely restatements of already vague definitions, which sometimes include even more ambiguous terminology, such as "involved with;" Rule 2, Section 11 forbids "practice," yet contains no definition of the term under that section; and the out-of-season coaching prohibition in Rule 2, Section 11 contains no mention of the broader category of "coaching functions," yet the entire inquiry of the Controversies Committee decision centered on what is or is not a "coaching function." The NJSIAA rules, Haddonfield concludes, are "arbitrary and capricious per se, as having no standards, guidelines or meanings." (Haddonfield's Brief, at p. 25)

Haddonfield's third assertion on the merits of this matter is that the NJSIAA's application of its erroneous interpretation of the rules to the record has no factual or legal basis. Haddonfield argues that NJSIAA is guilty of faulty analysis of the factual record in order to reach predetermined results, robotic

interpretation of rules with no consideration of the underlying intent or design, blind reliance on irrelevant aspects of the record, and findings of fact and conclusions of law based on what might have taken place, rather than what actually took place on October 1 and 2, 1994. (Haddonfield's Brief, at p. 26)

Here, Haddonfield contends that NJSIAA found that both coaches violated Rule 1, Section 6, dealing with camps and clinics, yet made no findings that the Shootout was a camp or clinic. (Haddonfield's Brief, at p. 26; Supplemental Brief, at p. 2) Haddonfield points to the record which contains no evidence that the Shootout was a camp or clinic; rather, there was specific testimony to the contrary. (Haddonfield's Brief, at p. 27) Further, Haddonfield maintains that NJSIAA's oral argument before the Executive Committee indicated that the finding (that the Shootout was a camp or clinic) was based on the fact that the Shootout is sponsored by an organization named "Sports Camp, Inc.," rather than on the factual record. (Haddonfield's Brief, at pp. 28, 29)

Haddonfield next addresses the finding of the Controversies Committee that Rule 1, Section 6 is subsumed within Rule 2, Section 11, so that a violation of the former constitutes a violation of the latter. Where the rules do not hint at such an interpretation, Haddonfield contends, "The NJSIAA is simply making it up as it goes along***." (Haddonfield's Brief, at p. 28) Haddonfield avers that NJSIAA should be concerned with the specific conduct in question, and should not determine that a violation of Rule 1, Section 6 is automatically a violation of Rule 2, Section 11. "Such an interpretation," Haddonfield maintains, "renders Rule 1, Section 6 mere surplusage" and runs counter to the structure of

these rules, which are found under separate headings. (Haddonfield's Brief, at p. 29)

Moreover, to the extent that the NJSIAA determined that Haddonfield violated Rule 2, Section 11 based upon Mr. Panhuisse's October 21, 1994 letter containing statements made within the context of Rule 1, Section 6, supra, Haddonfield argues that a predetermined result was reached and never questioned. Haddonfield concludes there is no rational basis for determining that one rule (Rule 2, Section 11) encompasses the other (Rule 1, Section 6).

Haddonfield contends that NJSIAA's finding that its coaches violated Rule 2, Section 11 is without adequate basis on the record. Haddonfield avers that NJSIAA improperly based its decision on liberal use of the term "coach" as used in the course of the Shootout, and in literature provided by the Shootout sponsor, rather than on the actual conduct of the individuals;¹ that NJSIAA improperly relied on an outdated version of Shootout game rules in reaching its decision;² that NJSIAA improperly based its finding

¹ Haddonfield maintains that the record clearly demonstrates there was no "instruction" at the Shootout, and no "coaching" in the ordinary meaning of the word. The players, Haddonfield argues, made strategic decisions. There was no emphasis on winning. The games were haphazard, and the two Haddonfield "coaches" were only responsible for the substitution of players in a rotation which the players themselves dictated. (Haddonfield's Brief, at pp. 32, 33)

² Haddonfield further avers that NJSIAA erred in basing its conclusions on a set of Shootout rules which testimony demonstrated were outdated, rather than on the set of rules which were actually employed on October 1 and 2, 1994. In so doing, Haddonfield argues, NJSIAA discounted the entire testimony of Mr. McDonough, the director of the Shootout. (Haddonfield's Brief, at pp. 34, 35)

of violation on conjecture,³ and that NJSIAA's broad reading of Rule 2, Section 11 amounts to overreaching by finding out-of-season "involvement" by Haddonfield coaches. (Haddonfield's Brief, at p. 30)

***The Committee's overly broad interpretation of the word "involvement" as used in Clarification 2 as prohibiting any interaction with a student-athlete while on a gym floor is contrary to the spirit, intent and goals of the NJSIAA rules in prohibiting conduct that creates an unfair competitive advantage. If NJSIAA wants to prohibit any and all contact, no matter what the situation, between a coach and student-athlete during the out-of-season period it could have easily drafted the rule that way. Rather, by using the term "involved," the drafters of the rules were speaking in terms of being so entwined, so connected, and so wrapped-up in the student-athlete such that undue competitive advantage would result.

(Haddonfield's Brief, at p. 36)

Furthermore, Haddonfield contends, there is no factual basis for NJSIAA's conclusion that Haddonfield gained a competitive advantage by the coach's "involvement" with Haddonfield students at the Shootout.

Inasmuch as NJSIAA's rules are vague and broad, Haddonfield contends, and there are no definitions, standards or precision, due process is violated and the decision rendered by the NJSIAA must be reversed.

³ The Controversies Committee determined: "Even if the Committee were to accept Mr. McDonough's testimony, that Exhibit C-2 constituted the actual 'game rules,' that very document required the coaches to undertake substitutions; make certain that the teams utilized only man-to-man defenses without any zones; and make sure that there was no 'trapping' or 'double teaming.' It is inconceivable to the Committee that an individual who was assigned as 'supervisor/counsellor' could perform any of these functions without exercising the expertise and knowledge of a basketball coach." (emphasis added) (Haddonfield's Brief, Exhibit I, at p. 11)

RESPONDENT'S ARGUMENTS

Respondent outlines the following arguments as to the merits of Haddonfield's claim: 1) Petitioner must be precluded from challenging rules it has adopted as its own; 2) Deference must be afforded the NJSIAA decision; 3) The rules are clear on their face; 4) The rules have been upheld by the Commissioner of Education and the courts; 5) The NJSIAA has provided complete due process; 6) The NJSIAA decision was based on clear violations of the rules; and 7) The penalty was appropriate.

NJSIAA initially asserts that its member schools adopt as their own, and agree to be governed by, the Constitution, Bylaws and Rules and Regulations of the NJSIAA. In so doing, NJSIAA argues that Haddonfield should be precluded from asserting that the rules are faulty, now that they are being applied against it. NJSIAA attaches a copy of Haddonfield's Membership Resolution evidencing its agreement to adopt NJSIAA rules and regulations as its own. (NJSIAA's Brief, at p. 21, and Exhibit 1)

Underscoring that the Commissioner's review in this matter is an appellate one, NJSIAA also contends that where due process has been granted, and there is an adequate basis for the decision, the Commissioner will not substitute his judgment for that of the Association, even if he would have determined otherwise in a de novo review. Dam Jin Koh and Hong Jun Kim v. NJSIAA, supra Citing Board of Education of the City of Camden v. NJSIAA, 92 N.J.A.R. 2d (EDU) 182, 188, NJSIAA asserts that, "The Commissioner must only determine whether the NJSIAA's decision was based on substantial credible evidence in the record." (NJSIAA's Brief, at p. 22)

Further, the NJSIAA contends that the rules governing out-of-season relationships between coaches and athletes are clear on their face. With respect to these rules, NJSIAA argues,

***Succinctly stated, they forbid any involvement between a coach and her athlete during the out-of-season period. Coaches must not participate in open gym programs, meetings, practices, scrimmages, camps or clinics during the out-of-season period. Nor may coaches transport students to any such activities. Four times the rules state that coaches "may not be involved in any way" with athletes. The rule is so obvious that when the Haddonfield administration realized that its coaches had taken part in the Shootout, it immediately reported the violation to the NJSIAA. At that time, Haddonfield characterized it as a violation of Rule 1, Section 6. However, it was later pointed out to the school by the Administration that the same conduct was also a violation of Rule 2, Section 11. (NJSIAA's Brief, at p. 25)

Additionally, that these rules have been upheld by the Commissioner and the courts when the NJSIAA has disqualified a team from championship is, according to NJSIAA, further reason to sustain its decision. NJSIAA highlights two cases in particular to advance its argument. In Board of Education of the South Orange-Maplewood School District, Essex County v. NJSIAA, decided by the Commissioner November 20, 1986, the coach therein claimed that he was involved with a recreation league as a "volunteer and responsible adult." (NJSIAA's Brief, at p. 26) Arguing that he provided no coaching or actual instruction, the coach in South Orange-Maplewood asserted he was only responsible for making substitutions to assure that all team members had an opportunity to play. Even where that coach had no contact with his students, as opposed to the facts in the instant matter, NJSIAA barred the high school's soccer team from state

championship participation for one year.⁴ Additionally, in Board of Education of the Township of Verona, Essex County v. NJSIAA, decided by the Commissioner February 14, 1990, the NJSIAA disqualified a school from championship consideration in ice hockey when the coach coached his son on both a high school team and a club team. The Commissioner sustained the NJSIAA's decision. NJSIAA contends that it has been upheld in every instance in which it has disqualified a team from championship play. (See NJSIAA's Brief, at p. 27.)

NJSIAA next asserts that its decision should not be reversed where Haddonfield has been provided due process. Specifically, NJSIAA notes that there were two hearings, with an opportunity to present evidence, witnesses and legal argument; proceedings were recorded and over 200 pages of transcripts now exist in this matter. Both the Controversies Committee and the Executive Committee unanimously found that Haddonfield violated the rules. (NJSIAA's Brief, at p. 28) NJSIAA further avers that the transcripts, the colloquy between members and the thoroughness of the written decision "all demonstrate the fatuous nature" of Haddonfield's claim that a decision was "predetermined." (NJSIAA's Brief, at p. 28)

⁴ The Commissioner initially reversed NJSIAA's penalty decision but was himself reversed when the Appellate Division entered a stay of his decision. The stay was affirmed by Justice Handler which, in effect, reinstated the decision of NJSIAA.

The action taken by NJSIAA was, the Association continues to argue, reasonably based on clear violations of the rules. Here, NJSIAA points to the October 21, 1994 letter from Haddonfield's athletic director to NJSIAA indicating that the coaches had violated the rules, and that Haddonfield had penalized the coaches accordingly. That Haddonfield now argues the coaches did not actually coach, but were merely "cheerleading," NJSIAA contends, belies the words in the coaches' own letters of October 17, 1994, supra. NJSIAA further contends, with respect to the athletic director's letter, "Petitioner has now attempted to extricate itself from that initial admission of wrongdoing, yet the letter points out the inherent reasonableness of the Association's action: it found responsibility for a violation which the school recognized and confessed." (NJSIAA's Brief, at p. 29) Evaluating the conduct of the Haddonfield coaches on October 1 and 2, 1994, NJSIAA summarizes:

The fact is that the coaches coached. They may not have devised strategy or instructed their players the way they would in a high school game, but they motivated their players; provided supervision; made substitutions to ensure that each player played at least half the game; made certain that the team utilized only man-to-man defense without any zones, and made sure that there was no trapping or double-teaming as required by the rules of the Shootout. All of these facts were carefully delineated in the decision of the Controversies Committee. (Petitioner's Exhibit I, pp. 9-11.) They called themselves coaches and they were referred to as coaches. (NJSIAA's Brief, at p. 32)

NJSIAA further argues that the Controversies Committee "was well within its discretion" to interpret Rule 2, Section 11 to consider an event such as the Shootout as a camp or clinic. (NJSIAA's Brief, at p. 30) Additionally, the Association maintains

that the fundamental violation occurred when Coach McCaffery "was *** involved with a nonschool team on which one of her student-athletes*** participated." That "Coach Castorina was also 'involved' with one of his athletes, and Coach McCaffery transported one of her athletes to the event," merely adds, the Association argues, to the fundamental violation. (NJSIAA's Brief, at pp. 30, 31)

Moreover, NJSIAA maintains that the mandatory penalty, contrary to Haddonfield's assertions, does apply to Rule 1, Section 6, inasmuch as that mandatory penalty deals with out-of-season rules, which include Rule 1, Section 6. However, NJSIAA continues,

***even if the mandatory penalty somehow did not apply to the out-of-season violations in Rule 1, Section 6, it assuredly applies to Rule 2, Section 11, and Ms. McCaffery clearly violated that rule by being involved with [a] non-school team on which one of her student-athletes participated (Rule 2, Section 11, CL4C), and transporting her student to the Shootout (Rule 2, Section 11, CL1B); and Ms. McCaffery and Mr. Castorina both violated the rule by becoming involved with their student-athletes at the basketball event (Rule 2, Section 11, CL2).
(NJSIAA's Brief, at p. 33)

Finally, NJSIAA contends that the penalty imposed was appropriate. It argues that drawing bright lines necessarily discourages improper conduct among member schools which have adopted these rules and regulations. To the extent that NJSIAA has applied the rules against Haddonfield in this matter, the Association argues, it is merely establishing standards in a predictable way.

Upon his careful and independent review of the record of this matter, including transcripts from both the Controversies Committee hearing and the Executive Committee hearing, the

Commissioner affirms the determination of NJSIAA disqualifying the Haddonfield varsity girls' basketball team from the basketball championships, and placing said team on probation for one year from October 1, 1994 for the reasons expressed by the Controversies Committee and for those reasons expressed in the Brief submitted by NJSIAA on January 30, 1995.

The Commissioner is persuaded that the facts in the instant matter are similar to those in South Orange-Maplewood, supra. There, the coach assisted a community soccer association

as a volunteer and responsible adult not as a coach he was not asked to, nor did he, provide any coaching since the team already had paid a coach. (South Orange-Maplewood, supra, Slip Op., at p. 5)

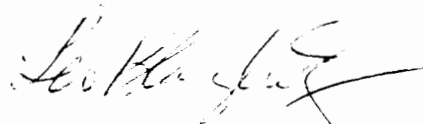
In that case, petitioner alleged that the coach's role in the seven or eight games he attended was a collaborative one with parents, making substitutes which were not strategic in nature. However, in contrast with the instant matter, the South Orange-Maplewood Board asserted that its coach had no contact with his student-athletes. (Id., at p. 6)

Acknowledging that the conduct of the coaches herein could have been an inadvertent violation, the Commissioner is nevertheless mindful of the precedent established in similar petitions seeking reversal of the Controversies Committee's interpretation of its rules. The Commissioner therefore finds that Haddonfield has failed to establish that the Committee's interpretation and application of NJSIAA's rules and regulations in this matter constituted arbitrary, capricious or unreasonable action which would warrant reversal of the NJSIAA's decision.

As to the penalty assigned, the Commissioner concurs with NJSIAA's assertion that by agreeing to be bound by the NJSIAA's rules as a member of the Association, the Board agreed to the minimal penalty for violation of Rule 2, Section 11, which requires elimination from any post-season championship competition. Verona, supra, slip op. at p. 10

Accordingly, for the reasons expressed above, the instant Petition of Appeal is dismissed, with prejudice.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

FEBRUARY 10, 1995

DATE OF MAILING - FEBRUARY 10, 1995

DHP #471-94
SB # 51-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOYMENT : STATE BOARD OF EDUCATION
OF GREGORY CAMPBELL. : DECISION
_____ :

Decided by the Deputy Commissioner of Education,
March 24, 1995

For the Petitioner-Appellant, Zazzali, Zazzali, Fagella
& Nowak (Richard A. Friedman, Esq., of Counsel)

For the Respondent-Respondent, Pamela B. Katten, Deputy
Attorney General (Deborah T. Poritz, Attorney
General of New Jersey)

The State Board of Education grants the request of the parties to remand this matter to the Commissioner of Education for a hearing in order to provide the petitioner with an adequate opportunity to establish a record in support of his contention that he has satisfied the statutory standard for rehabilitation.¹ Given the circumstances, we direct that such hearing and a final determination by the Commissioner be rendered

¹ We note that the Office of Criminal History Review was apparently not represented in the proceedings before the Deputy Commissioner. Upon the filing of the appeal, Counsel to the State Board notified the Attorney General's Office that an appeal had been taken in the matter, and transmitted a copy of the record. A Deputy Attorney General was then assigned to appear as attorney of record in the appeal.

June 5, 1995

on an expedited basis, and that such determination considers all pertinent circumstances under the factors set forth in N.J.S.A. 18A:6-7.1, including "any evidence of rehabilitation." See Wolffbrandt v. New Jersey State Department of Education, decided by the State Board, July 1, 1992.

Moreover, although the Deputy Commissioner states in his letter decision that petitioner's criminal history record review reveals a conviction for "possession of narcotics" in 1989, we can find no such offense indicated on the record. Indeed, there is no reference to such an offense on the records obtained from either the New Jersey State Bureau of Identification or the Federal Bureau of Investigation.² Nor do the disqualification letters from the manager of the Department's Office of Criminal History Review reveal any criminal offenses subsequent to 1984. The record does, however, indicate that petitioner was incarcerated in 1989.

Consequently, we direct that the proceedings on remand also provide clarification of the circumstances surrounding petitioner's incarceration in 1989. This information is particularly critical in view of the Deputy Commissioner's

² The criminal record review obtained from the Federal Bureau of Investigation indicates that petitioner was in custody in February 1989. However, we note that such status appears under his 1984 arrest for possession of amphetamines. It does not indicate a subsequent arrest or conviction.

conclusion, based on his statement that petitioner was convicted of "possession of narcotics" in 1989, that insufficient time had lapsed for him to be convinced of petitioner's rehabilitation.

Petitioner has the burden on remand of establishing his rehabilitation by clear and convincing evidence.

We retain jurisdiction.

July 5, 1995

Date of mailing JUL 07 1995

(SB) 51-95

DHP #471-94
SB # 51-95
DHP # 33-96

IN THE MATTER OF THE DISQUALIFI- :
CATION FROM SCHOOL EMPLOYMENT : STATE BOARD OF EDUCATION
OF GREGORY CAMPBELL. : DECISION

Decided by the Deputy Commissioner of Education, March 24, 1995

Remanded by the State Board of Education, July 5, 1995

Decision on remand by the Commissioner of Education, January 30, 1996

For the Petitioner-Appellant, Zazzali, Zazzali, Fagella & Nowak (Richard A. Friedman, Esq., of Counsel)

For the Respondent-Respondent, Pamela B. Katten, Deputy Attorney General (Deborah T. Poritz, Attorney General of New Jersey)

The decision of the Commissioner of Education disqualifying petitioner from school employment following a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1 is affirmed for the reasons expressed therein. We concur with the Commissioner that petitioner has failed to affirmatively demonstrate his rehabilitation by clear and convincing evidence.

Wendel E. Daniels opposed.

Maud Dahme abstained.

July 10, 1996

Date of mailing JUL 12 1996

52-95

BOARD OF EDUCATION OF THE BOROUGH :
 OF BOUND BROOK, :

PETITIONER, :

V. :

BOROUGH COUNCIL OF THE BOROUGH :
 OF BOUND BROOK, SOMERSET COUNTY, : COMMISSIONER OF EDUCATION

RESPONDENT. : DECISION

AND :

IN THE MATTER OF THE CAP WAIVER :
 APPEAL OF THE BOUND BROOK :
 BOROUGH SCHOOL DISTRICT, SOMER- :
 SET COUNTY. :

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of \$522,661 made by governing body following voter rejection of proposed budget on April 19, 1994.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore \$312,592.

Board also appealed General Fund cap waiver in the amount of \$619,761 rejected by voters.

Upon review of the record, Commissioner determined to order the increase of \$492,761 in cap waiver monies for a total General Fund tax levy of \$7,816,460 for 1994-95 school year.

BOARD OF EDUCATION OF THE BOROUGH :
OF BOUND BROOK, :

PETITIONER, :

V. :

BOROUGH COUNCIL OF THE BOROUGH :
OF BOUND BROOK, SOMERSET COUNTY, :

RESPONDENT. : COMMISSIONER OF EDUCATION

AND : DECISION

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION :
OF THE BOROUGH OF BOUND BROOK, :
SOMERSET COUNTY. :

For Petitioner, John E. Collins, Esq., (Carroll & Weiss)

For Respondent, James G. O'Donohue, Esq., (Hill Wallach)

This consolidated matter was opened before the Commissioner on June 16, 1994, through the filing of a Petition of Appeal of the defeated budget by the Bound Brook Borough Board of Education (Board) pursuant to the provisions of N.J.A.C. 6:24-7.4. On June 16, 1994, the Board also filed a Petition of Appeal of its defeated cap waiver. On the grounds of necessity for a thorough and efficient system of education, the Board sought restoration of line item reductions made by the Bound Brook Borough Council (Council) following voter rejection of the Board's proposed budget and cap waiver on April 19, 1994. Subsequent to the defeat, the Board and Council consulted on the defeated budget pursuant to N.J.S.A.

18A:22-37 and N.J.A.C. 6:24-7.2(b)(2), and the Council reduced the General Fund Tax Levy by \$635,307. Following the filing of the Petition of Appeal, the Board and Council continued to consult on the defeated budget, and the Council reduced the General Fund Tax Levy reduction to \$522,661. Consequently, the monies in contention in this consolidated matter are as set forth below:

<u>Proposed Tax Levy Adopted By Board of Education</u>	<u>Amount of Tax Levy Certi- fied by Governing Body</u>
General Fund \$7,533,768	General Fund \$7,011,107
Cap Waiver \$619,761	Cap Waiver - 0 -
<u>Amount of Reduction By Governing Body</u>	<u>Amount of Reduction in Dis- pute Before the Commissioner</u>
General Fund \$522,661	General Fund \$522,661
Cap Waiver \$619,761	Cap Waiver \$619,761

On June 24, 1994, the Council submitted its Answer to the Petition on the defeated budget; and on June 27, 1994, the Council submitted its Answer to the Petition on the cap waiver. A Position Statement on both matters was received on July 18, 1994. Position Statements on the defeated budget and cap waiver were received from the Council on July 18, 1994.

As a result of the State Board of Education's July 7, 1993, decision in Board of Education of the Borough of Rutherford v. Mayor and Council of Rutherford, wherein the State Board ruled that decisions in defeated voter cap waiver appeals must determine whether or not reallocation within the district's maximum permissible budget is possible and whether, and to what extent, the specific programs at issue are essential in order to enable the Board to meet its constitutional obligation to provide a thorough and efficient system of education, a letter was sent to the parties by the director of the Bureau of Controversies and Disputes

informing them of the need to supplement the record to document the reallocation and cap waiver review conducted by the Somerset County Superintendent pursuant to N.J.S.A. 18A:7D-26. The county superintendent was accorded thirty (30) days from receipt of the letter to submit a sworn affidavit setting forth an explanation and documentation of the review, including the bases for concluding that: (1) reallocation within the district's maximum permissible budget for the 1994-95 school year was not possible, and (2) the specific programs at issue were essential for the Board to provide a thorough and efficient system of education to its students.

The Council and the Board were provided twenty (20) days from receipt of the county superintendent's submission to file a response thereto.

The county superintendent's affidavit and supporting documentation was received on July 26, 1994. The Board's Responses to the Council's Position Statements on both matters were filed on July 27, 1994. The Council's Response to the Board's Position Statement on the defeated budget was received on July 28, 1994. The Board's Summation was filed on August 3, 1994, and the Borough's Summations on both matters were filed on August 4, 1994. The director of the Bureau of Controversies and Disputes notified both parties on December 16, 1994, that the school district's 1993-94 year-end budget audit would be reviewed and utilized in the determination of the appeal to verify that there is no underestimated undesignated surplus that could be appropriated in the 1994-95 budget. Letters were received on this issue from the Board on December 16 and 19, 1994, and from the Council on December 19, 1994.

No additional documents were filed by either party and the record of this consolidated matter was closed on December 19, 1994.

The specific reductions under appeal in the General Fund tax levy are as follows:

<u>Account</u>	<u>Title</u>	<u>Reduction</u>
11-110-100-101	Pre-School/Kindergarten Substitutes Salaries	\$950

EXPLANATION: A reduction of \$950 is appropriate based upon past experience, inasmuch as the 1992-93 budget allowed the amount of \$2,100 for this item and the 1992-93 actual audit shows that only \$805 was expended. The proposed recommendation reflects a greater than 30% increase over what was actually needed in the 1992-93 budget. This reduction will not impact on providing a thorough and efficient education.

11-130-100-101	Grades 6-8 Teacher Salaries	\$10,000
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EXPLANATION: A reduction of \$10,000 is appropriate based upon over-budgeting in 1992-93 in the amount of \$24,000 and also based upon retirement and replacement with new teachers. This recommendation will not adversely impact on providing a thorough and efficient education.

11-140-100-101	Grades 9-12 Teacher Salaries	\$20,000
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EXPLANATION: A reduction of \$20,000 is appropriate based upon teachers retiring and being replaced with teachers at a lower salary. Again, overbudgeting in the 1992-93 budget in the amount of \$39,587 was taken into account in this recommendation. This recommendation will not adversely impact on providing a thorough and efficient education.

11-140-100-101 Grades 9-12 Summer Employment \$2,600

EXPLANATION: The 1993-94 budget contained no funds for this category and it is our recommendation that this item not be funded. Elimination of this line item will not adversely impact on a thorough and efficient education.

11-140-100-101 Grades 9-12 Department Heads \$10,000

EXPLANATION: A department head is a salaried teacher who is given an extra duty as such and is paid a stipend for that duty. The 1992-93 budget of \$11,050 was audited as not having been paid. The 1993-94 budget of \$14,517 seems excessive in view of the fact that nothing was actually spent in this account in 1992-93. Therefore, the recommendation to limit this line item to \$15,000 in 1994-95 is appropriate, as it reflects a greater than 35% raise from the budgeted amount in 1992-93 which was not even expended. This recommendation will not adversely impact on providing a thorough and efficient education.

11-140-100-101 Grades 9-12 Substitutes \$17,000

EXPLANATION: This item seems to fluctuate from underbudgeted to lower than previously used. The amount recommended of \$25,600 reflects the use of a substitute teacher in the 9-12 grade levels over 365 times in a 180-day school year. While understanding that illness cannot be predicted, department heads, supervisors and other teachers certainly can be utilized during emergency absences. This recommended cut will not adversely impact on providing a thorough and efficient education.

11-190-100-106 Regular Program Instruction Paraprofessional \$15,000

EXPLANATION: The 1993-94 budget reflects an amount budgeted of only \$12,000 for this line item. An increase in this line item of 25% is more appropriate than a 150% increase as proposed. This recommended

cut will not adversely impact on providing a thorough and efficient education.

11-190-100-320	Regular Program Instruction	
	Assembly Programs - Lafayette	\$300
	Assembly Programs - LaMonte	\$300
	Assembly Programs - Smalley	\$300
	Assembly Programs - Middle School	\$400
	Assembly Programs - High School	\$1,050

EXPLANATION: The 1992-93 budget shows nothing budgeted for this account. The 1993-94 budget contains amounts of \$300 for Lafayette School, \$800 for the middle school and \$800 for the high school. The recommended amounts show a substantial increase over previous years' budgeted amounts for all schools, except the middle school, which was kept at the same level. This recommendation will not adversely impact on providing a thorough and efficient education.

11-190-100-590	Regular Program Instruction	
	Printing Services - Lafayette	\$500
	Printing Services - LaMonte	\$500
	Printing Services - Smalley	\$500
	Printing Services - Middle School	\$500
	Printing Services - High School	\$1,100

EXPLANATION: This line item was not budgeted in 1992-93 and no expenditures for that year are shown. The total amount budgeted in this account is more than 125% higher than 1993-94. A reduction in this account will not impact on providing a thorough and efficient education.

11-190-100-610	Regular Program Instruction Miscellaneous	\$3,240
	Supplies - High School	

EXPLANATION: The 1992-93 budgeted amount was greater than 40% higher than what was actually used. The recommended adjustment reflects a sufficient amount for miscellaneous supplies inasmuch as each department in the high school is budgeted for additional funds for supplies. This recommended adjustment will not adversely impact on providing a thorough and efficient education.

11-190-100-610 Regular Program Instruction Miscellaneous \$533
Supplies - Audio Visual

EXPLANATION: This amount has been consistently high in previous budgets. This recommendation is the same as reflected in the 1993-94 budget and will not adversely impact on providing a thorough and efficient education.

11-190-100-610 Regular Program Instruction Supplies - High \$400
School Home Economics

EXPLANATION: This account reflects overbudgeting in past years. Based on that, a modest reduction is recommended and prudent planning for supplies should be encouraged. This recommendation will not impact on a thorough and efficient education.

11-190-100-640 Regular Program Instruction-Music \$580
Textbooks-LaMonte

EXPLANATION: Supplies for elementary music have been covered in the cap waiver. This line item is redundant and its elimination will not adversely impact on providing a thorough and efficient education.

11-190-100-890 Regular Program Instruction High \$200
School - Art

EXPLANATION: This item was budgeted at \$280 in the 1993-94 budget and the recommendation to increase to \$300 is appropriate based on the previously budgeted amount and based on no funds having been allocated or used in the 1992-93 budget. This recommendation will not adversely impact on providing a thorough and efficient education.

11-190-100-890 Regular Program Instruction
Field Trips-H.S. - Foreign Language \$100
Field Trips-H.S. - Home Economics \$500
Field Trips-H.S. - Science \$300

EXPLANATION: Based on prior years' spending and 1992-93 audited figures, the amounts recommended are sufficient to provide field trips in these areas. In 1992-93 foreign language was budgeted at

\$400 with \$280 being actually used. Our recommendation is 35% more than what was actually used in 1992-93. The recommendation of \$150 in home economics is 50% higher than the 1992-93 budgeted amount from which nothing was expended. The science recommendation is \$700 which represents a greater than 160% increase over the 1993-94 budget amount. These recommendations will not adversely impact on providing a thorough and efficient education.

11-240-100-106 Neurologically Impaired Salaries-Aides \$5,465

EXPLANATION: Aides for N.I. classes are usually not used at the beginning of a school year due to the fact that, if the N.I. class is greater than a certain number of students, a certified teacher must be hired. There was no expenditure from this line item in 1992-93 and nothing budgeted in 1993-94. An allowance has been made for the possible need for an aide later in the year. Reduction of this line item will not adversely impact on providing a thorough and efficient education.

11-209-100-106 Emotionally Disturbed Salaries-Aides \$5,465

EXPLANATION: The recommended amount would provide for an aide to relieve the classroom teacher for free periods and lunch. This free time should be scheduled consecutively to conserve the use of an aide. The recommended reduction allows for a part-time aide and should be permitted. This recommendation will not adversely impact on providing a thorough and efficient education.

11-240-100-610 Bilingual Education-Materials and Supplies - LaMonte \$4,000

EXPLANATION: Each school in the district has a line item amount of \$831 or less for this account. Budgeting so much more for one school is inappropriate. The amount of \$862 is higher than the high

school appropriation and twice the amount of the other elementary schools. This reduction is appropriate because the budget for total bilingual education supplies would have increased more than 224% over the 1993-94 budget. Even with this recommendation, the budget for total bilingual education supplies will increase more than 124% over the 1993-94 budget. This cut will not adversely affect providing a thorough and efficient education.

11-402-100-100 School Athletics-Site Manager \$4,220

EXPLANATION: A site manager seems to be a completely new position in the current year's budget. Due to the fact that this position has never before been used, it should be deleted as being unnecessary. This reduction will not adversely impact on providing a thorough and efficient education.

11-402-100-590 School Athletics Equipment-Cleaning and Conditioning \$5,000

EXPLANATION: This item was not budgeted in 1992-93. In 1993-94, the budgeted amount was the same as that in the 1994-95 budget. The amount requested seems excessively high for these services. Even assuming that conditioning of football helmets is included in this line item, the cost is too high. Uniforms should be cleaned by the students following each activity. This recommendation will not impact on safety of students involved in sports activities and will not adversely impact on the provision of a thorough and efficient education.

11-402-100-590 School Athletics Uniform \$1,835

EXPLANATION: While realizing that wear and tear on athletic uniforms occurs, a program to replace uniforms periodically should

be instituted over a period of time. The recommended amount should be held in this account and gradually augmented in each year until such time as whole sets of uniforms can be replaced. Allowing, for example, \$200 per uniform, this amount equates to the purchase of 20 new uniforms. This recommendation will not adversely impact on providing a thorough and efficient education.

11-402-100-610	School Athletics-Athletic Trainer Supplies	\$2,000
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EXPLANATION: The 1993-94 budget appropriated \$6,000 for this account which was a new account. Adding the \$4,000, as recommended, totals \$10,000 for two years for this account which is sufficient for supply purposes. This recommendation will not adversely impact on providing a thorough and efficient education.

11-402-100-610	School Athletics-Sport Specific Supplies	\$10,000
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EXPLANATION: There was no expenditure from this line item in 1992-93 and no amount budgeted in 1993-94. This recommendation will not adversely impact on providing a thorough and efficient education.

11-402-100-890	School Athletics-Special Police/Auxiliary Personnel	\$8,267
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EXPLANATION: The amount budgeted is excessive and should be cut to the recommended amount of \$5,000. Police are paid \$27.50 per hour, and the recommended amount equates to approximately 182 hours of police time, which seems appropriate. The 1994-95 budgeted amount calls for 482 hours of police time which seems excessive. This cut will not adversely impact on providing a thorough and efficient education.

11-000-100-562	Instruction-Tuition/Other LEA's/Special	\$30,000
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EXPLANATION: Last year the district brought back to our schools

many of the students previously placed elsewhere. The program of placing students back within the district was instituted primarily to save on tuitions. Hopefully this program is continuing and, based on that, the 1993-94 budgeted amount for this category of \$70,000 should once again cover tuitions having to be paid in this category. Additionally, the budget packet information provided to the Borough Council indicates a decline in LEA projected to be from seven students in 1993-94 to six students in 1994-95. This recommendation will not adversely impact on providing a thorough and efficient education.

11-000-100-564	Instruction-County Vocational Schools Special	\$10,000
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EXPLANATION: There was nothing budgeted or expended for this line item in 1992-93. This cut will not adversely impact on providing a thorough and efficient education.

11-000-100-566	Instruction-Tuition - Handicapped within State	\$43,000
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EXPLANATION: The previous year's budgeted amount in this account of \$488,762 seems excessive due to the fact that the district was attempting to bring students back into the district to save tuition fees. The handicapped facility which was built at the district high school several years ago seems to be underutilized and should, in an effort to save tuition in this account, be studied to ascertain its full potential. The 1994-95 budgeted amount of \$674,437 reflects an increase in this account of almost 40% over the 1993-94 budgeted figures. This is inappropriate if efforts are truly being made to keep handicapped students within the school system. The recommended amount of cut should be permitted to encourage reassessment of students being placed out of district. This cut will not adversely impact on providing a thorough and efficient education and should be

allowed. The school board should be encouraged to reassess all students being placed out of district due to the remaining high amounts paid in tuitions. All district facilities that will accommodate handicapped students should be reassessed to ascertain their full potential, and efforts should be made to guarantee that full utilization of such facilities is accomplished. This recommendation allows for an average tuition payment of \$29,690 per student. (This reduction was decreased in the later consultation to the \$43,000 listed above.)

11-000-218-104 Guidance Salaries - High School \$2,314

EXPLANATION: This item apparently reflects a 6% increase in salary for the director of guidance. The recommendation is to limit the salary increase to 3% for this contract period. This reduction will not adversely impact on providing a thorough and efficient education.

11-000-218-104 Guidance Salaries - Summer \$2,800

EXPLANATION: Guidance is a twelve-month position and summer employees should not be required. Much can be accomplished by full-time employees over the summer months because students are not attending school during this time. This reduction will not adversely impact on providing a thorough and efficient education. (This reduction was changed to \$2,800 in the later consultation.)

11-000-218-580 Guidance - Other-Travel \$500

EXPLANATION: This is a new account and is not appropriate for the guidance office. This recommendation will not adversely impact on providing a thorough and efficient education.

11-000-218-610 Guidance - Comp./Off./Student Supplies \$750

EXPLANATION: The 1992-93 budget appropriated \$1,112 in this account. This was not used. The 1993-94 budgeted amount of \$4,550

and the 1994-95 recommended amount of \$4,000 would result in approximately \$9,000 in this account over the two-year period. This recommended cut will not adversely impact on the provision of a thorough and efficient education and should be allowed.

11-000-219-104&105	Special Services	
	Salary - Summer Work CST	\$4,035
	Salary - Secretary OT/Summer	\$2,004

EXPLANATION: Summer work should not be needed when the secretaries in the department work twelve months. This cut will not adversely impact on providing a thorough and efficient education.

11-000-219-390	Special Services - Student Evaluation	\$5,000
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EXPLANATION: The 1993-94 budgeted amount of \$9,200 seems to be an appropriate amount for this account. A slight increase in the recommended amount to \$10,000 has been allowed. This cut will not adversely impact on providing a thorough and efficient education and should be permitted.

11-000-219-610	Special Services-Materials and Supplies	\$1,000
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EXPLANATION: The 1992-93 budgeted amount of \$550 was more than actually used. The 1993-94 budget is excessive in comparison. The recommended amount is more than three times what was actually used in 1992-93. This cut will not adversely impact on providing a thorough and efficient education.

11-000-221-102	Improvement of Instruction - Salaries-Supervisors	\$60,500
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EXPLANATION: The recommended amount reflects eliminating the position of curriculum director which was created the preceding year. The job description for this position indicates that the responsibilities can be handled efficiently by either the Lafayette School principal or the high school guidance director. The district

should be looking to economize by downsizing administrative staff and having some allocation of responsibility to current staff. Fiscal responsibility can only be accomplished by careful assignment of duties. It is far too easy to create new duties and hire a new person to administer such duties. Creative combining of responsibility will go far in downsizing supervisory and administrative staff in this small school district. The recommended cut certainly will not impact on providing a thorough and efficient education and such cut is strongly urged so that administrative and supervisory staff can be utilized to full potential.

11-000-221-101	Improvement of Instruction	
	Salaries-Substitutes - Lafayette	\$1,000
	Salaries-Substitutes - LaMonte	\$1,000
	Salaries-Substitutes - Smalley	\$1,000

EXPLANATION: With nothing budgeted or expended in the 1992-93 budget, this account should not be funded. The account is not critical to the provision of a thorough and efficient education and the cut should be permitted.

11-000-221-580	Improvement of Instruction - In-Service/ Staff Development-District	\$6,000
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EXPLANATION: This account seems inappropriate since in-service funds for each school in the district are separately budgeted. The reduction of this item will not adversely impact on providing a thorough and efficient education.

11-000-221-580	Improvement of Instruction - Supervisor of Curriculum Travel/Meetings	\$1,000
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EXPLANATION: This position should be eliminated. Therefore, no account for travel is necessary. This cut will not adversely impact on providing a thorough and efficient education.

11-000-222-100 Educational Media Services - Salaries - \$1,310
Summer Employment

EXPLANATION: Students are not attending school in the summer. If the library or other media services are required by students over the summer recess, the local library is available to them. If stocking of the library is required, there are enough regular employees to accomplish this. This cut will not adversely impact on providing a thorough and efficient education. (This reduction was changed to \$1,310 in the later consultations.)

11-000-222-580 Educational Media Services - Travel \$150

EXPLANATION: This same amount was budgeted for the first time in 1993-94. Travel is not appropriate in this category and the recommended cut should be allowed. This cut will not adversely impact on providing a thorough and efficient education.

11-000-222-614 Educational Media Services - Art \$330
Audiovisual-High School

EXPLANATION: This account shows no expenditures in 1992-93 and \$140 budgeted for 1993-94. The recommended amount is slightly higher than the 1993-94 budget and will not adversely impact on providing a thorough and efficient education.

11-000-222-614 Educational Media Services - \$600
Audiovisual-High School

EXPLANATION: Only approximately half of the 1992-93 budgeted amount was used, yet the same amount was budgeted in 1993-94 and 1994-95. The recommended cut will not impact on providing a thorough and efficient education.

11-000-222-614 Educational Media Services - Library- \$532
Audiovisual-High School

EXPLANATION: The 1993-94 budget reflects the same amount as actually spent in 1992-93. The 1994-95 budgeted amount is more than

double the previous amount. The recommended cut aligns with what was used in 1992-93 and budgeted in 1993-94 and will not adversely impact on providing a thorough and efficient education.

11-000-222-890	Educational Media Services	
	Miscellaneous Expenses - Lafayette	\$550
	Miscellaneous Expenses - LaMonte	\$550
	Miscellaneous Expenses - Smalley	\$550
	Miscellaneous Expenses - High School	\$976

EXPLANATION: The budgeted amounts are inappropriate in view of past expenditures. The recommended amounts are 35% higher than budgeted in 1993-94 and are more in line with economy of expenses and will not adversely impact on providing a thorough and efficient education.

11-000-230-331	General Administration - Legal Services	\$25,000
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EXPLANATION: Previous years' legal services were required for various items. The recommended amount reflects an increase over what was actually expended in 1992-93 when legal services were called upon frequently because of the buy-out of the prior superintendent and other negotiations. It is no longer necessary for the board attorney to attend meetings with the same frequency as in the past two years. Therefore, the cut recommended is appropriate and will not adversely impact on providing a thorough and efficient education.

11-000-230-530	General Administration - Telephone	\$7,000
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EXPLANATION: Economy is encouraged. 1992-93 actual telephone expenses were \$10,000 less than budgeted that year. A reduction in this item will encourage frugality in the use of the telephone by everyone in the district and will not impact on providing a thorough and efficient education.

11-000-230-530	General Administration	
	Postage - Middle School	\$1,000
	Postage - High School	\$2,000
	Postage - Board of Education	\$2,000

EXPLANATION: The audited 1992-93 budget indicates the total amount used for postage in all accounts was \$6,870. The recommended cuts still allow for a greater than 45% increase over the total actual 1992-93 expenditure for postage. This cut will not adversely impact on providing a thorough and efficient education and will promote better awareness of the use of postage and hopefully encourage alternative means to using mail where possible.

11-000-230-610	General Administration	
610	Superintendent's Office Supplies	\$2,000

EXPLANATION: The 1992-93 budget reflects \$7,000 used in this account. The 1993-94 budgeted amount was more than double the previous year's. The recommended amount should be sufficient to cover office supplies and, with funds available in other supply accounts, will cause no hardship. This cut will not adversely impact on providing a thorough and efficient education.

11-000-230-610	General Administration	
	Superintendent's Miscellaneous Supplies	\$500
	Board Meetings/Workshops	\$500

EXPLANATION: The recommendation is sufficient for a miscellaneous account and will not adversely impact on providing a thorough and efficient education.

11-000-230-890	General Administration-Superintendent's	\$500
	Mem./Registrations/Dues	

EXPLANATION: The memberships, registrations and dues covered by this account have historically been budgeted at \$1,000. This recommended cut keeps this account at \$1,000 and will not adversely affect the provision of a thorough and efficient education.

11-000-230-890	General Administration-Election - Miscellaneous Expenses	\$500
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EXPLANATION: Funding for this account has historically been budgeted at \$1,500. The recommendation is to continue the funding at \$1,500. This cut will not adversely impact on providing a thorough and efficient education.

11-000-240-103	School Administration-Salaries-Principal Elementary	\$16,126
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EXPLANATION: There are three elementary schools in the district. This past year one of the elementary school principals retired. One principal is to be hired to replace the one who retired. It is assumed that the principal hired will be hired at the entry level salary of \$58,000. The recommendation allows the entry level salary to hire a new elementary school principal for Lafayette School and also allows for a 3% salary increase for the principals of the other two elementary schools in the district. Being aware of the fact that administration contract negotiations are being held at the present time, it is Borough Council's recommendation that a salary increase for this contract period be held to 3%. This recommended cut will not adversely impact on providing a thorough and efficient education and should be permitted. It is further recommended that the Board of Education diligently pursue the feasibility of a shared principal between Lafayette and LaMonte Schools. Lafayette School consists of Pre-K through third grades and LaMonte consists of fourth through sixth grades. The schools are four blocks from each other, and there may be a greater savings in combining the principalships of the two schools. A thorough and efficient education is not provided through money or administrative positions alone. It is provided through efforts on the part of the school

board and administrative staff investigating ways to combine duties so that dollars can be better spent on items that directly affect the quality of life of the student. This recommended cut will not adversely impact on providing a thorough and efficient education.

11-000-240-103 School Administration-Salaries-Principal \$13,894
High School

EXPLANATION: In February 1994, the high school principal resigned to take a position in another district. At present, one of the elementary school principals is filling the position until a new one is hired. There is also one vice-principal in the high school. The recommended cut reflects the fact that a new high school principal will be hired at the entry level salary of \$68,500. The recommendation also includes a 3% salary increase for the high school vice-principal. This recommendation is reasonable and will not adversely impact on providing a thorough and efficient education and should be permitted.

11-000-240-105 School Administration Salaries-Secretary \$23,732
to Middle School Principal

EXPLANATION: A middle school principal is requested in the Cap Waiver. The position is an unnecessary one since the middle school and high school, grades 7 through 12, are housed in one building which has a principal and vice-principal. There is also a guidance counselor for the middle school. The recommendation is based on the fact that because a middle school principal is not required, a middle school secretary to the principal is not required. The high school principal's office and vice-principal's office have several secretaries. The vice principal should oversee the middle school, and his current secretarial staff should absorb the middle school

secretarial work. This recommended cut will not adversely impact on a thorough and efficient education and should be permitted.

11-000-240-105 School Administration-OT & Substitute \$1,500
School Secretary

EXPLANATION: The actual 1992-93 audited amount shows an expenditure in this account 35% less than budgeted. The recommended cut is more than 18% greater than what was actually used in 1992-93 and will not adversely impact on providing a thorough and efficient education.

11-000-240-890	School Administration	
11-000-240-860	Admin. Dues/Reg. - Lafayette	\$400
11-000-240-860	Admin. Dues/Reg. - LaMonte	\$400
11-000-240-860	Admin. Dues/Reg. - Smalley	\$400
11-000-240-860	Admin. Dues/Reg. - Middle School	\$600
11-000-240-860	Admin. Dues/Reg. - High School-Art	\$170
11-000-240-860	Admin. Dues/Reg. - High School-F. Lang.	\$150
11-000-240-860	Admin. Dues/Reg. - High School-Math	\$320
11-000-240-860	Admin. Dues/Reg. - High School-Music	\$100
11-000-240-860	Admin. Dues/Reg. - High School-PE/Health	\$70
11-000-240-860	Admin. Dues/Reg. - High School-Soc. Stud.	\$150
11-000-240-860	Admin. Dues/Reg. - High School	\$1,000

EXPLANATION: This recommended cut is based on previous years where nothing was budgeted or expended in this account. There is a provision for the possibility of expenditures in this category and these recommendations are reasonable based on past history. These recommended cuts will not adversely impact on providing a thorough and efficient education.

11-000-260-100 Operation & Maintenance-Salaries - Reg. \$31,895
Custodians

EXPLANATION: This account is funded for 11 custodians: one for each elementary school, one for district buildings (two of them) and six for the high school building. The custodian used for the two district buildings is frivolous as these buildings are houses converted to offices. These two buildings do not warrant the use of a full-time custodian, and we recommend that the duties of this

custodian be absorbed by the remaining ten. This recommended cut also reflects the hope that overtime in this account be cut 25% during the next budget year. This recommendation certainly will not adversely impact on providing a thorough and efficient education. The recommendation will promote downsizing of custodial staff as well as scheduling of work so as to minimize the need for overtime.

11-000-260-100 Operation & Maintenance-Salaries - Lunch/ \$12,398
Hall Aides

EXPLANATION: It is our understanding that two hall monitors are presently being used in the high school building. The recommended cut reflects the use of just one hall monitor. Two hall monitors should not be necessary since there are many teachers in the building as well as other personnel. One hall monitor should suffice and will not adversely impact on providing a thorough and efficient education.

11-000-260-100 Operation & Maintenance-Summer \$7,500
Maintenance Projects

EXPLANATION: Summer maintenance projects should be performed by the regular maintenance and custodial staff. Painting and general sprucing up should be performed with the aid of community service workers who will, upon request to the Borough of Bound Brook, be provided to help perform routine projects such as painting, sweeping, mopping, waxing, etc. This recommended cut should be allowed and will not adversely impact on providing a thorough and efficient education. As a matter of fact, the reduction in this account will allow for the Board and the Borough to initiate a dialogue on sharing of some services as well as allow the Borough to become aware of maintenance projects the Board is seeking to accomplish.

11-000-260-590 Operation & Maintenance-Other Vehicular \$4,000
 Expenses

EXPLANATION: The 1992-93 audited budget shows that this account was overbudgeted for that year. The recommended amount reflects a 45% increase over the 1992-93 actual expenses. This cut will not adversely impact on providing a thorough and efficient education.

11-000-260-590 Operation & Maintenance-Other Miscel. \$5,000
 Services & Expenses

EXPLANATION: Again, the 1992-93 audited budget shows this item as being overbudgeted. This recommendation is appropriate and will not adversely impact on providing a thorough and efficient education.

11-000-260-610 Operation & Maintenance-Grounds Supplies \$2,000

EXPLANATION: The 1992-93 audited budget reflects this item as being grossly overbudgeted. The amount spent that year seems more appropriate, and the recommendation reflects a greater than 260% increase over that amount and should be permitted. This cut will not adversely impact on providing a thorough and efficient education.

11-000-260-610	Operation & Maintenance	
11-000-260-692	Custodial Supplies - Lafayette	\$1,000
11-000-260-692	Custodial Supplies - LaMonte	\$1,000
11-000-260-692	Custodial Supplies - Smalley	\$1,000
11-000-260-692	Custodial Supplies - Middle & High School	\$1,800

EXPLANATION: Custodial supplies in this account reflect an average of \$25 per day being spent in each elementary school for such supplies and an average of \$82 per day in the high school. These amounts are inappropriate and the recommendation reflects a more logical cost-per-school. It is hoped that the Board is buying in bulk quantities so as to receive better value. It would, perhaps, be beneficial to both the Board and the Borough to dialogue on sharing bulk purchases for these items. This cut will not adversely impact on providing a thorough and efficient education.

11-000-260-610	Operation & Maintenance	\$3,800
694	Other Expenses - Repair Buildings	

EXPLANATION: This recommendation allows for general repair to buildings and allows an 8% increase over the actual 1993-94 adjusted budget. This cut will not adversely impact on the provision of a thorough and efficient education.

11-000-260-610	Operation & Maintenance	
11-000-260-697	Electricity - Lafayette	\$1,000
11-000-260-697	Electricity - Smalley	\$2,000
11-000-260-697	Electricity - Middle & High School	\$3,000

EXPLANATION: The recommended cuts allow for an 8% increase over the 1992-93 actual audited budget figures. Conservation of energy should be practiced and encouraged. This recommendation will not adversely impact on providing a thorough and efficient education.

11-000-260-620	Operation & Maintenance	
11-000-260-698	Heat - Lafayette	\$1,000
11-000-260-698	Heat - LaMonte	\$1,000
11-000-260-698	Heat - Smalley	\$1,000
11-000-260-698	Heat - Middle & High School	\$3,000
11-000-260-698	Heat - District School	\$2,000

EXPLANATION: The 1992-93 audited budget shows this item as being overbudgeted by approximately \$5,000. The 1994-95 proposed budget of \$94,000 is approximately \$14,000 more than what was actually spent in 1992-93. The recommended cuts will encourage conservation of energy and will not adversely impact on the provision of a thorough and efficient education.

11-000-270-890	Student Transportation-Field Trips - High School	\$1,000
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EXPLANATION: The recommended reduction in this line is to encourage the funding of field trips for the special education classes, which have not been funded in this account. We hope that this cut will be permitted and that a new line item funding \$800 for field trips for the special education class will be permitted. This cut will not

adversely impact on providing a thorough and efficient education and will, in fact, provide for funding of field trips for students who would otherwise be deprived of same.

ADD TO BUDGET NEW LINE ITEM:

11-000-270-890	Student Transportation-Field Trips -	+ \$800
	Special Education	
11-000-290-104	Business & Other Services-Salaries -	\$24,000
	Office of Business Administrator	

EXPLANATION: The recommendation indicates no allowance for an additional employee, as proposed, in this account. This cut will not adversely impact on providing a thorough and efficient education.

11-000-290-340	Business and Other Services-Equipment	\$2,000
	Service Contract	

EXPLANATION: This account has no prior history. The 1993-94 adjusted budget indicates the amount of \$12,678 as being expended. The recommendation allows for a slight increase over actual expenditures and will not adversely impact on providing a thorough and efficient education.

11-000-290-590	Business and Other Services-Travel -	\$500
	Board Office	

EXPLANATION: This is a redundant account which has no prior spending history. Travel should be minimized and the recommended amount should be sufficient to cover any minor expenses of travel in this account. This cut will not adversely impact on providing a thorough and efficient education.

Total Recommended Reduction	<u>\$522,661</u>
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NOTE: The reductions add to a total of \$523,461, but this number is reduced by \$800 because the Council added that amount for special education field trips. The net reduction is \$522,661.

The cap waiver amounts under appeal are as follows:

11-120-100-101	Grades 1-5 Teachers Salaries	\$220,887
11-190-100-610	Instructional Supplies	10,403
11-000-211-101	Attendance/Social Work Salaries	18,921
11-000-222-100	Media Salaries	40,000
11-000-230-103	Salaries of Principals	75,000
11-000-290-290	Other Employee Benefits	60,000
12-000-222-730	Media Equipment	5,550
12-000-400-450	Facilities Construction Services	<u>189,000</u>

TOTAL \$619,761

I. DEFEATED BUDGET

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature, by way of statutory scheme, has delegated the responsibility for providing a thorough and efficient system to local boards of education. Additionally, the Legislature, pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37, has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction is imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Mindful, then, of this standard of review, the Commissioner makes the following determination with respect to the reduction in the General Fund Tax Levy effectuated by the Council:

11-140-100-101 Grades 9-12 Summer Employment \$2,600

The Council states that these funds are not necessary because no funds were budgeted in 1993-94. The Board states that funds for summer employment were expended in 1993-94 but charged to the regular salary account. The Board also states that the summer employment is essential for curriculum work and preparation for the opening of school in September. The Commissioner agrees that many details of curriculum development and preparation for the school program must be completed prior to school opening each year. The Commissioner orders the restoration of the \$2,600.

11-140-100-101 Grades 9-12 Department Heads \$10,000

The Council bases this reduction on the absence of any expenditures in 1993-94 and the provision, after the reduction, of more than the 1993-94 budgeted amount. The Board states the budgeted funds are for contractual obligations. The Board explains that the amount budgeted for 1994-95 is greater than that in 1993-94 because only seven (7) of ten (10) positions were included in 1993-94 and all ten (10) positions are included in 1994-95. The Commissioner has grave concerns about the significant increase in this line item and determines that the Board has not proved that this amount is necessary for the provision of a thorough and efficient education. The Commissioner sustains the \$10,000 reduction.

11-140-100-101 Grades 9-12 Substitutes \$17,000

The Council bases this reduction on what it states are fluctuations in the budgeted amounts and its belief that the amount after the reduction provides sufficient funds for substitute teachers. The Council also states that other staff can cover

classes in emergencies. The Board states that the funds budgeted in 1994-95 were based on expenditures in 1992-93 and 1993-94. Again, it must be noted that the budgeted amounts for substitutes must be estimated and must provide sufficient funds for coverage of all classes. It cannot be assumed that other staff will be free of duties and able to cover classrooms when a teacher is absent. The Commissioner, therefore, orders the restoration of the \$17,000.

11-190-100-106 Regular Program Inst. Paraprofessional \$15,000

The Council states that the amount provided after the reduction is twenty-five percent (25%) greater than the 1993-94 amount which is more appropriate than the one hundred and fifty percent (150%) increase proposed by the Board. The Board states that these funds provided for one elementary aide in 1993-94. A second aide and possibly a third will be needed in 1994-95. Based on this information, the Commissioner orders the restoration of the \$7,500 and sustains \$7,500.

11-190-100-320 Regular Program Inst.-Assemblies \$2,350

The Council based this reduction, which involves all schools, on the absence of any budgeted funds in 1992-93 and the provision of sufficient funds, after the reduction, in comparison with 1993-94. The Board states that the funds budgeted would provide a wide-based exposure to ancillary educational programs, and that many of these programs have never been provided in the district. The funds provided after the Council reduction are greater than the total provided in 1993-94 and would appear to be more than sufficient for this portion of the educational programs. The Commissioner sustains the reduction of \$2,350.

11-190-100-590 Regular Program Inst.-Printing Serv. \$3,100

The Council bases this reduction, which again involves all schools, on the absence of any budgeted funds in 1992-93 and the great increase in the proposed 1994-95 budgeted amount over 1993-94. The Board states that the proposed amount is "reasonable" and that written communication to parents, staff, and students is necessary. The Commissioner agrees that there must be provision for some written communication, but the amount provided by the Council exceeds the 1993-94 amount by greater than twenty percent (20%). The Commissioner determines this increase to be quite reasonable and sustains the reduction of \$3,100.

11-190-100-610	Regular Program Inst.-Miscellaneous Supplies High School	\$3,240
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The Council bases this reduction on the 1992-93 budget and expenditures and the fact that there are also supplies budgeted for each department in the high school. The Board states that supply orders are tightly monitored and that the proposed budget for this item is based on actual need. The Council's argument is somewhat arbitrary since it does not consider the fact that the district enrollment has increased since 1992-93 and that the proposed amount for 1994-95 is only slightly greater than that budgeted for 1993-94. The Commissioner orders the restoration of the \$3,240.

11-190-100-610	Regular Program Inst.-Miscellaneous Supplies-Audiovisual	\$533
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The Council states that this account has been consistently high in previous budgets and that the reduction provides funds equal to that in 1993-94. The Board states that the proposed funds are essential for the proper repair and replacement of parts in the district's audiovisual equipment. The Council's argument is somewhat confusing, because high costs in past years do not

logically justify a reduction but, rather, may demonstrate a consistently necessary expenditure. The amount provided by the Board is only slightly greater than the 1993-94 amount, and proper maintenance of school equipment is essential to the provision of a thorough and efficient education. The Commissioner orders the restoration of the \$533.

11-190-100-610	Regular Program Inst.-Supplies-Home Economics	\$400
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The Council bases this reduction on its position that there was overbudgeting in past years and that prudent planning for supplies should be encouraged. The Board states that this account has been examined very closely and that the 1994-95 proposed budget provides for an increase of two full classes. It is unquestionable that supplies must be provided for all classes. The Commissioner orders the restoration of the \$400 reduction.

11-190-100-640	Regular Program Inst.-Music Textbooks-LaMorte	\$580
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The Council states that these funds are not necessary because supplies for elementary music are covered in the cap waiver. The Board states that the music supplies in the cap waiver are different from this textbook account which is necessary to complete the third year of a three-year replacement program. The Board is correct that the account in the cap waiver is for supplies, not textbooks. The appropriate updating of textbooks is essential to the provision of a thorough and efficient education. The Commissioner orders the restoration of the \$580.

11-190-100-890	Regular Program Inst.-Field Trips Art	\$200
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The Council bases this reduction on the absence of any budgeted amount in 1992-93 and the amount of \$280 budgeted in

1993-94. The Council reduction provides \$300 for this item. The Board states that the monies budgeted for this item provide for a variety of trips to enhance the classroom experience. The Board does not, however, provide any rationale for the significant increase in the proposed funds for 1994-95 over 1993-94. Based on the information presented, the Commissioner sustains the reduction of \$200.

11-190-100-890	Reg. Prog. Inst.-Field Trips-High School Foreign Language, Home Economics, Science	\$900
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The Council bases this reduction on the 1992-93 expenditures. The Board states that these field trips are important to students in these three program areas. Again, however, the Board does not justify any need for the significant increase in the proposed funds for 1994-95 over 1993-94. Based on the information presented, the Commissioner sustains the reduction of \$900.

11-204-100-106	Neurologically Impaired Salaries-Aides	\$5,465
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The Council bases this information on the absence of expenditures in 1992-93 and no budgeted funds in 1993-94. The Council also states that aides are not usually used at the beginning of the school year. The Board states that it must hire an aide pursuant to N.J.A.C. 6:28-4.4(a)(7) in 1994-95 because the class size will be greater than eight (8) pupils. Commissioner orders the restoration of the \$5,465.

11-209-100-106	Emotionally Disturbed Salaries-Aides	\$5,465
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The Council bases this information on its belief that a part-time aide to relieve the teacher for free periods and lunch would be sufficient. The Board states that an aide is essential for this class so that there is appropriate supervision of the students for every period of the day and as they move throughout the building

for any mainstreaming. The Board also states that a student being evaluated by the Child Study Team may be assigned to this class which would then require an aide under the code cited above. Based on this information, the Commissioner orders the restoration of the \$5,465.

11-240-100-610 Bilingual Education-Supplies-LaMonte \$4,000

The Council bases this reduction on the lesser amounts budgeted for the other schools in 1994-95 and a comparison with the 1993-94 budget. The Board states that an administrative review of the instructional supplies at each school indicated that LaMonte School had not received adequate supplies for the Bilingual/ESL program and that extra funds were budgeted to correct this problem. The Board also states that the bilingual population has grown substantially over the last few years. Proper supplies must be provided for programs to ensure a thorough and efficient education, and, in this case, to correct an apparently existing inequity. The Commissioner orders the restoration of the \$4,000.

11-402-100-100 School Athletics-Site Manager \$4,220

The Council bases this reduction on its belief that this is a new position and, therefore, unnecessary. The Board states that this is not a new position but, rather, a slightly changed position that was called "assistant athletic director." In either case, this position does not seem warranted by the documentation presented and is not essential to the provision of a thorough and efficient educational program. The Commissioner sustains the reduction of \$4,220.

11-402-100-590 School Athletics Equipment - Cleaning and Conditioning \$5,000

The Council states that this item was not budgeted in 1992-93 and that the amount requested for 1994-95, the same as for 1993-94, is excessively high. The Council also states that the uniforms should be cleaned by the students following each activity. The Board states that the funds requested are based on previous bills and detailed estimates for 1994-95 and are required for recertifying football helmets, batting helmets, and shoulder pads. It is inarguably essential that properly maintained and safe equipment be provided for school programs. The Commissioner orders the restoration of the \$5,000.

11-402-100-590 School Athletics-Uniforms \$1,835

The Council bases this reduction on the suggestion that the Board set up an account in which a specific amount is placed each year until there are sufficient funds to purchase a whole set of uniforms. The Board accurately states that this proposal is a violation of the accounting principles under which a school district must operate. However, the Board's only justification for these funds is that the manufacturer went out of business last year. This does not justify the need for uniforms or the requested funding. The Commissioner sustains the reduction of \$1,835.

11-402-100-610 School Athletics-Athletic Trainer \$2,000
Supplies

The Council bases this reduction on its position that the amount provided after the reduction, when added to the budgeted amount for 1993-94, provides ample funds over a two-year period. The Board states that the funds are necessary to provide supplies such as training (topping tables, ultrasound machines, whirlpools, cabinets, etc., as well as tape, gauze, etc.) it does not seem

reasonable that such major "supplies" as listed by the Board must be purchased each year. The Commissioner sustains the reduction of \$2,000.

11-402-100-610 School Athletics-Sport-Specific Supplies \$10,000

The Council bases the reduction on the absence of any expenditures in 1992-93 and any budgeted amount in 1993-94. The Board states that expenditures, under different account numbers, can be documented for both 1992-93 and 1993-94 and that the funds are necessary to maintain the current athletic offerings. A review of the budget document that was submitted confirms that more was expended in 1992-93 and budgeted in 1993-94 than requested by the Board in 1994-95. The Council states in its response that it is not their intent to cut any sport. Based on the information presented and Council's stated intention, the Commissioner orders the restoration of the \$10,000.

11-402-100-890 School Athletics - Special Police/
Auxiliary Personnel \$8,267

The Council states that the amount budgeted by the Board is excessive, based on the hourly rate for policemen and the number of hours their services would be required. The Board states that this account also includes other auxiliary personnel, such as ticket takers, sellers, clock operators, and game announcers. The Board also states that additional police coverage is necessary for crowd control and proper security and that the reduction would only allow the district to maintain the current coverage. The Commissioner has serious concerns about the necessity for additional police coverage at high school sporting events which are supposed to represent an extension of physical education and healthy competition. The Commissioner advises the Board to review this matter and perhaps

suspend those activities which are not conducted in a positive manner. The Commissioner sustains the reduction of \$8,267.

11-000-100-562 Instruction-Tuition/Other LEA's - Spec. \$30,000

The Council bases this reduction on its assertion that the district is bringing special education students back into district placement and that the number for placement in 1994-95 is one (1) less than in 1993-94. The Board states that placement for special education students must be based on each child's needs and that the return to the district is not appropriate for every child. The Board specifies the actual costs for five (5) current student placements. In addition, three (3) more students are expected to need outside placement. Appropriate services are absolutely required by both State and Federal law for learning disabled students and sufficient funds must be provided to meet that obligation. The Commissioner orders the restoration of the \$30,000.

11-000-100-564 Instruction-Tuition/County Vocational \$10,000
 Schools-Special

The Council bases this reduction on the absence of any budgeted amount or expenditure in 1992-93. The Board states that the alternative program at the Vocational School has been very beneficial for disaffected students, with one student in the program in 1993-94 and two identified for 1994-95. It is absolutely vital that districts provide effective programs for students to ensure the provision of a thorough and efficient education. The Commissioner orders the restoration of the \$10,000.

11-000-100-566 Instruction-Tuition/Handicapped within \$43,000
 State

The Council again asserts that the amount budgeted by the Board is excessive and that handicapped students should be taught in

the district's handicapped facility which was built at the high school several years ago. The Board again cites the legal requirement for appropriate placement for each pupil with an educational disability and also notes that the district handicapped facility is at ninety-five percent (95%) utilization. Based on the information presented and the requirements for appropriate placements, the Commissioner orders the restoration of the \$43,000.

11-000-218-104 Guidance - Salaries - High School \$2,314

The Council reduction provides a three percent (3%) salary increase in place of the budgeted six percent (6%). The Board states that the amount budgeted is the actual contractual obligation for current staff. The Council cannot arbitrarily change terms of an existing contract. The Commissioner orders the restoration of the \$2,314.

11-000-218-104 Guidance - Salaries - Summer \$2,800

The Council states that guidance is a twelve (12) month position and that additional summer employees should not be required. The Board states that guidance counselors have a ten-(10) month contract and that summer employment is essential for contact with students who have not received credit for a course and those who need summer school or remedial classes. The counselors also register new students. Based on the Council's misunderstanding about the contract period for counselors and the information presented, the Commissioner orders the restoration of the \$2,800.

11-000-218-580 Guidance - Travel \$500

The Council states that this is a new account and not appropriate for the guidance office. The Board states that these funds are necessary for state-mandated meetings on testing and

assessments and that the monies for these were in the high school administrative account in the past. It is essential that district guidance staff be aware of, and informed about, mandated tests and student assessments. The Commissioner orders the restoration of the \$500.

11-000-218-610	Guidance - Supplies	\$750
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The Council bases this reduction on the 1992-93 expenditures and the sum of the 1993-94 budgeted amount and the 1994-95 amount after the reduction. The Board states that this account now includes the middle school computer and office supplies and provides a small increase for higher costs for paper goods. The Board lists in its documents the specific materials that must be purchased. The Commissioner orders the restoration of the \$750.

11-000-219-104	Special Services-Summer Work CST	\$4,035
11-000-219-105	Special Services-Secretary - OT/Summer	2,004

The Council states that summer work should not be needed. The Board states that Child Study Team services are necessary during the summer months to provide student evaluations and comply with N.J.A.C. 6:28-1.1 et seq. The Board also states that vacation time for secretaries requires funds to provide secretarial services throughout the summer. The need to provide Child Study Team services during the summer is valid because evaluations and placement prior to the opening of school is the least disruptive to the students. The Board's position on the secretarial services is not valid, however, since all offices are affected by vacations and can schedule work to accommodate the absences. The Commissioner, therefore, orders the restoration of the \$4,035 reduction and sustains the reduction of \$2,004.

11-000-219-390 Special Services - Student Evaluation \$5,000

The Council bases this reduction on the provision of a slight increase over the 1993-94 budgeted amount. The Board cites the necessity for the services of outside professionals for evaluations and annual reviews of student programs and states that these services have not been appropriately budgeted or provided for in the past. On the basis of the information provided, the Commissioner orders the restoration of the \$5,000.

11-000-219-610 Special Services-Materials and Supplies \$1,000

The Council bases this reduction on the 1992-93 expenditures. The Board states that surplus materials were utilized in the past and no longer exist. It is obviously essential that sufficient supplies be provided for the efficient operation of district offices. The Commissioner orders the restoration of the \$1,000.

11-000-221-102 Improvement of Instruction-Salaries/
Supervisors \$60,500

The Council bases this reduction on the elimination of the position of director of curriculum which was created in the district in the prior year. The Board states that the position was established because responsibilities for the many aspects of curriculum were not handled effectively when assigned to several administrators. The Board cites the district's failure in the Chapter I program review and the neglect of curriculum development in support for the position. Upon review the Commissioner determines that the Board has not established that the position is essential in order to effectively handle curriculum development. Consequently, the Commissioner sustains the \$60,500 reduction.

11-000-221-101 Improvement of Instruction - Salaries - \$3,000
Substitutes

The Council bases this reduction on the absence of any expenditures in 1992-93. The Board states that these funds provide substitutes for teachers so that they can write curricula during the school year. The Board states that this reduces the expense of employing teachers during the summer. Since it has been established that the district curriculum needs attention and improvement, the Commissioner orders the restoration of the \$3,000 reduction.

11-000-221-580 Improvement of Instruction - In-Service/ \$6,000
Staff Development

The Council states that these funds are inappropriate since each school has budgeted funds for in-service. The Board states that there is an urgent need to provide K-12 staff development to ensure vertical and horizontal articulation. This position is valid, but the Board does not specify how this will be achieved or why the additional funds are necessary. Based on the provision of \$4,000 for district staff development plus funds for each school, the Commissioner sustains the reduction of \$6,000.

11-000-221-580 Improvement of Instruction-Supervisor \$1,000
of Curriculum - Travel

The Council eliminates this budget item because it believes there is no need for a director or supervisor of curriculum. The Board states that the supervisor of curriculum must attend meetings to receive technical assistance for the writing of grants and the implementation of programs such as basic skills. Compliance with mandated programs is essential and the skillful application for special funding can provide significant benefits for students. The Commissioner orders the restoration of the \$1,000.

11-000-222-100 Educational Media Services - Salaries/ Summer \$1,310

The Council states that all the funds budgeted are not necessary for summer library services. The Board states that the summer employment is necessary to complete the inventory and prepare for the opening of school. These duties are important, but the Board does not specify the time required for this work or the need for the additional funds. The amount provided by the Council is only twenty-five dollars (\$25) less than the amount budgeted in 1993-94. The Commissioner sustains the reduction of \$1,310.

11-000-222-580 Educational Media Services - Travel \$150

The Council states that travel is not appropriate in this category. The Board states that these funds provide for the librarians to attend workshops to keep up with current trends and technological advances. Updated information is essential to the provision of thorough and efficient library services. The Commissioner orders the restoration of the \$150.

11-000-222-614 Educational Media Services - Art, Audio-visual - High School \$330

The Council bases this reduction on the lack of expenditures in 1992-93 and the provision, after the reduction, of an amount slightly more than that in 1993-94. The Board states that the reduction by the Council will not allow purchases for any special requests. To provide stability in budgeting, requests should be thoroughly considered during the budget development process. In a budget appeal, funds cannot be provided for unanticipated requests for audiovisual materials. The Commissioner sustains the reduction of \$330.

11-000-222-614 Educational Media Services-Audiovisual- \$600
High School

The Council bases this reduction on the 1992-93 expenditures. The Board states that some 1992-93 expenditures were charged to different accounts and that these funds are necessary for slide presentations for award ceremonies, photos of special events, and repairs. The Board does not, however, provide any specific detail to justify the additional funds. The Commissioner sustains the reduction of \$600.

11-000-222-614 Educational Media Services-Library Audio- \$532
visual - High School

The Council bases this reduction on the 1992-93 expenditures and the 1993-94 budgeted amount. The Board states that 1992-93 funds were transferred to the "new Audio-Visual account," but it is not clear what that means. The Board also states that monies had to be added to the 1993-94 account for purchases and upgrading equipment. The Board again, however, does not provide any specific detail to justify the need for the additional funds. The Commissioner sustains the reduction of \$532.

11-000-222-890 Educational Media Services-Miscellaneous \$2,626
Expenditures

The Council states that the budgeted amounts are inappropriate in view of past expenditures and that the amount provided after the reduction is thirty-five percent (35%) higher than the 1993-94 budgeted amount. The Board states that the funds are necessary for the district to move from a contracted elementary media program to a district-level program and at the middle/high school for actual needs. The Board, again, fails to provide specific detail to justify the need for the additional funds. The Commissioner sustains the reduction of \$2,626.

11-000-230-331 General Administrative - Legal Services \$25,000

The Council bases the reduction on 1992-93 expenditures and states that the board attorney does not have to attend meetings as frequently as in the past two years. The Board states that the Council did not consider the many ongoing grievance, arbitration and unfair practice charges. The Commissioner sustains the \$25,000 reduction.

11-000-230-530 General Administrative - Telephone \$7,000

The Council bases this reduction on 1992-93 expenditures and a recommendation for economizing. The Board states that the budgeted amount was based on projections and discussions with the telephone company to determine a reasonable amount and the need for additional telephone lines and modems to bring the schools online with the accounting system. Also, the amount provided by Council is less than the budgeted amount in 1993-94. Based on the information presented, the Commissioner orders the restoration of the \$7,000.

11-000-230-530 General Administrative - Postage \$5,000

The Council, again, bases this reduction on 1992-93 expenditures. The Board states that the budgeted amount is necessary for identified needs. The Board does not provide any specific detail or justify the need for the additional funds. The amount provided, after the reduction, is more than seven percent (7%) greater than the 1993-94 budgeted amount. The Commissioner sustains the reduction of \$5,000.

11-000-230-610 General Administrative - Superintendent \$2,000
Office Supplies

The Council bases this reduction on the 1992-93 expenditures. The Board states that the supplies are carefully scrutinized and that the 1994-95 proposed amount is a thirty percent (30%) decrease from 1993-94. Based on the information presented, the Commissioner orders the restoration of the \$2,000 reduction.

11-000-230-610	General Administrative - Superintendent	\$500
	Miscellaneous Supplies	
11-000-230-610	General Administrative - Board Meetings/ Workshops	\$500

The Council states that the amount provided after the reduction is sufficient for a miscellaneous account. The Board states that the amounts budgeted are the same as in 1993-94, but it does not identify what the funds are used for nor why the funds are needed. The Commissioner sustains the reduction of \$1,000.

11-000-230-890	General Administrative - Superintendent's Mem./Reg./Dues	\$500
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The Council bases this reduction on 1992-93 expenditures and the 1993-94 budgeted amount. The Board states that the amount budgeted for 1994-95 is based on actual costs and required by contract. Since contractual obligations must be met, the Commissioner orders the restoration of the \$500.

11-000-230-890	General Administrative - Election - Miscellaneous Expenditures	\$500
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The Council states that this reduction provides for the same funds that have been "historically" budgeted. The Council does not acknowledge that the 1992-93 expenditures exceeded the amount budgeted. The Board states that additional election workers will be hired because of long lines encountered in past elections. The Board obviously has a responsibility to provide funds for the efficient operation of the annual school election. The Commissioner orders the restoration of the \$500.

11-000-240-103	School Administration - Salaries-Principal-Elementary	\$16,126
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The Council bases this reduction on a replacement principal being hired at an entry level salary and the provision from negotiations of a three percent (3%) salary increase. The Board states the proposed budget includes funds for all principals, including the new person who was hired at a salary higher than entry level, and the provision for "reasonable" salary increases. The amount budgeted in 1994-95 is the same as budgeted in 1993-94, so it would seem that the savings from retirement were already considered. It is also necessary to budget funds for effective negotiations. The Commissioner orders the restoration of the \$16,126.

11-000-240-103	School Administration - Salaries-Principal-High School	\$13,894
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The Council bases this reduction on the same position as noted above, replacement of a principal who left and the provision of a three percent (3%) salary increase. The Board states the new principal has not yet been selected and that funds must be provided for the appointment of a qualified individual and for salary increases. The Commissioner agrees that there must be some reasonable flexibility in the budgeting for the employment of new staff and for contract negotiations. The amount proposed by the Board for this account is more than eleven thousand dollars (\$11,000) less than that budgeted in 1993-94. The Commissioner orders the restoration of the \$13,894 reduction.

11-000-240-105	School Administration - Salaries-Sec'y to Middle School Principal	\$23,732
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The Council states that the middle school principal requested by the district in the cap waiver is not necessary and, therefore, a secretary to that position is not required. The Board states that this position has existed for over forty (40) years and is the only secretarial support for the middle school staff. The Commissioner agrees that the services of a secretary for the middle school staff are essential, regardless of whether or not the middle school principal position is filled. Assigning those duties to other staff who already have specific assignments would not provide efficiency of services based upon the evidence presented. The Commissioner orders the restoration of the \$23,732.

11-000-240-105	School Administration - Overtime and Sub. School Secretary	\$1,500
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The Council bases this reduction on the provision of eighteen percent (18%) more than the 1992-93 expenditures. The Board states that monies for secretarial overtime and substitutes were not previously budgeted appropriately for the projected needs. The Board states that "the secretarial pool is the one used to complete project-specific clerical support." This very generalized statement does not support the need for any additional funds. The Commissioner sustains the reduction of \$1,500.

11-000-240-890	School Administration - Administrative Dues - Various	\$3,760
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The Council bases this reduction on the absence of any amount budgeted or expended in this account in prior years. The Board states that these dues are contractual obligations. On this basis, the Commissioner must order the restoration of the \$3,760 reduction.

11-000-260-100	Operation and Maintenance - Salaries - Regular Custodians	\$31,895
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The Council bases this reduction on the elimination of one custodial position and a reduction of twenty-five percent (25%) in overtime costs. The Board states that the existing custodial staff is necessary to properly maintain the buildings and that one custodian also does outside grounds maintenance work. The Board states that the overtime is for athletics, cocurricular activities, emergencies, snow removal, and community groups. The fees charged for community groups are budgeted as revenues. Based on the information presented, the Commissioner sustains the \$31,895 reduction.

11-000-260-100	Operation and Maintenance - Salaries - Lunch/Hall Aides	\$12,398
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The Council bases this reduction on the elimination of one hall monitor position. The Board states that two hall monitors are essential in the high school, which has eighty (80) classrooms on four (4) floors in three (3) wings, to provide safety and security for students, staff, and buildings. Based on the information presented and the necessity for safety and security in buildings, the Commissioner orders the restoration of the \$12,398.

11-000-260-100	Operation and Maintenance - Summer Maintenance Projects	\$7,500
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The Council states that summer maintenance projects should be performed by the regular maintenance and custodial staff. The Council also states that the Borough will, upon request, provide community service workers for routine projects such as painting, sweeping, etc., and it recommends further discussions on sharing services. The Board responds that summer maintenance projects are completed by district staff and that additional workers are hired

for painting, cleaning, and other duties. The Commissioner strongly supports the concept of shared services with reduced expenditures, particularly in this area where both parties agree on the necessity of properly maintained buildings and grounds. Based upon the evidence presented, Commissioner orders the restoration of the \$7,500; however, the Commissioner urges both parties to discuss the possibility of shared services for subsequent years.

11-000-260-590	Operation and Maintenance - Other Vehicular Expenditures	\$4,000
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The Council bases this reduction on the provision of a forty-five percent (45%) increase over the 1992-93 expenditures. The Board states that \$3,000 was budgeted for each of its three (3) vehicles to provide funds for maintenance repair and daily operation costs including gasoline. However, two (2) of those three (3) vehicles are new this year, the 4W-D snow plow pick-up, listed by the Board in its Position Statement, and the new school bus included in the capital outlay budget. These two new vehicles should not require maintenance repair expenses and daily operation costs of \$3,000 each. The Commissioner, therefore, sustains the reduction of \$4,000.

11-000-260-590	Operation and Maintenance - Other Mis- cellaneous Service and Expenditure	\$5,000
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The Council bases this reduction on the fact that the 1992-93 expenditures were less than the amount budgeted that year. The Board states that this account is \$5,000 less than prior years, and that the funds are necessary for the proper custodial/maintenance services in the schools. A review of the budget document submitted in this matter confirms that the amount proposed by the Board is \$5,000 less than that budgeted in 1992-93, the year

cited by Council. The amount proposed by the Board is also almost \$3,000 less than the 1992-93 expenditures. Based on the information presented, the Commissioner orders the restoration of the \$5,000 reduction.

11-000-260-610	Operation and Maintenance - Ground Supplies	\$2,000
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The Council bases this reduction on the 1992-93 expenditures and the provision of a greater than 260% increase over that amount. The Board states that the requested amount for 1994-95 is less than the amount budgeted in 1993-94 and that the funds are necessary to maintain the school grounds. The Board's generalized assertion does not address the fact that the funds provided by Council significantly exceed the 1992-93 expenditures and provide a more than reasonable rate of increase for the two-year period. The Commissioner sustains the reduction of \$2,000.

11-000-260-610	Operation and Maintenance - Custodian Supplies - All Schools	\$4,800
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The Council bases this reduction on the provision of "a more logical" daily cost-per-school. The Board states that the amount requested is a reduction of approximately eighteen percent (18%) from the 1993-94 budget and that the funds are necessary for specific supplies listed by the Board. The amount requested by the Board is also less than the 1992-93 audited expenses. Certainly, appropriate supplies are essential for the proper custodial services in schools. The Commissioner orders the restoration of the \$4,800.

11-000-260-610	Operation and Maintenance - Other Expen- diture - Repair Buildings	\$3,800
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The Council bases this reduction on the provision of an eight percent (8%) increase over the 1993-94 adjusted budget. The

Board states that this account was already reduced from the amount budgeted in 1993-94 and that the funds requested are essential to make necessary repair to the buildings which are over fifty (50) years old. Since proper repairs of buildings are essential and the Board's request for 1994-95 is less than the budgeted amount in 1993-94 and also less than the 1992-93 expenditures, the Commissioner orders the restoration of the \$3,800 reduction.

11-000-260-620	Operation and Maintenance - Electricity- Three Schools	\$6,000
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The Council states that the reduction provides an eight percent (8%) increase over 1992-93 expenditures and that conservation of energy is practical and should be encouraged. The Board states that the electrical costs include electrical heat in the four (4) additional modular units at one school site. Based on this information and the fact that proper lighting levels must be maintained in schools to comply with state code, the Commissioner orders the restoration of the \$6,000.

11-000-260-620	Operation and Maintenance - Heat-Five Schools	\$8,000
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The Council bases this reduction on the 1992-93 expenditures and recommends conservation of energy. The Board states that the amount budgeted is necessary based on the 1992-93 audited expenditures and the 1993-94 expenditures. It is without question that the funds budgeted for heat must be estimated, with the actual costs dependent upon the severity of the winter. Also, buildings must maintain temperatures in compliance with state code. The Commissioner orders the restoration of the \$8,000.

11-000-270-890	Student Transportation - Field Trips- High School	\$1,000
11-000-270-890	Student Transportation - Field Trips- Special Education	800

The Council reduces the line for high school field trips and adds funds for special education field trips, which, they state, have not been funded in the past. The Board states that special education students are included in regular field trips. The Board also states that all field trips are planned to relate directly to classroom curricula. It would seem appropriate and educationally sound to provide for some combined field trips and for some that are specifically for special education students. The Commissioner sustains the reduction of \$1,000 and orders the funding of \$800 for special education field trips.

11-000-290-104	Business and Other Services - Salaries- Office of Business Administration	\$24,000
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The Council bases this reduction on the elimination of the additional employee proposed in the budget. The Board states that the proposed position is for one-half payroll and one-half personnel, and that the district now has no personnel office and only one person in payroll. The Board states that the district is "negatively impacted by understaffing." Sufficient support staff is essential for the efficient operation of a school district, but the Board has apparently functioned with existing staff and does not cite any specific negative impact. The Commissioner sustains the reduction of \$24,000.

11-000-290-340	Business and Other Services - Equipment Service Contract	\$2,000
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The Council bases this reduction on the provision of a slight increase over the 1993-94 adjusted budget. The Board states that these funds are necessary for service contracts on computers, mailing machines, typewriters, etc., and that more funds will be required as more office functions are automated. Service contracts

are important for the proper maintenance of equipment, but the Board's generalized statement does not provide any specific need for the additional funds. The Commissioner sustains the reduction of \$2,000.

11-000-290-590 Business and Other Services - Travel- Board Office \$500

The Council states that this is a "redundant" account with "no prior spending history." Council also states that travel should be minimized. The Board states the amount budgeted is the same as in 1993-94 and is a contractual obligation to the school business administrator for travel to meetings and conferences. Based on this information, the Commissioner orders the restoration of the \$500 reduction.

Thus, for the reasons set forth above, the Commissioner determines to restore and to sustain the reductions in the General Fund tax levy appealed herein, as summarized by the chart below:

<u>Account Number</u>	<u>Title</u>	<u>Restored</u>	<u>Sustained</u>
11-110-100-101	Pre-Sch./Kind.Subs. Salaries	\$ 950	\$ -0-
11-130-100-101	Grades 6-8 Teacher Salaries	10,000	-0-
11-140-100-101	Grades 9-12 Teacher Salaries	20,000	-0-
11-140-100-101	Grades 9-12 Summer Employment	2,600	-0-
11-140-100-101	Grades 9-12 Department Heads	-0-	10,000
11-140-100-101	Grades 9-12 Substitutes	17,000	-0-
11-190-100-106	Reg.Prog.Inst.-Paraprofessional	7,500	7,500
11-190-100-320	Reg.Prog.Inst.-Assemblies	-0-	2,350
11-190-100-590	Reg.Prog.Inst.-Printing Service	-0-	3,100
11-190-100-610	Reg.Prog.Inst.-Misc.Suppl.-H.S.	3,240	-0-
11-190-100-610	Reg.Prog.Inst.-Misc.Suppl.-A.V.	533	-0-
11-190-100-610	Reg.Prog.Inst.-Suppl.-Home Econ.	400	-0-
11-190-100-640	Reg.Prog.Inst.-Music Textbks-LaMonte	580	-0-
11-190-100-890	Reg.Prog.Inst.-Field Trips- Art	-0-	200
11-190-100-890	Reg.Prog.Inst.-Field Trips-H.S.	-0-	900
	Three Programs		
11-240-100-106	Neurologically Impaired Sal.-Aides	5,465	-0-
11-209-100-106	Emotionally Disturbed Sal.-Aides	5,465	-0-
11-240-100-610	Bilingual Education-Supplies-LaMonte	4,000	-0-
11-402-100-100	Sch. Athletics-Site Manager	-0-	4,220
11-402-100-590	Sch. Athletics-Equip. Clean & Cond.	5,000	-0-
11-402-100-590	Sch. Athletics-Uniforms	-0-	1,83
11-402-100-610	Sch. Athletics-Athl. Trainer Suppl.	-0-	2,000

<u>Account Number</u>	<u>Title</u>	<u>Restored</u>	<u>Sustained</u>
11-402-100-610	Sch. Athletics-Sport Specific Suppl.	\$ 10,000	\$ -0-
11-402-100-890	Sch. Athletics-Sp. Police/Aux. Pers.	-0-	8,267
11-000-100-562	Inst.-Tuition/Other LEA's-Special	30,000	-0-
11-000-100-564	Inst.-Tuition/Cty. Voc. Sch. Special	10,000	-0-
11-000-100-566	Inst.-Tuition/Handicapped w/i State	43,000	-0-
11-000-218-104	Guidance-Salaries-High School	2,314	-0-
11-000-218-104	Guidance-Salaries-Summer	2,800	-0-
11-000-218-580	Guidance-Travel	500	-0-
11-000-218-610	Guidance-Supplies	750	-0-
11-000-218-104	Special Services-Summer Work-CST	4,035	-0-
11-000-219-105	Special Services-Sec'y-OT/Summer	-0-	2,004
11-000-219-390	Special Services-Student Evaluation	5,000	-0-
11-000-219-610	Special Services-Materials & Suppl.	1,000	-0-
11-000-221-102	Imp. of Inst.-Sal./Supervisors	-0-	60,500
11-000-221-101	Imp. of Inst.-Sal./Subs.	3,000	-0-
11-000-221-580	Imp. of Inst.-In-Service/Staff Dev.	-0-	6,000
11-000-221-580	Imp. of Instr.-Sup. of Cur.-Travel	1,000	-0-
11-000-222-100	Ed. Media Services-Sal/Summer	-0-	1,310
11-000-222-580	Ed. Media Services-Travel	150	-0-
11-000-222-614	Ed. Media Services-Art-A.V.-H.S.	-0-	330
11-000-222-614	Ed. Media Services-A.V.-H.S.	-0-	600
11-000-222-614	Ed. Media Services-Library-A.V.-H.S.	-0-	532
11-000-222-890	Ed. Media Services-Misc. Exp.	-0-	2,626
11-000-230-331	Gen. Admin.-Legal Services	-0-	25,000
11-000-230-530	Gen. Admin.-Telephone	7,000	-0-
11-000-230-530	Gen. Admin.-Postage	-0-	5,000
11-000-230-610	Gen. Admin.-Supt's Office Supplies	2,000	-0-
11-000-230-610	Gen. Admin.-Supt's Misc. Supplies and Board Meetings/Workshops	-0-	500
11-000-230-890	Gen. Admin.-Supt's Mem./Reg./Dues	500	-0-
11-000-230-890	Gen. Admin.-Election-Misc. Exp.	500	-0-
11-000-240-103	Sch. Admin.-Sal.-Princ.-Elem.	16,126	-0-
11-000-240-103	Sch. Admin.-Sal.-Princ.-H.S.	13,894	-0-
11-000-240-105	Sch. Admin.-Sal.-Sec. to MS. Princ.	23,732	-0-
11-000-240-105	Sch. Admin.-O.T. & Sub. Sch. Sec'y	-0-	1,500
11-000-240-890	Sch. Admin.-Admin. Dues	3,760	-0-
11-000-260-100	Oper. & Maint.-Sal.-Reg. Custodian	-0-	31,895
11-000-260-100	Oper. & Maint.-Sal.-Lunch/Hall Aide	12,398	-0-
11-000-260-100	Oper. & Maint.-Summer Maint. Proj.	7,500	-0-
11-000-260-590	Oper. & Maint.-Other Vehicle Exp.	-0-	4,000
11-000-260-610	Oper. & Maint. - Cust. Supplies	4,800	-0-
11-000-260-610	Oper. & Maint. - Ground Supplies	-0-	2,000
11-000-260-610	Oper. & Maint.-Other Misc.Serv.& Exp.	5,000	-0-
11-000-260-610	Oper. & Maint.-Other Exp.-Rep.Bldgs.	3,800	-0-
11-000-260-620	Oper. & Maint.-Electricity	6,000	-0-
11-000-260-620	Oper. & Maint.-Heat	8,000	-0-
11-000-270-890	Student Transp.-Field Trips-H.S.	-0-	1,000
11-000-270-890	Student Transp.-Field Trips-Spec.Ed.	800	-0-
11-000-290-104	Bus. & Other Serv.-Sal.-Off.of B.A.	-0-	24,000
11-000-290-340	Bus. & Other Serv.-Equip.Serv.Cont.	-0-	2,000
11-000-290-590	Bus. & Other Serv.-Travel-Bd.Off.	500	-0-
TOTALS		\$312,592	\$211,669

NOTE: As noted in the totals after all the reductions were itemized, the total reductions equalled \$523,461, which was reduced by the \$800 added by Council for the special education field trips. When this \$800 is included as above in all the monies reviewed, the total of the two columns then equals \$524,261.

II. CAP WAIVER

The Board had presented a cap waiver request to the voters in the amount of \$619,761.

Grades 1-6 Teachers \$220,887

The Board requested monies to retain art and music programs on the elementary level and to provide for an additional section of third grade because of increased enrollment. The Council did not dispute the need for the position; but, because of an error in its calculations, did recommend a reduction to the requested amount. The positions included in this request are one full- and one part-time (.8) vocal music teacher, one full- and one half-time art teacher, and one third grade teacher. The Board states that the salaries for these positions are all actual except for the third grade position, which has an estimated salary. It asserts that the art and music teaching positions have been part of the elementary program and should be continued in order to maintain a thorough and efficient education. In addition, the students entering third grade were served in three classes in second grade. Maintaining three class sections for these students provides educational benefits and complies with requirements on classroom occupancy.

The Commissioner determines that the \$220,887 is essential for the maintenance of a thorough and efficient educational program.

Instructional Supplies

\$10,403

These supplies are for the art and music programs discussed above and are, therefore, essential with the approval of those programs.

Attendance/Social Work Salaries

\$18,921

The Board requests these funds to continue the position of district attendance officer, which it states is necessary to address truancy and residency issues. District efforts to ensure attendance at school by all able students is certainly essential to the provision of an effective educational program for those students. It is also a district responsibility to ensure that those students benefiting from the educational program entitled as residents or tuition students for those services. The Commissioner determines that the funds of \$18,921 are essential.

Media Salaries

\$40,000

The Board requests these funds for one elementary media specialist for the three elementary schools as part of the implementation of a media program with instruction at this level. The Board has in the past contracted for library services with the community library which does not include any instruction. Educational research has verified the benefits of elementary library programs with instructional services. The district, in this request, is attempting to begin an initiative to provide those services and ensure a thorough and efficient educational program. The Commissioner finds that while the program implementation may be worthwhile, the Board has not established that the \$40,000 is essential within the narrow parameters for inclusion in the cap waiver.

Salaries of Principals

\$75,000

The Board requests these funds to provide for a middle school principal position. The Board states that grades 7-12 are currently housed in one school under the supervision of one high school principal. It asserts that a separate administrator in the middle school will allow the "unique needs of middle school age students to be addressed." The Council in its submission on the cap waiver objects to this proposed expenditure and states that the building currently has several administrators and does not need another. Although the Commissioner does understand the Board's position and does recognize the potential benefits of a middle school principal, the position is not essential for a thorough and efficient education with the present grade-level arrangement. The Commissioner, therefore, does not approve the \$75,000 requested for this position.

Benefits

\$60,000

The Board requests these funds for the employee benefits obligation for the positions in the cap waiver. Based on the approval of some and the disapproval of one, the Commissioner determines that \$48,000 will be required for benefits for the approved position.

Media Equipment

\$5,550

These funds are requested to provide one computer and printer in each elementary media center. Again, media center services have been determined to be valuable in a thorough and efficient educational program. Also, electronic equipment must be provided to effectively serve students in this advanced

technological age. The Commissioner determines that these funds of \$5,550 are essential.

Facilities Construction Services

\$189,000

The Board requests these funds to address specific facility deficiencies, including the installation of a two-hood suppression system in the elementary fire alarm systems, safety renovations to elementary playgrounds, and boiler repairs in all schools. The Council in its submission suggests that these items be deferred until decisions on new construction are made and then put in a bond referendum at that time. The items listed by the Board are not discretionary and must be completed to ensure the health and safety of students and staff and to comply with fire and construction codes. The Commissioner determines that these funds of \$189,000 are essential.

In summary, upon review of the documentation submitted on this matter, the Commissioner finds and determines that the record amply establishes that \$492,761 of the cap waiver monies sought by the Board are necessary to provide a thorough and efficient educational system. The Commissioner also finds and determines that there are no excess surplus funds to be appropriated and that reallocation of funds within the district's maximum permissible budget is not possible. (Board of Education of the Rutherford v. Mayor and Council of Rutherford, Bergen County, decided by State Board of Education, July 7, 1993, and Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater, Bergen County, decided by the State Board of Education, July 6, 1994.)

Accordingly, the Somerset County Board of Taxation is directed to make the necessary adjustments as set forth below to reflect a total of \$7,816,460 to be raised in tax levy for General Fund purposes by the Borough of Bound Brook for the 1994-95 school year.

	<u>General Fund</u>
Tax Levy Certified by County	\$7,011,107
Restored by Commissioner (Defeated Budget)	312,592
Cap Waiver Ordered by Commissioner	<u>492,761</u>
TOTAL	<u>\$7,816,460</u>

IT IS SO ORDERED

COMMISSIONER OF EDUCATION

FEBRUARY 10, 1995

DATE OF MAILING- FEBRUARY 10, 1995

SB #52-95

BOARD OF EDUCATION OF THE	:	
BOROUGH OF LINCOLN PARK,	:	
MORRIS COUNTY,	:	
APPELLANT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
LEO KLAGHOLZ, COMMISSIONER OF	:	
EDUCATION,	:	
RESPONDENT.	:	

Decided by the Commissioner of Education, March 22, 1995

For the Appellant, Peggy M. O'Dowd, Esq.

For the Respondent, John Worthington, Deputy Attorney General (Deborah T. Poritz, Attorney General of New Jersey)

On April 10, 1995, the Board of Education of the Borough of Lincoln Park (hereinafter "Lincoln Park" or "Board") filed a notice of appeal to the State Board of Education from a determination of the Commissioner of Education rejecting the Board's challenge to a "noninstructional cost penalty" applied by the Department of Education against the Board's 1995-96 State aid. On May 11, 1995, the Board filed an appeal brief, along with an explanation for the late filing of its brief. At the same time, it requested that the briefing schedule be placed in abeyance because legislation was being proposed which the Lincoln Park Board believed was likely to affect the outcome of its appeal. That request was granted.

4/3/96

On August 23, 1995, the Governor signed into law the School Efficiency Program Act, L.1995, c. 236, which established a program to penalize excessive administrative expenditures and to reward administrative efficiency in the public schools. Lincoln Park, however, failed to advise us as to whether it wanted to proceed with the appeal or withdraw it. Counsel for the State Board then attempted to ascertain how the Lincoln Park Board wished to proceed and, by letter dated November 9, 1995, requested the counsel for the Lincoln Park Board to advise us accordingly. Counsel for the Lincoln Park Board did not respond to that request. On March 21, 1996, Lincoln Park's counsel was again requested in a telephone conversation to advise us of the Board's intentions. Once again, counsel has failed to provide us with any information.

In view of the counsel for the Board's repeated failure to provide us with the information we have requested regarding the Lincoln Park Board's intentions in this matter, and given the length of time that has passed since we accommodated the Board by placing this matter in abeyance at its request, we dismiss this appeal.¹

April 3, 1996

Date of mailing APR 08 1996

¹ Although counsel for the Board indicated in the telephone call placed to her on March 21 that she no longer represents the Board, she has never formally advised us of such status or submitted a substitution of counsel. Consequently, she remains the attorney of record in this matter.

53-95

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF MANSFIELD, WARREN COUNTY :
: PETITIONER, :
: : COMMISSIONER OF EDUCATION
V. :
: DECISION
TOWNSHIP COMMITTEE OF THE TOWN- :
SHIP OF MANSFIELD, WARREN COUNTY, :
: RESPONDENT. :

SYNOPSIS

Board appealed \$21,000 in line-item reductions made by Township pursuant to N.J.S.A. 18A:22-37 following defeat of the proposed 1994-95 budget at the annual school election on April 19, 1994.

Commissioner directed restoration of \$18,000 in specified line-item accounts, but ordered such restorations to be funded through appropriation of surplus rather than raising of additional tax levy. Tax levy for General Fund purposes is to remain as certified by the Township.

FEBRUARY 10, 1995

BOARD OF EDUCATION OF THE TOWNSHIP OF MANSFIELD, WARREN COUNTY :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MANSFIELD, WARREN COUNTY, :
 RESPONDENT. :
 : DECISION

David A. Wallace, Esq., (Stiles & Wallace) for Petitioner
 Edward M. Dunne, Esq., (Valentino, Dunne & Stein) for Respondent

This matter was opened before the Commissioner of Education on June 15, 1994 through the filing of a Petition of Appeal by the Mansfield Township Board of Education (Board) pursuant to the provisions of N.J.A.C. 6:24-7.1 et seq. The Board sought restoration, on grounds of necessity for a thorough and efficient education, of reductions made by the Mansfield Township Committee (Township) pursuant to N.J.S.A. 18A:22-37 following voter rejection on April 19, 1994 of the Board's proposed General Fund tax levy for the 1994-95 school year. The amounts in dispute in this matter are as follows:

<u>Proposed Tax Levy Adopted by Board of Education</u>		<u>Amount of Tax Levy Certified by Governing Body</u>	
General Fund	\$2,418,717	General Fund	\$2,397,717
<u>Amount of Reduction by Governing Body</u>		<u>Amount of Reduction in Dis- pute Before the Commissioner</u>	
General Fund	\$21,000	General Fund	\$21,000

On June 23, 1994, an Answer to the Petition was submitted by the Township through the municipal clerk. The Director of the Bureau of Controversies and Disputes wrote to the Township on July 6, 1994 regarding the incomplete form of the Answer. A reply was received from the Township through the municipal attorney advising that the Township had decided not to employ the services of its attorney for this matter and requesting an extension of fourteen (14) days for the Township to address the deficiencies in its Answer. The Director wrote to the Township advising that the additional copies and certification required to be submitted with the Answer should be provided immediately, as these were documents requiring no preparation so as to warrant granting of an extension.

In the interim, as a result of the State Board of Education's July 7, 1993 decision in Board of Education of the Borough of Rutherford v. Mayor and Council of Rutherford and its July 6, 1994 decision in Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater, wherein the State Board ruled that review of budgets with cap waivers must include a determination on whether or not reallocation within the district's maximum permissible budget was possible and whether and to what extent the specific programs at issue were essential for the provision of a thorough and efficient system of education, the county superintendent was directed to submit a sworn affidavit setting forth an explanation and documentation of the review that led to inclusion in the General Fund tax levy of an approved Commissioner's cap waiver of \$140,604 pursuant to N.J.S.A. 18A:7D-28. The county superintendent's affidavit, with supporting documentation, was filed on July 31, 1994.

On August 25, 1994, a letter was received from the Township through the municipal attorney advising that, notwithstanding its earlier determination not to employ the services of counsel, the Township had now requested that he file an Answer in this matter; accordingly, he sought some "indulgence" in the time allowed to file such Answer. On September 16, 1994, the Township through the municipal clerk filed two (2) copies of the same documents submitted as its Answer on June 23, 1994.

On October 14, 1994, the Director of the Bureau of Controversies and Disputes sent a letter to both parties advising that, notwithstanding that a corrected Answer had not yet been filed by the Township, to avoid any further delays, the parties' Position Statements must be filed within twenty (20) days.

On October 17, 1994, through the municipal clerk, the Township submitted a letter dated September 23, 1994, two (2) copies of the Township's school budget resolution and a certification of delivery to the Board. The reductions in this submission, however, totalled \$37,500, not \$21,000 as previously identified for appeal. One item in the resolution was a reduction of \$26,500, the difference between the two numbers above, which reduction was apparently eliminated prior to final certification of the tax levy by the Township. This elimination was never explained by the parties. Position Statements were filed by the Board on November 9, 1994 and by the Township on November 14, 1994. The submission by the Township also included a list of reductions totalling \$47,500, a figure differing from both the amount given in the original resolution's list of line-item reductions and the amount given as the final aggregate reduction.

The reductions actually made in the General Fund tax levy, verified by the documents submitted with the Petition of Appeal and initial Answer, are as follows:

<u>Account Number</u>	<u>Title</u>	<u>Rationale</u>	<u>Reduction</u>
12-000-100-730	Capital Outlay Equipment	One Computer for each of the ten (10) classrooms to access library data is not necessary.	\$5,000
11-000-260-620	Energy	Surplus in account indicates reduction warranted.	3,000
11-190-100-610	General Suppl.	Spending patterns over two years show increase to be excessive and student population forecast not accurate.	3,000
11-000-100-566	Tuition-Private Schools	Substantial increase for minimum increase in student enrollment and account traditionally over-budgeted.	10,000
TOTAL			\$21,000

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford

Township v. Mayor and Council of Deptford Township, 116 N.J. 305
(1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction is imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

It has also been determined in the State Board of Education decision of July 1, 1992 in the matter of Board of Education of the Township of Rochelle Park, Bergen County that the decision on the adequacy of a budget proposal cannot be based on procedural grounds alone. In this case, therefore, the Township's failure to submit timely and accurate documents cannot be the decisive factor in the decision.

Mindful, then, of the balance to be applied in the standard of review, the Commissioner makes the following determinations with respect to the reductions in the General Fund tax levy effectuated by the Township.

12-000-100-730 Capital Outlay - Equipment \$5,000

The Township contends that one computer for each of ten (10) classrooms to access library data is not necessary. The Board states that the proposed computers are part of the district's long-range plan to improve programs in the area of technology and to address the State's "educational technology plan." The Board further states that the network provision was included to provide access to software by all workstations, which ultimately saves on the cost of software and printers and also provides equal access to all students. Without question, technological education is

essential to a thorough and efficient educational system to prepare students to function effectively in this age of advancing technology. The Board herein has demonstrated a concern for fiscal prudence, and for stability in budgeting, by developing a long-range plan to meet this educational need. The Township's argument that the Board presently has one (1) computer on a cart in each of six (6) wings reflects neither an understanding of the need for effective educational programs in this area nor an appreciation of what is required to sustain them. The Commissioner orders restoration of the \$5,000 reduction.

11-000-260-620 Energy \$3,000

The Township bases its reduction on what it believes to be a surplus in this account. The Board states that the reduction provides less funds than were budgeted in 1993-94 and that the proposed budget for heat must be estimated because of variances in weather patterns. It is not clear to what "surplus" the Township is referring. A review of the budget document submitted in this matter indicates that the amount proposed by the Board is an increase of less than 3.75% over actual expenditures in 1992-93. The Commissioner believes that this increase over a two-year period appears appropriate and agrees that heating expenditures must be estimated to assure proper heating levels. The Commissioner, therefore, orders the restoration of the \$3,000 reduction.

11-190-11-610 General Supplies \$3,000

The Township bases this reduction on district spending patterns over the last two years and the fact that student enrollment did not increase as projected. The Board states that the amount after reduction is an increase of \$4,150 over the amount

budgeted in 1993-94 and that enrollment is increasing from 622 students in 1993-94 to 663 students in 1994-95. The Board also cites State statistics on spending in this area. It is certainly indisputable that sufficient supplies must be provided to maintain a thorough and efficient educational system. However, the increase over 1993-94 provided after the Township reduction is almost eight percent (8%), which is greater than the enrollment increase cited by the Board. Also, the amount of \$57,150 in this account after the reduction is significantly greater than the actual expenditures of \$20,821 in 1992-93. The Board also does not provide any specific detail on why the additional funds are necessary. Based on the information presented, the Commissioner sustains the reduction of \$3,000.

11-000-100-566 Tuition - Private Schools \$10,000

The Township bases this reduction on what it considers to be a substantial increase for a minimum increase in student enrollment. It also states that this account has traditionally been over-budgeted. The Board states that out-of-district special education placements have increased from five (5) in 1993-94 to nine (9) in 1994-95. The Board also states that funds must be budgeted for contingencies in this area to provide for unexpected placements. The Township's position is based on what it considers to be a minimal increase in student enrollment. However, the documents submitted by the Board verify that the number of special education placements has almost doubled from 1993-94 to 1994-95. The Board's position that there must be provision for any unanticipated placements is appropriate, since the need for such educational services can arise during the year and must be

addressed. Based on the information presented, the Commissioner orders the restoration of the \$10,000 reduction.

Thus, for the reasons set forth above, the Commissioner determines to restore \$18,000 and sustain \$3,000 of the reductions to the General Fund tax levy appealed herein, as summarized by the chart below:

<u>Account Number</u>	<u>Title</u>	<u>Restored</u>	<u>Sustained</u>
12-000-100-730	Capital Outlay Equipment	\$5,000	- 0 -
11-000-260-620	Energy	3,000	- 0 -
11-190-100-610	General Supplies	- 0 -	\$3,000
11-000-100-566	Tuition-Private Schools	10,000	- 0 -
	TOTALS	<u>\$18,000</u>	<u>\$3,000</u>

Following review of the record of the appeal as set forth above, on December 16, 1994, the parties to this matter were notified that the Commissioner intended to take official notice of the Board's 1993-94 year-end audit for the purpose of identifying whether the Board underestimated in its 1994-95 budget the amount of anticipated undesignated surplus. In response to this notification, on December 23, 1994, the Board filed a letter objecting to such consideration. No filing was made by the Township.

The Board objected to use of the annual audit on grounds that budget disputes are to be resolved on the basis of the financial circumstances known to the governing body at the time it acted to reduce the budget and to the Board at the time the budget was prepared and submitted to the voters, and that audited surplus amounts are properly considered in review by the Commissioner and County Superintendent of subsequent-year budgets, not budgets

currently under appeal. The Commissioner rejects this argument, noting that, notwithstanding that the Commissioner's review does in fact focus on the merits of specific line-item reductions and that certain line items may be found to be necessary for T&E, it would be manifestly unfair to consider raising tax levies in the wake of express voter disapproval when a board is holding surplus over and above a level sufficient to meet reasonable contingencies.

Upon review of the Board's surplus in this case, the Commissioner notes that, of a projected fund balance of \$328,930 as indicated in its 1994-95 Budget Statement, the Board had appropriated \$200,000 for General Fund purposes, leaving a projected undesignated surplus of \$128,930. However, upon audit, the amount of undesignated unreserved surplus stood at \$273,298, more than twice the amount projected by the Board, even after the \$200,000 appropriation. Therefore, the Commissioner finds that the \$18,000 in line-item restorations resulting from his determinations herein can easily be funded by appropriation from surplus rather than increased tax levy.

Accordingly, for the reasons set forth above, notwithstanding the line-item restorations made by the Commissioner, the 1994-95 General Fund tax levy for the Mansfield Township School District shall stand as certified to the Warren County Board of Taxation by the Mansfield Township Committee.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

FEBRUARY 10, 1995

DATE OF MAILING - FEBRUARY 10, 1995

C #53-95
SB #22-95

BOARD OF EDUCATION OF THE :
TOWNSHIP OF MANSFIELD, :

PETITIONER-APPELLANT, :

V. :

STATE BOARD OF EDUCATION

TOWNSHIP COMMITTEE OF THE :
TOWNSHIP OF MANSFIELD, WARREN :
COUNTY, :

DECISION

RESPONDENT-RESPONDENT. :
_____ :

Decided by the Commissioner of Education, February 10, 1995

For the Petitioner-Appellant, David A. Wallace, Esq.

For the Respondent-Respondent, Valentino, Dunne & Stein (Edward M. Dunne, Esq., of Counsel)

Upon our review of the terms of the settlement proposed by the parties and the Commissioner's letter decision of August 7, 1995, in which he approved the settlement as it related to the Board's budget appeal for 1995-96, the State Board of Education consents to withdrawal of the appeal currently pending before us with respect to the Board's budget for 1994-95.

September 6, 1995

Date of mailing SEP 08 1995



ROBERT M. HARRINGTON,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF CLINTON,	:	
HUNTERDON COUNTY,	:	
	:	
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, superintendent employed pursuant to a three-year contract under N.J.S.A. 18A:17-15 et seq., alleged Board's unilateral termination of his employment violated the tenure rights conferred by N.J.S.A. 18A:17-20.2, notwithstanding that the Board upon termination paid him the balance of salary due for the remainder of his contract.

ALJ found that 1991 amendments to superintendent tenure law were intended to provide flexibility to boards of education in the choice of chief school administrator and that there was no prohibition against terminating a superintendent's employment without resort to tenure charges, so long as the financial obligations of the employment contract were honored by the Board. Petition was dismissed.

Commissioner modified the initial decision, holding that under applicable law the actual employment of a duly contracted superintendent can only be terminated through filing of tenure charges, resignation or separation by mutual agreement; however, pursuant to N.J.S.A. 18A:27-9, the Board may relieve him/her of performance of duties for the remainder of the contract period upon due notice of nonrenewal given pursuant to N.J.S.A. 18A:17-20.1.

FEBRUARY 16, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 10750-93

AGENCY DKT. NO. 342-9/93

ROBERT M. HARRINGTON,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF CLINTON, HUNTERDON
COUNTY,**

Respondent.

Margaret C. Murphy, Esq., for petitioner

Robert A. McLarty, Jr., Esq., for respondent (Carson, Astorino, McLarty, Howarth
& DeMille, attorneys)

Record Closed: July 5, 1994

Decided: November 17, 1994*

BEFORE M. KATHLEEN DUNCAN, ALJ:

This matter commenced on September 24, 1993 with the filing of a petition of appeal by Robert M. Harrington (hereinafter petitioner) alleging that the Board of Education of the

* Extensions of time for issuing the Initial Decision were requested and granted pursuant to N.J.S.A. 52:14B-10(c).

Township of Clinton (hereinafter respondent) had terminated his employment as superintendent in violation of N.J.S.A. 18A:17-20.2 and the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 to 8. An answer was filed on behalf of respondent on November 1, 1993, and on November 8, 1993 the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13.

On February 10, 1994 respondent filed with the undersigned a notice of motion and supporting papers to dismiss the petition based upon the entire controversy doctrine. On February 23, 1994 a prehearing conference was conducted by telephone conference call at which time it was determined that petitioner would respond to the motion to dismiss and also file a cross-motion for summary decision. Petitioner filed his responding papers and cross-motion for summary decision on March 21, 1994. Also on that date, petitioner withdrew his claims with respect to respondent's alleged violations of the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 to 8. Respondent filed a letter memorandum in response on April 11, 1994 and a reply was filed on behalf of petitioner on April 25, 1994. Oral argument on the cross-motions was conducted by telephone conference call on June 14, 1994, following which both parties submitted supplemental memoranda. Respondent's submissions were received on June 24, 1994 and July 1, 1994. Petitioner's submissions were received on June 22, 1994 and July 5, 1994, whereupon the record closed.

FINDINGS OF FACT

The facts relevant to a determination of this matter are not in dispute and I therefore find the following as uncontested facts.

Petitioner was hired by respondent as its superintendent by contract dated April 6, 1990 for the period from June 1, 1990 through May 31, 1993. Petitioner's employment as superintendent was renewed by contract dated April 8, 1993 for the period from June 1, 1993 through July 1, 1996. The provisions of that contract provided in pertinent part as follows:

.

ARTICLE III

BENEFITS IN ADDITION TO SALARY

.

E. Harrington shall be entitled to an annual vacation of twenty-five (25) working days per year earned annually at the rate of 2 per month worked. In the event that his contract is terminated prior to its expiration, earned, accumulated and unused vacation time shall be paid on a prorated basis (days earned x 1/240).

.

J. In case of resignation or retirement in good standing, Harrington shall be entitled to severance pay based upon the days remaining in his vacation and sick leave bank. For up to 30 available vacation and 30 sick days, Harrington will receive one hundred percent (100%) of his current per diem salary computed as 1/240 of his annual salary. No payment, however, for either category, vacation or sick leave, may exceed the gross sum of \$10,000.

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ARTICLE V

TERMINATION AND NON RENEWAL

B. With regard to the termination of the contract, Mr. Harrington enjoys all the rights provided to him by New Jersey and Federal Law. In the event the Board elects to terminate the employment of Harrington prior to the expiration date of this contract, it is understood that Harrington shall exercise due diligence and make reasonable efforts to obtain re-employment in a

comparable professional position. If Harrington obtains comparable employment elsewhere prior to July 1, 1996, the salary received by him in such comparable employment shall be deducted from the payments made to Harrington by the Board.

C. Harrington agrees that he shall not terminate this agreement except upon giving the Board at least ninety (90) days prior written notice of such election to terminate. Such notice shall at the least be sent via Certified mail, return receipt requested, addressed to the Board Secretary.

ARTICLE VI

MODIFICATION OF CONTRACT TERMS

The terms and conditions of the Contract shall not be modified, except by the written consent of both parties hereto.

Shortly after the signing of the new contract, a dispute arose between petitioner and some of respondent's board members, the particulars of which are not material to the within proceedings. On June 28, 1993 respondent voted to terminate petitioner's employment and pay him out what was due and owing for the remainder of the contract term. On July 15, 1993 petitioner filed suit in the United States District Court for the District of New Jersey against respondent and various individually-named defendants (Civil Action No. 93-3166) alleging, inter alia, that respondent's actions at its meeting of June 28, 1993 violated petitioner's rights under the Conscientious Employee Protection Act, N.J.S.A. 34:19-3 to 8. Petitioner filed the within matter with the Commissioner of Education on September 24, 1993. As noted in the procedural history hereinabove, on March 21, 1994 petitioner withdrew his claims concerning the Conscientious Employee Protection Act in the within matter and accordingly, the only issue remaining for determination herein is whether respondent's actions in terminating petitioner's employment

without filing tenure charges violated his rights pursuant to N.J.S.A. 18A:17-20.2 and N.J.S.A. 18A:6-9 to 26.

APPLICABLE LAW AND DISCUSSION

RESPONDENT'S MOTION TO DISMISS THE PETITION

“The entire controversy doctrine” reflects a strong policy in favor of the adjudication of all components of a legal controversy at one time in one litigation. The doctrine has been established both by case law and court rule. See Cogdell v. Hospital Center at Orange, 116 N.J. 7, 15-16 (1989) and R. 4:30A. The doctrine requires that a person assert all related claims against an adversary, including all affirmative defenses, counter claims and cross-claims or be estopped from later asserting an omitted component. Aetna Ins. Co. v. Gilchrist Brothers, Inc., 85 N.J. 550, 556-57 (1981). The entire controversy doctrine serves the aim of avoiding delay, expense and waste incident to the fragmentation of litigation. It promotes efficiency and fairness to the parties, prevents harassment, and avoids congestion in court calendars. “A disposition that reflects only a partial glimpse of the merits, . . . or that resolves only a segment of the controversy does not fully effectuate the judicial ideal of complete, not piecemeal adjudications. Cogdell, supra, at 23.

Respondent asserts that the entire controversy doctrine required petitioner to bring all his claims against respondent in the federal district court action and that petitioner’s failure to do so bars the within action. In support of its position, respondent cites Blazer Corp. v. N.J. Sports and Exposition Auth., 199 N.J. Super. 107 (App. Div. 1985), wherein the court held:

(A) plaintiff who brings an action in a federal court is obliged to include in his complaint all claims authorized under state law arising out of the same controversy or he will be barred by the single controversy doctrine from thereafter asserting the state claims in state court. Id. at 112.

Respondent suggests that upon dismissal of the within action petitioner could reassert his claims in federal court, again citing Blazer, supra at 112, wherein the court explained:

When a federal court declines to exercise jurisdiction over state claims that must be asserted under the single controversy doctrine, the doctrine will not bar reassertion of those claims in a state court action. We have held that plaintiffs who asserted related federal and state claims in federal court were free to reassert in state court the state claims that the federal court declined to adjudicate. Ferger v. Local 483, 94 N.J. Super., 554 (Ch. Div. 1967), *aff'd*, 97 N.J. Super., 505 (App. Div. 1967), *certif. den.*, 51 N.J. 180 (1968). The single controversy doctrine is, after all, “one of judicial fairness and will be invoked in that spirit.” Crispin v. Volkswagenwerk, A.G., 96 N.J. at 343.

The essence of petitioner’s response is that requiring him to take such a course of action would be a futile exercise since the federal court would most certainly refrain from interpreting N.J.S.A. 18A:17-20.2, effective August 24, 1991, and as yet not the subject of any published New Jersey court or administrative decision. I agree. It would almost certainly not advance the interests the entire controversy doctrine is designed to promote, specifically, judicial economy and fairness to the litigants, by dismissing the within petition, waiting for the federal courts to decline to exercise jurisdiction and then refile or reactivating the within matter. In United Mine Workers of America v. Gibbs, 383 U.S. 715, 16 L. ed. 2d. 218, 228 (1966), cited by petitioner, the Court explained that “(n)eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed, reading of applicable law.” Where state claims predominate, the state claims may be dismissed without prejudice by the federal courts and left for resolution to state tribunals. *Id.* at 228. Relying upon Gibbs, *supra.*, the court in Shaffer v. Board of School Directors, 730 F. 2d. 910 (3rd Cir. 1984), held that it was improper for the federal district court to have maintained jurisdiction of state claims involving the application of a state school law question of first impression. The court explained, “[W]here the underlying issue of state law is a question of first impression with important implications for public education in Pennsylvania, factors weighing in favor of state court adjudication certainly predominate.” *Id.* at 1139. See also, Williams v. Red Bank Board of Ed., 662 F. 2d. 1008, 1017 (3rd Cir. 1981) wherein the court, noting that New Jersey’s interest in education was a substantial one, stated, “Any intervention by the federal courts into the functioning of the tenure scheme would seriously hinder New Jersey in its attempt to fulfill its

commitment to provide public education.” In that case, the district court was directed to retain the federal issues and stay their resolution until state proceedings were terminated. Since the only issue remaining in petitioner’s case before the Commissioner of Education is whether respondent violated N.J.S.A. 18A:17-20.2 by terminating petitioner’s employment without filing tenure charges pursuant to N.J.S.A. 18A:6-9 to 26, I **CONCLUDE** that state tribunals are the appropriate forum for resolution of this issue and for providing guidance to New Jersey’s educational community concerning interpretation of this new law. For these reasons respondent’s motion to dismiss the petition of appeal is hereby **DENIED**.

CROSS-MOTIONS FOR SUMMARY DECISION

N.J.A.C. 1:1-12.5, the rule governing motions for summary decision, provides:

(b) The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.

The now classic statement of the standards for granting or denying summary judgment set forth in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954), explains that the procedure is designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion, clearly shows not to present any genuine issue of material fact requiring disposition at a trial. In the present matter although there are some disputes concerning what transpired between April 8, 1993 and June 28, 1993, those

facts are not material to a resolution of the only issue raised in this matter, and accordingly, this matter is ripe for summary decision.

N.J.S.A. 18A:17-20.2, the interpretation of which is at issue in this matter, provides:

During the term of any employment contract with the board, a superintendent shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming a superintendent or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of Title 18A of the New Jersey Statutes. (N.J.S.A. 18A:6-9 to 26).

These provisions are part of an extensive revision of the law regarding tenure for superintendents of schools enacted by the Legislature, effective August 24, 1991. The legislation amended N.J.S.A. 18A:17-15, together with N.J.S.A. 18A:28-5, and added N.J.S.A. 18A:17-20(b) through N.J.S.A. 18A:17-20.5. The amendments removed life-time tenure for superintendents of schools* and substituted a contractual relationship. N.J.S.A. 18A:17-15, as amended, provides in pertinent part:

The board of education of a Type I district and of any Type II district, now having or hereafter authorized to have a superintendent of schools, may, by contract appoint, for a term of not less than three nor more than five years and expiring July 1, a superintendent of schools by the recorded roll call majority vote of the full membership of the board.

. . . .

N.J.S.A. 18A:17-20.1 provides for automatic reappointment of the superintendent except in certain circumstances:

At the conclusion of the term of the initial contract or of any subsequent contract as hereinafter provided, the superintendent

* The provisions of the legislation did not affect the tenure rights of any superintendent who had acquired tenure as of the effective date of the bill and did not impair the validity of any contract entered into prior to the effective date. N.J.S.A. 18A:17-20.4.

shall be deemed reappointed for another contracted term of the same duration as the previous contract unless either: a. the board by contract reappoints him for a different term which term shall be not less than three nor more than five years, in which event reappointments thereafter shall be deemed for the new term unless a different term is again specified; or b. at least one year prior to the expiration of the first or any subsequent contract the board shall notify the superintendent in writing that he will not be reappointed at the end of the current term, in which event his employment shall cease at the expiration of that term.

Accordingly, the Legislature has dictated two provisions which must be part of any contract with a superintendent, *i.e.*, the term which must be not less than three nor more than five years and the non-reappointment notification which must be at least one year prior to the expiration of the then current contract. Petitioner asks the Commissioner herein to construe N.J.S.A. 18A:17-20.2 as prohibiting a board of education from unilaterally terminating the employment contract and fulfilling its obligation under the contract by paying to the superintendent the amount of compensation he would have received had he served the remainder of the contract. In other words, petitioner wishes to interpret the provisions of N.J.S.A. 18A:17-20.2 to mean that once appointed, a superintendent can only be removed during the contractual period pursuant to the procedures set forth at N.J.S.A. 18A:6-9 to 26 for inefficiency, incapacity or conduct unbecoming a superintendent or other just cause.

In support of its actions on June 28, 1993, respondent relies upon Article V subparagraph B in the contract entered into with petitioner on April 8, 1994, which provides that "in the event the Board elects to terminate the employment of Harrington prior to the expiration of this contract, it is understood that Harrington shall exercise due diligence and make reasonable efforts to obtain reappointment in a comparable, professional position." The contract then provides for whatever salary is earned in such a new comparable position to be deducted from the payments required to be made to petitioner by respondent. Respondent's position is succinctly summarized in its supplemental memorandum submitted following telephone oral argument as follows:

Inflicting the tenure dismissal process as the only option on school boards at the same time as dismantling tenure for superintendents seems at odds with the statutory intent. Certainly, if the Board

were confronted with a clear and unmistakable tenure dismissal issue, for example, commission of crime or the like, dismissal could and should be accomplished as set forth in the tenure law. However, in the run-of-the mill subjective, conduct unbecoming a superintendent-type case, the intent of the Legislature clearly was to give boards of education a new tool to deal with such a problem. The Legislature, which is presumed to know what is encompassed in the arduous, time-consuming and expensive tenure removal process, could not have intended that that process apply to a superintendent with a three-year term. The process itself in many cases could encompass the entire term. The legislative remedy, as proposed by petitioner, is worse than the malady sought to be cured.

When questioned during oral argument about the meaning of Article V subparagraph B, petitioner argued that the contractual language should be interpreted to require mitigation by petitioner only if the parties mutually agreed to terminate the contract prior to its expiration. Accordingly, it appears that petitioner is not arguing that the new statutory provisions prohibit the parties to the contract from negotiating a "buy-out" of the contract, but rather only that it prohibits unilateral cancellation by the board even upon pay-out of the entire agreed upon amount.

The issue presented in the within matter is strictly one of statutory construction. Although the courts generally consider with deference the interpretation of the agency responsible for enforcing a statute, the construction of statutes is a judicial function, not an executive function, and a court is in no way bound by an agency's interpretation of a statute. Service Armanent Co. v. Hyland, 70 N.J. 550, 561 (1976); Petrucelli v. Board of Trustees, 211 N.J. Super. 280, 289 (App. Div. 1986). In addition, since this is a new statute there will be no long-standing interpretation by the Commissioner and the State Board to which the court's might defer. See State, Dept. of Envir. Protection v. Stavola, 103 N.J. 425, 435 (1986). Nevertheless, I **CONCLUDE** that it is appropriate for the Commissioner to consider this matter of first impression to provide his experience and expertise in the educational field to assist the courts who will undoubtedly be called upon to address this important and probably not infrequent issue concerning the proper interpretation of N.J.S.A. 18A:17-20.2 at some time in the not too distant future.

Well established principles of statutory construction direct one to look first to the statute's plain language to derive its meaning. Town of Morristown v. Woman's Club, 124 N.J. 605, 610 (1991). The plain meaning of N.J.S.A. 18A:17-20.2 is that if a board wishes to terminate its obligations to a superintendent under contract it must file tenure charges pursuant to N.J.S.A. 18A:6-9 to 26. The statute does not say that buy-outs (consensual) or pay-outs (at the option of the board) are impermissible. It is silent on this issue.

The Assembly Education Committee Statement for Assembly No. 1131-L1991, c. 267, which is published with the statute in New Jersey Statutes Annotated and therefore is readily available to the legal community, includes the following statement about the bill as it existed on April 29, 1991, prior to final passage:

The bill does, however, authorize the board of education to terminate the contract with the superintendent upon paying to the superintendent the amount of compensation he would have received had he served the remainder of the contract period and the period of any contract for which he is deemed to have been reappointed.

The language to which the Assembly Education Committee statement refers stated:

Notwithstanding any other provision of this act to the contrary, the board of education shall have the right at any time, by the recorded roll call majority vote of the full membership of the board, to terminate the contract and the corresponding tenure of the superintendent granted pursuant to this act upon paying him the full amount of compensation which he would have received had he served the remaining period of his contract, and the amount of compensation he would have received had he served during the period of any contract for which he is deemed to have been reappointed in accordance with the provisions of section 4 of this amendatory and supplementary act.

This language was removed by Senate amendments on June 20, 1991 and the Senate amendments were adopted by the Assembly on June 30, 1991. The bill which was signed into law by Governor Florio on August 24, 1991, therefore, does not contain the language referred to in the published Assembly Education Committee Statement. Since the legislative history does not reveal

the reason for removal of the language, it may be that the legislators thought the subject should be left for negotiation between the parties to the contract, or it may be that they did not wish to encourage buy-outs, or it may be that there were other motivations unrelated to the issue at hand. No controlling inference may be drawn from the absence of the provisions, *i.e.*, legislative silence. Donaldson v. Board of Ed. of No. Wildwood, 65 N.J. 236 (1974), *fn.* at page 240-241, commenting on Justice Mountain's dissenting opinion. In Donaldson the Court determined that a board of education was required to provide a non-tenured teacher with a statement of reasons for non-renewal even though provisions requiring such a statement of reasons were removed from the legislation prior to final passage. The case cited by petitioner in support of the opposite conclusion, *i.e.*, that a controlling inference should be drawn from deletion of the provision, State v. Crawley, 90 N.J. 241 (1982), was a case involving revision of the criminal code and, therefore, the court concluded that the absence of a loitering proscription from the Code reflected a State policy to decriminalize such activity. *Id.* at 247. In that instance, however, unlike the present matter, there was only one inference to be drawn from the legislative removal of the provision.

In attempting to discover the legislative intention in any law, it is also proper to consider other laws which pertain to a similar subject matter and to consider the history of the statute prior to its enactment. Key Agency v. Continental Cas. Co., 31 N.J. 98, 103 (1959). The statements of the bill's sponsor, Assemblywoman Kalik, the Assembly Committee and Governor Florio upon signing all indicate that the legislation was designed to relieve boards of education (and taxpayers) of the tremendous financial burdens associated with removing a superintendent under life-time tenure in whom the Board has lost confidence; negotiated buy-outs in those circumstances were extraordinarily expensive. The new legislation was designed to offer boards more flexibility in terminating an unsatisfactory superintendent and to offer superintendents job security for the duration of the contract. By limiting the term of the contract, the Legislature limited the board's monetary exposure if the relationship did not work out. The legislation also provided that the board could advise the superintendent anytime after the onset of the contract, but not later than one year prior to its expiration, of the intention not to renew. It seems unreasonable to conclude that a board must either subject itself to the stress and expense of tenure proceedings or be forced to continue to work with a chief administrator it finds unsatisfactory for a period of up to five

years after it has advised that it will be terminating the contract; five years may not seem like much in a lifetime, but it could span the entire high school career of two graduating classes, and that is a long time to suffer disharmony in a district. A more reasonable and practical interpretation of the new statutory scheme would allow for an option of remedies by the board: it could either file tenure charges pursuant to N.J.S.A. 18A:17-20.2 which, if successful, would terminate the board's obligations under the contract, or the board could voluntarily fulfill its obligations under the contract by providing the superintendent with all the benefits of her contract, but relieving her of her obligations thereunder. * Respondent notes that N.J.S.A. 18A:27-9, a prior enactment of the Legislature of which it is presumed to have been aware when it enacted N.J.S.A. 18A:17-15 and 18A:17-20.2, permits a board to determine whether a contractual employee shall continue to perform his duties during the period between the giving of the notice of termination and the actual date of termination of employment. Petitioner argues that N.J.S.A. 18A:27-9 does not apply, citing the well known cases which say that statutory tenure supersedes contractual terms. Those cases, particularly Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982), explained that once a staff member had fulfilled the statutory criteria for tenure, continued employment was not dependent upon the terms of a contract. What petitioner's argument fails to recognize, however, is that the Legislature has created a hybrid position here which is dependent upon the existence of a contract and is governed by the terms of the negotiated, written agreement.

Adopting the interpretation urged by petitioner could lead to absurd results, directly at odds with the flexibility and money-saving purposes of the statute; e.g., a board could be forced to institute tenure proceedings against an inefficient superintendent who has only a year left to run on her contract, inevitably putting the board in the position of having to engage in expensive litigation against the superintendent long after the expiration of the contractual relationship. It

* Incidentally, it seems clear from the language of the terms of the negotiated agreement that petitioner himself agreed with this interpretation when he entered into the contract of April 8, 1993; his explanation that the language of Article V Paragraph B which reads, "In the event the Board elects to terminate . . ." really means, "In the event the parties agree to terminate . . ." is contrary to the plain meaning of the words and is simply not plausible. Other paragraphs of the agreement deal with petitioner's voluntary actions or consensual termination. See Article III E & J and Article V C.

makes far more sense to conclude that the board, being in possession of all the facts relevant to making such a decision, should be permitted to choose the best option under the circumstances; *i.e.*, whether to tolerate the situation until the expiration date of the contract, whether to litigate tenure charges or whether to relieve the superintendent of her obligations under the contract while fulfilling its own. The last option, if determined to be the most educationally and economically sound alternative, would also have the benefit of permitting certainty in contracting with a new chief administrator, and the board would be accountable for its actions to the voters on election day.

For all of the foregoing reasons, I **CONCLUDE** that N.J.S.A. 18A:17-20.2 does not limit a board's options to filing tenure charges or working with a superintendent in whom it has lost confidence. Petitioner's motion for summary decision granting reinstatement because respondent did not file tenure charges is therefore **DENIED**. Whatever other claims petitioner has against respondent concerning violations of other statutes, constitutional rights, etc. or alleged contract violations can and must be dealt within the context of the federal litigation instituted by petitioner against respondent prior to commencement of the within action. Blazer Corp. v. N.J. Sports and Exposition Auth., *supra*. No further issues for determination remaining in this case, it is hereby **ORDERED** that the Petition of Appeal is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions."** A copy of any exceptions must be sent to the judge and to the other parties.

November 17, 1994
DATE

11/17/94
DATE

NOV 21 1994
DATE

cc

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

Hope R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

Jeff S. Mani
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 10750-93

ROBERT M. HARRINGTON, :
 :
 PETITIONER, :
 : COMMISSIONER OF EDUCATION
 V. :
 : DECISION
 BOARD OF EDUCATION OF THE :
 TOWNSHIP OF CLINTON, :
 HUNTERDON COUNTY, :
 :
 RESPONDENT. :
 :
 _____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner pursuant to N.J.A.C. 1:1-18.4, as were replies thereto by respondent.

In his exceptions, petitioner first argues that the ALJ erred in characterizing the statutory provisions operative in this matter as having substituted a contractual relationship for tenure; rather, what the Legislature established was contractual tenure, which provides far more rights than a simple contractual relationship. Unlike other teaching staff members, superintendents obtain tenure immediately upon employment, but only for the duration of their contract; like other teaching staff members, however, superintendents cannot be dismissed except for cause and then only in the manner provided by the Tenure Employees Hearing Act. N.J.S.A. 18A:17-15, 17-20 and 17-20.2 (Petitioner's Exceptions, at 1-3)

Petitioner next contends that the ALJ erred in finding petitioner's tenure rights to be governed by the terms of his contract with the Board. Petitioner could not forfeit his statutory rights by negotiation or waiver; such a result would permit boards, in the superior bargaining position, to render tenure a nullity by insisting on hiring only persons willing to negotiate or waive away tenure. Spiewak, supra Moreover, even accepting the waiver provision arguendo, it cannot be overlooked that the contract on its face also entitles petitioner to "all rights provided to him by New Jersey and Federal Law"; thus, the contract must be interpreted as merely providing petitioner with the option, should he agree to exercise it, to act upon the Board's request for resignation and payment until he obtains comparable employment. Kelly v. Guaranteed Trust Co., 114 N.J. Eq. 110, 115 (E & A 1933), New Jersey Bank v. Palladino, 77 N.J. 33, 46 (1978) (Petitioner's Exceptions, at 3-4)

Finally, petitioner avers that the ALJ ignored the plain meaning of controlling statute, which states that superintendents shall not be dismissed during the term of their contracts except through tenure proceedings. She further ignored its legislative history, which establishes that the Legislature specifically contemplated, and rejected, statutory language giving boards the option of unilaterally terminating a superintendent's contract and paying out the balance of salary remaining. Instead, the initial decision assumes that: 1) loss of confidence by a board is sufficient reason for a superintendent's dismissal; 2) boards of

education always act legally and in the best interest of their districts; 3) the contractual tenure law was crafted with only the rights of boards in mind; and 4) there is no need to balance the superior bargaining power of boards by ensuring tenure rights during the superintendent's term of employment.

The Legislature, petitioner opines, did not agree with these assumptions.

***Instead, it understood the need for a balance of power at the top-most level of school governance. There are times when a board will want to terminate a superintendent, not because s/he has done something wrong, but because s/he has done the correct thing for the students--though it may not be politically in vogue. In addition, boards have been known to choose alternatives that are not only not educationally and economically sound, but which are, in fact, self-serving. What the Legislature has fashioned is a statute that does not permit boards to dismiss superintendents at whim. The term, "three to five years," substantially cuts the length of the board's commitment to the superintendent. At the same time, by limiting the board's power to dismiss, the Legislature promoted overall continuity and harmony in the administration of the schools by building in an incentive for boards to find ways to work together with administrators. Further, unless a superintendent cannot be dismissed during the term of the agreement, it will be difficult to attract the best candidates for the position of superintendent and the salaries for the position will increase with the increased risk inherent in the position.

It would be anomalous indeed if a tenured employee can be dismissed from his position without cause and without recourse to tenure charges, simply because the board has "lost confidence" in him/her. Initial decision at 14. That is not [what] the Legislature intended when it said,

A superintendent shall not be dismissed...
except for inefficiency, incapacity, or
conduct unbecoming a superintendent or
other just cause and then only in the
manner prescribed by [N.J.S.A. 18A:6-9,
et seq.]

(Petitioner's Exceptions, at 5-7; citation at 7)

In reply, the Board urges acceptance of the ALJ's view that N.J.S.A. 18A:17-15 et seq. must be read to provide the intended flexibility to boards of education, and that no controlling inference can be drawn from the Legislature's deletion of language expressly permitting termination of a superintendent's employment upon payment of salary. The Board reiterates the distinction between "dismissal for cause," which can only be effectuated through tenure proceedings and which terminates a district's financial obligation to the superintendent notwithstanding the existence of a contract, and "termination on notice," which can be undertaken by the district unilaterally at any time and which terminates the employment relationship between the superintendent and the board while continuing the board's financial obligation, subject to any mitigation clauses, for the term of the contract.

Upon careful review and consideration, while concurring with much of the ALJ's analysis of the procedural and substantive matters at issue, the Commissioner would modify the findings and conclusions of the initial decision as set forth below.

Initially, the Commissioner concurs with the ALJ and the Board that the 1991 amendments to the law governing superintendent tenure were intended to offer increased flexibility to boards of education which had been effectively forced by the previous lifetime tenure system to either live with, or "buy out," often at enormous expense, superintendents with whom they were dissatisfied for any reason not rising to the level of warranting tenure

charges. The Commissioner concurs with petitioner, however, that the Legislature was equally mindful of the need to ensure a reasonable degree of security for superintendents, so that their employment status and professional integrity would not be subject to the whims of ever-changing boards which could summarily dismiss them for any reason. In seeking to balance these fundamentally opposing principles, the Legislature created a hybrid position incorporating elements of both contractual and tenured employment.

The initial decision herein properly concludes that the Legislature could not have intended, and did not enact, a law leaving no alternative but tenure charges to a board which has become sufficiently dissatisfied with its superintendent to consider severing their relationship prior to the expiration of the current contract, as petitioner herein would have it. Rather, the ALJ correctly finds that the law permits a board to "choose the best option under all of the circumstances; i.e., whether to tolerate the situation until the expiration of the date of the contract, whether to litigate tenure charges or whether to relieve the superintendent of her obligations under the contract while fulfilling its own." Initial Decision, at 14

The ALJ errs, however, in equating the latter option with the action taken by the Board herein, that is, with unilateral termination of the superintendent's employment upon notice and payment of remaining contractual salary. Such an equation assumes that termination on notice, which is not expressly prohibited by controlling statute, is consistent with

the tenure status conferred by that same statute so long as a board's financial obligation to the tenured employee is met upon termination.

In the Commissioner's view, the scheme established by N.J.S.A. 18A:17-15 et seq. does not permit this result. Rather, the statute provides for a superintendent to be employed through one or more three-to-five-year contracts, with employment following the initial contract to either continue via a succession of subsequent contract(s), or cease upon expiration of the current contract following due notice of nonrenewal, or alternatively, upon dismissal through tenure proceedings. N.J.S.A. 18A:17-20 through 18A:20.2 There is neither mention of, nor place for, unilateral termination in this scheme, notwithstanding that a sum equivalent to remaining salary may be paid to the ousted superintendent; to the contrary, the law as it was ultimately enacted expressly provides for employment for the duration of a superintendent's contract, thus conferring a status beyond mere entitlement to money. Thus, the 1991 amendments protect boards by limiting their obligation to continue any given superintendent's employment to a maximum of five years. However, they also protect superintendents by ensuring that employment does in fact continue for the period designated by contract, absent dismissal for cause, resignation or separation by mutual agreement.

Moreover, the law's requirement for continued employment does not compel a Board to either file tenure charges or continue, for practical purposes, a working relationship it no longer finds

satisfactory. Rather, as with any other contracted teaching staff member, the board may elect to relieve the superintendent of the performance of his or her duties during any time between the giving of notice pursuant to N.J.S.A. 18A:17-20.1 that employment will not be continued beyond the term of the current contract and the actual termination of employment upon that contract's expiration. N.J.S.A. 18A:27-9 Such a result recognizes both the employment entitlement of the tenured superintendent and the need for a reasonable degree of flexibility on the part of the employing board of education.

Finally, with regard to the contractual provisions at issue in the present matter, where the possibility of unilateral termination is expressly contemplated, the Commissioner holds that such provisions cannot take precedence over a statutory requirement for tenured employment. Such precedence would permit terms and conditions of employment to effectively negate a legislative entitlement, a perversion which is not only unacceptable as a matter of law, Spiewak, supra, but also inadvisable as a matter of educational policy, largely for the reasons expressed by petitioner.

However, notwithstanding that the Commissioner finds the Board in this matter to have acted beyond the scope of its authority in unilaterally terminating petitioner's employment, the Commissioner notes that the controlling statute is a relatively new one which has not yet been interpreted by the Commissioner, the State Board of Education or the courts so as to have provided

guidance to the Board. The Commissioner further notes petitioner's effective acquiescence to the Board's position by his acceptance of contractual terms that clearly contemplate, notwithstanding his protestations to the contrary in these proceedings, unilateral termination. Therefore, to the extent that petitioner may have been entitled to any relief beyond a finding that the Board should have retained him in its employ while relieving him of his duties rather than terminating his employment outright, the Commissioner declines to so order.

Accordingly, the initial decision of the Office of Administrative Law is affirmed with the modifications set forth herein.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

FEBRUARY 16, 1995

DATE OF MAILING - FEBRUARY 16, 1995

DHP #465-94
SB # 54-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOYMENT : STATE BOARD OF EDUCATION
OF ROGER E. MARSHALL. : DECISION

_____ :

Decided by the Deputy Commissioner of Education,
January 30, 1995

For the Petitioner-Appellant, Roger E. Marshall, pro se

For the Respondent-Respondent, Arlene G. Lutz, Deputy
Attorney General (Deborah T. Poritz, Attorney
General of New Jersey)

The State Board of Education grants the request of the parties to remand this matter to the Commissioner of Education for a hearing in order to provide the petitioner with an adequate opportunity to establish a record in support of his contention that he has satisfied the statutory standard for rehabilitation.¹ Given the circumstances, we direct that such hearing and a final determination by the Commissioner be rendered

¹ We note that the Office of Criminal History Review was apparently not represented in the proceedings before the Deputy Commissioner and was not served with notice of the appeal to the State Board. Upon the filing of the appeal, Counsel to the State Board notified the Attorney General's Office that an appeal had been taken in the matter, and transmitted a copy of the record. A Deputy Attorney General was then assigned to appear as attorney of record in the appeal.

JUN 5, 1995

on an expedited basis, and that such determination considers all pertinent circumstances under the factors set forth in N.J.S.A. 18A:6-7.1, including "any evidence of rehabilitation." See Wolffbrandt v. New Jersey State Department of Education, decided by the State Board, July 1, 1992. Such review must also include a determination of whether any criminal history record information pertaining to petitioner exists on file in the Federal Bureau of Investigation, see N.J.S.A. 18A:6-7.1, in that such information is not included in the record before us.

We stress, in addition, that the statute expressly requires consideration of the "date of the offense" (emphasis added), rather than the date of conviction relied upon by the Deputy Commissioner in his decision.

Petitioner has the burden on remand of establishing his rehabilitation by clear and convincing evidence.

We retain jurisdiction.

July 5, 1995

Date of mailing

JUL 07 1995

(SB) 54-95

DHP #465-94
SB # 54-95
DHP # 93-96

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOYMENT : STATE BOARD OF EDUCATION
OF ROGER E. MARSHALL. : DECISION

Decided by the Deputy Commissioner of Education, January 30, 1995

Remanded by the State Board of Education, July 5, 1995

Decision on remand by the Commissioner of Education, March 12, 1996

For the Petitioner-Appellant, Roger E. Marshall, pro se

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney
General (Deborah T. Poritz, Attorney General of New Jersey)

On July 5, 1995, we remanded this matter to the Commissioner of Education for a hearing in order to provide petitioner, who had been disqualified from employment in the State's schools as a custodian following a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1, with an adequate opportunity to establish a record in support of his contention that he had satisfied the statutory standard for rehabilitation. We retained jurisdiction.

In accordance with our remand, the Commissioner transmitted this matter to the Office of Administrative Law, where a hearing was held on November 29, 1995. On January 26, 1996, the Administrative Law Judge ("ALJ") rendered an initial decision in which she concluded that petitioner had not demonstrated his rehabilitation by clear

6/5/96

and convincing evidence. On March 12, 1996, the Commissioner adopted the ALJ's recommended decision upholding petitioner's disqualification from school employment and, pursuant to our retention of jurisdiction, transmitted the file back to us. Petitioner has not filed an appeal from that decision.

After a review of the record, we are satisfied that the Commissioner fully complied with the terms of our remand. Accordingly, we dismiss the appeal.

Ronald K. Butcher abstained.

June 5, 1996

Date of mailing JUN 07 1996

55-95

R.L. AND D.L., on behalf of their :
minor child, K.A.L.,

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY :
OF HACKENSACK, BERGEN COUNTY,

DECISION

RESPONDENT. :

_____ :

FEBRUARY 3, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7284-94

AGENCY DKT. NO. 184-6/94

**R. L. AND D. L., ON BEHALF OF THEIR
MINOR CHILD, K-A. L.,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE
CITY OF HACKENSACK, BERGEN COUNTY,**

Respondent.

No appearance by or for petitioners

Cherie L. Maxwell, Esq., for respondent

(Sills Cummis Zuckerman Radin Tischman Epstein & Gross, attorneys)

Record Closed: December 20, 1994

Decided: January 12, 1995

BEFORE STEPHEN G. WEISS, ALJ:

This matter was transmitted to the Office of Administrative Law by the Department of Education on July 28, 1994 as the result of the filing of a petition of appeal by R. L. and D. L., on behalf of their minor daughter, K-A. L., against the Hackensack Board of Education alleging that their daughter's five-day suspension in March 1994 was not warranted. A telephone prehearing conference was scheduled for October 3, 1994 but had to be adjourned in light of a calendar conflict. However, efforts to reach the petitioners by telephone proved unsuccessful and counsel for the

Board advised the undersigned administrative law judge that the family had, in fact, moved out of the district to another state.

Thereafter, by letter dated October 4, 1994, I notified petitioners and Board counsel that I would appreciate it if I was informed by the parents whether or not they wished further to pursue the case. That letter was sent by both certified and regular mail. Thereafter, on October 24, 1994, I again wrote to the parents and to Board counsel suggesting that in light of the failure by the petitioners to indicate any further interest in the case that a motion to dismiss would be appropriate.

A motion to dismiss now has been filed by the Board to which is attached a cover letter brief by Board counsel. In her letter Ms. Maxwell indicates that she spoke personally with D. L., the mother of K-A. L., who told counsel that the petitioners no longer had any interest in further pursuing the appeal. Beyond that, Ms. Maxwell points out that the petitioners have moved out of state and thereby removed their daughter from the school system. Under the circumstances, counsel urges that a dismissal would be appropriate.

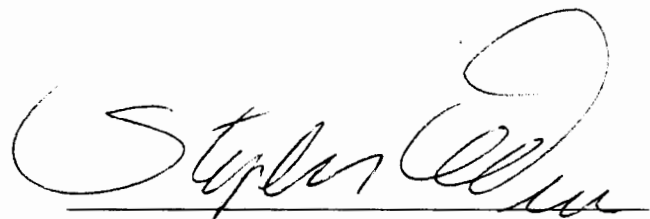
Based upon the foregoing undisputed chronology of events, it is clear that the petitioners no longer wish to pursue this matter and that a dismissal of the appeal, with prejudice, is appropriate. Accordingly, for the reasons set forth herein, I **ORDER** that the petition of appeal in this matter be **DISMISSED**, with prejudice.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.


This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

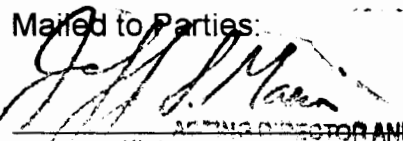
January 12, 1995
DATE


STEPHEN G. WEISS, ALJ

1/13/95
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

JAN 24 1995
DATE
amr

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

R.L. AND D.L., on behalf of their :
minor child, K.A.L.,

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY :
OF HACKENSACK, BERGEN COUNTY,

DECISION

RESPONDENT. :

_____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that the within Petition of Appeal be dismissed as a result of petitioners' failure to prosecute.

Accordingly, the recommended decision of the Office of Administrative Law is adopted as the final decision in this matter and the instant Petition of Appeal is dismissed, with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

FEBRUARY 3, 1995

DATE OF MAILING FEBRUARY 4, 1995

DHP #461-94
SB # 55-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOYMENT : STATE BOARD OF EDUCATION
OF ANTHONY F. JAMES. : DECISION
_____ :

Decided by the Deputy Commissioner of Education,
February 6, 1995

For the Petitioner-Appellant, Anthony F. James, pro se

For the Respondent-Respondent, Pamela B. Katten, Deputy
Attorney General (Deborah T. Poritz, Attorney
General of New Jersey)

The State Board of Education grants the request of the parties to remand this matter to the Commissioner of Education for a hearing in order to provide the petitioner with an adequate opportunity to establish a record in support of his contention that he has satisfied the statutory standard for rehabilitation.¹ Given the circumstances, we direct that such hearing and a final determination by the Commissioner be rendered

¹ We note that the Office of Criminal History Review was apparently not represented in the proceedings before the Deputy Commissioner and was not served with notice of the appeal to the State Board. Upon the filing of the appeal, Counsel to the State Board notified the Attorney General's Office that an appeal had been taken in the matter, and transmitted a copy of the record. A Deputy Attorney General was then assigned to appear as attorney of record in the appeal.

June 5, 1995

on an expedited basis, and that such determination considers all pertinent circumstances under the factors set forth in N.J.S.A. 18A:6-7.1, including "any evidence of rehabilitation." See Wolffbrandt v. New Jersey State Department of Education, decided by the State Board, July 1, 1992. Petitioner has the burden on remand of establishing his rehabilitation by clear and convincing evidence.

We stress, in addition, that the statute expressly requires consideration of the "date of the offense" (emphasis added), rather than the date of conviction relied upon by the Deputy Commissioner in his decision.

We retain jurisdiction.

July 5, 1995

Date of mailing JUL 07 1995

DHP #461-94
SB # 55-95
DHPR #311-96

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF A.F.J. : DECISION

Decided by the Deputy Commissioner of Education, February 6, 1995

Remanded by the State Board of Education, July 5, 1995

Decision on remand by the Deputy Commissioner of Education,
July 15, 1996

For the Petitioner-Appellant, A.F.J., pro se

For the Respondent-Respondent, Pamela B. Katten, Deputy Attorney
General (Peter Verniero, Attorney General of New Jersey)

On July 5, 1995, we granted the request of the parties to remand this matter to the Commissioner of Education for a hearing in order to provide petitioner, who had been disqualified from employment in the State's schools as a substitute teacher following a criminal history review conducted pursuant to N.J.S.A. 18A:6-7.1, with an adequate opportunity to establish a record in support of his contention that he had satisfied the statutory standard for rehabilitation. We retained jurisdiction.

In accordance with our remand, the Commissioner transmitted this matter to the Office of Administrative Law ("OAL"), where a hearing was held on May 15, 1996.¹ On

¹ We note that petitioner's hearing had originally been scheduled for November 14, 1995. However, when petitioner failed to appear for that hearing, the Administrative Law Judge returned the case to the Commissioner for disposition pursuant to N.J.A.C. 1:1-14.4. On December 20, 1995, the Commissioner

10/2/96

May 29, 1996, the Administrative Law Judge ("ALJ") rendered an initial decision in which he concluded that petitioner had demonstrated his rehabilitation by clear and convincing evidence. On July 15, 1996, the Commissioner adopted the ALJ's recommended decision, finding petitioner to be qualified for school employment as a substitute teacher. Pursuant to our retention of jurisdiction, the Commissioner transmitted the file back to us. No appeal has been filed from the decision of the Commissioner.

After a review of the record, we are satisfied that the Commissioner fully complied with the terms of our remand. Accordingly, pursuant to the Commissioner's decision, petitioner is qualified for school employment as a substitute teacher, and we dismiss the appeal.

October 2, 1996

Date of mailing OCT 04 1996

remanded this matter to the Office of Administrative Law, finding that petitioner had filed notification with OAL prior to that hearing date that he could not be present due to job responsibilities. The hearing was subsequently rescheduled for May 15, 1996.

JOSEPH DI FALCO, :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE : DECISION
 BOROUGH OF KINNELON,
 MORRIS COUNTY, :
 RESPONDENT, :
 AND :
 ROBERT SCHOTT, :
 INTERVENOR. :
 _____ :

SYNOPSIS

Petitioning taxpayer challenged Board's buyout of the high school principal, charging the buyout agreement was arbitrary, procedurally defective, a misuse of public funds and in violation of the thorough and efficient law. Petitioner sought order that agreement was null, that the Board president be removed, and that the multi-year agreement was illegal because the current board of education could not bind a future board. The Board moved for dismissal of the petition for three reasons: 1) the dispute presented a nonjusticiable political question; 2) the Commissioner of Education lacked jurisdiction to rule on a contractual matter; and 3) petitioner lacked standing to assert these claims.

ALJ concluded that partial summary decision should be granted in favor of the Board. ALJ determined petitioner's complaint did not allege any wrongful acts by the Board that might support a finding of genuine impropriety but that that portion of the petition challenging the right of current Board members to enter into a multi-year agreement binding on future boards is the type of issue suitable for administrative review. As to jurisdiction, the ALJ found that petitioner is asking that a contract be nullified which calls for application of Title 18A which is directly within the area of the Commissioner's special expertise. As to standing, ALJ found Board's action substantially, specifically and directly affects him in his capacity as a taxpayer. ALJ ordered Board's motion denied with respect to whether Board could enter into the multi-year contract, but ordered Board's motion granted with respect to all remaining issues, which were dismissed.

Commissioner modified ALJ's determination to the extent that petitioner's claims of arbitrariness and bad faith, as well as the question of adoption of an agreement binding future boards, were remanded to OAL for hearing on the merits.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

PARTIAL SUMMARY DECISION

OAL DKT. NO. EDU 9335-92

AGENCY DKT. NO. 461-9/92

JOSEPH DIFALCO,

Petitioner,

v.

**BOARD OF EDUCATION OF
THE BOROUGH OF KINNELON,**

Respondent and

ROBERT SCHOTT,

Intervenor.

Joseph DiFalco, pro se

Phillip E. Stern, Esq. for respondent
(Rand, Algeier, Tosti & Woodruff, attorneys)

Robert M. Schwartz, Esq., for intervenor
(Lake & Schwartz, attorneys)

Record Closed: December 20, 1993

Decided: January 5, 1995

BEFORE KEN R. SPRINGER, ALJ:

Statement of the Case

This is a suit brought by a taxpayer seeking to challenge the lawfulness of a buyout agreement between a high school principal and a local board of education. Petitioner Joseph DiFalco ("DiFalco") attacks the validity of the agreement on several grounds, including a contention that the amount of money, allegedly "the highest buyout of any staff member in State history," offends the constitutional mandate for a thorough and efficient education as well as the Public School Education Act of 1975, N.J.S.A. 18A:7A-1 to -52; that the action by the board was arbitrary, capricious and unreasonable; that the multi-year agreement is illegal because the current board of education cannot bind a future board; and that two board members were improperly excluded from participation in the decision-making process.

Prior to hearing, respondent Kinnelon Board of Education ("Board") has moved to dismiss the petition for three separate reasons: first, that the dispute presents a nonjusticiable political question; second, that the Commissioner of Education ("Commissioner") lacks jurisdiction to rule on a contractual matter; and, third that petitioner lacks standing to assert these claims.

Most of the claims raised by DiFalco must be dismissed at this stage for nonjusticiability or lack of standing. Nevertheless, the Board's motion will be denied in part, to enable the Commissioner to consider the important public question of whether a current board of education can enter into a long-term buyout agreement that is binding on future boards.

Procedural History

On September 28, 1992, DiFalco filed a verified petition with the Commissioner challenging the validity of the buyout agreement. One month later, on October 23, 1992, the Board filed its answer, raising justiciability, standing and jurisdiction as affirmative defenses. Thereafter, on January 8, 1993, DiFalco filed an amended

petition objecting to the Board's readoption of the buyout agreement after a Superior Court judge had invalidated its earlier adoption for procedural reasons. On February 24, 1993, the Board filed an amended answer, preserving its affirmative defenses.

Meanwhile, on November 30, 1992, the Commissioner had transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. By order entered on March 15, 1993, the OAL granted the application of Robert Schott to intervene in this proceeding to protect his interests as beneficiary of the buyout agreement. Shortly thereafter, on May 5, 1993, the Board filed a notice of motion to dismiss, together with a supporting brief. DiFalco filed opposing papers on June 14, 1993. The OAL heard oral argument on June 18, 1993. After oral argument, DiFalco filed supplemental papers on November 24, 1993 and the Board submitted its response on December 20, 1993.¹

Findings of Fact

For the purpose of resolving these preliminary legal issues, the facts that are undisputed in the pleadings will be used. Most of the facts necessary for disposition of this motion may be derived from the actual language of the buyout agreement, which is uncontroverted. **I FIND:**

Joseph DiFalco brought this petition as a resident, taxpayer and registered voter of the Borough of Kinnelon. At the time of the agreement, Robert Schott was "employed by the Board as Principal of Kinnelon High School and [had] tenure as a teaching staff member employed by the Kinnelon Borough School District." For whatever reasons the Board desired that Mr. Schott resign from his position and Mr. Schott was willing to

¹ While suit was pending, DiFalco applied directly to the OAL requesting that any amounts due to intervenor Schott under the buyout agreement be placed in escrow. Initially, on September 29, 1993, the OAL issued an order of emergent relief granting this request. On October 22, 1993, however, the OAL vacated the emergent relief order on jurisdictional grounds. The Commissioner denied emergent relief on November 15, 1993.

accommodate the Board's wishes. Accordingly, these two parties entered into a written contract entitled "Separation of Employment Agreement." Both parties "acknowledge[d] that each has received independent legal advice of his or its own selection." Respondent admits that the parties reached the agreement at "about 6:30 p. m. on August 24, 1992, and that the Agreement was then voted on by the Board at or after 8:00 p.m. that same night." It was approved by vote of five to two. Although DiFalco alleges that the two negative-voting Board members "were not made aware of the scope and detail of the agreement," the Board maintains that "at all times, [it] allowed full participation of all Board members."²

Under the terms of the agreement, Mr. Schott "submitted a letter of resignation from all employment with the Board effective October 1, 1993" and the Board agreed to "accept Mr. Schott's resignation at a public meeting to be conducted on August 24, 1992." Until his resignation became effective some thirteen months thereafter, Mr. Schott would be on leave of absence "for personal reasons . . . with full pay and full insurance and health benefits." Salary would be prorated based on an annual rate of \$99,649 through June 30, 1993 and then at an annual rate of \$112,105.

Paragraph No. 3, the most controversial provision of the agreement is reproduced in pertinent part below:

Between October 1, 1993, and June 30, 1996, Mr. Schott shall be entitled to receive the sum of \$337,848.00 ("Settlement Amount") in further settlement of all claims and obligations which he may have or hold against the Board. Such Settlement Amount shall be paid by the Board to Mr. Schott as he may request subject to the following restrictions:

² In separate litigation filed by a citizens' group in the Superior Court of New Jersey Judge Reginald Stanton declared that the Board's approval of the agreement on August 24, 1992 was null and void as violative of the Open Public Meetings Act, N.J.S.A. 10:4-6 to 4-17. At a later meeting on December 9, 1992, the Board ratified the agreement in order to cure the deficiencies found by the Court. See N.J.S.A. 10:4-15(a). Since the amended pleadings do not specify any additional violations occurring at the December 9th meeting, petitioner has failed to state any claim arising under the Open Public Meetings Act.

- (a) Between October 1, 1993, and June 30, 1994, the Board shall not be obligated to pay more than \$112,616.00 of the Settlement Amount;
- (b) Between July 1, 1994, and June 30, 1995, the Board shall not be obligated to pay more than one-half (1/2) of the balance of the Settlement Amount remaining as of June 30, 1994;
- (c) Between July 1, 1995 and June 30, 1996, the Board shall pay, upon the request of Mr. Schott the remaining balance of the Settlement Amount.

Apparently the signatories themselves harbored some doubts about the legality of the agreement. They inserted a savings clause giving Mr. Schott the option of refunding all funds paid to him after retirement and returning to active employment in the event that "the Board is precluded by a final order, administrative or judicial, from making any payment to Mr. Schott as required by the Agreement."

While the existing record does not reflect the monetary value of the entire settlement package, Board counsel estimates that it totals roughly half a million dollars. DiFalco condemns the expenditure of such a large sum to buy out a tenured school administrator as "a frivolous waste of taxpayer money" and a "shocking" abuse of the Board's discretionary authority. Other than generalized accusations of "obvious" defects and "numerous" violations of federal and state law, however, DiFalco specifies only one substantive provision which he claims has been violated, namely, the constitutional and statutory guaranty of a thorough and efficient public education at *N.J. Const.*, art. VIII, §4, ¶ 1 and *N.J.S.A.* 18A:7A-1. Thus, DiFalco urges that the "misuse of public funds" will result in a severe restriction of the Board's ability to carry out its proper responsibilities and in "a major negative impact on the educational experience of the children."

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that partial summary decision should be granted in favor of respondent.

(1) Justiciability

Justiciability has been described as "a concept of uncertain meaning and scope." *Flast v. Cohen*, 392 U.S. 83, 95, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968). It implicates a subtle "blend of constitutional requirements and policy considerations." *Flast*, 392 U.S. at 97. Deciding whether a matter presents a nonjusticiable political question is a "delicate exercise in constitutional interpretation" *Gilbert v. Gladden*, 87 N. J. 275, 282 (1981). Usually, the problem is approached in terms of separation of powers or the proper allocation of responsibility among the various branches of government. New Jersey has looked to the United States Supreme Court for guidance in identifying political questions and has focused on several factors, such as the "constitutional commitment of the issue to a coordinate political department;" the "lack of judicially discoverable and manageable standards for resolving it;" and the "impossibility of undertaking independent resolution without expressing lack of the respect due coordinate branches of government." *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L. Ed. 2d 674 (1962), quoted in *Gilbert v. Gladden*, 87 N.J. at 282. Federal courts have viewed the determination of justiciability as consisting of two parts first "whether the claim presented and the relief sought are of the type which admit of judicial resolution;" and, second, whether the structure of government renders the issue a political question "because of the separation of powers provided by the Constitution." *Committee to Free the Fort Dix 38 v. Collins*, 429 F. 2d 807, 811 (3rd Cir. 1970).

Routinely, personnel matters fall within the discretionary authority of local boards of education. School boards have express statutory powers to make rules for the employment, conduct and discharge of its employees, N.J.S.A. 18A:11-1 and 18A:27-4

to adopt salary schedules for full-time supervisory staff, *N.J.S.A.* 18A:29-4.3, and, consistent with law, to do all things "necessary for the lawful and proper conduct of the public schools of the district," *N.J.S.A.* 18A:11-1. Of course, the Commissioner alone has exclusive jurisdiction to dismiss a tenured teaching staff member for cause once formal charges have been certified. *N.J.S.A.* 18A:6-10. *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967). The Commissioner will review any proposed settlement of a tenure proceeding to assure that it is consistent with the public interest. *Cardonick v. Brooklawn Bd. of Educ.*, 1983 *S.L.D.* ___ (St. Bd. April 6, 1983). Unless tenure charges have been brought, however, a teaching staff member may voluntarily relinquish his position and waive whatever tenure and reemployment rights he might possess. *N.J.S.A.* 18A:28-8. *O'Toole v. Forestal*, 211 *N.J. Super.* 394, 402 (App. Div. 1986). Normally, these matters would never come before the Commissioner.

Negotiated buyout agreements are not readily susceptible to judicial or administrative review because they involve the exercise of discretion and judgment rather than application of established legal principles. Reasonable minds can differ on the dollar value to be placed on such arrangements. These are *quasi-legislative* determinations which have been entrusted to the school board as representative of the public. It may be that the choices by the Board are extravagant or even foolish, but that does not necessarily make them illegal. As noted by the New Jersey Supreme Court in *Ridgefield Park v. Bergen Cty. Bd. of Taxation*, 31 *N.J.* 420, 432 (1960), "The judiciary has no power to devise tax programs or to qualify the existing legislative mandate with a judge's private view of what is just or sensible." Similarly, an administrative law judge is not entitled to substitute his own personal preferences for those of a local governmental unit acting within its legitimate authority. "The appropriations represented an exercise of legislative judgment. As such, they constituted a purely political decision and an exercise of governmental discretion." *Borough of Glassboro v. Byrne*, 141 *N.J. Super.* 19, 24 (App. Div. 1976)

School law decisions have respected this important distinction. Illustratively in *Wassmer v. Wharton Bd. of Educ.*, 1967 *S.L.D.* 125 (Comm'r May 4, 1967) the Commissioner declined to interfere with a local board's decision to eliminate sc t

sessions immediately, even though the consensus of professional opinion was to defer action until the following year. Finding no necessity for further hearings, the Commissioner observed, "[A]bsent a clear showing that the Board of Education has acted unreasonably and beyond the scope of its discretionary authority, in bad faith, in violation of the law, or in any other illegal manner, the Commissioner is without authority to intervene." 1967 S.L.D. at 128. Indeed, *Boult v. Passaic Bd. of Educ.*, 135 N.J.L. 136 (E.& A. 1947), a case on which DiFalco relies, is actually additional authority for the Board's position. Commenting on the scope of the Commissioner's review powers in connection with a local school closing, the Court explained:

The reviewing officer was not empowered to substitute his discretion for that of the local board. The offer of proof, as it is described in the Commissioner's opinion, amounted to nothing more than an offer to establish that the local board's determination was based upon erroneous factual material. Discretionary municipal action may not be judicially condemned on that basis. 136 N.J.L. at 523

Despite vague references to bad faith and arbitrariness, DiFalco's complaint does not allege any wrongful acts by the Board that might support a finding of genuine impropriety. Instead, DiFalco emphasizes the high cost of the agreement and its potential impact on property taxes and real estate prices in the community. These are issues of great concern to many citizens, but they do not lend themselves to an administrative solution. Rather, the appropriate remedy lies with the legislative branch and the electoral process. *Ridgefield Park*, 31 N.J. at 431. Clearly State government has a constitutional obligation to assure that the money for education is spent well and not wasted. *Abbott v. Burke*, 136 N.J. 444, 455 (1994). In order to implement this responsibility, the Commissioner may adopt mechanisms to control, regulate or monitor the use of funds by local school districts. But it does not follow that the Commissioner must react every time a private individual believes that a particular expenditure is unjustified or happens to disagree with the choice made by his elected representatives.

In one respect, however, DiFalco raises an issue which squarely comes within the Commissioner's jurisdiction to hear and determine "all controversies and disputes

arising under the school laws." N.J.S.A. 18A:6-9. Surely it would be meaningless for dissatisfied residents to elect a new school board if the old board could effectively stymie policy changes. To the extent that DiFalco's petition can be read as challenging the right of the current board members to enter into a multi-year agreement binding on future boards, that is the type of issue suitable for administrative review.³ The outcome of that issue does not depend on debatable concepts of whether a particular action is desirable or cost-effective, but on an ascertainable determination of whether a public body has exceeded its delegated authority. It necessitates an inquiry not into the wisdom of the Board's decision, but into its lawfulness.

(2) Jurisdiction Over Contractual Issues

Numerous cases hold that the Commissioner of Education lacks subject matter jurisdiction over the interpretation or enforcement of employment contracts. In support of its motion for dismissal, the Board cites *Wilson v. Sussex Cty. Vo-Tech. Schs.*, 91 S.L.D. 1276, 1284 (Comm'r Aug. 19, 1991), which declared that questions of contractual interpretation "do not arise under the school laws" *Accord, Paladino v. Lacey Twp. Bd. of Educ.*, 1989 S.L.D. 3063 (St. Bd. Feb. 1, 1989); *Salley v. Newark Bd. of Educ.*, 1984 S.L.D. 1714 (Comm'r Nov. 8, 1984); *Pennetta & Sons, Inc v. North Bergen Bd. of Educ.*, OAL DKT. EDU 3648-82 (Comm'r May 27, 1983); *Larsen v. Piscataway Bd. of Educ.*, OAL DKT. EDU 1445-81 (St. Bd. Oct. 6, 1982). Unlike this long line of authority, however, the present case does not deal with either interpretation or enforcement of a contract. Petitioner is not seeking clarification of the meaning of ambiguous contractual language. Certainly he is not asking for enforcement of the purportedly illegal contract. Quite the contrary, he is asking that the contract be nullified as beyond the statutory powers conferred on the Board by the education law

³ Although the amended petition does not expressly identify the multi-year aspect of the agreement as a reason for its alleged invalidity, the contention that the agreement will drain the coffers of funds needed for other purposes carries that implication. Moreover, the prehearing order entered on February 16, 1993 includes the issue: "Whether the multi-year agreement is illegal because the current board of education cannot bind a future board of education."

Resolution of this issue does not require extensive knowledge of contracts, commercial transactions or labor law. Rather, it calls for an application of Title 18A and, as such, is a matter directly within the area of the Commissioner's special expertise. *N.J.S.A. 18A:6-9. East Brunswick Bd. of Educ. v. Twp. Council*, 48 N.J. 94, 102 (1966). *Fair Lawn Bd. of Educ. v. Mayor*, 143 N.J. Super. 259, 266 n.3 (Law. Div. 1976), *aff'd* 153 N.J. Super. 480 (App. Div. 1977).

(3) Standing

Standing has been called one of "the most amorphous [concepts] in the entire domain of public law." *Flast*, 392 U.S. at 99. Notwithstanding its ambiguities, the fundamental aspect of standing is that "it focuses on the party seeking to get his complaint before a . . . court and not on the issues he wishes to have adjudicated. Simply put, standing means that a particular litigant must have sufficient interest in the subject of the litigation so that a genuine clash between opposing viewpoints will be presented. *Kenwood v. Montclair Bd. of Educ.*, OAL DKT. EDU 8858-81 (Comm'r June 14, 1992).

Traditionally, New Jersey courts have adopted a generous approach toward recognition of standing in order that aggrieved parties will not be denied easy access to the legal system. Unlike the federal courts which are constitutionally confined to deciding narrowly defined "cases and controversies," *U.S. Const.*, art. III, §2, the state courts have been much more willing to allow persons with only a tangential interest in the outcome of a case to obtain redress for real or potential injuries. Nonetheless even in state court, there exist some minimum barriers which a petitioner must overcome before he may be heard. In the leading case of *Crescent Park Tenants Ass'n v. Realty Eq. Corp.*, 58 N.J. 98, 107 (1971), our Supreme Court outlined these threshold requirements:

[We] will not render advisory opinions or function in the abstract (*New Jersey Turnpike Authority v. Parsons*, 3 N.J. 325, 240 (1949)) nor will we entertain proceedings by plaintiffs who are "mere intermeddlers" (*Baxter v. Baxter*, 13 N.J. Eq. 82, 86 (Ch. 1887)).

aff'd 44 N.J. Eq. 298 (E. & A. 1888)), or are merely interlopers or strangers to the dispute (*Bergen County v. Port of New York Authority et al.*, 32 N.J. 303, 307, 318 (1960)). Without ever becoming enmeshed in the federal complexities and technicalities, we have appropriately confined litigation to those situations where the litigant's concern with the subject matter evidenced a sufficient stake and real adverseness.

Similar restrictions are imposed on those who would initiate administrative proceedings before the Commissioner of Education. While N.J.S.A. 18A:6-9 confers upon the Commissioner jurisdiction to hear and determine "all controversies and disputes arising under the school laws," the Commissioner has promulgated regulations clarifying exactly who may be considered interested persons for purposes of such hearings. N.J.A.C. 6:24-1.1 defines "interested person(s)" as anyone "who will be substantially, specifically and directly affected by the outcome of a controversy before the Commissioner." Such language is fully consistent with the Administrative Procedure Act and the uniform procedural rules, which limit the definition of contested case to proceedings where the "legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or statute to be determined." N.J.S.A. 52:14B-2(b); N.J.A.C. 1:1-2.1. As the uniform rules further make clear, contested cases concern the rights or duties of particular parties as opposed to "large, undefined classes of people." N.J.A.C. 1:2.1.

DiFalco bases his claim for relief on his status as "a citizen, voter and taxpayer" of the municipality comprising the Kinnelon school district. Courts have been understandably reluctant to recognize standing to sue based on taxpayer status alone. For many years, the federal courts absolutely refused to entertain challenges by taxpayers to expenditures of public funds. Seventy years ago, in *Frothingham v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L. Ed. 1078 (1923), the United States Supreme Court precluded a federal taxpayer from attacking the constitutionality of a federal grant program, reasoning that the taxpayer's "interest in the moneys of the Treasury is comparatively minute and indeterminable" and that "the effect upon future taxation of any payment out of the [Treasury's] funds, . . . [is] remote and uncertain." 262 U.S. at 487. Likewise, in *Doremus v. Hawthorne Bd. of Educ.*, 342 U.S. 429, 72 S. Ct. 394 36

L. Ed. 475 (1952), the High Court rejected a taxpayer's constitutional challenge to a statute requiring Bible reading in the public schools, without reaching the underlying merits of the dispute. Citing *Frothingham*, the Court reiterated that a party who invokes the judicial power "must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." 342 *U.S.* at 434.

Even at its most extreme, federal courts have always conceded that the results may be different at the local level, "when measured against a municipal taxpayer's interest in a smaller city treasury." *Flast*, 392 *U.S.* at 93. Insofar as New Jersey is concerned, "the standing of a taxpayer to attack illegal disbursements of public funds or other illegal official action has been long and firmly established." *Crescent Park Tenants Assoc.*, 58 *N.J.* at 102. DiFalco has marshaled several examples in which New Jersey courts have recognized the standing of municipal taxpayers, as such, to bring legal action to remedy alleged wrongful conduct by government officials. See, e.g., *Silverman v. Millburn Bd. of Educ.*, 134 *N.J. Super.* 253 (Law Div. 1975), *aff'd* 136 *N.J. Super.* 435 (App. Div. 1975), where taxpayers had standing to sue a school district over the closing of school financed by a multi-purpose bond issue. See also, *Booth v. Rockaway Twp. Bd. of Adjustment*, 50 *N.J.* 302 (1967) and *Aurentz v. Little Egg Harbor Twp. Planning Bd.*, 171 *N.J. Super.* 135 (Law Div. 1979), where taxpayers or property owners had standing to contest municipal exercise of the zoning power. One authoritative commentator has gone so far as to suggest that New Jersey cases "seem to stand for the proposition that standing is largely self regulating. The high cost of litigation and the general reluctance for most members of the public to become 'involved' in practical effect excludes those persons who do not have a genuine interest in the litigation." Steven LeFelt, *Administrative Law & Practice*, 37 *N.J. Practice Series* § 308 (1988).

Moreover, the federal courts themselves have retreated from their strict application of the standing doctrine and now allow taxpayer suits under certain limited circumstances. Accordingly, in *Flast v. Cohen supra*, the Supreme Court ruled that a

taxpayer could sue to enjoin the allegedly unconstitutional use of federal funds to support private religious schools. Elaborating on its earlier analysis, the Court held that its concerns would be adequately met when a taxpayer alleges a breach of specific constitutional limitations imposed upon the congressional taxing and spending power. In reaching that result, the Court demanded that the taxpayer establish "a logical nexus between the status asserted and the claim sought to be adjudicated." 392 U.S. at 102. Since the taxpayer in *Flast* alleged that the expenditures for religious purposes contravened specific protections guaranteed by the First Amendment, the Court was satisfied that the issues were "framed with the necessary specificity" and that the litigation would be "pursued with the necessary vigor." 392 U.S. at 106.

Basically, therefore, the inquiry is whether DiFalco has sufficiently demonstrated that he will be "substantially, specifically and directly affected by the outcome" so as to bring him within the intendment of N.J.A.C. 6:24-1.2. In his papers, DiFalco argues that the school budget represents the largest component of local property taxes, that the amount of such tax levy greatly affects the market value of his home, and that his home is the single largest asset which he owns.⁴ In addition, he urges that the excessively generous buyout payment diverts limited revenues which should be used for the benefit of children, thereby directly affecting "the quality of life of all citizens." If these were his only arguments, they might be insufficient to conclude that DiFalco has met the requirements for standing. After all, DiFalco's complaint sounds suspiciously like a mere disagreement with the wisdom of decisions made by his elected representatives and a personal belief that he could do a better job. (See discussion of the school board's proper role, *supra*, at pages 7 to 8.)

But DiFalco also raises the important public question of whether a multi-year settlement agreement entered into by an existing board is binding on future boards. In the event that DiFalco were barred from obtaining a definitive ruling on this point he would be left totally without recourse. Reform through the electoral process would be

⁴Although no proofs were taken, DiFalco claims that education costs account for at least 65% of the total local property tax assessment.

unavailing, unless there exists some capacity in the new board to reverse the policies adopted by its predecessors. Important public questions of this type have generally been regarded as a sufficient basis on which to posit standing. Where a case is of great public interest, any "slight additional private interest" will be sufficient to afford standing. *Salario v. Glaser*, 82 N.J. 482, 491 (1980). The extent of the interest of the community at large is particularly important and may, if sufficiently great, negate the necessity of proof of unique financial detriment to the party seeking review. *Kozesnik v. Montgomery Twp.*, 24 N.J. 154, 177 (1957). *Allen*, 137 N.J. Super. at 363. Viewed in this context, DiFalco's interest as a taxpayer and homeowner is enough to satisfy any residual need for some measurable amount of detrimental impact on the complaining party's personal rights. Due to the public significance of the issue presented in this case, the Commissioner should take the opportunity to clarify the law for guidance of school boards throughout the state.⁵

Beyond that, the present matter is highly reminiscent of the situation in which federal courts recognize standing, although not, of course, involving comparable questions of federal jurisdiction or of constitutional magnitude. Like *Flast v. Cohen*, DiFalco is claiming not only that a governmental body improperly exercised its spending powers, but also that it exceeded specific limitations designed to curb legislative abuse. In particular, DiFalco challenges the legal authority of the current board to bind its successors. Such allegations supply the missing link between DiFalco's status as a taxpayer and the precise nature of the legislative action sought to be overturned. Far from intruding into the legislative domain, DiFalco's suit enhances

⁵To the extent, however, that DiFalco claims that two board members were deprived of full participation in the decision-making process, he is improperly trying to vindicate rights belonging to others. Whatever tangential impact may have fallen on taxpayers in general, only the board members themselves were directly affected. Ordinarily a litigant may not claim standing to assert the rights of a third party. *Jersey Shore Med. Ctr.-Fitkin Hosp. v. Est. of Baum*, 84 N.J. 137, 144 (1980). Repeatedly, school law decisions have determined that a volunteer is not a proper party to initiate causes on behalf of someone else. See, e.g., *D. K. v. Clifton Bd. of Educ.*, 93 N.J.A.R. 21 (Vol. 4A) 71 (Comm'r of Educ.); *Huettemann v. East Rutherford Bd. of Educ.*, 1986 S. 2248 (Comm'r Sept. 3, 1986).

the separation of powers by insuring that the Board is acting within the proper confines of its powers.

Cases cited by the Board deal with routine personnel matters and do not raise any important public question implicating a school board's operational authority. For instance, in *Huetteman v. East Rutherford Bd. of Educ.*, 1986 S.L.D. 2248 (Comm'r Sept. 3, 1986), the Commissioner determined that parents do not have standing to litigate the propriety of a transfer of principals among different school buildings in the district. In *Ricardelli v. Newark Bd. of Educ.*, OAL DKT. EDU 1894-79 (Comm'r Nov. 16, 1979), the Commissioner held that a person's status as a resident of the district does not entitle him to contest a local board's decision to transfer personnel. Likewise, in *Delaney v. Woodbridge Bd. of Educ.*, OAL DKT. EDU 382-78 (Dec. 12, 1979), the Commissioner said that a taxpayer could not challenge a school board's action in filling certain job vacancies. Each of these cases involved discretionary managerial decisions clearly within the scope of a school board's delegated powers. They lack the element of a serious issue regarding the limits of a board's statutory authority as it relates to expenditure of public revenues. In contrast, DiFalco has articulated an alleged breach of limits on the Board's spending powers which substantially, specifically and directly affects him in his capacity as a taxpayer.

Order

It is **ORDERED** that the Board's motion is denied with respect to whether a current board of education can enter into a multi-year buyout agreement binding on future boards.

And it is further **ORDERED** that the Board's motion is granted with respect to all remaining issues, which are hereby dismissed.

This order granting summary decision in part and denying summary decision in part is being submitted under *N.J.A.C. 1.1-12.5(e)* for immediate review. This

recommended order may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make the final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this order was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Jan. 5, 1995
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

1/12/95
DATE

[Signature]
DEPARTMENT OF EDUCATION

JAN 12 1995
DATE
al

Mailed to Parties:
[Signature]
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

JOSEPH DI FALCO, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
BOROUGH OF KINNELON,
MORRIS COUNTY, :
RESPONDENT, :
AND :
ROBERT SCHOTT, :
INTERVENOR. :
_____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Pursuant to the provisions of N.J.A.C. 1:1-18.4, petitioner, respondent and intervenor each filed timely exceptions to the initial decision, and the Board and petitioner filed replies. Petitioner's reply, however, was untimely filed and is not considered herein.

Respondent and intervenor except to the ALJ's having kept any aspect of the case alive, while petitioner objects to further proceedings being limited to the question of whether the contract at issue improperly binds future boards.

Petitioner argues that, had he been permitted to proceed on the totality of his claims, he would have provided evidence and testimony showing that the Board never gave, either at public meetings, on record or in response to citizen inquiry, any reason for its action, which therefore must be presumed to be arbitrary,

capricious and unreasonable. (Preston K. Mears, Jr. et al. v. Board of Education of the Town of Boonton, Morris County, 1968 S.L.D. 108) Moreover, had his claim not been summarily dismissed, petitioner would have been able to muster proof of bad faith, as the Board has already been found to have violated the Open Public Meetings Act in its first attempt to approve the buyout, and at least two Board members were not aware of the buyout, or the reasons for it, when they were asked to vote on its acceptance. While generally endorsing the ALJ's discussion to the effect that actions taken within the lawful discretionary authority of a board of education are not susceptible to administrative or judicial review, petitioner claims that the action challenged herein was not taken within such lawful authority, but rather, was a gross abuse of discretion, as he would have demonstrated at hearing had he been given the opportunity. Thus, the effect of the ALJ's summary dismissal, without having granted the legitimate inferences due petitioner's claims in this context, is to have insulated the Board from challenge and reduced petitioner's attempt to raise a matter of local and statewide public significance to the level of a frivolous suit.

The respondent Board of Education (Board) contends that it should have prevailed on all issues as a matter of law, so that the ALJ erred in permitting even the limited question of binding future boards to survive its motion to summarily dismiss petitioner's appeal. There is no question, the Board argues, that the Board was within its rights to grant the paid leave that

constitutes one part of the settlement, and it is not at all uncommon for such a leave to extend beyond the life of the board granting it. Similarly, as the other part of its agreement, the Board provided for a lump sum payout; that such payout was effectuated, for budgetary reasons, through a schedule of payments spread over the course of three years, does not render the Board's action any different than if it had determined to pay the full amount in a one-time lump sum, so that the question of binding future boards would not even have arisen. Moreover, the Commissioner has previously approved settlement agreements which have included payment schedules extending beyond the life of the authorizing board. (In the Matter of the Tenure Hearing of Debbie F. Smith, School District of the Township of Rochelle Park, Bergen County, decided May 17, 1988, and Helene Narucki v. Board of Education of the Toms River Regional School District, Ocean County, decided December 8, 1986)

Intervenor, in addition to endorsing the argument of the Board above, objects to the ALJ's findings regarding the Commissioner's jurisdiction to hear this matter and petitioner's standing to raise it. With respect to jurisdiction, intervenor argues that there is no basis for the Commissioner to assert jurisdiction, as the matter at issue clearly arises from a contract entered into by the Board and intervenor, and does not arise under the school laws. (Dr. Columbus Salley v. Board of Education of the City of Newark, Essex County, 1984 S.L.D. 1714) With respect to standing, intervenor contends that petitioner does

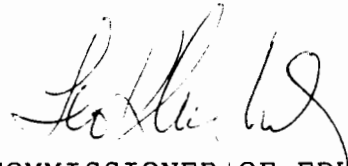
not raise the question of binding future boards in his claims, which are in essence no more than a challenge to the wisdom of the Board's action. Nothing in petitioner's filing is sufficient to confer standing, and indeed, the remedy for his claims is to be properly obtained through the ballot box and not through adjudication by the Commissioner.

Upon careful consideration, the Commissioner finds that he cannot concur with the ALJ's summary dismissal of petitioner's complaint. While the underlying action challenged by petitioner herein is, indeed, as noted by the ALJ, an action of the type that falls within the board of education's discretionary authority, it is not insulated from review on that basis alone. Petitioner, who has standing to do so for the reasons stated by the ALJ, has raised a question of considerable public interest and alleged arbitrariness and bad faith on the part of the Board; therefore, he has certainly raised a claim justiciable before the Commissioner pursuant to N.J.S.A. 18A:6-9 and N.J.A.C. 6:24-1.1 et seq. Moreover, he has provided at least some factual basis for his allegations, which facts were not included in the language of the buyout agreement on which the ALJ relied in granting summary decision, and which facts are disputed by the Board; therefore, summary judgment would likewise appear to have been inappropriately granted. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954) Neither does the Commissioner find merit in respondent and intervenor's exceptions; rather, he finds that the ALJ ruled correctly on the questions of standing and

jurisdiction, and that the question of binding future boards is not adequately resolved by the argument and evidence thus far on record.

Accordingly, the initial decision of the Office of Administrative Law is modified to the extent that petitioner's claims of arbitrariness and bad faith, as well as the question of adoption of an agreement binding future boards, are remanded to OAL for hearing on the merits.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

FEBRUARY 21, 1995

DATE OF MAILING FEBRUARY 21, 1995

(SB) 57-95

DHP #59-95
SB #57-95
DHP #82-96

IN THE MATTER OF THE DISQUALIFI- : STATE BOARD OF EDUCATION
CATION FROM SCHOOL EMPLOYMENT : DECISION
OF MATTHEW J. GAMBALE. :

Decided by the Deputy Commissioner of Education, May 26, 1995

Remanded by the State Board of Education, August 2, 1995

Decision on remand by the Commissioner of Education, March 7, 1996

For the Petitioner-Appellant, Matthew J. Gambale, pro se

For the Respondent-Respondent, Pamela B. Katten, Deputy Attorney General
(Deborah T. Poritz, Attorney General of New Jersey)

On August 2, 1995, we remanded this matter to the Commissioner of Education for a hearing in order to provide petitioner, who had been disqualified from employment in the State's schools as a bus driver following a criminal history review conducted pursuant to N.J.S.A. 18A:39-19.1 et seq., with an adequate opportunity to establish a record in support of his contention that he had satisfied the statutory standard for rehabilitation. We retained jurisdiction.

In accordance with our remand, the Commissioner transmitted this matter to the Office of Administrative Law, where a hearing was held on December 6, 1995. On January 18, 1996, the Administrative Law Judge ("ALJ") rendered an initial decision in which he concluded that petitioner had demonstrated his rehabilitation by clear and

convincing evidence. On March 7, 1996, the Commissioner adopted the ALJ's recommended decision, finding petitioner to be qualified for school employment as a bus driver. Pursuant to our retention of jurisdiction, the Commissioner transmitted the file back to us.

After a review of the record, we are satisfied that the Commissioner fully complied with the terms of our remand. Thus, pursuant to the Commissioner's decision, petitioner is qualified for school employment as a bus driver, and we dismiss the appeal.

Maud Dahme opposed.

May 1, 1996

Date of mailing MAY 03 1996

58-95

BOARD OF EDUCATION OF THE BOROUGH :
OF ROSELLE PARK, UNION COUNTY, :

PETITIONER, :

V. :

DANIEL SACHOWSKY, JR., MARIA :
SACHOWSKY, JOSEPH SACHOWSKY, AND :
DANIEL SACHOWSKY, :

RESPONDENTS. :

COMMISSIONER OF EDUCATION

DECISION

FEBRUARY 22, 1995

Arnold Samuels, ALJ
January 3, 1994
Page - 2 -

If you have any questions or need any further information,
please feel free to contact me at your convenience.

Very truly yours,



STEVEN S. GLICKMAN

SSG/lr

cc: William Clarke, Superintendent
Daniel Sachowsky, Jr.

BOARD OF EDUCATION OF THE BOROUGH :
OF ROSELLE PARK, UNION COUNTY, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION


DANIEL SACHOWSKY, JR., MARIA :
SACHOWSKY, JOSEPH SACHOWSKY, AND :
DANIEL SACHOWSKY, :

DECISION

RESPONDENTS. :

The record and initial decision of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

FEBRUARY 22, 1995

DATE OF MAILING- FEBRUARY 22, 1995

59-95

IN THE MATTER OF THE TENURE :
HEARING OF PETER GRANALDI, SCHOOL : COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF : DECISION
EASTAMPTON, BURLINGTON COUNTY. :
_____ :

FEBRUARY 22, 1995

charges and to have entered negotiations with respondent for purposes of settlement. In *Cardonick, supra*, the State Board of Education recognized that:

The New Jersey courts have looked with great favor upon the voluntary resolution of litigation through settlement. [Citations omitted] As a general principle, and without considering the toll of human resources, the settlement of lawsuits in good faith can be said to save time, money and proof problems. School boards, in their efforts to conserve public funds, no less than private parties, have been encouraged by the state and federal courts to carefully consider equitable settlement possibilities.

(Slip opinion, at p. ____)

The State Board does caution that boards of education which settle litigation “must act in the public interest, lawfully, constitutionally, reasonably and in accordance with duly enacted rules and regulations of the Commissioner of Education and State Board of Education.” (*Id.*)

In this case, the Board in the proposed Settlement Agreement acknowledges its present belief “that there is an absence of evidence to support the charges. . .” and that “the prosecution of these charges will divert substantial amounts of money, time and key staff resources from the true mission of the district. . .”. (Paragraph Six, Background section of proposed Agreement) Having reviewed the charges, the Statement of Evidence and related documents which purportedly support the charges, and the terms of the Settlement Agreement, the decision of this Board to settle the case is encouraged.

SETTLEMENT TERMS

The five essential terms of the proposed Settlement include the joint withdrawal and dismissal, with prejudice, by both parties of the tenure charges and the answer. Upon dismissal of the charges by the Commissioner, respondent shall withdraw with prejudice the remaining Count Two of his petition of appeal against the Board.

It is further agreed by and between the parties that they shall continue to abide by state and federal law governing affirmative action, as well as the rules and regulations of the Board of Education. The Board agrees that in consultation with the superintendent it shall confer and

discuss directly with respondent any complaints brought against him by staff members in the district.

CONCLUSION

Based on the record in this case including society's interest in the nature of the charges, as well as the interests of the Board, the interests of respondent and of the school district as a whole, the likelihood of whether the charges may be supported by proofs reasonably anticipated by the Board to be offered at the hearing, the terms of the proposed Agreement including the absence of an exchange of public funds for services not rendered, and the consistency of the Agreement with existing law, I **CONCLUDE** that the proposed Settlement Agreement, which was freely entered into by the parties with full knowledge of their rights and each of whom are represented by competent counsel, is a full, fair, lawful and final disposition of the issues presented in this case.

ORDER

The parties are **ORDERED** to fully comply with the terms of the Settlement Agreement as attached and as set forth therein.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

January 5, 1995
DATE

1/11/95
DATE

JAN 17 1995
DATE

slf

Daniel B McKeown, ALJ
DANIEL B. MCKEOWN, ALJ, T/A

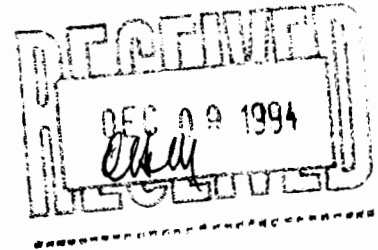
Receipt Acknowledged:

Har R Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

Jeff S. Mason
**ACTING DIRECTOR AND
OFFICE OF THE ADMINISTRATIVE JUDGE**

STEPHEN J. MUSHINSKI, ESQ.
110 Marter Avenue, Suite 411
Moorestown, New Jersey 08057
(609) 866-9582
Attorney for Eastampton
Township Board of Education



IN THE MATTER OF THE TENURE) BEFORE THE COMMISSIONER
HEARING OF PETER GRANALDI,) OF EDUCATION OF THE
SCHOOL DISTRICT OF TOWNSHIP OF) STATE OF NEW JERSEY
EASTAMPTON, BURLINGTON COUNTY)
) AGENCY DOCKET NO.
) 25-2/94
) OAL DOCKET NO.
) 02707-94S
) 02708-94S
) (Consolidated)
) SETTLEMENT AGREEMENT

BACKGROUND

1. Mr. Peter Granaldi ("Granaldi") filed a Petition (OAL Docket No. EDU 8107-92S and EDU 8108-92S [consolidated]) against the Eastampton Township Board of Education on or about September 21, 1992, which was amended on or about March 22, 1993.

2. The Eastampton Township Board of Education ("Board") filed tenure charges against Granaldi on February 10, 1994, which charges are currently pending before the Commissioner of Education ("Tenure Charges").

3. On March 1, 1994 Granaldi filed an Answer, with respect to the Tenure Charges ("Answer").

4. A hearing was held on April 27, 1994, with respect to Count One of Granaldi's Petition. Count Two of Granaldi's Petition was consolidated with the Tenure Charges [OAL Docket Nos. 2707-94S and 2708-94S (Consolidated)]. Only the Tenure Charges, the Answer and Count Two of Granaldi's Petition are the subject of this Settlement Agreement. Count One of Granaldi's Petition shall not be the subject of this Settlement Agreement.

5. The attorneys for the Board and Granaldi have met and have held discussions with regard to the matters alleged in the Tenure Charges. Granaldi and Board acknowledge that allegations exist regarding the occurrence of certain events which have been delineated in the Tenure Charges; Granaldi denies the allegations made as part of the Tenure Charges. The parties have determined it to be in their respective best interests to resolve the above referenced matters and come to an agreement with respect to the obligations, duties and responsibilities of the Board and Granaldi regarding certain aspects of administration and the roles and responsibilities of the Board and Principal of the Elementary School.

6. Based upon these understandings, and recognizing that, when the Board certified the Tenure Charges, it did not suspend Granaldi; and based on its present belief that there is not sufficient evidence to support the Tenure Charges, and further based on its belief

that the prosecution of these charges will divert substantial amounts of money, time and key staff resources from the true mission of the district, the parties have agreed to resolve this matter under and subject to the terms as outlined in this Settlement Agreement.

AGREEMENT

The parties to this Agreement, intending to be legally bound, agree as follows:

1. The Board and Granaldi shall make application to the Commissioner of Education to withdraw and dismiss the Tenure Charges and the Answer with prejudice.

2. Upon dismissal of the Tenure Charges by the Commissioner, Granaldi shall withdraw Count Two of his Petition with prejudice.

3. Acknowledging Granaldi's denial of the charges raised in the Tenure Charges, the Board and Granaldi agree to each abide by the policies and procedures of the Eastampton School District including, but not limited to affirmative action obligations of the Board and staff members.

4. The Board and Granaldi shall abide by all affirmative action laws, rules, regulations, policies and procedures.

5. The Board, with the Superintendent, shall confer and discuss directly with Granaldi any complaints brought against Granaldi by staff members in the school district.

WHEREAS, Granaldi and the Board have reviewed this Settlement Agreement and have consulted with their respective attorneys; and

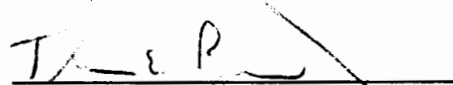
WHEREAS, Granaldi has approved of the terms and conditions of this Settlement Agreement; and

WHEREAS, this Settlement Agreement has been approved by a vote of the Members of the Board of Education of the Eastampton Township School District at its meeting of November 21, 1994, and has been made a part of the minutes of that meeting;


IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

BOARD OF EDUCATION OF THE
EASTAMPTON TOWNSHIP SCHOOL DISTRICT

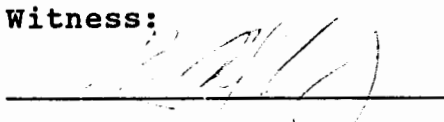
Attest:



Thomas Reynolds
Board Secretary

By: 

David Bradford, Board President

Witness:




PETER GRANALDI


IN THE MATTER OF THE TENURE :
HEARING OF PETER GRANALDI, SCHOOL : COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF : DECISION
EASTAMPTON, BURLINGTON COUNTY. :
_____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.

FEBRUARY 22, 1995

DATE OF MAILING - FEBRUARY 22, 1995


COMMISSIONER OF EDUCATION

(SB) 59-95

DHP # 40-95
SB # 59-95

IN THE MATTER OF THE DISQUALIFI- :
CATION FROM SCHOOL EMPLOYMENT :
OF ROOSEVELT SIMS. :

STATE BOARD OF EDUCATION
DECISION

Decided by the Deputy Commissioner of Education, March 31, 1995

For the Petitioner-Appellant, Roosevelt Sims, pro se

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney General
(Deborah T. Poritz, Attorney General of New Jersey)

Roosevelt Sims (hereinafter "petitioner"), who was employed as a school custodian in the Ridgewood school district, was disqualified by the Office of Criminal History Review of the Department of Education from continued employment in the State's schools when a fingerprint search conducted pursuant to N.J.S.A. 18A:6-7.1 revealed that he had been arrested in New York in August 1988 on charges of possession of a controlled dangerous substance, and subsequently convicted. The record review also revealed convictions for several nondisqualifying offenses in New York: resisting arrest and assault, both of which occurred in 1984, and petit larceny in 1985. Petitioner sought to overturn his disqualification on the basis of rehabilitation.

Dec. 6, 1995

In a letter decision dated March 31, 1995, the Deputy Commissioner of Education upheld the disqualification,¹ concluding that "given the serious nature of your convictions, insufficient time has transpired since your last conviction to find clear and convincing evidence of your rehabilitation."

The petitioner filed the instant appeal to the State Board of Education.²

After a thorough review of the record, we reverse the decision of the Deputy Commissioner, finding that petitioner has demonstrated clear and convincing evidence of his rehabilitation.

N.J.S.A. 18A:6-7.1 provides, in pertinent part:

e. Notwithstanding the provisions of this section, an individual shall not be disqualified from employment or service under this act on the basis of any conviction disclosed by a criminal record check performed pursuant to this act if the individual has affirmatively demonstrated to the Commissioner of Education clear and convincing evidence of his or her rehabilitation. In determining whether an individual has affirmatively demonstrated rehabilitation, the following factors shall be considered:

1. The nature and responsibility of the position which the convicted individual would hold;
2. The nature and seriousness of the offense;
3. The circumstances under which the offense occurred;
4. The date of the offense;
5. The age of the individual when the offense was committed;

¹ We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws...." N.J.S.A. 18A:4-34.

² The Office of Criminal History Review was apparently not represented in the proceedings before the Deputy Commissioner. Upon the filing of the appeal, Counsel to the State Board notified the Attorney General's Office that an appeal had been taken in the matter, and transmitted a copy of the record. A Deputy Attorney General was then assigned to appear as attorney of record in the appeal.

6. Whether the offense was an isolated or repeated incident;
7. Any social conditions which may have contributed to the offense;
8. Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have had the individual under their supervision.

(Emphasis added.)

Petitioner's submissions to the Deputy Commissioner include a letter from the principal of the school in which he had been employed prior to his disqualification, who indicates that:

I am extremely pleased with [petitioner's] performance and have recommended him for supervisory work. Mr. Sims is hard-working, aggressive, and resourceful. He goes beyond the responsibilities of his job to find work that needs attention. For example, a member of my staff left her computer in the parking lot. Mr. Sims saw the machine, worried that it was going to be taken, placed the computer in a safe place, and notified the teacher.

Mr. Sims has excellent leadership skills. The other members of the unit respect him because he works hard and takes charge. My staff members know that if they ask him to take care of a problem, he will find a way to get it done.

....I would like him to remain here on the custodial staff.

The teacher involved in the computer incident relates that after she inadvertently left the laptop in the school parking lot on a Saturday afternoon, she received a call from petitioner, who indicated that he had found it and brought it home for safekeeping. He offered to meet her at the school on Sunday morning to return it to her since she

needed it before Monday morning. She states that his "honesty and his efforts to return the computer to me should be commended."

The unit manager of the private management services firm which had employed petitioner in his school custodial job praises him as "a reliable worker and supervisor.....Mr. Sims showed good customer service skills, assisting organizations using the school facilities for functions and helping teachers move furniture and supplies."

The president of a jail ministry who counseled petitioner following his release from prison commends him as "an example for any young person...that they can change their lives and get on the right track." She describes petitioner as "faithful" and "hardworking," adding that he "is an asset to any employer."

Petitioner's submissions to the Commissioner also reveal that he successfully completed and received an academic achievement award for a course in office technology in June 1993 at an adult education center. He also successfully completed a prison pre-release program and a 40-hour intensive peer counseling training program, in which students learned basic counseling skills while at the same time receiving therapy for alcohol and drug problems. In addition, following his release from prison, petitioner completed a life skills program offered by the Rockland County Department of Social Services. There have been no further arrests since August 1988.

While the gravity of petitioner's offenses is apparent, we find that further penalization of this individual is neither a just result nor warranted under the terms of the statute. Given the uncontradicted evidence in the record, including the

recommendations of his supervisors and petitioner's successful efforts to acquire training and experience, as well as his actions in safeguarding and returning the computer left in the school parking lot, we conclude that he has convincingly demonstrated his rehabilitation under N.J.S.A. 18A:6-7.1(e). Moreover, as required by that provision, we have considered the "nature and responsibility" of the position petitioner held within the public school system. In this respect, we stress that he was disqualified from employment as a school custodian, a position which does not include responsibility for the care, supervision or instruction of students.

We note further that there is no indication in the record that petitioner's New York assault conviction resulting from his arrest in June 1984 constituted a disqualifying offense under the statute. While any conviction for aggravated assault is disqualifying, N.J.S.A. 18A:6-7.1(c)(1), a conviction for simple assault is disqualifying only if it involves "the use of force which results in bodily injury." N.J.S.A. 18A:6-7.1(c)(2). In this case, the record does not specify the particular provisions of New York's criminal code under which petitioner was convicted. Nor is there any indication as to petitioner's underlying conduct. Consequently, there is no indication on this record that such offense would be disqualifying under N.J.S.A. 18A:6-7.1. See In the Matter of the Disqualification from School Employment of Michael Taylor, decided by the State Board, November 1, 1995.

Moreover, in concluding that "insufficient time has transpired," the Deputy Commissioner improperly relied upon the date of petitioner's conviction, rather than the "date of the offense." N.J.S.A. 18A:6-7.1(e)(4) (emphasis added).

Accordingly, in view of our finding that petitioner has demonstrated clear and convincing evidence of his rehabilitation pursuant to N.J.S.A. 18A:6-7.1(e), we reverse the decision of the Deputy Commissioner disqualifying petitioner from service in the schools of New Jersey.

Margaret M. Bennett and Maud Dahme opposed.

December 6, 1995

Date of mailing _____

DEC 08 1995

60-95

SUMMIT SECRETARIES ASSOCIATION, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF : DECISION

SUMMIT, UNION COUNTY, :

RESPONDENT. :

FEBRUARY 22, 1995


SUMMIT SECRETARIES ASSOCIATION, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF : DECISION
SUMMIT, UNION COUNTY, :
RESPONDENT. :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

FEBRUARY 22, 1995

DATE OF MAILING - FEBRUARY 22, 1995


COMMISSIONER OF EDUCATION

DHP #445-94
SB # 60-95

IN THE MATTER OF THE DISQUALI- :
 FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
 MENT OF SHAWN HINES. : DECISION ON MOTION
 _____ :

Decided by the Deputy Commissioner of Education, January 30, 1995

For the Petitioner-Appellant, Shawn Hines, pro se

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney General (Deborah T. Poritz, Attorney General of New Jersey)

Shawn Hines (hereinafter "petitioner"), who was employed as a substitute teacher for the Newark school district, was disqualified by the Office of Criminal History Review (hereinafter "respondent") of the Department of Education from continued employment in the State's schools following a fingerprint search conducted pursuant to N.J.S.A. 18A:6-7.1.

In a letter decision dated January 30, 1995, the Deputy Commissioner of Education upheld the disqualification.¹ Relating that petitioner had been convicted of simple assault in 1990 and also had an arrest in 1989 for possession of marijuana

¹ We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws..." N.J.S.A. 18A:4-34.

SEPT. 6, 1995

which "has not been fully resolved," the Deputy Commissioner found that petitioner had not demonstrated his rehabilitation by clear and convincing evidence.

Petitioner filed the instant appeal to the State Board of Education.² Respondent subsequently filed a motion to remand this matter to the Commissioner for a hearing on the issue of petitioner's rehabilitation. Petitioner opposes such a remand, claiming that the Commissioner's staff is "influenced by members of an Italian organized crime group" and cannot be trusted to provide him with a fair hearing.

After a thorough review of the record, we remand this matter to the Commissioner for the reasons that follow.

We find initially that the Deputy Commissioner's decision does not indicate a conviction for an offense which is regarded as disqualifying under N.J.S.A. 18A:6-7.1. Although petitioner was arrested on a charge of aggravated assault, that charge was subsequently reduced to simple assault. Simple assault, unlike aggravated assault, is disqualifying under the statute only if it involves "the use of force which results in bodily injury." N.J.S.A. 18A:6-7.1(c). There is no indication of bodily injury in the record before us. The only other arrest shown in the record is for possession of a controlled dangerous substance, 50 grams or less of marijuana, which, while disqualifying if it results in a conviction, "has not been fully resolved." Deputy Commissioner's Decision, slip op. at 1. Consequently, the only conviction revealed in

² The Office of Criminal History Review was apparently not represented in the proceedings before the Deputy Commissioner. Upon the filing of the appeal, Counsel to the State Board notified the Attorney General's Office that an appeal had been taken in the matter, and transmitted a copy of the record. A Deputy Attorney General was then assigned to appear as attorney of record in the appeal.

the Deputy Commissioner's decision is for simple assault, a non-disqualifying offense in the absence of bodily injury.

In that the record before us reveals an arrest for possession of marijuana, but does not clearly indicate the disposition of that charge, we remand this matter to the Commissioner for an initial determination regarding the outcome of that particular charge and for a resultant determination as to whether petitioner has any convictions which would disqualify him from school employment pursuant to N.J.S.A. 18A:6-7.1.³

In the event it is determined that petitioner has been convicted of a disqualifying offense, we also grant the respondent's motion to remand this matter to the Commissioner for a hearing on the issue of rehabilitation. Petitioner has presented no evidence to substantiate his bias allegation against the Commissioner, and we reject as entirely without merit his contention that the Commissioner cannot provide him with a fair hearing. Consequently, in the event it is determined that petitioner has been convicted of a disqualifying offense, we direct the Commissioner to conduct a hearing in order to provide petitioner with an adequate opportunity to establish a record in support of his contention that he has satisfied the statutory standard for rehabilitation. We direct that such hearing and a final determination by the Commissioner be rendered on an expedited basis, and that such determination considers all pertinent circumstances under the factors set forth in N.J.S.A. 18A:6-7.1, including "any evidence of

³ The criminal record reports indicates that petitioner was arrested on April 1, 1989 and charged with obstruction of justice, hindering arrest and possession of marijuana. The disposition indicated on the marijuana charge is "CD [conditional discharge] granted." Although a more detailed record provided by the New Brunswick Municipal Court indicates a fine and probation, the specific disposition of the marijuana charge is not entirely clear.

of rehabilitation." See Wolffbrandt v. New Jersey State Department of Education,
decided by the State Board, July 1, 1992. Petitioner has the burden on remand of
demonstrating his rehabilitation by clear and convincing evidence.

We retain jurisdiction.

September 6, 1995

Date of mailing SEP 08 1995

DHP #445-94
SB # 60-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF SHAWN HINES. : DECISION

Decided by the Deputy Commissioner of Education, January 30, 1995

Remanded by the State Board of Education, September 6, 1995

Decision on remand by the Deputy Commissioner of Education,
December 6, 1995

For the Petitioner-Appellant, Shawn Hines, pro se

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney
General (Deborah T. Poritz, Attorney General of New Jersey)

In a letter decision dated January 30, 1995, the Deputy Commissioner of Education upheld the disqualification of petitioner from continued employment in the State's schools as a substitute teacher following a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1 which revealed a conviction for simple assault. On September 6, 1995, we rejected that determination, stressing that simple assault was not a disqualifying offense under N.J.S.A. 18A:6-7.1 in the absence of bodily injury. However, in that the record also revealed an arrest for possession of marijuana, but did not indicate the disposition of that charge, we remanded this matter to the Commissioner for a determination regarding the outcome of that particular

6/5/96

charge and for a resultant determination as to whether petitioner had any convictions which would disqualify him from school employment pursuant to N.J.S.A. 18A:6-7.1.

In a letter decision dated December 6, 1995, the Deputy Commissioner, in accordance with our remand,¹ indicated that the "outstanding warrant for your arrest...with respect to a Possession of Marijuana charge against you has been vacated and all fines have been paid." Consequently, the Deputy Commissioner concluded that petitioner was deemed qualified for school employment. Pursuant to our retention of jurisdiction, the Commissioner transmitted the file back to us.

After a review of the record, we are satisfied that the Commissioner complied with the terms of our remand. However, we clarify the Deputy Commissioner's determination. The record indicates that petitioner received a conditional discharge of the possession of marijuana charge. See N.J.S.A. 2C:36A-1. The outstanding warrant revealed in the record was apparently issued when petitioner failed to pay the fines imposed as a condition of such discharge. When those fines were subsequently paid, the court dismissed the charge in accordance with the terms of the conditional discharge. Pursuant to N.J.S.A. 2C:36A-1, "dismissal [following satisfaction of the terms of a conditional discharge] shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of disqualifications or disabilities, if any, imposed by law upon conviction of a crime or disorderly persons offense...." Consequently, since petitioner does not have a conviction for a disqualifying offense

¹ We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws...." N.J.S.A. 18A:4-34.

under N.J.S.A. 18A:6-7.1, he is not disqualified from school employment on the basis of that statute.² We therefore dismiss the appeal.

June 5, 1996

Date of mailing JUN 07 1996

² We note that, in a separate proceeding, the State Board of Examiners revoked petitioner's teaching certificate as a result of his conviction for simple assault. In the Matter of the Revocation of the Teaching Certificate of Shawn R. Hines, decided by the State Board of Examiners, October 19, 1995. That decision is currently on appeal to the State Board of Education.

61-95

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF WINSLOW, CAMDEN COUNTY, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE LOWER :
CAMDEN COUNTY REGIONAL SCHOOL :
DISTRICT, CAMDEN COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

FEBRUARY 22, 1995

OAL DKT. NO. EDU 09910-94

BOARD OF EDUCATION OF THE TOWN-
SHIP OF WINSLOW, CAMDEN COUNTY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE LOWER
CAMDEN COUNTY REGIONAL SCHOOL
DISTRICT, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION


DECISION

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

FEBRUARY 22, 1995

DATE OF MAILING - FEBRUARY 22, 1995


COMMISSIONER OF EDUCATION

62-95

J.R. and W.R., on behalf of their :
minor child, W.R.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWN-
SHIP OF TEANECK, BERGEN COUNTY,

RESPONDENT.

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COMMISSIONER OF EDUCATION

DECISION

FEBRUARY 22, 1995

J.R. and W.R., on behalf of their :
minor child, W.R., :

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF TEANECK, BERGEN COUNTY, :


DECISION

RESPONDENT. :

_____ :

The record and notice of withdrawal transmitted to the
Commissioner by the Office of Administrative Law pursuant to
N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the
withdrawal. Consequently, the matter is no longer deemed to be a
contested matter before the Commissioner and is dismissed with
prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

FEBRUARY 22, 1995

DATE OF MAILING - FEBRUARY 22, 1995

63-95

S.G., on behalf of her minor child, R.G., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

FEBRUARY 22, 1995

S.G., on behalf of her minor
child, R.G.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWN-
SHIP OF SOUTH BRUNSWICK,
MIDDLESEX COUNTY,


RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

FEBRUARY 22, 1995

DATE OF MAILING - FEBRUARY 22, 1995

64-95

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF MIDDLE, :
PETITIONER, :
V. :
MAYOR AND COMMITTEE OF THE TOWN- :
SHIP OF MIDDLE, CAPE MAY COUNTY, :
RESPONDENTS. : COMMISSIONER OF EDUCATION
AND : DECISION
IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE MIDDLE TOWNSHIP :
BOARD OF EDUCATION, CAPE MAY :
COUNTY. :

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of \$650,357 made by governing body following voter rejection of proposed budget on April 19, 1994. The amount was subsequently reduced to \$185,600.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore \$29,000.

Board also appealed General Fund cap waiver in the amount of \$222,183 rejected by voters.

Upon review of the record, Commissioner determined to order the increase of \$139,418 in cap waiver monies for a total General fund tax levy of \$9,037,608 for the 1994-95 school year.

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLE, :
 PETITIONER, :
 V. :
 MAYOR AND COMMITTEE OF THE TOWNSHIP OF MIDDLE, CAPE MAY COUNTY, :
 RESPONDENTS. : COMMISSIONER OF EDUCATION
 AND : DECISION
 IN THE MATTER OF THE CAP WAIVER :
 APPEAL OF THE MIDDLE TOWNSHIP :
 BOARD OF EDUCATION, CAPE MAY :
 COUNTY. :

For Petitioner Board of Education, Corino and Dwyer
 (Louis C. Dwyer, Jr., Esq., of Counsel)

For Respondent Township, Bruce M. Gorman, Esq.

This consolidated matter was opened before the Commissioner of Education on June 16, 1994, through the filing of a Petition of Appeal by the Middle Township Board of Education (Board) pursuant to the provisions of N.J.A.C. 6:24-7.1 et seq. The Board sought restoration, on the grounds of necessity for a thorough and efficient system of education, of \$650,357 in reductions made by the Mayor and Committee of the Township of Middle, Cape May County (Township) pursuant to N.J.S.A. 18A:22-37, to the General Fund tax levy for the 1994-95 school year proposed by the Board in its budget which was rejected by the voters at the annual school election held

on April 19, 1994. Additionally, on June 17, 1994, the Board filed a Petition of Appeal seeking the Commissioner's approval of a defeated cap waiver in the amount of \$222,183 which had been approved by the Cape May County Superintendent for submission to the voters of the district. On July 18, 1994, the Township filed its Answer.

Subsequent to filing the original Petition of Appeal in the base budget matter, the Board by letter dated June 7, 1994, informed the Cape May County Superintendent that altered circumstances had permitted the Board to accept \$464,757 of the \$650,357 in reductions imposed by the Township in the base budget, thus, reducing the amount in dispute between the parties as related to the base budget to \$185,600. (See letter of June 7, 1994 from Elaine M. Jordan, School Business Administrator to County Superintendent Sandra Lowe.) Upon approval of the budget appeal reduction by the County Superintendent, the Board was directed by the Commissioner's representative to file an Amended Petition of Appeal which was filed on July 20, 1994. The Township filed an Amended Answer on September 8, 1994. The parties to this controverted matter were also informed by the director of the Bureau of Controversies and Disputes, that the total revised amount sought by the Board was within the statutory budget cap limits; therefore, the original consolidated matter would be reviewed as a standard budget appeal. (See letter of Hope Blackburn to parties dated July 8, 1994.)

Position Statements on the base budget appeal were filed by the Township and the Board on September 19, 1994 and October 6, 1994, respectively. The Board filed a Position Statement on its cap waiver line items December 15, 1994. The Township did not submit a

position statement for those line items contained within what was the Board's original cap waiver appeal despite letters dated September 21, 1994 and November 22, 1994 from the director of the Bureau of Controversies and Disputes to the parties notifying the Township of its right to file an Answer and a position statement. In addition, on December 16, 1994, the parties to this matter were notified that the Commissioner intended to take official notice of the Board's 1993-94 year-end audit for the purpose of identifying whether the Board underestimated in its 1994-95 budget the amount of anticipated underdesignated surplus. The record was closed upon the expiration of time for responses.

Consequently, the amounts in dispute in this matter are as follows:

<u>Proposed Tax Levy Adopted by the Board of Education</u>	<u>Amount of Tax Levy Certified by the Township Committee</u>
General Fund \$9,519,547	General Fund \$8,869,190
<u>Amount of Reduction in the Budget by Township Committee</u>	<u>Amount of Reduction in Dispute Before the Commissioner</u>
General Fund \$650,357	General Fund \$185,600
<u>Amount of Line Items Contained in Original Cap Waiver</u>	<u>Total Amount to be Decided by Commissioner</u>
\$222,183	\$407,783

After consultation with the Board, the Township certified to the Cape May County Board of Taxation a General Fund tax levy in the amount of \$8,869,190 for the 1994-95 school year. The line items and the rationale for the reductions as provided by counsel are set forth below:

<u>Line</u>	<u>Budget Category</u>	<u>Account Number</u>	<u>Reduction</u>
265	Purchased Professional-Educ. Serv.	11-190-100-320	\$10,000
604	Purchased Services (300-500 series)	11-401-100-500	5,000

<u>Line</u>	<u>Budget Category</u>	<u>Account Number</u>	<u>Reduction</u>
606	Other Objects	11-401-100-800	5,000
661	Purchased Professional-Educ. Serv.	11-000-219-320	7,000
686	Purchased Professional & Tech. Serv.	11-000-222-300	5,000
688	Supplies and Materials	11-000-222-600	5,000
693	Other Purchased Professional Serv.	11-000-230-339	5,000
699	Miscellaneous Expenditures	11-000-230-890	14,000
707	Supplies and Materials	11-000-240-600	5,000
711	Purchased Professional & Tech. Serv.	11-000-260-300	25,000
718	Energy (Heat and Electricity)	11-000-260-620	15,000
719	Other Objects	11-000-260-300	75,000
732	Supplies and Materials	11-000-270-600	9,600
Total			<u>\$185,600</u>

<u>Account Number</u>	<u>Title</u>	<u>Reduction</u>
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11-190-100-320	Purchased Professional-Educ. Services	\$10,000
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Met with Kelliann DiTullio to review 1993-94 actual expenditures and found \$10,500 was spent through April 30, 1994. After reviewing the budgeted amount of \$26,416 determined that \$10,000 could be reduced without harming any program.

11-401-100-500	Purchased Services (300-500 series)	\$5,000
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Per Kelliann some of this line is paid for out of student activity funds. Proposed reduction would not harm this program.

11-401-100-800	Other Objects	\$5,000
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Per Kelliann some of this line is paid for out of student activity funds. Proposed reduction would not harm this program.

11-000-219-320	Purchased Professional-Educ. Serv.	\$7,000
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Met with Kelliann DiTullio to review 1993-94 actual expenditures and found \$16,639 was spent through April 30, 1994. After reviewing the budgeted amount of \$28,000, determined that \$7,000 could be reduced without harming the program.

<u>Account Number</u>	<u>Title</u>	<u>Reduction</u>
11-000-222-300	Purchased Professional & Tech. Serv.	\$5,000
	There is a new item in the amount of \$5,000, plus some of this line is in Operation and Maintenance of Plant. Proposed reduction would not harm the district.	
11-000-222-600	Supplies and Materials	\$5,000
	This line has \$11,000 allocated for library books. The library will not be completed until 1995. Suggested purchasing 6,000 (books) in this year and 5,000 next year.	
11-000-230-339	Other Purchased Professional Services	\$5,000
	Met with several board members concerning this line and the members agreed some expenditures were estimated too high.	
11-000-230-890	Miscellaneous Expenditures	\$14,000
	Met with several board members concerning this line and the members agreed some expenditures were estimated too high. Also the positions eliminated would save about \$4,000.	
11-000-240-600	Supplies and Materials	\$5,000
	Reviewed 1993-94 expenditures and projected expenditures to June 30, 1994 and propose a \$5,000 reduction.	
11-000-260-300	Purchased Professional & Technical Serv.	\$25,000
	Met with several board members concerning this line and the members agreed that \$275,000 was to be budgeted for Service Master not \$300,000.	
11-000-260-620	Energy (Heat and Electricity)	\$15,000
	The combination of this line plus the Utilities budgeted on Line 624 are in excess of 1993-94 expenditures.	

<u>Account Number</u>	<u>Title</u>	<u>Reduction</u>
11-000-260-300	Other Objects	\$75,000

This line contains many small projects scheduled for the summer. These could be held off until next year.

11-000-270-600	Supplies and Materials	\$9,600
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Reviewed 1993-94 expenditures and projected expenditures to June 30, 1994 and propose a \$9,600 reduction.

All of the above reductions were reviewed with several board members on May 16, 1994. It was agreed that none of the reductions would harm any educational programs.

The Township was not authorized pursuant to its authority under N.J.S.A. 18A:22-37, to review the following line item accounts contained within the original cap waiver appeal. These accounts will not be considered by the Commissioner as part of the base budget appeal because of the subsequent changed circumstances recorded above.

<u>Account Title</u>	<u>Account Number</u>	<u>Amount</u>
Pre-School Kindergarten Sal. of Teachers	11-205-100-106	\$16,553
Grades 1-5 Salaries of Teachers	11-213-100-101	33,106
Special Education - Res. Room	11-213-100-106	33,106
Other Salaries for Instruction		
Operation & Maintenance of Plant		
Purchase Professional Tech. Services	11-000-260-300	54,033
Other Objects	11-000-260-800	8,947
Support Services School Admin.	11-000-240-104	8,000
Salaries of Other Professional Staff		
Student Transportation Services -		
Salaries for Pupil Transportation	11-000-270-107	23,350
Other Employee Benefits	11-000-290-290	38,910
Social Security	11-000-290-220	<u>6,178</u>
	Total	\$222,183

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey

requires the Legislature to provide for a thorough and efficient system of education. The Legislature, by way of statutory scheme, has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction is imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

COMMISSIONER'S DETERMINATION

Below are set forth the arguments of the parties in those line item accounts in dispute and the Commissioner's conclusion in each such line item. Additionally, the Commissioner has considered the Board's rationale on those line items which were originally contained within the cap waiver appeal and set forth his determination for each individual item and its relationship to a thorough and efficient system of education.

<u>Account Number</u>	<u>Title</u>	<u>Reduction</u>
11-190-100-320	Purchased Professional-Educ. Services	\$10,000

The Township's position is set forth in a sworn affidavit from Leon Costello, the Municipal Accountant, who cites an alleged written submission from Kelliann DiTullio, a Board-employed accountant, to the effect that the Board expended only \$10,500 for this purpose in 1993-94. (See Exhibit 1.) The Board merely cites the purpose of the funds in this line item as being the cost of membership in the County Visual Aids membership and assembly programs.

The Commissioner determines that the Board has failed to demonstrate why the amounts remaining in this account are insufficient to meet its requirements. Mere citation of the purpose for which a reduced item is to be used does not constitute a sufficient basis for the Commissioner to conclude that the elimination of the funds prevents the district from providing a thorough and efficient system of education. The Commissioner also notes that the Board offered no rebuttal questioning the accuracy of Mr. Costello's assertions either here or in any other accounts. The \$10,000 reduction is sustained.

11-401-100-500	Purchased Services (300-500 series)	\$5,000
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The Township, citing Ms. DiTullio again, asserts that the funds in this account had in the past been provided from student activity funds and had not previously been budgeted. (See Exhibit 1.) The Board once again offers no argument other than indicating the alleged purpose for which the funds were budgeted. The reduction of \$5,000 in this account is sustained.

<u>Account Number</u>	<u>Title</u>	<u>Reduction</u>
11-401-100-800	Other Objects	\$5,000

The Township, citing alleged recommendations from Ms. DiTullio, indicates that the fees for copyrights for plays and the other purposes cited by the Board were also previously paid for out of student activity funds. The Board, as in the earlier accounts, provides no data other than the cost of the various activities in this account and no rebuttal of the Township's assertion that these activities have previously been funded out of student activity funds. The \$5,000 reduction is sustained.

11-000-219-320	Purchased Professional-Education Serv.	\$7,000
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The Township, citing Ms. DiTullio, contends that only \$16,639 was expended for neurological and psychiatric services in 1993-94; therefore, the \$28,000 budgeted by the Board in this account was excessive. The Board offers no rebuttal, once again limiting its position to citing the purposes for which the funds in this account are used. The Board offers no documentation to explain the gap between its 1993-94 costs for the evaluations in this account and the \$28,000 projected appropriation. Consequently, the Commissioner sustains the \$7,000 reduction in this account.

11-000-222-300	Purchased Professional & Technical Serv.	\$5,000
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The Township asserts that in previous years the professional repair services included in this account were budgeted as Miscellaneous Expenditures under account 11-998-0260-0890. The amount expended for that purpose in 1993-94 was \$3,695.82 out of an appropriation of \$29,651. (See Exhibits 4 and 5.) Based upon such documentation, the Township asserts that the Board's recommended appropriation of \$19,477 was excessive. The Board once again offers

no rebuttal and limits its position to indicating the items for which the monies in this account are used. The aforesaid Board information does not successfully meet the standard for overriding the Township's reasons for the reduction. The \$5,000 reduction is sustained.

<u>Account Number</u>	<u>Title</u>	<u>Reduction</u>
11-000-222-600	Supplies and Materials	\$5,000

The Township points out that the Board's budget documentation provided \$11,000 for setting up a new library in Elementary School #1. It contends that at a public meeting on May 9, 1994, the Board acknowledged that the new library would not be completed until at least half way through the year and, thus, not all books would be purchased during 1994-95. The Board offers no rebuttal to the Township's assertion regarding the library in Elementary School #1, limiting itself once again to indicating the purposes for which funds in this account are utilized. Notwithstanding the Board's weak position, the Commissioner deems the stocking of a new library to be unquestionably consistent with the provision of a thorough and efficient system of education. Therefore, he directs the restoration of the \$5,000 reduction in this account so that the Board ^{MAY} (my) complete the purchases of the books, periodicals and audiovisual materials in Elementary School #1 during the 1994-95 academic year. The Commissioner notes in this regard that there is no argument from the Township which challenges the need for these funds and he further concludes that if funds for this purpose are not provided in 1994-95, they will nonetheless be required in 1995-96 at perhaps greater cost. ✓

<u>Account Number</u>	<u>Title</u>	<u>Reduction</u>
11-000-230-339	Other Purchased Professional Services	\$5,000

The Township justifies its reduction in this account by pointing out that the Board's hiring of Ms. DiTullio as an accounting consultant to perform some of the functions previously carried out by the auditor would permit the reduction of the auditor's fee. The Board lists the purposes for which the monies in this account are expended including the auditor, architect, negotiator and the accounting consultant. (See Exhibit 16 of the Township's Position Statement.) Since fees for professional services are generally determined prior to the development of a budget, it would appear that a reduction in this account might leave the Board short in meeting its obligations. The \$5,000 reduction is restored.

11-000-230-890	Miscellaneous Expenditures	\$14,000
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The Township, citing Board documentation contained in Exhibit 17, claims \$4,000 can be eliminated from this account by virtue of the elimination of the position of Supervisor of Instruction. Further, the Township contends that the Board could not satisfactorily document the purposes for which \$25,000 was budgeted for Board member expenses. The Board cites the fact that the money in this account includes fees for membership in the New Jersey School Boards Association, as well as negotiated travel benefits for the Superintendent and Directors. The Commissioner, upon consideration of the position of the parties, concludes that the Board has failed to adequately document its detailed costs, particularly as it relates to Board expenses and the relationship of

such expenses to a thorough and efficient system of education. The \$14,000 reduction is sustained.

<u>Account Number</u>	<u>Title</u>	<u>Reduction</u>
11-000-240-600	Supplies and Materials	\$5,000

The Township contends that the Board's expenditures in 1993-94 were \$50,365.55 through April 30, 1994. It contends that even allowing for expenditures in May and June, the 1994 projected budget of \$71,560 was excessive. The Board offers no rebuttal, limiting its presentation to the purposes for which this account is funded. The Commissioner, therefore, sustains the \$5,000 reduction in this account.

11-000-260-300	Purchased Professional & Technical Serv.	\$25,000
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The Township contends that Board members had assured it that the Board did not intend to pay more than \$275,000 for the custodial services provided by the Service Master Company, yet had budgeted \$300,000 for that purpose. The Board contends that it has yet to send out bids for custodial services. It argues that should these bids come in higher than the \$275,000 allowed by the Township's reduction, this account would be short. The Board has failed, however, to prove that these amounts are essential. Consequently, the \$25,000 reduction is sustained.

11-000-260-620	Energy (Heat and Electricity)	\$15,000
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The Township provides a detailed breakdown of heating and electricity costs for the 1993-94 school year up to March 31, 1994, and prorates the balance of the school year to arrive at an estimate of the total cost for 1993-94. (See pages 17-19 of the Township's Position Statement for details.) The Board offers no explanation or

documentation to support its position. The Commissioner sustains the \$15,000 reduction in this account.

<u>Account Number</u>	<u>Title</u>	<u>Reduction</u>
11-000-260-300	Other Objects	\$75,000

The Township argues that the summer maintenance projects outlined by the Board are laudable but are not all essential during a period of what it deems to be financial crisis. Of the sum of \$113,000 worth of projects, the Township provided \$38,000 for the Board to pick the most important projects for completion. The Board for its part provides no data as to the urgency of its needs but limits itself to listing projects.

Notwithstanding the Board's failure to provide back-up data as to the urgency of individual projects, the Commissioner deems the \$75,000 reduction by the Township to be too severe and arbitrary. He, therefore, directs the restoration of \$19,000 so that the Board may complete at least half of its projected maintenance projects. A \$56,000 reduction is sustained.

11-000-270-600	Supplies and Materials	\$9,600
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The Township argues that the expenditures for 1993-94 up to April 30, 1994 were \$51,806. Providing the additional two months, the Township estimates the total cost for 1993-94 was \$64,757, while the proposed budget for 1994-95 in this account is \$94,600, a \$30,000 increase. The Board merely indicates the supplies funded by this account and claims because of the reduction imposed, that it was unable to restock needed supplies for repair and maintenance of its buses.

The Commissioner notes that the Board offers no rebuttal to the Township's estimates of 1993-94 costs, nor does it provide

detailed documentation as to what factors justified the large increase in appropriations in 1994-95. The \$9,600 reduction is sustained.

SUMMARY

The following constitutes the summary of the Commissioner's determinations as it relates to the reductions imposed by the Township.

<u>Account Number</u>	<u>Title</u>	<u>Sustained</u>	<u>Restored</u>
11-190-100-320	Purchased Prof.-Educ. Serv.	\$10,000	\$- 0 -
11-401-100-500	Purchased Services	5,000	- 0 -
11-401-100-800	Other Objects	5,000	- 0 -
11-000-219-320	Purchased Prof.-Educ. Serv.	7,000	- 0 -
11-000-222-300	Purchased Prof.& Tech. Serv.	5,000	- 0 -
11-000-222-600	Supplies and Materials	- 0 -	5,000
11-000-230-339	Other Purchased Profes. Serv.	- 0 -	5,000
11-000-230-890	Miscellaneous Expenditures	14,000	- 0 -
11-000-240-600	Supplies and Materials	5,000	- 0 -
11-000-260-300	Purchased Prof.& Tech. Serv.	25,000	-0-
11-000-260-620	Energy (Heat & Electricity)	15,000	- 0 -
11-000-260-300	Other Objects	56,000	19,000
11-000-270-600	Supplies and Materials	<u>9,600</u>	<u>- 0 -</u>
	Totals	\$156,600	\$29,000

The following are the accounts originally included in the Board's cap waiver appeal, but which are now being considered as part of the base budget since the Board in the above-described budget appeal reduced the amount it was seeking in restorations, thus, resulting in the total budget being within cap. In reading his determination in these accounts, the Commissioner shall apply the standard of review applicable in budget appeals as delineated earlier in this decision.

<u>Account Number</u>	<u>Title</u>	<u>Amount</u>
11-205-100-106	Other Salaries for Instruction	\$16,553
11-213-100-101		33,106
11-213-100-106		<u>33,106</u>
	Total	\$82,765

The Board concedes that the funds in the above accounts, which included five aide positions, are no longer needed due to changes in enrollment, staff attrition and reassignments.

<u>Account Number</u>	<u>Title</u>	<u>Amount</u>
11-000-260-300	Purchase of Technical Services	\$54,033
11-000-260-800	Other Objects	<u>8,947</u>
	Total	\$62,980

The Board argues that the above funds are needed to meet contractual obligations and to provide essential services such as trash collection. The Board offers no specifics as to the contractual obligations involved in these accounts other than trash removal; however, based upon the Department of Education's records as to the actual audited unappropriated free balance available to the Board as of June 30, 1994, the Commissioner is aware that the Middle Township Board only had an undesignated unreserved fund balance of \$32,439 or .16% of its total General Fund Budget. Given the unavailability of any significant free balance to meet its obligations, the Commissioner directs the inclusion of the total of \$62,980 for these two accounts in the district General Fund tax levy for 1994-95.

<u>Account Number</u>	<u>Title</u>	<u>Amount</u>
11-000-240-104	Other Professional Staff	\$8,000

The Board argues for the inclusion of this amount in order to fill vacancies for department chairpersons in two high school departments which have been vacant due to financial circumstances.

The Commissioner, having concluded that supervision of staff and the provision of leadership in curriculum development is essential to a thorough and efficient education, directs the

inclusion of the \$8,000 in this account in the 1994-95 General Fund tax levy.

<u>Account Number</u>	<u>Title</u>	<u>Amount</u>
11-000-270-107	Student Transp. Services-Salaries	\$23,350

The funds in this account are for bus drivers to provide field trips and after school transportation.

Extension of educational experiences beyond the confines of the school building are an integral part of a thorough and efficient education. The Commissioner directs the inclusion of \$23,350 in the 1994-95 General Fund tax levy.

11-000-290-290	Other Employee Benefits	\$38,910
11-000-290-220	Social Security	6,178
		<u>\$45,088</u>

The above accounts are for hospitalization and social security. The Board contends that it is presently in deficit in both of these accounts.

Given the precarious free balance situation of this district and the lack of active opposition from the governing body, the Commissioner directs the inclusion of a total of \$45,088 in the 1994-95 General Fund tax levy.

By way of summary, the Commissioner has found the following amounts necessary to provide a thorough and efficient system of education from those accounts included in the original cap waiver request:

<u>Account Number</u>	<u>Amount</u>
11-000-260-300	\$54,033
11-000-260-800	8,947
11-000-240-104	8,000
11-000-270-107	23,350
11-000-290-290	38,910
11-000-290-220	<u>6,178</u>
Total	\$139,418

As a consequence of the above determinations, the Commissioner directs the Cape May County Board of Taxation to strike an additional tax levy for support of the Middle Township Public Schools consisting of \$29,000 in restorations of reductions imposed by the Township and \$139,418 consisting of those accounts contained within the original cap waiver request for a total of \$168,418. The result of the above additional General Fund tax levy shall constitute a total 1994-95 General Fund tax levy of \$9,037,608.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

FEBRUARY 23, 1995

DATE OF MAILING FEBRUARY 23, 1995

65-95

R.D. AND L.D., on behalf of their :
minor child, M.D., :

PETITIONERS, :

V. :

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF ROXBURY, MORRIS COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

FEBRUARY 21, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO.: EDU 8697-94

AGENCY DKT. NO. 325-8/94

**R. D. and L. D. on behalf
of their minor child M.D.,**

Petitioner,

v.

**ROXBURY TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

R. D. and L. D. appeared for their son, **M.D.**

Russell J. Schumacher, Esq., appeared for respondent
(Rand, Algeier, Tosti & Woodruff, attorneys)

Record Closed: December 22, 1994

Decided: January 3, 1995

BEFORE **JEFFREY A. GERSON, ALJ**

This matter was transmitted to the Office of Administrative Law (OAL) on September 8, 1994 for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Consent Order.

Accordingly, I **CONCLUDE** that the attached Consent Order meets the requirements of *N.J.A.C. 1:1-19.1* and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Jan 3 1995
DATE

1/12/95
DATE

JAN 12 1995
DATE

[Signature]
JEFFREY A. GERSON, ALJ

Receipt Acknowledged:
[Signature]

DEPARTMENT OF EDUCATION
Mailed to Parties:
[Signature]
**ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**
OFFICE OF ADMINISTRATIVE LAW

/g

RAND, ALGEIER, TOSTI & WOODRUFF

ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
COURTHOUSE PLAZA
60 WASHINGTON STREET

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GARY C. ALGEIER
DAVID B. RAND
ROBERT M. TOSTI
ROBERT B. WOODRUFF
JOHN F. McDONNELL

RONALD M. PFLUG
OF COUNSEL

RECEIVED

DEC 22 9 42 AM '94

STATE OF NEW JERSEY
OFFICE OF THE CLERK
JOHN E. CROFT, JR.
KATHRYN J. KINCREE
ROBERT A. KNEE
RUSSELL J. SCHUMACHER
DEBORAH A. WHITE

December 14, 1994

Honorable Jeffrey A. Gerson, Administrative
Law Judge
185 Washington Street
Newark, New Jersey 07102

**Re: Rudolph DiGiosaffatte, et al. v. Roxbury
Township Board of Education
OAL Docket No.: EDU-08697-94N**

Dear Judge Gerson:

Enclosed please find an original and two (2) copies of a Consent Order executed by the parties incorporating the terms and conditions of Petitioners' withdrawal of the above captioned petition.

If the Order meets with Your Honor's approval, kindly return a fully executed copy to this office in the enclosed self-addressed stamped envelope.

Thank you for your attention to this matter.

Respectfully submitted,



RUSSELL J. SCHUMACHER

RJS:cb
Enclosures

pc: Rudolph and Linda DiGiosaffatte (w/enc.)
Angela Krass (w/enc.)

\\misc\gerson.ltr

RECEIVED

DEC 22 9 42 AM '94

RAND, ALGEIER, TOSTI & WOODRUFF, P.C.
Courthouse Plaza
60 Washington Street
Morristown, New Jersey 07960
(201) 539-2600

STATE OF NEW JERSEY

Attorneys for Respondent, Roxbury Township Board of Education

RUDOLPH DiGIOSAFFATTE and	:	BEFORE THE COMMISSIONER OF
LINDA DiGIOSAFFATTE on behalf	:	EDUCATION OF THE STATE OF
of M.D.,	:	
	:	
Petitioners,	:	DOCKET NO. EDU-08697-94N
	:	
v.	:	
	:	CONSENT ORDER
ROXBURY TOWNSHIP BOARD	:	
OF EDUCATION,	:	
	:	
Respondent.	:	

This matter having been brought before the Commissioner of Education by the filing of the above captioned petition of appeal and having been transmitted to the Office of Administrative Law for a hearing and the parties having agreed that the issues in this matter have been rendered moot by the petitioners' decision to enroll their son, M.D. in private school, the petitioners hereby agree to withdraw the petition subject to the following conditions:

If the petitioners decide to re-enroll their son, M.D., in the respondent's school district, they shall not be precluded from raising the issues set forth in the petition or any other issues which may arise with respect to the grade placement of M.D. or the educational program provided to him.

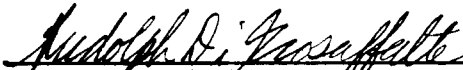
The Court having noted the consent of the parties as to the form and entry of this Order, and for good cause shown;

IT IS ORDERED on this 20 day of Dec, 1994, that the above captioned petition is dismissed without costs to either party.

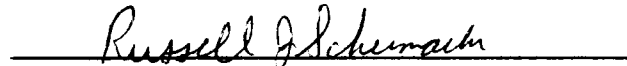


Jeffrey A. Gerson, A.L.J.

We hereby consents to the form and entry of this Order.

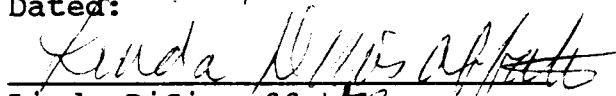


Rudolph DiGiosaffatte
On behalf of M.D.



Russell J. Schumacher, Esq.
Rand, Algeier, Tosti & Woodruff
On behalf of the Roxbury
Township Board of Education

Dated: Dec 4, 1994



Linda DiGiosaffatte
On behalf of M.D.


Dated: December 6, 1994

Dated: 12/4/94

R.D. AND L.D., on behalf of their	:	
minor child, M.D.,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWN-	:	DECISION
SHIP OF ROXBURY, MORRIS COUNTY,	:	
	:	
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


 COMMISSIONER OF EDUCATION

FEBRUARY 21, 1995

66-95

CHARLES J. SEVERINO,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE BOROUGH	:	DECISION
OF BOGOTA, BERGEN COUNTY,	:	
	:	
RESPONDENT.	:	
	:	
	:	

FEBRUARY 24, 1995


CHARLES J. SEVERINO, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH : DECISION
OF BOGOTA, BERGEN COUNTY, :
RESPONDENT. :
_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed without prejudice.

IT IS SO ORDERED.

FEBRUARY 24, 1995

DATE OF MAILING - FEBRUARY 24, 1995


COMMISSIONER OF EDUCATION

SB # 66-95

BOARD OF EDUCATION OF THE CITY	:	
OF BAYONNE, HUDSON COUNTY,	:	
	:	
APPELLANT,	:	STATE BOARD OF EDUCATION
	:	
V.	:	
	:	DECISION
DR. LEO KLAGHOLZ, COMMISSIONER	:	
OF EDUCATION,	:	
	:	
RESPONDENT.	:	

For the Appellant, Kenneth R. Hampton, Esq.

For the Respondent, Nancy Kaplen, Deputy Attorney General (Deborah T. Poritz, Attorney General of New Jersey)

On June 1, 1995, the Board of Education of the City of Bayonne (hereinafter "Board") filed a "petition of appeal" and accompanying motion for leave to appeal with the State Board of Education. The Board indicated that it was seeking to appeal from a determination of the Commissioner of Education with respect to a reallocation of its 1995-96 current expense budget.

By letter dated June 6, 1995, the Board was notified by the Counsel to the State Board that its notice did not designate the decision of the Commissioner from which it was appealing, as required by N.J.A.C. 6:2-1.7. She noted, however, that it did contain a determination made on March 20, 1995 by the Acting Commissioner pursuant to N.J.S.A. 18A:7D-28. The Board was provided with the opportunity to amend its filing

SEPT. 6, 1995

so as to specifically designate the decision from which it was appealing. The Board was further advised that in the event it had intended to file a motion for leave to appeal, rather than a notice of appeal from a final decision of the Commissioner, its motion was deficient in that it did not include a supporting brief as required by N.J.A.C. 6:2-1.18. In addition, the Board was advised that, although it had named the Commissioner as a respondent in this matter, there was no indication that the Commissioner had been served with the notice of appeal. In that the papers filed by the Board did not conform with such requirements, the Board was notified that this matter was being referred to our Legal Committee, and it was given until June 14 to correct the deficiencies.

The Board, however, has failed to amend its filing, file a supporting brief or provide the required proof of service. Nor has it at any time requested an extension of time for such filing or offered any explanation for the delay.

The State Board of Education therefore dismisses the appeal in this matter for failure to perfect.

September 6, 1995

Date of mailing SEP 08 1995

so as to specifically designate the decision from which it was appealing. The Board was further advised that in the event it had intended to file a motion for leave to appeal, rather than a notice of appeal from a final decision of the Commissioner, its motion was deficient in that it did not include a supporting brief as required by N.J.A.C. 6:2-1.18. In addition, the Board was advised that, although it had named the Commissioner as a respondent in this matter, there was no indication that the Commissioner had been served with the notice of appeal. In that the papers filed by the Board did not conform with such requirements, the Board was notified that this matter was being referred to our Legal Committee, and it was given until June 14 to correct the deficiencies.

The Board, however, has failed to amend its filing, file a supporting brief or provide the required proof of service. Nor has it at any time requested an extension of time for such filing or offered any explanation for the delay.

The State Board of Education therefore dismisses the appeal in this matter for failure to perfect.

September 6, 1995

Date of mailing SEP 08 1995

67-95

MARGARET A. LEWIS,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY OF	:	DECISION
ORANGE TOWNSHIP, ESSEX COUNTY,	:	
	:	
RESPONDENT.	:	
	:	
_____	:	

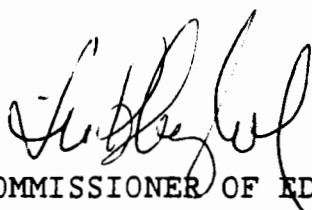
FEBRUARY 24, 1995

OAL DKT. NO. EDU 9753-92

MARGARET A. LEWIS, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF : DECISION
ORANGE TOWNSHIP, ESSEX COUNTY, :
RESPONDENT. :
_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

FEBRUARY 24, 1995

DATE OF MAILING - FEBRUARY 24, 1995

(SB) 67-95

DHP #59-95
SB #67-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF MATTHEW J. GAMBALE. : DECISION
_____ :

Decided by the Deputy Commissioner of Education,
May 26, 1995

For the Petitioner-Appellant, Matthew J. Gambale, pro se

For the Respondent-Respondent, Pamela B. Katten, Deputy
Attorney General (Deborah T. Poritz, Attorney
General of New Jersey)

The State Board of Education grants the request of the parties to remand this matter to the Commissioner of Education for a hearing in order to provide the petitioner with an adequate opportunity to establish a record in support of his contention that he has satisfied the statutory standard for rehabilitation.¹ Given the circumstances, we direct that such hearing and a final determination by the Commissioner be rendered on an expedited

¹ We note that the Office of Criminal History Review was apparently not represented in the proceedings before the Deputy Commissioner and was not served with notice of the appeal to the State Board. Upon the filing of the appeal, Counsel to the State Board notified the Attorney General's Office that an appeal had been taken in the matter, and transmitted a copy of the record. A Deputy Attorney General was then assigned to appear as attorney of record in the appeal.

Aug. 2, 1995

basis, and that such determination considers all pertinent circumstances under the factors set forth in N.J.S.A. 18A:6-7.1, including "any evidence of rehabilitation." See Wolffbrandt v. New Jersey State Department of Education, decided by the State Board, July 1, 1992. Petitioner has the burden on remand of establishing his rehabilitation by clear and convincing evidence.

We stress, in addition, that the statute expressly requires consideration of the "date of the offense" (emphasis added), rather than the date of conviction relied upon by the Deputy Commissioner in his decision. Moreover, while N.J.S.A. 18A:6-7.1(e) includes "the circumstances under which the offense occurred" as a factor to be considered in determining whether an individual has demonstrated rehabilitation, that statute does not require submission of a statement detailing the circumstances leading to an arrest and conviction in order to establish rehabilitation.

We retain jurisdiction.

August 2, 1995

Date of mailing AUG 04 1995

68-95

IN THE MATTER OF THE TENURE	:	
HEARING OF MARY MORRIS, BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION OF THE TOWNSHIP OF	:	DECISION
NORTH BRUNSWICK, MIDDLESEX	:	
COUNTY.	:	
_____	:	

FEBRUARY 24, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5121-94

AGENCY DKT. NO. 71-4/94

**IN THE MATTER OF THE TENURE
HEARING OF MARY MORRIS,
BOARD OF EDUCATION OF THE
TOWNSHIP OF NORTH BRUNSWICK**

Anthony B. Vignuolo, Esq., for petitioner (Borris, Goldin, Foley, Vignuolo,
Hyman & Stahl, attorneys)

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

Record Closed: January 12, 1995

Decided: January 13, 1995

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

The North Brunswick Board of Education (petitioner or Board) filed tenure charges of inefficiency before the Commissioner of Education and against Mary Morris (respondent or Morris), an art teacher, on April 15, 1994

The charges were answered and the matter was transmitted to the Office of Administrative Law for disposition as a contested case pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13.

After notice, the undersigned conducted a prehearing conference on July 13, 1994. Among other things, it was settled that the matter would be heard on November 9, 10, 14 and 15,

1994; the respondent reserved the right to bring certain motions after initial discovery, and that the issue to be resolved was whether the charges or any of them were true in fact and, if true in fact, sufficient to warrant removal or reduction in salary.

In July, hearing dates were adjourned to November 28, 29 and 30 and December 1 to accommodate counsel.

Each party filed a motion in early autumn and in sufficient time to allow consideration before hearing.

On November 23, 1994, counsel informed the judge that the matter was settled. The judge directed that the settlement be reduced to writing, executed and submitted for consideration. The papers have been received and reviewed.

The State Board of Education in *Tenure Hearing of Cardonick*, OAL DKT. EDU 0100-82 (Apr. 8, 1983), established guidelines and criteria for application to tenure case settlements. After noting that New Jersey courts look with great favor on settlements, the Board also noted the Commissioner of Education's exclusive authority to decide tenure matters. Thus, the Commissioner's power "to review and evaluate, and to approve and disapprove, tenure settlements." Slip op. at 4.

I have reviewed the pleadings and the terms of settlement and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law, including the Commissioner's April 7, 1982 and the State Board's April 8, 1983 decisions in *Cardonick* and the settlement is consistent with public policy.
3. The total of moneys and emoluments the respondent will receive under the agreement do not exceed what would otherwise be her entitlement.

4. Both parties will save considerable hearing-related costs.
5. The charges against the respondent did not touch upon moral turpitude or unlawful conduct.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

13 JANUARY 1995
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

11/18/95
DATE

Hope R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 23 1995
DATE

Jeff S. Main
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cae

BORRUS, GOLDIN, FOLEY, VIGNUOLO, HYMAN & STAHL
A Professional Corporation
2875 U.S. Highway #1
P.O. Box 7463
North Brunswick, New Jersey 08902
(908) 422-1000
Attorneys for Petitioner

Petitioner	:	BEFORE THE OFFICE OF ADMINISTRATIVE LAW
	:	
	:	
IN THE MATTER OF THE TENURE HEARING OF MARY MORRIS, BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK	:	
	:	
	:	DOCKET NO. EDU-5121-94 71-9/94
	:	
	:	
	:	Civil Action
	:	
	:	STIPULATION OF SETTLEMENT
	:	
	:	
	:	

The parties having amicably adjusted the matter in dispute, it is hereby stipulated and agreed to as follows:

1. The North Brunswick Board of Education will pay the sum of twenty-five thousand dollars (\$25,000.00) as a lump sum settlement, to be applied against the last three (3) years annual increment of Mary Morris until exhausted but in no event to exceed \$25,000.00 in total.
2. Mary Morris will submit a written resignation effective December 1, 1994.
3. Mary Morris will be paid full salary through November 30, 1994.
4. The North Brunswick Board of Education shall continue

BORRUS, GOLDIN
FOLEY, VIGNUOLO
HYMAN & STAHL
A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW
2875 US - HIGHWAY #1
NORTH BRUNSWICK, NJ 08902

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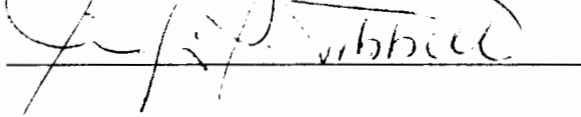
provide medical, pharmaceutical and dental insurance pursuant to the Collective Bargaining Agreement through December 31, 1994 for Mary Morris.

5. The settlement of the within action is not contingent upon any application that Mary Morris may make for disability, disability retirement or any other benefits.

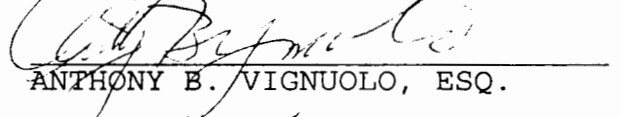
6. In the event that the within agreement is rejected by the Commissioner of Education, the parties agree that the Board shall have no obligation to pay salary to Mary Morris from November 23, 1994, the date of the agreement, through the date of the rejection. Thereafter the obligation of the Board to pay additional salary shall be governed by the laws of the State of New Jersey.

7. The within matter having been amicably adjusted by and between the parties is hereby dismissed with prejudice and without costs to either party.

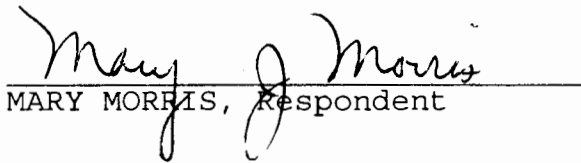
NORTH BRUNSWICK TOWNSHIP
BOARD OF EDUCATION, Petitioner



BORRUS, GOLDIN, FOLEY, VIGNUOLO,
HYMAN & STAHL, P.C.



ANTHONY B. VIGNUOLO, ESQ.



MARY MORRIS, Respondent



STEPHEN E. KLAUSNER, ESQ.

Dated:

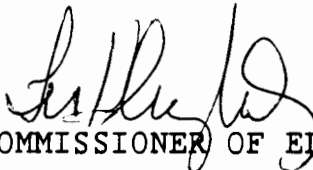
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BORRUS, GOLDIN
FOLEY, VIGNUOLO,
HYMAN & STAHL
PROFESSIONAL CORPORATION
COUNSELLORS AT LAW
2875 US HIGHWAY #
NORTH BRUNSWICK, NJ 08902

IN THE MATTER OF THE TENURE :
 HEARING OF MARY MORRIS, BOARD OF : COMMISSIONER OF EDUCATION
 EDUCATION OF THE TOWNSHIP OF : DECISION
 NORTH BRUNSWICK, MIDDLESEX :
 COUNTY. :
 _____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.


 COMMISSIONER OF EDUCATION

FEBRUARY 24, 1995

DATE OF MAILING - FEBRUARY 24, 1995

DHP #35-95
SB #68-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF JUNE A. SEIFRED. : DECISION
_____ :

Decided by the Deputy Commissioner of Education, May 12, 1995

For the Petitioner-Appellant, June A. Seifred, pro se

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney
General (Deborah T. Poritz, Attorney General of New Jersey)

The State Board of Education grants the request of the parties to remand this matter to the Commissioner of Education for a hearing in order to provide the petitioner with an adequate opportunity to establish a record in support of her contention that she has satisfied the statutory standard for rehabilitation.¹

Based upon our review of the submissions made by petitioner to the Deputy Commissioner, we find that she has shown significant evidence of rehabilitation on that basis alone. Those submissions reveal that petitioner has cared for children in her home for a number of years and has also successfully completed the requirements

¹ We note that the Office of Criminal History Review was apparently not represented in the proceedings before the Deputy Commissioner and was not served with notice of the appeal to the State Board. Upon the filing of the appeal, Counsel to the State Board notified the Attorney General's Office that an appeal had been taken in the matter, and transmitted a copy of the record. A Deputy Attorney General was then assigned to appear as attorney of record in the appeal.

Aug. 2, 1995

for a commercial drivers license. The parent of one child in petitioner's care praises her as a "very thoughtful and caring person," having "good character and sound judgment." A parent who has entrusted petitioner with the care of her two daughters, now seven and nine, since infancy, describes petitioner as "caring, reliable and trustworthy....I have never seen [petitioner] use or show any interest in dangerous substances. In fact, her personal beliefs of leading a decent, quality life are contradictory to drug or alcohol use." Another parent characterizes petitioner's driving skills as "excellent....I would feel very comfortable with [petitioner] as my daughter's bus driver."

Petitioner acknowledges the mistakes she made a decade ago, contending that she was "mixed up with the wrong crowd," and asserts that she has remained drug-free for the past ten years. Her submissions to the Deputy Commissioner include a certification from a vicinage chief probation officer in Middlesex County attesting to her rehabilitation and indicating that her service as a school bus driver "would not be incompatible with the welfare of society." We note, in addition, that there have been no further arrests since 1985, when petitioner was 24.

Given the circumstances, we direct that the hearing and a final determination by the Commissioner in conformity with our decision herein be rendered on an expedited basis, and that such determination considers all pertinent circumstances under the factors set forth in N.J.S.A. 18A:6-7.1, including "any evidence of rehabilitation." See Wolffbrandt v. New Jersey State Department of Education, decided by the State Board, July 1, 1992. Petitioner has the burden on remand of establishing her rehabilitation by clear and convincing evidence. However, given petitioner's submissions to the Deputy Commissioner, we conclude that the

recommendation of an individual who has had petitioner under his or her supervision in her position as a bus driver for the Edison school district would alone be sufficient at hearing to establish her rehabilitation.

We retain jurisdiction.

S. David Brandt opposed.

August 2, 1995

Date of mailing AUG 04 1995

DHP #35-95
SB #68-95
DHP #57-96

IN THE MATTER OF THE DISQUALIFI- : STATE BOARD OF EDUCATION
CATION FROM SCHOOL EMPLOYMENT : DECISION
OF JUNE A. SEIFRED. :

Decided by the Deputy Commissioner of Education, May 12, 1995

Remanded by the State Board of Education, August 2, 1995

Decision on remand by the Commissioner of Education, February 16, 1996

For the Petitioner-Appellant, June A. Seifred, pro se

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney
General (Deborah T. Poritz, Attorney General of New Jersey)

On August 2, 1995, we remanded this matter to the Commissioner of Education for a hearing in order to provide petitioner, who had been disqualified from employment in the State's schools as a bus driver following a criminal history review pursuant to N.J.S.A. 18A:39-19.1 et seq., with an adequate opportunity to establish a record in support of her contention that she had satisfied the statutory standard for rehabilitation. Based upon our review of the submissions which had been made by petitioner to the Deputy Commissioner, we found that petitioner had shown significant evidence of rehabilitation on that basis alone. We therefore concluded that the recommendation of an individual who had had petitioner under his or her supervision in her position as a

4/3/96

bus driver for the Edison school district would alone be sufficient at hearing to establish her rehabilitation. We retained jurisdiction.

In accordance with our remand, the Commissioner transmitted this matter to the Office of Administrative Law, where a hearing was held on November 22, 1995. On January 6, 1996, the Administrative Law Judge ("ALJ") rendered an initial decision in which she concluded that petitioner had demonstrated her rehabilitation by clear and convincing evidence. The ALJ detailed petitioner's evidence of rehabilitation, including a letter of recommendation submitted by the assistant manager of the transportation company employing petitioner.

On February 16, 1996, the Commissioner adopted the ALJ's recommended decision, finding petitioner to be qualified for school employment as a bus driver. Pursuant to our retention of jurisdiction, the Commissioner transmitted the file back to us.

After a review of the record, we are satisfied that the Commissioner fully complied with the terms of our remand. Thus, pursuant to the Commissioner's decision, petitioner is qualified for school employment as a bus driver, and we dismiss the appeal.

Maud Dahme opposed.

April 3, 1996

Date of mailing APR 08 1996

69-95

WAYNE DEMIKOFF, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH : DECISION

OF HARRINGTON PARK, BERGEN COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner, former school business administrator/Board secretary, challenged his termination from that position after one year of service. Petitioner alleged that termination violated Open Public Meetings Act (OPMA); that it was violative of the contract under which petitioner was denied health benefits for 1993; and that the Board wrongfully failed to account to petitioner for unused vacation time and certain other expenses due and reimbursable to him.

ALJ concluded the Board's motion for summary decision dismissing petition for lack of jurisdiction was ripe for determination, there being no genuine material issues of fact in dispute. (N.J.A.C. 1:1-12.5) Moreover, the issues were fundamentally contractual matters more properly cognizable in a judicial forum, not before the Commissioner of Education since education law or statutory entitlement under education law was not sufficiently implicated. Also, there was no valid education claim to which the claim of violation of the OPMA was pendent or ancillary. Petition was dismissed without prejudice to whatever rights petitioner has in an appropriate forum.

Commissioner adopted findings and determination in initial decision as his own.

FEBRUARY 24, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION ON MOTION

FOR SUMMARY DECISION

OAL DKT. NO. EDU 6757-93

AGENCY DKT. NO. 162-5/92

WAYNE DEMIKOFF,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
BOROUGH OF HARRINGTON
PARK, BERGEN COUNTY,**

Respondent.

Patrick C. English, Esq., for petitioner
(Dines and English, attorneys)

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

Record Closed: January 5, 1995

Decided: January 11, 1995

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

The position of Wayne Demikoff as school business administrator/board secretary pursuant to written employment contract with the Board of Education of the Borough of Harrington Park, Bergen County, was terminated by the Board at its meeting of March 2, 1993, effective April 30, 1993, pursuant to Article VI of the contract giving either party at its sole option a right to elect to terminate the employment on 60 days' notice. In a petition of appeal filed with the Commissioner of the Department of Education on May 27, 1993, petitioner alleged in Count I that action of the Board at the

March 2, 1993 meeting contravened the Open Public Meeting Act and that termination of employment was void for violation of it and was otherwise violative of "code or contract"; in Count II that Board action of termination was violative of the contract under which petitioner was denied health benefits for 1993; and in Count III that the Board wrongfully failed to account to petitioner for unused vacation time and certain other expenses due and reimbursable to him. He sought judgment of monetary remediation accordingly. The Board's answer, filed with the Commissioner on June 11, 1993, admitted petitioner's employment generally but alleged Board action was in good faith and compliant with state law, regulation, Board policy and contractual obligation. The Board sought dismissal of petition. The Commissioner transmitted the matter to the Office of Administrative Law on July 19, 1993 for hearing and determination in accordance with *N.J.S.A. 52:14F-1 et seq.*

There were telephone prehearing conferences in the Office of Administrative Law on December 15, 1993, February 18, 1994 and May 10, 1994. In confirmation of conference on the latter day, the administrative law judge **ORDERED** the parties to address a Board motion for summary decision testing the petition on the following issues:

1. Whether the Commissioner of Education has dispute resolution jurisdiction under *N.J.S.A. 18A:6-9* over alleged breach of petitioner's employment contract; and
2. Whether petitioner's rights under the OPMA, *N.J.S.A. 10:4-6 et seq.*, were violated by Board action as alleged in paragraphs 5-8 of the petition.

Hearing on motion was set for September 23, 1994, adjourned to December 15, 1994 at request and/or with consent of the parties and ultimately set for hearing on January 5, 1995. Board motion for summary decision with documentation was filed formally on December 21, 1994; petitioner's response with documentation was filed on January 4, 1995. The motion being ripe for disposition, argument thereon was held on January 5, 1995 and concluded. No genuine material triable issues of fact remained.

DISCUSSION

As argued by the Board, the Commissioner of Education under *N.J.S.A. 18A:6-9* has "jurisdiction to hear and determine . . . all controversies and disputes arising under the school laws. . ." The New Jersey Supreme Court has determined that where controversies do not arise under school laws, they are outside the Commissioner's jurisdiction even though they may pertain to school boards. *Board of Ed., East Brunswick Township v. Township Council East Brunswick*, 48 N.J. 94, 102 (1966). It has been held more narrowly that employment contract claims of nontenured school employees do not arise under school laws sufficiently to generate the Commissioner's dispute resolution jurisdiction. *Cf., Picogna v. Board of Ed., Twp. of Cherry Hill*, 249 N.J. Super. 332 (App. Div. 1991), in which the court said:

Whether petitioner's employment was wrongfully terminated under the contract . . . is for the court, not the Commissioner, to decide. [249 N.J. Super. at 335.]

This is especially so where no statutory educational entitlement like tenure is implicated in a disaffected school employee's claim and especially so where claims involve contractual perquisites like compensation for accrued annual leave that are otherwise squarely covered under contract. In *Pijoux v. Board of Ed., City of Orange Twp.*, 1993 S.L.D. -- (Commissioner's decision, June 17, 1993; slip op. at 8-10), the Commissioner determined in a suit against the Board by a terminated untenured school superintendent that despite claims in the petition of appeal purporting to invoke educational law entitlements under, for example, *N.J.S.A. 18A:17-19* and *N.J.S.A. 18A:29-4.1*, a review of the petition itself led to a conclusion the overall claim did not sufficiently implicate educational law to permit the Commissioner to exercise jurisdiction over its resolution since it was fundamentally a contractual matter. Such claims are more properly cognizable in judicial forum. *Id.* at 9. *Cf., South Orange-Maplewood Education Association v. Board of Ed. of South Orange-Maplewood*, 146 N.J. Super. 457, 462 (App. Div. 1977); *Love v. Board of Ed., Trenton*, 1988 S.L.D. -- (State Board

August 2, 1989); slip op. at 7-9; *Paladino v. Board of Ed., Twp. of Lacey*, 1989 S.L.D. -- (State Board February 1, 1989); slip op. at 4-7.

Petitioner's claims are contractual in nature. They do not derive substantively from education law or statutory entitlement. The principal claim, for salary reimbursement from April 30, 1993 to the end of contract term on June 30, 1993, recognizes the Board's contractual power to terminate employment on 60 days' notice. Thrust of the claim, it would seem, is an allegedly faulty action at its Board meeting on March 2, 1993 when, said petitioner, the Board acted in violation of the OPMA. Reduced to essentials, the petition is a money claim for breach of an employment-at-will contract containing a 60-day termination clause.

As argued by the Board, however, if the Commissioner does not possess jurisdiction to hear contractual claims, he possesses no independent jurisdiction to remediate claims under the OPMA. In *Sukin v. Northfield Board of Education*, 171 N.J. Super. 184 (App. Div. 1979), the court concluded the Commissioner had incidental jurisdiction to hear issues arising under the OPMA as they relate to controversies under the school laws. 171 N.J. Super. at 187. Thus, *Sukin* and related case law hold that the Commissioner's jurisdiction to address OPMA violations is only "ancillary" or "pendent." The obverse is equally true: if the only significant issue presented before the Commissioner is an OPMA purported violation, absent a significant nexus to an underlying substantive school law issue, the Commissioner is without jurisdiction to adjudicate the sole question presented under the OPMA. See, *Rovello v. Board of Ed., Hopewell Valley*, 93 NJAR 2d (EDU) 313, 316. On application of that holding here, it becomes clear the question of regularity of the Board's action in terminating petitioner's employment contract on March 3, 1993 is not independently remediable as an OPMA violation, since the issue could only come before the Commissioner if it were "pendent" or ancillary to jurisdiction over the contract question which, equally obviously, it is not. The analysis moots the remaining question whether the Board effectually ratified its action later by resolution on September 27, 1994 confirming contract termination on March 2, 1993. See, J-5.

CONCLUSION

Based on the foregoing, having considered documentation, memoranda of law and argument of the parties, I **CONCLUDE** the Board motion for summary decision dismissing the petition for lack of jurisdiction is ripe for determination, there being no genuine material issues of fact in dispute, under criteria of *N.J.A.C. 1:1-12.5*. I **CONCLUDE** further the gist of the petition does not sufficiently implicate education law or statutory entitlement under education law to warrant or permit exercise of the Commissioner's dispute resolution jurisdiction over what are fundamentally contractual matters more properly cognizable in judicial forum. Finally, I **CONCLUDE** there is no jurisdiction in the Commissioner to remediate claim against the Board for alleged violation of the OPMA at a meeting of March 2, 1993 when it terminated petitioner's employment contract, there being no valid education claim to which the claim of violation of the OPMA is pendent or ancillary. The petition is **DISMISSED**, without prejudice to whatever rights petitioner has in appropriate forum.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 11, 1995
DATE

1/13/95
DATE

JAN 21 1995
DATE
amr

James A. Ospenson
JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

Hope R Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:
[Signature]
OFFICE OF ADMINISTRATIVE LAW

EXHIBIT LIST

- J-1 Employment contract between Harrington Park Board of Education and Wayne Demikoff, dated November 12, 1991, for term of employment as school business administrator/board secretary for the period January 1, 1992 through June 30, 1993 at specific annual salary and benefits subject to, in Article VI, right of election by either party at its sole option to terminate or not to renew any portion of the agreement not subject to tenure upon the giving of at least 60 days' notice to the other party
- J-2 Memorandum from superintendent to petitioner dated March 1, 1993
- J-3 Letter of superintendent to petitioner, dated March 1, 1993, concerning "Rice" notice for meeting of Board of March 2, 1993
- J-4 Board resolution of March 2, 1993 terminating petitioner's employment as business administrator/board secretary as of April 30, 1993; certified by superintendent as true copy
- J-5 Board letter through business administrator/board secretary to petitioner dated September 22, 1994, a "Rice" notice for Board meeting of September 27, 1994 to consider ratification of prior resolution of Board on March 2, 1993 terminating petitioner's employment
- J-6 Resolution of Board on motion at meeting of September 27, 1994 ratifying prior resolution of March 2, 1993 terminating petitioner's employment effective April 30, 1993

WAYNE DEMIKOFF, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH : DECISION

OF HARRINGTON PARK, BERGEN COUNTY, :

RESPONDENT. :

The record and initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions were untimely pursuant to N.J.A.C. 1:1-18.4, having been filed on February 14, 1995 in response to an initial decision mailed on January 24, 1995. Although petitioner included a cover letter explaining the basis for his late filing, this submission did not satisfy the requirements of N.J.A.C. 1:1-18.8 for extension of the mandatory time limits. As such, these exceptions, and subsequent reply exceptions filed by the Board, are not considered herein.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that the within Petition of Appeal must be dismissed for lack of Commissioner of Education jurisdiction. As correctly stated by the ALJ, "****the gist of the petition does not sufficiently implicate education law or statutory entitlement under education law to warrant or permit exercise of the Commissioner's dispute resolution jurisdiction over what are fundamentally

contractual matters more properly cognizable in [a] judicial forum.***" (Initial Decision, at p. 5) (Also see Pijeaux, supra.) The Commissioner further agrees that, absent a significant nexus to an underlying substantive education law issue, he is also without jurisdiction to adjudicate petitioner's remaining alleged OPMA violation purported to have occurred at the meeting where the Board terminated his employment contract. (See Sukin, supra; Rovello, supra.)

Accordingly, the initial decision of the Office of Administrative Law is affirmed for the reasons expressed therein. The Petition of Appeal is hereby dismissed without prejudice to any rights petitioner may have to pursue his contractual claims in an appropriate forum.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

FEBRUARY 24, 1995

DATE OF MAILING - FEBRUARY 24, 1995

BOARD OF EDUCATION OF THE TOWNSHIP :
OF LUMBERTON, BURLINGTON COUNTY, :

PETITIONER, :

V. :

TOWNSHIP COMMITTEE OF THE TOWNSHIP :
OF LUMBERTON, BURLINGTON COUNTY, :

RESPONDENT, :

COMMISSIONER OF EDUCATION

AND

DECISION

IN THE MATTER OF THE CAP WAIVER :

APPEAL OF THE BOARD OF EDUCATION :

OF THE TOWNSHIP OF LUMBERTON, :

BURLINGTON COUNTY. :

_____ :

SYNOPSIS

Board appealed \$272,954 in line-item reductions made by the Township following defeat of the proposed 1994-95 school budget at the annual school election. Board also appealed voter rejection of General Fund cap waiver in the amount of \$502,561.

Commissioner determined to sustain \$163,900 of the line-item reductions and to restore \$109,054. He further ordered the increase of \$502,561 in cap waiver monies for a total General Fund tax levy of \$4,787,402 for the 1994-95 school year.

MARCH 2, 1995

BOARD OF EDUCATION OF THE TOWNSHIP :
OF LUMBERTON, BURLINGTON COUNTY, :

PETITIONER, :

V. :

TOWNSHIP COMMITTEE OF THE TOWNSHIP :
OF LUMBERTON, BURLINGTON COUNTY, :

RESPONDENT, :

COMMISSIONER OF EDUCATION

AND

DECISION

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION :
OF THE TOWNSHIP OF LUMBERTON, :
BURLINGTON COUNTY. :

_____ :

For Petitioner, John G. Dyer, III, Esq.

For Respondent, John C. Gillespie, Esq.
(Ferg, Barron & Gillespie)

This consolidated matter was opened before the Commissioner of Education on June 7, 1994, through the concurrent filing of two Petitions of Appeal by the Lumberton Township Board of Education (Board). One sought restoration of \$272,954 reduced from the school budget by the Lumberton Township Committee (Township) pursuant to N.J.S.A. 18A:22-37 following defeat of the budget at the annual school election on April 19, 1994; the other sought inclusion within the 1994-95 General Fund Tax Levy of a cap waiver in the amount of \$502,561, which had been submitted to the voters pursuant to N.J.S.A. 18A:7D-28(f) and rejected by them.

On March 30, 1994, the Burlington County Superintendent of Schools had approved the Board's cap waiver request as being necessary for the provision of a thorough and efficient system of education (T & E), after reviewing the entire proposed school budget to determine whether further reallocation could be accomplished within the base budget so as to obviate the need for a cap waiver (see pp. 3-4 below). Having determined that no such additional reallocation was possible, the County Superintendent approved the budget for submission to the voters of the district on the condition that, should the budget or cap waiver question be rejected, the district must file appropriate appeals with the Commissioner of Education. See Administrative Agency Advice (AAA) 91-0036 (July 8, 1991).

At the annual school election on April 19, 1994, the T & E cap waiver question was placed before the voters, as was the public budget question proposing a General Fund Tax Levy of \$4,448,741 for the 1994-95 school year; both were defeated. In light of this defeat, on May 2, 1994, following consultation with the Board as required by law, the Township adopted a resolution determining to certify a General Fund tax levy of \$4,175,787 as sufficient to provide for a thorough and efficient system of education (T & E) in the district. This amount represented a reduction of \$272,954 from the tax levy proposed by the Board, and was effectuated through cuts in eleven line items, plus a reduction in capital outlay, for the reasons given in Schedule A attached to the resolution (see pp. 6 ff. below). By resolution

dated May 4, 1994, the Board determined to appeal these reductions, and, consistent with the directive of the County Superintendent above, duly filed its budget and cap waiver petitions.

The amounts in dispute in this consolidated appeal are as follows:

<u>Tax Levy Proposed by Board</u>		<u>Tax Levy Certified by Township</u>	
General Fund	\$ 4,448,741	General Fund	\$ 4,175,787
Cap Waiver	\$ 502,561	Cap Waiver	-0-
<u>Amount of Reduction by Township</u>		<u>Amount of Reduction in Dispute</u>	
General Fund	\$ 272,954	General Fund	\$ 272,954
Cap Waiver	N/A	Cap Waiver	N/A

Amount of Cap Waiver Approved as T & E and Appealed Herein

\$ 502,561

Total Amount on Appeal: \$ 775,515

Answers to the Board's budget and cap waiver petitions were filed by the Township on June 27, 1994 (perfected July 11, 1994) and June 29, 1994, respectively.

On August 3, 1994, the County Superintendent filed his affidavit and supporting documents attesting to the process of review and analysis that led to his conclusion, and that of the Department of Education's Cap Waiver Review Panel, that the cap waiver funds finally approved were both necessary for T & E and unable to be reallocated from within the base budget. These funds included both a \$405,961 Commissioner cap waiver requested pursuant to N.J.S.A. 18A:7D-28(e) based on an increase of 58.23% in special education costs (\$64,741) and an average increase in

enrollment of 12.64% (\$341,220), and a \$509,561 voter cap waiver requested pursuant to N.J.S.A. 18A:7D-28(f), of which \$7,000 for cafeteria aides was rejected as not necessary for T & E. They also reflected a panel-directed reallocation of \$19,500 from the base budget due to the Board's overestimation of tuition charges from the Burlington County Special Services School District. On August 24, 1994, the Township filed a response to this affidavit, contending that nothing therein would negate the Township's reductions or the reasons for them as set forth at length in its prior resolution, and that with respect to the cap waiver appeal, the Board had not met the requirements of Edgewater, infra.

On September 29, 1994, in response to Department of Education notices as to the Board's failure to file the position statement required by N.J.A.C. 6:24-7.8, the Board submitted its position statement with a cover letter indicating that it had been mailed on June 6, 1994, but apparently never received by the Department. On October 17, 1994, the Township filed a letter objecting to consideration of the Board's submission, as well as to the impending supplemental submissions mentioned in the Board's cover letter. Following a series of letters and conference calls with the Director of the Bureau of Controversies and Disputes, it was finally determined that the Board's September 29, 1994 filing would be accepted as its position statement, that both the Board and the Township would submit final papers by February 3, 1995, and that the Board's papers would be in the nature of a final summation, while the Township's could be in the nature of a response to the Board's position statement.

In the interim, the parties were notified on December 19, 1994, that the Commissioner would take official notice of the Board's 1993-94 year-end audit for the purpose of identifying whether the Board underestimated in its 1994-95 budget the amount of anticipated undesignated surplus; no objections to such notice were filed by the parties. On February 3, 1995, the parties' final submissions were received as scheduled and the record of the appeal was closed.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education. Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989)

With respect to appeals involving cap waivers, before the Commissioner can direct restoration of any amount of a waiver defeated by the voters, the Commissioner must determine that such amount is both fully necessary for purposes of T & E and unable to be derived from further reallocation within the base budget. Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, Bergen County, State Board decision July 7, 1993, and Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater, Bergen County, State Board decision July 6, 1994

Mindful, then, of the standards to be applied, the Commissioner makes specific determinations as follows.

COMMISSIONER'S DETERMINATION - BUDGET

The Township's reductions were primarily effectuated in eleven current expense line items, each of which is set forth below, together with the reason specifically given for the reduction in Schedule A attached to the Township's resolution, followed by the parties' respective arguments for and against restoration by the Commissioner.

<u>Account No.</u>	<u>Description</u>	<u>Amount Cut</u>
10-303	Budgeted Fund Balance	\$ 40,000

Reason: Review of current budget balances suggests that these funds will be available for appropriation in the 1994-95 budget.

The Board argues that, at \$192,526, it maintains only the most minimal surplus, that the district's history of increasing enrollments creates potentially significant exposures

in both regular and special student needs, and that the continuing delay in making capital improvements caused by budgetary constraints has left it vulnerable to possible boiler failure and/or roof replacement in the 1994-95 school year. In its final summation, the Board notes that it has now in fact enrolled several new students with special education needs totaling over \$85,000, thus leaving a dangerously low surplus to meet other contingencies, just as it had projected in its earlier submissions.

The Township argues that the Board has provided no factual support for its assertions regarding its potential need for surplus in the areas listed, instead relying on speculation, recommendations of unnamed "consultants," and exaggerated accounts of district enrollment increases over the last several years. The Township further observes that, at the time of its summation, well into the 1994-95 school year, the district had still not provided actual numbers to back up its earlier claims of anticipated increased enrollment.

Upon review, the Commissioner concurs that the Board has not provided a sufficient factual basis for its claims regarding its potential need for surplus. More disturbing, however, is the fact that the Board, which herein contends that it could not absorb a \$40,000 allocation from surplus to fund 1994-95 current expenses, in fact, appropriated \$150,000 from surplus to cover just such expenses in its revised budget--including the full amount of advertised expenditures in line items reduced by the

Township--thus leaving itself with an undesignated unreserved free balance of less than 1%. While this does, in fact, represent a low level of surplus, the Commissioner will not permit the Board to now benefit from its conduct by directing restoration of a reasonable reduction to compensate for the Board's having expended funds on items in dispute in this appeal and not yet specifically adjudged necessary for T & E. Accordingly, the reduction of \$40,000 is sustained.

12-XXX-XXX-73X	Equipment	\$ 3,000
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Reason: The amount budgeted is for the purchase of a mulch mower and additional dumpsters. The Board explained that the mower is eight years old and the dumpsters have deteriorated. The governing body believes that an eight-year-old mower is capable of being repaired and does not need to be replaced; and that dumpsters can be repaired by welding. \$500 is sufficient to accomplish both purposes.

The Board argues that its current mulch mowers are in sufficiently poor condition to require replacement, and that expenditure of \$1,000 to replace them will ultimately result in savings for the Board because the new mowers have significantly increased cutting capacity and will concomitantly decrease labor hours and costs. The Board further argues that it has had to spend money to repair worn out and heavily used dumpsters due to citations from the Department of Health for code violations, and that it would ultimately be more cost effective to purchase new ones, one this year at \$2,000, and one next.

The Township presents no arguments in addition to those given in the resolution above.

Upon review, the Commissioner finds that, while the Board's proposed purchases are facially reasonable attempts to maintain plant in a cost efficient manner, the particular purchases at issue are not truly essential for provision of T & E in the 1994-95 budget year. Moreover, it is difficult to see how custodial costs will be meaningfully reduced when the work is done by district staff who are paid on an annual rather than an hourly basis and reduction in lawn-cutting duties will not alone likely result in reduction of any positions. In the wake of the voters' defeat of the Board's proposed budget, the Commissioner cannot restore the amounts reduced by the Township under these circumstances. Accordingly, the \$3,000 reduction is sustained.

11-401-100-100	School sponsored	\$ 9,504
11-401-100-600	co-curricular activities -	200
	instruction (salaries and	
	supplies and materials)	

Reason: These monies are for new extracurricular activities. It is otherwise already budgeted, for school-sponsored athletics instruction under similar account numbers, at \$14,550, which is more than sufficient to fund these programs.

The Board argues that these monies, which represent the entire amount of the accounts at issue, are neither for athletic programs nor for new offerings, but rather to maintain existing activities in the areas of 8th grade advisor, student government advisor, literary magazine coordinator, drama advisor, yearbook advisor, AVA coordinator, safety patrol advisor, graduation coordinator, cheerleading coach and detention advisor; the only new position is for a proposed academic pride coordinator.

The Township further argues on appeal that these positions are not necessary for T & E, however desirable they may otherwise be.

Upon review, the Commissioner finds that the Township's reduction was based on a faulty premise, namely that this account represented a duplication of monies budgeted elsewhere and/or covered a number of new positions. As maintenance of some degree of extracurricular activity is consistent with the provision of T & E, the Commissioner declines to eliminate this account in its entirety, as the Township's reduction would do; however, creation of an "academic pride coordinator" has not been shown to be necessary for T & E. Accordingly, the Commissioner sustains a reduction of \$900 in Account 11-401-100-100, but restores the remaining \$8,604 and \$200 in Account 11-401-100-600.

11-000-230-339	Other purchased	\$ 5,000
	professional services	

Reason: The Board explained that these monies were set aside as a stipend to compensate individual employees for having assumed the task of telephoning substitute teachers when same are needed. The Township Committee is aware that said duties can be simply assigned to an employee already compensated under existing titles and positions, and that while it might be preferable to the Board of Education to pay someone "extra" for these services, same are not necessary and are not required in order to provide a thorough and efficient education.

The Board initially points out that the Township misidentified the line item within which this expenditure is located, noting that it is, in fact, included within Account No. 11-000-240-110 and is budgeted at \$3,000, not \$5,000. The Board further argues that establishment of a "substitute caller"

position represents the least expensive and most efficient way to maintain the necessary system of absentee call-in and substitute procurement for teachers, aides and custodians, secretaries no longer being able to handle this ever-growing task in addition to their other duties.

The Township offers no arguments in addition to those given above.

Upon review of the Board's staffing and enrollment charts, the Commissioner accepts the Board's contention that the district has grown to a measurable degree in number of pupils and professional staff, and that secretarial and other support staff are relatively limited in number; he further recognizes that the function of responding to unforeseen staff absences and procuring substitutes on short notice is an essential component of providing T & E. In light of the Township's \$2,000 accounting error and in light of the fact that the Board's proposed method of carrying out this necessary T & E function appears reasonable and cost-efficient, the Commissioner restores the \$5,000 reduction.

11-000-260-620	Energy - Heat and Electricity	\$ 20,000
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Reason: The Board indicated that it costs approximately \$12,000 per month for energy costs under this category. However, it is expected that the final year-end bill for this fiscal year will be approximately \$164,000 because of the extraordinary nature of this past winter. Moreover, the Board indicated that it expects PSE&G to apply for a rate increase which may go into effect in 1995. Said expectation, however, is speculative at best; and if not petitioned until 1995, then the rate increase would likely not go into effect until after the 1994-95 fiscal year. If such an increase occurs, it would be appropriate to reflect same in the 1995-96 budget. Accordingly, the amount

budgeted, \$1,713,000, is \$23,000 more than the revised appropriations for 1993-94; and is almost \$30,000 more than the annual average based upon the Board's representations of a \$12,000 monthly average. Reducing the appropriation by \$20,000 still leaves the Board sufficient additional monies in the event the \$12,000 per month average increases in the coming fiscal year.

The Board argues that 1993-94 energy costs will amount to about \$164,000, and that, there having been no rate increase for two years and in the absence of assurances that one will not be forthcoming this year, it is prudent to assume an increase of 5.5%, all other areas of the budget being "stretched to the limit" and there being only minimal surplus available. In its final summation, the Board states that subsequent PSE&G charges for the 1993-94 school year brought the total bill to over \$178,000--more than was budgeted in this account even before reduction. Notwithstanding that the Board is contesting these additional charges, it contends that this situation is indicative of the accuracy of the Board's budgeting and the unreasonableness of the Township's reduction.

The Township in its summation reaffirms the arguments of its resolution and notes that, in fact, no increase in rates has yet been requested, let alone implemented, for 1994-95.

Upon review, the Commissioner concurs with the Township's rationale regarding this reduction; mere speculation regarding a possible rate increase is simply not sufficient to support a claim of necessity for T & E. As to the Board's contention regarding late-billed costs for the 1993-94 school

year, the Commissioner notes both the extreme weather conditions of last winter and the fact that no evidence has been provided to indicate that such costs have recurred or will recur in 1994-95. Accordingly, the reduction of \$20,000 is sustained.

11-000-230-590 Other purchased services - \$ 3,750
 400-500 series other
 than 530

Reason: The Board represented this line item consisted of contractual obligations for travel reimbursement for professional development training for the superintendent and Board members. Of the \$7,500 appropriated, \$4,200 is allocated to Board member professional development; \$1,500 is allocated to the superintendent for travel reimbursement; and \$2,000 is allocated for district staff travel reimbursement. The Township Committee understands that new Board members may be required to attend certain training courses; but that not all Board members need to attend conferences, workshops, etc. Therefore, reducing that component of the overall allocation related to Board member professional development, and allowing a total of \$4,000 for the overall appropriation will be sufficient to allow for travel reimbursement under existing contracts, and for required Board member training.

The Board argues that a total of \$4,250 is allocated to Board member conferences, including mandatory \$680 plus mileage attendance at new board member training sessions. An additional \$3,000 is allocated for attendance by three Board members at the annual New Jersey School Boards Association convention, which the Board views as essential to Board member development and hence for provision of T & E, noting that the Board would prefer to send all members, but has limited participation to three in response to budgetary constraints.

The Township offers no arguments in addition to those contained in its resolution.

Upon review, the Commissioner concurs with the Board that mandatory Board member training must be implemented and contractual obligations honored; he further concurs that additional Board member development through attendance at NJSBA events is an important component of T & E. He does not concur, however, that it is necessary in any given year to send more than one Board member to such events, so that \$2,000 of the Township's reduction is sustained and \$1,750 is restored.

11-120-100-101	Grades 1 - 5 -	\$ 60,000
	Salaries of Teachers	
11-000-290-290	Other Employee Benefits	\$ 16,000

Reason: These reductions represent the reduction of two teaching positions in these grades. The Board of Education indicated that each position is appropriated \$38,000, \$30,000 from salary and \$8,000 from other employee benefits. The total reduction, therefore, is \$76,000. This is based upon the Board's acknowledgment that its anticipated hiring of additional teachers for these grade levels is based upon projected enrollment increases over the summer, which, by the Board's own acknowledgment, are not necessarily supported by historical statistical data. Moreover, even if said projections occur, the size of the classrooms currently in existence is adequate to house the additional students. There is no need to create new classrooms to reduce the number of students per classroom. While it may be preferable to increase the number of teachers and decrease the number of students, same is not necessary for a thorough and efficient education, and the classrooms to be occupied by the additional students were built and approved by the State of New Jersey, Department of Education, to accommodate 28 to 32 students. If the projected increase occurs, then the number of students per classroom will not exceed that limit.

The Board argues that its 1993-94 class sizes averaged 28 to 33 students, and that with anticipated enrollment increase for 1994-95, classes will be at 33 to 37 students, even with the two positions proposed to be cut by the Township; without these

positions, class sizes will be in excess of 37 students, a level which is entirely unacceptable in the elementary grades. In its final summation, the Board specifies that loss of a first grade teacher will increase class sizes from 22 to 28, which would seriously compromise educational effectiveness; loss of a second grade teacher would increase class size to 38, a size beyond the capacity of the room; and loss of a third or fourth grade teacher would likewise increase class size beyond room capacity.

Upon review of the Board's staffing analysis as provided to the Township following defeat of the budget, the Commissioner notes that reduction of one first grade teacher would bring class sizes to 28-29 pupils, a size which is neither educationally untenable nor beyond the physical capacity of the room; he further notes that third and fourth grade classes were projected at 26-27 pupils without addition of new staff, so that it is unclear on what basis the Board makes its claims of class sizes in excess of 37 students. Accordingly, as the Board's own analysis supports the action taken by the Township, the reductions of \$60,000 and \$16,000 are sustained.

11-000-270-511	Contract Services -	\$ 22,000
	Between Home and School	
	(Vendors)	

Reason: The amount represents the elimination of a bus run which it is felt can be accommodated by existing walkways which allow students to walk to school.

The Board concedes that most, if not all, of this transportation is not required by statute for reasons of

remoteness; rather, it is for safety reasons which the Board deems to be extremely compelling, involving walkways along a major county highway with partial sidewalks, inadequate shoulders and no traffic light at the crossway. The Board believes that, in view of the unlikelihood of county or municipal remedy, it has a "moral responsibility" to provide the transportation at issue.

The Township in summation adds that, even given the Board's view of its obligation, it has presented no evidence that it cannot accommodate the students at issue through existing routes.

Upon review, notwithstanding that the Board is acting in what it believes to be the best interest of children, the Commissioner cannot restore funds for an item that is clearly beyond the bounds of necessity for T & E. It is well established that boards of education are responsible for provision of transportation for reason of remoteness, but that correction of, or compensation for, roadway hazard is the responsibility of the governmental entities in control of the roadway(s) at issue. While it is unfortunate that budgetary constraints might compel a Board to eliminate "courtesy" busing it would otherwise like to provide, in the wake of a defeated budget, there is simply no basis on which the Commissioner can act to restore monies for transportation the district is not required by law to provide. Accordingly, the reduction of \$22,000 is sustained.

11-000-310-100 Salaries - Food Service \$ 90,000

Reason: The amounts appropriated appear to reflect anticipated salary increases for the various categories

above, ranging from 4% to 12%, with a number of 5% increases in between. The governing body believes that in today's economy and given the extraordinary size of this budget, large salary increases cannot be afforded or accommodated. Since there are currently no contractual obligations binding the school district to pay any given increase, the Board having represented to the governing body that they are currently in negotiations with the various unions for the 1994-95 fiscal contract year, the Township Committee believes that the reduction of \$90,000 still affords the Board of Education sufficient leeway to negotiate significant salary increases for its employees.

The Board notes that the Township cut \$90,000 from an account which is budgeted at \$12,670 and designated to pay the salaries of food service employees, providing as justification its belief that the district has set aside an excessive amount for salary increases, which in economic times such as these should be severely limited, if granted at all. The Board contends that the amounts left by the Township's reduction will not even cover the mandatory increments which the district is obliged by law and/or contract to pay even without negotiation of a new contract. In its final summation, the Board states that it settled its contract at 4.4% increases, less than the 5% accorded by the Township to its own employees, thus holding to its promise to try and contain salary expenditures.

The Township states that the Board settled at 4.1%, and that by the Board's own earlier admission (Position Statement, at p. 21), if it were to obtain a 4% settlement (which it contended it could not), its additional costs would be \$100,000. The Township now claims that, in reducing the amount allocated in this

item to allow for a 4% settlement, it actually provided the district with precisely what it ultimately needed, so that no restoration is warranted.

Upon review, given the lack of specification as to the line items actually affected and the lack of other detail, the Commissioner cannot ascertain the basis for the Township's calculation; neither can he determine how much is left in the affected accounts after reduction or whether those amounts would, in fact, be sufficient for the Board to meet its salary obligations districtwide. Under these circumstances, the Township's reduction has the effect of being a "lump sum" figure designed to, as the Board states, "send a message" to the Board and limit its parameters in negotiating with employees. As such, the reduction must be viewed as arbitrary, and since payment of contracted staff salaries and increments is certainly necessary for T & E, the Commissioner restores the \$90,000 reduction. As the line item to which this reduction was made is budgeted at less than \$15,000, the balance of the restoration is to be applied to the various salary accounts consistent with their original levels.

Capital Outlay (No Line Item Given)	\$ 3,500
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Finally, the Commissioner notes that the Township included as an addendum to Schedule A of its resolution a reduction of \$3,500 to "capital outlay," with no specification of line-item account or basis for the reduction; neither do the parties address this reduction in their filings on appeal. However, given the Township's complete lack of specification and

justification, and given the need demonstrated by the district elsewhere in the record for enhanced and expanded facilities, this reduction of \$3,500 is restored.

COMMISSIONER'S DETERMINATION - CAP WAIVER

The line-item amounts approved by the County Superintendent for submission to the voters as a T & E cap waiver question were as follows:

<u>Account Title</u>	<u>Account Number</u>	<u>Dollar Amount</u>
Half-time Kindergarten Teacher	11-110-100-101	\$ 15,000
Additional Grades 1-5 Teachers	11-120-100-101	181,371
Additional Grades 7-8 Teachers	11-130-100-101	66,859
School Supplies	11-190-100-610	36,044
Textbooks	11-190-100-640	5,630
Summer School - Basic Skills	11-230-100-101	8,500
BSIP Aide	11-230-100-106	8,751
Basic Skills - Textbooks	11-230-100-640	702
Nurse's Aide - Elementary	11-000-213-330	15,000
Library Supplies	11-000-222-610	6,190
Architect's Fees	11-000-230-340	40,000
Two Bus Runs - Enrollment	11-000-270-511	44,000
Benefits for Staff Listed	11-000-290-290	67,764
Elementary Equipment	12-120-100-730	4,500
Secondary Equipment	12-130-100-730	880
Perceptually Impaired Equipment	12-205-100-730	400
Resource Room Computer Upgrade	12-213-100-730	970
Total Amount of T & E Cap Waiver:		\$502,561

In support of its claims, the Board offers the following arguments:

Additional Teaching Positions/Benefits (Account Nos.
 11-110-100-101, 11-120-100-101, 11-130-100-101 and
 11-000-290-290). These positions are needed due to increased enrollment. Without the kindergarten position, classes will be larger than regulatory size; without the four additional elementary teachers, middle school teacher and part-time physical

education teacher, the district will be forced to create classes that exceed acceptable size for health and safety purposes as well as educational. Moreover, as the district's growth is continuing, it will prevent the district from adequately preparing for future increases.

School Supplies (Account No. 11-190-100-610). New workbooks are needed to implement the district's newly created math, science and reading curricula.

Textbooks (Account Nos. 11-190-100-640 and 11-230-100-640). Middle school students are presently sharing textbooks, as not enough are available for new students.

Summer School - Basic Skills (Account No. 11-230-100-101). This money is to restore a valuable program that was lost to budgetary restrictions this past summer. Basic skills students need program continuity and reinforcement between school years to maintain the gains they have made.

Basic Skills Instruction Aide (Account No. 11-230-100-106). The district's goal is to have one aide per grade level, covering four classrooms. At present, the district is one aide short of this goal, so that one aide is covering two grades (eight classes). This is not educationally effective and the benefit of this relatively low-cost item is enormous.

Nurse's Aide - Elementary (Account No. 11-000-213-330). The nurse's aide position, added two years ago, is essential to maintaining necessary services to the district's increasing number of students, in that the school nurse cannot alone handle

both student needs and administrative duties.

Library Supplies (Account No. 11-000-222-610). This amount is to replace unusable books and purchase new ones consistent with the district's growing student population. The amount included in the base budget is insufficient for this purpose.

Architect's Fees - Building Program (Account No. 11-000-230-340). The district plans to hold a referendum during this school year in order to begin to meet its ever-increasing facilities needs. An architect is required to assist in the development and costing out of the various options available, ranging from expansion of present facilities to new construction.

Bus Runs (Account No. 11-000-270-511). Growth necessitates the addition of two bus runs for mandated transportation. This is the minimum number needed (four were originally proposed) based on a sophisticated computer analysis that enabled the district to explore every option for using existing runs to the fullest.

Computers/Equipment (Account Nos. 12-120-100-730, 12-130-100-730, 12-205-100-730, 12-213-100-730). These monies will purchase five Macintosh computers and three printers to be distributed among the elementary school, middle school, resource room and the perceptually impaired program. This addition of technology will greatly benefit the educational program.

In sum, the Board stresses the growth the district has experienced in recent years, and which it will continue to experience for some time to come, and the needs that this creates for facilities and programs, both in the long and short run. The

Board urges approval of the cap waiver amounts as truly essential for continued provision of T & E in the wake of such expansion.

In reply to the Board's arguments as to the need for a waiver, the Township generally contends that the Board has failed to provide factual support for its assertions, and that the Board can, in reality, provide for T & E without budgeting over cap.

Upon review of the record on appeal, it is clear that, notwithstanding the disagreement between the Board and the Township as to the precise extent of the problem, the Lumberton school district is experiencing a high degree of growth and has need of funds over and above ordinarily permissible levels to enable it to adjust its programs and enhance its facilities accordingly, so as to continue its provision of T & E to a significantly expanded and still-growing student population. The items requested in the Board's cap waiver question, and approved by the County Superintendent and Cap Waiver Review Panel after careful review, are all directly related to such provision. Neither is the need for these funds obviated by the reductions to the base budget sustained above; rather, in this context, such reductions merely create areas where necessary line-item expenditures placed into the cap waiver question can be accommodated within the base budget so as to minimize the degree of spending over cap.

Accordingly, the Commissioner concurs with the judgment of the County Superintendent regarding the necessity of the above line items for provision of T & E, and, with allowance for the

line-item reductions sustained to the base budget above, with the determination that further reallocation is not possible, so that the full amount of the cap waiver request should be granted.

In summary, the Commissioner directs restoration or sustaining of the Township's \$272,954 in line-item reductions, and approval of cap waiver amounts, as set forth below:

<u>Line Item</u>	<u>Sustained</u>	<u>Restored</u>
10-303 Surplus	\$ 40,000	\$ -0-
12-XXX-XXX-73X Equipment	3,000	-0-
11-401-100-100 Co-curricular Sal.	900	8,604
11-401-100-600 Co-curricular Sup.	-0-	200
11-000-230-339 Professional Services	-0-	5,000
11-000-260-620 Energy	20,000	-0-
11-000-230-590 Purchased Services	2,000	1,750
11-120-100-101 Grades 1-5 Salaries	60,000	-0-
11-000-290-290 Benefits	16,000	-0-
11-000-270-511 Busing	22,000	-0-
11-000-210-100 Food Service Salaries	-0-	90,000
Not Given Capital Outlay	-0-	3,500
	<hr/>	<hr/>
Total Line-Item Determinations:	\$ 163,900	\$ 109,054
Total Cap Waiver Granted:		\$ 502,561
Tax Levy Certified by Township:		\$ 4,175,787
Restoration of Reductions:		109,054
Cap Waiver Granted:		<hr/> 502,561
Total Tax Levy for 1994-95:		\$ 4,787,402

Accordingly, the Burlington County Board of Taxation is directed to make the necessary adjustments as set forth above to reflect a total of \$4,787,402 to be raised in tax levy for General Fund purposes of the Lumberton Township Board of Education for the 1994-95 school year.

IT IS SO ORDERED.

MARCH 2, 1995

DATE OF MAILING - MARCH 2, 1995


 COMMISSIONER OF EDUCATION

C #70-95
SB #41-95

BOARD OF EDUCATION OF THE TOWNSHIP OF LUMBERTON,

PETITIONER-CROSS/APPELLANT,

V.

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF LUMBERTON, BURLINGTON COUNTY,

RESPONDENT-APPELLANT,

AND

IN THE MATTER OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF LUMBERTON, BURLINGTON COUNTY.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 2, 1995

For the Petitioner-Cross/Appellant, John G. Dyer, III, Esq.

For the Respondent-Appellant, Ferg, Barron & Gillespie (John C. Gillespie, Esq., of Counsel)

This case involves an appeal to the State Board of Education made by the Township Committee of the Township of Lumberton (hereinafter "Township Committee") and a cross-appeal by the Board of Education of the Township of Lumberton (hereinafter "Board") from a decision of the Commissioner which: 1) directed restoration of \$109,054 of the line item reductions made by the Township Committee pursuant to N.J.S.A. 18A:22-37 after the voters defeated the education budget proposed by the Board for 1994-95, but sustained \$163,900 of those reductions,

8/7/96

and 2) directed an additional increase in the District's budget so as to fund additional items that had been proposed to and defeated by the voters as provided by N.J.S.A. 18A:2D-28(f).¹

By its appeal, the Township Committee challenges the Commissioner's determination to restore amounts budgeted by the Board to fund instructional staff to maintain existing co-curricular activities, including eighth grade advisor, student government advisor, literary magazine coordinator, safety patrol advisor, graduation coordinator, cheerleading coach, and detention advisor. The Township Committee also challenges the Commissioner's determinations to restore funds budgeted to reflect anticipated salary increases for food service staff and to capital outlay for facilities enhancement and expansion.

In addition, the Township Committee contends that restoration by the Commissioner of amounts presented to the voters under N.J.S.A. 18A:7D-28(f) was made without analysis of the District's need for the funds and was therefore arbitrary. The Township Committee also argues that the Commissioner lacks the authority to direct such an increase at this juncture because N.J.S.A. 18A:7D-28(f) provides that voter disapproval of a proposition to exceed the maximum permissible net budget presented to them pursuant to that particular statutory provision "shall be deemed final

¹ N.J.S.A. 18A:7D-28(f) provides in pertinent part that:

Any school district may submit a proposal to raise the amount of the tax levy necessary to exceed the maximum permissible net budget permitted by this section to the legal voters of the district for type II school districts without a Board of School Estimate....The proposal to raise additional tax levy to exceed the maximum permissible net budget shall be in addition to the amounts required to be approved for each school district in accordance with chapters 22 and 54....In the event that a school district's proposal to raise the tax levy...is not approved in accordance with the budget approval process set forth in chapter 22...that disapproval shall be deemed final and shall not be subject to further review or appeal.

and shall not be subject to further review or appeal.”² While the Township Committee acknowledges that the State Board’s decision in Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater, decided by the State Board, July 6, 1994, held that these limitations did not alter the Commissioner’s obligation to insure that the budget of a local school district is sufficient to provide a thorough and efficient education, it asserts that “the legislation in question has in fact removed that component of the determination as to what constitutes a thorough and efficient education from the Commissioner, and has placed it squarely in the hands of the voters.” Township Committee’s brief, at 24.

By its cross-appeal, the Board seeks restoration of those reductions made by the Township Committee which the Commissioner sustained. These include reductions that were made in surplus, equipment, energy, purchased services, and teacher salaries and benefits. The Board also urges affirmance of the Commissioner’s determination that an increase beyond the District’s maximum permissible budget was required in order to fund those items which were not included in the base budget but which were necessary to provide a thorough and efficient education to the District’s students.

Initially, we reject the Township Committee’s contention that enactment of N.J.S.A. 18A:7D-28(f) “removed” from the Commissioner of Education the responsibility to determine what constitutes a thorough and efficient education and entrusted that task instead to the voters. As we stressed in Edgewater, the limitations of that statutory provision:

² See infra note 4.

...in no way alter the Commissioner's ultimate constitutional obligation, and that of this Board to insure that the budget of a local school district is sufficient to provide a thorough and efficient education. As the State Board emphasized in Board of Education of the Borough of Rutherford v. Mayor and Council of Rutherford, decided by the State Board, July 7, 1993:

The starting point for resolving [such matters] is arriving at a proper appreciation of the Commissioner's obligation to assure that each school district has sufficient fiscal resources to provide a thorough and efficient education to its students. Robinson v. Cahill, 69 N.J. 265 (1981). Given the nature of the responsibility entrusted to the Commissioner we have no doubt that the authority to fulfill it must embrace the power to direct an increase in a district's education budget in any case where such increase is necessary to satisfy the constitutional mandate, including a case where voters have defeated a proposal to exceed its statutory budget limitation. See Administrative Agency Advice (AAA) 91-0036 (July 8, 1991).

Rutherford, *supra*, slip op. at 4-5, quoting Board of Education of the Borough of Lincoln Park v. Borough Council of the Borough of Lincoln Park (hereinafter "Lincoln Park"), decided by the State Board, December 2, 1992, slip op. at 5.

Edgewater, slip op. at 14-15.

However, as we also emphasized in Edgewater:

Careful examination of the terms of the current statutes reflects the Legislature's intent that the portion of the proposed education budget placed before the voters pursuant to N.J.S.A. 18A:22-7 et seq. include all of the amounts that are essential for a given school district to provide a thorough and efficient education and that none of these amounts should be included in proposals made under authority of N.J.S.A. 18A:7D-28(f).

Id. at 14.

In view of the critical role which the budget review process plays in insuring both the adequacy of local budgets, see N.J.S.A. 18A:7D-27,³ and conformity with statutory requirements, we went to great lengths to detail the flaws in that process that were revealed by Edgewater. Review of the record in the case now before us indicates that although there was great improvement in the budget review process for the 1994-95 school year, some of the flaws which we identified in our decision in Edgewater persisted. In view of our responsibilities in this area, we can not ignore this fact. Hence, we once again delineate the conditions under which the Commissioner may act to direct an increase in a district's education budget beyond its maximum permissible budget. As we articulated in Edgewater:

the power to direct such increase may properly be exercised only where an increase is necessary to enable the district to provide a thorough and efficient education. Upper Freehold, [86 N.J. 265 (1981).] Further, any increase must be limited to those amounts the district needs in order to provide a thorough and efficient education. Id. Consequently, it is necessary to assess the adequacy of the budget as advertised and to determine whether it is possible to reallocate amounts within that budget before directing any increase. See AAA 91-0036, supra, at 6.

Id. at 5-6 (emphasis added).

The circumstances that would warrant directing an increase in a district's education budget beyond its statutory limitation where voters have defeated a proposal to do so are extremely limited. In In re Upper Freehold Reg'l. School Dist., 86 N.J. 265 (1981), which presented an analogous situation, the New Jersey Supreme Court affirmed an order

³ N.J.S.A. 18A:7D-27 provides that:

Annually, on or before February 1, local boards of education shall submit to the commissioner a copy of their proposed budgets for the next school year. The commissioner shall review each item of appropriation within the current expense and capital outlay budgets and shall determine the adequacy of the budgets with regard to the annual reports submitted pursuant to [N.J.S.A. 18A:7A-11] and such other criteria as may be established by the state board.

of the Commissioner and State Board to direct a local school district to issue bonds for a capital project after voters had rejected referenda to finance the project.. In that case, the roof of the district's high school had deteriorated to the point where dripping water had to be collected in 55 gallon drums placed throughout the school and students had to navigate puddles stretching for hundreds of feet. Sagging roof planks created the danger that tiles or pieces of concrete would fall from the ceiling. Despite the obvious safety hazards, the district's voters twice rejected bond issues to repair the roof. The board therein then sought emergency funding from the Commissioner to fund the repairs. The Commissioner did not provide the funds. Instead he referred the matter to the Office of Administrative Law for evidentiary hearings. The facts established by these hearings provided the basis for the order to issue bonds which was ultimately affirmed by the Court.

Upper Freehold affirms the vast power granted the Commissioner to meet the mandate of the New Jersey Constitution. It also shows the kind of circumstances that must be present to justify exercising that power by compelling a district's taxpayers to raise additional monies. Those circumstances are rarely presented. Moreover, even in the extreme circumstances in Upper Freehold, the Court endorsed the remedial action taken by the Commissioner only after the due process provided by an evidentiary hearing.

As we stressed in Rutherford, supra, the power to direct an increase such as involved here must be exercised only where it is necessary to enable the district to provide a thorough and efficient education. We conclude that this limitation requires that such increases be directed only in circumstances where it has been established that the district's base budget does not include the minimal amount needed to provide a constitutionally adequate education.

We recognize that the current budget review process is not required to and is not aimed at establishing the minimal amount necessary in order for a given school district to provide a thorough and efficient education. Nor does the statutory framework require this kind of review in all cases. However, the current statutory framework does require that a determination be made as to the minimal amount necessary to provide a constitutionally adequate education where a district is seeking to exceed its maximum

permissible budget. Quite simply, such a determination is a necessary prerequisite to a conclusion that reallocation within the district's permissible budget is not possible.

Id. at 16-17.

In this case, the District had requested and the Commissioner had granted a cap waiver pursuant to N.J.S.A. 18A:7D-28(e) on the basis of a 58.23% increase in the District's special education costs and a 12.64% increase in enrollment.⁴ This increased the District's maximum permissible budget by \$405,961. See supra. note 4.

In addition, the District presented a proposal to the voters pursuant to N.J.S.A. 18A:7D-28(f) to further raise the tax levy so as to exceed that maximum. This occurred on direction of the County Superintendent following reallocation from the base budget by the Department of Education's Cap Waiver Review Panel of \$19,500 to correct for the District's overestimation of tuition charges by the Burlington County Special Services School District. At that point, the County Superintendent attested that no further reallocations could be made from the District's base budget and that, consequently, it was necessary for the District to exceed its budget limitation by an additional \$502,561 in order to fund all of the items necessary in order for the District to provide a thorough and efficient education. Accordingly, on direction of the

⁴ N.J.S.A. 18A:7D-28(e) provides in pertinent part that:

A board of education of a school district which: (1) for the two years prior to the prebudget year, has had an annual average increase in the district's resident enrollment which is greater than two percent; or (2) between the prebudget year and the year prior to the prebudget year, has had an increase in the district's local cost for special education pupils which is greater than five percent...may apply to the Commissioner of Education for a waiver of the expenditure limitation established pursuant to this section....Any waiver granted by the commissioner pursuant to this subsection shall not be included in the question on excess expenditures which is to be submitted to the voters of the district pursuant to subsection f. of this section.

Department, a proposal to further raise the tax levy was presented to the voters pursuant to N.J.S.A. 18A:7D-28(f) and an appeal was made to the Commissioner following defeat of the question.⁵

This process did not conform with our decision in Edgewater. As set forth above, Edgewater holds that amounts necessary to provide a thorough and efficient education should not be included in proposals made to the voters under authority of N.J.S.A. 18A:7D-28(f). Furthermore, the process that was followed in this case did not reflect that this particular district had been eligible to request a cap waiver from the Commissioner under N.J.S.A. 18A:7D-28(e) because of its increased enrollment and special education costs. Under these circumstances, the proper course was to increase the amount of the waiver granted pursuant to N.J.S.A. 18A:7D-28(e) so as to fund any additional items which were necessary to the provision of a thorough and efficient education rather than to direct the Board to place the question before the voters pursuant to N.J.S.A. 18A:7D-28(f). In the Matter of the Cap Waiver Appeal of the Board of Education of the Washington Township School District, decided by the State Board March 27, 1996.

Further, it is apparent from the record before us that the items which were originally included in the Board's proposal to the voters were largely necessitated by the District's growth over the past few years. After reviewing the specific items which the Commissioner directed to be included in the District's budget, we reject the Township Committee's contentions that they were not necessary to a thorough and efficient education. To the contrary, on the basis of this District's growth, we fully concur with

⁵ We note that there are no procedural regulations relating specifically to such appeals. See the Budget Appeal Rules, N.J.A.C. 6:24-7.1 et seq.

the Commissioner that items such as the additional teachers and supplies which were included in the proposal were necessary in this case in order for the District to meet its constitutional obligations.

Nor has the Township Committee convinced us that the Commissioner acted improperly with respect to any of the restorations he directed as a result of his review of the line item reductions which the Township Committee made to the District's base budget pursuant to N.J.S.A. 18A:22-37. Review of the Commissioner's decision shows that the restorations which he directed represented documented costs to the District of maintaining its educational program at the current level. In this regard, we stress that the efforts of the Township Committee to effect cost savings through its reductions can not be permitted to jeopardize the District's educational program. E.g., Board of Education of the Township of East Brunswick v. Township Council of East Brunswick, 48 N.J. 94 (1966). While such student activities as the literary magazine, student government, and drama club, for example, may not be a required part of the District's curriculum, we agree with the Commissioner that it is necessary for the District to maintain some level of these kinds of activities in order to afford its students a constitutionally adequate education. Given that none of the amounts which the Commissioner restored were for the expansion of programs and because the Township Committee has not demonstrated that their elimination would not impair the educational program which the District is currently providing, we will not disturb the Commissioner's determinations in this respect.

However, the District has not demonstrated to us that restoration of any of the reductions that were sustained by the Commissioner was necessary in order to

enable it to provide a thorough and efficient education in 1994-95. Furthermore, we would not direct restoration of any amounts to support these items unless the Board had shown us both that the items were necessary to the provision of a thorough and efficient education and that the budget established as a result of the Commissioner's decision was the minimal amount necessary to meet its constitutional obligations. In this respect, we stress that while the County Superintendent attested that no further reallocation was possible, upon closer review, the Commissioner was able to sustain many of the reductions which the Township Committee made in the base budget following its defeat by the voters, including funds budgeted for the purchase of a mulch mower.

We also agree with the Commissioner that restoration of amounts reduced from surplus is not warranted in this case. Although the District's surplus is low, as the Commissioner observed, this was the result of its own decision to appropriate \$150,000 from its surplus to fund current expenses for 1994-95.

In sum, for the reasons stated herein, we affirm the Commissioner's determination establishing a tax levy of \$4,787,402 for General Fund purposes for the Lumberton school district for the 1994-95 school year. We therefore dismiss both the appeal and the cross-appeal in this case.

August 7, 1996

Date of mailing **AUG 09 1996**

71-95

BOARD OF EDUCATION OF THE BOROUGH :
 OF FAIRVIEW, BERGEN COUNTY,
 PETITIONER, :

V. : COMMISSIONER OF EDUCATION

MAYOR AND COUNCIL OF THE BOROUGH : DECISION
 OF FAIRVIEW, BERGEN COUNTY, :

RESPONDENT. :

AND :

IN THE MATTER OF THE CAP WAIVER :
 APPEAL OF THE BOARD OF EDUCATION :
 OF THE BOROUGH OF FAIRVIEW, :
 BERGEN COUNTY, :

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of \$880,243 made by governing body following voter rejection of proposed budget on April 19, 1994.

By settlement, \$405,243 was restored.

Board also appealed General Fund cap waiver in the amount of \$595,757 rejected by voters.

Upon review of the record, Commissioner determined to order the increase of \$336,000 in cap waiver monies for a total General Fund tax levy of \$7,177,682 for 1994-95 school year.

MARCH 3, 1995

BOARD OF EDUCATION OF THE BOROUGH :
OF FAIRVIEW, BERGEN COUNTY, :

PETITIONER, :

V. :

MAYOR AND COUNCIL OF THE BOROUGH :
OF FAIRVIEW, BERGEN COUNTY, :

RESPONDENT, :

COMMISSIONER OF EDUCATION

DECISION

AND :

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION :
OF THE BOROUGH OF FAIRVIEW, :
BERGEN COUNTY. :

For the Petitioner, Dennis J. Oury, Esq. (Oury & Mizdol)

For the Respondent, Christos J. Diktas, Esq. (Diktas & Habib)

This consolidated matter was opened before the Commissioner of Education on June 13, 1994, through the filing of a Petition of Appeal of a defeated school budget by the Board of Education of the Borough of Fairview (Board) and the filing of a Petition of Appeal of its defeated cap waiver. An Answer to the Petitions of Appeal regarding the defeated school budget and the defeated cap waiver was filed by the Mayor and Council of the Borough of Fairview (Borough) on June 29, 1994.

The Board was seeking restoration of \$880,243 in reductions made by the Borough to the General Fund tax levy for the 1994-95

school year. The reductions were made pursuant to N.J.S.A. 18A:22-37, following rejection of the proposed school budget by the voters at the annual school election held on April 19, 1994.

In addition, the Board was seeking inclusion within the 1994-95 General Fund tax levy of a cap waiver in the amount of \$595,757, which had also been rejected by the voters.

On March 31, 1994, the Bergen County Superintendent of schools had approved \$595,757 of the Board's cap waiver request as being necessary for the provision of a thorough and efficient system of education (T&E), after reviewing the entire proposed school budget to determine whether further reallocation could be accomplished within the base budget so as to obviate the need for a cap waiver. Having determined that no such reallocation was possible, the County Superintendent approved the budget for submission to the voters of the district on the condition that, should the budget or cap waiver question be rejected, the district must file appropriate appeals with the Commissioner of Education. See Administrative Agency Advice (AAA) 91-0036 (July 8, 1991).

Position statements were filed by the parties regarding the defeated budget and cap waiver appeals on June 13, 1994 and July 27, 1994, respectively. In addition, the Board filed a Supplemental Statement in the cap waiver appeal on July 19, 1994. Further, as a result of the State Board of Education decision on July 7, 1993, in Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, (wherein the State Board ruled that in defeated voter cap waiver appeals, the Commissioner must determine whether both reallocations within the district's maximum permissible budget are possible and if, and to what extent, the specific

programs at issue are essential in order to provide a thorough and efficient system of education), the Bergen County Superintendent was directed to file an affidavit articulating and documenting the budget reallocation review process pursuant to N.J.S.A. 18A:7D-27. The County Superintendent was also requested to set forth the basis for concluding that reallocation within the base budget was not possible, and that the monies included within the cap waiver were necessary for the provision of a thorough and efficient system of education. The County Superintendent filed his affidavit and supporting documents attesting to the process of review and analysis that led to his conclusion, and that of the Department of Education's Cap Waiver Review Panel that the requested cap waiver funds were both necessary for T&E and unable to be reallocated from within the base budget. The parties were provided twenty (20) days within which to file responses to the County Superintendent's August 8, 1994 affidavit. No response was filed by either party.

On August 29, 1994, the Borough passed a resolution reducing its reduction to the 1994-95 base budget from \$880,243 to \$475,000 restoring a total of \$405,243 in settlement of the appeal of the base budget reductions. By letter to the County Superintendent dated October 11, 1994, the Board advised that the Board had approved of the settlement on August 31, 1994. The County Superintendent by letters dated October 4 and October 11, 1994, respectively, filed documentation determining that the settlement was based upon changed circumstances which occurred after the school election and would not impair the Board's ability to provide for a thorough and efficient system of education provided the cap waiver appeal went forward.

Additionally, by letter dated February 20, 1995, the Board notified the Commissioner that it was attempting to confirm that the Borough would withdraw its opposition to the cap waiver appeal. As of the date of preparation of this opinion, no such confirmation was received. The Commissioner, therefore, accepts the settlement and considers the remaining cap waiver appeal in light of the opposition submitted by the Borough.

Consequently, as a result of the settlement of the base budget, the remaining issues to be decided in the appeal before the Commissioner of Education are the inclusion of the cap waiver line-item amounts approved for submission to the voters as necessary for a thorough and efficient system of education as follows:

<u>Account Title</u>	<u>Account Number</u>	<u>Amount</u>
Teachers 1-5	11-120-100-101	\$ 55,000
Teachers 6-8	11-130-100-101	79,000
Other Salaries: Instruction	11-190-100-106	27,000
General Supplies	11-190-100-610	25,000
Textbooks	11-190-100-640	40,000
Other Objects: Instruction	11-190-100-800	32,000
Basic Skills Teachers	11-230-100-101	80,000
Other Objects: Basic Skills	11-230-100-800	22,000
Bilingual Teacher	11-240-100-101	37,000
Extracurricular Activities	11-401-100-100	3,000
Social Worker	11-000-211-100	15,000
Athletic Instruction	11-402-100-100	14,500
School Psychologist	11-000-219-104	30,000
School Librarian	11-000-222-100	28,000
Library Supplies and Books	11-000-222-600	22,500
Assistant Principal	11-000-240-103	70,000
Employee Benefits	11-000-290-290	<u>15,757</u>
	Total	\$595,757

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient

system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line-item reduction is imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Moreover, the Commissioner has the constitutional obligation to ensure that a school district budget is sufficient for the provision of a thorough and efficient education. Robinson v. Cahill, 69 N.J. 449, 463 (1976) (Robinson V); Abbott v. Burke, 119 N.J. 287 (1990). In order to meet this duty, the Commissioner is charged with the responsibility to review defeated budgets which had been "conditionally certified" by the county superintendent subject to voter approval to exceed the statutory budget limitation (cap waiver). See Administrative Agency Advice (AAA) 91-0036 (July 8, 1991). Upon review, the Commissioner may order an increase in those limited instances where it is necessary to meet the constitutional mandate. Districts must demonstrate both that particular amounts

above the cap are necessary to provide a thorough and efficient education and that reallocation within the permissible budget amount cannot be accomplished. Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, Bergen County, decided by the State Board of Education July 6, 1994; see AAA 91-0036, supra.

Mindful then of the balance to be applied in this standard of review with respect to the various line items contained in the cap waiver request, the Commissioner makes the following determination with respect to the cap waiver appeal before him.

BOARD'S POSITION

In its Position Statement and Supplemental Statement of Position, the Board asserts that the cap waiver provides for salaries for existing positions for supplies and textbooks necessary to support its curriculum revision. It asserts that each account is essential for it to provide a thorough and efficient system of education for its students.

BOROUGH'S POSITION

The Borough opposes the cap waiver based upon its assertion that the Board has not proved that the funds sought are necessary for the Board to meet the constitutional mandate pursuant to the standards set forth, most recently rearticulated by the State Board of Education in Edgewater, supra.

COMMISSIONER'S DETERMINATION


Upon his own independent review and consideration of the papers filed by the Board and the Borough, together with the affidavit and supporting documents of the County Superintendent, the

Commissioner finds that the following line items and amounts approved by the County Superintendent and Review Panel are necessary for the provision of a thorough and efficient system of education, both as to the nature of the expenditures and their amounts. The Commissioner determines that the amounts are required for services and materials related to the instructional program and direct services to students. Finally, the Commissioner determines that the County Superintendent and Review Panel undertook a thorough examination of the Board's base budget for possible reallocation prior to arriving at the amount ultimately approved for submission to the voters.

<u>Account Title</u>	<u>Account Number</u>	<u>Amount</u>
Teachers 1-5	11-120-100-101	\$ 55,000
Teachers 6-8	11-130-100-101	79,000
Textbooks	11-190-100-640	40,000
Basic Skills Teachers	11-230-100-101	80,000
Bilingual Teacher	11-240-100-101	37,000
Social Worker	11-000-211-100	15,000
School Psychologist	11-000-219-104	<u>30,000</u>
	Total	\$336,000

Accordingly, the Bergen County Board of Taxation is directed to make the necessary adjustments to reflect an increase of \$405,243 in the base budget and \$336,000 in cap waiver monies for a total of \$7,177,682 to be raised in tax levy for General Fund purposes of the Board of Education of the Borough of Fairview for the 1994-95 school year.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

MARCH 3, 1995

DATE OF MAILING - MARCH 3, 1995

G. MICHAEL NELSON, :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE TOWN- : DECISION
 SHIP OF OLD BRIDGE, MIDDLESEX :
 COUNTY, :
 RESPONDENT. :
 _____ :

SYNOPSIS

Petitioner, former supervisor presently serving as a teacher, contended by virtue of his tenure and seniority rights under his supervisor/administrator certification, he was entitled to a principal position filled by the Board with a nontenured individual.

Citing Denney Supreme Court decision, ALJ concluded that petitioner should have been appointed to the position of principal of the Cooper Elementary School in December 1993 and that he should receive the difference in salary between his present position and that position from December 1993 until his actual instatement therein.

Commissioner set aside findings and determination in the initial decision. In light of statutory framework and decisional law, the Commissioner found that because supervisors and principals are separately tenurable positions pursuant to N.J.S.A. 18A:28-5, petitioner acquired tenure as a supervisor not a principal, notwithstanding the fact that he also held a principal's endorsement. Tenure can accrue in such position only as a result of actual work experience in the position. Thus, petitioner had no claim to the position of principal. Initial decision was reversed, summary decision was granted to the Board and petition was dismissed.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 668-94

AGENCY DKT. NO. 405-12/93

G. MICHAEL NELSON,

Petitioner,

v.

**BOARD OF EDUCATION OF
THE TOWNSHIP OF OLD BRIDGE,
MIDDLESEX COUNTY,**

Respondent.

Gail Oxfeld Kanef, Esq., for petitioner (Balk, Oxfeld, Mandell & Cohen, attorneys)

Francis X. Journick, Jr., Esq., for respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: January 3, 1995

Decided: January 11, 1995

BEFORE **ROBERT S. MILLER, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about December 2, 1993, G. Michael Nelson ("petitioner") filed a petition of appeal with the Commissioner of Education asserting that, by virtue of school tenure law, he was entitled to be appointed to any one of three different positions that had become available in the Old Bridge

school system: (1) principal of the Cooper Elementary School; (2) vice-principal of the Carl Sandburg Middle School; and (3) principal of the Shirra School.¹

An answer was filed on behalf of the Board of Education of Old Bridge Township (“respondent” or “the Board”) on December 17, 1993, and on January 26, 1994 the matter was transmitted to the Office of Administrative Law for determination as a contested case under the New Jersey Administrative Procedure Act.

Prior to the holding of a prehearing conference, counsel for respondent filed a motion for summary decision, supported by certifications and a memorandum of law. Petitioner’s counsel thereafter submitted answering papers and a brief. On July 29, 1994 a stipulation of facts was filed. At my request, counsel submitted supplemental briefs, the last of which was received on November 30, 1994. Oral argument was conducted on January 3, 1995, whereupon the record closed.

The facts relevant to a determination of this matter are not in dispute, having been stipulated, as noted above. Accordingly, I make the following:

FINDINGS OF FACT

1. Petitioner is the holder of a teaching certificate and an administrative certificate (with separate supervisor and principal endorsements) issued by the New Jersey Commissioner of Education. He received his teaching certificate in June 1974, his administrative certificate with supervisor endorsement in February 1978, and a principal endorsement to his administrative certificate in July 1978.

2. Petitioner began employment with respondent as a teacher of industrial arts on September 1, 1974.

¹ At oral argument petitioner’s counsel withdrew his demand for reinstatement to the Sandburg and Shirra schools, it being conceded that the positions in question were filled by tenured individuals.

3. On September 21, 1982, the Board appointed petitioner to the position of Department Chairperson of Industrial Arts at Cedar Ridge High School, effective September 15, 1982. He was qualified for this position and achieved tenure therein on September 15, 1985.

4. On May 29, 1990, the Board eliminated (effective July 1, 1990) the position of Department Chairperson of Industrial Arts, and reassigned petitioner to the position of teacher of industrial arts; he has served in the latter position from 1990 to the present.

5. Petitioner has never served in the Old Bridge district or any other district under his principal endorsement.

6. As Department Chairperson of Industrial Arts, petitioner's duties (fully set forth in Exhibit A of the stipulation of facts) included assisting in the recruitment, hiring and training of department personnel, preparing the departmental budget, evaluating teacher performance, and supervising departmental personnel.

7. In approximately October 1993, the position of elementary school principal became available at the Board's Cooper Elementary School. Early in December 1993 this position was filled by a non-tenured individual qualified for the position.

8. In early November 1993, a middle school vice principal position became available at the Board's Carl Sandburg Middle School. The position was filled at a November 16, 1993 Board of Education meeting by a tenured teacher qualified for the position.

9. In late November or early December 1993, an elementary school principal at the Board's Shirra School announced his retirement effective December 31, 1993. Shortly after the announcement, the position was filled by a tenured teacher qualified for the position.

10. The job description for middle school vice principal (fully set forth in Exhibit C of the stipulation of facts) includes disciplining students, assisting in observing and evaluating teacher performance, and assisting the principal in preparing the annual budget.

11. The job description for elementary school principal (fully set forth in Exhibit B of the stipulation of facts) includes developing an instructional program with staff input, supervising and evaluating staff members, and assisting in screening, hiring and assigning staff members.

12. Petitioner has the master's degree, administrative certificate and five years of teaching experience required of elementary school principals and middle school vice principals.

ISSUE AND ANALYSIS

Neither party challenges any facts material to a determination of the motion for summary decision, and both assert entitlement to a decision as a matter of law; accordingly, the case is ripe for summary decision. N.J.A.C. 1:1-12.5; Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67, 73-75 (1954).

The specific question to be decided in this matter is whether petitioner is entitled to appointment to the position of principal of the Cooper Elementary School, which requires the possession of an administrative certificate, by reason of his having achieved tenure in a different position also requiring the possession of an administrative certificate. For the reasons that follow, I am of the opinion that he is so entitled.

This case turns on the decision of the New Jersey Supreme Court in Dennery v. Passaic County Reg. H.S. Dist. #1 Bd. of Educ., 131 N.J. 626 (1993), and specifically on the following language from that opinion (at 634):

An educator who has attained tenure by virtue of the requisite service in a specific position will have tenure with respect to all positions under the particular certificate. Tenure under any one endorsement entitles an educator to tenure under all endorsements obtained under his or her certificate. . . .²

² Educators in New Jersey must possess a professional certificate issued by the State Board of Examiners. N.J.S.A. 18A:6-38; N.J.S.A. 18A:26-2. There are three such certificates, each corresponding to a major area of educational responsibilities: (1) instructional, (2) educational services, and (3) administrative. Dennery, supra, 131 N.J. at 629; N.J.A.C. 6:11-2.3.

Thus, an educator with tenure in any endorsement that he or she possesses can, in effect, extend or transfer that tenure to other endorsements that are subsumed under the same certificate.

[Citations omitted.]

This language clearly applies to petitioner. If taken literally, it is dispositive, validating petitioner's claim to the position filled by respondent with a non-tenured person.

Respondent, however, argues that this language should not be taken literally, relying on the case of Ellicott v. Frankford Tp. Bd. of Educ., 1990 S.L.D. 1714 (footnote five³), aff'd, 251 N.J. Super. 342 (App. Div. 1991), and on a line of decisions at the administrative level, declaring that tenure rights attach to the positions specifically named in N.J.S.A. 18A:28-5 and that a person must actually serve the requisite three years in one of those positions in order to obtain tenure therein. See, e.g., Schienholz v. Ewing Tp. Bd. of Educ., 1990 S.L.D. 1809, 1812 (“tenure is achieved in and tenure protection attaches to the position of ‘principal.’”); Schaefer v. Lakewood Tp. Bd. of Educ., 93 N.J.A.R.2d. (Vol. 4B) 741 (Education); Halpern v. Delran Tp. Bd. of Educ., 94 N.J.A.R. 2d (Vol. 4B) 22 (Education); Skowronski v. Jackson Tp. Bd. of Educ., 94 N.J.A.R.2d (Vol. 4B) 208 (Education); Miller v. New Providence Bd. of Educ., 1987 S.L.D. 23, 43-44; DeCarlo v. South Plainfield Boro. Bd. of Educ., 1988 S.L.D. 1796; Di Simoni v. Passaic Co. Reg. H.S. Dist. #1 Bd. of Educ., 1990 S.L.D. 1249, 1261, aff'd, 1990 S.L.D. 2540, 2541; and Kish v. Elmwood Park Boro. Bd. of Educ., 92 N.J.A.R.2d (Vol. 4) 134 (Education), aff'd, 92 N.J.A.R.2d (Vol. 4) 367 (Education).

The answer to this argument is threefold: (1) the Ellicott case and most of the other tenure decisions cited by respondent were decided before Dennery; (2) the “separately tenurable” distinction made by the Commissioner and the State Board of Education finds little or no support

³ In footnote five, 1990 S.L.D. at 1718, the State Board declared: “However, by virtue of the fact that principal and vice principal are, pursuant to N.J.S.A. 18A:28-5, separately tenurable positions, a tenured vice principal who has no tenure as a principal would have no statutory entitlement by virtue of tenure to assignment as a principal following a RIF.”

in either statute or regulation⁴; and (3) the Supreme Court in Dennerly was clearly well aware of the complexity of and confusion arising from the teacher tenure law and some of the decisions thereunder, but the Court lent no sanction to and expressed no approval of the “separately tenurable” distinction made by the Commissioner and the State Board of Education.

Respondent also argues that the language of the Supreme Court was simply dicta, since it was not necessary to the Court’s decision and therefore should not be given stare decisis effect. Beirne v. Gangemi, 74 N.J. Super. 557, 572 (App. Div. 1962). A close reading of the opinion in Dennerly, however, reveals that the Court intended to deal squarely with the broad question of whether and under what circumstances tenure can be extended. Recognizing the confusion that existed, the Court sought to clarify this area of school law. Dennerly, supra, 131 N.J. at 635. Thus, I am of the opinion that the language used was carefully considered and chosen.

Nevertheless, assuming, arguendo, that the aforesaid language is dicta, it is, at the very least, highly persuasive. Where more recent decisions of the Supreme Court plainly undermine the authority of a prior decision although not squarely and explicitly overruling it, a lower court will usually decide subsequent cases in a manner consistent with the new pronouncement of the higher court. State v. Ciuffini, 164 N.J. Super. 145, 152 (App. Div. 1978); Juliano and Sons v. Chevron, U.S.A., 250 N.J. Super. 148, 157 (App. Div. 1991); Burrell v. Quaranta, 259 N.J. Super. 243, 252 (App. Div. 1992).

Respondent further relies on the principle that great deference should be granted to an administrative agency (here the Commissioner and the State Board of Education) that has “peculiar competence” in applying the statutes and regulations which it is charged with implementing. In re Amendment of N.J.A.C. 8:31B-3.31, 119 N.J. 531, 543 (1990). However,

⁴ N.J.S.A. 18A:28-5 provides that “[T]he services of all teaching staff members, including all teachers, principals other than administrative principals, assistant principals, vice principals. . . and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners. . . shall be under tenure. . . .” The statute is silent about the extension of tenure rights from one position to another and about the rights of tenured employees vis-a-vis non-tenured employees. Further, I am aware of no regulation stating that tenure in any position can be achieved only by serving the requisite three years in that position. The Commissioner or the State Board of Education may wish to implement a policy of “separately tenurable,” but they must comply with the rulemaking requirements of the New Jersey Administrative Procedure Act in order to do so. See Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313 (1984).

although courts generally consider with deference the interpretation of a statute by the agency charged with enforcing it, the construction of statutes is a judicial function, not an executive function, and a court is in no way bound by an agency's interpretation thereof. Service Armament Co. v. Hyland, 70 N.J. 550, 561 (1976); Petrucelli v. Board of Trustees, 211 N.J. Super. 280, 289 (App. Div. 1986).

Finally, it is important to recognize that the Tenure Act is remedial in purpose and should be liberally construed to achieve its beneficial intent of affording security to educators. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 74 (1982); Bednar v. Westwood Bd. of Educ. 221 N.J. Super. 239, 241 (App. Div. 1987); and Capodilupo v. West Orange Tp. Bd. of Educ., 218 N.J. Super. 510, 515 (App. Div. 1987). I must assume that the Supreme Court in Dennery intended that its language be interpreted liberally, not restrictively or grudgingly, thus entitling this petitioner, under this set of facts, to prevail.

CONCLUSION AND ORDER

For the reasons expressed above, I **CONCLUDE** that petitioner should have been appointed to the position of principal of the Cooper Elementary School in December 1993; that as soon as practical he should be appointed to that position; and that he should receive the difference in salary between his present position and that position from December 1993 until his actual instatement therein. It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 11, 1995
DATE

Robert S. Miller
ROBERT S. MILLER, ALJ

Receipt Acknowledged:

1/12/95
DATE

Hope R. Blackman
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 18 1995
DATE

Jeff S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

tmp

G. MICHAEL NELSON, :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE TOWN- : DECISION
 SHIP OF OLD BRIDGE, MIDDLESEX :
 COUNTY, :
 RESPONDENT. :
 _____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The Board's exceptions and petitioner's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

The Board's exceptions assert that the ALJ erred in determining that the within petitioner may use his tenure as a department chairperson/supervisor to claim an entitlement to a principal position, a position in which this petitioner has never served. Citing Ellicott, supra, 1990 S.L.D. at 1719-20, it maintains that

By virtue of its separate listing in N.J.S.A. 18A:28-5, tenure in the position of principal is obtained in that specific position *** and a person who has not satisfied all of the prerequisites for tenure as a principal has no tenure right to that position. Id., 1990 S.L.D. at 1720 n.5. *** This is to be distinguished from tenure obtained in positions not separately listed in N.J.S.A. 18A:28-5.***
 (Board's Exceptions, at p. 8)

The Board contends that the initial decision reverses long-settled tenure principles established by the Commissioner and the State

Board in this specific area. (See Skowronski, supra; Halpern, supra; Schaefer, supra; Kish, supra.) The Board additionally urges that the ALJ's reliance on the Supreme Court's decision in Dennery, supra, was misplaced in that the court in that matter was not faced with the issue presented herein, i.e., Dennery did not address the separately tenurable positions specifically listed in N.J.S.A. 18A:28-5, or whether tenure may be properly transferred among endorsements to the administrative certificate. Further, it asserts, in actuality Dennery is fully consistent with the Board's position in that it "reaffirms the requirement that tenure accrues only upon actual service in the tenurable position, Dennery, supra, 131 N.J. at 638-39, as opposed to experience in a different position under a different endorsement." (Board's Exceptions, at pp. 13-14)

In conclusion, the Board argues that since petitioner did not acquire tenure in the separately tenurable position of principal, he has no superior claim to such position, and the Board was fully justified in filling this position with another nontenured individual who, it believed, would more appropriately fill the position. As such, it urges the Commissioner to reject the initial decision and direct summary decision for the Board.

In response, petitioner argues that the ALJ correctly determined that Dennery, supra, which provides "tenure under any one endorsement entitles an educator to tenure under all endorsements obtained under his/her certificate" (Id., at 634) controls this matter. He asserts that under Dennery "since Petitioner has earned [tenure] under his supervisor/administrator certificate as the vocational chairperson, the tenure he has earned in that position is transferable or extendable to the principal and vice-principal

positions which have become available in the Old Bridge district and to which Petitioner claims entitlement." (Petitioner's Reply Exceptions, at p. 3) Petitioner further contends that subsequent Commissioner decisions relied upon by the Board in support of its argument that petitioner is ineligible for the positions he seeks, in particular Ellicott, supra, are totally irrelevant as these decisions have been overruled by Dennery.

Petitioner next maintains that, even assuming, arguendo, that Ellicott applied in this matter, the portion of this decision relied upon by the Board is based upon a tortured reading of N.J.S.A. 18A:28-5, which is clearly contrary to the plain meaning of the statutory language and, therefore, inconsistent with legislative intent. He contends

In Ellicott, the State Board of Education incorrectly asserts that N.J.S.A. 18A:28-5 sets forth which positions are separately tenurable and which positions permit an educator to extend tenure earned under one endorsement to a single certificate to other endorsements under the same certificate. This distinction is simply not present anywhere in the language of the relevant statute. See ALJ Initial Decision at 5-6. The statute merely states which positions are tenure eligible. To construe the statute any other way is clearly contrary to the plain language in the statute.*** (emphasis in text)

(Petitioner's Reply Exceptions, at pp. 4-5)

Petitioner contends that the ALJ's initial decision must be affirmed by the Commissioner in that it is clear that Dennery allows him to extend his tenure under his supervisory endorsement to his principal endorsement.

Upon a careful and independent review of the record in this matter, the Commissioner rejects the ALJ's conclusion that, based on the decision of the New Jersey Supreme Court in Dennery, supra, the

within petitioner is entitled to the position of principal by virtue of his having achieved tenure in a supervisory position under an administrative certificate. Rather, the Commissioner finds and determines that, consistent with the statutory framework and decisional law in this area, because supervisors and principals are separately tenurable positions pursuant to statute, N.J.S.A. 18A:28-5, petitioner acquired tenure as a supervisor not a principal, notwithstanding the fact that he also held a principal's endorsement. As such, petitioner has no claim to the position of principal. Additionally, it is herein noted that a determination to the contrary would lead to ludicrous conclusions detrimental to sound educational policy. Further, for the reasons detailed below, the Commissioner finds the outcome in this matter to be unaltered by the court's decision in Dennery.

Initially, as recognized by the ALJ, numerous Commissioner and State Board decisions have consistently interpreted N.J.S.A. 18A:28-5 as a provision which sets forth the requirements for attaining tenure and the positions in which tenure may be attained, (see Ellicott, supra; Schienholz, supra; Schaefer, supra; Halpern, supra; Skowronski, supra; Miller, supra; De Carlo, supra; Di Simoni, supra; Kish, supra), finding such conclusion compelled by the statutory scheme and express language of this provision. (See Capodilupo v. West Orange Township Board of Education, decided by the State Board of Education September 3, 1986, slip op. at 7, aff'd 218 N.J. Super. 510 (App. Div. 1987), certif. den. 109 N.J. 514 (1987); also see Schienholtz, supra.) As explained by the State Board in Ellicott, supra:

Tenure is created by a statute, N.J.S.A. 18A:28-1 et seq., which should be liberally construed to further its beneficial purpose of affording security to teaching staff who meet its standard of length of service. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 74 (1982). Under the statutory scheme, tenure is achieved in a particular "position." The "position" in which tenure is achieved is initially limited by the certificate that the teaching staff member must hold in order to fulfill the statutory prerequisite of qualification for employment. Capodilupo v. West Orange Bd. of Ed., decided by the State Board of Education, September 3, 1986, slip op. at 7, aff'd. 218 N.J. Super. 510 (App. Div. 1987), certif. den., 109 N.J. 514 (1987). Further definition of the "position" in which tenure is achieved is provided by N.J.S.A. 18A:28-5, which, by specifying that service as a teacher, principal, assistant principal, vice principal, superintendent, assistant superintendent and school nurse shall be under tenure if other statutory prerequisites are met, defines, for individuals serving in these capacities, the scope of the "position" in which tenure is achieved and to which tenure protection attaches.*** (Ellicott, at 1716)

As such, in one of these separately tenurable positions specifically enumerated by statute, tenure can accrue in such position only as a result of actual work experience in the position.

Additionally, the Commissioner has determined that sound educational policy also compels such an interpretation in that

***To hold otherwise would result in anomalous circumstance of assistant principals having tenure rights to principal positions and principals having tenure rights to assistant superintendencies. (Schaefer, at 744)

The Commissioner dismisses as being without merit the contention that the court in Dennery, supra, overturns this long-established precedent of tenure law. It is noted that the case before the court in Dennery dealt with a guidance counselor who possessed an educational services and an administrative certificate who was attempting to transfer tenure achieved under her educational

services certificate to her administrative certificate, thereby claiming entitlement to a position of class supervisor which required both certificates. In this matter, the Dennery court reversed the finding of the Appellate Division (which had reversed the determination of the Commissioner and the State Board), and determined that tenure rights were not transferable across certificates. The Commissioner finds that the Dennery court did not address the separately tenurable positions specifically enumerated in N.J.S.A. 18A:28-5, nor did it consider whether tenure could be transferred across endorsements to the administrative certificate at issue herein, as an examination of these was unnecessary in the case before it. (See Halpern, supra; Skowronski, supra.) It is also noted with great interest that the general broad statements made by the Dennery court, relied on by the ALJ and the petitioner in the instant matter with respect to the extent of tenure protection and its relationship to the certificate required for the position, are expressly built on a line of prior Commissioner, State Board and court decisions that specifically maintained the concept of separately tenurable positions. (See Dennery, supra, at 634.) Consequently, the Commissioner finds and determines that there is no indication in any reasonable reading of Dennery that the Supreme Court intended to reverse prior holdings in this area. (See again, Halpern, supra; Skowronski, supra.) To the contrary, the Commissioner notes the Dennery court's strong assertion with respect to the deference which should be afforded to decisions of the Commissioner and the State Board.

***The Legislature intended that the State Board "promulgate specifications concerning the categories of 'certification'" and that courts


not intervene "unless the State Board's decision is palpably arbitrary." *** The delegation of regulatory and administrative responsibility over tenure to the State Board is based on the complexity and specialized nature of the subject of teacher tenure.*** Our courts have long recognized the importance of allowing the State Board to devise requirements governing both students and teaching staff.***

(Dennery, at 636-37)

In light of the above, the Commissioner finds and determines that because petitioner has not acquired tenure in the separately tenurable position of principal, he has no superior claim to such position over the nontenured individual selected by the Board to fill the position.

Accordingly, the initial decision of the Office of Administrative Law is reversed, summary decision is hereby granted to the Board, and the instant Petition of Appeal is dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

FEBRUARY 27, 1995

DATE OF MAILING - FEBRUARY 28, 1995

EDU #668-94
C # 72-95
SB # 26-95

G. MICHAEL NELSON, :
 :
 PETITIONER-APPELLANT, :
 :
 V. : STATE BOARD OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 TOWNSHIP OF OLD BRIDGE, :
 MIDDLESEX COUNTY, :
 :
 RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, February 27, 1995

For the Petitioner-Appellant, Balk, Oxfeld, Mandell & Cohen (Gail Oxfeld-Kanef, Esq., of Counsel)

For the Respondent-Respondent, Wilentz, Goldman & Spitzer (Francis X. Journick, Jr., Esq., of Counsel)

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

June 7, 1995

Date of mailing JUN 09 1995

DHP #54-95
SB #72-95

IN THE MATTER OF THE DISQUALIFI- :
CATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF MICHAEL C. BENJAMIN. : DECISION
_____ :

Decided by the Deputy Commissioner of Education, May 12, 1995

For the Petitioner-Appellant, Michael C. Benjamin, pro se

For the Respondent-Respondent, Pamela B. Katten, Deputy Attorney
General (Deborah T. Poritz, Attorney General of New Jersey)

Michael Benjamin (hereinafter "petitioner"), who was employed as a security guard in the Camden school district, was disqualified by the Office of Criminal History Review of the Department of Education from continued employment in the State's schools when a fingerprint search conducted pursuant to N.J.S.A. 18A:6-7.1 et seq. revealed that he had been convicted of distribution of a controlled dangerous substance, cocaine, in 1988. Petitioner sought to overturn his disqualification on the basis of rehabilitation.

In a letter decision dated May 12, 1995, the Deputy Commissioner of Education upheld the disqualification,¹ stating that:

¹ We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly

OCT. 5, 1995

You have submitted letters indicating your current good standing and dedication to your work, as well as your successful completion of the Intensive Supervision Program in November 1992. However, I also note that, contrary to instructions provided in your letter of disqualification from the Office of Criminal History Review, you have failed to provide a detailed account of the circumstances pertaining to your arrest and conviction; you merely state that you were in the wrong place at the wrong time. Moreover, most of the letters submitted on your behalf are not notarized, as required when submitting an appeal based on rehabilitation.

Deputy Commissioner's Decision, slip op. at 1.

The petitioner filed the instant appeal to the State Board of Education. The parties subsequently submitted an executed order consenting to a remand to the Commissioner for a hearing on the issue of rehabilitation.²

However, we find the record in this matter to be such that, given our authority as the ultimate administrative decision-maker and fact-finder in school matters, In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), certif. den., 121 N.J. 615 (1990); Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 452 (App. Div. 1982), we need not remand for determination of the substantive issues raised. Our review of the record has eliminated any question that petitioner has demonstrated clear and convincing evidence of his rehabilitation.

N.J.S.A. 18A:6-7.1 provides, in pertinent part:

e. Notwithstanding the provisions of this section, an individual shall not be disqualified from employment or

includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws...." N.J.S.A. 18A:4-34.

² The Office of Criminal History Review was apparently not represented in the proceedings before the Deputy Commissioner. Upon the filing of the appeal, Counsel to the State Board notified the Attorney General's Office that an appeal had been taken in this matter, and transmitted a copy of the record. A Deputy Attorney General was then assigned to appear as attorney of record in the appeal.

service under this act on the basis of any conviction disclosed by a criminal record check performed pursuant to this act if the individual has affirmatively demonstrated to the Commissioner of Education clear and convincing evidence of his or her rehabilitation. In determining whether an individual has affirmatively demonstrated rehabilitation, the following factors shall be considered:

1. The nature and responsibility of the position which the convicted individual would hold;
2. The nature and seriousness of the offense;
3. The circumstances under which the offense occurred;
4. The date of the offense;
5. The age of the individual when the offense was committed;
6. Whether the offense was an isolated or repeated incident;
7. Any social conditions which may have contributed to the offense;
8. Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have had the individual under their supervision.

(Emphasis added.)

The only arrest and conviction revealed by petitioner's criminal history review involved the distribution of cocaine in 1988. His submissions to the Commissioner include a letter from an officer in the Intensive Supervision Program of the Administrative Office of the Courts who indicates that petitioner was under the supervision of that program beginning in August 1990 and was successfully discharged therefrom in November 1992. During that period, he showed signs of rehabilitation and no signs of substance abuse. He also received a certificate of excellence in December 1990 for his participation in a group therapy program. Petitioner's supervisor at a

janitorial firm recommends him, praising petitioner as "always willing to learn and do his work properly." Moreover, since his arrest, petitioner has successfully completed courses in nursing and security at an evening vocational school.³ There have been no further arrests.

While the gravity of petitioner's offense is apparent, examination of the circumstances indicates that further penalization of this individual is neither a just result nor warranted under the terms of the statute. Petitioner's only arrest occurred in 1988, at a time when he indicates he was living in a drug infested area, and given the uncontradicted evidence that petitioner submitted for the record, including his successful subsequent efforts to acquire vocational training, the recommendation of a supervisor and the fact that he showed no evidence of substance abuse while under court supervision following his conviction, we conclude that petitioner has convincingly demonstrated his rehabilitation pursuant to N.J.S.A. 18A:6-7.1(e). Moreover, as required by that provision, we have considered the "nature and responsibility" of the position petitioner held within the public school system. In this respect, we stress that petitioner was disqualified from employment as a school security guard, which does not include responsibility for the instruction of students.

We note, in addition, that while N.J.S.A. 18A:6-7.1(e) includes "the circumstances under which the offense occurred" as a factor to be considered in determining whether an individual has demonstrated rehabilitation, that statute does not

³ We note that petitioner's completion of the security course occurred subsequent to the Deputy Commissioner's decision in this matter.

require submission of a statement detailing the circumstances leading to an arrest and conviction, as the Deputy Commissioner indicates.

Accordingly, for the reasons expressed herein, we find that petitioner has demonstrated clear and convincing evidence of his rehabilitation pursuant to N.J.S.A. 18A:6-7.1(e). We therefore reverse the decision of the Deputy Commissioner disqualifying petitioner from service in the schools of New Jersey.

Margaret M. Bennett and Maud Dahme opposed.

October 5, 1995

Date of mailing OCT 10 1995

73-95


ENRIQUE FERNANDEZ, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN- : DECISION
SHIP OF DOVER, MORRIS COUNTY, :
RESPONDENT. :
_____ :

MARCH 2, 1995

ENRIQUE FERNANDEZ,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWN-	:	DECISION
SHIP OF DOVER, MORRIS COUNTY,	:	
	:	
RESPONDENT.	:	
	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

MARCH 2, 1995

DATE OF MAILING - MARCH 2, 1995

DHP # 61-95
SB # 73-95

IN THE MATTER OF THE DISQUALIFI- :
CATION FROM SCHOOL EMPLOYMENT : STATE BOARD OF EDUCATION
OF CHRISTOPHER M. HENDERSON. : DECISION
_____ :

Decided by the Deputy Commissioner of Education, May 12, 1995

For the Petitioner-Appellant, Christopher M. Henderson, pro se

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney General
(Deborah T. Poritz, Attorney General of New Jersey)

Christopher M. Henderson (hereinafter "petitioner"), who was employed as a security guard in the Camden school district, was disqualified by the Office of Criminal History Review of the Department of Education from continued employment in the State's schools when a fingerprint search conducted pursuant to N.J.S.A. 18A:6-7.1 et seq. revealed that he had been convicted of distribution of a controlled dangerous substance, cocaine, in 1992. Petitioner sought to overturn his disqualification on the basis of rehabilitation.

In a letter decision dated May 12, 1995, the Deputy Commissioner of Education upheld the disqualification.¹ The Deputy Commissioner indicated that,

¹ We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws...." N.J.S.A. 18A:4-34.

Nov. 1, 1995

although petitioner had made significant progress in his rehabilitation, the disqualifying offense was recent and of a serious nature.

The petitioner filed the instant appeal to the State Board of Education.²

After a thorough review of the record, we reverse the determination of the Deputy Commissioner disqualifying petitioner from school employment, subject, however, to a determination that no further criminal history record information pertaining to petitioner exists on file in the Federal Bureau of Investigation ("FBI"). While we conclude on the basis of the record before us that petitioner has demonstrated clear and convincing evidence of his rehabilitation, we note that the record does not include the results of a criminal history review conducted by the FBI. See N.J.S.A. 18A:6-7.1. Consequently, in the absence of such information, we are compelled to remand this matter to the Commissioner for the limited purpose of determining whether the FBI has any criminal history information pertaining to petitioner which is not revealed in the record.³

N.J.S.A. 18A:6-7.1 provides, in pertinent part:

e. Notwithstanding the provisions of this section, an individual shall not be disqualified from employment or service under this act on the basis of any conviction disclosed by a criminal record check performed pursuant to this act if the individual has affirmatively demonstrated to the Commissioner of Education clear and convincing evidence of his or her rehabilitation. In determining whether an individual has affirmatively demonstrated rehabilitation, the following factors shall be considered:

² The Office of Criminal History Review was apparently not represented in the proceedings before the Deputy Commissioner. Upon the filing of the appeal, Counsel to the State Board notified the Attorney General's Office that an appeal had been taken in the matter, and transmitted a copy of the record. A Deputy Attorney General was then assigned to appear as attorney of record in the appeal.

³ We note in so doing that there is nothing in the record that indicates the presence of any additional convictions.

1. The nature and responsibility of the position which the convicted individual would hold;
2. The nature and seriousness of the offense;
3. The circumstances under which the offense occurred;
4. The date of the offense;
5. The age of the individual when the offense was committed;
6. Whether the offense was an isolated or repeated incident;
7. Any social conditions which may have contributed to the offense;
8. Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have had the individual under their supervision.

(Emphasis added.)

The only arrest revealed by petitioner's criminal history review involved the distribution of cocaine in February 1992, for which petitioner was subsequently convicted and received a fine and two years probation. The terms of such probation included unannounced urine monitoring. His submissions to the Commissioner include an order for early termination of his probation in June 1993, which indicates that petitioner had complied with all the conditions of his probation, had remained drug-free during that period and had maintained a stable residence and employment. The letters of reference include a recommendation from the assistant principal at Camden High School, in which petitioner had been employed prior to his disqualification, who praises him as "conscientious, diligent and dedicated....He was always willing to do a little 'extra' when needed. I strongly feel that Mr. Henderson is and will continue to be an

asset to any organization. I highly support him and sure [sic] he will continue to succeed as a productive, upstanding member of society.”

The chief security officer for the Camden Board of Education also recommends petitioner, indicating that he “has had very good attendance, no tardiness and no absence” and had proven to be a “valuable asset to Camden High School,” never refusing tasks and handling situations involving staff or students in a “professional and mature manner....He became an important part of the security team and has been of value to the school since his employment.”⁴ The record further reveals that petitioner successfully completed an evening vocational course for security personnel on June 14, 1995.⁵ There have been no further arrests.

While the gravity of petitioner’s offense is apparent, examination of the circumstances indicates that further penalization of this individual is neither a just result nor warranted under the terms of the statute. Petitioner’s only arrest occurred in February 1992, and given the uncontradicted evidence that petitioner submitted for the record, including his successful efforts thereafter to acquire vocational training, the recommendation of his supervisors and the fact that he showed no evidence of substance abuse during the year he was on probation, we conclude that petitioner has demonstrated clear and convincing evidence of his rehabilitation pursuant to N.J.S.A. 18A:6-7.1(e). Moreover, as required by that provision, we have considered the “nature and responsibility” of the position petitioner held within the public school system. In

⁴ We note that such recommendation was submitted by petitioner subsequent to the decision of the Deputy Commissioner in this matter.

⁵ We note that petitioner completed this course subsequent to the decision of the Deputy Commissioner in this matter.

respect, we stress that petitioner was disqualified from employment as a school security guard, which does not include responsibility for the instruction of students.

Again, however, the record does not include a criminal record review by the FBI. Consequently, we remand this matter to the Commissioner and reverse the Deputy Commissioner's decision contingent only upon a determination by the Commissioner on remand that there are no additional convictions revealed by an FBI criminal record review.

In the event that there are additional convictions revealed by the FBI record review, we direct the Commissioner to conduct a hearing in order to provide the petitioner with an adequate opportunity to establish a record in support of his contention that he has satisfied the statutory standard for rehabilitation. Given the circumstances, we direct that such hearing and a final determination by the Commissioner be rendered on an expedited basis, and that such determination considers all pertinent circumstances under the factors set forth in N.J.S.A. 18A:6-7.1, including "any evidence of rehabilitation." See Wolffbrandt v. New Jersey State Department of Education, decided by the State Board, July 1, 1992.

Under the circumstances, we stay petitioner's disqualification from service in the schools of New Jersey, pending a final determination on remand by the Commissioner in accordance with our decision herein.

We retain jurisdiction.

Maud Dahme and Corinne M. Mullen opposed.

November 1, 1995

Date of mailing NOV 03 1995

(SB) 73-95

DHP # 61-95
SB # 73-95

IN THE MATTER OF THE DISQUALIFI- : STATE BOARD OF EDUCATION
CATION FROM SCHOOL EMPLOYMENT :
OF CHRISTOPHER M. HENDERSON. : DECISION

Decided by the Deputy Commissioner of Education, May 12, 1995

Remanded by the State Board of Education, November 1, 1995

Decided by the Deputy Commissioner of Education, November 21, 1995

For the Petitioner-Appellant, Christopher M. Henderson, pro se

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney General
(Deborah T. Poritz, Attorney General of New Jersey)

On November 1, 1995, we reversed the decision of the Deputy Commissioner of Education upholding petitioner's disqualification from employment in the State's schools pursuant to N.J.S.A. 18A:6-7.1, subject only to a determination on remand that no further criminal history record information pertaining to petitioner existed on file in the Federal Bureau of Investigation ("FBI"). We concluded on the basis of the record before us, which did not include the results of a criminal history review conducted by the FBI, that petitioner had demonstrated clear and convincing evidence of his rehabilitation. Accordingly, we remanded this matter to the Commissioner for the limited purpose of determining whether the FBI had any criminal history information pertaining to petitioner which was not revealed in the record. We retained jurisdiction.

2/7/96

In accordance with the terms of our remand, the Deputy Commissioner inquired as to whether the FBI had any information on petitioner.¹ On November 21, 1995, the Deputy Commissioner, indicating that no additional convictions had been revealed by the FBI record review, concluded that petitioner was qualified for school employment. Pursuant to our retention of jurisdiction, the Commissioner transmitted the file back to us on November 27.

After a review of the record, we are satisfied that the Commissioner fully complied with the terms of the State Board's remand. Thus, pursuant to the Deputy Commissioner's decision, petitioner is qualified for school employment, and we dismiss the appeal.

Donald C. Addison, Jr., Wendel E. Daniels and Thomas P. McGough abstained.

Maud Dahme opposed.

February 7, 1996

Date of mailing FEB 09 1996

¹ We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws...." N.J.S.A. 18A:4-34.

74-95

JERRY NESTER,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWN-	:	DECISION
SHIP OF OLD BRIDGE, MIDDLESEX	:	
COUNTY,	:	
	:	
RESPONDENT.	:	
	:	
_____	:	

MARCH 2, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3231-94

AGENCY DKT. NO. 47-3/94

JERRY NESTER,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF OLD BRIDGE,
MIDDLESEX COUNTY,**

Respondent.

Gail Oxfeld Kanef, Esq., on behalf petitioner (Balk, Oxfeld, Mandell & Cohen,
attorneys)

Francis X. Journick, Esq., on behalf of respondent (Wilentz, Goldman & Spitzer,
attorneys)

Record Closed: January 26, 1995

Decided: January 27, 1995

BEFORE ROBERT S. MILLER, ALJ:

This matter was transmitted to the Office of Administrative Law on April 6, 1994, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13.

The parties have agreed to a settlement and have prepared a stipulation of settlement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

January 27, 1995
DATE

Robert S. Miller
ROBERT S. MILLER, ALJ

1/31/95
DATE

Receipt Acknowledged:
Therese Blackburn
DEPARTMENT OF EDUCATION

FEB 03 1995
DATE

Mailed to Parties:
Jeff M. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cae

BALK, OXFELD, MANDELL & COHEN
A Professional Corporation
50 Commerce Street
Newark, New Jersey 07102
(201) 623-0353
Attorneys for Petitioner

JERRY NESTER,	STATE OF NEW JERSEY
	OFFICE OF ADMINISTRATIVE LAW
	OAL DOCKET NO. EDU-03231-94S
	AGENCY DOCKET NO. 47-3/94
Petitioner,	:
	:
-vs-	: STIPULATION OF SETTLEMENT
	:
BOARD OF EDUCATION OF THE	:
TOWNSHIP OF OLD BRIDGE	:
MIDDLESEX COUNTY	:
	:
Respondent.	:
	:

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement which fully disposes of all issues in controversy between the appellant and respondent:

1. The appellant withdraws his appeal and request for a hearing.

2. The respondent agrees to appoint petitioner to the position of Administrator of Athletics effective January 1, 1995. The Administrator of Athletics or Athletics Director position will require the holder to maintain a valid supervisory endorsement to the administrative certificate and not a principal endorsement.

3. Mr. Nester will be credited with seniority in the aforementioned position retroactive to July 1, 1994.

4. For the period January 1, 1995 through June 30, 1995, petitioner will be paid at an annual salary rate of \$76,467.00.

5. The position of Administrator of Athletics or Athletic

Director will be a twelve month position.

6. After June 30, 1995, petitioner's salary level may be negotiated by the respondent and petitioner or petitioner's collective representative.

7. Except as noted above, the petitioner waives all claims against the respondent with regard to this matter, including any award of back pay or other monetary relief.

DATED:

~~HONORABLE ROBERT MILLER, A.L.J.~~

DATED:

Gail O. Kanef

GAIL OXFELD KANEF, ESQ.
Attorney for Petitioner

DATED:

1-25-94

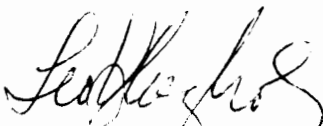
Francis X. Journick

FRANCIS X. JOURNICK, ESQ.
Attorney for Respondent

JERRY NESTER, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN- : DECISION
SHIP OF OLD BRIDGE, MIDDLESEX :
COUNTY, :
RESPONDENT. :
_____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

MARCH 2, 1995

DATE OF MAILING - MARCH 2, 1995


IN THE MATTER OF THE TENURE :
 HEARING OF LLOYD WAYNE : COMMISSIONER OF EDUCATION
 WASHINGTON, BOARD OF EDUCATION : DECISION
 OF SOUTH PLAINFIELD, MIDDLESEX :
 COUNTY. :
 _____ :

MARCH 2, 1995

IN THE MATTER OF THE TENURE :
HEARING OF LLOYD WAYNE : COMMISSIONER OF EDUCATION
WASHINGTON, BOARD OF EDUCATION : DECISION
OF SOUTH PLAINFIELD, MIDDLESEX :
COUNTY. :
_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MARCH 2, 1995

DATE OF MAILING - MARCH 2, 1995

DHP # 68-95
SB # 75-95

IN THE MATTER OF THE DISQUALIFI- :
CATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF ROMUL R. RISCO. : DECISION

Decided by the Deputy Commissioner of Education, June 8, 1995

For the Petitioner-Appellant, Romul R. Risco, pro se

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney
General (Deborah T. Poritz, Attorney General of New Jersey)

On June 8, 1995, the Deputy Commissioner of Education affirmed the determination of the Department's Office of Criminal History Review disqualifying Romul R. Risco (hereinafter "petitioner") from school employment as a teacher following a criminal history check conducted pursuant to N.J.S.A. 18A:6-7.1.¹ The Deputy Commissioner determined that petitioner had failed to demonstrate his rehabilitation by clear and convincing evidence.

On June 23, 1995, the petitioner filed a notice of appeal to the State

¹ We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws..." N.J.S.A. 18A:4-34.

Nov. 1, 1995

Board of Education.² Pursuant to N.J.A.C. 6:2-1.11(a), petitioner's brief in support of the appeal was due by July 13, 1995, 20 days after the appeal was filed. Petitioner, however, failed to file a brief by that date. By letter dated July 17 from the Counsel to the State Board, petitioner was notified of his failure to file a brief in support of the appeal and advised that this matter was being referred to our Legal Committee for consideration of his failure to perfect the appeal. Given his pro se status, petitioner was again notified in a letter dated September 12 of his failure to file. He was thereupon given until October 5 to file a written explanation as to why he should not be disqualified from school employment. Petitioner has still failed to file an appeal brief or written explanation. Nor has he at any time requested an extension of time for such filing or provided any explanation for the delay.

The State Board of Education therefore dismisses the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a).

November 1, 1995

Date of mailing NOV 03 1995

² The Office of Criminal History Review was apparently not represented in the proceedings before the Deputy Commissioner. Upon the filing of the appeal, Counsel to the State Board notified the Attorney General's Office that an appeal had been taken in the matter, and transmitted a copy of the record. A Deputy Attorney General was then assigned to appear as attorney of record in the appeal.

76-95


SARA WHITE, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH : DECISION
OF WASHINGTON, WARREN COUNTY,
RESPONDENT. :
_____ :

MARCH 3, 1995

SARA WHITE, :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE BOROUGH : DECISION
 OF WASHINGTON, WARREN COUNTY,
 RESPONDENT. :
 _____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

MARCH 3, 1995

DATE OF MAILING - MARCH 3, 1995

77-95

SIMON J. GAINER,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF TRENTON, MERCER COUNTY,	:	
	:	
RESPONDENT.	:	
	:	
_____	:	

MARCH 3, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT

OAL DKT. NO. EDU 7282-94

AGENCY DKT. NO. 264-6/94

SIMON J. GAINER,

Petitioner,

v.

BOARD OF EDUCATION, CITY OF TRENTON,

MERCER COUNTY,

Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzali,
Fagella & Nowak, attorneys)

Thomas W. Sumners Jr., Esq., for respondent (Sumners, Council,
George & Dortch, attorneys)

Record Closed: January 18, 1995

Decided: January 19, 1995

BEFORE STEVEN C. REBACK, ALJ:

STATEMENT OF CASE

This matter was transmitted to the Office of Administrative Law (OAL) on July 28, 1994, for a hearing pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The petitioner, a tenured teacher employed by the Trenton City Board of Education, contends that the respondent's recoupment of alleged overpayments of salary reduced his salary improperly.

The parties have agreed to settle this matter and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

11/17/95

DATE

[Signature]

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

11/24/95

DATE

[Signature]

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 27 1995

DATE

[Signature]
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

njf

SUMNERS COUNCIL GEORGE & DORTCH, P.C.
120 Sanhican Drive, Suite 300
P.O. Box 7824
Trenton, New Jersey 08618
(609) 393-6604
Attorneys for Respondent

Simon J. Gainer,
Petitioner,

vs

Board of Education of the
City of Trenton, County of Mercer,
Respondent.

BEFORE THE COMMISSIONER
OF EDUCATION

OAL DOCKET NO. EDU-7282-94S
AGENCY DOCKET NO. 264-6/94


CIVIL ACTION

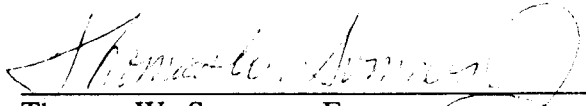
STIPULATION OF SETTLEMENT

Petitioner, Simon J. Gainer, and Respondent, Board of Education of the City of Trenton, Mercer County (hereinafter "Board"), desire to resolve this matter that is before this Court in an amicable fashion, hereby agree and stipulate as follows:

1. The Board shall issue a check to Petitioner in the amount of \$401.65 representing reimbursement of five (5) deductions of \$80.33 each from paychecks during the time period of April through June, 1994. The Board shall not seek to recoup any salary payments from Petitioner.
2. Petitioner dismisses the Petition of Appeal with prejudice.
3. This agreement is reached voluntarily and without duress.

Dated: *January 5, 1995*


Richard A. Friedman, Esq.
Zazzali, Zazzali, Fagella & Nowak, P.C.
Attorney for Petitioner


Thomas W. Sumners, Esq.
Sumners Council George & Dortch, P.C.
Attorney for Respondent

SIMON J. GAINER, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY : DECISION
OF TRENTON, MERCER COUNTY, :
RESPONDENT. :
_____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

MARCH 3, 1995

DATE OF MAILING - MARCH 3, 1995

78-95

JOHN TILLI,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE BOROUGH :	:	DECISION
OF FAIR LAWN, BERGEN COUNTY,	:	
	:	
RESPONDENT.	:	

MARCH 3, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10556-93

AGENCY DKT. NO. 323-9/93

JOHN TILLI,

Petitioner,

v.

FAIR LAWN BOARD OF EDUCATION,

Respondent.

Robert G. Rosenberg, Esq., for petitioner

Paul H. Green, Esq., for respondent

(Green & Dzwilewski, P.A., attorneys)

Record Closed: December 26, 1994

Decided: January 20, 1995

BEFORE DIANA C. SUKOVICH, ALJ

On September 8, 1993, John Tilli (petitioner) filed a petition with the State Department of Education (Department) contesting the withholding of an increment by the Fair Lawn Board of Education (respondent). Respondent filed an answer by letter dated September 23, 1993. The case was transmitted by the Department to the Office

of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to 13.

Conferences were conducted throughout the proceedings. Hearings initially scheduled to commence in June and, subsequently, in August 1994, were adjourned at petitioner's request with respondent's consent. Hearings were thereafter scheduled to commence on October 12, 1994. The parties appeared on that date and conferred. Petitioner's counsel represented that petitioner intended to withdraw his hearing request and that a letter of withdrawal would subsequently be filed.

A letter of withdrawal was not filed, and this judge inquired regarding the status of the matter by letters dated November 24, 1994 and December 19, 1994. The latter letter advised petitioner's counsel that if a letter of withdrawal were not received within seven days, I would issue an initial decision dismissing the petition and requested that counsel contact the OAL if another conference were requested in the interim. A letter of withdrawal was not filed, and no replies were received to the December 19, 1994 letter. The record is therefore deemed to have closed on December 26, 1994.

When there is a reasonable failure to comply with any order of a judge, the presiding judge may take appropriate case-related action, including dismissal of an application. *N.J.A.C.* 1:1-14.4.

I **FIND** that petitioner has failed to diligently prosecute this matter and to comply with directives contained in the December 19, 1994 letter. I **CONCLUDE** that the petition should be dismissed pursuant to *N.J.A.C.* 1:1-14.14.

It is hereby **ORDERED** that the petition filed by petitioner with the Department on September 8, 1993 be and is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 23, 1995
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

1/24/95
DATE

Ther. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 30 1995
DATE
le

J. J. Marin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

JOHN TILLI, :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE BOROUGH : DECISION
 OF FAIR LAWN, BERGEN COUNTY, :
 RESPONDENT. :


The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that the within Petition of Appeal be dismissed as a result of petitioner's failure to comply with the directives of the ALJ and his failure to diligently prosecute this matter.

Accordingly, the recommended decision of the Office of Administrative Law is adopted as the final decision in this matter and the instant Petition of Appeal is dismissed, with prejudice.

IT IS SO ORDERED.

MARCH 3, 1995


 COMMISSIONER OF EDUCATION

DATE OF MAILING- MARCH 3, 1995

MARGARET E. DALY, :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE TOWN- : DECISION
 SHIP OF WINSLOW, CAMDEN COUNTY, :
 RESPONDENT. :
 _____ :

SYNOPSIS

Petitioner, former teacher of preschool handicapped children, alleged Board's denial of tenure was motivated by sex discrimination (her pregnancy).

Following review of extensive documentary evidence and testimony, the ALJ concluded that petitioner's pregnancy was not a factor in the denial of tenure. ALJ found that the Board's reasons for denial of tenure were advanced in good faith and showed the Board's dissatisfaction with petitioner. There was no basis for concluding that petitioner was the victim of unlawful discrimination. Petition was dismissed.

Commissioner adopted findings and determination in the initial decision as his own.

MARCH 3, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO EDU 10113-93

AGENCY DKT. NO. 324-9/93

MARGARET E. DALY,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF WINSLOW, CAMDEN
COUNTY,**

Respondent.

Walter Lucas, Esq., and Kyle M. Francis, Esq., for petitioner (Smith Mullin, attorneys)

Anthony I. Padovani, Esq., for respondent (Sahli & Padovani, attorneys)

Record Closed: October 31, 1994

Decided: January 27, 1995*

BEFORE M. KATHLEEN DUNCAN, ALJ:

This matter commenced on September 14, 1993, when Margaret E. Daly (hereinafter petitioner) filed a petition with the Commissioner of Education in which she alleged that the Board of Education of the Township of Winslow (hereinafter respondent) had failed to offer her a

* Extensions of time for issuing the initial decision were requested and granted pursuant to N.J.S.A. 52:14B-10(c).

tenure contract because of her pregnancy in violation of various federal and state statutory and regulatory provisions. An answer on behalf of respondent was filed on October 18, 1993, wherein respondent denied each of the allegations of sex discrimination. On October 22, 1993 the Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13.

A prehearing conference was conducted on January 24, 1994, at which time the following were identified as issues for determination at hearing:

1. Were the reasons given by respondent for petitioner's nonrenewal a pretext for sex discrimination (pregnancy)?
2. If the answer to the foregoing question is yes, what are the appropriate remedies?

An amended petition alleging a violation of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to 42, was filed on March 1, 1994. Hearing dates which had been scheduled for May 2, 3, 4, 10 and 11, 1994 were adjourned at petitioner's request, and the matter was rescheduled and commenced on September 26, 1994. The hearing continued on September 27 and September 28 and concluded on September 29, 1994. Following the conclusion of testimony, the record remained open for the receipt of written submissions. Petitioner had filed a trial brief on the first day of hearing. Respondent's written post-hearing submission was received on October 25, 1994. By letter received October 31, 1994, petitioner advised that no reply memorandum would be forthcoming, whereupon the record closed.

FINDINGS OF FACT

Some of the facts relevant to a determination of the within matter are not in dispute and I therefore find the following as uncontested facts.

Petitioner, who holds a Bachelor of Science Degree in Elementary Education and Special Education and a Masters Degree in Early Childhood Special Education, had six years of teaching experience when she was hired by respondent. She commenced employment in respondent's district as a teacher of preschool handicapped children in September 1990. During the 1990-91 school year, she received four performance evaluation reports, one following a classroom observation by the building principal, William T. Dennison, and the other three following classroom observations by Assistant Superintendent, Patricia Hoey, whose responsibilities included supervising special education in the district. Petitioner also received a Teacher Annual Written Performance Report in June 1991. Petitioner's teaching contract was renewed for the 1991-92 school year and she was again assigned to teach preschool, handicapped children. During the 1991-92 school year she received three formal performance evaluation reports and an annual performance report in May 1992. Her contract was again renewed for the 1992-93 school year; during that year her classroom performance as a teacher of preschool handicapped students was formally observed on three occasions, followed by the issuance of written performance evaluation reports. On each Classroom Observation Report petitioner's skills were evaluated on a ranking scale of "excellent", "good", "fair" or "unsatisfactory" for personal qualities, professional qualities, professional competence, instructional competence and management. On each report there were forty different assessments made including subcategories and there were various explanatory comments. The ratings petitioner received were primarily "good", with a fair number of "excellent" ratings. During 1990-91 she received eight "fair" ratings and during 1992-93 she received four "fair" ratings. She never received an "unsatisfactory" rating.

On or about January 20, 1993, petitioner performed a home pregnancy test and determined that she was pregnant. At her first visit to the obstetrician's on March 10, 1993, she was given an estimated due date of mid-October; this due date was apparently based upon misinformation, however, and the estimated date of arrival was later recalculated to be mid-September. Petitioner's son, her second child, was born on September 16, 1993.

On January 21, 1993, Ms. Hoey went to petitioner's classroom for the purposes of conducting a formal observation and evaluation. When Ms. Hoey arrived, petitioner was not in

her classroom and Ms. Hoey did not observe her in the hallway. Petitioner did arrive after a few minutes and Ms. Hoey conducted the evaluation; however, the evaluation report was destroyed on February 19, 1993 at the recommendation of the teacher's union building representative because the written report and the post-observation conference did not take place within the time period specified in the negotiated agreement.

On February 3, 1993,* just before classes commenced, one of the kindergarten teachers, Joan Pedrick, collapsed in her classroom and petitioner, along with another teacher, MaryAnn Pestone, left the building to escort Ms. Pedrick home. The following day, February 4, 1993, Ms. Hoey approached petitioner to question her concerning why she had left her class the morning before. Petitioner advised Ms. Hoey that she had believed that Mr. Dennison, the school principal, had given her permission to assist Ms. Pestone in taking Ms. Pedrick home and that she would not have left the building and put her job in jeopardy if she had not believed that she had permission. The contents of the remainder of that discussion are in dispute. Ms. Hoey issued a written reprimand to petitioner, dated February 8, 1993 which read as follows:

As we discussed last week (2/3/93), I wish to reiterate with you that your primary responsibility is to provide direct services to your children in your classroom.

When I entered the mods the morning of 2/3/93 at the time of arrival of the preschool children, you were down the hall speaking with a kindergarten teacher. This again is reflective of your lack of professional responsibility. It is your responsibility to be in your classroom with your children.

After our discussion the morning of 2/3/93, I discussed the situation with Mr. Dennison, who informed me he did not give you permission to leave the building the morning of 2/3/93.

As we discussed, you left the school premises to escort a fellow teacher who was ill home. This was done, without administrative permission and while your children were present for instruction. Your class was left with a non-certified teacher

* The record is not entirely clear concerning the date of this incident; it may have been February 2, 1993 as some of the documents indicate.

assistant in charge. This is a clear violation of your professional responsibilities.

If such an incident would occur again, be assured that additional action will be taken.

A letter dated February 16, 1993 from petitioner to Ms. Hoey explained petitioner's version of the events which occurred and requested that the situation be reviewed and that the February 8, 1993 letter of reprimand be removed from her personnel file. Mr. Dennison did conduct an investigation by questioning all those involved in his office, following which he sent petitioner a note stating that he had not given her permission to leave the building that day.

On March 12, 1993, Ms. Hoey met with petitioner to discuss her classroom observation of petitioner's performance on March 3, 1993. On this written evaluation, which is part of P-2C in evidence, Ms. Hoey rated petitioner's performance as "Good", with four exceptions. Under Personal Qualities: Reacts rationally - Ms. Hoey rated petitioner as "Fair" and made the following written comments:

Mrs. Daly is in her third year as teacher of the preschool handicapped class. Overall, she has demonstrated the health and energy to meet this responsibility. Mrs. Daly, however, acts impulsively and this results in diminished services to her children. During this observation period, on two occasions the observer entered the classroom and Mrs. Daly was not at her teaching assignment. This is of concern. Although teacher assistants are in preschool, it is the professional responsibility of the teacher to be in the classroom.

Under Professional Competence: Supports and implements authorized policies and procedures - Ms. Hoey also rated petitioner as "Fair" and made the following written comments:

Mrs. Daly generally demonstrates the competence needed for her professional responsibilities. However, on 2/3/93 Mrs. Daly left the school building without administrative permission when her students were present. This certainly is a violation of authorized

policies and procedures. Mrs. Daly has been sent by administration to a professional workshop this year to broaden her knowledge of Preschool Handicapped Curricula.

Under Management she judged petitioner's performance as "Fair" in two categories: Establishes class routines and Implements a management schedule for optimum teacher/pupil time on tasks - and made the following written comments:

One of the most crucial aspects of management is the time management and organizational plan of a teacher's day to assure the meeting of the IEP's of the children. Your daily lesson plans show six separate activity times, i.e. Job Time, Circle Time, Tactile, Language, Quiet and Gross Motor. Snack is the last activity of the day. You need to review your time allotment for these activities to assure that the goals and objectives can be met. It is especially important to be conscious of the children's individual speech schedules and be sure that they are in the room when the therapist comes. Her schedule is very tight and it is important that the children are served.

During the post-observation conference, Ms. Hoey advised petitioner that she had doubts about recommending her for a tenure contract. Petitioner transmitted her own written comments on the evaluation of March 3, 1993 to Ms. Hoey by cover letter, dated March 15, 1993. The cover letter indicated that petitioner was surprised and upset by Ms. Hoey's comments concerning her tenure contract. The letter outlined petitioner's contributions to the preschool program and concluded:

I think I am trying to say is that I don't think it is fair to base your recent evaluation and future recommendations on the situation that occurred on 2/3/93. The letter or reprimand you wrote and placed in my personal file was quite sufficient, I believe. I have offered my explanation of the events that took place on the morning, and I believe that my future in Preschool should not be solely based upon that particular situation.

I hope that you will take all of the positive things I have done for the program into consideration when making your decisions about next year.

Enclosed you will find a copy of my comments about your most recent evaluation. Would you please attach it to the copy in my personal file.

On or before March 30, 1993, Ms. Hoey advised Mr. Dennison, the building principal, that it was her intention to recommend petitioner for nonrenewal. Mr. Dennison, by letter dated March 30, 1993, advised Dr. Galasso, the Superintendent of Schools, that he supported Ms. Hoey's recommendations for nonrenewal of petitioner's contract for the 1993-94 school year. By letter dated March 31, 1993 and hand-delivered to petitioner, Dr. Galasso advised petitioner that the Board of Education on Monday, April 5, 1993 would determine whether her services as a teacher would be terminated effective June 30, 1993. That same afternoon, March 31, 1993, petitioner placed a telephone call to Ms. Hoey to discuss her situation. When she spoke to Ms. Hoey she indicated that Ms. Hoey's decision would have devastating effects on her and her family, that her husband was in and out of work, and that she was the primary support for her family. She also told Ms. Hoey that she needed the medical benefits which came with the job because she was pregnant and that she feared she would not be able to find another job because of her condition. The rest of the particulars of that conversation are in dispute and will be discussed hereinafter.

On April 2, 1993, petitioner spoke with Dr. Galasso concerning her desire to address the Board of Education on April 5, 1993. Dr. Galasso wrote a memo to his file memorializing the contents of that conversation. The April 2, 1993 memo stated:

On Friday at noon, I returned a telephone call to Margaret Daly. She was inquiring about the potential of having her employment status being discussed in a public meeting. I informed her that she could do that as long as she provided us with a written statement asking to do that. At that time, she also indicated that this is a very trying time for her because she informed me that she was also pregnant. This office has no prior knowledge of her pregnancy prior to that day. Mrs. Daly was also told that as a resident, she could speak at the public meeting prior to the action and after the action was taken - that would be her choice. The only requirement would be to give her name and address.

Mrs. Daly brought a note requesting permission to have her employment status discussed in public and she notified us of the fact that she did want to speak at the public portions of the meeting. That letter was dropped off in the early AM of April 5th.

On April 5, 1993, Ms. Hoey articulated for the Board of Education her reasons for recommending denial of tenure to petitioner. Petitioner also spoke to the Board of Education and advised all of them that evening that she was pregnant. A number of parents then spoke on petitioner's behalf. By recorded roll call vote the Board voted not to renew petitioner's contract for the 1993-94 school year. Thereafter petitioner solicited and received from several parents written letters of support for her to use at her "Donaldson"* hearing. Those letters were marked as part of the record as P-2D in evidence. The manner in which petitioner solicited these letters is in dispute and will be discussed hereinafter.

By letter dated May 11, 1993, respondent provided petitioner with the list of written reasons for nonrenewal which petitioner had requested pursuant to N.J.S.A. 18A:27-3.2.

At the regular meeting of the Winslow Township Board of Education on April 5, 1993, your teaching contract was terminated by a recorded majority roll call vote. The action was based on insufficient professional growth to be awarded a tenure contract.

Specifically there was observed insufficient professional growth in the following areas:

Personal Qualities

- Reacts rationally
- Voice, tone and manner

Professional Competence

- Supports and implements authorized policies and procedures

* Donaldson v. Bd. of Ed. of No. Wildwood, 65 N.J. 236 (1974).

Management

- Establishes class routines
- Implements a management schedule for optimum teacher/pupil time on task
- Organizational planning of a program to assure adherence to Individualized Educational Program needs

These reasons are provided in accordance with Title 18A:27-3.2.

Petitioner's "Donaldson" hearing took place on June 14, 1993, following which respondent declined to reconsider its previous nonrenewal action. Petitioner's teaching position was posted and Janice Hauser, who is certified by the New Jersey Department of Education as a teacher of the handicapped and who had previously functioned as a long-term substitute in respondent's preschool handicapped program was selected to fill the vacancy caused by petitioner's nonrenewal. Ms. Hauser's application for employment indicated that she had received her Bachelor's degree in Health and Physical Education in 1973. Her written evaluations as a long term substitute for 1992-93 were equally divided between "good" and "excellent" ratings, and written comments were uniformly positive. This concludes the recitation of uncontested facts.

Petitioner testified that on the morning of February 3, 1993, MaryAnn Pestone and Barbara Grimmie had gone to speak with Mr. Dennison who was on bus duty to obtain permission from him to leave the building to take Joan Pedrick home. Petitioner testified that Ms. Pedrick had specifically asked that she be permitted to accompany her, and Barbara Grimmie had advised petitioner when she and Ms. Pestone returned from their conversation with Mr. Dennison that Mr. Dennison had given petitioner permission to do so. Petitioner further testified that when she discussed the incident with Ms. Hoey the next day, she had specifically said to Ms. Hoey that she did have permission from the principal and that she had further stated something to the effect, "I would not put my job in jeopardy considering the condition I am in." According to petitioner, Ms. Hoey then asked her what she meant, and she advised Ms. Hoey that she was pregnant. She also testified that she had shared the news of her pregnancy during the first week in February with

Jennifer Entrikan, her teaching assistant, and with Irene Detweiller, a teacher's aide assigned to her classroom. According to petitioner it was roughly around the same time when she advised the kindergarten teacher's, Joan Pedrick, MaryAnn Pestone and Barbara Grimmie.

When Ms. Entrikan testified she indicated that it was her recollection that petitioner had advised her about the pregnancy on or about Valentine's Day 1993. Ms. Entrikan testified that she remembered this because petitioner had given her a Valentine's present at the same time. Ms. Entrikan did not recall if petitioner had asked her to keep the news a secret, but she did not hear anyone else discuss it during February. Dr. Galasso testified that the first he learned of petitioner's pregnancy was when petitioner had advised him of the fact during the telephone conversation on April 2, 1993. Two staff members testified that they had learned of petitioner's pregnancy when petitioner put a stork and her due date on her door as part of a door decorating contest in April 1993. Mr. Dennison testified that he was unaware of the pregnancy until late March or early April. None of the other witnesses had any specific recollection concerning when they had learned of petitioner's pregnancy.

Ms. Hoey testified that the first time she had heard about petitioner's pregnancy was during the telephone call on March 31, 1993, at which time she had asked petitioner whether other people knew about the pregnancy and petitioner had told her that she had not told people because she did not want it known, that she was 3 1/2 months pregnant, and that she was due in October. Ms. Hoey produced a hand-written "Note to File", dated 3/31/93 summarizing the conversation between petitioner and herself. Also attached to this note were the actual notes she took during the telephone conversation, she said. Those notes contain words and phrases, notably, "Jeopardize my career" and "I knew I was pregnant that day".

Ms. Hoey further testified that she had also made notes during the April 5, 1993 telephone conversation she had with petitioner. One of these notes states "Indicated - someone told her I knew she was pregnant I asked who - she wouldn't say. I ended the conversation with a strong reinstatement that I did not know and she was the one who told me the other night 3/31." Ms. Hoey also produced hand-written notes which she testified she had made over the weekend

between April 2 and April 5 in preparation for her Board of Education presentation concerning petitioner's tenure contract - as well as the full handwritten text of the comments which she had read verbatim to the Board at the public meeting on April 5, 1993. Those comments provided:

After a careful review of Margaret Daly's performance over the past three years, I am unable to recommend her to the Board of Education for her tenure contract.

Given the weight and significance of a tenure contract, I cannot in my professional capacity recommend a teacher when I have doubts and concerns with their performance.

This recommendation comes after much deliberation and careful thought. It is my professional opinion, after fifteen years in the area of supervision in Special Education, that Mrs. Daly has not made sufficient growth to meet the criteria for a tenured contract within the Special Education Department in Winslow Township.

Areas of concern center on:

- 1) Mrs. Daly's ability to consistently implement a program which addresses the developmental needs of the children according to their IEP objectives.
 - (a) in other words planning activities and implementing them in light of the modifications needed by the children.

This concern/need was noted to Mrs. Daly in her PIP - 6/10/91, 5/18/92

- also comments were made in this area in her evaluations dated: 11/13/90, 4/2/91, 10/3/91, 3/3/93

- B) Organization: i.e. - Time allotment for activities/class routines/pupil time on task/smooth transition. Comments in this area were noted in evaluations: 10/3/91, 2/28/92, 3/3/93

Also noted in PIP - 6/10/91, 5/18/92

- C) One of the important roles in a Special Ed Class is for the teacher to act as (esp. language model) a model for the T.A.'s in the room. and for the children. Comments were noted in this area: 11/13/90, 1/23/90, 4/2/91, 2/28/92

- D) Adherence to school policies and procedures.
1. - on two occasions this school year the obs. entered Mrs. Daly's preschool classroom and Mrs. Daly was not present.
 - in the first case she was down the hall - kindergarten teachers
 - the second incident the observer was in the classroom for a time observing the children before she returned.
 - (For the BOE's information, it is my opinion that the PSH teachers have more than ample time between classes (50 min. per day) and there is no reason why communications with other teachers or sharing material could not occur during that time)
 2. On another occasion this school year Mrs. Daly left the school premises to take an ill kindergarten teacher home without administrative permission while her children were present.

This is documented in the file by a signed memo from Mr. Dennison.

In summary -

I wish to restate - this recommendation is based on a thorough review of three years performance.

As noted in Mrs. Daly's evaluation - she has demonstrated a degree of growth. However - Given the weight and significance of tenure - and the long term meaning of this act. - I cannot recommend Mrs. Daly since it is my professional opinion that she has not made sufficient/consistent growth in the areas mentioned to warrant a tenured position in the Special Education Dept. in Winslow Township.

In response to a question from the undersigned Ms. Hoey testified that her recommendation for nonrenewal had been a fairly easy one to make prior to March 31, 1993; however, after petitioner had advised her of the pregnancy she had struggled with her previous decision but had finally determined that her professional opinion concerning petitioner's performance had to prevail over any feelings of empathy with petitioner's situation and her need for employment, she said.

She further testified that pregnancy was always a non-issue in recommending teachers for contract renewal. On three occasions in the past she had recommended pregnant teachers for their tenure year contract, and two other pregnant teachers who were not yet eligible for tenure also had their contracts for the next year renewed upon her recommendation. On cross-examination she indicated that one of the pregnant teachers that she had recommended for tenure had not returned after her maternity leave; one had asked for additional leave time. When she was asked why she recommended against tenure for petitioner after she had given her so many "goods" and "excellents", she responded that "good" means "O.K." and excellent means "you're where I want you to be", and that petitioner had not satisfied her criteria for where she wanted a permanent employee to be. She testified that for her to recommend a person for tenure the ratings must be predominantly "excellent." She indicated that she had recommended nonrenewal of others with evaluation ratings similar to or better than petitioner's.

Mr. Dennison, the school principal, testified that with respect to employment recommendations for teachers of special education, he always defers to Ms. Hoey; special education is her area of expertise, not his, he testified. Accordingly, his role in this particular recommendation was very limited, he said.

Dr. Galasso testified that he relies upon the recommendations of his administrators and his function is simply to pass along the recommendations to the board.

With respect to the contested facts, I **FIND** that Ms. Hoey first learned of petitioner's pregnancy during her telephone conversation with petitioner on March 31, 1993. Ms. Hoey was a candid, sincere and credible witness and the documentary exhibits which were prepared at or about the time of the incidents corroborate her version of the events. Notably, there is no mention of the pregnancy in petitioner's letter to Ms. Hoey, dated February 16, 1993. There is likewise no mention of the pregnancy in her letter to Ms. Hoey of March 18, 1993. Ms. Hoey's notes of her conversation with petitioner on March 31, 1993 and April 5, 1993 do not recite any comments by petitioner that she had told Ms. Hoey about the pregnancy in February. In fact, the comments noted in the March 31, 1993 notes stating that petitioner had said about February 3, "I

knew I was pregnant that day”, and in the April 5, 1993 memo, stating that petitioner had indicated during the conversation that “someone” told her that Ms. Hoey knew she was pregnant, support the opposite conclusion.

Listed among Ms. Hoey’s concerns both in the notes she prepared over the weekend between April 2, and April 5 and also in her verbatim comments to the Board of Education was the incident of February 3, 1993 for which petitioner was reprimanded. In response to a question from the undersigned concerning what weight was given to that incident in her determination to recommend nonrenewal for petitioner, Ms. Hoey responded that even if the facts were different from what she had believed them to be, it would be irrelevant to her ultimate conclusion. I had asked this specific question because even after hearing all of the witnesses, I have my doubts concerning what actually happened on the morning of February 3, 1993. The other kindergarten teachers who were involved in the incident, Ms. Pestone, Ms. Grimmie and Ms. Pedrick, did not testify in the within proceedings, and Mr. Dennison’s testimony regarding the incident was not particularly specific or persuasive. In view of Ms. Hoey’s credible testimony that the absence of this particular incident from her list of concerns would make no difference in her ultimate recommendation, I conclude that it is not necessary to determine exactly what the facts were in connection with the February 3, 1993 incident.

With respect to the question of how petitioner solicited letters of support from the parents, petitioner testified that although she had written R-11 in evidence, a letter addressed, “Dear Parents,” dated April 19, 1993, that she had not in fact sent the letter home with the children but rather had telephoned certain parents to ask for their support. Ms. Entrikan, however, testified that it was her responsibility to put any papers which were to go home with the children into their folders and that she personally had placed R-11 in the children’s folders, so she was fairly certain that letter had gone home with the children. Dr. Galasso had testified that in his opinion, children should not be involved in adult issues and that if the letter had gone home with the children and responses were sent back with the children, he would consider it unprofessional. He indicated that during a meeting he called to determine how the letter had been distributed, petitioner had denied that she sent it home and he had merely accepted what she said rather than

to continue to make an issue out of it. He further testified that the issue of the letter going home was not a reason for petitioner's nonrenewal, obviously, since it came after the nonrenewal vote, but that the letter writing incident had solidified his determination to support the recommendations of his administrators and ask the Board to affirm their decision after the Donaldson hearing in June of 1993. With respect to this issue, although it does not appear to be of major significance, I **CONCLUDE** that petitioner was less than candid in her testimony that she never sent the letter home. It certainly appears from the testimony of Ms. Entriakan and from the fact that the April 19, 1993 letter came into the hands of the administration somehow, without petitioner having given it to them, that the letter had been distributed.

Finally, although the board members certainly knew before they voted on April 5, 1993, that petitioner was pregnant because she told them so that evening, there is no evidence from which to conclude that respondent's determination was based upon anything other than their Assistant Superintendent's comments and recommendation to them. Ms. Hoey testified that the board had never rejected her recommendations and the May 11, 1993 letter from respondent to petitioner sets forth the same reasons for nonrenewal Ms. Hoey read on April 5, 1993. Accordingly, I **FIND** that respondent's actions were based upon Ms. Hoey's recommendations.

APPLICABLE LAW AND DISCUSSION

Absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board. Dore v. Bedminster Township Board of Education, 185 N.J. Super. 447, 456 (App. Div. 1982). The New Jersey Law Against Discrimination (LAD) is one such legislative pronouncement which circumscribes the breadth of the board's discretionary authority by establishing a list of proscribed reasons for nonrenewal. Under N.J.S.A. 10:5-12a, it is unlawful for "an employer, because of the . . . sex . . . of any individual . . . to refuse to hire or employ or to bar or to discharge . . . from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment . . ." Unquestionably, discrimination because of pregnancy is

discrimination on the basis of sex. Castellano v. Linden Board of Education, 79 N.J. 407 (1979), Gilchrist v. Haddonfield Board of Education, 155 N.J. Super. 358 (App. Div. 1978). Brenda Esher v. Brad's Red Tavern, 94 N.J.A.R. 2d (CRT)45. The burden of proof in this matter is upon petitioner to establish that her pregnancy was "a determinative factor" in the decision-making process to deny her tenure. Slohoda v. U.P.S., 207 N.J. Super. 145, 154-155 (App. Div. 1986), certif. denied 104 N.J. 400 (1986).

At the end of petitioner's case in chief in this matter, I denied respondent's motion to dismiss for failure to state a prima facie case. At the time of her nonrenewal, petitioner was pregnant; she was performing her job at a level which, based upon her written evaluations, was at least satisfactory; she was discharged from her employment; and finally, she was replaced by a worker who was not pregnant and was probably not likely to be; although Ms. Hauser's age cannot be determined with any specificity from the facts in the record, her employment application indicates that she graduated from college in 1973 which would most probably make her forty-something in 1993 at the time she was hired to replace petitioner. See Peper v. Princeton University Board of Trustees, 77 N.J. 55 (1978) and Goodman v. London Metals Exchange, Inc., 86 N.J. 19 (1981). Any more detailed discussion of whether petitioner established a prima facie case is unnecessary once respondent has articulated its asserted, legitimate nondiscriminatory reasons for the employment action. U. S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 75 L.Ed.2d 403, 410 (1983). The task of the finder of fact at that point is to "decide which party's explanation of the employer's motivation it believes." Id. at 411. Petitioner can prevail either directly by persuading the judge that a discriminatory reason most likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 67 L.Ed.2d 207, 217 (1981). The determination that a prima facie case had been established herein shifted the burden of moving forward with the evidence to respondent, but petitioner retains the burden to persuade by a preponderance of the evidence that unlawful discrimination has occurred. Aikens, supra, at 410, quoting Burdine.

Since I have found as a matter of fact in the within proceedings that respondent's determination to deny tenure to petitioner was based upon the recommendation of Patricia Hoey and since I have determined as a matter of fact that Patricia Hoey was unaware of petitioner's pregnancy at the time she made her initial recommendation for nonrenewal, petitioner cannot prevail in this matter. Petitioner has argued that her evaluations were exemplary until she announced her pregnancy. A review of the extensive documentary evidence in this matter in conjunction with Ms. Hoey's credible testimony reveals, however, that comments critical of petitioner's performance had been made in her written evaluations throughout the years, notwithstanding that petitioner's performance in general was satisfactory and continued to be satisfactory throughout the course of her employment. A board of education is not required to offer a tenure contract to a teacher whose evaluations have been satisfactory or even to a teacher whose evaluations have been "good" or "excellent." "The board's determination not to grant tenure need not be grounded on unsatisfactory classroom or professional performance for there are many unrelated but nonetheless equally valid reasons why a board, having had the benefits of observation during a probationary period, may conclude that tenure should not be granted." Donaldson v. Bd. of Ed. of No. Wildwood, 65 N.J. 236, 241 (1974).

The function of the Commissioner of Education in reviewing the reasons articulated by a board of education in support of its discretionary decision is not to assess whether respondent's decision was wise or whether the reasons were good or even adequate. The Commissioner need determine only whether the reasons given were advanced in good faith, *i.e.*, they were not willfully false or a pretext for some unlawful, arbitrary or capricious motivation. In the present matter I am satisfied that the reasons articulated by Ms. Hoey in her statement to the board of education and adopted by the board of education and issued to petitioner in the letter of May 11, 1993 were the genuine reasons for their dissatisfaction with petitioner. I **CONCLUDE** that not only was petitioner's pregnancy not "a determinative factor" but it was not a factor at all. Ms. Hoey's testimony in this regard was very convincing, especially when she indicated, in response to a question from the undersigned, that after she found out about petitioner's pregnancy, she considered whether she should change her recommendation out of empathy for petitioner's financial situation and her need for medical benefits. Ms. Hoey's determination that the

pregnancy should not be a factor in the decision at all, either for or against renewal of her contract, was the correct decision, the one compelled both by law and by professional standards. Petitioner's argument that the three teachers discussed by Ms. Hoey who had been granted tenure contracts while they were pregnant had created administrative and personnel headaches for respondent either by not returning to their jobs or by asking for additional leave, thereby causing Ms. Hoey to recommend against petitioner in order to avoid further personnel headaches, is not very persuasive when examined in the context of an entire school system where most of the employees are female and vacancies, either temporary or permanent, due to maternity/disability leaves, are commonplace. There is absolutely no basis for concluding that petitioner was the victim of unlawful discrimination. For all of the foregoing reasons, it is hereby **ORDERED** that the amended petition filed with the Commissioner is hereby **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Jan. 27, 1995
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

1/30/95
DATE

Step R Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 03 1995
DATE

Jeff S. Main
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

EXHIBITS IN EVIDENCE

For petitioner:

- P-1 Resume of Margaret E. Daly
- P-2A Petitioner's Formal Written Evaluations for 1990-91 (10 pages)
- P-2B Petitioner's Formal Written Evaluations for 1991-92 (8 pages)
- P-2C Petitioner's Formal Written Evaluations for 1992-93 (6 pages)
- P-2D Letters and cards from parents of children in petitioner's class April - May, 1993 (7 envelopes)
- P-3 Letter of reprimand from Ms. Hoey to petitioner, dated 2/8/93
- P-4 Letter from petitioner to Ms. Hoey, dated February 16, 1993
- P-5 Letter from petitioner to Ms. Hoey, dated March 15, 1993 (2 pages)
- P-6 Letter from respondent to petitioner, dated May 11, 1993
- P-7 Letter from William T. Dennison, Principal, to Dr. Galasso, Superintendent, dated March 30, 1993
- P-8 Respondent's answers to interrogatories (10 pages)
- P-9 Personnel Record of petitioner
- P-10 Cover letters for resumes sent out by petitioner July 16, 1993 through June 1994 (42 pages)
- P-11 Letter from respondent to petitioner, dated July 29, 1994 (5 pages)
- P-12 Letter from respondent to petitioner, dated June 21, 1993
- P-13 Memorandum to file, superintendent's office, dated April 2, 1993
- P-14 Teacher Application completed by Janice G. Hauser (4 pages)

For respondent:

- R-1 Letter from respondent to petitioner, dated March 31, 1993
- R-2 Letter from respondent to petitioner, dated April 16, 1991

- R-3 Letter from respondent to petitioner, dated April 21, 1992
- R-4 Letter from respondent to petitioner, dated April 6, 1993
- R-5 Winslow Township Board of Education Regular Meeting and Public Hearing Minutes from April 5, 1993 (4 pages)
- R-6 Letter from William T. Dennison, Principal, to petitioner, dated March 30, 1993
- R-7 Letter from petitioner to Dr. Galasso, dated April 2, 1993
- R-8 Photocopy of handwritten comments by Patricia Hoey (4 pages)
- R-9 Letter from petitioner to respondent, dated April 13, 1993
- R-10 Letter from respondent to petitioner, dated April 26, 1993
- R-11 Photocopy of handwritten letter from petitioner addressed "Dear Parents", dated April 19, 1993
- R-13 Memorandum from Mr. Dennison to petitioner, dated May 13, 1993
- R-14 Letter from respondent to petitioner, dated May 14, 1993
- R-15 Executive Session Minutes from June 14, 1993 (2 pages)
- R-16 Letter from respondent to petitioner, dated June 16, 1993
- R-17 Petitioner's Medical Records, March 10, 1993 through October 27, 1993 (10 pages)
- R-18 Last page of November 13, 1990 Written Evaluation
- R-20 First page of petitioner's Federal Income Tax Return 1990
- R-21 First page of petitioner's Federal Income Tax Return 1993
- R-22 Petitioner's W2 Form for 1993
- R-23 First page of petitioner's Federal Income Tax Return 1992
- R-24 Petitioner's W2 Forms 1991 and 1992
- R-25 Memorandum from Ms. Hoey to Dr. Galasso, Superintendent, dated March 31, 1993
- R-26 Curriculum Vitae of Patricia Hoey (2 pages)
- R-27 Last page of petitioner's Formal Written Evaluation April 2, 1991
- R-28 Handwritten note to file 3/31/93 (3 pages)
- R-29 Handwritten notes of Patricia Hoey (4 pages)

- R-30 Handwritten notes of Patricia Hoey concerning phone conversation with petitioner on 4-5-93 (3 pages)
- R-31 Letter to Mr. Dennison from parents, dated December 20, 1992 re: Janice Hauser (2 pages)
- R-32 Performance Evaluation Report for Janice Hauser 1992-93 school year (4 pages)

EXHIBITS FOR IDENTIFICATION ONLY

For respondent:

- R-12 Letter from Dr. Galasso to petitioner, dated May 18, 1993 (4 pages)
- R-19 Employee Health History 1990

WITNESSES

For petitioner:

Margaret E. Daly
Jennifer A. Entrikan

For respondent:

Bernandette C. Druding
Carol A. Wood
Kathleen M. Stillwell
Joan Ruberton
Barry J. Galasso, ED.D
Patricia R. Hoey
William T. Dennison

MARGARET E. DALY, :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE TOWN- : DECISION
 SHIP OF WINSLOW, CAMDEN COUNTY, :
 RESPONDENT. :
 _____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

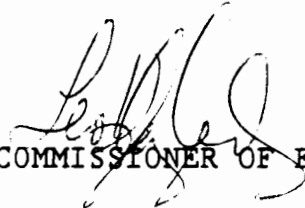
Upon a careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge that there is no basis for concluding that petitioner was the victim of unlawful discrimination or that the Board's action in not renewing her employment contract was otherwise arbitrary, capricious or unreasonable.

Accordingly, the recommended decision of the Office of Administrative Law is adopted as the final decision in this matter for the reasons clearly articulated in the initial decision and the instant Petition of Appeal is dismissed, with prejudice.

IT IS SO ORDERED.

MARCH 3, 1995

DATE OF MAILING - MARCH 3, 1995



COMMISSIONER OF EDUCATION

DHP # 520-94
SB # 79-95

IN THE MATTER OF THE DISQUALIFI- :
CATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF GEORGE CAMPBELL, JR. : DECISION
_____ :

Decided by the Deputy Commissioner of Education, February 7, 1995

For the Petitioner-Appellant, George Campbell, Jr., pro se

For the Respondent-Respondent, Nancy Kaplen, Deputy Attorney
General (Deborah T. Poritz, Attorney General of New Jersey)

On July 13, 1995, George Campbell, Jr. (hereinafter "appellant") filed a notice of appeal to the State Board of Education from a letter decision of the Deputy Commissioner dated February 7, 1995, which upheld his disqualification from school employment as a bus driver after a criminal history review conducted pursuant to N.J.S.A. 18A:39-19.1 revealed a conviction for possession of cocaine with intent to distribute.¹ By letter dated July 24, appellant was notified that his appeal had been due within 30 days of the decision from which he was appealing and that this matter was being referred to our Legal Committee for consideration of the effect of his failure to file

¹ We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws..." N.J.S.A. 18A:4-34.

Oct. 5, 1995

timely notice. Appellant was given until August 12 to file any materials necessary to clarify the circumstances of his late filing. He, however, has failed to file a clarification or to otherwise respond to that letter.

Pursuant to N.J.S.A. 18A:6-28, appeals to the State Board must be taken "within 30 days after the decision appealed from is filed." The State Board may not grant extensions. N.J.A.C. 6:2-1.5(a). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6:24-1.2; N.J.A.C. 6:24-1.15, the time limit within which an appeal must be taken to the State Board is statutory, and, given the jurisdictional nature of the statutory time limit, the State Board lacks the authority to extend it. Mount Pleasant-Blythedale Union Free School District v. New Jersey Department of Education, Docket #A-2180-89T1, slip op. at 5 (App. Div. 1990).

We conclude that the statutory filing requirement with which the appellant failed to comply is of such significance that we dismiss the appeal. In Yorke v. Board of Education of the Township of Piscataway, decided by the State Board of Education, July 6, 1988, aff'd, Docket #A-5912-87T1 (App. Div. 1989), the Court upheld the dismissal of an appeal by the State Board where it found that the notice of appeal had been filed one day late by appellant's counsel who alleged that he had misread or misunderstood the applicable regulations. The Court added that even if the statute could be construed to permit enlargement of the time for filing an appeal, the appellant therein had failed to establish good cause.

In this case, the Deputy Commissioner's decision was rendered on February 7, 1995 and mailed to the parties on that date. Accordingly, pursuant to

N.J.A.C. 6:2-1.4, the decision appealed from was deemed filed on February 10. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6:2-1.3(a); N.J.A.C. 6:2-1.4(a), as computed under N.J.A.C. 6:2-1.4(b), the appellant was required to file his notice of appeal to the State Board on or before March 13, 1995. The appellant's notice of appeal was dated June 30, 1995 and filed on July 13.

Even if N.J.S.A. 18A:6-28 can be construed to provide us with the authority to enlarge the time limit for filing an appeal, we find no substantive basis to warrant doing so in this particular instance. Appellant has failed to provide an explanation for his late filing or to otherwise respond to our request for clarification of the circumstances surrounding that filing.

Accordingly, we dismiss the appeal in this matter for failure to file notice thereof within the statutory time limit as computed under the applicable regulations.

October 5, 1995

Date of mailing

OCT 10 1995
OCT 10 1995

E.P. REID, INC.,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	DECISION
THE CITY OF JERSEY CITY, HUDSON	:	
COUNTY,	:	
	:	
RESPONDENT.	:	
	:	
_____	:	

MARCH 3, 1995


E.P. REID, INC., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF : DECISION
THE CITY OF JERSEY CITY, HUDSON :
COUNTY, :
RESPONDENT. :
_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

MARCH 3, 1995

DATE OF MAILING - MARCH 3, 1995


COMMISSIONER OF EDUCATION

81-95


PAUL INNOCENZI ,	:	
	:	
PETITIONER ,	:	
	:	
V .	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY OF	:	DECISION
TRENTON , MERCER COUNTY ,	:	
	:	
RESPONDENT .	:	
	:	
_____	:	

MARCH 3, 1995

PAUL INNOCENZI,	:	
	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF	:	DECISION
TRENTON, MERCER COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

MARCH 3, 1995

DATE OF MAILING - MARCH 3, 1995

82-95

RITA URBANSKI, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

UNION COUNTY VOCATIONAL-TECHNICAL : DECISION

SCHOOLS, UNION COUNTY, :

RESPONDENT. :

_____ :

SYNOPSIS

Petitioner, tenured teaching staff member, contested Board's action in withholding her employment and adjustment increments for the 1993-94 school year for alleged unsatisfactory performance.

In light of testimony and exhibits, ALJ concluded that Board properly withheld petitioner's increments, finding that petitioner failed to properly supervise her students, failed to implement procedures to prevent theft in the student-run retail store, and disregarded administrative directives. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

MARCH 6, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5732-94

AGENCY DKT. NO. 149-5/94

RITA URBANSKI,

Petitioner,

v.

**UNION COUNTY VOCATIONAL
TECHNICAL SCHOOL,**

Respondent.

Randi Doner, Esq., attorney for petitioner (Balk, Oxfeld, Mandell & Cohen, attorneys)

Judith A. Babinski, Esq., attorney for respondent (Bivona, Cohen, Kunzman, Coley, Yospin, Bernstein & DiFrancesco, attorneys)

Record Closed: December 14, 1994

Decided: January 17, 1995

BEFORE MARIE P. SIMONELLI, A.L.J.

STATEMENT OF THE CASE

Petitioner, Rita Urbanski (Ms. Urbanski), appeals the decision of respondent Union County Vocational Technical School (the Vocational School) to withhold her 1993-94 salary employment increment and adjustment increment pursuant to *N.J.S.A.* 18A:29-14. The Vocational School based its decision on Ms. Urbanski's teaching performance during the 1992-93 school year.

PROCEDURAL HISTORY

On May 6, 1994, Ms. Urbanski filed a Petition of Appeal. The Vocational School filed an Answer to Appeal on June 2, 1994. The Department of Education transmitted the matter to the Office of Administrative Law (OAL) on June 10, 1994 for a hearing as a contested case.

The OAL held a hearing on November 29 and 30, 1994. The record closed on December 14, 1994 after the submission of all post-hearing Briefs.

FINDINGS OF FACT

Having heard the witnesses and reviewed the Exhibits, I **FIND** the following **FACTS**:

Ms. Urbanski began working at the Vocational School in 1988. She presently is a tenured teacher (J-1: Stipulation of Facts, No. 1). During the 1991-92, 1992-93 and 1993-94 school years, Ms. Urbanski was the Retail Store Instructor (J-1, No. 2).

Ms. Urbanski supervised a student-run retail store where students could purchase various items. During the 1991-92 and 1992-93 school years, the store had cash receipts of between \$20 and \$50 per day. As part of the retail curriculum, Ms. Urbanski instructed the students in her class on how to handle cash transactions accurately and on how to detect shoplifting (R-5: Outline For Retail/Clerical Curriculum, Unit VIII).

Prior to September 24, 1991, Ms. Urbanski had two cash registers in the store. She also had assigned a student to answer the telephone in her office located inside the store. At the end of each day, Ms. Urbanski and her students would count the money from the sales that day. She would leave \$33 in one cash register and \$10 in the other. Ms. Urbanski would then place the remaining money into a cash box, she would lock the cash box and place it into a filing cabinet located in her office, she would lock the filing cabinet and then she would lock her office. Once a week, Ms. Urbanski brought the money to the Special Needs Office for deposit.

On September 24, 1991, a theft of \$73 occurred at the store. Ms. Urbanski reported the theft to the Principal, Carol A. Hopper (Ms. Hopper). After this theft, Ms. Urbanski no longer allowed students in her office for any reason. In addition, on Ms. Hopper's instruction, Ms. Urbanski eliminated one of the cash registers.

On October 3, 1991, a theft of \$80 occurred at the store. Ms. Urbanski claimed that she saw a certain student steal the money. The student denied taking the money. The Vocational School's Social Worker, Evelyn Jeffrey (Ms. Jeffrey) searched the student and found no money on her. The police were called and they did not search the student because they decided that Ms. Jeffrey had done a thorough search.

By Memorandum, dated October 7, 1991, Ms. Hopper instructed Ms. Urbanski to institute the following procedures to avoid future thefts:

1. The office and file cabinets must be locked at all times.
2. Students are to be closely supervised both near the money and the merchandise.
3. You were to order a new locking cash box for your change and bills.
4. You were to arrange for ongoing inservice for your students regarding the consequences of theft.

(P-6: Memorandum, dated October 7, 1991, from Ms. Hopper to Ms. Urbanski). Thereafter, Ms. Urbanski met with her students, she got a new locking cash box, she had the police come to talk to her students, she did a lesson on shoplifting and she cut articles out of the newspaper about employee theft.

On February 13, 1992, the Interim Business Administrator, Paul E. Griggs (Mr. Griggs), directed all members of the staff at the Vocational School that, in order to provide maximum security, cash receipts "*must* be received and counted by the business office on a *daily basis*." (R-2: Memorandum, dated February 13, 1992, from Mr. Griggs to Members of the Staff) (Emphasis supplied). Ms. Urbanski did not interpret this directive to mean that she had to make daily deposits.

On February 14, 1992, a theft of \$50 occurred at the store. On February 21, 1992, Ms. Hopper instructed Ms. Urbanski to implement additional procedures to avoid future thefts, some of which were:

2. There should never be more than twenty dollars in the cash register at any given time.
3. Any amount which exceeds twenty should be placed in a locking cash box. This should then be brought to the office for safekeeping.
6. The room should be rearranged so that the cash register is not out in the open and accessible to theft by a customer. All money should be transacted at one and only one register. The register should be in clear view of the teacher.
8. Students in your class should be provided the opportunity to participate in educational programs which reflect real life consequences for theft. There are programs similar to the "Scared Straight" program which are provided by the prosecutor's office. As a teacher, you could arrange to have your class participate in these programs.

(P-7: Memorandum, dated February 21, 1992, from Ms. Hopper to Ms. Urbanski). Thereafter, Ms. Urbanski implemented some of the procedures. Among other things, she did not rearrange the store and she did not have her students participate in programs similar to "Scared Straight."

On April 21, 1992, Ms. Hopper instructed all staff that, "Effective Monday, April 27, 1992, all money which is collected in the school will be deposited at the Business Office by the teacher or their designee". (R-3: Memorandum, dated April 21, 1992, from Ms. Hopper to All Staff). Despite Mr. Griggs' directive that deposits should be made in the Business Office on a daily basis (R-2), Ms. Urbanski also did not interpret Ms. Hopper's instruction to mean that she had to make daily deposits.

On Thursday, February 11, 1993, Ms. Urbanski fell in the store. The next day, which was a Friday, she reported to school, but she left early because she was in pain as a result of being injured in the fall the prior day. She had over \$400 in cash in the store at the time and she locked it in the cash box. She claimed that she placed the cash box into the filing cabinet in her office and locked the filing cabinet. She then locked the office and left the Vocational School without telling anyone about the cash. She also did not ask anyone to help her with the cash despite the fact that other staff members had substituted or assisted her at the store in the past and she could have called one of them for help.

At the time Ms. Urbanski left the Vocational School, she knew that it would be closed on Monday and Tuesday, February 15 and 16, 1993, for the holidays and that the cash would be left in the store over a long weekend. In addition, due to her injury, she was out of work until February 22, 1993. During this time, she never notified anyone at the Vocational School that she had left the cash in the store.

During Ms. Urbanski's absence, the Pre-Vocational Instructor, Daniel Feldman (Mr. Feldman), substituted for her. When Ms. Urbanski returned on February 22, 1993, she did not check the money. The next day, she counted the money and discovered the theft of \$397.68. She reported the theft to the Assistant Principal and the police were called.

There are five other departments in the Vocational School that deal with cash receipts. They are Horticulture, Foods, Food Service, Baking and Shop Service. None of these departments had any thefts of cash. In addition, the Instructor of Foods, Vesta Winston, testified that she made deposits on a daily basis and that she had cash receipts of between \$250 and \$300 per day. The Horticulture Instructor, Bonnie Baldasare, testified that the procedures for depositing cash receipts changed when Mr. Griggs came to the Vocational School. He instructed the staff to make daily deposits of any cash receipts over \$20. She did not make daily deposits because she did not have cash receipts of over \$20.

The Superintendent, Vito A. Gagliardi, Ed.D. (Dr. Gagliardi), met with Ms. Urbanski on April 22, 1993. He questioned Ms. Urbanski about why she had not complied with Mr. Griggs' directive and Ms. Hopper's instructions. Ms. Urbanski responded that she did not receive any memorandum or directive instructing her to make daily deposits. Dr. Gagliardi suggested to Ms. Urbanski that, even without a directive, with the history of thefts in the store (four in seventeen months and three in one school year), it would have been prudent for her to bring the money to the Business Office for safekeeping on a daily basis. (See also: R-10: Letter, dated April 26, 1993, from Dr. Gagliardi to Ms. Urbanski.)

Dr. Gagliardi found Ms. Urbanski's response to be unacceptable. He, thus, recommended to the Board of Education of the Vocational School (the Board) that it withhold her salary

increment and adjustment increment for the 1993-94 school year. On August 5, 1993, the Board voted to withhold Ms. Urbanski's salary increment and adjustment increment for the 1993-94 school year (J-1, No. 7). The Board found that Ms. Urbanski failed to properly supervise students, she failed to implement procedures to prevent theft and she disregarded administrative authority by refusing to comply with instructions and directives given to her by Mr. Griggs and Ms. Hopper (R-8: Resolution).

DISCUSSION AND CONCLUSION

Under *N.J.S.A.* 18A:29-13, the Board has the power to give annual increments. An award of an annual increment is not a matter of statutory right. Rather, *N.J.S.A.* 18A:29-14 permits the Board to withhold an increment "for inefficiency or other good cause." An annual increment "is in the nature of a reward for meritorious service" and is "subject to annual evaluation of teacher performance." *North Plainfield Education Association v. Board of Education*, 96 *N.J.* 587, 593-594 (1984).

The Board has the statutory authority to establish the criteria by which it evaluates the performance of a teacher. The Board's determination that a teacher has not satisfactorily performed and is, thus, not entitled to an annual increment will not be overturned unless it is found to be arbitrary, without rational basis or induced by improper motives. *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). There must be a reasonable basis for the Board's conclusion. *Id.* at 295. It is Ms. Urbanski's burden of proving unreasonableness. *Id.* at 297.

In the present case, the Board determined that Ms. Urbanski would not receive an annual increment for the 1993-94 school year because she failed to follow directives and instructions. The facts in this case support that determination. Ms. Urbanski had received several directives and instructions. Although she followed some of them, she clearly did not follow the directive that she should not keep cash in the retail store. Mr. Griggs' Memorandum, dated February 13, 1992 (R-2), was crystal clear. Cash receipts were to be deposited at the Business Office on a *daily* basis. It is inconceivable that Ms. Urbanski or anyone one else could have interpreted this

directive any other way. Ms. Hopper's Memorandum, dated February 21, 1992 (P-7), also was crystal clear. Ms. Urbanski was to bring any cash receipt in excess of \$20 to the office for safekeeping.

In violation of the clear directives given to her, Ms. Urbanski left in excess of \$400 in the retail store. She left it knowing that it would be there over a long weekend. While it is understandable that Ms. Urbanski may have left the Vocational School in great haste because she was in pain from the injury she sustained, it is inexcusable that she never contacted anyone at the Vocational School during her absence to assure that the money was safe. It was of no value that Ms. Urbanski may have locked the money in a cash box, then locked the cash box in a cabinet in her office and then locked the office. The money never should have been left in the retail store at all. The theft of this money occurred because of Ms. Urbanski's failure to follow directives that Mr. Griggs and Ms. Hopper gave her.

By reason of the foregoing, I **CONCLUDE** that the Board properly withheld Ms. Urbanski's salary increment and adjustment increment for the 1993-94 school year. I further conclude that Ms. Urbanski has not proved that the Board's decision was arbitrary, without rational basis or induced by improper motive.

ORDER

Therefore, I **ORDER** that the Board's decision to withhold Ms. Urbanski's salary increment and adjustment increment for the 1993-94 school year be and hereby is **AFFIRMED**, Ms. Urbanski's appeal be and hereby is **DENIED** and this matter be and hereby is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.


Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Jan. 17, 1995
DATE



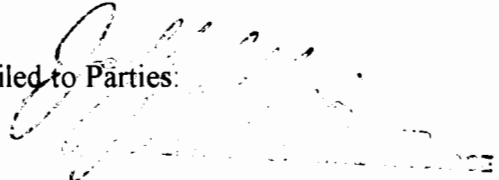
MARIE P. SIMONELLI, A.L.J.

Jan 26, 1995
DATE

Receipt Acknowledged:


DEPARTMENT OF EDUCATION

JAN 31 1995
DATE

Mailed to Parties:


OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Witnesses:

For Petitioner:

Daniel Feldman, former Pre-Vocational Instructor at the Vocational School
Mary Egan, former Retail Marketing Instructor at the Vocational School
Elizabeth D. Lally, former Vocational School Nurse
Jane McKernan, Cafeteria Worker
Vesta Winston, Foods Instructor
Ruth Young, former Handicapped Teacher at the Vocational School
Bonnie Baldasare, Horticulture Instructor
Rita Urbanski, petitioner

For Respondent:

Evelyn Jeffrey, Social Worker and Counselor
Carol A. Hopper, Principal
Vito A. Gagliardi, former Superintendent of the Vocational School

Exhibits:

J-1 Stipulation of Facts
P-1 Mr. Feldman's Notes, dated 2/17/93
P-4 Memorandum, dated February 19, 1992, from Mr. Griggs to Ms. Urbanski, et al.
P-5 Memorandum, dated March 24, 1993, from Mr. Griggs to All Staff Members
P-6 Memorandum, dated October 7, 1991, from Ms. Hopper to Ms. Urbanski
P-7 Memorandum, dated February 21, 1992, from Ms. Hopper to Ms. Urbanski
P-8 Ms. Urbanski's Handwritten Notes, dated February 14, 1992
P-9 Injury Visits Report, dated February 19, 1993
P-10 Memorandum, dated February 25, 1993, from Ms. Urbanski to Mr. Motus
P-11 Memorandum, dated March 15, 1993, from Ms. Urbanski to Ms. Hopper
P-12 Memorandum, dated April 29, 1993, from Ms. Urbanski to Mr. Griggs
P-13 Memorandum, dated May 6, 1993, from Ms. Urbanski to Mr. Motus
P-14 Evaluation, dated February 12, 1992
P-15 Evaluation, dated January 6, 1993

- R-1 Police Report, dated February 24, 1993
- R-2 Memorandum, dated February 13, 1992, from Mr. Griggs to Members of the Staff
- R-3 Memorandum, dated April 21, 1992, from Ms. Hopper to All Staff
- R-4 Memorandum, dated March 24, 1993, from Mr. Griggs to All Staff Members
- R-5 Outline For Retail/Clerical Curriculum
- R-6 Outline For Retail/Clerical Curriculum
- R-7 Memorandum, dated February 23, 1993, from Ms. Hopper to Ms. Urbanski
- R-8 Board of Education Resolution
- R-9 Memorandum, dated April 21, 1992, from Ms. Hopper to All Staff
- R-10 Letter, dated April 26, 1993, from Dr. Gagliardi to Ms. Urbanski

RITA URBANSKI, :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 UNION COUNTY VOCATIONAL-TECHNICAL : DECISION
 SCHOOLS, UNION COUNTY, :
 RESPONDENT. :
 _____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed pursuant to N.J.A.C. 1:1-18.4.

Petitioner's exceptions are essentially a verbatim recitation of her post-hearing summation submitted to the Administrative Law Judge presenting her version of testimony elicited at the OAL hearing which she contends establishes that the Board's action in withholding her employment increment was arbitrary, capricious and unreasonable. Petitioner maintains that the ALJ herein "virtually ignored two days of testimony in issuing her ruling***" (Petitioner's Exceptions, at p. 22) and, therefore, urges the Commissioner to overturn the ALJ's decision and restore her increment.

In reply, the Board argues:

After a two (2) day extensive hearing in which testimony was heard regarding both sides of the

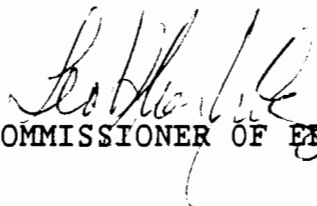
increment withholding issue in which twenty-four (24) exhibits were submitted into evidence and written legal arguments were considered in the form of Summations, Judge Simonelli correctly found that Respondent properly withheld Petitioner's salary and adjustment increments for the 1993-94 school year.***

(Board's Reply Exceptions, at p. 7)

The Board, therefore, urges adoption of the initial decision.

Upon a careful and independent review of the record of this matter, the Commissioner concurs with the findings and conclusions of the ALJ for the reasons expressed by her in the initial decision. With respect to the exceptions of petitioner, the Commissioner notes that without a review of the transcripts of this matter, which were not a part of the record before him, it is not possible to consider petitioner's claims with respect to proffered testimony. However, it is clear that the existing record provides no cause to challenge any of the determinations or credibility assessments made by the ALJ.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter and the within Petition of Appeal is hereby dismissed.


COMMISSIONER OF EDUCATION

MARCH 6, 1995

DATE OF MAILING MARCH 6, 1995

EDU #5732-94
C # 82-95
SB # 28-95

RITA URBANSKI,	:	
	:	
PETITIONER-APPELLANT,	:	
	:	
V.	:	STATE BOARD OF EDUCATION
	:	
UNION COUNTY VOCATIONAL-TECH-	:	DECISION
NICAL SCHOOLS, UNION COUNTY,	:	
	:	
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, March 6, 1995

For the Petitioner-Appellant, Rita Urbanski, pro se

For the Respondent-Respondent, Bivona, Cohen, Kunzman, Coley, Yospin, Bernstein & DiFrancesco (Judith A. Babinski, Esq., of Counsel)

The decision of the Commissioner of Education dismissing petitioner's challenge to the Board's action in withholding her salary increments for the 1993-94 school year is affirmed, as clarified herein. After reviewing the record before us,¹ we agree that petitioner has failed to demonstrate that the Board's action was arbitrary, capricious or unreasonable. Although, we disagree with the ALJ's finding, which the Commissioner adopted, that memos received by the petitioner in 1992 were "crystal clear" in directing her to bring cash receipts from the student-run retail store she

¹ We note that the parties have not provided us with a copy of the transcripts from the hearing held in the Office of Administrative Law in this matter.

Apr. 2, 1995

supervised to the school's business office on a daily basis for safekeeping, a review of the record indicates that the Board's action herein was predicated on petitioner's performance, rather than insubordination. In that context, it is undisputed that, despite several cash thefts from the store and the resultant concerns conveyed to petitioner by the school's principal, petitioner continued to leave daily cash receipts in her office, resulting in an additional loss of nearly \$400 in February 1993.

We also deny petitioner's motion to supplement the record on appeal pursuant to N.J.A.C. 6:2-1.9. Petitioner has not demonstrated that the documents with which she seeks to supplement the record are material to assessing the propriety of the Board's action in withholding her increment.

August 2, 1995

Date of mailing AUG 04 1995

SB # 82-95

IN THE MATTER OF THE APPLICATION :
TO ESTABLISH A NORTH JERSEY :
JOINTURE COMMISSION BY THE :
SCHOOL DISTRICTS OF BOGOTA, :
CLIFFSIDE PARK, EDGEWATER, :
ENGLEWOOD CLIFFS, FAIRVIEW, :
LITTLE FERRY, PALISADES PARK AND :
RIDGEFIELD PARK, BERGEN COUNTY. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, May 19, 1995

For the Petitioners-Appellants, Martin R. Pachman, P.C. (Robin T. McMahon, Esq., of Counsel)

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney General (Deborah T. Poritz, Attorney General of New Jersey)

This is an appeal from a determination by the Commissioner of Education to reject the application of eight school districts to establish a jointure commission pursuant to N.J.S.A. 18A:46-24 through N.J.S.A. 18A:46-27.

On November 7, 1994, the petitioning school districts requested approval by an application filed with the Bergen County Superintendent, accompanied by resolutions adopted by each district board. The eight districts had been obtaining services through an informal consortium of school districts, but, as stated in their application, had been led to seek the creation of a consortium because of the demand for more efficient services and greater responsiveness.

By letter of May 19, 1995, the Commissioner informed the petitioning districts that he supported their intent to provide consolidation of services in the area of

2/2/86

special education in order to provide more effective and efficient programs. However, as expressed by the Commissioner in his letter, he determined that:

I cannot approve the request to establish another governance structure in order to bring about the establishment of effective and cost-efficient programs. This decision is based upon the existence of the South Bergen Jointure Commission, which I believe can be expanded without adding an additional governance structure and duplicating central office administrative positions.

The Commissioner advised the districts that he was requesting the coordinating county superintendent and the county superintendent to meet with their representatives and representatives of the South Bergen Jointure Commission to determine if an expansion would be advisable. The Commissioner's final determination was embodied in a letter on July 6, 1995, from Assistant Commissioner Peter B. Contini stating that "the decision made by Commissioner Klagholz in his letter of May 19, 1995, regarding the establishment of the North Jersey Jointure Commission, has not changed."

All eight districts have appealed the Commissioner's determination, requesting that the State Board set aside the Commissioner's decision and approve the formation of the North Jersey Jointure Commission. They assert that the county superintendent and the coordinating county superintendent explored the possibility of expanding the South Bergen Jointure Commission and determined that this was not a feasible option. They contend that the Commissioner therefore lacked any basis to refuse to reconsider his original denial of their application and that his determination constituted an abuse of his discretion.

We have reviewed this appeal carefully on the basis of the Commissioner's decision and the materials relating to that decision which were provided to us on behalf of the Commissioner. Although the Assistant Commissioner's letter of July 6, 1995, does not express a rationale for the Commissioner's determination, the Commissioner's letter of May 19, 1995, indicates that denial of the application was grounded in the feasibility of expanding the South Bergen Jointure Commssion to include the petitioning districts. In that the materials that were provided on behalf of the Commissioner do not include any documentation relating to the efforts of the county superintendent and the coordinating county superintendent to explore expansion of the South Bergen Jointure Commission or any conclusions they may have reached, we are unable to evaluate the substance of this appeal.

We therefore remand this matter to the Commissioner in order for him to provide the basis for his final determination and the record upon which he arrived at his decision. N.J.A.C. 6:2-1.8. We retain jurisdiction and defer our final resolution of this appeal pending completion of proceedings before the Commissioner pursuant to this remand.

Donald C. Addison, Jr., Wendel E. Daniels and Thomas P. McGough abstained.

February 7, 1996

Date of mailing FEB 09 1996

SB # 82-95

IN THE MATTER OF THE APPLICATION :
 TO ESTABLISH A NORTH JERSEY :
 JOINTURE COMMISSION BY THE :
 SCHOOL DISTRICTS OF BOGOTA, : STATE BOARD OF EDUCATION
 CLIFFSIDE PARK, EDGEWATER, :
 ENGLEWOOD CLIFFS, FAIRVIEW, : DECISION ON MOTION
 LITTLE FERRY, PALISADES PARK AND :
 RIDGEFIELD PARK, BERGEN COUNTY. :
 _____ :

Decided by the Commissioner of Education, May 19, 1995

Decided by the State Board of Education, February 7, 1996

Decision on remand by the Commissioner of Education, May 21, 1996

For the Petitioners-Appellants, Martin R. Pachman, P.C. (Robin T. McMahon, Esq., of Counsel)

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

This matter involves an appeal from a determination by the Commissioner of Education to reject the application of eight school districts to establish a jointure commission pursuant to N.J.S.A. 18A:46-24 through N.J.S.A. 18A:46-27.

On November 7, 1994, the petitioning school districts requested approval by an application filed with the Bergen County Superintendent, accompanied by resolutions adopted by each district board. The eight districts had been obtaining services through an informal consortium of school districts, but, as stated in their application, had been led to seek the creation of a consortium because of the demand for more efficient services and greater responsiveness.

8/7/96

By letter of May 19, 1995, the Commissioner informed the petitioning districts that he supported their intent to provide consolidation of services in the area of special education in order to provide more effective and efficient programs. However, as expressed by the Commissioner in his letter, he determined that:

I cannot approve the request to establish another governance structure in order to bring about the establishment of effective and cost-efficient programs. This decision is based upon the existence of the South Bergen Jointure Commission, which I believe can be expanded without adding an additional governance structure and duplicating central office administrative positions.

The Commissioner advised the districts that he was requesting the coordinating county superintendent and the county superintendent to meet with their representatives and representatives of the South Bergen Jointure Commission to determine if an expansion would be advisable. The Commissioner's final determination was embodied in a letter on July 6, 1995, from Assistant Commissioner Peter B. Contini stating that "the decision made by Commissioner Klagholz in his letter of May 19, 1995, regarding the establishment of the North Jersey Jointure Commission, has not changed."

All eight districts appealed the Commissioner's determination.

After reviewing the Commissioner's decision and the materials that had been provided to us on his behalf, we found that it was necessary for the Commissioner to provide us with the basis for his final determination and the record upon which he had arrived at his decision in order for us to be able to evaluate the substance of the appeal. Therefore, by decision of February 7, 1996, we retained jurisdiction over this matter, but remanded it to the Commissioner for that purpose.

By motion filed with the State Board on May 9, 1996, the petitioning districts sought an order requiring the Commissioner to comply with our decision and requested that we decide this matter on an expedited basis.

The Commissioner responded to our remand with a memorandum transmitted to us on May 21, 1996. In that memorandum, the Commissioner stated that his determination to deny the application to form a new jointure commission was based entirely on the application which had been submitted to him and rested solely on his conclusion that he could not approve the establishment of another governance structure.

By letter of May 24, 1996, the Commissioner sought dismissal of the motion on the grounds that it was moot because he had complied with the remand.

The petitioning districts counter that the motion is not moot because the Commissioner did not fully comply with the terms of our remand, contending that such compliance required him to provide documentation relating to the efforts of the county superintendent and the coordinating county superintendent to explore the expansion of the South Bergen Jointure Commission.

Regardless of whether or not the petitioning districts ultimately prevail on the merits of their appeal, we find that the Commissioner has complied with the terms of our remand and that their motion to compel compliance is therefore moot. By his memorandum of May 21, 1996, the Commissioner settled that his determination to deny the application by the petitioning districts to form a jointure commission was based solely on the application which they had submitted to him and that his decision was based on his belief that it was not necessary to create another governance structure in

order for them to achieve their goal, rather than on the existence of the South Bergen Jointure Commission. In that the Commissioner's memorandum clarifies that he did not consider any efforts by the coordinating county superintendent and the county superintendent to explore other alternatives in arriving at his decision, documentation relating to such efforts was outside the record before the Commissioner. Hence, the Commissioner did not fail to comply with the terms of our remand by not including such documentation in the materials he transmitted to the State Board pursuant to our remand. That being the case, the State Board of Education denies the motion of the petitioning districts to compel compliance and directs that briefing on the merits of this appeal proceed. Accordingly, the petitioning districts are directed to file a brief in support of their appeal, based on the record as now established by the Commissioner, within twenty days of this decision.

August 7, 1996

Date of mailing **AUG 09 1996**

SB # 82-95

IN THE MATTER OF THE APPLICATION :
 TO ESTABLISH A NORTH JERSEY :
 JOINTURE COMMISSION BY THE :
 SCHOOL DISTRICTS OF BOGOTA, STATE BOARD OF EDUCATION :
 CLIFFSIDE PARK, EDGEWATER, :
 ENGLEWOOD CLIFFS, FAIRVIEW, DECISION :
 LITTLE FERRY, PALISADES PARK AND :
 RIDGEFIELD PARK, BERGEN COUNTY. :

Decided by the Commissioner of Education, May 19, 1995

Decision by the State Board of Education, February 7, 1996

Decision on remand by the Commissioner of Education, May 21, 1996

Decision on motion by the State Board of Education, August 7, 1996

For the Petitioners-Appellants, Martin R. Pachman, P.C. (Robin T. McMahon, Esq., of Counsel)

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

This matter is before us for consideration of the substance of an appeal by eight school districts (hereinafter "petitioning districts") from a determination of the Commissioner of Education to reject their application to establish a jointure commission pursuant to N.J.S.A. 18A:46-24 through N.J.S.A. 18A:46-27.

The petitioning districts filed their application with the Bergen County Superintendent on November 7, 1994. They had been obtaining services through an informal consortium of school districts, but, as stated in their application, were led to seek the creation of a formal consortium because of the demand for more efficient services and greater responsiveness.

2/5/97

By letter of May 19, 1995, the Commissioner informed the petitioning districts that he supported their intent to provide consolidation of services in the area of special education in order to provide more effective and efficient programs. However, as expressed in his letter, the Commissioner found that:

I cannot approve the request to establish another governance structure in order to bring about the establishment of effective and cost-efficient programs. This decision is based upon the existence of the South Bergen Jointure Commission, which I believe can be expanded without adding an additional governance structure and duplicating central office administrative positions....

I trust you fully understand why the request to form the North Jersey Jointure Commission cannot be approved until these other options are explored fully.

In his letter, the Commissioner also advised the districts that he was requesting the coordinating county superintendent and the county superintendent to meet with their representatives and representatives of the South Bergen Jointure Commission to determine if an expansion of that jointure commission would be advisable. The Commissioner's final determination was embodied in a letter on July 6, 1995, from Assistant Commissioner Peter B. Contini stating that "the decision made by Commissioner Klagholz in his letter of May 19, 1995, regarding the establishment of the North Jersey Jointure Commission, has not changed."

All eight districts appealed the Commissioner's determination, requesting that the State Board set aside the Commissioner's decision and approve the formation of the North Jersey Jointure Commission.

As set forth in our decision of February 7, 1996, when we initially reviewed the appeal, we found that the Assistant Commissioner's letter of July 6, 1995 did not

express a rationale for the Commissioner's determination. We, however, concluded that the Commissioner's letter of May 19, 1995 indicated that his denial of the application was grounded in the feasibility of expanding the South Bergen Jointure Commission to include the petitioning districts. In that the Commissioner had not provided us with any documentation relating to the efforts of the county superintendent and the coordinating county superintendent to explore expansion of the South Bergen Jointure Commission or any conclusions they may have reached, we were unable to evaluate the substance of the appeal. Therefore, although we retained jurisdiction, we remanded the matter to the Commissioner so that he could provide us with the basis for his final determination and the record upon which it had been based.

The Commissioner responded to our remand with a memorandum transmitted to the State Board on May 21, 1996. In that memorandum, the Commissioner stated that his determination to deny the application to form a new jointure commission was based entirely on the application submitted to him and rested solely on his conclusion that he could not approve the establishment of another governance structure.

In the interim, the petitioning districts filed a motion with the State Board to compel the Commissioner to comply with the terms of our remand. In deciding that motion, we found that the Commissioner's memorandum of May 21, 1996 settled that his determination to deny the application by the petitioning districts to form a jointure commission had been based solely on the application which they had submitted and that his decision was based on the belief that it was not necessary to create another governance structure in order for them to achieve their goal. That being the case, we denied the motion and directed briefing on the merits of the appeal.

The petitioning districts argue that the Commissioner's decision to deny their application is arbitrary given the facts set forth in the application. They contend that these facts show that it would be more efficient and economical to provide special education and related services through the proposed jointure commission. They further argue that enactment of N.J.S.A. 18A:7E-7 through -9 has increased the need for such a commission because penalties may be imposed on them for administrative costs if they continue their informal arrangement. They maintain that their proposal to establish a jointure commission satisfies the requirements of Chapter 46 of Title 18A and that the statutory scheme therefore requires the Commissioner to approve the proposal.

The petitioning districts also maintain that the Commissioner's belief that governance structures currently exist to enable the petitioning districts to comply with Chapter 46 is implicit in his decision. They claim that the Commissioner therefore abused his discretion in failing to approve their application after Department of Education officials had determined that expansion of the South Bergen Jointure Commission was not feasible.

In addition, the petitioning districts filed a motion to supplement the record with three documents prepared by Dr. Anthony Scalzo, the former Bergen County Superintendent, and Dr. Sharon Clover, the Coordinating County Superintendent. The petitioning districts argue that these documents confirm that Dr. Scalzo and Dr. Clover had recommended that the Commissioner approve their application to form a jointure commission and that under the relevant case law, consideration of such documents is required.

In response, the Commissioner urges that these documents are not relevant to the issues before the State Board. However, he does not oppose the motion. Nor does he dispute that there is a great need throughout the state for the consolidation of services. Rather, the Commissioner maintains that given the extraordinarily high number of school governance structures already in existence in New Jersey, he could not approve the establishment of a new structure with its attendant administrative costs. The Commissioner supports this view by pointing to the fact that the districts' proposal indicates their intention to hire a superintendent and board secretary.

Initially, we grant the motion to supplement the record in this matter with the documents prepared by Dr. Scalzo and Dr. Clover. As set forth in their motion, those documents include: 1) A memo to Dr. Peter Contini from Dr. Sharon Clover of January 17, 1995, 2) A fax message to Dr. Peter Contini from Dr. Sharon Clover of June 1, 1995, and 3) A letter to Dr. Sharon Clover from Dr. Anthony Scalzo of June 1, 1995.

However, after carefully reviewing all of the materials that have been submitted in the course these proceedings, we conclude that we must once again remand this matter to the Commissioner.

N.J.S.A. 18A:46-14 mandates that programs required by N.J.S.A. 18A:46-1 et seq. (Classes and Facilities for Handicapped Children) must be provided through one of the mechanisms listed in that statute. One such mechanism is a jointure commission program. N.J.S.A. 18A:46-25, in turn, provides that:

When two or more boards of education determine to carry out jointly by agreement the duties imposed upon them in regard to the education and training of handicapped pupils the said boards may, in accordance with the rules and regulations of the state board, and with the approval of the commissioner by the adoption of similar resolution establish

a jointure commission for the purpose of providing such services.

Our rules relating to the provision of special education programs are codified at N.J.A.C. 6:28-1.1 et seq. While the provisions of that chapter do not specify criteria for approval of the establishment of a jointure commission, N.J.A.C. 6:28-7.1 and -7.2 delineate requirements for programs provided by such entities and specify the approval procedures required for establishing such programs. The purpose of these regulatory provisions is to ensure that all pupils with educational disabilities have an appropriate free public education available to them in accordance with the standards of the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et. seq., as well as to ensure the evaluation of the effectiveness of the education of these pupils and to assist public and private agencies providing educational services to the pupils. N.J.A.C. 6:28-1.1.

Viewed from this perspective, the Commissioner's conclusory determinations fail to reflect that he properly considered the application of the petitioning districts to provide special education programs and services through a jointure commission. Rather, the Commissioner's determinations convey only that he does not favor the creation of "an additional governance structure" with the "attendant administrative costs." Nowhere does the Commissioner make a factually-supported, reasoned statement reflecting consideration of the districts' current obligations to provide special education services and the costs attending those obligations.

Nor may the Commissioner disregard the recommendations made by his staff during the application process. Those recommendations were prepared at his direction. His failure to consider them highlights how critical it is that the Commissioner provide some explanation of the reasoning by which he reached his conclusion to deny

the application and the factual basis for such conclusion. In re Valley Hospital, 240 N.J. Super. 301 (App. Div. 1990), certif. denied, 126 N.J. 318 (1991).

In sum, we remand this matter for reconsideration by the Commissioner. Such reconsideration should include all relevant information, including the recommendations of the County Superintendent and Coordinating County Superintendent.¹ The Commissioner should then reconsider this matter in the context of our agency's policy favoring the regionalization of educational programs and services as it applies to the districts involved and to the various options available to accomplish their objectives. Finally, the Commissioner's final determination should provide the assurance that our State will continue to fulfill its obligations with respect to the provision of an appropriate free public education to the disabled students in the petitioning districts. Upon receipt of the Commissioner's findings and conclusions, we will determine whether any further proceedings are necessary. We retain jurisdiction.

February 5, 1997

Date of mailing FEB 07 1997

¹ We note that in their supplemental certification in support of their motion to supplement the record, the petitioning districts requested inclusion of an affidavit executed by Dr. Peter Contini and production of a memorandum prepared by Dr. Contini. In that these requests were outside the scope of the motion before us, we did not consider them.

Additionally, by letter of February 3, 1997, counsel for the petitioning districts advised us that the petitioning districts obtained an order from Superior Court on January 30 directing the Commissioner to release Dr. Contini's memorandum by February 18, 1997. This does not, however, alter the scope of the motion which is before us. Furthermore, in view of our determination today, as well as the Superior Court's decision, it is more appropriate at this point that the Commissioner consider such requests.

SB # 82-95

IN THE MATTER OF THE APPLICATION :
 TO ESTABLISH A NORTH JERSEY :
 JOINTURE COMMISSION BY THE :
 SCHOOL DISTRICTS OF BOGOTA, STATE BOARD OF EDUCATION :
 CLIFFSIDE PARK, EDGEWATER, :
 ENGLEWOOD CLIFFS, FAIRVIEW, DECISION :
 LITTLE FERRY, PALISADES PARK AND :
 RIDGEFIELD PARK, BERGEN COUNTY. :

Decided by the Commissioner of Education, May 19, 1995

Decision by the State Board of Education, February 7, 1996

Decision on remand by the Commissioner of Education, May 21, 1996

Decision on motion by the State Board of Education, August 7, 1996

Remanded by the State Board of Education, February 5, 1997

For the Petitioners-Appellants, Martin R. Pachman, P.C. (Robin T. McMahon, Esq., of Counsel)

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

This matter came before the State Board of Education for consideration of the substance of an appeal by eight school districts (hereinafter "petitioning districts") from a determination of the Commissioner of Education to reject their application to establish a jointure commission pursuant to N.J.S.A. 18A:46-24 through N.J.S.A. 18A:46-27. By decision of February 5, 1997, we remanded this matter to the Commissioner for reconsideration with the direction that such reconsideration should include all relevant information, including the recommendations that had been made by the County Superintendent and the Coordinating County Superintendent, and that he then

12/3/97

reexamine this matter in the context of our agency's policy favoring the regionalization of educational programs and services as it applied to the districts involved.

By a memorandum dated May 30, 1997 directed to the superintendents of the eight petitioning districts, Dr. Peter B. Contini, who was then Assistant Commissioner for the Division of Field Services, indicated that the school districts of Bogota, Cliffside Park and Englewood Cliffs were no longer interested in participating as member districts of the proposed jointure commission. He advised the districts that the Commissioner would take no action in the matter unless a revised application was submitted to him reflecting the current proposed members and the services they wished to provide.

By letter dated September 24, 1997, we notified counsel for the parties that the State Board had been provided with a copy of the memorandum and that our Legal Committee would be recommending that the State Board dismiss the appeal. Thereafter, by letter dated November 12, 1997, we notified the superintendents of the eight petitioning districts, as well as their counsel, that the State Board of Education would decide whether to dismiss this matter at its next public meeting.

We have received no response to either correspondence from any of the districts which had been among the original applicants. Consequently, we dismiss the appeal.

December 3, 1997

Date of mailing DEC 05 1997

BOARD OF EDUCATION OF THE CITY	:	
OF LONG BRANCH, MONMOUTH COUNTY,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	
V.	:	DECISION
HAROLD F. COOPER,	:	
	:	
RESPONDENT.	:	
_____	:	

For the Board, Martin F. Pflieger, Esq. (McOmber & McOmber)

This matter was opened before the Commissioner of Education by way of a Petition of Appeal with Motion for Emergent Relief filed by the Board of Education on March 1, 1995. In its petition, the Board seeks a declaration that respondent, who filed a facially valid nominating petition in order to be placed on the ballot as a candidate for a seat on the Board at the annual school election, is disqualified from such candidacy by reason of a conflict of interest prohibited by N.J.S.A. 18A:12-2. The Board seeks a directive that respondent either cure the disqualifying conflict or withdraw from candidacy prior to the printing of ballots for the election.

Upon review of the Board's papers, the Commissioner determines that they are inappropriately filed at the present time.* It has now been established that N.J.S.A. 18A:12-2 cannot be read to disqualify individuals with inconsistent interests from

*Given the law controlling its outcome as cited above, the Commissioner has decided this matter without answer from respondent. He has done so in the belief that respondent is not prejudiced by such action, and that prompt disposition of the question of respondent's continued candidacy is in the best interest of both the parties and the public. N.J.A.C. 6:24-1.15.

being candidates for board membership. Wayne W. Thomas, Acting Board Secretary, Board of Education of the Township of Willingboro, Burlington County v. Charlene J. Edwards, decided by the State Board of Education November 3, 1993. Therefore, even assuming, arguendo, that respondent does in fact have an inconsistent interest that would act as a bar to Board membership, that interest does not preclude him from appearing on the ballot as a candidate and divesting himself of the inconsistent interest prior to commencement of his term of office if elected.

Accordingly, the instant Petition and Motion are dismissed without prejudice to the Board's right to bring its claim anew should respondent be elected, but not divested of the alleged conflict under N.J.S.A. 18A:12-2, on which the Commissioner expressly makes no ruling herein.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

March 7, 1995

DATE OF MAILING MARCH 8, 1995

SB # 83-95

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

APPELLANT,

V.

STATE BOARD OF EDUCATION

NEW JERSEY STATE DEPARTMENT OF EDUCATION.

DECISION

RESPONDENT.

Decided by the Commissioner of Education, June 29, 1995

For the Appellant, Arthur Stein & Associates (Arthur Stein, Esq., of Counsel)

For the Respondent, Nancy Kaplen, Deputy Attorney General (Deborah T. Poritz, Attorney General of New Jersey)

This matter was initiated by a notice of appeal filed with the State Board of Education on July 28, 1995, by the Board of Education of the Township of Lacey. The Lacey Board sought to appeal the contents of a letter dated June 29, 1995, from the Commissioner of Education to several members of the New Jersey Legislature. The Commissioner's letter was in response to a letter written to him on June 15, 1995, by Senator Leonard Connors and Assemblymen Jeffrey Moran and Christopher Connors concerning an adjustment that had been made to the Lacey Board's 1994-95 debt service aid.

On August 7, 1995, the Lacey Board was notified that the matter was being referred to the Legal Committee for consideration of whether the Commissioner's letter constituted an appealable decision pursuant to N.J.A.C. 6:2-1.1. In the

Oct. 5, 1995

correspondence resulting from this notification, the Lacey Board confirmed that in addition to its Notice of Appeal to the State Board, it had also challenged the action described in the Commissioner's letter by filing a Petition of Appeal with the Commissioner pursuant to N.J.S.A. 18A:6-9.

Upon examination of the contents of the Commissioner's letter of June 29, 1995, we find that this letter does not constitute an appealable decision. The letter does not represent a determination of the issues by the Commissioner, but merely provides members of the New Jersey Legislature with an explanation relating to actions that had been taken by staff within the Department of Education. Such a letter does not embody a final decision appealable to the State Board. N.J.S.A. 18A:6-27; N.J.A.C. 6:2-1.1

Further, the actions which the Lacey Board seeks to appeal to us are currently the subject of litigation initiated by the Lacey Board's Petition of Appeal to the Commissioner. That being the case, appeal to the State Board of Education is premature.

We therefore dismiss the appeal.¹

October 5, 1995

Date of mailing OCT 10 1995

¹ We note that dismissal of this appeal in no way affects the Lacey Board's right to appeal a final decision of the Commissioner rendered as a result of the petition now pending before him.

84-95E

BOARD OF EDUCATION OF THE CITY	:	
OF ASBURY PARK, MONMOUTH COUNTY,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	
	:	DECISION
SHELIA C. SOLOMON,	:	
	:	
RESPONDENT.	:	
_____	:	

For the Board, Martin F. Pflieger, Esq. (McOmber & McOmber)

This matter was opened before the Commissioner of Education by way of a Petition of Appeal with Motion for Emergent Relief filed by the Board of Education on March 1, 1995. In its petition, the Board seeks a declaration that respondent, who filed a facially valid nominating petition in order to be placed on the ballot as a candidate for a seat on the Board at the annual school election, is disqualified from such candidacy by reason of a conflict of interest prohibited by N.J.S.A. 18A:12-2. The Board seeks a directive that respondent either cure the disqualifying conflict or withdraw from candidacy prior to the printing of ballots for the election.

Upon review of the Board's papers, the Commissioner determines that they are inappropriately filed at the present time.* It has now been established that N.J.S.A. 18A:12-2 cannot be read to disqualify individuals with inconsistent interests from

*Given the law controlling its outcome as cited above, the Commissioner has decided this matter without answer from respondent. He has done so in the belief that respondent is not prejudiced by such action, and that prompt disposition of the question of respondent's continued candidacy is in the best interest of both the parties and the public. N.J.A.C. 6:24-1.15.

MARCH 7, 1995

being candidates for board membership. Wayne W. Thomas, Acting Board Secretary, Board of Education of the Township of Willingboro, Burlington County v. Charlene J. Edwards, decided by the State Board of Education November 3, 1993. Therefore, even assuming, arguendo, that respondent does in fact have an inconsistent interest that would act as a bar to Board membership, that interest does not preclude her from appearing on the ballot as a candidate and divesting herself of the inconsistent interest prior to commencement of her term of office if elected.

Accordingly, the instant Petition and Motion are dismissed without prejudice to the Board's right to bring its claim anew should respondent be elected, but not divested of the alleged conflict under N.J.S.A. 18A:12-2, on which the Commissioner expressly makes no ruling herein.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MARCH 7, 1995

DATE OF MAILING MARCH 8, 1995

EDU # 3889-94
SBE # 241-2/94
SB # 84-95

IN THE MATTER OF THE REVOCATION :
OF THE TEACHING CERTIFICATE OF :
CALVIN J. WILLIAMS, JR., BY THE : STATE BOARD OF EDUCATION
STATE BOARD OF EXAMINERS. : DECISION ON MOTIONS
_____ :

Decided by the State Board of Examiners, May 15, 1995

For the Petitioner-Respondent, David Earle Powers, Deputy Attorney General (Deborah T. Poritz, Attorney General of New Jersey)

For the Respondent-Appellant, Bucceri & Pincus (Sheldon H. Pincus, Esq., of Counsel)

For the Participant, Laddey, Clark, Coffin & Ryan (Thomas N. Ryan, Esq., of Counsel) and Schwartz, Simon, Edelstein, Celso & Kessler (Nathanya G. Simon, Esq. of Counsel).¹

This matter was initiated by a petition filed by the Fredon Township Board of Education with the State Board of Examiners pursuant to N.J.A.C. 6:11-3.6(a)3, alleging that respondent Calvin Williams had submitted fraudulent information when he applied for certification to be a School Administrator. The State Board of Examiners issued an Order to Show Cause and, upon determining that the matter was a contested

¹ After all of the motions in this matter were filed, Schwartz, Simon, Edelstein, Celso & Kessler entered an appearance as co-counsel for participant Fredon Board in order to file an answer to respondent's motion seeking affirmative relief from the Fredon Board.

OCT. 5, 1995

case, it referred the case to the Office of Administrative Law (OAL) for hearing as required by N.J.A.C. 6:11-3.6(b).

Following the hearing, the Administrative Law Judge (ALJ) found that respondent had acted "neglectfully" in making his application for School Administrator's certification, Initial Decision, at 17, but that the State Board of Examiners had failed to prove that respondent had committed fraud in applying for the certificate. Id. She recommended revocation of the School Administrator's certification for which respondent was not eligible, but concluded that there had been no showing of unbecoming conduct that would warrant revoking respondent's instructional and principal/supervisory certifications.

Noting that it had not been provided with transcripts of the hearing, the State Board of Examiners adopted the ALJ's findings both that respondent had acted negligently in applying for certification as a School Administrator and that there had been no showing of unbecoming conduct warranting revocation of respondent's other certificates. However, the State Board of Examiners found that respondent's negligence called for suspending his other certificates for two years.

Respondent appealed the suspension of his instructional and principal/supervisory certifications to the State Board of Education. He also sought a stay of the State Board of Examiners' determination from that Board.

The State Board of Examiners held a special meeting on August 16, 1995, at which time it determined to stay its decision. It also voted to seek a remand of the matter from the State Board of Education in order to review the entire record,

including the transcript of the OAL hearing, which had in fact been provided, but which the Board of Examiners had failed to include in the case file it had maintained.

By a motion filed by the Deputy Attorney General responsible for advising the State Board of Examiners in its decision-making capacity, the State Board of Examiners has requested that we remand the matter.

Respondent Williams opposes this request and urges that the State Board of Education proceed with its consideration of the appeal. Respondent argues that by expanding the scope of the case so as to consider conduct which the ALJ found to be negligent rather than fraudulent, the State Board of Examiners has evidenced its bias. He contends that, therefore, the State Board of Examiners should not be permitted to serve as the prosecutor, judge and jury in this case. Respondent further urges that the only issue involved in this appeal is one of law and that remanding the matter will delay justice.

Participant Fredon Board of Education has filed a statement supporting the Board of Examiner's request that we remand the matter. At the same time, the Fredon Board seeks leave to appeal to the State Board of Education from the stay that has been granted by the State Board of Examiners.

Respondent opposes the Fredon Board's motion for leave to appeal and seeks additional relief from the State Board of Education in the form of an order directing his reinstatement by the Fredon Board.

The Fredon Board, in turn, opposes the grant of such relief, arguing that the State Board is without jurisdiction to grant it. It further argues that to reinstate

respondent would disrupt the District's educational program and pose a threat to the safety and welfare of students, other personnel, school property and the school climate.

Initially, we grant the request of the State Board of Examiners that we remand this matter. Because it is charged with both issuing certificates to teach and revoking them when necessary under rules prescribed by the State Board of Education, N.J.S.A. 18A:6-38, the Board of Examiners is the appropriate body to assess in the first instance whether the circumstances as established by the complete record in this case warrant such action. In this respect, we stress that the decision to be made is whether respondent should be precluded from being employed not just by the Fredon Board, but by any school district in the state. Hence, the responsibility with which the Board of Examiners is charged is a significant one, and it is imperative that its decision be based on careful consideration of all the evidence relating to this question. E.g., In the Matter of the Revocation of the Teaching Certificates of John Ahern, decided by the State Board, August 7, 1987 (subsequent history omitted).

We recognize that as respondent has pointed out, there is an increased danger of arbitrariness when, as here, prosecutorial and adjudicative functions are concentrated in the same body. E.g., In the Matter of Petition for Review of Opinion No. 583 of the Advisory Committee on Professional Ethics, 107 N.J. 230, 236-238 (1987); General Motors Corp. v. Blair, 129 N.J. Super. 412 (App. Div. 1974). However, respondent has not presented us with evidence of actual bias on the part of the Board of Examiners in this case so as to convince us that it should be precluded from considering the matter on the basis of the complete record. In the Matter of Petition for Review of Opinion No. 583, *supra*, at 236; Del Tufo v. J.N., 268 N.J. Super. 291, 300

(App Div. 1993). In this regard, we stress that there has been no hint that the Board of Examiners was aware that the record before it was incomplete when it first considered the matter.

We deny participant's motion for leave to appeal the stay granted by the Board of Examiners. As a participant, the Fredon Board does not have the standing to appeal the action taken by the Board of Examiners. Board of Education of the City of Salem v. City Council of the City of Salem, decided by the State Board, April 4, 1990. As reflected by the applicable regulations, in contrast to intervenors, participants do not have either the obligations or the rights of a party. Rather, the role of participant is an extremely limited one, and a participant may only present oral or written arguments on the claims made by parties. N.J.A.C. 1:1-16.6(c). To permit the Fredon Board to transform the very limited role of a participant so as to be able to shape the course of these proceedings would be entirely inappropriate. Moreover, it would be entirely inconsistent with our determination to remand the matter to the State Board of Examiners were we to set aside the stay which that body has granted.

We turn now to the affirmative relief which respondent is seeking. Quite simply, given that the Board of Examiners has stayed the suspension of respondent's certifications, the Fredon Board has no basis to terminate his employment. Respondent is a tenured teacher in the district and in the absence of tenure charges under N.J.S.A. 18A:6-10, the Fredon Board is contravening the education laws by failing to reinstate him. We reject the Fredon Board's assertions that respondent's reinstatement would cause serious disruption to its educational program or that respondent poses a "potential threat to the continued safety of the School District's

students, personnel, property and school climate....” Certification of Efthimia Christie, September 15, 1995, at #13 and #14. Nothing in the record in this matter in any way suggests that this is the case, and the Fredon Board has presented no evidence to support such a conclusion other than the statements we have quoted from the certification submitted by the District’s Superintendent. These concerns can not justify the Fredon Board’s conduct in failing to conform to the clear requirements of the education law once the State Board of Examiners acted on August 16 to stay its decision. Nor does the “stress attendant to this litigation” justify keeping respondent “off of School District premises” until a “final administrative resolution” is achieved. Certification, at #14.

Given the clarity of the education laws, it should not be necessary for us to act affirmatively to assure that the Fredon Board knows what its responsibilities are. However, there is no question that we have the jurisdiction to do so. E.g., N.J.S.A. 18A:4-10. Given the failure of the Fredon Board to act consistently with its clear legal obligations, we have no hesitation in directing that the participant Fredon Board of Education conform with the requirements of the education laws by reinstating respondent to his tenured position as of August 16, 1995, when the Board of Examiners acted to stay its decision to suspend his teaching certification.

October 5, 1995

Date of mailing OCT 10 1995

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~~242-94~~

EDU # 3889-94
SBE # 241-2/94
SB # 84-95

IN THE MATTER OF THE REVOCATION :
OF THE TEACHING CERTIFICATES OF :
CALVIN J. WILLIAMS, JR. BY THE : STATE BOARD OF EDUCATION
STATE BOARD OF EXAMINERS. : DECISION ON MOTION

Decided by the State Board of Examiners, May 15, 1995

Remanded by the State Board of Education, October 5, 1995

Decision on remand by the State Board of Examiners,
December 14, 1995

For the Petitioner-Respondent, David Earle Powers, Deputy Attorney
General (Deborah T. Poritz, Attorney General of New Jersey)

For the Respondent-Appellant, Bucceri & Pincus (Sheldon H. Pincus,
Esq., of Counsel)

For the Participant, Laddey, Clark, Coffin & Ryan (Thomas N. Ryan, Esq.,
of Counsel) and Schwartz, Simon, Edelstein, Celso & Kessler
(Nathanya G. Simon, Esq. of Counsel).¹

The State Board of Education grants the motion filed by respondent Calvin J.
Williams, Jr. for a stay of the decision of the State Board of Examiners in this matter
dated December 14, 1995.

May 1, 1996

Date of mailing MAY 03 1996

¹ On April 9, 1996, the participant, Board of Education of the Township of Fredon, authorized the continued appearance of Schwartz, Simon, Edelstein, Celso & Kessler as co-counsel for the Board in this appeal.

EDU # 3889-94
SBE # 241-2/94
SB # 84-95
Ch. Div. #SSX-L-713-95PW
SB # 6-96

IN THE MATTER OF THE REVOCATION :
OF THE TEACHING CERTIFICATES OF :
CALVIN J. WILLIAMS, JR. BY THE : STATE BOARD OF EDUCATION
STATE BOARD OF EXAMINERS. : DECISION

Decided by the State Board of Examiners, May 15, 1995

Decision on motion by the State Board of Examiners, August 16, 1995

Remanded by the State Board of Education, October 5, 1995

Decision by the Chancery Division, December 2, 1995

Decision on remand by the State Board of Examiners,
December 14, 1995

Decision on motion by the State Board of Examiners, February 29, 1996

Decision on motion by the State Board of Education, May 1, 1996

For the Petitioner-Respondent, David Earle Powers, Deputy Attorney
General (Peter Verniero, Attorney General of New Jersey)

For the Respondent-Appellant, Bucceri & Pincus (Sheldon H. Pincus,
Esq., of Counsel)

For the Participant, Laddey, Clark, Coffin & Ryan (Thomas N. Ryan, Esq.,
of Counsel) and Schwartz, Simon, Edelstein, Celso & Kessler
(Nathanya G. Simon, Esq. of Counsel).¹

¹ On April 9, 1996, the participant, Board of Education of the Township of Fredon, authorized the continued appearance of Schwartz, Simon, Edelstein, Celso & Kessler as co-counsel for the Board in this appeal.

12/4/96

The underlying facts giving rise to this case can be summarized as follows. In 1979, the Board of Education of the Township of Fredon (hereinafter "participant" or "Fredon Board") appointed Calvin J. Williams, Jr. (hereinafter "respondent"), a tenured teaching staff member employed by the Fredon Board since 1972, to a part-time Administrative Assistant position to assist the superintendent of schools. In 1984, the Board revised the title of that position to Assistant to the Superintendent and adopted a new job description which required an administrative certificate. Respondent served in such position from the 1979-80 school year through 1985-86, while also continuing to perform his teaching duties. Respondent received his principal/supervisor certification in October 1984.

On October 10, 1990, respondent applied to the Office of Teacher Certification ("OTC" or "Licensing") for certification as a school administrator. OTC subsequently issued that certification to respondent in June 1991.

The Fredon Board thereafter filed a petition with the State Board of Examiners, pursuant to N.J.A.C. 6:11-3.6(a)3, alleging that respondent had submitted fraudulent information regarding his administrative experience when he applied for such endorsement. The Board of Examiners issued an order to show cause and, upon determining that the matter was a contested case, referred it to the Office of Administrative Law ("OAL") for hearing.

On April 10, 1995, following the hearing, the Administrative Law Judge ("ALJ") found that respondent had been "neglectful" in not reviewing the regulatory requirements for certification as a school administrator before he submitted his application, but that the State Board of Examiners had failed to demonstrate that

respondent had committed fraud in applying for such certification or had willfully intended to violate the law. The ALJ found that respondent had mistakenly concluded that he was qualified to receive a school administrator's endorsement by virtue of his employment as an assistant to the superintendent of schools for six years. Moreover, the ALJ observed that if the Office of Teacher Certification had examined the relevant dates more closely, it would have ascertained at the initial application stage that respondent did not have the requisite experience for a school administrator's certificate since he only had two years of administrative experience under his administrative certificate. Since respondent did not satisfy the administrative requirements for certification as a school administrator, the ALJ recommended revocation of his school administrator's endorsement. However, she concluded that there had been no showing of unbecoming conduct that would warrant revoking respondent's instructional and principal/supervisor certificates.

On May 15, 1995, the State Board of Examiners, noting that it had not been provided with transcripts of the OAL hearing, adopted the ALJ's findings that respondent had acted neglectfully in applying for certification as a school administrator and that there had been no showing of unbecoming conduct warranting revocation of respondent's instructional and principal/supervisor certificates. However, the Board of Examiners concluded that respondent's negligence in failing to familiarize himself with the requirements for a school administrator's endorsement called for the suspension of his instructional and principal/supervisor certificates for a period of two years.² The Board of Examiners reasoned:

² The parties stipulated that respondent held the following certification, in addition to the school administrator's endorsement: Teacher of physical education, teacher of biological sciences, elementary school teacher and principal/supervisor.

The professional conduct of a "seasoned educator" mandates the highest degree of responsibility in applying for a certificate. Negligence in such circumstances is, therefore, unprofessional. Failure to adhere to the highest standards of professionalism demanded of teachers both reflects poorly on the applicant whose negligence caused him to receive a certificate for which he was clearly ineligible and at the same time harms the integrity of the teacher certification system. Licensing assures the public that each certificate holder is properly qualified for the position and any certificate obtained with fraudulent documents demeans the value of all certificates. The ALJ's finding of negligence in the circumstances herein, therefore, constitutes conduct unbecoming the certificate holder and, as such, requires a sanction.

State Board of Examiners' Decision, slip op. at 5.

Respondent appealed that determination to the State Board of Education, and also sought a stay thereof from the Board of Examiners.

On August 16, 1995, the Board of Examiners determined to stay its decision of May 15. It also voted to seek a remand of this matter from the State Board of Education in order to review the entire record, including the transcripts of the OAL hearing, which it inadvertently had failed to include in its case file.

On October 5, 1995, we granted the Board of Examiners' request to remand this matter, observing that the Board of Examiners was the appropriate body to determine in the first instance whether the circumstances, as established by the complete record in this case, warranted any action against respondent's certificates. We denied the Fredon Board's motion for leave to appeal the stay granted by the Board of Examiners, finding that the Fredon Board, as a participant in this case, did not have the standing to appeal the action taken by the Board of Examiners. We also granted respondent's request that the Fredon Board reinstate him to his tenured position as of August 16,

1995, when the Board of Examiners acted to stay its decision to suspend his instructional and principal/supervisor certificates.

On December 2, 1995, the Superior Court, Chancery Division, upon application by the respondent, directed the Fredon Board to immediately implement the State Board of Education's decision of October 5, 1995 and reinstate respondent to a teaching position within the scope of his certificates.

On December 14, 1995, the Board of Examiners vacated its stay and adopted the recommendation of the ALJ that respondent's school administrator certification be revoked but that his instructional and principal/supervisor certificates not be revoked. However, upon review of the transcripts, the Board of Examiners rejected the ALJ's conclusion that respondent's conduct was negligent, finding instead that respondent had "participated in a deliberate pattern of activity designed to mislead Licensing as to his qualification for a School Administrator certificate, which constitutes conduct unbecoming a certificate holder." State Board of Examiners' Decision on Remand, slip op. at 7. The Board of Examiners found that respondent, in applying for such certification, had submitted "half-truths and misinformation, which, taken as a whole, caused Licensing to be misled regarding his eligibility for certification." *Id.* at 4. Accordingly, the Board of Examiners directed that respondent's instructional and principal/supervisor certificates be suspended for two years.

Respondent filed the instant appeal to the State Board of Education from the determination of the Board of Examiners to suspend his instructional and

principal/supervisor certificates.³ He also filed a motion with the Board of Examiners seeking a stay of its decision of December 14, 1995.

On February 29, 1996, the Board of Examiners denied respondent's motion for a stay. Respondent thereupon sought a stay from the State Board of Education.

On May 1, 1996, we granted respondent's motion and stayed the determination of the Board of Examiners to suspend respondent's certificates for two years.

After an exhaustive review of the record, we reverse the determination of the Board of Examiners to suspend respondent's instructional and principal/supervisor certificates. We agree with the ALJ that the Board of Examiners has failed to demonstrate that respondent committed fraud in attempting to secure a school administrator's endorsement. Nor does the record establish that he intended to mislead the Office of Teacher Certification into issuing that endorsement.

In October 1990, when respondent applied for a school administrator's endorsement, the pertinent certification regulation, then codified in N.J.A.C. 6:11-10-7, required, in relevant part, that an applicant demonstrate:

Successful completion of three years of educational administrative or supervisory experience, under a New Jersey administrative or supervisory endorsement or its equivalent, when spending at least half time in administrative or supervisory duties.

That regulation authorized waiving one year of such experience if the applicant held a doctorate in educational administration. It also provided that one year of internship in a program approved by the Commissioner could be submitted towards the fulfillment of the experience requirement.

³ We note that respondent does not challenge the determination of the State Board of Examiners to revoke his school administrator's certification.

It is undisputed herein that respondent did not have three years of administrative experience under an administrative or supervisory endorsement since he had not received his principal/supervisor certification until October 1984 and had only served as the Assistant to the Superintendent through the 1985-86 school year.

In determining that respondent had deliberately misled OTC as to his qualifications, the Board of Examiners focused on two letters written by Richard A. Walter (hereinafter "Walter"), the Fredon Township Superintendent of Schools, which respondent had submitted to the OTC in support of his application. In a letter dated October 10, 1990, which respondent apparently submitted with his application, Walter wrote:

This is to certify that Mr. Calvin J. Williams, Jr. has been an outstanding science teacher for over eighteen years. During this tenure he has also served as my assistant administrator for six years.

As the Assistant to the Superintendent, Mr. Williams has fulfilled the responsibilities found on the "ASSISTANT TO THE SUPERINTENDENT" job description which is attached.

I would heartily endorse Mr. Williams for any administrative position as he is a very capable and knowledgeable individual.

Exhibit P-3, in evidence.

Following review of respondent's application, an OTC examiner found it necessary to request clarifying information as to "the exact years in which this applicant served as an assistant administrator." By letter dated March 12, 1991, Walter responded:

Mr. Williams has informed me that in order to complete your evaluation of his application for administrative certification you will need an original letter detailing the exact years in which he served as my assistant administrator.

Mr. Calvin J. Williams, Jr. served as my Administrative Assistant from school year 1979-80 through school year 1985-86.

I hope this letter supplies the necessary information.

Exhibit P-4, in evidence.

Our review of the record herein indicates that the information provided by Walter was an accurate representation of the time frame during which respondent had served as his assistant. While it is true that Walter's letters do not detail the specific period during which respondent had served in such capacity under an administrative certificate, the record is devoid of any evidence that would demonstrate a deliberate effort or specific intent by respondent to deceive OTC in order to circumvent the certification regulations. In the absence of any such evidence, we decline to infer a deceptive intent. Nor does the record support the Board of Examiners' finding that respondent provided "inaccurate documentation," State Board of Examiner's decision on remand, slip op. at 6, or that respondent was "plainly aware that the documents he submitted to OTC were not wholly accurate." Id.

Indeed, contrary to the Board of Examiners' finding, the record shows that the Office of Teacher Certification was not misled by either respondent's application or Walter's supporting letters. Rather, the record reveals that even after receipt of Walter's letters, OTC was aware of the fact that respondent did not have three years of administrative experience under an administrative or supervisory certification.

Ida B. Graham, who was the assistant director of the Office of Teacher Certification at the time respondent applied for school administrator certification, was called as a witness on behalf of the Board of Examiners and testified, based on her

review of the record in this case,⁴ that an OTC examiner had determined that respondent had only two years of the required experience under an administrative or supervisory endorsement and would be eligible for school administrator certification only after he presented one additional year of experience. Tr. 11/29/94, at 22. Graham agreed that the determination to issue the endorsement was made not on the basis of anything submitted by respondent, but, rather, as the result of OTC having made a determination to issue the certification under these circumstances. Id. at 19-20.

Graham testified as to a memorandum dated May 29, 1991, after the submission of Walter's letters, from Dr. Bernard Andrews, then the Sussex County superintendent, to Dr. Celeste Rorro, then the director of the Office of Teacher Certification, requesting, "per our telephone discussion," that Dr. Rorro "review the enclosed information...to determine if [respondent] qualifies for the additional year needed for School Administrator certification." Exhibit R-26, in evidence. In a handwritten note dated June 3, 1991 at the top of that memorandum, Dr. Rorro indicated: "3 years administrative experience -- OK." Id. The record does not indicate what information Dr. Andrews had enclosed with his memorandum, and Graham did not know what had been provided. Tr. 11/29/94, at 23-26. A school administrator's endorsement was thereafter issued to respondent.

Neither Dr. Andrews nor Dr. Rorro were called as witnesses by the Board of Examiners to explain the basis for Dr. Rorro's determination to approve three years of pertinent experience, and Graham could not offer an explanation. She indicated, however, that, based on her review of the file, she had found no indication of a

⁴ We note that Graham had no personal involvement in the receipt, review or evaluation of respondent's application for the school administrator's certification. Tr. 11/29/94, at 16.

deliberate fraud undertaken by respondent in securing the school administrator's endorsement. Id. at 19.

We note that neither Graham nor the only other witness called by the Board of Examiners, the current superintendent of the Fredon district who was employed in another school district at the time of the relevant events herein, had any involvement in or personal knowledge of the events surrounding the issuance of the school administrator's endorsement to respondent. Moreover, while the letters written by Walter did not detail the period of respondent's employment which was under an administrative certificate, OTC's own records would have shown that respondent did not receive his principal/supervisor certification until October 1984.⁵ Tr. 11/29/94, at 18-19.

Furthermore, although the Board of Examiners stressed that respondent "had never kept track of the time that he was allegedly performing these [administrative] functions," State Board of Examiners decision on remand, slip op. at 4-5, there is no indication in the record that respondent ever represented to OTC that he had spent at least half of his time in administrative duties as required by the certification regulations then in effect. Given the documentation submitted by respondent, OTC should either have requested the necessary information or rejected his application.

We also reject the Board of Examiners' finding that Walter's submission of his October 10, 1990 and March 12, 1991 letters on school stationery supports a "pattern of deception surrounding respondent's application." State Board of Examiners' Decision on Remand, slip op. at 5. Although he was on paid sick leave subsequent to June 1990, Walter did not officially retire from his position as the superintendent of

⁵ It is evident that OTC was aware that respondent had not received his principal/supervisor certification until 1984 since the OTC examiner determined that respondent still needed to present one additional year of experience.

schools in Fredon until October 1991, and there is no indication in the record that the stationery utilized by Walter for those letters was any different than the stationery being used by the district during that period. Under these circumstances, we find nothing devious or deceptive in Walter's actions. Moreover, it is undisputed that Walter was the superintendent at the time of respondent's service as the assistant administrator.

Nor do we place undue significance on the fact that respondent had not performed every duty listed on the job description while serving as the Assistant to the Superintendent. Walter's letter of October 10, 1990 simply indicated that respondent had "fulfilled the responsibilities" found on that job description, and it was uncontradicted on the record that respondent had served under that job description and performed the majority of the duties shown thereon. Those duties included acting in the place of the superintendent during his absence by: supervising the implementation of laws, regulations and policies; making rules and giving instruction to school employees and students to implement Board policy; and supervising all school employees. The testimony also showed that respondent had assisted in supervising the planning, implementation and evaluation of all school programs and activities, served as director of all student testing and acted as the first step in the chain of command between the public, school staff and the superintendent. Tr. 11/30/94, at 23-26, 80. The fact that respondent did not perform each and every individual function outlined on the job description does not provide evidence of a deceptive intent.

Nor can we accept the Board of Examiners' contention in its decision that the Initial Decision in this matter "reflects the ALJ's belief that the information respondent provided to Licensing was fraudulent." State Board of Examiners' Decision on Remand,

slip op. at 5. To the contrary, the ALJ expressly concluded that respondent's conduct was "not a deliberate and willful intent to violate the law." Initial Decision, slip op. at 19.

Thus, for the reasons expressed herein, we find that the State Board of Examiners has failed to demonstrate a deliberate effort by respondent to mislead the Office of Teacher Certification into issuing him a school administrator's endorsement for which he was not qualified. Indeed, we are unable to determine on the basis of the record before us why and under what circumstances the former director of OTC decided to approve three years of administrative experience under an administrative or supervisory endorsement when an OTC examiner had determined that respondent did not have the required experience. Indeed, our review of the record supports Graham's conclusion that respondent's application failed to document the experience required by the regulations then in effect. The fact that a determination was made by the former director of OTC to issue a school administrator's endorsement to respondent under these circumstances does not evidence misconduct or a deceptive intent by respondent. If he had, indeed, participated in a deliberate scheme designed to deceive OTC into issuing him such an endorsement, we agree with the ALJ that it has not been established on this record.

Nor, under the circumstances presented herein, do we find respondent's "neglectful" conduct in failing to familiarize himself with the requirements for a school administrator's endorsement before applying for such certification to warrant suspension of his other administrative and instructional certificates. While it is indisputable that respondent should have taken more care in applying for a school administrator's certification, we find nothing in the school laws or implementing

regulations that would justify suspending the other certificates held by an applicant, even a "seasoned educator," for failure to appreciate the certification requirements before submitting an application, in the absence of fraud, intentional submission of false information or a deliberate intent to mislead OTC. The fact that respondent's application in this particular instance was approved by OTC does not, under the record before us, transform his actions into unbecoming conduct.

Consequently, we agree with the ALJ that the record does not justify either the revocation or suspension of respondent's other administrative and instructional certificates. We therefore reverse the determination of the State Board of Examiners to suspend those certificates for two years.

Attorney exceptions are noted.

December 4, 1996

Date of mailing DEC 08 1996

THOMAS J. MADIGAN, :

PETITIONER, : COMMISSIONER OF EDUCATION

V. : DECISION

BOARD OF EDUCATION OF THE :

RAMAPO-INDIAN HILLS REGIONAL :

HIGH SCHOOL DISTRICT, AND DAVID L. :

RINDERKNECHT, BUSINESS :

ADMINISTRATOR/BOARD SECRETARY, :

BERGEN COUNTY, :

RESPONDENTS. :

For Petitioner, Thomas J. Madigan, Pro Se

For the Board, Allan P. Dzwilewski, Esq. (Green & Dzwilewski)


This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed on February 28, 1995, by Thomas J. Madigan. Madigan had attempted to file a nominating petition seeking to be placed on the ballot at the annual school election for a seat on the Board of Education, but his petition was rejected by the respondent Board Secretary on grounds that Madigan was not qualified for Board membership due to an impermissible conflict of interest under N.J.S.A. 18A:12-2. On March 3, 1995, respondents filed an Answer together with a crossclaim seeking a declaration that petitioner is disqualified from candidacy because he failed to cure the alleged conflict on or before the date nominating petitions were due to be filed.

Upon review of this matter, the Commissioner determines that Madigan's name must be placed on the ballot, there being no allegation of defect in his nominating papers or qualification for office other than the Board's contention of conflict of interest under N.J.S.A. 18A:12-2. It is now well established that the

statutory scheme cannot be construed to disqualify individuals with inconsistent interests, as opposed to individuals who do not meet the qualification standards of N.J.S.A. 18A:12-1, from being candidates for board membership. Wayne W. Thomas, Acting Board Secretary, Board of Education of the Township of Willingboro, Burlington County v. Charlene J. Edwards, decided by the State Board of Education November 3, 1993. Therefore, even assuming, arguendo, that Madigan does in fact have an inconsistent interest that would act as a bar to Board membership, that interest does not preclude him from appearing on the ballot as a candidate and divesting himself of the inconsistent interest prior to commencement of his term of office if elected.

Accordingly, petitioner has prevailed in his claim and the Commissioner directs that his name be placed on the ballot as if his nominating petition had been accepted at the time of filing. The Commissioner concurrently dismisses the Board's crossclaim without prejudice to the Board's right to bring such claim anew should Madigan be elected, but not divested of the alleged conflict under N.J.S.A. 18A:12-2, on which the Commissioner expressly makes no ruling herein.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MARCH 7, 1995

DATE OF MAILING MARCH 8, 1995

C # 234-95
SB # 85-95

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCA- :
TION OF THE TOWNSHIP OF MIDDLE- :
TOWN, MONMOUTH COUNTY. :
_____ :

STATE BOARD OF EDUCATION
DECISION

Decided by the Commissioner of Education, June 30, 1995

For the Petitioner-Appellant, Kalac, Newman, Lavender & Campbell
(Peter P. Kalac, Esq., of Counsel)

For the Township Committee, Dowd & Reilly (John T. Lane, Jr., Esq., of
Counsel)

This is an appeal from a decision of the Commissioner of Education which directed that a total of \$64,586,822 be raised in local tax levy to support the general fund for the Middletown school district for the 1995-96 school year. By this appeal to the State Board of Education, the Board of Education of the Township Middletown (hereinafter "Board") is seeking an additional \$1,204,500 in local tax levy.

The Board originally proposed to the voters a general fund tax levy for 1995-96 for education purposes totalling \$67,691,322. \$62,006,242 of that amount was proposed to the voters pursuant to N.J.S.A. 18A:22-33 and represented the District's maximum permissible budget as determined under N.J.S.A. 18A:7D-28(a) ("base budget"). The remaining \$5,685,080 was presented to the voters as a cap waiver request as provided for by N.J.S.A. 18A:7D-28(f). \$250,000 of this represented

Nov. 1, 1995

amounts which the County Superintendent had designated as not necessary for a thorough and efficient education.

Both questions failed. Since the base budget proposed pursuant to N.J.S.A. 18A:22-33 had been defeated, the Township Committee was then required by N.J.S.A. 18A:22-37 to determine the amount for each item appearing in that budget that was necessary for a thorough and efficient education. With the intercession of the County Superintendent, the Township Committee and the Board reached an agreement to reduce \$1,750,000 from items in the base budget while increasing the amounts budgeted for maintenance and construction services by that same amount. This agreement was reached with the understanding that the Board would seek from the Commissioner an additional \$3,685,080.

On this basis, the Township Committee, as required by N.J.S.A. 18A:22-37, certified an amount totalling \$62,006,242 as necessary for a thorough and efficient education. At the same time, it resolved to support an appeal by the Board to the Commissioner to obtain another \$3,685,080.

In reviewing the Board's appeal, the Commissioner found on the basis of the documentation provided by the Board and his assessment of the Board's financial condition as of June 23, 1995, that further reallocations could be made from the Board's base budget without jeopardizing its ability to provide a thorough and efficient education. He concluded that some of the items included in the Board's cap waiver proposal could be funded by such reallocation, thereby reducing the amount of additional funds which the Board would require for 1995-96. Hence, after determining that the resulting budget was sufficient to allow the District to address those of its

facilities deficiencies which needed immediate attention, the Commissioner granted only part of the relief the Board was seeking.

The Board then appealed to the State Board seeking the additional amount. The sole argument offered by the Board in support of its appeal is that when the County Superintendent approved the District's budget in March 1995, he determined that the Board needed \$5,435,080 beyond its maximum permissible budget in order to provide a thorough and efficient education and that to award it less than half that amount, as had the Commissioner in his decision, means that the

...Constitutional concept of a thorough and efficient education in New Jersey is a meaningless proposition, or, in the alternative the decision of the Commissioner of Education is patently wrong...

Brief on Behalf of Petitioner, August 10, 1995, at 4-5.

We reject this argument and for the reasons that follow dismiss the appeal.

Initially, we stress that this is not an appeal pursuant to N.J.S.A. 18A:22-37 from reductions made by a governing body to a proposed education budget after it was defeated by the voters. Rather, while the Board here agreed to a base budget in the amount certified by the Township Committee pursuant to that statute, it is seeking by this appeal additional amounts beyond the total certified by the Township Committee and above the District's maximum permissible budget.

This is not the first time we have been asked to direct an increase in an education budget beyond a district's maximum permissible budget. In our decision in Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater, decided by the State Board, July 6, 1994, we recognized that the

limitations of N.J.S.A. 18A:7D-28(f) in no way altered the constitutional obligation of either the Commissioner or of the State Board of Education to insure that the budget of a local school district is sufficient to provide a thorough and efficient education.

However, as we emphasized,

...the power to direct such increase may properly be exercised only where an increase is necessary to enable the district to provide a thorough and efficient education. [In re Upper Freehold Reg'l School Dist., 86 N.J. 265 (1981).] Further, any increase must be limited to those amounts the district needs in order to provide a thorough and efficient education. Id. ...

Edgewater, supra, slip op. at 15, quoting Board of Education of the Borough of Rutherford v. Mayor and Council of Rutherford, decided by the State Board, July 7, 1993, slip op. at 5-6.

In Edgewater, we made it abundantly clear that the circumstances that would warrant directing an increase in a district's education budget beyond its statutory limitation where the voters have defeated a proposal to do so are extremely limited. In doing so, we pointed to Upper Freehold, supra, which presented an analogous situation.

It is evident from an examination of Upper Freehold that the kind of circumstances that must be present to justify exercising the Commissioner's power by compelling a district's taxpayers to raise additional monies are rarely presented. In that case, the New Jersey Supreme Court affirmed an order of the Commissioner and State Board to direct a local school district to issue bonds for a capital project after voters had rejected several referenda to finance the project. The roof of the district's high school had deteriorated to the point where dripping water had to be collected in 55

gallon drums placed throughout the school and students had to navigate puddles stretching for hundreds of feet. Sagging roof planks created the danger that tiles or pieces of concrete would fall from the ceiling. Despite the obvious safety hazards, the district's voters twice rejected bond issues to repair the roof. The board therein then sought emergency funding from the Commissioner to fund the repairs. Even then, the Commissioner did not provide the funds. Instead he referred the matter to the Office of Administrative Law for evidentiary hearings, and it was the facts established by those hearings which provided the basis for the order to issue bonds ultimately affirmed by the Court.

In light of the paucity of support the Board in this matter has provided to support its claim to the relief it is seeking, we are compelled once again to reiterate that we will exercise the power to direct an increase such as involved here only where it is necessary to enable the district to provide a thorough and efficient education. Furthermore, as we have previously held, we will direct such an increase only in circumstances where it has been established that the district's base budget does not include the minimal amount needed to provide a constitutionally adequate education. Edgewater, supra; Rutherford, supra; Board of Education of the Borough of Lincoln Park v. Borough Council of the Borough of Lincoln Park, decided by the State Board, December 2, 1992.

Before we can even consider directing an increase beyond that amount, a district board must demonstrate to our satisfaction that every item in its budget and the specific amount budgeted to support each of those amounts is essential in order for it to provide a thorough and efficient education to its students. Then it must establish

that the additional amounts are necessary in order for the board to provide its students with a constitutionally adequate education.

In this case, the Commissioner determined that this district could provide a thorough and efficient education without raising the additional monies the Board is seeking. The fact that this is a lesser amount than the total originally approved by the County Superintendent is of no moment. As we held in Edgewater,

while the Commissioner is entitled to rely on his county superintendents when fulfilling his responsibilities to review the education budgets proposed by district boards, such reliance may not be absolute. Where a district board seeks administrative review to increase its budget beyond the amount established by the governing body following voter defeat, the record must provide sufficient factual support for the level of funding sought before the Commissioner can direct such increase.

Edgewater, supra, slip op. at 23.

In this case, the Commissioner assessed the documentation provided to him and determined that the Board could meet its constitutional obligations with a local levy totalling \$64,586,822. The Board has not demonstrated to us that the budget resulting from the Commissioner's decision is not adequate. As reflected in the Commissioner's decision, the reallocations that have been made permit the Board to undertake the maintenance projects which it must commence at this point. Moreover, despite the Board's assertions, the record does not indicate that there is any risk that the Board will be forced to compromise the quality of its education program to do so. Rather, the level of funding should be more than adequate to enable the Board to proceed to systematically address its facilities deficiencies while maintaining its educational program. In this respect we note that the District's Superintendent has

attested that the District expects to present a sizable bond referendum to the voters within the next school year to resolve its facilities problems. Affidavit of Peter Merluzzi, May 23, 1995. This is the proper course under the circumstances reflected in the record before us.

In that the Board has made no showing that it requires additional money at this juncture in order to fulfill the constitutional mandate, we deny it the relief it is seeking on appeal.

November 1, 1995

Date of mailing NOV 03 1995

IN THE MATTER OF THE TENURE :
 HEARING OF DAVID ISAAC, : COMMISSIONER OF EDUCATION
 STATE-OPERATED SCHOOL DISTRICT : DECISION
 OF PATERSON, PASSAIC COUNTY. :

SYNOPSIS

Board certified tenure charges of neglect of duty, excessive absenteeism and insubordination against respondent custodian.

Based upon his poor work performance, his failure to comply with employment policies of the district, his early departures and failure to report to work, the ALJ concluded that respondent was guilty of neglect of duty and excessive absenteeism. (ALJ concluded he was not guilty of insubordination.) Moreover, since respondent was notified repeatedly that his attendance and performance were unacceptable over a period of at least three years and he received verbal and written warnings and a three-day suspension, in addition to having his increment withheld twice, the ALJ concluded that the only appropriate penalty was to remove him from his position. ALJ ordered respondent removed from his position as custodian.

Commissioner concurred with the ALJ that the record supported sufficient cause to terminate respondent from his position as custodian based upon his neglect of duty and excessive absenteeism. Commissioner ordered dismissal as of date of his decision.

MARCH 8, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8378-94

AGENCY DKT. NO. 336-8/94

**IN THE MATTER OF THE TENURE
HEARING OF DAVID ISAAC,
STATE OPERATED SCHOOL DISTRICT
OF PATERSON, PASSAIC COUNTY,**

Gregory G. Johnson, Esq., for petitioner

Louis P. Bucceri, Esq., for respondent (Bucceri & Pincus, attorneys)

Record Closed: January 10, 1995

Decided: February 2, 1995

BEFORE EDITH KLINGER, ALJ:

On August 10, 1994, petitioner, the State Operated School District of Paterson (District), certified tenure charges against respondent, David Isaac, to the Commissioner of Education. Respondent filed his answer on August 23, 1994, and on August 30, 1994, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A. 52:14B-1 to - 15* and *N.J.S.A. 52:14F-1 to - 13*.

A prehearing conference was held on October 25, 1994, at which time it was determined that the following issues were to be resolved at hearing:

1. Was respondent guilty of neglect of duty between July 1991 and June 1994?
2. Was respondent excessively absent between July 1992 and June 1994?
3. Was respondent insubordinate between July 1992 and June 1994 because of his failure to be present at work?
4. Was respondent insubordinate between July 1991 and May 1994 for failing to call in absences as required and failing to heed verbal and written warnings concerning these absences?
5. If so, what penalty, if any, is appropriate?
6. Is respondent being discharged because of a handicap in violation of N.J.S.A. 10:5-4.1?

The hearing was scheduled for January 10, 1995. It was held and the record closed on that date. David Isaac did not appear and his attorney elected to proceed without him.

STIPULATION OF FACTS

The parties stipulated to the following facts:

- A. The District hired the respondent as a custodian on November 23, 1981. He was assigned to Eastside High School.
- B. On or about May 1, 1988, respondent received a copy of the district policy on work rules written by Louis Milone, Supervisor of Custodial Services.

The district policy provides, in relevant part:

1. When absent or late you must notify the school immediately.
 2. When absent three consecutive days or more, a doctor's note is required upon your return to work.
 3. ...
 4. Excessive absenteeism and tardiness will not be tolerated.
 5. You are required to work the hours assigned to you. Leaving the building early is strictly prohibited.
 6. If you must leave the building, permission must be obtained from the Principal or Vice-Principal.
 7. ...
 8. The daily workload assigned to you must be completed in its entirety.
 9. ...
 10. ...
 11. ...
 12. During the summer months and holidays you are required to be at work, the building is to remain open as usual. Leaving early at these times is strictly prohibited.
 13. ...
 14. ...
- C. During the 1991-92 school year, Isaac was assigned to Public School No. 24. On or about May 1, 1992, Principal Harold Simon issued an evaluation to the respondent.
- D. On May 1, 1992, and May 7, 1992, respondent received written memos from Supervisor Milone.
- E. On June 15, 1992, the State District Superintendent, Dr. Laval S. Wilson, acted to with hold the respondent's salary increment for the 1992-93 school year.
- F. On July 21, 1992, Supervisor Milone recommended the respondent's termination.
- G. On November 2, 1993, and December 1993, the respondent received written memos from Principal George Hirschberg, Public School No. 10.

- H. On March 28, 1994, Dr. Wilson acted to suspend the respondent for three days.
- I. On April 27, 1994, Dr. Wilson acted to withhold the respondent's salary for the 1994-95 school year.
- J. On June 2, 1994, Principal Hirschberg recommended respondent's termination.
- K. During the 1992-93 and 1993-94 school years, respondent was absent on numerous days.

REVIEW OF TESTIMONY

Respondent received his last good evaluation on July 16, 1990.

Harold Simon, now retired as principal of Public School No. 24, testified that Isaac was assigned to his school during the school years from 1979-80 through 1991-92. He supervised Isaac through the chief custodian, Garry Mott.

On September 24, 1991, Simon wrote a memo to Milone recommending that Isaac and another custodian, Freddie Bethea, be given final warnings before removal. They did not complete their workloads and when they did they were careless. Simon reported complaints from teachers that classrooms were not cleaned or cleaned poorly. A fifth grade teacher related to Simon that garbage containing food from a class Thanksgiving feast was left in her classroom, which was Isaac's responsibility, over the Thanksgiving recess. It smelled very badly when the class returned after the holiday. She also complained that she had to sweep her own classroom on November 27, 1991, because Isaac failed to clean it.

Simon wrote a memo to Isaac on April 14, 1992, that the first floor bathrooms which were Isaac's responsibility were filthy and had not even been touched. "You did not even flush the toilet."

On May 1, 1992, Simon evaluated Isaac and found his work to be of unsatisfactory quality. His cooperation with his coworkers was also unsatisfactory. His initiative, completion of assigned tasks and attendance were somewhere between unacceptable and unsatisfactory. He was only found satisfactory in his punctuality and his attitude toward criticism. Simon's written commentary on the evaluation states that Isaac's work habits were so poor that all other aspects of his evaluation were irrelevant. Simon added, "On 4/30/92 he came to work and did absolutely nothing. On 5/1/92 we found his entire workload undone." Isaac had been absent thirteen days as of May 1, 1992.

According to Simon, Isaac had been reported for poor performance on several occasions prior to this evaluation. He was also written up after the evaluation. Simon said that Isaac was permitted fifteen absences a year. The thirteen mentioned in his evaluation were less than the number he actually took. He did not provide medical excuses for his absences nor were any requested.

On May 1, 1992, Isaac was warned in writing by Milone that he left the building on April 30, 1992, without completing his assignment. His scheduled hours were from 3:00 p.m. to 11:00 p.m.. The security company notified Milone that the building was secured at 6:59 p.m., when Isaac left early. Milone scheduled a conference with Isaac for May 7, 1992. Isaac signed the notice indicating that he received it and returned it to Milone at the time of the scheduled conference.

On the scheduled day, Milone recorded the substance of the conference, attended by himself, Simon, Mott and Isaac, in a memo. Isaac was told that his increment would be withheld for the reasons stated in the notice of May 1. He was further warned that his lack of responsibility was having an adverse effect upon the rest of the staff and the students and he was expected to improve his performance immediately. Isaac agreed to improve. After the conference, he signed the memo acknowledging that the conference had taken place.

Following the conference, Simon met Isaac in the hall and told him that he could not continue failing to complete his work. He testified that respondent's performance never improved.

Mott testified that Isaac did good work at times and at other times did exactly as he pleased. Even when Mott warned him that Simon was coming in to inspect his work he did not do a good job. Mott's major concern was that the children have clean bathrooms. He was also worried that the Board of Health might take action against the school if the bathrooms were dirty. He said that it was very unusual for him to receive complaints from teachers that their classrooms were not cleaned.

On May 21, 1992, Isaac left the building at 6:15 p.m. and did not return to complete his shift. During the week of June 1, his shift was from 11:00 a.m. to 8:00 p.m. and Mott reported to Milone that all of Isaac's work was completed satisfactorily.

On June 6, 1992, Isaac notified the custodian's secretary that he was going to the doctor. He came to work one hour late, left the building for lunch at 1:00 p.m. and did not return until 4:00 p.m.

On June 10, Mott inspected and found that Isaac had done none of his work except to remove the garbage. On June 22, Mott told Milone that Isaac did not return to work after lunch on June 15. On June 17, Isaac did not clean the front entrance, or sweep the staircase or first floor corridor. Simon noted that his performance continued to be unsatisfactory. On June 25, Mott found that Isaac had not swept any of the classrooms, cleaned the front entrance and the staircase, swept the corridor or removed discarded material from a hallway. Simon asked Milone to deal with this "intolerable situation" immediately. Isaac picked up his paycheck on June 25, left the building, and, as of July 2, he had not returned to work. Simon recommended to Milone that respondent be terminated immediately. On July 14, Isaac returned from lunch half an hour late with no explanation. On the following day he reported to work but did

nothing and was charged with half a day's absence. On July 21, he came in at 12:45 p.m., stayed five minutes and went home.

On July 21, 1992, Milone requested that tenure charges be filed against respondent.

Isaac was transferred to Public School No. 10 at the end of the 1991-92 school year. His increment was withheld for the 1992-93 school year.

George Hirschberg, the principal of school No. 10 evaluated Isaac for the 1992-93 school year. He found respondent's use of his knowledge of cleaning materials, his completion of assigned tasks, the quality of his work, his work habits and his attendance to be less than satisfactory. He warned Isaac that he had to improve but did not recommend that his increment be withheld for the following year. Isaac had been absent twenty-two days as of March 24, 1993.

Hirschberg also supervised Isaac for the 1993-94 school year. He reported to Milone that Isaac picked up his paycheck on October 15, 1993, but did not report for his scheduled work that afternoon. He requested that Milone consider removing Isaac from his position immediately. On October 18, Isaac was healthy when he reported to work, but saw that there was a substitute working and decided to call in sick. On May 16, 1994, he failed to clean two rows of the auditorium and cleaned two other rows poorly.

On November 2, 1993, Isaac was told that he had not cleaned the main office properly and he was directed to reclean the bathroom. On December 6, he was again told that he had not cleaned the main office and he was advised to hand in his resignation if he could not perform his job properly.

On March 28, 1994, he was suspended for three days for leaving the worksite early without permission.

Joseph Vacca, night assistant supervisor of custodial services, scheduled a conference on May 26, 1994 with Isaac on his poor performance.

In March 1994, Isaac was evaluated. He was rated either less than satisfactory or unsuccessful in all but two aspects of his job performance. His personal appearance and his rapport with his co-workers were commendable. His evaluation as to his cleaning skills and his overall evaluation were "very poor." He had been absent for seventeen and one half days as of the date of the evaluation. Isaac commented that the evaluation was "not fair."

Isaac's increment was withheld for the 1994-95 school year because his work habits and attendance were unsatisfactory.

On June 2, 1994, Hirschberg requested that tenure charges be filed against respondent. He reported that Isaac had been absent thirty-four and a half days and suspended for three days during that school year. He was absent for six consecutive working days between September 7 and September 14, 1993 without a doctor's note. He was absent for three consecutive working days between October 6 and October 8, 1993 without a doctor's note. He was absent for three consecutive working days between October 18 and October 20, 1993 without a doctor's note.

Hirschberg was aware the Isaac had been hospitalized occasionally during the school year but was never told the reason. He was never told that Isaac had any physical limitations. There were no days excused for worker's compensation. Hirschberg testified that he received a doctor's note on June 2 excusing Isaac from work until June 6. He explained that Isaac's absence record was taken from the sign-in sheets. By contract, employees are required to sign in when they report to work. The district's computer records do not contain all of the days on which respondent did not sign in and Hirschberg said that the sign-in sheets are more accurate.

Only one other doctor's note was introduced into evidence by respondent. It excuses him from work between December 27, 1992 and January 4, 1993.

No evidence was offered to support the suggestion that Isaac failed to report to work or carry out his duties because of a handicap.

Since Isaac failed to appear at hearing, I **FIND** the evidence of the District to be credible and uncontroverted. Consequently, I **FIND** the testimony set forth above as fact in this matter.

DISCUSSION OF LAW AND CONCLUSIONS

I **CONCLUDE** that respondent repeatedly violated several district policies of which he had notice:

I **CONCLUDE** that he was absent at least three times in September and October 1993 for more than three consecutive working days without a doctor's note.

I **CONCLUDE** that he is guilty of excessive absenteeism in that he failed to carry out his job assignments because of his early departures as well as his failures to report for work.

I **CONCLUDE** that he failed to work the hours assigned to him and left the building without permission.

I **CONCLUDE** that he consistently failed to complete the daily workload assigned to him.

Based upon his poor work performance and his failures to comply with the employment policies of the district, I **CONCLUDE** that respondent was guilty of neglect of duty between July 1991 and June 1994.

I **CONCLUDE** that he was excessively absent between July 1992 and June 1994. His absences were for the most part unexplained and severely affected the level of cleanliness which the school was able to maintain.

I **CONCLUDE** that respondent is not guilty of insubordination because of his failure to be present at work or to call in his absences. There is no evidence that he violated, refused or failed to carry out a direct order of a supervisor to call in or come to work. *Eddy v. Department of Transportation*, 208 N.J. Sup. 156, 159 (App. Div. 1986). The substance of this alleged offense is already encompassed within the district's charge of excessive absenteeism. Isaac might be guilty of insubordination for failing to carry out his job assignments but he is not charged with this violation.

PENALTY

N.J.A.C. 4A:2-2.3 provides that an employee may be subject to major discipline for neglect of duty and/or excessive absenteeism. Major discipline includes removal. N.J.A.C. 4A:2-2.2(a)1.

In order to determine the appropriate penalty to be imposed, it is necessary to examine Isaac's employment record. This shows that he was notified repeatedly that his attendance and performance were unacceptable over a period of at least three years. His increment was withheld twice. He received verbal and written warnings and a three day suspension. In spite of these actions by the district, his performance continued to deteriorate. He made no effort to do anything to help to save his employment. I **CONCLUDE** that there is no appropriate penalty other than to remove Isaac from his position.

ORDER

It is **ORDERED** that respondent, David Isaac, be removed from his position as custodian in the State-Operated School District of Paterson.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 2, 1995
DATE

Edith Klinger
EDITH KLINGER, ALJ

2/6/95
DATE

Receipt Acknowledged:
[Signature]
DEPARTMENT OF EDUCATION

FEB 8 1995
DATE
md

Mailed to Parties:
[Signature]
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Witnesses

For Petitioner:

Harold Simon
Garry Mott
George Hirschberg

For Respondent:

There were no witnesses for respondent

Exhibits

- J-1 Stipulation of Facts
- J-2 Board of Education Policy
- J-3 Custodians Evaluation Form, dated May 1, 1992
- J-4 Memo from Milone to Isaac, dated May 1, 1992
- J-5 Memo from Milone to Isaac, dated May 7, 1992
- J-6 Notice of Increment Withholding, dated June 15, 1992
- J-7 Letter from Milone Requesting Removal of Isaac, dated July 21, 1992,
with attachment
- J-8 Memo from Hirschberg to Isaac, dated November 2, 1993
- J-9 Memo from Hirschberg to Isaac, dated December 6, 1993
- J-10 Notice of Suspension, dated March 28, 1994
- J-11 Notice of Increment Withholding, dated April 27, 1994
- J-12 Letter from Hirschberg Requesting Removal of Isaac, dated June 2,
1994
- J-13 Annual Listing of Absent Employees

- J-14 Employees Attendance Calendar July 1993 - June 1994

- P-1 Memo from Simon to Isaac, dated April 14, 1992
- P-2 Letter from Simon to Milone, dated September 24, 1991
- P-3 Memo from Mott to Milone, dated May 25, 1992
- P-4 Memo from Mott to Milone, dated June 7, 1992
- P-5 Memo from Mott to Milone, dated June 16, 1992
- P-6 Memo from Mott to Milone, dated June 22, 1992
- P-7 Memo from Mott to Milone, dated June 25, 1992
- P-8 Memo from Mott to Milone, dated July 2, 1992
- P-9 Letter from Padron to Mott
- P-10 Custodian's Evaluation Form, dated March 29, 1993
- P-11 Memo from Hirschberg to Milone, dated October 20, 1993
- P-12 Memo from Hirschberg to Milone, dated October 21, 1993
- P-13 Memo from Hirschberg to Isaac, dated May 18, 1994
- P-14 Memo from Vacca to Isaac, dated May 20, 1994
- P-15 Custodian's Evaluation Form, 1993-94 School Year

- R-1 Custodian's Evaluation Form, dated July 1990
- R-3 Physician's Note, dated January 2, 1993
- R-3 Physician's Note, dated June 2, 1994


IN THE MATTER OF THE TENURE :
HEARING OF DAVID ISAAC, : COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT : DECISION
OF PATERSON, PASSAIC COUNTY. :
_____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record in this matter, the Commissioner concurs with, and accepts as his own, the findings of fact, credibility determinations and conclusions of the Office of Administrative Law in this case. Further, the Commissioner determines that the record fully supports sufficient cause to terminate respondent from his position as custodian based upon his neglect of duty and excessive absenteeism.

Accordingly, for the reasons expressed in the initial decision, respondent is dismissed from his tenured position with the State-operated School District of the City of Paterson as of the date of this decision.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MARCH 8, 1995
DATE OF MAILING MARCH 8, 1995

87-95E

PAUL A. BATTILORO, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION

TOWN OF WESTFIELD, UNION :

COUNTY, AND DR. ROBERT RADER, :

BOARD SECRETARY, :

RESPONDENTS. :

SYNOPSIS

Petitioning candidate for seat on Board sought declaration that respondent Board and Board Secretary erred in rejecting his nominating petition on grounds that petitioner was disqualified from such candidacy by reason of a conflict of interest prohibited by N.J.S.A. 18A:12-2 and employment as a deputy fire chief contrary to N.J.S.A. 18A:12-3. Matter was transferred from Superior Court, where stay of further election proceedings had been ordered pending determination by the Commissioner.

Commissioner found statutes cannot be read to disqualify individuals with inconsistent interests or employment from being candidates for board membership. (Thomas State Board Decision) Commissioner directed Board to place petitioner's name on ballot and dissolved stay of election proceedings, noting that the Board may bring its claim anew if respondent is elected but has not divested himself of the alleged inconsistent interests prior to commencement of his term of office.

MARCH 10, 1995

PAUL A. BATTILORO,	:	
	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
TOWN OF WESTFIELD, UNION	:	
COUNTY, AND DR. ROBERT RADER,	:	
BOARD SECRETARY,	:	
	:	
RESPONDENTS.	:	

For Petitioner, James C. Heimlich, Esq.

This matter was opened before the Commissioner of Education on March 6, 1995, by way of an Order of the Superior Court of New Jersey, Union County, transferring the matter to the Commissioner for determination as a controversy arising under the school laws. Petitioner had attempted to file a nominating petition seeking to be placed on the ballot at the annual school election for a seat on the Board of Education, but had been rejected by the respondent Board Secretary on grounds that he was not qualified for candidacy due to an impermissible conflict of interest under N.J.S.A. 18A:12-2 and employment as Deputy Fire Chief contrary to N.J.S.A. 18A:12-3. On March 2, 1995, the Honorable Edward W. Beglin, Jr., A.J.S.C. issued an order temporarily restraining the Board from any further action relating to election of Board members pending determination of this matter by the Commissioner.

Upon review of the papers filed by petitioner,* it is clear that he is entitled to prevail as a matter of law, there being no allegation of defect in petitioner's nominating papers or qualification for office other than the Board's contention of conflict of interest under N.J.S.A. 18A:12-2 and inconsistent employment under N.J.S.A. 18A:12-3. It is now well established that the statutory scheme cannot be construed to disqualify individuals with inconsistent interests, as opposed to individuals who do not meet the qualification standards of N.J.S.A. 18A:12-1, from being candidates for board membership. Wayne W. Thomas, Acting Board Secretary, Board of Education of the Township of Willingboro, Burlington County v. Charlene J. Edwards, decided by the State Board of Education November 3, 1993. Therefore, even assuming, arguendo, that petitioner does in fact have an inconsistent interest or inconsistent employment that would act as a bar to Board membership, that interest does not preclude him from appearing on the ballot as a candidate and divesting himself of the inconsistent interest prior to commencement of his term of office if elected.

Accordingly, petitioner has prevailed in his claim and the Commissioner directs that his name be placed on the ballot as if his nominating petition had been accepted at the time of its attempted filing. The stay issued by Judge Beglin is hereby

*Given the law controlling its outcome, the Commissioner has decided this matter without answer from the Board, in the belief that prompt disposition of the question of petitioner's continued candidacy is in the best interest of both the parties and the public. N.J.A.C. 6:24-1.15.

dissolved, and preparations for the election are to proceed in the normal manner.

The Commissioner notes, however, that there is nothing to prevent the Board, should it deem appropriate, from bringing its allegations to the Commissioner for adjudication should petitioner be elected, but not divested of the alleged inconsistencies under N.J.S.A. 18A:12-2 and N.J.S.A. 18A:12-3, on which the Commissioner expressly makes no ruling herein.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

MARCH 10, 1995

DATE OF MAILING - MARCH 10, 1995

EXPERT BUILDING MAINTENANCE,
INC., A NEW JERSEY CORPORATION,
T/A JANITORIAL MANAGEMENT, AND
DONALD SINCLAIR, INDIVIDUALLY,

PETITIONERS,

V.

WEST NEW YORK BOARD OF EDUCATION,
A BODY POLITIC OF NEW JERSEY,
HUDSON COUNTY, AND MAVERICK
BUILDING SERVICE, INC., A NEW
JERSEY CORPORATION,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning unsuccessful bidder for maintenance contract alleged Board's award of contracts was based on preferential treatment and that successful bidder did not meet specifications.

ALJ granted summary decision in favor of respondents, dismissing the complaint. ALJ found that there was no demonstration of any material allegation of fact to support allegations of unlawful collusion beyond conjecture; petitioner lacked standing to challenge the award; there was no basis for relief by judgment of compensatory or punitive damages under N.J.S.A. 18A:18A-46; and there was no basis for any other relief as the contract in question had already been fully performed.

Commissioner adopted findings and determination in initial decision as his own.

March 13, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION ON MOTION
FOR SUMMARY DECISION
DISMISSING COMPLAINT
OAL DKT. NO. EDU 8081-94
AGENCY DKT. NO. 333-8/94

**EXPERT BUILDING MAINTENANCE,
INC., A NEW JERSEY CORPORATION,
T/A JANITORIAL MANAGEMENT, AND
DONALD SINCLAIR, INDIVIDUALLY,**
Petitioners,

v.

**WEST NEW YORK BOARD OF EDUCATION,
A BODY POLITIC OF NEW JERSEY, AND
MAVERICK BUILDING SERVICE, INC., A
NEW JERSEY CORPORATION,**
Respondents.

Frederick R. Dunne, Jr., Esq., for petitioners
(Dunne & Thompson, attorneys)

George L. Vitureira, Esq., for respondent
(Siff Rosen, attorneys)

Joseph J. Ferrara, Esq., for respondent
(Ferrara and Hantman, attorneys)

Record Closed: January 18, 1995

Decided: January 30, 1995

BEFORE JAMES A. OSPENSON, ALJ:

The Board of Education of the Town of West New York, Hudson County, advertised on July 3, 1993 an invitation for bids to furnish labor, materials and equipment necessary for cleaning, maintenance and preservation of school buildings in the district. Two bids were received and opened on July 13, 1993, one from petitioner Expert Building Maintenance and one from Maverick Building Service. Maverick Building Service being lower bidder, the Board awarded it the contract for school year 1993-94. Alleging unlawful collusion between the Board through actions of its secretary/business administrator and the successful bidder, Expert Building Maintenance and its sole owner Donald Sinclair filed suit against the Board and Maverick Building Service in Superior Court of New Jersey, Hudson County, on August 4, 1993, demanding judgment invalidating the bidding process, setting aside award of the contract to Maverick, ordering rebid of all contracts, and granting Expert Building Maintenance and its owner compensatory and punitive damages. The Board and Maverick filed answers denying illegality or liability, asserting nonrecoverability of damages under *N.J.S.A. 18A:18A-46*, and challenging petitioners' standing to bring suit. A superior court judge denied petitioners' request for temporary restraints on August 17, 1993 and entered an order requiring respondents to show cause why preliminary injunction should not be issued restraining and enjoining the Board from awarding a contract for performance of the school maintenance services to Maverick, returnable September 24, 1993. Before then, however, petitioners withdrew their request for preliminary injunction. On May 2, 1994, a superior court judge ordered the matter transferred for adjudication to the Commissioner of the Department of Education, under *R. 1:13-4(a)*. The Commissioner transmitted it to the Office of Administrative Law on August 19, 1994 for hearing and determination as a contested case in accordance with *N.J.S.A. 52:14F-1 et seq.*

On November 10, 1994 the Board filed a motion for summary decision dismissing the complaint pursuant to *N.J.A.C. 1:1-12.5*. Annexed to the motion were Exhibits R-1 through 10. Maverick joined the motion to dismiss. On notice to the parties, the matter came on for argument on January 13, 1995. Responding to

motions, petitioners filed no answering certifications of fact or affidavits to challenge factual assertions supporting the motions. *N.J.A.C. 1:1-12.5(b)* provides:

The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered. . .

The parties declared that all discovery had been found complete. Motions to dismiss the complaint, therefore, were ripe for determination. It was represented the building maintenance contract for the school year 1993-94 had been fully performed by Maverick, contract for the succeeding school year 1994-95 having been extended by the Board without new bids, based on satisfactory prior performance, as allowed under *N.J.S.A. 18A:18A-42*.

DISCUSSION

Motions to dismiss raise only questions of law in respect of Counts II and III of the complaint. Count III alleges the West New York Board failed to comply with *N.J.S.A. 40A:11-23* and its time frames between publishing and advertising for bids and the opening date on which bids were taken. Filing procedures here are governed not by the local Public Contracts Law in Title 40 but by the Public School Contract Law in *N.J.S.A. 18A:18A-1 et seq.* Count III, therefore, is defective as a matter of law. In Count II, petitioners, neither of whom is a taxpayer of the school district, challenge Maverick's failing "properly to comply with the specification by not inspecting the various premises that would require cleaning and maintenance work within the district. . ." Undisputedly not the lowest responsible bidder, Expert has no standing to

challenge the result since the assertion is essentially an attack on specifications and fulfillment thereof by a rival bidder. See, *Waszen v. City of Atlantic City*, 1 N.J. 272, 276 (1949):

Since [plaintiffs] were the unsuccessful bidders they therefore have no standing to challenge the award of the contract to a rival bidder. . . The rationale of such a holding is that one cannot endeavor to take advantage of a contract to be awarded under illegal specifications and then, when unsuccessful, seek to have the contract set aside. . .

Certification of a principal officer of Maverick, moreover, not challenged by petitioners on the motion, denied their allegation the contract premises were not inspected before bid. Exhibit R-7 at 2 and 3.

Count I of the complaint, which seeks damages, alleged unlawful collusive conduct "to limit competition" and to procure "an unfair advantage in the public bidding" through a close friendship between Board secretary/business administrator and the brother of an owner of Maverick. Deposition testimony of Donald W. Sinclair, owner of Expert, in R-2, demonstrated Sinclair had no direct knowledge of any actual collusion nor anything but a perceived "special relationship." Allegations of collusion are insupportable through him as a matter of law. Nothing within his personal knowledge was exposed in discovery that could be said to be competent to support an unlawfully collusive relationship. R-2; R-10. All three counts of the complaint are subject to dismissal to the extent relief sought in each is that of compensatory and punitive damages. *N.J.S.A. 18A:18A-46* provides:

No action for damages shall lie against the State Board, any state official, or any board of education or any of its officers because of any action taken by virtue of the provisions of this chapter.

Summary judgment is an appropriate remedy where no genuine issue of material fact remains in a case and where, as a result, only questions of law remain for

determination on undisputed facts. The remedy is especially appropriate where all discovery has been completed and where available discoverable evidence nevertheless demonstrates what can and what cannot be proven. Summary judgment in the courts and here under *N.J.A.C. 1:1-12.5* is a procedure favored in the interest of judicial economy. In *Judson v. Peoples Bank and Trust Company of Westfield*, 17 N.J. 67 (1954), the Supreme Court said:

[Summary judgment] is designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion, clearly shows not to present any genuine issue of material fact requiring disposition at a trial. . .

If the opposing parties offer . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, . . . fanciful, frivolous, gauzy or merely suspicious, he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts in the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact. *Id.* at 74-75.

CONCLUSION

Having reviewed pleadings, submissions, certifications, documentation and memoranda of law, having heard arguments of the parties, and noting petitioners have not filed certifications or affidavits establishing any material fact remains in dispute, I **CONCLUDE** (1) that the complaint should be dismissed because there has not been demonstrated any material allegation of fact to support allegations of unlawful collusion beyond conjecture, suspicion or opinion; (2) that Expert Building Maintenance and its individual owner, Donald J. Sinclair, being unsuccessful higher bidder for the school maintenance contract of West New York Board of Education, lack standing to challenge award of the contract to Maverick Building Service, lowest bidder; (3) that there is no basis for relief by judgment of compensatory or punitive damages under *N.J.S.A. 18A:18A-46*; and (4) that there is no basis for any other form of relief, the contract for

1993-94 having been fully performed by low bidder and injunctive relief herein having heretofore been foresworn.

Motions of West New York Board of Education and Maverick Building Service for summary decision in their favor dismissing the complaint are **GRANTED**. Judgment is **ENTERED** accordingly.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 30, 1995
DATE

2/1/95
DATE

FEB 7 1995
DATE
amr

James A. Oспенсон
JAMES A. OSPENSON, ALJ

Receipt Acknowledged:
Mr. & Mrs. [Signature]

DEPARTMENT OF EDUCATION

Mailed to Parties: Jeff M. [Signature]
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

EXHIBIT LIST

- R-1 Complaint by petitioners in Superior Court of New Jersey, Hudson County, Law Division, dated August 4, 1993
- R-2 Excerpts of deposition testimony of Donald Sinclair, taken September 1, 1993
- R-3 Excerpts of deposition testimony of Judy C. Flynn, taken September 21, 1993
- R-4 Invitation for bids announced by West New York Board of Education, dated July 3, 1993
- R-5 Bid proposal submitted to Board by Maverick Building Service, dated July 6, 1993
- R-6 Bid proposal submitted to Board by Expert Building Maintenance, dated July 12, 1993
- R-7 Certification of Jose Garcia, owner of Maverick Building Service
- R-7A Certification of Raul Garcia, dated February 4, 1994
- R-8 Letter of Jose P. Garcia for Maverick Building Service to Dr. Louis Romano, Board secretary/business administrator
- R-9 Letter of Dr. Louis A. Romano, Board secretary/business administrator, to Maverick Building Service and Jose P. Garcia, dated June 22, 1993
- R-10 Affidavit of Conchetta Sico, administrative clerk of Board business administration office, dated August 12, 1993

EXPERT BUILDING MAINTENANCE,
INC., A NEW JERSEY CORPORATION,
T/A JANITORIAL MANAGEMENT, AND
DONALD SINCLAIR, INDIVIDUALLY,

PETITIONERS,

V.

WEST NEW YORK BOARD OF EDUCATION,
A BODY POLITIC OF NEW JERSEY,
HUDSON COUNTY, AND MAVERICK
BUILDING SERVICE, INC., A NEW
JERSEY CORPORATION,

RESPONDENTS.

COMMISSIONER OF EDUCATION


DECISION

The record of this matter and the initial decision in the form of summary judgment by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record of this matter, the Commissioner adopts as his own the conclusion of the Administrative Law Judge that the complaint herein is ripe for dismissal where its allegation of unlawful collusion rests on mere conjecture, where Expert Building Maintenance and its individual owner lack standing to challenge the contract awarded to Maverick Building Service, where the contract in question has already been fully performed, and where there exists no basis for relief in damages under pertinent statute (N.J.S.A. 18A:18A-46).

Accordingly, the initial decision of the Office of Administrative Law dismissing the complaint is affirmed for the reasons expressed therein.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

March 13, 1995
Date of Mailing-March 13, 1995

EDE # 4359-91
SBE #162-2/91
SB # 88-95

IN THE MATTER OF THE REVOCATION :
OF THE TEACHING CERTIFICATES OF : STATE BOARD OF EDUCATION
LINDA PEDRICK BY THE STATE BOARD : DECISION ON MOTIONS
OF EXAMINERS. :

Decided by the State Board of Examiners, February 23, 1995

Decision on motion by the State Board of Examiners, September 14, 1995

For the Petitioner-Respondent, Arlene G. Lutz, Deputy Attorney
General (Deborah T. Poritz, Attorney General of New Jersey)

For the Respondent-Appellant, Selikoff & Cohen (Stephen R. Cohen, Esq., of
Counsel)

This matter is before us today for disposition of two motions: a motion to supplement the record made by the State Board of Examiners and a motion for a stay of the Board's decision made by Linda Pedrick (hereinafter "respondent"), who has appealed the decision of the State Board of Examiners to the State Board of Education.

The underlying case was initiated on February 28, 1991, when the Board of Examiners issued an order to show cause as to why respondent's certificates should not be revoked or suspended. The matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to the Administrative

Dec. 6, 1995

Procedure Act, N.J.S.A. 52:14B-1 et seq., and a hearing was conducted before an Administrative Law Judge (ALJ) in April 1994.

Following the hearing, the ALJ issued his Initial Decision, concluding that respondent's conduct did not warrant revoking or suspending her certificates. That decision was received by the State Board of Examiners on January 3, 1995.

The Board of Examiners acted on the ALJ's Initial Decision at its meeting on February 23, 1995, rejecting his determination and suspending respondent's certificates for a period of two years.

The Board of Examiners mailed its decision to respondent on July 10, 1995, and respondent appealed to the State Board of Education.

As stated, respondent is seeking a stay of the Board of Examiners' decision pending our decision on the merits of her appeal. It is her position that a stay is warranted because the terms of N.J.S.A. 52:14B-10 of the Administrative Procedure Act provide that if an agency does not act within 45 days of receiving an Initial Decision, the ALJ's decision shall be deemed the final decision and the Board of Examiners in this case failed to act within the requisite time period.

The Board of Examiners seeks to supplement the record with the certification of the Assistant Director of the Department of Education's Office of Licensing and Academic Credentials delineating the circumstances of the Board of Examiners' actions. It is the Board of Examiners' position that "an accurate picture of the events that transpired regarding the issuance of the Board's decision" is necessary so that the State Board of Education can decide "the legal question posed by

respondent regarding the status of the Board's decision." Board of Examiners' letter brief of September 28, 1995.

After reviewing the arguments of counsel, we grant both respondent's motion for a stay and the Board of Examiners' motion to supplement the record. We also direct that the parties now submit briefs as to the effect of the Board's failure to act on the ALJ's decision within 45 days of its receipt of that decision. We stay briefing of the other issues involved in this appeal until resolution of those questions relating to the 45-day rule. Respondent's brief shall be due within twenty days from the date of this decision, and the Board of Examiners shall file its responsive brief within twenty days thereafter.

December 6, 1995

Date of mailing DEC 08 1995

EDE # 4359-91
SBE #162-2/91
SB # 88-95

IN THE MATTER OF THE REVOCATION :
OF THE TEACHING CERTIFICATES OF : STATE BOARD OF EDUCATION
LINDA PEDRICK BY THE STATE BOARD : DECISION
OF EXAMINERS. :

Decided by the State Board of Examiners, February 23, 1995

Decision on motion by the State Board of Examiners, September 14, 1995

Decisions on motions by the State Board of Education, December 6, 1995

For the Petitioner-Respondent, Arlene G. Lutz, Deputy Attorney
General (Deborah T. Poritz, Attorney General of New Jersey)

For the Respondent-Appellant, Selikoff & Cohen (Stephen R. Cohen, Esq., of
Counsel)

This case was initiated on February 28, 1991, when the Board of Examiners issued an order to show cause as to why respondent's certificates should not be revoked or suspended. The matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and a hearing was conducted before an Administrative Law Judge (ALJ) in April 1994.

Following the hearing, the ALJ issued his initial decision, concluding that respondent's conduct did not warrant revoking or suspending her certificates. That decision was received by the State Board of Examiners on January 3, 1995.

6/5/96

The Board of Examiners acted on the ALJ's initial decision at its meeting on February 23, 1995, rejecting his determination and suspending respondent's certificates for a period of two years.

The Board of Examiners mailed its decision to respondent on July 10, 1995, and respondent appealed to the State Board of Education.

Respondent also sought a stay of the Board of Examiners' decision pending our decision on the merits of her appeal. It was her position that a stay was warranted because the terms of N.J.S.A. 52:14B-10 of the Administrative Procedure Act provide that if an agency does not act within 45 days of receiving an initial decision, the ALJ's decision shall be deemed the final decision, and that the Board of Examiners had failed to act within the requisite time period in this case.

The Board of Examiners then moved to supplement the record with the certification of the Assistant Director of the Department of Education's Office of Licensing and Academic Credentials delineating the circumstances of the Board of Examiners' actions.

On December 6, 1995, we granted both respondent's motion for a stay of the Board of Examiners' decision and the Board of Examiners' motion to supplement the record on appeal. We also directed the parties to submit briefs as to the effect of the Board's failure to act on the ALJ's decision within 45 days of receipt of the decision. Both parties complied with that directive.

Respondent argues that the plain language of N.J.S.A. 52:14B-10(c) and binding precedent of the New Jersey Supreme Court mandate that the failure of the Board of Examiners to act on the ALJ's decision within 45 days must result in the initial

decision being “deemed approved.” She contends that none of the excuses offered by the Board of Examiners have any merit and that the inadvertence of an inexperienced employee can not justify extending the 45 day period after it has expired. Respondent further argues that, in any event, the Board of Examiners’ decision can not withstand appellate scrutiny because the Board of Examiners did not issue its written findings of fact and conclusions of law until nearly five months after it acted to reject the ALJ’s initial decision.

In response, the Board of Examiners first urges that we ignore respondent’s arguments relating to the fact that the Board did not issue its written decision until nearly five months after its February 23 action rejecting the ALJ’s determination. It also urges that we disregard the documents relating to the inquiry respondent’s counsel made to the Board in order to ascertain the circumstances of the Board’s action. It argues that the Board of Examiners’ delay was caused by an inadvertent error made by an inexperienced staff person and that application of the “deemed adopted” provision of N.J.S.A. 52:14B-10(c) in these circumstances would impede the public interest. It contends that it was not the Board of Examiners which failed to take action, but a Department of Education employee over which the Board of Examiners had no authority or control because the Board of Examiners is not part of the Department of Education. As expressed in its brief, the Board of Examiners argues that:

In this matter there was “an exceptional and excusable lapse” in conforming with the time limitations. In balancing the competing considerations of the APA, the integrity of the hearing process versus the right of the agency to carry out its responsibilities, it is obvious that the balance must shift to the agency’s right to decide a matter of public interest

without being thwarted by an inexperienced individual's inadvertent error.

Board of Examiners' brief, at 10-11.

We have reviewed the arguments of the parties and the applicable law with utmost care. We agree with the Board of Examiners that the responsibility with which the Legislature has entrusted it is an important one. However, because of the importance of that responsibility and for the reasons that follow, we conclude that, under the circumstances presented to us, the ALJ's initial decision must be deemed to have been adopted by the Board of Examiners.

N.J.S.A. 52:14B-10(c) provides in pertinent part that:

A recommended...decision...shall be filed...with the agency in such form that it may be adopted as the decision in the case and delivered or mailed to the parties of record with an indication of the date of receipt by the agency head....The head of the agency...shall adopt, reject or modify the recommended...decision no later than 45 days after receipt of such recommendations. Unless the head of the agency rejects or modifies the report within such period, the decision of the administrative law judge shall be deemed adopted as the final decision of the head of the agency.

Although the State Board of Education is the head of the State Department of Education, N.J.S.A. 18A:4-1, the Board of Examiners is the "head of the agency" in this context for purposes of assessing compliance with N.J.S.A. 52:14B-10(c). Winston v. Bd. of Ed. of South Plainfield, 125 N.J. Super. 131, 137-39 (App. Div. 1973), aff'd, 64 N.J. 582 (1974). However, we reject as entirely without merit the Board of Examiners' assertion that it is not part of the Department of Education. N.J.S.A. 18A:6-34 (all members of the Board of Examiners are appointed by the Commissioner of Education with the approval of the State Board); N.J.S.A. 18A:6-38

(Board of Examiners shall issue and may revoke certificates subject to rules and regulations prescribed by the State Board). Hence, we also reject the Board of Examiners' contention that it can not be held responsible for its failure to act within the statutory time period because that failure was the result of a mistake made by an employee of the Department of Education.

We recognize that the automatic approval mechanism of N.J.S.A. 52:14B-10(c) should be applied with caution. E.g., King v. New Jersey Racing Comm'n., 103 N.J. 412 (1986). We also recognize that there have been cases where an ALJ's initial decision has not been deemed adopted despite the agency's failure to properly discharge its decision-making responsibilities. King v. New Jersey Racing Comm'n., supra; DiMaria v. Board of Trustees of Pub. Employees' Retirement System, 225 N.J. Super. 341 (App. Div. 1988), certif. denied, 113 N.J. 638 (1988). However, in contrast to the case now before us, the agencies involved in those cases took some action within the statutory time period notwithstanding that their action was procedurally defective. Mastro v. Retirement System, 266 N.J. Super. 445, 451 (App. Div. 1993).

In this case, the Board of Examiners did not take any action at all within the time allowed by N.J.S.A. 52:14B-10(c). Since the Board of Examiners received the ALJ's initial decision on January 3, 1995, it was required to adopt, reject, or modify that decision by February 18, 1995. It neither did so by that date nor sought to obtain an extension of time in which to act as provided for by the rules. N.J.A.C. 1:1-18.8 (time limits for issuing a final decision may be extended for good cause if requested from the Director of the Office of Administrative Law by the day on which the time period is to expire). Instead, it waited until February 23 to summarily reject the ALJ's determination

and did not even acknowledge that its decision was untimely until respondent appealed to us. Furthermore, although not determinative of our decision, the Board of Examiners then failed to actually issue its decision until nearly five months after it acted. See DiMaria v. Bd. of Trustees of P.E.R.S., supra. Under these circumstances, we conclude that the statute's objective to encourage prompt consideration and disposition of contested cases is best served by holding that the ALJ's initial decision was automatically adopted by the Board of Examiners in this instance. Mastro v. Retirement System, supra.

We reject the Board of Examiners' contention that this result is contrary to the public interest. In this respect, we stress that our conclusion would not have precluded us from reviewing the ALJ's decision if we had found that determination to be manifestly erroneous. See Mastro v. Retirement System, supra, at 452; DiMaria v. Bd of Trustees of P.E.R.S., supra, at 348, n. 2. This, however, was not the case here. While the ALJ's initial decision found that respondent had acted improperly and had "participate[d] in an activity which was violative of the public trust," initial decision, at 23, he found that her conduct did not warrant revoking her certification. This conclusion was based on his findings that respondent's role in events occurring in 1987 in the Department of Education's Division of Vocational Education, which culminated in several criminal indictments, had been peripheral and that, to the extent that she had participated, she had merely been following the dictates of her superiors. He also found that her conduct was the result of naiveté rather than criminal intent. The ALJ grounded his conclusion in respondent's unblemished record in education, together with the years of successful service she had contributed, as well as her impeccable

reputation among her peers and supervisors. The Board of Examiners disagreed with the ALJ's assessment of respondent's conduct to the extent that it concluded that her conduct warranted suspending her certification for two years. It did not, however, reject the ALJ's findings of fact. These facts provided a reasonable basis for the ALJ's conclusion that no action against her certification should be taken, and we are not aware of any mandate in law that would dictate a different result. Mastro v. Retirement System, supra. Nor does consideration of the arguments made on behalf of the Board of Examiners in its exceptions to our Legal Committee's Report convince us that the ALJ's determination of this matter was manifestly erroneous. We therefore do not find it to be against the public interest to permit the ALJ's initial decision to be the final agency decision in this case.

Wendel E. Daniels abstained.

Attorney exceptions are noted.

June 5, 1996

Date of mailing ~~_____ JUN 07 1996 _____~~

89 - 95

OAL DKT. NO. EDU 8199-91

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF LIVINGSTON, ESSEX COUNTY, :

PETITIONER, :

V. :

HANK AND DOLLY LUWISCH, :
individually and as natural :
guardians of K.L. and J.L., :

RESPONDENTS. :

COMMISSIONER OF EDUCATION

DECISION



MARCH 14, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT

OAL DKT. NO. EDU 8199-91
AGENCY DKT. NO. 37-2/91

**BOARD OF EDUCATION OF THE
TOWNSHIP OF LIVINGSTON,
ESSEX COUNTY**

Petitioner,

v.

HANK and DOLLY LUWISCH,

Respondents.

Vito A. Gagliardi, Jr., Esq., attorney for petitioner (Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Hank and Dolly Luwisch, respondents, *pro se*

Record Closed: January 13, 1995

Decided: February 6, 1995

BEFORE **RALPH J. TOLOMEO, A.L.J.**

STATEMENT OF THE CASE

Petitioner, the Board of Education of the Township of Livingston, Essex County (Board) seeks reimbursement of tuition for K. L. and J. L., children of Hank and Dolly Luwisch, which it

alleges were not domiciled in the district for a period of time, namely October 1, 1990 through January 18, 1991.

By letter dated February 19, 1991, petitioner, the Livingston Board of Education (Board) filed with the Commissioner of Education of the State of New Jersey a verified petition alleging that respondents owed a tuition responsibility for their two children to the Livingston Board of Education for the period October 1, 1990 through January 18, 1991.

Under date of April 24, 1991, respondents filed an answer to the petition with the Commissioner of Education which was filed as received on May 20, 1991 by the Office of the Commissioner of Education. Thereafter, on August 26, 1991, the matter was forwarded to the Office of Administrative Law as a contested case.

The matter was assigned to the undersigned on October 28, 1991. By letter dated May 31, 1992, the parties were advised that a telephonic prehearing conference would be conducted on Friday, June 5, 1992.

On the scheduled prehearing conference date, a telephonic prehearing conference was conducted and the matter scheduled for hearing therefrom for August 27, 1992. By letter dated July 21, 1992, Barry W. Howowitz, Esq. entered his appearance on behalf of respondents in this matter.

As a result of a request for discovery, the scheduled hearing date was adjourned.

Thereafter, on July 28, 1992, the Board, through counsel, filed a notice of motion for summary judgment with accompanying brief and affidavits.

A telephone conference was conducted with counsel for the parties on August 26, 1992 wherein petitioner was to provide to counsel for respondents instances involving students, of which the petitioner was aware, who attended the Livingston Public Schools between 1985 and 1990 whose family, although not residing in the Township, owned property on which a home was being constructed or renovated during the time they were attending school, and what action was taken by the petitioner regarding tuition; and instances involving students, of which the petitioner was aware, who attended Livingston Public Schools between 1985 and 1990 who resided with persons ~~not~~ **not** their parents or legal guardians within the Township during the time that they were attending school, and what action was taken by the petitioner regarding tuition.

It was ordered that the information be provided to respondents on or about September 25, 1992. Thereafter, counsel for respondents would have four weeks from the date such information was received to respond to the Board's motion for summary judgment.

Thereafter, the Board provided the information requested to respondents. Respondent's counsel sought additional information in terms of the identity of the individuals listed; however, no motion was ever brought by respondents' counsel regarding the same. Additionally, no response to the Board's motion for summary judgment was filed by counsel for respondents.

Thereafter, the matter was scheduled for hearing on August 30, 1994. However, at the request of respondents, the matter was adjourned.

The matter was rescheduled for settlement conference on January 4, 1995. The day prior to the conference, counsel for respondents requested an adjournment and, when the request was denied, counsel advised that respondents would appear at the conference without counsel, representing their own interests.

On Wednesday, January 4, 1995, the Luwischs appeared and represented for the record that they were no longer represented by Barry Horowitz, Esq. and were proceeding *pro se*.

During the course of the settlement conference on January 4, 1995, the Luwischs renewed their request for the identity of the individuals whose circumstances, but not identities, were provided to respondents in discovery. This request was denied. Additionally, the Luwischs sought to respond to petitioner's allegations, but were advised that counsel who had represented them in this matter had not filed an answer to petitioner's notice of motion for summary judgment within the prescribed time. Therefore, the request to offer evidence was denied.

At the conclusion of the settlement conference, the parties requested that the record remain open as to the pending motion for summary judgment to afford an opportunity to resolve the matter. By letter dated January 12, 1995, counsel for petitioner advised that the matter could not be resolved. This correspondence was received on January 13, 1995, on which date the record in this matter closed.

**DISCUSSION AND ANALYSIS REGARDING THE BOARD'S
MOTION FOR SUMMARY JUDGMENT**

Respondents, Hank and Dolly Luwisch, informed the Livingston Board of Education that they would be residing in a home in Livingston, New Jersey, in the fall of 1990. As such, their children, K.L. and J.L., were enrolled in and attended the Burnet Hill School of the Township of Livingston school system commencing September 1990. It appears from the facts presented that the Luwischs took title to the property on February 2, 1988, and were domiciled and resided in Staten Island, New York. The Luwischs did not become "residents" of the Township of Livingston until mid-January 1991, specifically January 18, 1991. The Board has sought payment from the Luwischs for the tuition period from October 1990 through January 18, 1991, in the amount of \$5,614.03, the amount for two students attending school for that period of time.

The Board of Education of Livingston had in effect a policy number 5118 entitled "Tuition Students".

The policy states:

1. The Board shall not, as a general policy, accept non-resident pupils.

2. The Board shall not charge tuition for a period of 30 calendar days for pupils who attend classes in a Livingston public school and whose parents or guardians will be taking title to a home in Livingston; after this free tuition period of 30 calendar days, tuition shall be charged based on the specified annual rate set by the Board. Such a non-resident tuition student will not be permitted to register for the succeeding year.

- ...

4. All non-resident pupils shall be charged tuition at a specified rate set by the Board.

- ...

8. Other exceptions, such as hardship cases, will be reviewed and resolved by the Superintendent.

When billed, the Luwischs refused to pay the tuition bill, stating:

We fully agree that the monies for our children's education should be appropriated to Burnet Hill. However, our position is that as taxpayers within the Township of Livingston, the responsibility should [be] incurred by said Township.

In September of 1990, we submitted a paid tax bill to the Board of Education upon enrollment of J. and K. We assumed as taxpayers that tuition was appropriately applied. Under the circumstances, we feel we are being doubly taxed based on the levy of tuition fees in conjunction with taxes. We feel the Board of Education should request those tuition fees from the Township of Livingston for this period of time. (Letter from Jand and Dolly Luwisch, February 10, 1991).

The Luwischs further submitted that they had "every intention" of being in their Livingston home by September, but were prevented from doing so by construction problems. (See letter answer from Hank and Dolly Luwisch to John Ellis, Commissioner of Education, April 24, 1991). Respondents believed it was in the best interests of their children to enroll them in the Livingston school and commute to New Jersey from Staten Island every day until they could "officially" move into their house.

The Board of Education argues that there is no genuine issue of material fact raised in that respondents did not "reside" in the Township during the period in question and, as such, the Board is entitled to summary decision when its tuition claim is a matter of law.

N.J.S.A. 18A:38-1 provides:

Attendance at school free of charge. Public school shall be free to the following persons over five and under twenty years of age:

- (a) Any person who is domiciled within the school district.

N.J.S.A. 18A:38-3 provides:

Attendance at school by non-residents. Any person not resident in the school district, if eligible except for non-residence, may be admitted to the schools of the district with the consent of the Board of Education upon such terms and with or without payment of tuition, as the Board may prescribe.

The above authorizes the Board to promulgate policy such as its policy number 5118.

The terms "domicile" and "residence" are not interchangeable. Domicile is defined as the place where a man has his true, fixed and permanent home and principal establishment and to which, whenever he is absent, he has the intention of returning. The permanent residence of a person, or the place to which he intends to return, even though he may actually reside elsewhere. A person may have more than one residence, but only one domicile. The legal domicile of a person is important since it, rather than the actual residence, often controls the jurisdiction of the taxing authorities and determines where a person may exercise the privilege of voting and other legal rights and privileges. The established, fixed, permanent or ordinary dwelling place or place of residence of a person as distinguished from a place to which business or pleasure may temporarily call him. *Blacks' Law Dictionary*, 435 5th Ed. (1979).

Conversely, residence is defined as

A personal presence at some place of abode with no present intention of definite and early removal and with purpose to remain for an undetermined period, not infrequently, but not necessarily combined with design to stay permanently. . . . Residence implies something more than mere physical presence and something less than domicile. *Blacks' Law Dictionary*, id. at 1176.

Therefore, residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.

In this matter, it is clear from the facts, to which there is no dispute, that the Luwischs resided in Staten Island, New York. They purchased a property in Livingston in 1988 and enrolled their children in the Livingston school system in September 1990, with the understanding that they would be residents within the Township within 30 days of their children's enrollment. By their own admission, this did not occur. Accordingly, there is no dispute as to the facts in their matter, and, pursuant to the statutory scheme cited above and the Board policy as enacted under its policy number 5118, the Board must prevail as a matter of law.

ORDER

Accordingly, it is **ORDERED** that the Board's motion for summary judgment for tuition expense for the children of Hank and Dolly Luwisch, K.L. and J.L., for the period October 1, 1990 through January 18, 1991, in the amount of \$5,614.03, be **GRANTED**. It is further **ORDERED** that the appeal of respondents be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Feb 6, 1995
DATE

2/8/95
DATE

FEB 14 1995
DATE

ak

Ralph J. Tolomeo
Ralph J. Tolomeo, A.L.J.

Receipt Acknowledged:
Hope R. Blum

DEPARTMENT OF EDUCATION

Mailed to Parties: J. J. Marin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF LIVINGSTON, ESSEX COUNTY, :
 :
PETITIONER, :
 :
V. : COMMISSIONER OF EDUCATION
 :
HANK AND DOLLY LUWISCH, : DECISION
individually and as natural :
guardians of K.L. and J.L., :
 :
RESPONDENTS. :
 :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions were untimely filed by respondents pursuant to N.J.A.C. 1:1-18.4. Therefore, these exceptions and the replies thereto were not considered by the Commissioner.

Upon careful and independent review of the record of this matter, the Commissioner adopts as his own the determination of the Office of Administrative Law granting summary judgment to the Board. The Commissioner concurs with the ALJ that, inasmuch as there is no dispute that respondents were not domiciled in Livingston Township until January 18, 1991, yet their children, K.L. and J.L., were enrolled in the district as of September 1990, respondents are obligated to the Board for tuition payments from October 1, 1990, when the 30-day grace period provided by Board policy expired, through January 18, 1991, when respondents became residents of Livingston Township.

Accordingly, the initial decision of the Office of Administrative Law ordering payment of tuition in the amount of \$5,614.03 is affirmed for the reasons expressed therein.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

MARCH 14, 1995

DATE OF MAILING - MARCH 14, 1995

EDU #8199-91
C # 89-95
SB # 48-95

BOARD OF EDUCATION OF THE :
TOWNSHIP OF LIVINGSTON, ESSEX :
COUNTY, :

PETITIONER-RESPONDENT, :

STATE BOARD OF EDUCATION

V. :

DECISION ON MOTION

HANK AND DOLLY LUWISCH, :
individually and as natural :
guardians of K.L. and J.L., :

RESPONDENTS-APPELLANTS. :

Decided by the Commissioner of Education, March 14, 1995

For the Petitioner-Respondent, Riker, Danzig, Scherer,
Hyland & Perretti (Vito A. Gagliardi, Esq., of
Counsel)

For the Respondents-Appellants, Hank and Dolly Luwisch,
pro se

The State Board of Education grants appellants' motion to
supplement the record on appeal pursuant to N.J.A.C. 6:2-1.9.
Given our disposition of this motion, we direct appellants to file
a brief in support of their appeal within twenty days of this
decision.

July 5, 1995

Date of mailing JUL 07 1995

EDU # 8199-91
C # 89-95
SB # 48-95

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF LIVINGSTON, ESSEX COUNTY, :

PETITIONER-RESPONDENT, :

V. :

STATE BOARD OF EDUCATION

HANK AND DOLLY LUWISCH, individually :
and as natural guardians of K.L. and J.L., :

DECISION

RESPONDENTS-APPELLANTS. :

_____ :

Decided by the Commissioner of Education, March 14, 1995

Decision on motion by the State Board of Education, July 5, 1995

For the Petitioner-Respondent, Riker, Danzig, Scherer, Hyland & Perretti
(Vito A. Gagliardi, Esq., of Counsel)

For the Respondents-Appellants, Hank & Dolly Luwisch, pro se

After a thorough review of the record, including the supplemental materials
submitted by the appellants, we affirm the decision of the Commissioner of Education
for the reasons expressed therein.

Daniel Moroney opposed.

October 5, 1995

Date of mailing OCT 10 1995

EDU # 8199-91
C # 89-95
SB # 48-95
APP. DIV. #A-1753-95T3
EDU # 11593-96
C # 233-98
SB # 60-98

BOARD OF EDUCATION OF THE :
TOWNSHIP OF LIVINGSTON, ESSEX :
COUNTY, :

PETITIONER-RESPONDENT, : STATE BOARD OF EDUCATION

V. : DECISION ON MOTION

H.L. AND D.L., individually, and as :
natural guardians of K.L. AND J.L., :

RESPONDENTS-APPELLANTS. :
_____ :

Decided by the Commissioner of Education, March 14, 1995

Decision on motion by the State Board of Education, July 5, 1995

Decided by the State Board of Education, October 5, 1995

Remanded by the Appellate Division, October 24, 1996

Decision on remand by the Commissioner of Education, May 26, 1998

Decided by the State Board of Education, February 3, 1999

Decision on motions by the State Board of Education, April 7, 1999

For the Petitioner-Respondent, Riker, Danzig, Scherer, Hyland & Perretti
(James S. Rothschild, Jr., Esq., of Counsel)

For the Respondents-Appellants, H.L. and D.L., pro se

JUNE 2, 1999

Inasmuch as the respondents' application fails to meet the standards that would entitle them to relief under Crowe v. De Gioia, 90 N.J. 126 (1982), we deny their motion for a stay.

June 2, 1999

Date of mailing JUN 04 1999

DHP # 86-95
SB # 89-95

IN THE MATTER OF THE DISQUALIFI- :
CATION FROM SCHOOL EMPLOYMENT : STATE BOARD OF EDUCATION
OF ELAINE M. NEWMAN. : DECISION

Decided by the Deputy Commissioner of Education, July 28, 1995

For the Petitioner-Appellant, Elaine M. Newman, pro se

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney
General (Deborah T. Poritz, Attorney General of New Jersey)

The State Board of Education affirms the decision of the Deputy Commissioner of Education upholding petitioner's disqualification from employment as a substitute teacher following a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1. That record review revealed that petitioner had been charged with simple possession of marijuana in South Carolina in August 1993, and that she subsequently had been convicted and forfeited her bond when she did not appear for her hearing. Pursuant to N.J.S.A. 18A:6-7.1(e), petitioner had the burden of affirmatively demonstrating clear and convincing evidence of her rehabilitation.

Notwithstanding petitioner's assertion that she had not been aware of the marijuana discovered in her boyfriend's car, in which she had been a passenger, her evidence submitted to the Commissioner was limited to a report she had prepared in college dealing with cocaine and pregnancy and letters of recommendation from close

DEC. 6, 1995

family members and her pastor. Moreover, as required by N.J.S.A. 18A:6-7.1(e), we have considered the "nature and responsibility" of the position from which petitioner was disqualified. In this respect, we stress that employment as a substitute teacher includes responsibility for the care, supervision and instruction of students.

Consequently, we agree that petitioner has failed to demonstrate her rehabilitation by clear and convincing evidence.

December 6, 1995

Date of mailing DEC 08 1995

90 - 95

RUSSELL A. BREESE, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

NEW JERSEY STATE DEPARTMENT OF
CORRECTIONS, :

DECISION

RESPONDENT. :

_____ :



MARCH 14, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6577-94

AGENCY DKT. NO. 129-4/94

RUSSELL A. BREESE,

Petitioner,

v.

NEW JERSEY STATE

DEPARTMENT OF CORRECTIONS,

Respondent.

Russell A. Breese, petitioner, *pro se*

Marlene Zuberan, Deputy Attorney General, on behalf of respondent (Deborah T. Poritz, Attorney General of New Jersey, attorney)

Record Closed: January 6, 1995

Decided: February 6, 1995

BEFORE SOLOMON A. METZGER, ALJ:

This matter arises out of petitioner's claim that his tenure rights were violated in contravention of *N.J.S.A.* 18A:6-10. The Department of Education transmitted the matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14F-1 through -13. The matter has been submitted on cross-motions for summary decision.

The questions presented are whether petitioner's claim is time barred pursuant to *N.J.A.C.* 6:24-1.2 and, if not, whether there has been a violation of his tenure rights.

The facts are undisputed. Petitioner is a teacher who has been employed by respondent at Mountainview Youth Correctional Facility since June 1970. Petitioner held a ten-month position from the time he was hired until he applied for and received a twelve-month position commencing on June 26, 1993. Prior to the new placement petitioner earned \$39,670.71 annually; thereafter, his salary increased to \$45,910.92. However, petitioner's daily rate of pay decreased from \$182.81 to \$175.80.

On July 23, 1993, petitioner filed two grievances seeking to redress this daily rate differential. Grievance hearings were held on August 5, 1993, and the assigned hearing officer issued decisions on November 5, and December 22, 1993, finding that both claims fell outside the scope of the grievance procedure. He indicated that petitioner could appeal to the Department of Personnel. Petitioner did so on December 15, 1993, and on February 1, 1994, the deputy director of classification and compensation informed him that the state compensation plan established the differential for ten- and twelve-month titles, that his union subscribed to the plan and that his salary is calculated on an annual basis, not as a daily rate. The deputy director concluded that the salary differential was properly determined in accordance with applicable rules. On March 1, 1994, petitioner wrote to the Department of Education, Bureau of Controversies and Disputes, seeking to file a complaint and was instructed on March 11, 1994, as to the proper procedure. His petition was filed on May 5, 1994. This is the substance of the record.

Respondent argues initially that petitioner's claim is time barred pursuant to *N.J.A.C.* 6:24-1.2(c), because claims must be filed no later than ninety days after receiving notice of the final order, ruling or other action complained of. I agree. The ninety-day period of limitations begins to run when a party knows or should know of an adverse agency action. *Kaprow v. Board of Educ. of Berkeley Tp.*, 131 N.J. 572, 586-89 (1993). At the latest, petitioner knew that his daily rate of pay had decreased when he filed grievances contesting this fact on July 23, 1993. His petition was not filed until May of 1994. Petitioner argues that as a *pro se* party he was not aware of this procedural requirement and should not be held to it. There is nothing in the rule, however, or in the cases to support this contention. In *Kaprow*, the petitioner, apparently acting

on his own, exchanged correspondence with counsel for the school board over a lengthy period and as a result did not file a timely claim. The Court did not find this compelling *See also Board of Educ. of Bernards Tp. v. Bernards Tp. Educ. Ass'n*, 79 N.J. 311, 326-27 n.4 (1979), where the Court ruled that a teacher who proceeds first to advisory arbitration is not relieved of compliance with the ninety-day rule.

Petitioner argues also that he was misled by the hearing officer into believing that his appeal was to the Department of Personnel. The correspondence does not support this contention. The hearing officer addressed himself exclusively to the grievances filed by petitioner and his letters of November 5, and December 22, 1993, correctly indicate that these issues were reviewable before the Department of Personnel. He makes no global assessment of petitioner's potential claims and there is no indication that the hearing officer was even aware of petitioner's tenure argument.

Should there be some disagreement with my conclusion that this claim is time barred, I also think that it is without merit. *N.J.S.A. 18A:6-10* protects persons under tenure from improper or arbitrary reductions in compensation. These cases generally arise when an employer takes some initiative to which the employee objects. Here, petitioner sought out this twelve-month position, received the attendant salary increase, and now seeks remediation because his daily pay differential is unfavorable. Even if there were something to the argument that petitioner's salary has been reduced by this one method of calculation, he asked for the position and the tenure laws do not protect him from himself. Moreover, he does not even indicate that he has made a bad bargain that he would now undo. Rather, he wants the Commissioner of the Department of Education to improve upon his salary increase.

If petitioner had been coerced into exchanging positions, we might next inquire whether the state compensation plan properly remunerates his increased effort from the perspective of the tenure laws. It is possible to envision circumstances in which an employee forced into such an exchange and given little additional reward could properly claim an erosion in the value of his position. If the question were to be reached here, it might demand an additional affidavit or testimony to explain the considerations that go into salary conversions for ten- and twelve-month

employees. I believe, however, that summary decision is appropriate for the reasons already stated and that respondent need not be put to further effort.

Based on the foregoing, it is my conclusion that petitioner's claim is time barred and that it is substantively without merit. Respondent's motion for summary decision is granted.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

2/6/95
DATE

Solomon A. Metzger
SOLOMON A. METZGER, ALJ

2/8/95
DATE

Receipt Acknowledged:

Hope R. Blackman
DEPARTMENT OF EDUCATION

FEB 14 1995
DATE

Mailed to Parties:
Jeff S. Main
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cae

LIST OF WITNESSES

On behalf of Petitioner:

None

On behalf of Respondent:

None

LIST OF EXHIBITS

On behalf of Petitioner:

None

On behalf of Respondent:

None

RUSSELL A. BREESE,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
NEW JERSEY STATE DEPARTMENT OF	:	DECISION
CORRECTIONS,	:	
	:	
RESPONDENT.	:	
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The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record of this matter, the Commissioner adopts as his own the conclusion of the Office of Administrative Law that petitioner's claim is time barred pursuant to N.J.A.C. 6:24-1.2(c) since petitioner had notice of his per diem rate of pay when he filed grievances contesting same on July 23, 1993, but failed to file a Petition of Appeal before the Commissioner until May 4, 1994. Moreover, the Commissioner concurs with the ALJ that the petition itself is without merit and, consequently, this matter is ripe for summary decision.

Accordingly, the initial decision of the Office of Administrative Law granting summary decision to the respondent is affirmed for the reasons expressed therein.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

MARCH 14, 1995

DATE OF MAILING - MARCH 14, 1995

91 - 95

DAVID A. SOUSA, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE :

BOROUGH OF NEW PROVIDENCE, :

UNION COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

MARCH 14, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDUOA 11612-94

AGENCY DKT. NO. 415-10/94

DAVID A SOUSA,

Petitioner,

v.

**BOARD OF EDUCATION OF THE BORO
OF NEW PROVIDENCE**

Respondent.

Jerry N. Driban, Esq., for petitioner

Martin R. Pachman, Esq., for respondent

Record Closed: February 3, 1995

Decided: February 8, 1995

BEFORE MUMTAZ BARI-BROWN, ALJ:

This matter was transmitted to the Office of Administrative Law on December 13, 1994, for determination as a contested case, pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The parties have agreed to a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Feb 8, 1995
DATE

2/10/95
DATE

FEB 15 1995
DATE

Mumtaz Bari-Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

Hope R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:
Jeff J. Mani
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

RECEIVED
OFFICE OF THE ATTORNEY GENERAL
STATE OF NEW JERSEY
FEB 3 12 04 AM '95

MARTIN R. PACHMAN, P.C.
60 East Main Street
Freehold, New Jersey 07728
(908) 780-5590
Attorneys for Respondent

DR. DAVID A. SOUSA,	:	BEFORE THE COMMISSIONER OF
	:	EDUCATION OF THE STATE OF
Petitioner	:	NEW JERSEY
vs.		
	:	OAL DOCKET #EDUOA 11612-94
	:	AGENCY REF. #415-10/94
BOARD OF EDUCATION OF NEW	:	STIPULATION OF SETTLEMENT
PROVIDENCE, UNION COUNTY,	:	AND DISMISSAL
Respondent	:	

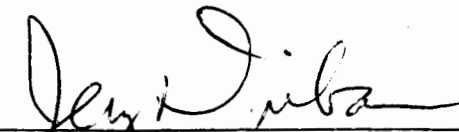
The parties in this appeal have voluntarily resolved all disputed matters between them and enter into the following settlement, which fully disposes of all issues in controversy between the parties:

1. Petitioner consents to the dismissal of his Petition with prejudice.
2. In consideration thereof, Respondent will pay Petitioner the sum of \$3,200.00 in satisfaction of his claims against Respondent, including Petitioner's claim for payment for additional vacation days under his contract of employment.
3. The parties agree that the dismissal of the Petition shall also serve as a release of Respondent and its employees and agents by Petitioner as to all claims that have been made or that could have been made as a result of Petitioner's employment agreement with Respondent and Petitioner's separation from employment by Respondent.

4. This settlement is contingent upon and will only become effective when it is approved by the Board of Education of the Borough of New Providence and the Commissioner of Education.




DAVID A. SOUSA, Petitioner



JERRY N. DRIBAN, ESQUIRE
Counsel for Petitioner

DATE: January 14, 1995

NEW PROVIDENCE BOARD OF EDUC.

By: 

ROBIN T. MCMAHON, ESQUIRE
for MARTIN R. PACHMAN, P.C.
Attorneys for Respondent

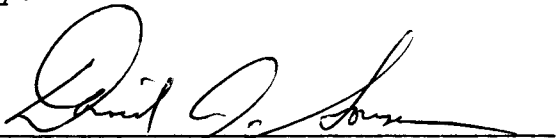
DATE: January 26, 1995

CERTIFICATION

I, David A. Sousa, being the Petitioner in this matter hereby certify that I have reviewed this Settlement Agreement, and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and my acceptance of the terms of this Agreement. I am satisfied with my legal representation, and I enter into this Agreement voluntarily.

DATE:

January 14, 1995


DAVID A. SOUSA

DAVID A. SOUSA,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
BOROUGH OF NEW PROVIDENCE,	:	
UNION COUNTY,	:	
	:	
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


 COMMISSIONER OF EDUCATION

MARCH 14, 1995

DATE OF MAILING - MARCH 14, 1995

92 - 95

LARAINÉ JASON,	:	
	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWN-	:	DECISION
SHIP OF MIDDLETOWN, MONMOUTH	:	
COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

MARCH 14, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8100-93

AGENCY DKT. NO. 284-7/93

LARAINÉ JASON,

Petitioner,

v.

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

Respondent.

Stephen Hunter, Esq., for petitioner (Klausner, Hunter, Cige & Seid, attorneys)

Francis J. Campbell, Esq., for respondent (Kalac, Newman, Lavendar & Campbell, attorneys)

Record Closed: January 12, 1995

Decided: January 31, 1995

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

This matter was transmitted to the Office of Administrative Law on August 26, 1993, for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14-F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of the settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

31 January 1995
DATE

Lillard E. Law
LILLARD E. LAW, A&J

2/8/95
DATE

Receipt Acknowledged:

Hope R. [Signature]
DEPARTMENT OF EDUCATION

FEB 14 1995
DATE

Mailed to Parties:
Jeff S. Mann
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

FILED

JAN 12 11 19 AM '95

STATE OF NEW JERSEY
NO. 1

KALAC, NEWMAN, LAVENDER & CAMPBELL
A Professional Corporation
934 Highway 35
P.O. Box 4040
Middletown, New Jersey 07748
(908) 671-6100
Attorneys for Respondent

STATE OF NEW JERSEY
BEFORE THE COMMISSIONER OF
EDUCATION
Docket No. 284-7-93

LARAIN JASON,

Petitioner,

vs.

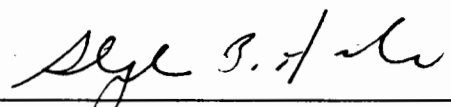
MIDDLETOWN TOWNSHIP BOARD OF
EDUCATION,

Respondent.

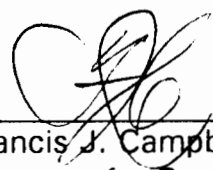
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STIPULATION OF SETTLEMENT

The matter in controversy in the above entitled action having been amicably adjusted by the respondent's offer to employ the petitioner as a Learning Disabilities Teacher/Consultant for the 1994-95 school year, it is hereby stipulated and agreed that the controversy be and is hereby dismissed with prejudice.



Stephen B. Hunter
Attorney for Petitioner



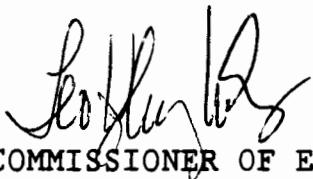
Francis J. Campbell
Attorney for Respondent

Dated: January 9, 1995

LARAINÉ JASON, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN- : DECISION
SHIP OF MIDDLETOWN, MONMOUTH :
COUNTY, :
RESPONDENT. :
_____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

MARCH 14, 1995

DATE OF MAILING - MARCH 14, 1995

LAURENCE APGAR, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE :
CUMBERLAND COUNTY VOCATIONAL- :
TECHNICAL CENTER, CUMBERLAND :
COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

AND :

IN THE MATTER OF THE TENURE :
HEARING OF LAURENCE APGAR, :
CUMBERLAND COUNTY VOCATIONAL- :
TECHNICAL CENTER, CUMBERLAND :
COUNTY. :

_____ :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION DISMISSAL

OAL DKT. NO. EDU 9846-93

AGENCY DKT. NO. 321-8/93

**IN THE MATTER OF THE TENURE HEARING
OF LAURENCE APGAR, CUMBERLAND COUNTY
VOCATIONAL SCHOOL DISTRICT, CUMBERLAND
COUNTY.**

Keith Waldman, Esq., for petitioner (Selikoff & Cohen, attorneys)

Richard McCarthy, Esq., for respondent

Record Closed: January 18, 1995

Decided: February 8, 1995

BEFORE EDGAR R. HOLMES , ALJ:

This matter was transmitted to the Office of Administrative Law on for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14-F-1 to -13.

The petitioner, Laurence Apgar declines to prosecute his appeal in this matter pursuant to his letter of January 13, 1995. The matter is hereby returned to the active list and dismissed with prejudice.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.


Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Feb 8, 1995
DATE


EDGAR R. HOLMES, ALJ

2/14/95
DATE

Receipt Acknowledged:


DEPARTMENT OF EDUCATION

FEB 17 1995
DATE

Mailed to Parties:


ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh



Selikoff & Cohen, P.A.

Counselors at Law

Suite #314
307 Fellowship Road
Mount Laurel, New Jersey 08054-1233
(609) 778-6055
Telefax: 609-778-6056

Joel S. Selikoff
Member of NJ and DC Bars

Steven R. Cohen
Member of NJ, PA and DC Bars

* Carol H. Sapakie
* Michael C. Damm
* Keith Waldman

* Members of NJ and PA Bars

January 13, 1995

HONORABLE EDGAR R. HOLMES, ALJ
OFFICE OF ADMINISTRATIVE LAW
1201 Bacharach Boulevard
Atlantic City, New Jersey 08401

RE: I/M/O TENURE HEARING OF
LAURENCE APGAR, CUMBERLAND
COUNTY VOCATIONAL SCHOOL
DISTRICT, CUMBERLAND COUNTY
DOCKET NO. 321-8/93
Dismissal
Our File No. 3148

Dear Judge Holmes:

The above-referenced letter which has been on Your Honor's inactive list may be removed from the Court's inactive list and may be dismissed with prejudice.

Respectfully,
SELIKOFF & COHEN, P.A.

BY: 
KEITH WALDMAN

KW:kaz
Enclosures
c :Richard McCarthy, Esq.
Mr. Laurence Apgar

STATE OF NEW JERSEY
JAN 18 11 22 AM '95

FILED



COPIES OF
ALL DECISIONS
AND OPINIONS
95 MAR -6 AM 9:03

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

MEMORANDUM

TO: FILE

FR: EDGAR R. HOLMES, ALJ

RE: INITIAL DECISION DISMISSAL
*In the Matter of the Tenure Hearing of Laurence Apgar,
Cumberland County Vocational School District, Cumberland County
OAL Dkt. No. EDU 9846-93
Agency Dkt. No. 321-8/93*

DT: February 23, 1995

The initial decision rendered on February 8, 1995, contains an error. The Initial Decision Dismissal should have read as follows:

OAL Dkt. No. EDU 9846-93 AND OAL Dkt. No. 9845-93.

The Initial Decision Dismissal was meant to apply to both docket numbers.

The parties and their addresses are:

Keith Waldman, Esq.
Selikoff & Cohen
307 Fellowship Road
Mt. Laurel, NJ 08054

Richard McCarthy, Esq.
1800 Executive Suites - Rte 47
Millville, NJ 08332

LAURENCE APGAR, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE :
 CUMBERLAND COUNTY VOCATIONAL- :
 TECHNICAL CENTER, CUMBERLAND :
 COUNTY, :

RESPONDENT. : COMMISSIONER OF EDUCATION

AND : DECISION

IN THE MATTER OF THE TENURE :
 HEARING OF LAURENCE APGAR, :
 CUMBERLAND COUNTY VOCATIONAL- :
 TECHNICAL CENTER, CUMBERLAND :
 COUNTY. :


The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties. It is noted that subsequent to the issuance of the initial decision in this matter, the Commissioner received a memorandum from the Administrative Law Judge advising that his decision herein was meant to apply to both docket numbers of this consolidated matter, rather than just EDU 9846-93 as indicated in his initial decision.

Upon a careful and independent review of the record of this matter, the Commissioner cannot concur with the findings and conclusions of the ALJ that this matter should be dismissed as a

consequence of Apgar's declining to prosecute his appeal. As noted above, this is a consolidated matter. Although Apgar's failure to prosecute is ample justification for dismissal of his petition, the record does not clearly reflect the basis for dismissal of the tenure charges involved herein.

Accordingly, the recommended decision of the ALJ is rejected and this matter is hereby remanded to OAL for supplementation of the record with respect to the basis for dismissal of tenure charges against Laurence Apgar.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MARCH 14, 1995

DATE OF MAILING - MARCH 14, 1995

DHP #431-94
SB # 93-95

IN THE MATTER OF THE DISQUALIFI- :
CATION FROM SCHOOL EMPLOYMENT : STATE BOARD OF EDUCATION
OF WILLIAM R. PALUMBO. : DECISION

Decided by the Deputy Commissioner of Education, January 24, 1995

Decided by the Assistant Commissioner of Education, August 7, 1995

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

William R. Palumbo (hereinafter "petitioner"), who was employed as a teacher in the Hudson County Area Vocational Technical Schools, was disqualified by the Office of Criminal History Review of the Department of Education from continued employment in the State's schools when a fingerprint search conducted pursuant to N.J.S.A. 18A:6-7.1 revealed that he had been convicted in June 1991 on a federal charge of conspiracy to distribute more than 1,000 pounds of marijuana, arising from his involvement in a marijuana importation and distribution operation in the mid-1980's.¹ Petitioner sought to overturn his disqualification on the basis of rehabilitation.

¹ We note that a 1989 conviction on charges of tax evasion and conspiracy to distribute marijuana, arising from the same events, was subsequently vacated on appeal on the grounds that the indictment against petitioner had been obtained solely on the basis of immunized information received from him.

2/7/96

In a letter decision dated January 24, 1995, the Deputy Commissioner of Education upheld the disqualification,² concluding that petitioner had not demonstrated his rehabilitation by clear and convincing evidence.

By letter dated February 8, 1995, the Deputy Commissioner notified petitioner that the appeal was being reopened in order to clarify information in his criminal history record.

Following a hearing held on July 14, 1995, an Assistant Commissioner of Education upheld petitioner's disqualification.³ Stressing the serious nature of petitioner's offense and the fact that he was disqualified from service as a teacher, the Assistant Commissioner, considering all evidence presented by petitioner to be true, indicated that:

While Mr. Palumbo initially engaged in the importation of illegal substances without knowledge, in that his company was used as a 'front,' he admittedly acted with knowledge in 1985 that the New Orleans' shipment would contain marijuana, notwithstanding that he felt compelled to do so. Then, after closing his company, he moved to Key West, and did not contact the authorities until he realized that an investigation which was likely to implicate him was underway. Moreover, while these acts occurred ten years ago, they cannot be attributed to immaturity or ignorance, in that Mr. Palumbo was, at the time, a 40 year old man who held a master's degree, and was both an experienced teacher and entrepreneur. Mr. Palumbo's burden to

² We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws...." N.J.S.A. 18A:4-34.

³ See, n.2, supra.

establish his rehabilitation, under these circumstances, has not been met.

Assistant Commissioner's Decision, slip op. at 3.

The petitioner filed the instant appeal to the State Board of Education.⁴

After a careful review of the record, including the evidence of rehabilitation submitted by petitioner, we affirm the decision of the Assistant Commissioner essentially for the reasons expressed therein.

We add only that the evidence of rehabilitation presented by petitioner, which includes a letter of recommendation from the principal of the school in which he had been employed prior to his disqualification, does not, under the circumstances, convince us of his rehabilitation under the statutory standard. While the evidence is compelling with regard to petitioner's professional skills and teaching abilities, even prior to the offense at issue,⁵ we find that the record does not sufficiently demonstrate reformation of petitioner's character in the years subsequent to his criminal misconduct. Nor do we find such evidence to be sufficiently related to the particular nature of petitioner's wrongdoing.

As the Assistant Commissioner properly observed, N.J.S.A. 18A:6-7.1(e) requires, inter alia, consideration of the "nature and seriousness of the offense," as well as the "nature and responsibility of the position which the convicted individual would

⁴ The Office of Criminal History Review was apparently not represented in the proceedings before the Deputy Commissioner. Upon the filing of the appeal, Counsel to the State Board notified the Attorney General's Office that an appeal had been taken in the matter, and transmitted a copy of the record. A Deputy Attorney General was then assigned to appear as attorney of record in the appeal.

⁵ The evidence reveals that petitioner received a meritorious teaching award from the National Council for Geographic Education in 1971.

hold." The gravity of the federal offense for which petitioner was convicted, conspiracy to distribute more than 1,000 pounds of marijuana, is beyond dispute. Moreover, like the Assistant Commissioner, we stress that petitioner was disqualified from employment as a teacher, a position which includes responsibility for the care, supervision and instruction of students. Consequently, he faces a heavy burden in attempting to demonstrate his rehabilitation. Cf. Application of Matthews, 94 N.J. 59 (1983).

Thus, while we recognize that ten years have passed since the criminal events which gave rise to these proceedings, we are unable to conclude on the record before us that petitioner has affirmatively demonstrated his rehabilitation by clear and convincing evidence. We therefore affirm the decision of the Assistant Commissioner disqualifying petitioner from continued employment in the schools of New Jersey.

Donald C. Addison, Jr., Wendel E. Daniels and Thomas P. McGough abstained.

Bonnie J. Green abstained.

February 7, 1996

Date of mailing FEB 09 1996

94 - 95

OAL DKT. NO. EDU 2717-94

IN THE MATTER OF THE TENURE :
HEARING OF JAMES PERCY, SCHOOL :
DISTRICT OF THE TOWNSHIP OF OLD :
BRIDGE, MIDDLESEX COUNTY. :
_____ :

COMMISSIONER OF EDUCATION
DECISION

MARCH 15, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2717-94

AGENCY DKT. NO. 20-2/94

**IN THE MATTER OF THE TENURE
HEARING OF JAMES PERCY,
OLD BRIDGE SCHOOL DISTRICT,
MIDDLESEX COUNTY**

Francis X. Journick, Jr., Esq., on behalf of petitioner, Old Bridge School District, (Wilentz, Goldman & Spitzer, attorneys)

Stephen E. Klausner, Esq., on behalf of respondent, James Percy (Klausner, Hunter, Cige & Seid, attorneys)

Record Closed: February 16, 1995

Decided: February 16, 1995

BEFORE SOLOMON A. METZGER, ALJ:

This matter arises out of tenure charges filed by petitioner pursuant to the School Law, *N.J.S.A. 18A:6-10 et seq.*, and regulations promulgated thereunder. The matter was transmitted to the Office of Administrative Law as a contested case pursuant to *N.J.S.A. 52:14F-1 to -13*. The parties have now submitted a stipulation of settlement in the matter which is annexed. Having reviewed the terms of the stipulation and it appearing that it fully disposes of all issues in controversy and was entered into voluntarily, I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the terms of the settlement and that these proceedings be and hereby are **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

2/15/95
DATE

[Signature]
SOLOMON A. METZGER, ALJ

2/21/95
DATE

Receipt Acknowledged:
[Signature]
DEPARTMENT OF EDUCATION

FEB 24 1995
DATE

Mailed to Parties:
[Signature]
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cae

ALLEGEDLY
5

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
90 Woodbridge Center Drive
P.O. Box 10
Woodbridge, New Jersey 07095-0958
(908) 636-8000
Attorneys for Petitioner
Old Bridge Board of Education

NOV 10 1994

NEW JERSEY OFFICE OF
ADMINISTRATIVE LAW
OAL DOCKET NO. EDU-02717-94S
AGENCY REF. NO. 20-2/94

-----X	:	
THE BOARD OF EDUCATION OF	:	On Referral from the
THE TOWNSHIP OF OLD BRIDGE,	:	Commissioner of Education,
MIDDLESEX COUNTY,	:	New Jersey Department
	:	of Education
Petitioner,	:	
	:	
v.	:	
	:	
JAMES PERCY,	:	<u>STIPULATION OF SETTLEMENT</u>
	:	
Respondent.	:	
-----X	:	

The petitioner Board of Education of the Township of Old Bridge (the "Board") and the respondent James Percy ("Percy") having conferred with respect to this matter and having mutually agreed upon certain terms by which this matter may be settled, such terms being set forth in this Stipulation of Settlement, it

378692 WP

is hereby stipulated and agreed by and between the Board and Percy as follows:

1. Percy shall immediately retire from the employ of the Board effective as of February 28, 1995. Within 10 days of the execution of this Stipulation of Settlement by the Board and Percy, Percy shall (1) formally notify the Board in writing of his retirement from its employ as of February 28, 1995 and (2) file an application with the Public Employee Retirement System ("PERS") for retirement as of February 28, 1995, which may include disability retirement and such retirement benefits as may be available to Percy from PERS.

2. The Board and Percy agree that the annual salary payable to Percy, the actual salary paid to Percy and the amount of salary retroactively due to Percy over the last three years is as follows:

YEAR	SALARY PAYABLE	SALARY PAID	RETROACTIVE SALARY DUE
1991-1992	\$38,000.00	\$36,630.00	\$1,370.00
1992-1993	39,900.00	36,630.00*	922.50
1993-1994	41,900.00	-0-	-0-
Total Retroactive Salary Due			\$2,292.50

*Note: Paid at this rate through September 30, 1992.

Within 15 days of the Board's receipt of the notice of retirement and a copy of the completed and executed retirement application

filed with PERS required by Paragraph 1 above, the Board shall pay Percy the sum of \$2,292.50 representing the retroactive salary due to Percy as agreed above.

3. The Board and Percy agree that for purposes of his retirement, Percy's salary for the last three years of his employment is as set forth in Paragraph 2 above. The Board shall make whatever retroactive pension contribution payments to PERS are necessary such that Percy's retirement pension is calculated based on the annual salaries set forth above.

4. Within 15 days of the Board's receipt of the notice of retirement and a copy of the completed and executed retirement application filed with PERS required by Paragraph 1, the Board shall, consistent with law and the terms of the collective bargaining agreement which pertains to Percy's employment by the Board, pay to Percy the value of his unused sick, personal, compensatory and vacation days. Should Percy provide the Board with appropriate evidence of any valid election by Percy under the Internal Revenue Code which would permit the Board to properly pay the value of any or all such days to Percy without withholding or deducting taxes from such value, then the Board shall abide by such election and not withhold or deduct taxes from the value of any or all such days.

5. The Board shall continue to maintain and pay the premiums for medical and health insurance coverage for Percy as a

retiree from the employ of the Board as required by the collective bargaining agreement pertaining Percy's employment by the Board.

6. Percy hereby waives all rights to continued employment or reemployment by the Board, including but not limited to any and all rights based on tenure and/or seniority and any and all rights to be recalled to employment by the Board or appear on any recall or other list of employees eligible for employment or reemployment by the Board. Percy also hereby waives and releases any and all claims, whether known or unknown, against the Board which arise out of or relate to his employment by the Board, including but not limited to claims for unpaid salary or other employment benefits. Notwithstanding the foregoing, Percy does not waive nor release his currently pending workman's compensation claim against the Board. Similarly, the Board hereby waives and releases any and all claims, whether known or unknown, against Percy which arise out of or relate to his employment by the Board.

7. Throughout the negotiations leading to this Stipulation, Percy has had the counsel of his attorney, Stephen E. Klausner, Esq., and with this counsel, Percy has voluntarily determined to agree with the Board upon the terms set forth in this Stipulation.

WHEREFORE, the Board and Percy set their hands to this Stipulation of Settlement on the dates indicated below.

OLD BRIDGE BOARD OF EDUCATION

By: Ellen McDermott
ELLEN McDERMOTT, President

James F. Percy 1-27-95
JAMES PERCY

DATED:


DATED:

OAL DKT. NO. EDU 2717-94

IN THE MATTER OF THE TENURE :
HEARING OF JAMES PERCY, SCHOOL :
DISTRICT OF THE TOWNSHIP OF OLD : COMMISSIONER OF EDUCATION
BRIDGE, MIDDLESEX COUNTY. :
: DECISION
: _____ :
:

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administration Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

MARCH 15, 1995

DATE OF MAILING - MARCH 15, 1995

95 - 95

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF GREEN BROOK, SOMERSET :
COUNTY, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

ROBERT J. PATRONICK AND JOAN :
PATRONICK, :

DECISION

RESPONDENTS. :

MARCH 15, 1995

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF GREEN BROOK, SOMERSET :
COUNTY, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
ROBERT J. PATRONICK AND JOAN : DECISION
PATRONICK, :
RESPONDENTS. :

Ellen Marie Walsh, Esq., for Petitioner

This matter came before the Commissioner by way of a Petition of Appeal filed on September 27, 1994, seeking tuition reimbursement pursuant to N.J.S.A. 18A:38-1b(1), declaration of respondents as disorderly persons under N.J.S.A. 18A:38-1c, and attorney's fees.

Petitioner Board operates a kindergarten through eighth grade school district for persons domiciled in the Township of Green Brook, and sends its resident high school students to Watchung Hills Regional High School, paying tuition to said high school based on the number of petitioner's residents who so attend. Petitioner avers that Robert J. Patronick, the father of R.P., the student in question, alleges that R.P. resided with Joan Patronick, R.P.'s grandmother, in Green Brook, during the 1993-94 school year. R.P.'s father, Robert J. Patronick, is divorced from R.P.'s mother and claims that he also resides in Green Brook at Joan Patronick's

address. Mr. Patronick has physical custody of R.P. during the school year. There has never been a claim that R.P. was residing gratis with his grandmother, or a claim that R.P. was residing in Green Brook temporarily. After investigation, the Board has determined that R.P. was not properly domiciled in Green Brook in the 1993-94 school year, yet attended the regional high school.

No Answer or other submission has been filed by respondents in the matter, despite three notices to do so, the most recent of which was mailed on December 6, 1994 (return receipt dated December 8, 1994).

The Commissioner has carefully reviewed the arguments of the Board in the matter. In the absence of any response by respondents, the Commissioner hereby deems the facts as pled by the Board as true, pursuant to N.J.A.C. 6:24-1.4(e). Based upon the facts admitted as pled, the Commissioner finds and determines that R.P. was not properly domiciled in petitioner's district in the 1993-94 school year.

The Commissioner, therefore, finds and directs that the Board's prayer for tuition reimbursement, in the amount which it has determined appropriate, for R.P. as a student enrolled in the regional high school district for the 1993-94 school year, is hereby granted.

Finally, the Commissioner rejects petitioner's prayer for a declaration under N.J.S.A. 18A:38-1c of respondents as disorderly persons, as said declaration would usurp the jurisdiction of the Municipal Court, and further rejects petitioner's prayer for attorney's fees in this matter, there being no provision for the

grant of attorney's fees or costs within the Commissioner's authority. Board of Education of the Pascack Valley Regional High School District v. Kwon, 93 N.J.A.R. 2d (EDU) 897, 898, citing Balsley v. North Hunterdon Board of Education, 117 N.J. 434 (1990)

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MARCH 15, 1995

DATE OF MAILING - MARCH 15, 1995

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF GREEN BROOK, SOMERSET :
COUNTY, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

SUSAN DOWD AND JOAN PATRONICK, :

DECISION

RESPONDENTS. :

_____ :

MARCH 15, 1995

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF GREEN BROOK, SOMERSET :
COUNTY, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
SUSAN DOWD AND JOAN PATRONICK, : DECISION
RESPONDENTS. :
_____ :

Ellen Marie Walsh, Esq., for Petitioner

This matter came before the Commissioner by way of a Petition of Appeal filed on September 27, 1994, seeking tuition reimbursement pursuant to N.J.S.A. 18A:38-1b(2), declaration of respondents as disorderly persons under N.J.S.A. 18A:38-1c, and attorney's fees.

Petitioner Board operates a kindergarten through eighth grade school district for persons domiciled in the Township of Green Brook, and sends its resident high school students to Watchung Hills Regional High School, paying tuition to said high school based on the number of petitioner's residents who so attend. Petitioner avers that Susan Dowd, the mother of S.P., the student in question, alleges that S.P. resided with Joan Patronick, S.P.'s grandmother, in Green Brook, during the 1993-94 school year, but Mrs. Dowd refused to sign an affidavit attesting to that fact, in accordance with N.J.S.A. 18A:38-1c. After investigation, the Board has

determined that S.P. was not properly domiciled in Green Brook in the 1993-94 school year, yet attended the regional high school.

No Answer or other submission has been filed by respondents in the matter, despite three notices to do so, the most recent of which was mailed on December 6, 1994 (return receipts dated December 8, 1994).


The Commissioner has carefully reviewed the arguments of the Board in the matter. In the absence of any response by respondents, the Commissioner hereby deems the facts as pled by the Board as true, pursuant to N.J.A.C. 6:24-1.4(e). Based upon the facts admitted as pled, the Commissioner finds and determines that S.P. was not properly domiciled in petitioner's district in the 1993-94 school year.

The Commissioner, therefore, finds and directs that the Board's prayer for tuition reimbursement, in the amount which it has determined appropriate, for S.P. as a student enrolled in the regional high school district for the 1993-94 school year, is hereby granted.

Finally, the Commissioner rejects petitioner's prayer for a declaration under N.J.S.A. 18A:38-1c of respondents as disorderly persons, as said declaration would usurp the jurisdiction of the Municipal Court, and further rejects petitioner's prayer for attorney's fees in this matter, there being no provision for the grant of attorney's fees or costs within the Commissioner's authority. Board of Education of the Pascack Valley Regional High

School District v. Kwon, 93 N.J.A.R. 2d (EDU) 897, 898, citing
Balsley v. North Hunterdon Board of Education, 117 N.J. 434 (1990)

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MARCH 15, 1995

DATE OF MAILING - MARCH 15, 1995

ROBERT KERATT,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	
	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH	:	
OF CARTERET, MIDDLESEX COUNTY,	:	
AND SALLY BONAVENTURE,	:	
	:	
RESPONDENTS.	:	
_____	:	

SYNOPSIS

Petitioner sought declaration that respondent candidate for seat on Board was disqualified from such candidacy by reason of a conflict of interest prohibited by N.J.S.A. 18A:12-2 and School Ethics Act. Petitioner further sought stay of Board's action to place respondent's name on ballot.

Commissioner found statutes cannot be read to disqualify individuals with inconsistent interests from being candidates for board membership. (Thomas State Board Decision) Petition was dismissed without prejudice to petitioner's right to bring claim anew if respondent is elected but has not divested herself of alleged conflict prior to commencement of term of office.

MARCH 15, 1995

ROBERT KERATT,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE BOROUGH	:	
OF CARTERET, MIDDLESEX COUNTY,	:	
AND SALLY BONAVENTURE,	:	
	:	
RESPONDENTS.	:	
	:	

For Petitioner, Robert Keratt, Pro Se

This matter was opened before the Commissioner of Education by way of a Petition of Appeal with Motion for Emergent Relief filed on March 10, 1995. Petitioner seeks a declaration that respondent, who filed a facially valid nominating petition in order to be placed on the ballot as a candidate for a seat on the Board at the annual school election, is disqualified from such candidacy by reason of a conflict of interest prohibited by N.J.S.A. 18A:12-2 and N.J.S.A. 18A:12-21 et seq. (School Ethics Act). He further seeks a stay of the Board's determination to place respondent's name on the ballot notwithstanding his challenge to her candidacy.


Upon review of petitioner's papers, the Commissioner determines that they are inappropriately filed at the present time.* It has now been established that N.J.S.A. 18A:12-2 cannot be read to disqualify individuals with inconsistent interests from

*Given the law controlling its outcome as cited herein, the Commissioner has decided this matter without answer from respondent. He has done so in the belief that respondent is not prejudiced by such action, and that prompt disposition of the question of respondent's continued candidacy is in the best interest of both the parties and the public. N.J.A.C. 6:24-1.15.

being candidates for board membership. Wayne W. Thomas, Acting Board Secretary, Board of Education of the Township of Willingboro, Burlington County v. Charlene J. Edwards, decided by the State Board of Education November 3, 1993. While the State Board in Thomas did not address the School Ethics Act, as it was not raised in that appeal, the Board's rationale as to application of N.J.S.A. 18A:12-2 is equally germane to the Ethics Act. Therefore, even assuming, arguendo, that respondent does in fact have an inconsistent interest that would act as a bar to Board membership, that interest does not preclude her from appearing on the ballot as a candidate and divesting herself of the inconsistent interest prior to commencement of her term of office if elected.

Accordingly, the instant Petition and Motion are dismissed without prejudice to petitioner's right to bring his claim anew should respondent be elected, but not divested of the alleged conflicting interest, on which the Commissioner expressly makes no ruling herein.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MARCH 15, 1995

DATE OF MAILING MARCH 15, 1995

BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF MANCHESTER,	:	
OCEAN COUNTY,	:	COMMISSIONER OF EDUCATION
	:	
PETITIONER,	:	DECISION
	:	
V.	:	
	:	
MAYOR AND COUNCIL OF THE	:	
TOWNSHIP OF MANCHESTER,	:	
OCEAN COUNTY,	:	
	:	
RESPONDENT.	:	
	:	
_____	:	

SYNOPSIS

Board appealed \$433,441 of the General Fund tax levy reductions made by governing body following voter rejection of the proposed budget on April 19, 1994.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line-item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore \$239,009 for a total General Fund tax levy of \$17,664,237 for 1994-95 school purposes.

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

PETITIONER,

V.

MAYOR AND COUNCIL OF THE
TOWNSHIP OF MANCHESTER,
OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

Richard K. Sacks, Esq., for Petitioner

Steven Secare, Esq. (Russo, Secare, Ford & Delanoy), for Respondent

This matter was opened before the Commissioner of Education on June 20, 1994, through the filing of a Petition of Appeal by the Manchester Township Board of Education (Board) seeking restoration of \$1,039,441 reduced from the school budget by the Mayor and Council of the Township of Manchester (Township) pursuant to N.J.S.A. 18A:22-37 following defeat of the budget at the annual school election on April 19, 1994. At the annual school election the voters rejected the budget question proposing a General Fund Tax Levy of \$18,611,032 for the 1994-95 school year. On May 19, 1994, following consultation with the Board as required by law, the Township adopted a resolution

certifying the General Fund tax levy of \$17,425,138 as sufficient to provide for a thorough and efficient system of education (T & E) in the district. This amount represented a reduction of \$1,185,894 from the tax levy proposed by the Board, and was effectuated through cuts in fifteen line items, for the reasons given in Schedule A attached to the resolution (see Exhibit D attached to the July 20, 1994 submission by the Board). By resolution dated June 8, 1994, the Board determined to appeal \$1,039,441 of the reduction to the Commissioner of Education.

On December 16, 1994, the Commissioner of Education notified the parties that he intended to take official notice of the Board's 1993-94 year-end audit for the purpose of identifying whether the Board underestimated in its 1994-95 budget the amount of anticipated undesignated surplus. On January 5, 1995, the Commissioner denied the Board's motion to compel the Township to produce the information and supporting reasons and data it relied upon in reducing the Board's budget, or in the alternative to strike the Township's Answer. (See Commissioner of Education Decision dated January 5, 1995.) The Commissioner, further, decided that the weight and sufficiency of the documentation submitted would be determined in light of all evidence submitted upon the closure of the record. On January 17, 1995, the Township submitted its final statement.

Subsequently, on January 25, 1995, the Board amended its petition reducing the amount of its appeal to \$433,441 after determining that it had an additional available fund balance in the amount of \$606,000 which it determined should be appropriated to the 1994-95 school budget (\$500,000 as directed by the Township plus an additional

\$106,000). The Township filed its Answer to the Amended Petition on January 31, 1995. The board filed its position statement in support of the Amended Petition on February 14, 1995, and a closing statement in support of the Amended Petition of appeal on March 9, 1995, whereupon the record closed.

Consequently, the amounts in dispute in this appeal are as follows:

<u>Tax Levy Proposed by Board</u>	<u>Tax Levy Certified by Township</u>
General Fund \$18,611,032	General Fund \$17,425,138
<u>Amount of Reduction by Township</u>	<u>Amount of Reduction in Dispute</u>
General Fund \$1,185,894	General Fund \$433,441

STANDARD OF REVIEW

In rendering judgment on budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education. Board of Education of East Brunswick Township v.

Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).

Mindful, then, of the standards to be applied, the Commissioner makes specific determinations as follows.

COMMISSIONER'S DETERMINATION

The Township's reductions were effectuated in fifteen current expense line items, ten of which are part of the Amended Petition of Appeal and are set forth below, together with the reason specifically given for each reduction in Schedule A attached to the Township's resolution. Also set forth below are the arguments of the parties for and against restoration by the Commissioner. It should be noted at the outset that the Board, in support of its Amended Petition, submitted documentation for both line items and amounts beyond the scope of the appeal. To the extent line items were introduced which were not part of the Township's line item reductions in Schedule A attached to the Township's resolution dated May 19, 1994, those items will not be addressed herein.

N.J.S.A.18A:22-37.

Salary Accounts

The Township's rationale for each salary account reduction is as follows:

Rationale: The procedure followed in this account was to determine the level of expenditure by the School District for the current school year, 1993-94, and to add to that number a very reasonable increase of 6%. The product of this number resulted in the 1994-95 salary recommendation.

<u>Account No.</u>	<u>Description</u>	<u>Amount</u>
11-120-100-101	Salaries of Teachers Grades 1-5	\$109,198

The Board asserts that the Township's reduction was based, in part, upon its erroneous finding that the expenditures for 1993-94 were \$2,082,227, when, in actuality the unaudited figure for this line item was \$2,427,914. The Board's projected expenditure was based upon no increase in the number of staff from the 1993-94 school year and included substitutes and class coverage. In addition, the number of staff for the 1994-95 school year only provided for an increase of four staff members from the 1992-93 school year.

The Township argues that the amount of its reduction is based upon no increase in staff, but takes the current contractual staff of seventy-two and adds six percent for salary increases. This figure, it asserts, is based upon real expenditure figures of \$2,379,261. It alleges that the other figures submitted by the Board are unrealistic in that it asks for a class coverage figure that is five times larger than the prior year. Further, the Board's figures for additional teaching periods are inflated.

Upon review, the Commissioner finds that the Township's determinations are based upon its assertion that the Board actually expended \$2,379,261, an amount not established by the record. It is impossible to ascertain upon what basis this figure was determined. The Board has established that the amount requested is necessary to maintain the staffing level as intended by the Township. Consequently, the \$109,198 reduction is restored.

11-130-100-101	Salaries of Teachers - Grades 6-8	\$ 87,290
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The Board asserts that once again, the reduction of the Township was based upon faulty assumptions concerning the Board's actual expenditures. The account provides for forty-three teaching staff members and represents no staffing increase from the prior year. The increase in the amount of the appropriation by the Board included substitute teachers, coverage of classes, lateral movement on the salary guides and \$24,293 for additional basic skills services. In addition, this account provides for teachers assigned to extra duty services for bus duty and the summer development program which is in year two of a three year restructuring project for the Manchester Middle School.

The Township counters that the expenditure for class coverage has increased by over three hundred percent and the summer development program has been added to this line item for the first time. It asserts that no proofs have been submitted to support these line items or to suggest that the reduction will result in the students being deprived of a thorough and efficient education.

Upon review of the record, the Commissioner determines that the Board has submitted information to support, in part, the restoration of this line item. No evidence was presented, however, in support of the basic skills extra teaching period which the Board asserts may be necessary. Consequently, the Commissioner determines that \$24,293 is sustained and \$62,997 is restored.

11-204-100-101	Salaries of Teachers - Neurologically Impaired	\$73,751
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The Board asserts that this account provides for thirteen contractual staff members and represents no staff increase from the prior year. The additional funds

provide for lateral movement on the salary guide, substitute teachers and services for the Extended School Year Summer Program required by students' IEPs. The account, also, provides for \$35,941 for the possibility of additional students requiring services.

The Township asserts that the mere possibility of additional students without any basis in fact or documentation is insufficient reason to increase funding. The enrollment figures, it asserts, do not reflect the need for any additional classes or the need for any additional staffing.

Upon review, the Commissioner determines, again, that the Board has met, in part, its burden. The Township, in making its reduction makes no provision for lateral movement on the salary scale, substitutes or summer salaries. At the same time, the Board presents mere speculation that additional staffing may be needed and has not established that these additions are necessary for the provision of a thorough and efficient system of education. Consequently, the Commissioner orders that \$35,941 of the reduction is sustained and \$37,810 of the reduction is restored.

11-213-100-101	Resource Room - Teacher Salaries	\$ 28,749
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The Board argues that these amounts are necessary in order to meet the contractual obligations for this account. It asserts that restoration is essential in order to maintain the 23-member staffing level. Furthermore, additional classifications and evaluations resulted in additional students and modified placements necessitating an increase in positions by 1.5 resource center staff members.

The Township further argues on appeal that it added 6% to a figure of \$731,000 actually spent by the Board and asserts that the Board now claims a need for additional staffing despite representations to the contrary. It again asserts elevated year-end expenditures in this account that inflated the Board's figures.

Upon review, the Commissioner finds that the Board has not met its burden of showing that the restoration of these monies is essential to the provision of a thorough and efficient system of education, in that no evidence supporting the increase in staff positions was presented. Consequently, the \$28,749 reduction is sustained.

11-000-219-104	Salaries - Other Professional Staff	\$ 91,069
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The Board asserts that the amounts requested in this line item are essential for providing child study team salaries. Once again, it asserts, the Township has understated the 1993-94 expenditures when arriving at its reductions. This line item is for 14.5 staff members representing no increase in positions from the 1993-94 school year and includes negotiated salary increases, lateral movement on the salary scale and payment for summer referrals and evaluations. The Board asserts that it also includes \$58,158 to cover the possible employment of an additional school psychologist and/or social worker to assist at-risk students in pre-referral intervention and early intervention services and additional occupational and/or physical therapy services in order to accommodate individual students' IEPs.

The Township asserts that the Board has, again, attempted to factor in "possible" staffing increases that "may" be needed to support a request for an increase. It alleges that

there is no proof that the increase is necessary for a thorough and efficient system of education.

Upon review, the Commissioner determines that the Board has met its burden of establishing the necessity for these amounts except for the possible staffing increases. While these services may be worthwhile, no evidence was presented to support the necessity to add them in order to provide for a thorough and efficient system of education. Consequently, \$58,158 of the reduction is sustained and \$32,911 of the reduction is restored.

11-000-221-104	Salaries - Other Professional Staff	\$ 33,311
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The board asserts that the account provides funds for the positions of Director of Curriculum and the Director of Special Services, both of which were in place during the 1993-94 school year and have existed for many years. In addition, this line item provides funds for staff development projects including a five year plan in the areas of critical and higher order thinking skills. The reduction by the Township, it asserts, significantly impacts the district's ability to provide instructional improvement services through meaningful staff development as required by the monitoring guidelines and sound educational practices.

The Township counters that this reduction was agreed to by the Board in a meeting with representatives of the governing body.

Upon review, the Commissioner notes that N.J.A.C. 6:24-7.3(d) provides the mechanism for submitting to him any agreement or narrowing of the issues to him for his

consideration in budget appeals. As this was not done, the Commissioner is unable to determine that an agreement was reached as to this line item reduction. Nevertheless, the Commissioner determines that the Board has not established that the restoration sought is essential for the provision of a thorough and efficient system of education. Consequently, the \$33,311 reduction is sustained.

Other Undistributed Expenditure Accounts

The Township's rationale for each of the remaining undistributed expenditure accounts is as follows:

Rationale: The procedure followed in arriving at a recommendation in this account is as follows: A determination was made of the estimated level of expenditure by the School District in the 1993-94 school year and once that was determined, a reasonable increase was added which would permit the School District to operate in a thorough and efficient manner in the 1994-95 school year.

11-190-100-640	Textbooks	\$ 18,532
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The Board argues that the Township's reduction removes all funds to replace worn or lost textbooks district-wide. The current textbooks, it asserts, are outdated and new books need to be purchased in order to remain current. Planned purchases are for the adoption of a new math series in grades 1-5, which will align the curriculum with the NCTM standards and replace the current elementary math series which is more than ten years old. Planned purchases are also necessary for social studies, foreign language and algebra.

The Township asserts that this line-item reduction was originally agreed to by the Board of Education. In addition, the Township asserts that its analysis of the Board's

expenditures for 1993-94 showed "after the fact spending" that was not needed for that school year. This, it asserts, is indicated by the fact that in May and June of 1994 amounts were spent for books which could not possibly have been used in the last two months of the year.

Upon review, the Commissioner finds that providing for up-to-date math books is an essential component of a thorough and efficient system of education. Accordingly, the \$18,532 reduction is restored.

11-000-270-600	Student Transportation Services	\$ 26,174
	Supplies and Materials	

The Board asserts that these funds are necessary in order for it to provide for repair and replacement parts for its fleet of 50 vehicles. Seventy-five percent of the maintenance costs, it alleges, are for repair and maintenance of its 33 diesel buses, 25 of which the Board asserts are out of the warranty period and require a high degree of maintenance. In addition, it is the Board's position that the Township utilized the wrong figures when calculating 1993-94 expenditures, understating that amount by \$57,211. This erroneous calculation, it asserts, resulted in an actual decrease in the amount allocated for the 1994-95 school year of \$3,868.

In its August 5, 1994, submission the Township asserts that the Board averaged approximately \$11,700 per month for this line item, but the Board spent \$44,447 in the last two months, thereby driving the expenditure graph unequally upward. The Township explains that it used the figure of \$120,350 and added \$12,476 to arrive at its reduction, which it asserts is more than sufficient to support this line item.

Upon review, the Commissioner notes that although the Township states that it determined the average monthly expenditure to be \$11,700 it appears to have based its calculations on only ten months' expenditures and made no provision for expenditures for repairs to be conducted over the summer months. In so doing the Township, while intending to arrive at a figure that was an increase from the 1993-94 school year actually arrived at a figure that was lower than the expenditures for both the 1992-93 and 1993-94 school years. Consequently, the Commissioner determines that the \$26,174 reduction is restored.

11-000-230-530	General Administration - Telephone	\$13,890
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The Board asserts that the full amount is required to meet present anticipated annual obligations. The Board has stated that, as of December 30, 1994, the balance in all telephone accounts was \$163.05. It asserts that the figure originally budgeted was a reduction of \$6,500 from 1993-94 and represented the most recent three-year average of actual telephone expense.

The Township argues that again the Board has unexplained year-end expenditures greatly elevating the accounts. It is the Township's position that the taxpayers should not be penalized for any excess expenditures that have not been clearly defined.

Upon review, the Commissioner determines that while the need for appropriate communications is essential, the Board has not established the need for the amounts asserted for the provision of a thorough and efficient education. Consequently, the \$13,890 reduction is sustained.

11-000-260-420	Operation and Maintenance of Plant Cleaning, Repair & Maintenance	\$ 57,477
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The Board asserts that in 1993-94, as a result of the unexpected severity of the winter, non-contractual work in this account was frozen in order to generate savings to cover anticipated increased energy costs. For the 1994-95 school year, the Board asserts, it determined to use an independent contractor for maintenance and repair services. A contract was bid and awarded in the amount of \$82,800. This contract permitted the Board to eliminate three full-time maintenance staff positions, resulting in savings of approximately \$150,000 in salaries and benefits. The Board, further, asserts that the Township underestimated the actual 1993-94 expenditures by \$26,730. As a consequence of this reduction, the physical plant will deteriorate and the district will not be able to maintain contracted services in accordance with the terms of its written agreement and its five-year management plan, and for district maintenance and repair in accordance with N.J.A.C. 6:22-7.1.

The Township argues that the \$57,477 reduction was based upon actual expenditures of \$343,000 with an approximate fourteen percent increase.

Upon review, the Commissioner determines that the amount is necessary for the board to meet its contractual obligations. Consequently, the \$57,477 reduction is restored.

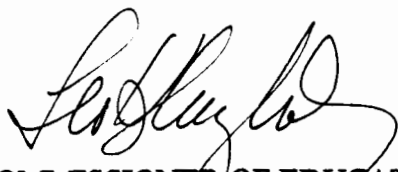
In summary, the Commissioner directs restoration or sustaining of the Township's \$433,441 line-item reductions in dispute in this amended appeal, as set forth below. In addition, the commissioner has offset the amount of the restoration by \$106,000, representing the amount already appropriated by the Board from its surplus over and above the \$500,000 originally directed by the Township and accepted by the Board, as

confirmed by the Board's letter dated March 9, 1995. Finally, upon review of the 1994-95 year-end audit the Commissioner determines that no further allocation from surplus is possible.

<u>Account</u>	<u>Sustained</u>	<u>Restored</u>
11-120-100-101 Grades 1-5 Salaries	\$ -0-	\$ 109,198
11-130-100-101 Grades 6-8 Salaries	24,293	62,997
11-204-100-101 NI Salaries	35,941	37,810
11-213-100-101 Resource Room Salaries	28,749	-0-
11-000-219-104 Other Staff Salaries	58,158	32,911
11-000-221-104 Other Staff Salaries	33,311	-0-
11-190-100-640 Textbooks	-0-	18,532
11-000-270-600 Transportation Supplies	-0-	26,174
11-000-230-530 Telephone	13,890	-0-
11-000-260-420 Repair and Maintenance	-0-	57,477
Line-Item Determinations:	<u>\$194,342</u>	<u>\$ 345,099</u>
Less \$106,000 additional surplus appropriation:		239,099
Amount Certified By Township:		17,425,138
General Fund Tax Levy for 1994-95:		<u>17,664,237</u>

Accordingly, the Ocean County Board of Taxation is directed to make the necessary adjustments as set forth above for a total of \$17,664,237 to be raised for General Fund purposes of the Manchester Township Board of Education for the 1994-95 school year.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

MARCH 17, 1995

DATE OF MAILING - MARCH 17, 1995

ROBERT T. KAROLEWSKI, RUSSELL N. :
 SHELLHAMMER, AND FRANCES HAWK :
 DUNCAN, :

PETITIONERS, : COMMISSIONER OF EDUCATION

V. : DECISION

BOARD OF EDUCATION OF THE TOWNSHIP :
 OF MANCHESTER, AND JOEL OPPENHEIM, :
 BOARD SECRETARY, OCEAN COUNTY, :

RESPONDENTS. :
 _____ :

SYNOPSIS

Petitioning citizens appealed determination of Board to place two one-year unexpired terms, arising from resignations announced on February 22, 1995, but not effective until April 14, 1995, and April 15, 1995, respectively, on the ballot at the annual school election to be held on April 18, 1995.

Commissioner held that N.J.S.A. 18A:12-15 controls in this matter. Therefore, the Board may not place these seats on the ballot, but must make appointments within 65 days of occurrence of the vacancies for terms to extend through the organization meeting following the 1996 annual school election, at which election the seats will appear on the ballot for regular three-year terms.

ROBERT T. KAROLEWSKI, RUSSELL N. :
SHELLHAMMER, AND FRANCES HAWK :
DUNCAN, :
PETITIONERS, : COMMISSIONER OF EDUCATION
V. : DECISION
BOARD OF EDUCATION OF THE TOWNSHIP :
OF MANCHESTER, AND JOEL OPPENHEIM, :
BOARD SECRETARY, OCEAN COUNTY, :
RESPONDENTS. :
_____ :

For Petitioners, Edward Basaman, Esq.

For Respondents, Richard K. Sacks, Esq.

This matter was opened before the Commissioner of Education on March 10, 1995 by way of a Petition for Declaratory Judgment with Motion for Emergent Relief, wherein petitioners sought to enjoin respondents ("the Board") from placing two unexpired terms on the ballot at the April 1995 annual school election, based on a contention that N.J.S.A. 18A:12-15 requires these terms to be filled by appointment of the Board rather than by election, and due to a claim that insufficient time was provided for the proper conduct of pre-election procedures.

Responses were filed by the Board, as well as by four of the six candidates for the terms at issue, all of whom were served with the petition and accorded an opportunity to respond. A response was also filed by the Deputy Attorney General on behalf of the Ocean County Superintendent of Schools, who was named as a respondent in the petition and motion.*

*Candidates' responses were filed pro se; Geraldine Callahan, DAG (Deborah T. Poritz, Attorney General) filed on behalf of the County Superintendent.

Initially, the Commissioner finds that the County Superintendent is not a proper party to the action herein, as she had no role in the action complained of, nor would she have any role in the appointment process sought, should petitioners prevail, unless the Board fails to make such appointments within 65 days of the vacancies at issue. Therefore, the Commissioner severs the County Superintendent from the appeal.

Turning to the merits of this matter, the central operative facts are not in dispute and are as follows: On or about February 22, 1995, at approximately 10:30 p.m., the Board at a public meeting received and accepted the intended resignations of two board members, effective April 14, 1995 and April 15, 1995, respectively. At the Board meeting, upon questioning as to how these vacancies would be filled, no response was forthcoming from the Board. The following day, February 23, 1995, information was provided by the Board to the press and in response to direct citizen inquiry to the effect that the two vacancies would be filled by special election for two unexpired one-year terms, such election to be held at the same time as the annual school election. On that same date, at 4:00 p.m., the statutory deadline passed for filing of nominating petitions for seats on the Board of Education to be on the ballot on April 18, 1995.

Petitioners contend that, as a matter of law, N.J.S.A. 18A:12-15 controls in this matter, and that the statute clearly provides for vacancies arising within the time frames operative herein to be filled by Board appointment. They further contend that the circumstances surrounding this matter have given rise to

a situation where 1) the general public did not have adequate opportunity to consider running for, or to obtain completed nominating petitions for, the unexpired terms; and 2) the only persons aware of the open seats were those who were either closely connected with the newspapers notified by the Board or directly informed by Board "insiders" or persons who happened to be in attendance at the Board meeting of February 22.

The Board disputes petitioners' factual contentions as to the effect of its actions, claiming that the public has a full panoply of six candidates from which to choose for the two unexpired terms, and that for the Commissioner to prevent exercise of such choice thwarts both the will of the people and the intent of law giving voters the right to elect boards of education. The Board further argues that N.J.S.A. 18A:12-15 is not applicable to this matter, and that it does not, in any event, prohibit the election at issue.

Of the four responding candidates, two essentially agree with petitioners' position, both as a matter of law and in terms of the purported effect of the Board's actions. Two others, however, urge acceptance of the Board's position, contending that the democratic process would be best served by election rather than appointment, and that petitioners' objections to the Board's actions are rooted in a dislike of certain individual candidates rather than an interest in proper application of the law. They further request, should the Commissioner rule that the seats at issue will not be on the ballot, that they be permitted to run as

candidates for the three-year seats, as was their original intent before learning of the one-year openings and altering their actions accordingly. (One candidate amended his three-year petition to seek an unexpired term prior to the deadline for filing nominating petitions; the other chose not to turn in a duly completed three-year petition, instead substituting a newly obtained and completed one-year petition.)

Upon review, the Commissioner finds that this matter is clearly controlled by operation of N.J.S.A. 18A:12-15, which governs the filling of all types of vacancies on boards of education.

That statute provides:

18A:12-15. Vacancies. Vacancies in the membership of the board shall be filled as follows:

a. By the county superintendent, if the vacancy is caused by the absence of candidates for election to the school board or by the removal of a member because of lack of qualifications, or is not filled within 65 days following its occurrence;

b. By the county superintendent, to a number sufficient to make up a quorum of the board if, by reason of vacancies, a quorum is lacking;

c. By special election, if in the annual school election two or more candidates qualified by law for membership on the school board receive an equal number of votes. Such special election shall be held only upon recount and certification by the Commissioner of such election result, shall be restricted to such candidates, shall be held within 60 days of the annual school election, and shall be conducted in accordance with procedures for annual and special school elections set forth in chapter 14 of Title 18A of the New Jersey Statutes. The vacancy shall be filled by the county superintendent if in such special election two or more candidates qualified by law for membership on the school board receive an equal number of votes;

d. By special election if there is a failure to elect a member at the annual school election due to improper election procedures. Such special election shall be restricted to those persons who were

candidates at such annual school election, shall be held within 60 days of such annual school election, and shall be conducted in accordance with procedures for annual and special school elections set forth in chapter 14 of Title 18A of the New Jersey Statutes;

e. By the Commissioner if there is a failure to elect a member at the annual school election due to improper campaign practices; or

f. By the board in all other cases.

Each member so appointed shall serve until the organizational meeting following the next annual election unless he is appointed to fill a vacancy occurring within 60 days immediately preceding such election to fill a term extending beyond such election, in which case he shall serve until the organizational meeting following the second annual election next succeeding the occurrence of the vacancy, and any vacancy for the remainder of the term shall be filled at the annual election or the second annual election next succeeding the occurrence of the vacancy as the case may be.

In the fact pattern operative herein, one vacancy will occur on April 14, 1995 and the other on April 15, 1995, by the express terms of the letters of resignation submitted to the Board on February 22, 1995, by Board members who have been, and will remain, seated up to that time; both vacancies are undisputedly for terms due to be on the ballot as regular three-year terms at the 1996 annual school election. The vacancies arising from these resignations do not fall within the parameters of (a) through (e) above; therefore, they are governed by (f), which provides for appointment by the board of education in all other cases. As appointments, they further fall under the provisions above setting forth the precise length of terms for vacancies occurring within 60 days of the annual school election. Thus, there can be no conclusion but that the vacancies at issue are to be filled, as a matter of law, by appointment of the Board of Education within 65 days of their occurrence, for terms to extend through the

organizational meeting following the 1996 annual school election, at which election these seats will appear on the ballot as regular three-year terms. While the Board might believe that this result is less responsive to the electorate than the route it proposed to take, the fact remains that the Board is not at liberty to disregard an established statutory scheme, or to subvert the intent of the law by attempting to cast its actions in a way that would place them outside the law's purview. The Commissioner cannot permit such a result, nor would he find it advisable in any event, as the law as it stands inherently seeks to avoid problems of precisely the type underlying the present matter.

As to the request from certain of the affected candidates that they be permitted, in the event the unexpired terms were removed from the ballot, to run for three-year seats in view of the circumstances herein and in view of their detrimental reliance on respondents' instructions and position in this matter, the Commissioner holds that, in the absence of express legislative authority, he cannot alter statutory rules for the conduct of school elections, including rules governing deadlines for filing of nominating petitions. Therefore, a request to permit, for reasons of equity, addition of candidates for three-year seats at this late date is beyond the scope of relief within the Commissioner's ability to grant.

Accordingly, the Commissioner declares that the two unexpired terms at issue in this matter may not be placed on the ballot by the Manchester Township Board of Education for the

election to be held on April 18, 1995, and that appointments to the vacancies in question are to be made by the Board within 65 days of their occurrence on April 14, 1995 and April 15, 1995, respectively, consistent with the requirements of N.J.S.A. 18A:12-15.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

MARCH 21, 1995

DATE OF MAILING MARCH 21, 1995

DHP #105-95
SB #100-95

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF MICHAEL J. LAZORKO. : DECISION

Decided by the Deputy Commissioner of Education, August 18, 1995

For the Petitioner-Appellant, Michael J. Lazorko, pro se

On August 18, 1995, the Deputy Commissioner issued a decision in this case holding that appellant Michael J. Lazorko was disqualified from school employment pursuant to N.J.A.C. 6:2-1.1 et seq. and that he had not demonstrated sufficient rehabilitation to alter that result.¹

By notice filed on August 30, 1995, appellant appealed the Deputy Commissioner's decision to the State Board of Education.

Counsel for the State Board of Education acknowledged receipt of Appellant's notice on September 19, 1995, advising him that his arguments in support of his appeal were due on or before October 11, 1995. He was at that

¹ We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly includes assignment by the commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws..." N.J.S.A. 18A:4-34.

2/7/96

time also provided with a copy of the regulations governing appeals to the State Board, and was instructed to contact the State Board's Administrator of Appeals if he had any questions.

By letter of October 12, 1995, Counsel for the State Board notified appellant that no brief had been filed to support his appeal and that the matter was being referred to the State Board's Legal Committee.

By letter of November 2, 1995, appellant was again advised that the matter was being referred to the Legal Committee and that this might result in dismissal of his appeal. Again, appellant was directed to call the State Board's Administrator of Appeals if he had any questions.

As described above, pursuant to N.J.A.C. 6:2-1.11(a), appellant's brief in support of his appeal was due on October 11, 1995. Appellant did not file a brief by that date and despite the numerous opportunities provided him to rectify this failure, has not filed an appeal brief. Nor has he at any time requested an extension or provided any explanation for his failure to file a brief.

The State Board of Education therefore dismisses the appeal in this matter for failure to perfect the appeal. N.J.A.C. 6:2-1.12(a).

Donald C. Addison, Jr., Wendel E. Daniels and Thomas P. McGough abstained.

February 7, 1996

Date of mailing FEB 09 1996

102-95

IN THE MATTER OF THE TENURE :
 HEARING OF CARL A. HESS, III, :
 SCHOOL DISTRICT OF THE TOWNSHIP COMMISSIONER OF EDUCATION
 OF PARSIPPANY-TROY HILLS, MORRIS : DECISION
 COUNTY. :
 _____ :

SYNOPSIS

Board certified tenure charges of unbecoming conduct against guidance counselor for alleged inappropriate comments to, and communications with, female students.

Having examined the testimony and evidence in this matter, the ALJ found there was no question that respondent engaged in the alleged unbecoming conduct and that even though he argues he now realizes that his conduct was wrong and inappropriate and that it would not happen again, the issue was whether his actions and conduct justify the penalty of dismissal. ALJ found that his conduct was so violative of his responsibilities as a teacher that his removal from his position was the appropriate action to be taken. ALJ ordered respondent removed from his position as a teaching staff member.

In light of the record, including transcripts of four days of hearings, the Commissioner concurred with the decision of the ALJ. Commissioner ordered respondent terminated from his position and directed the matter be transmitted to State Board of Examiners for appropriate action.

MARCH 27, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3470-92

AGENCY DKT. NO. 83-4/92

**SCHOOL DISTRICT OF THE
TOWNSHIP OF PARSIPANNY-
TROY HILLS, MORRIS COUNTY,**

Petitioner,

v.

CARL A. HESS, III,

Respondent.

Marie-Laurence Fabian, Esq., for petitioner (Dillon, Bitar & Luther, attorneys)

Sheldon H. Pincus, Esq., for respondent (Bucceri & Pincus, attorneys)

Record Closed: June 2, 1993

Decided: February 14, 1995

BEFORE JOSEPH F. MARTONE, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter involves charges of unbecoming conduct filed against a tenured guidance counselor based on inappropriate comments to and communications with female students. The charges were certified by the Board of Education of the school district on March 31, 1992, and the matter was transmitted by the Commissioner of the Department of Education to the Office of Administrative Law (OAL) on May 13, 1992, for hearing as a contested case. The matter was

assigned to administrative law judge (ALJ) Joseph F. Martone on June 1, 1992, and a telephone prehearing conference was scheduled for July 21, 1992. A telephone prehearing conference was held on that date and a prehearing order, settling the procedures to be followed in this matter, was entered on July 24, 1992. Hearing dates were scheduled for December 7, 8 and 9, 1992.

Hearings were held on December 7 and 8, 1992. However, the hearing scheduled for December 9, 1992, was adjourned to an undetermined future date in order to afford to petitioner the opportunity to call additional witnesses concerning prior alleged incidents which were not the subject of the instant charges for the purpose of challenging respondent's credibility, and to afford to respondent an opportunity for discovery concerning this proposed testimony.

The hearing of this matter was eventually rescheduled for April 2, 8, and 14, 1993. The testimony was concluded on April 8, 1993. At the conclusion of the hearing, the record remained open at the request of the parties in order to afford them the opportunity to submit written closing arguments. Post-hearing briefs were submitted on May 10, 1993, and reply briefs were submitted on May 24, 1993. Supplemental letters addressing a recent decision of the Commissioner of the Department of Education in a similar matter were submitted by petitioner on May 26, 1993, and by respondent on June 2, 1993.

Because the ALJ had been transferred from the Newark office to the Trenton Office of the OAL the file for this matter was mistakenly misplaced and, through inadvertence, no action was taken by the ALJ to close the record and to issue an initial decision. An extension of time to file the initial decision until February 21, 1995 was approved by the Commissioner of the Department of Education and the Director of the OAL on February 14, 1995.

TENURE CHARGES

In order to properly determine whether respondent is guilty of the tenure charges in this matter, it is necessary to review the specific charges filed against him. The Tenure Charge is set forth in a written statement of Ruth Krawitz, petitioner's Superintendent of Schools, dated March 9, 1992 (Exhibit P-2), and it charges respondent, a tenured teaching staff member employed at the district's Parsippany-Hills High School, with conduct unbecoming a teaching staff member in as

much as he wrote a letter expressing inappropriate personal feelings and emotions to a student, and he made other inappropriate comments to another student after having being reprimanded the previous year for engaging in inappropriate physical contact with a student. Attached to the Tenure Charge is a Statement of Facts in affidavit form signed by Ruth Krawitz in which she deposes and says that she is the superintendent of schools and respondent is a tenured teaching staff member who is guidance counselor at the Parsipanny Hills High School. She further asserts that on March 22, 1991, respondent inappropriately kissed a student and that this incident, which triggered a Division of Youth and Family Services (DYFS) investigation resulted in a letter of reprimand being placed in respondent's permanent record. She indicates that in signing the letter of reprimand, respondent acknowledged that he understood that "[w]ithin the counseling environment, only the highest standards of behavior will be accepted," and that "[f]ailure to adhere to these standards could result in serious disciplinary consequences." Superintendent Krawitz further asserts that on Thursday, February 27, 1992, the distraught mother of a sophomore student gave to the school principal a letter that respondent had written and given to her daughter who, in turn, had passed it onto her mother. She characterizes the letter as a "love letter" which expresses completely inappropriate feelings and emotions. Superintendent Krawitz goes on to assert that during the investigation of this matter, another sophomore student related that on a particular day when she was wearing what she described as a fairly tight skirt, respondent told her that she looked really good in the skirt and that she should come back to see him the next time she wore it. The same student also reported an "inappropriate comment" made by respondent with reference to her receipt of a Valentine's day "carnation-gram" from him. The student reported that when she told respondent that her older sisters, who had also been students at the school, had joked with her about the fact that they had never received similar Valentine's day greetings from respondent, he responded by saying that she should tell her sisters that this was because "the youngest girl in the family has the best buns." Superintendent Krawitz expressed the belief that the above described behavior constitutes conduct unbecoming a teaching staff member.

It is not disputed that respondent received notice of the charges (Exhibit P-3) and that on March 31, 1992, the Board of Education of Parsipanny-Troy Hill Township certified the charges pursuant to *N.J.S.A.* 18A:6-11 (Exhibit P-4).

ISSUES TO BE RESOLVED

The prehearing order entered in this matter on July 24, 1992 sets forth the following issues which are to be resolved as a result of this hearing. These issues are:

1. Whether respondent engaged in the alleged conduct giving rise to these charges?
2. Whether the alleged conduct set forth in the tenure charges constitutes conduct unbecoming a teaching staff member?
3. If respondents found guilty of the tenure charges, whether just cause exists for his removal or for the imposition of some other penalty?

It should be noted that paragraph 14a of the prehearing order provides that the attorneys for the parties agreed that the identity of any witnesses in this matter who are students who have not yet attained the age of majority shall be protected from disclosure. Accordingly, it is **ORDERED** that the transcripts, exhibits and the statement of facts supporting the tenure charges against respondent shall be redacted and amended by deleting therefrom the names of those students under age 18, and that at the hearing any student witnesses who have not yet attained the age of majority shall be referred to by initials only and shall not otherwise be publicly identified.

FACTUAL DISCUSSION

The testimony of the various witnesses in this matter may be summarized as follows:

Eugene Vasile, the Director of Personnel and Employee Relations with the school district testified that he has varied responsibilities dealing with personnel as well as employee staff discipline. He indicated that he represents the superintendent in various aspects of discipline. He testified that in February 1992 he received a call from Tony Sciaino, Principal of Parsipanny Hills High School, concerning certain allegations being made against respondent. Mr. Sciaino advised Mr. Vasile that the parent of one of the students reported that her daughter had received a letter written to her by respondent. After reviewing the letter he and Mr. Sciaino met with the school superintendent and subsequently arranged for a meeting with respondent and others on the

morning of February 28, 1992. Present at that meeting was Mr. Vasile, Mr. Sciaino, the Superintendent, Ms. Maggio who is Director of Guidance, respondent, Mr. Capsauris who was President of the Teachers' Association, and Mr. Neumiller who was the grievance chairperson for the Association. Mr. Vasile testified that at that meeting he reminded respondent that at about one year before there was an incident in which a letter of reprimand had been placed in his file. Mr. Vasile then asked respondent if he recognized the letter (Exhibit P-1) given to him by the mother of the student to whom it had been given by respondent. Respondent admitted that he recognized the letter and that he had written it. Respondent also indicated that the letter had been delivered to a student in the district whose name is C.O.

Mr. Vasile testified that the matter was investigated further and that on Tuesday of the next week, Mr. Sciaino came by his office with Mrs. O., the mother of C.O. Mrs. O. alerted Mr. Vasile and Mr. Sciaino to another situation involving C.F., a friend of C.O. C.F. had told C.O. and her mother that respondent made a remark which was considered to be inappropriate, having to do with C.F.'s having the best "buns" of her and her sisters in that family. However, Mrs. O. was concerned that C.F.'s parents be informed before C.F. was questioned about this matter. As a result of further investigation, Mr. Vasile indicate that it was decided to file tenure charges against respondent, and this was accomplished in March 1992 (Exhibits P-2, P-3 and P-4).

Mr. Vasile testified that the incident in 1991 that resulted in the disciplinary action against respondent had to do with an allegation that respondent inappropriately kissed a student at the conclusion of a counseling session. The student reported this incidence to a teacher who then brought this to the attention of Principal Sciaino. DYFS was also notified concerning this incident, but their records are confidential and unavailable in this proceeding. The substance of the allegation was that respondent met with a female student in his office. During the meeting a conversation was begun concerning lip gloss being worn by the student and about it being kissable and what it tasted like. At the conclusion of the session, respondent kissed the student on the lips. After he was questioned, respondent admitted the incident and wrote a letter of apology to the school principal (Exhibit P-8). The Board of Education directed that a letter of reprimand be placed in respondent's file. The letter of reprimand dated June 17, 1991 (attachment to P-2), contained the Board's concern and indicated that a violation of this type of behavior would be dealt with very seriously if it were to concur again. Mr. Vasile indicated that respondent did not

deny that the conduct that was reported by the student in the prior matter had actually taken place.

Mr. Vasile also identified a Performance Evaluation Report dated May 30, 1991 (Exhibit P-5) in which, under the heading Performance Area Needing Improvement/Development it is stated, "Mr. Hess must understand and respect the appropriate boundaries that are inherent in a counselor/counselee relationship. In interacting with students, the crossing of such boundaries is always unacceptable."

On cross-examination, Mr. Vasile admitted that the Performance Evaluation report of May 30, 1991, recommended that respondent receive his annual increment for the following year.

The next witness to testify was Anthony J. Sciaino, Principal of Parsipanny Hill High School. Mr. Sciaino testified that he received a phone call from the mother of C.O. indicating that she was very upset about a letter that she had been given by her daughter and which her daughter told her she had received from respondent. He asked the mother to bring in the letter which she did. He then spoke to Mr. Vasile, and met with the superintendent concerning this letter (Exhibit P-1). Mr. Sciaino testified that his reaction to the letter was that it was an inappropriate type of letter for a staff member to write to a student. As a result he felt that it was necessary to investigate the matter further. Mr. Sciaino testified to a meeting held the next day with various individuals including respondent and his representatives. Mr. Vasile showed the letter (Exhibit P-1) to respondent and respondent indicated that he had written the letter and that he had given the letter to a student, C.O.

Mr. Sciaino testified that C.O.'s mother called him again a few days later indicating that she had information concerning C.F., a friend of C.O., who indicated that an incident had occurred to her involving respondent and that she was uncomfortable with it.

Mr. Sciaino testified that he then contacted the mother of C.F. and he requested and was given permission to speak with C.F. concerning this. He then met with C.O. and her mother and with C.F. C.F. advised Mr. Sciaino that when she was in a conference with respondent he had

talked to her about the fact that she had the best "buns" of all the other girls in her family. Mr. Sciaino then reported the results of this meeting to Mr. Vasile.

Mr. Sciaino then testified as to his involvement in the prior 1991 kissing incident involving J.C. He indicated that J.C. had gone to respondent for some college information and that during the course of that counseling session, she was applying lip gloss or chap stick to her lips. Respondent stated that he wondered what it tasted like and at the end of the conference he leaned over and kissed J.C. on the lips. When respondent was confronted at a meeting concerning this allegation, he admitted that he had, indeed, kissed J.C. After this meeting, respondent returned and gave a letter of apology to Mr. Sciaino (Exhibit P-8). Mr. Sciaino identified a policy of the Board of Education concerning inappropriate interaction between faculty members and pupils (Exhibit P-9).

Mr. Sciaino testified that as a result of respondent's conduct with respect to J.C., disciplinary action was taken in the form of a letter of reprimand being placed in his file. In addition, respondent's performance evaluation for the school year 1990-91 (Exhibit P-5) was issued containing the comment concerning the unacceptability of crossing boundaries in interacting with students.

On cross-examination, Mr. Sciaino testified that when he met with C.F. and she reported respondent's statement that she had the best "buns" in her family, she indicated that she was uncomfortable with his remarks. He also indicated that C.O. told him that respondent paid her a lot of attention when she worked in the school store, and that respondent dropped by frequently. C.O. also told him that when she received the letter from respondent that she brought it home and showed it to her mother. She also indicated that there had been an exchange of Valentine greetings between her and respondent which students and teachers as well as students and students exchange with each other.

It should be noted that at this posture of the case, petitioner sought to produce testimony and other evidence of two alleged prior incidents of inappropriate conduct on the part of respondent which the ALJ ruled was irrelevant and would not be accepted in this matter if it had not been the basis of formal charges resulting in an adjudication of guilt, or it was not admitted by

respondent. However, the ALJ further ruled that since credibility is always an issue, that if respondent is questioned concerning these prior incidents and he denies their occurrence, petitioner will be given the opportunity to present evidence of such incidents for the limited purpose of challenging respondent's credibility.

In his defense, respondent produced the depositions of C.F. (Exhibit R-1) and of C.O. (Exhibit R-2). The deposition of C.F. (Exhibit R-1), in summary, indicates that she knows respondent, that he was her older sisters' guidance counselor starting in 1980 and that he has been a friend of the family. She indicated that respondent was not her guidance counselor but that she got along well with him because she knew who he was and that she could go to him if she needed to talk to someone other than her regular guidance counselor. C.F. testified that around February 1992, respondent made comments to her in the hallway about how she was dressed. She explained that respondent had sent her a carnation-gram for Valentine's day and that when her sisters found out they asked her to ask respondent why they never got one. C.F. indicated that when she asked the respondent this question he just said, "you can tell them that the youngest has the best buns in the family".

C.F. testified in the deposition that when she received the carnation-gram she did not think anything of it and it did not bother her in any way. She also indicated that she did not think that respondent meant anything by his statement to her about having the best "buns" and that he did not mean it in any suggestive way.

C.F. also testified in the deposition that an incident occurred when respondent commented about how she was dressed. She indicated that on March 4, 1992, because she was an officer in the Future Business Leaders of American and was to attend a meeting of that organization, she was dressed in a skirt. She described her outfit as a tight green skirt and a green long-sleeved shirt to match and she indicated that it was dressy for school. Respondent noticed how she was dressed and he stated to her that the next time she wore that outfit he expected a personal visit in his office. She indicated that she did not feel upset by this comment, that she felt that it was funny and that she did not think that he meant it "pervertedly".

C.F. testified in the deposition that these incidents came up because on a particular day she had gone to C.O.'s house and C.O. showed her a poem that respondent had written to her and that C.O.'s mother was upset about it. C.O.'s mother asked if respondent ever said anything to her, and it was at this point that C.F. told her about these incidents.

The deposition of C.O. (Exhibit R-2), in summary, indicates that she was age 16 when her deposition was taken in October 1992. She explained that her contact with respondent was in connection with an essay contest. Her guidance counselor advised her to get information concerning the contest from respondent. She indicated that subsequently she and respondent would say hello and were friendly. She also indicated that he was aware that she liked poetry. She identified a greeting card (attached to deposition as Exhibit R-1) and related the circumstances leading to the purchase of the card by her and her giving it to respondent. She indicated that she worked in the school store and that she always picked out cards to send to her friends from camp. On a particular occasion when she was looking at cards, respondent walked into the store and said to her "you're picking out a great card for me". As a result she had sent him the card just to be friendly. C.O. indicated that she sent the card to respondent prior to Valentine's Day.

C.O. testified in her deposition that around Valentine's Day respondent told her that he was sending her a carnation-gram and so she sent him one back because she did not want to be rude and feel awkward. She indicated that she believes that she wrote something like a poem in the carnation-gram. Following this, respondent saw C.O. and stated that he liked her poem and that he writes poetry too and he would write her a poem too. C.O. then received the letter (Exhibit P-1) from respondent. C.O. indicated that while she was working at the school store respondent came in and said that he has something for her and that she should come to his office. When she went to his office he handed her a letter. She read it sometime after respondent had given it to her. C.O. testified that she saw the respondent the next day and she said thank you to him. She indicated that she was very uncomfortable and that when she saw him the rest of the day she would go the other way. She stated that she was uncomfortable because, from knowing poetry, she understands that poetry is supposed to send a message and that it is telling a story or that it tells you something, and that she was confused as to what he was trying to tell her in the poem. She further indicated that it was something that she could see her boyfriend writing to her.

C.O. testified that because she was very uncomfortable with what the respondent had written in the letter she showed it to her mother.

Respondent Carl A. Hess, III, testified in this matter. He was first employed in June 1965 and has been continuously employed by petitioner since then. At first he was a substitute teacher and then he was an elementary physical education teacher. He subsequently became a guidance counselor at Parsipanny Hills High School in September 1981. In September 1987 he was appointed to be the Director of the Guidance Department at Parsipanny High School, and he held this position for a year. Eventually he requested a transfer back to Parsipanny Hills High School for the school-year 1989-90.

Respondent testified that he has a bachelor of science degree in education with a concentration in English and history and a minor in physical education, and a master's degree in counseling from Montclair State College. He has certificates in school administration and director of student personnel services. He has certifications issued by the New Jersey State Board of Examiners as a teacher of English, social studies and physical education, director of guidance and secondary school administrator and a guidance counselor.

Respondent testified that he had occasion to meet with a student, J.C. In J.C.'s junior year she was in the process of starting a search for colleges. Respondent indicated that he recalled the incident on a certain occasion when he kissed her. He indicated that J.C. was scheduled to come in for a computer printout. Respondent testified that he was really happy with J.C.'s success and that he just jumped up and gave her a kiss aimed at her cheek as a "happiness thing". Obviously, the kiss landed on her lips, but he did not intend it to land on her lips. He described the kiss as an exclamation of happiness and joy for J.C. because of things coming together for her. He indicated that there did not seem to be any shock or dismay on the part of J.C. and that she thanked him for the computer information.

The following Monday, J.C.'s mother called him and asked what had happened. He testified that he recounted his explanation of the incident to her and that he apologized to her if it had made J.C. feel uncomfortable because that was not his intention. He apologized again to her because it is not the type of behavior that should occur. He got the impression that J.C.'s mother

was satisfied with the explanation and the matter was concluded. However, Mr. Sciaino called respondent down to his office that same day and respondent was questioned as to this incident. Respondent recalls describing the incident as he previously indicated. He also identified a note he wrote to Mr. Sciaino (Exhibit P-8) because the mention of a DYFS investigation and the penalties involved shook him up.

Respondent testified that at this meeting, he was reminded of the proper behavior of a school employee. As a result of this incident, respondent considered getting some counseling as to why he had done this. Respondent also acknowledged receiving the letter of reprimand (attached to Exhibit P-2), dated June 7, 1991.

Respondent indicated that as a result of that incident he had one or two sessions with his priest, who is a licensed counselor, and who indicated to him that he felt respondent realized that he had made a mistake. Respondent described himself as having a style which is very friendly and open and very effusive with his students. He indicated that when a student does well and succeeds he becomes really happy for them and pumps his fists or shakes their hand, or does other things. As a result of this incident, he avoided physical contact with students and avoided going to the prom that year. He also indicated that he really backed off and tried to pull himself back from any open displays of affection to the students.

Respondent testified that he knows a student, C.O. and that she was an applicant for a Leadership Foundation award. Respondent identified a card that C.O. had sent to him (attached to Exhibit R-2). He indicated that he received this prior to writing a letter to C.O. (Exhibit P-1) and that he received the card just prior to Christmas. He testified that he just thanked C.O. for the card as a nice gesture. Respondent testified that he wrote the letter to C.O. (Exhibit P-1) while he was home recuperating from foot surgery. He indicated that because of the surgery he was taking Tylenol with codeine every four hours (Exhibit R-3).

Respondent explained the circumstances giving rise to his writing of the letter. He indicated that the school has a carnation-gram for Valentine's Day where students and faculty will give a flower to each other as a gesture of friendship. He indicated that there were no restrictions on a staff member participating in this activity. C.O. had sent him a carnation-gram

with a nice poem. He recalled that a couple of the lines of the poem were that "if smiles were stars in the sky, I would have a handful of stars in my hand at all times". He also recalled that there were two or three other lines. He stated that it was a nice poem that made him feel nice and appreciated.

Respondent testified that he ran into C.O. in the school store and thanked her for the carnation-gram. He also said to her that he did not realize that she wrote poetry and that he also writes poetry but no one knows. He then told her that over the vacation he would write something to her. As a result he wrote the letter. He gave the letter to C.O. several days later in the school store. He indicated that between the time he wrote the letter and he gave it to C.O. he did not review it again.

Respondent testified that after he gave her the letter, he saw her just once again in the school store and she thanked him.

On February 28, 1992, Mr. Sciaino called him at home and requested that he attend a meeting the following morning in the superintendent's office. At that meeting he was asked whether he had given C.O. the letter and he responded that it was his.

Respondent also testified that he knows C.F. and that he has a long family history with C.F.'s family and that all of the six children in the family had been his counselees. Respondent testified that on one occasion he saw C.F. in the hallway and she asked him why she got a carnation-gram and none of her sisters ever received one. He stated that he stopped to think for a second and that he knew it was going to "bust the chops" at the kids at home because he had a good relationship with the family, and they could kid around a lot. As a result he said to C.F. that the reason he gave her a carnation-gram was "because I think you have the best brains in the family". He indicated that he did not honestly remember saying "buns". He also indicated that C.F. did not register any discomfort at his response because she knew that he was kidding her.

Respondent then described an incident involving C.O. which occurred just after Christmas vacation. He indicated that he was walking down the hall by the main office when C.O. ran up to him and said that she had not seen him since before vacation and she gave him a hug in front of

the school office door. He indicated that he "damn near died" when this happened and that it really shook him up.

Respondent testified that as a result of these charges being brought against him he has been in counseling every since on a weekly basis with Family Services of Morristown. He meets regularly with a therapist and a psychiatrist and as a result it has made him rethink why he interacts so personally with his students and how to handle different situations. He also stated that his attendance at these counseling sessions has been a beneficial to him and that he intends to continue them.

On cross-examination, respondent indicated that he had surgery on his foot performed on an out-patient basis and received a prescription of Tylenol with codeine, which he was taking every four hours. He indicated that it was on the day of surgery that he wrote the letter to C.O. (Exhibit P-1). He indicated that he had taken two, possibly three, Tylenol with codeine tablets containing 30 mg. of codeine. He indicated that at the time he wrote the letter he was tired but was not dizzy or nauseated. Respondent also admitted that at the time he delivered the letter to C.O. several days later he had not taken any of the Tylenol with codeine tablets. He also indicated that he did not go back over and reflect upon the letter from the time he wrote it until the time he delivered it to C.O. He indicted that prior to giving the letter to C.O. he did not consider that it was inappropriate conduct in any way.

On cross-examination respondent indicated that at the time he wrote the letter the only thing going through in his mind was that he had said earlier to C.O. that he would write something for her over vacation demonstrating his way of writing. He also indicated that he did not consider it to be inappropriate behavior to send C.O. a carnation-gram because it has been appropriate behavior for teachers and students to do this in the past. He also said that he did not sit down with C.O. and say anything to her to the affect that her hugging him in public was inappropriate. He felt that there was no need to do that because there would not be any problem or any future contact.

Respondent testified that he went to counseling with his priest after the letter of reprimand involving J.S. and it was then that he realized that his way of expressing joy for his students in the

form of a hug would be inappropriate, and that he would have to act differently. Respondent testified that he did change his conduct because when honors and awards were received by students there were no longer any hugs but a large hand shake. There were also no kisses in any way.

Respondent was questioned regarding his kissing of J.C. He indicated that he does not recall asking her whether her lip gloss tasted good or telling her that it tasted good after the kiss. Respondent also testified that in his comment to C.F. as to why she was the only one in her family to get a carnation-gram, that C.F. misunderstood him and that he did not use the "buns", but used the word "brains".

Respondent indicated that immediately after hearing about his suspension in this matter, he concluded that his letter to C.O. was inappropriate. He indicated that C.O. was probably age 15 at the time. In response to the question whether the letter was written to C.O. with the intention to have sexual relations with her, he replied absolutely not. He indicated that his only purpose was to say thank you because C.O. gave him a card, and to show her how he could write.

The next witness called for respondent was Dr. Jen Chrobok, a psychiatric consultant employed by Family Services of Morris County. Dr. Chrobok testified to his educational background and training in the practice of psychiatry and indicated that he has been certified by the American Board of Psychiatry and Neurology as a diplomate, indicating that he is a specialist in the field of psychiatry. He was accepted as an expert witness in the field of psychiatry.

Dr. Chrobok testified that he evaluated respondent to determine whether a psychiatric disorder was present and to help in the treatment process. Ms. Donna Byrne is the therapist assigned to work with respondent.

Dr. Chrobok testified as to respondent's discussion with him concerning respondent's realization that his behavior was not only inappropriate, but that he used poor judgment and crossed boundaries as a teacher and guidance counselor that he should not have. He described feelings of guilt and shame. However, while he did not find that there was a psychotic disorder or some serious psychiatric disorder, he did find that respondent was emotionally detached.

Dr. Chrobok testified that he diagnosed respondent as having an adjustment disorder with mixed emotional features. The mixed emotional features were depression and anxiety. With regard to treatment or prognosis, Dr. Chrobok felt that respondent demonstrated a greater insight into his behavior, an awareness that what he had done was inappropriate, and that he used poor judgment and crossed boundaries which he should not have. He felt that respondent should continue to examine his behavior and to learn from it the limitations of interaction with young students.

Dr. Chrobok testified that on his second visit with respondent, respondent was definitely learning and becoming aware that what he had done was terribly wrong, and that he had caused pain and suffering not only to his family but to other people as well. Based on his examination of respondent and his findings, he expressed the opinion that the possibility of respondent acting again as he did previously is unlikely.

On cross-examination Dr. Chrobok, in examining the letter the respondent wrote to C.O., stated that he thinks its contents show the writer's feelings about this person. He indicated that respondent experienced thoughts, fantasies and feelings, and the unfortunate thing is that he stepped out and did something about them such as writing a letter and giving it to a person. Dr. Chrobok further indicated that if there was a long history of misconduct of this type, that respondent probably should not be a teacher. On further questioning about respondent's letter to C.O., Dr. Chrobok indicated that respondent was expressing the intensity of his feelings and that he wanted C.O. to respond, but that he could not make the deduction that respondent was actually interested in being sexually involved with C.O. In his cross-examination, Dr. Chrobok indicated that respondent told him that he had made inappropriate comments concerning C.F.

Donna Byrne also testified for respondent. She is a social worker employed as a senior clinician by Family Services of Morris County. She has a master's degree in social work and has post-masters training in which she specialized in individual therapy. Ms. Byrne was accepted as an expert based on her specialized training and experience in the field of social work and therapy of individuals.

Ms. Byrne testified that when respondent first came to her there was much of confusion and bewilderment on his part as to what had happened and why respondent had done the complained of acts. She indicated that she has met with respondent pretty consistently every week since May 1992. She testified that there confusion on respondent's part because it was hard for him to understand the severity of what he had done because his behavior was fairly commonplace.

In questioning Ms. Byrne concerning the letter written to C.O., she recalled that respondent stated that he did not really understand what he wrote, and that C.O. had asked him for the sample his writing. He indicated that C.O. had handed him several notes herself and that they had talked quite a bit about traveling out west. He indicated that the letter was a sample of his writing. Ms. Byrne remembers being struck by how much respondent did not understand about what was written, but otherwise he was candid with her. He did not feel that it his conduct was a romantic or sexual coming on to this young woman and he denied having such feelings for her. Ms Byrne stated that, eventually, respondent gained insight into the problem and became increasingly depressed, sad and shameful, and aware of the inappropriateness of his conduct and how this type of behavior could be misunderstood.

On cross-examination Ms. Byrne indicated that she was not aware that C.O. was not a counselee of the respondent and that he had no professional relationship with her. She further admitted that when she first saw the letter there was no question in her mind of the inappropriateness of this language being given by a guidance counselor to a 15-year-old student. She indicated that the respondent failed to see this because he was on medication and his judgment was very clouded. He also expressed his desire to provide the student with something that he had written. She indicated that the medication may have had some role in the inappropriateness of respondent's action.

When Ms. Byrne was questioned as to why it should now be believed that respondent will not engage in this inappropriate conduct, she indicated that after the therapy he has insight into some of the possible reasons for his behavior. She also indicated that the second infraction was not similar to the first in that it did not involve a physical touching.

Pursuant to the ALJ's prior ruling, petitioner was permitted to recall respondent for additional cross-examination with respect to prior alleged incidents of inappropriate behavior for the purpose of testing and challenging respondent's credibility. Respondent was questioned concerning his familiarity with a former student named Dana Perkins who, at the time of the hearing, was age 22 (Exhibit P-11). He indicated that in the 1985-86 school year Ms. Perkins was an independent study student working in the nurse's office for Ms. August. Respondent admitted to visiting Ms. Perkins in the nurse's office, but indicated this occurred very seldom. Respondent indicated that he asked Ms. August if it might be possible to have Dana Perkins change her work assignment to the guidance office because Ms. Perkins would have liked to have done so. He also acknowledged that he may have issued a pass to Ms. Perkins at one time or another. He admitted that Ms. Perkins was not one of his advisees.

Respondent denied ever asking either Ms. Perkins or any female student to go out to lunch with him. He indicated that he did not recall speaking to Mr. Packin, the School Principal, concerning his desire to have Ms. Perkins work for him in the guidance office.

When questioned about alleged inappropriate touching of Ms. Perkins, respondent stated that in the 1985-86 school year he indicated that there may have been a hug which occurred somewhere but that would be the "max", and that would be it. He denied kissing Ms. Perkins but indicated that he may have hugged her. He also indicated that he may have said that she looked nice.

Respondent also acknowledged knowing a student named Lois Fishbach who graduated in 1986 and stated that Lois and her sister were both his advisees at Parsippany Hills High School. He indicated that Lois had an interest in forestry but denied that he took her out to see what a forest ranger might do and denied that he took her to the Tourn, a park which is located in Boonton. He denied that he took Lois anywhere and that he lunged at her and attempted to kiss her while he was in the car with her.

On redirect examination respondent testified that it was his recollection that Ms. Perkins asked him if she could work in the guidance office. He admitted that there were one or two

occasions when he may have issued a pass to Ms. Perkins, but denied that he knew that she was taking the pass and leaving the school. Respondent also denied ever taking Ms. Perkins or any other student out to lunch. Respondent also denied the allegations of Ms Perkins in the memorandum from Ms. August to Mr. Vasile that respondent was having sex with friends of Ms Perkins' older sister. Respondent also denied that Mr. Packin had disciplined him behind closed doors concerning these incidents.

With regard to Lois Fishbach, respondent indicated that he had lengthy discussions with her about her career options but denied that he ever would take a student out of the building. He indicated that even if he wanted to do so, a permission note from the parents and contact with the principal would be required.

In continuation of respondent's defense, Bernard Packin was called as a witness. He retired from teaching in 1988 and is presently living in California. His last position was as principal of Parsipanny-Hill High School. He indicated that in the school year 1985-86 he evaluated respondent.

Mr. Packin testified that he met regularly with the guidance staff and counseled the guidance counselors with respect to teacher-student interactions. He recalls that there were always personal relations that were a problem and that independent study was another problem. He also indicated that many times when students had problems in their personal relations at home they would confide in the guidance counselor, who would then report these circumstances to him. He also indicated that physical contact between the counselor and student, including hugging, did occur.

Mr. Packin testified that he had no recollection of being contacted by Dana Perkins, Lois Fishbach, or their parents in the 1985-86 school year. He also did not recall speaking with respondent in January 1986 concerning allegations that had been raised against him by these students. Mr. Packin also indicated that he did not recall Ms. August ever coming to him and complaining about respondent's interaction with students.

On cross-examination Mr. Packin reiterated that he does not recall the allegations reported against respondent involving Dana Perkins and Lois Fishbach.

Respondent next called Jane W. Runte who was employed as a school counselor and guidance director by petitioner. She indicated that she was respondent's supervisor and she evaluated his performance. Ms. Runte testified that on several occasions, Bani August registered comments about respondent. She indicated that at one point, another counselor advised her of concern that respondent was too effusive with his students. She pursued this by further interviews and spent several days observing respondent, and she saw nothing that she would consider any problem. During this investigation, she went to Bani August who reported that she concurred with this concern. However, Ms August provided no details. She indicated that the name of the other counselor that registered concerns about respondent's conduct was Rita Maggio.

After further investigating these comments, Ms. Runte indicated that she reported back to Dr. Perlett. Dr. Perlett was the Assistant Superintendent and her supervisor. She indicated that she never saw respondent hugging or kissing students. She testified that respondent's reputation in the school district in terms of honesty and integrity is stellar and that he is an effective counselor.

On cross-examination Ms. Runte indicated that during the period of time she observed respondent his position in terms of familiarity with pupils was significantly different than that at Parsipanny Hills High School where he had been a guidance counselor with every day interaction with specific students. Ms. Runte was also asked to review the letter written by respondent to C.O. (Exhibit P-1) and she indicated that she thought it inappropriate and also poor poetry. When Ms. Runte was cross-examined concerning the incident involving Dana Perkins, she testified that, knowing the name of the student and what the student was like, she would discount the student's story completely. She indicated that the student would make up stories about the teachers. However, this is what other people told her and she did not personally observe any of that type of behavior on the part of Ms. Perkins. The witness also volunteered that there was another counselor involved in a situation in 1981 and 1982 where several students asked to be changed to another counselor because they did not like being in the office alone with him. On

She also stated that when he was talking to her he started to touch her fanny and that he would rub her fanny when he would talk to her. Ms. August indicated that she advised Ms. Perkins that she could go to the administration. She also advised Ms. Perkins that she was not in trouble. Ms. Perkins stated that she would let Ms. August go to the school's administration and that she would stop by later to find out what was going on. Shortly thereafter, Phyllis Madsen walked in and was upset, and she told her a similar story involving respondent concerning another student. at that point both she and Ms. Madsen went to see Mr. Packin. Because Mr. Packin was not present, they spoke to Dr. Perlett and he indicated that he would take care of it.

Ms. August indicated that on a particular day following this, she walked by the principal's office. The principal's door was closed and Principal Packin was talking and he was angry. She then went to the principal's secretary and to give her certain unrelated papers and said "Hess?" to which the secretary responded "Yes". She assumed that respondent was being reprimanded. Later that day, Principal Packin contacted Ms. August and stated that what she had told Perlett had been taken care of and not to worry about it.

Ms. August testified that previously she had seen respondent kissing students but heard no rumors. She also recounted that Mr. Slimowitz said to her that respondent's kissing students would get him into trouble.

On cross-examination Ms. August indicated that she observed respondent coming in to the nurse's office two or three times a week during the first period flirting with Ms. Perkins and she continually interrupted his conversation with Ms Perkins, continually gave Ms. Perkins something to do to bring her out of her office, and did other things to break it up. She indicated that in September of that school year she told respondent that she found his interactions and comments towards Dana Perkins to be inappropriate. She indicated that in response to the phone call from Mr. Packin concerning the request to transfer Ms. Perkins to the guidance office, that she explained that Dana is her most valuable worker and that respondent tried to get her to give him Dana several times. She indicated that respondent's flirting with Ms Perkins ceased immediately after the phone call about the change in the work assignment. Ms. August indicated that when Mr. Packin contacted her about Ms Perkins working in guidance that she did not report to him

that occasion, Mr. Packin said not to press charges and that he would take care of it. She also indicated that she filed a grievance in 1981 when this other counselor grabbed her by the neck and threatened her for talking about him. The other counselor was allowed to continue working until he retired about two years later.

Respondent next called David Slimowitz as a witness. He is a guidance counselor employed at the Parsipanny-Hills High School. He has known respondent since around 1980 or 1981. He indicated that as a counselor, respondent has a very good reputation as hard working, conscientious and always willing to help students. He also indicated that he found respondent to be truthful. He testified that he has never seen respondent engage in any inappropriate or unprofessional actions towards students and that he has never observed him hug or kiss any student. On cross-examination Mr. Slimowitz testified that he has had contact with respondent on a daily basis for 12 years and that they are colleagues but not friends.

Petitioner called Phyllis Madsen as a rebuttal witness. She is coordinator of business education, a position she held during the 1985-86 and 1986-87 school years. She indicated that she knows a former student named Lois Fishbach. She indicated that one day Lois asked if she could speak to her after class. Lois indicated that she wanted to be a forest ranger and she had mentioned it to her guidance counselor, respondent herein. Respondent indicated that it would be a good idea to go to the Tourn and see a forest ranger in action. Ms. Fishbach then reported that respondent drove her to the Tourn and lunged at her to kiss her, and Lois asked at that point to be taken back, and he returned her to school. She indicated that Ms. Fishbach had refused to tell her parents or anyone else about this incident. Eventually Ms. Madsen told Bani August about it. She indicated that she spoke to Ms. August because Ms. August mentioned that a student that was having a problem with respondent. They then reported the incident to Dr. Perlett at which time Ms. Madsen told him about the report of Lois Fishbach and Ms. August reported the incident involving Dana Perkins. She indicated that subsequently they were told by Mr. Packin that the matter had been taken care of.

On cross-examination Ms. Madsen indicated that she has since spoken to Lois Fishbach and that she did not want to become involved. She indicated that these events occurred in or about January 1986 and that the incident involving Louis Fishbach occurred in October or

November 1985. Ms. Madsen also admitted that up until the point where Ms. Fishbach mentioned this incident to her she had heard prior rumors about respondent. She admitted that in contrast to the prior deposition she gave to respondent attorney, her discussion with Bani August as to what Lois Fishbach told her was not reported to Ms. August immediately. She also indicated that when she spoke to Lois Fishbach, she was told that she did not want to become involved in this matter, that it was over and in the past and she did not want to relive it. She indicated that after they reported this to Dr. Perlett he said that he would take care of it. She never heard anything from Dr. Perlett or from Principal Packin. On redirect she indicated that there is no confusion that Lois Fishbach spoke to her and that Lois was upset about the incident involving respondent.

Petitioner then called Eugenie F. "Bani" August. She indicated that she has been school nurse at Parsippany Hills High School since 1983. She indicated that she is familiar with respondent and has a good working relationship with him. She testified that an independent study program has been in operation at the high school since 1986 and that two students every period would work in the nurse's office. Dana Perkins worked for her in the 1986-87 school year during the first period. Very early in that school year, respondent would stop by frequently, three or four times a week, and talk to Ms. Perkins. She then indicated that respondent asked if he could have Ms. Perkins work for him and she subsequently received a phone call from Mr. Packin because respondent was in his office making this request. However, Ms. Perkins had told Ms. August that she did not want to work for respondent because she had heard rumors about him. As a result, Ms. August reported to Mr. Packin that she would not agree to allow Ms. Perkins to change her assignment and work for respondent. After the phone call from Mr. Packin she did no longer saw respondent in her office.

Ms. August testified that several months later, in approximately January 1987, Ms. Perkins came into her office and closed the door and said that she was in trouble and scared, and she did not know what to do. She told Ms. August that respondent was very friendly to her and had started giving her passes so that she could cut classes, and that she had cut quite a few classes. She indicated that respondent had asked her out to lunch and she was very concerned that now she would have to pay him back. Ms Perkins indicated that if she did not she was afraid that he would go to her teachers and tell them that she had been cutting school and she would lose credit.

She also stated that when he was talking to her he started to touch her fanny and that he would rub her fanny when he would talk to her. Ms. August indicated that she advised Ms. Perkins that she could go to the administration. She also advised Ms. Perkins that she was not in trouble. Ms. Perkins stated that she would let Ms. August go to the school's administration and that she would stop by later to find out what was going on. Shortly thereafter, Phyllis Madsen walked in and was upset, and she told her a similar story involving respondent concerning another student. At that point both she and Ms. Madsen went to see Mr. Packin. Because Mr. Packin was not present, they spoke to Dr. Perlett and he indicated that he would take care of it.

Ms. August indicated that on a particular day following this, she walked by the principal's office. The principal's door was closed and Principal Packin was talking and he was angry. She then went to the principal's secretary and to give her certain unrelated papers and said "Hess?" to which the secretary responded "Yes". She assumed that respondent was being reprimanded. Later that day, Principal Packin contacted Ms. August and stated that what she had told Perlett had been taken care of and not to worry about it.

Ms. August testified that previously she had seen respondent kissing students but heard no rumors. She also recounted that Mr. Slimowitz said to her that respondent's kissing students would get him into trouble.

On cross-examination Ms. August indicated that she observed respondent coming in to the nurse's office two or three times a week during the first period flirting with Ms. Perkins and she continually interrupted his conversation with Ms Perkins, continually gave Ms. Perkins something to do to bring her out of her office, and did other things to break it up. She indicated that in September of that school year she told respondent that she found his interactions and comments towards Dana Perkins to be inappropriate. She indicated that in response to the phone call from Mr. Packin concerning the request to transfer Ms. Perkins to the guidance office, that she explained that Dana is her most valuable worker and that respondent tried to get her to give him Dana several times. She indicated that respondent's flirting with Ms Perkins ceased immediately after the phone call about the change in the work assignment. Ms. August indicated that when Mr. Packin contacted her about Ms Perkins working in guidance that she did not report to him

any of the information that Ms Perkins had told her about respondent's interactions with her sister and other prior students.

Robert A. Perlett was called by petitioner and testified that he is assistant superintendent. He was formerly an assistant principal at Parsippany Hills High School where he worked with respondent, Ms. August and Ms. Madsen. He reported that there came a time when Ms. Madsen and Ms. August came to him to discuss incidents which had been reported to them concerning respondent. Ms. August reported to him that a student had been touched inappropriately by respondent. He then stated that he would talk to Mr. Packin about the matter, and he did so. He vaguely remembers reporting to Mr. Packin that one student had been touched on the buttocks and another had been kissed by respondent. He indicated that Mr. Packin nodded his head and he took that to mean that Mr. Packin would take care of it.

Dr. Perlett also indicated that Jane Runte was one of his subordinates as Director of Guidance. He recalls at one point that Ms. Runte informally discussed with him some allegation that had been made against respondent concerning inappropriate conduct. He also indicated that he had no input into the June 1988 evaluation of respondent but that he does recall discussing with Ms. Runte problems of performance by respondent.

On cross-examination Dr. Perlett indicated that what he recalled of his meeting with Ms. August and Ms. Madsen is the attitude and visually memory of the meeting, but he does not recall the specifics. He indicated that he did not observe respondent kissing any students, hugging them or taking any students' hands. He also indicated that no student or parent ever came forward complaining about respondent.

Respondent next submitted into evidence the deposition of Dana C. Perkins which was taken on January 28, 1993 (Exhibit P-11). Attorney for respondent pointed out that as the trier of fact, the ALJ would not be given an opportunity to observe Ms. Perkins for purposes of determining demeanor and credibility and asked that the deposition be given the weight which may be deemed appropriate. The essence of the deposition of Dana C. Perkins is that she would go to see her guidance counselor frequently because she was having family problems. However, because her guidance counselor was busy with other students, she would speak with respondent.

On one occasion in her sophomore year she needed a pass and respondent offered to give it to her. She indicated that respondent made it apparent and known to her that if she ever needed a pass he would be willing to give her one. She recalled getting a pass from him to cut gym and leave the school premises, and recalled other occasions when he gave her a pass. She refused to divulge the name of a girlfriend who was with her on this occasion. She indicated that this occurred three or four times.

In her deposition, Ms. Perkins also testified to an incident which occurred during the first semester of her sophomore year. On that occasion respondent said that Ms. Perkins "had a great body" and he also commented that she looked good in spandex. She also indicated that respondent pinched her "behind". She indicated that she might have said "hi" to him and that he made the comment about her body after he touched her. She testified that this occurred simultaneously. She indicated that this made her feel very uncomfortable, nervous, angry and humiliated. She testified that she spoke to Ms. August on that same date and that Ms. August wanted to report this to Mr. Packin, the school principal. Ms. August tried to encourage her to speak with someone about this, but she did not want to get involved. Ms. Perkins also testified as to rumors and other allegations involving respondent but this testimony was not corroborated and is given no weight because of the lack of specifics. Ms. Perkins also testified that she told some friends of hers about this incident but refused to divulge the names of these friends. She recalled telling Ms. August that she was afraid of Mr. Hess because she felt that because he had given her passes he would want some form of pay back.

Anthony J. Sciaino was recalled as a rebuttal witness. Mr. Sciaino testified that he is presently principal of Parsipanny Hills High School and he was previously a guidance counselor there until 1984. He then left but returned in 1986 as vice-principal of Parsipanny High School and became principal at Parsipanny-Hills High School in 1988. He indicated that while he was a guidance counselor he observed respondent's interaction with students and described respondent as often-times engaged in conduct that he would consider uncomfortable with female students involving hugging, kissing and flirtations. He recalls that on at least one occasion, he mentioned to respondent that he thought that this conduct was something that should not be engaged in. He also indicated that when respondent applied for a transfer to return to Parsipanny Hills High School where he was the principal, he discussed with respondent rumors about respondent and his

reputation and advised respondent that it was not something that would be accepted at Parsipanny Hills High School. Respondent assured him that this would not occur and everything would be fine.

LEGAL DISCUSSION AND ANALYSIS

State statutes grant teachers in New Jersey the right to tenure, *Zimmerman v. Newark Board of Education*, 38 N.J. 65, 70-72 (1962) certif. den. 371 U.S. 956, 83 S. Ct. 508, 9L.Ed.2d (1963). The tenure statute prevents school boards from abusing their superior bargaining power over teachers in contract negotiations. *Spiewak v. Rutherford Bd. Of Ed.* 90 N.J. 63, 73 (1982). It protects teachers from dismissal for "unfounded, flimsy or political reasons." *Zimmerman v. Newark Board of Education*, 38 N.J. at 71.

Tenure is designed to aid in the establishment of "a competent and efficient school system" by affording to teachers a measure of security in the ranks they hold after years of service. *Viemeister v. Prospect Park Bd. of Educ.*, 5 N.J. Super. 215, 218 (App. Div. 1949). Toward that end, N.J.S.A. 18A:6-10 provides that no tenured teacher shall be dismissed or reduced compensation "except for inefficiency, incapacity, unbecoming conduct or other just cause." Additional procedural safeguards, including the right to a list of charges, a sworn statement of evidence and an impartial hearing, are written into the law.

It has long been held that unfitness to remain a teacher may be shown by a single incident, if sufficiently flagrant, but it is best evidenced by a series of incidents. *In re Fulcomer*, 93 N.J. Super. 404 (App. Div. 196)P; *Redcay v. State Bd. Of Ed.*, 130 N.J.L. 369, 371 (Sup. Ct.) aff'd. 131 N.J.L. 326 (E&A 1944). In determining the appropriateness of a teacher's conduct, the Commissioner of Education has often stressed ". . . that those persons who enter the teaching profession exercise a significant influence upon those they teach and . . . must exercise a high degree of exemplary behavior." *In re Tyler*, 13 N.J.A.R. 297.

While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary

restraint and mature self-control. *In the Matter of the Tenure Hearing of Thomas Appleby*, 1969 S.L.D. 159, 173, *aff'd*. State Board, 1970 S.L.D. 448.

Because of the position of public trust in which their profession places them, teachers in the public school system are held to certain prescribed standards of behavior. These standards were best expressed by the Commissioner in *In the Matter of the Tenure Hearing of Jacques L. Sammons, School District of Black Horse Pike Regional, Camden County*, 1972 S.L.D. 302, as follows:

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

Id. at 321.

These standards were reiterated by the Commissioner in *In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County*, 1974 S.L.D. 97, where it was said:

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

Id. At 98-99.

Where a teacher is found guilty of violating the public trust, factors to be considered in assessing penalty include the nature and gravity of the offense; any extenuating or aggravating

circumstances; and the effect on the maintenance of discipline and the proper administration of the school system. *In re Fulcomer*, 93 N.J. Super. 404, 420-422 (App. Div. 1967). Courts recognize that a single instance of misconduct, if sufficiently flagrant, is enough to justify removal of an unfit teacher. *Redcay v. St. Bd. Of Educ.* 130 N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E & A 1944).

At the commencement of this proceeding, attorney for respondent indicated that respondent did not dispute that he wrote a letter to C.O. and that, in hindsight, the letter was inappropriate. The position of respondent is that as a result of this matter being brought to his attention, he has become ashamed and embarrassed for himself and his family, and has engaged in therapy sessions and now realizes that his conduct was inappropriate and wrong. He further asserts that, a result of this realization, this type of conduct will not reoccur.

Specifically with regard to his conduct, respondent indicated that in a prior incident involving a student, J.C., because he was very happy for J.C.'s success, he spontaneously jumped up and gave her a kiss aimed at her cheek, as a "happiness thing". He did not intend this kiss to land on her lips, but it accidentally did. He subsequently apologized for this incident and received a letter of reprimand. He was reminded in very strong terms of the proper behavior of a school employee in interacting with students. He indicated that as a result of this incident he avoided physical contact with students and any open displays of affection.

Respondent further asserts that his motive in writing the letter-poem to C.O. (Exhibit P-1), were innocent. Both he and his therapist expressed the opinion that because respondent was taking medication when he wrote the poem his judgment was clouded. However, respondent admitted delivering the letter-poem to the student several days later. Respondent testified that he wrote the letter-poem to the student as a gesture of friendship because she had sent him a card and a Valentine's Day greeting containing a poem. He also indicated that he merely wished to display his talents as a poet.

Respondent denies that he said anything inappropriate to another student who inquired as to why she received a Valentine greeting and her older sisters did not when they had also been his counselees. Respondent testified that his response to her was because she had the best "brains" in

the family. Respondent further testified that he did not honestly remember saying "buns" instead of brains. On the other hand, the student, in her deposition, testified without hesitation that respondent indicated that she had the best "buns" in the family.

It should be noted respondent did not deny that on March 4, 1992, he stated to a female student who was wearing a tight skirt that the next time she wore that outfit he expected a personal visit in his office. The student testified that she felt this comment was funny and she did not think that respondent meant it in a perverted manner.

Respondent produced a psychiatric expert and a therapist who expressed the opinion that respondent did not originally realize that his conduct was improper, but he now realizes that his actions were inappropriate. Respondent described himself as being very effusive, friendly and open, and he appears to indicate that this was the cause of his difficulties.

As a result of my examination of the testimony and evidence in this matter, there is no question that respondent engaged in the alleged conduct giving rise to these charges, and I so **FIND**. However, respondent appears to be arguing that because he was not aware at the time he committed these acts that they were inappropriate or improper, therefore, he is not guilty of the charge of conduct unbecoming a teaching staff member. However, a close examination of respondent's acts do not support his assertions.

Respondent's letter to C.O. (Exhibit P-1) addressed as it was to a 15-year-old female student, is more on its face than merely a display of poetry. It is a question by respondent whether this student has the same feelings as those of respondent that are clearly expressed in the letter. It questions whether this young female student has similar feelings or whether she believes that respondent is "crazy". It inquires whether these feelings cross over years, ages, propriety, social acceptance and morality. By this letter-poem respondent is telling this young female student that she brings out words and feelings in him that are vast, soaring and beautiful and he inquires whether he has the right to have such feelings and thoughts. He indicates that she has an answer to these questions and that he will respect her thoughts and feelings. He finally indicates that these words are for her eyes, heart, soul and mind only.

After my initial examination of respondent's letter to C.O., I became concerned that my analysis of its contents may have been too harsh in assessing the intention of the author. However, my opinions concerning this letter were confirmed by several of the witnesses in this matter. In particular, Dr. Chrobok, questioned concerning the letter, stated that he thinks its content show the writer's feelings about the young female student. He indicated that respondent experienced thoughts, feelings and fantasies, and the unfortunate thing is that the respondent stepped out and did something about them by writing the letter and giving it to the student. He indicated that respondent was expressing the intensity of his feeling sand that he wanted the student to respond. Dr. Chrobok could not make the deduction that respondent was actually interested in being sexually involved with C.O.

Respondent's therapist, Donna Byrne also admitted on cross-examination that when she first saw the letter there was no question in her mind of the inappropriateness of the language of the letter being given by a guidance counselor to a 15-year-old female student.

As a result of questioning respondent on cross-examination concerning prior incidents, petitioner submitted the deposition of a former student who asserted that in the 1984-85 school year, respondent asked her lunch and she indicated that she was concerned that respondent would be looking for a "repayment" for respondent giving her permission slips to cut classes. The same student further testified that on another occasion respondent grabbed her buttocks and told her that she had a great body and looked great in spandex. The school nurse, "Bani" August testified that respondent frequently visited this student while she was working in the nurse's office. On the other hand, respondent denies these assertions and indicated that he seldom visited the student in the nurse's office. Petitioner also submitted the testimony of another teacher Phyllis Madsen who indicated that another former student repeated to her that respondent drove her to a park and lunged at the student in an attempt to kiss her. There is some indication that respondent was privately reprimanded by the school principal concerning these incidents which were reported to the principal. However, the principal, Mr. Packin, testified that he has no recollection of the reporting to him of these incidents, or of any reprimand of respondent.

This testimony was part of the record in this matter and was an effort on the part of petitioner to challenge the credibility of respondent. In one significant detail it accomplishes its purpose. Respondent indicated that he seldom visited the student in the nurse's office, and yet Bani August, the school nurse, testified that his visits to the student were frequent, and that she frequently intervened so as to stop respondent from speaking to the student while she was working in the nurse's office.

However, it is my opinion that this case does not involve an issue of credibility. It involves the issue whether respondent's conduct was inappropriate in dealing with female students and, if so, what is the appropriate action to be taken. Respondent would have the ALJ and Commissioner focus on whether respondent realized his conduct was inappropriate, and whether it will happen again, and in this regard, counsel for respondent has made a valiant effort and has made an outstanding presentation. However, as previously indicated, respondent's own conduct and actions reveal that his intentions were far less innocent and far more sinister than he expressed in his testimony. Anyone examining his letter to C.O. cannot help but conclude that it was an invitation to his young female student to return respondent's expression of thoughts and feelings. It is clearly an inquiry addressed to the student as to whether she has the same feelings as respondent. Likewise, respondent's communications with another young female student, C.F., where he indicates on one occasion that she has the best "buns" in the family, and on another occasion tells her that he expects her to come and visit him the next time she wears a particular tight skirt, is not mere innocent banter. The fact that the second student found these comments to be funny and that they were not meant to be perverted does not make them any less so.

Respondent and his attorney have attempted to direct this inquiry so as to lead to the conclusion that respondent now realizes that this conduct was wrong and inappropriate and that it will not happen again. However, as harsh as the result may be to respondent, that is not the issue in this case. The issue is whether the actions and conduct on the part of the respondent justify his removal from a position of public trust and, if not, what other penalty should be imposed.

In *Golaine v. Cardinale*, 142 N.J. Super. 385 (Law Div. 1976), affirmed 163 N.J. Super 453 (App. Div. 1978), the court discussed when good cause exists for the removal of a public official. In that case, the employee was not a teacher. However, the discussion by the court is

useful in giving some guidance in this matter. The court stated that where the dereliction charged is not of such reprehensible character, the determination whether a specific act or omission constitutes cause for removal requires an evaluation of the conduct in terms of its relationship to the nature of the office itself and, in that context, an appraisal of the actual or potential impairment of the public interest which may be expected to result from the conduct in question. The court made the point that the charged dereliction, to constitute good cause for removal, must be itself an act of misfeasance or nonfeasance and an act which, in view of the duties and obligations of the office, substantially disadvantages the public.

It has been often repeated that teachers are entrusted with the care and custody of school children with the hope that this trust will result in educational growth. Teachers hold positions demanding public trust because they teach, inform and mold habits and attitudes, and influence the opinions of their students. Students learn not only what they are taught by teachers, but what they see, hear, experience and learn about their teacher. This heavy duty requires a degree of self-restraint and controlled behavior which is unlike other types of employment.

In this matter, respondent, by his actions and conduct, has so clearly and unequivocally violated the public trust and has so clearly and unequivocally failed to carry out the duties and responsibilities of a teacher that cause for removal must be found. It does not matter that respondent's judgment was clouded when the conduct occurred, or that he did not realize the inappropriateness of his conduct, although I **FIND** that this was clearly not the case. Neither does it matter that this type of conduct will never occur again because respondent now realizes its inappropriateness. The fact remains that the complained of conduct occurred, and that it is the type of conduct that is so contrary to the nature of the position of teacher and so violative of the public trust that respondent's removal as a teacher is necessary.

This decision is not made lightly. Respondent appeared to be a likable and engaging individual who has family responsibilities. I do believe him when he indicates that this type of conduct will not occur in the future. I believe that he now realizes this type of conduct is inappropriate and I believe that he now recognizes that his own self interests demand no repetition

of these types of incidents. However, his conduct was so violative of his responsibilities as a teacher that his removal is the appropriate action be taken in this matter.

Based upon the foregoing, I **FIND** that respondent engaged in the conduct giving rise to these charges. I **FIND** that the conduct set forth in the tenure charges constitutes conduct unbecoming a teaching staff member. I **FIND** that as a result of respondent being found guilty of these charges that just cause exists for his removal. Accordingly, I **CONCLUDE** that the appropriate penalty to be imposed upon respondent is his removal as a teaching staff member for the school district of the Township of Parsipanny-Troy Hills, Morris County, New Jersey.

DECISION AND ORDER

Based upon the foregoing, it is hereby **ORDERED** that respondent is found guilty of conduct unbecoming a teaching staff member, and that just cause exists for his removal as a teaching staff member. Accordingly, it is further **ORDERED** that respondent is hereby removed as a teaching staff member for the school district of the Township of Parsipanny-Troy Hills, Morris County, New Jersey.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 14, 1995
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Feb. 15, 1995
Hope R. [unclear]
DATE

Receipt Acknowledged:

Hope R. [unclear]
DEPARTMENT OF EDUCATION

FEB 22 1995
DATE

Mailed to Parties:
Jeff S. Marin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

APPENDIX

LIST OF WITNESSES

For petitioner:

Eugene Vasile

Anthony J. Sciaino

Phyllis Madsen

Eugenie F. "Bani" August

Robert A. Perlett

For respondent:

Carl A. Hess, III

Jen Chrobok

Donna Byrne

Bernard Packin

Jane W. Runte'

Donald Slimowitz

LIST OF EXHIBITS

For petitioner:

- P-1 Letter written by respondent to student, C.O.
- P-2 Tenure charges
- P-3 Letter of March 9, 1992, notifying respondent of charges
- P-4 Certification of Board Action, dated March 31, 1992
- P-5 Performance Evaluation Report, dated May 30, 1991
- P-8 Undated handwritten letter from respondent
- P-9 Opening of School Bulletin, September 1990
- P-10 Memorandum from Mr. Sciaino to Mr. Vasile dated March 28, 1991 (first page only)
- P-11 Deposition of Dana Perkins, dated January 28, 1993

- R-1 Deposition of C.F., dated November 2, 1992
- R-2 Deposition of C.O., dated October 14, 1992
- R-3 Prescription Label for Codeine with Tylenol
- R-4 Respondent's complete personnel file
- R-5 Memo from R. Magi to Guidance Staff, dated February 25, 1992
- R-6 Letter from Elaine and Bill Czarnecki
- R-7 Observation Report of January 16, 1992
- R-8 Observation Report of March 5, 1991
- R-9 Observation Report of December 16, 1990
- R-10 Observation Report of December 7, 1990
- R-11 Performance Improvement/Development Plan, dated October 10, 1990
- R-12 Observation Report dated April 26, 1990
- R-13 Observation Report, dated January 31, 1990
- R-14 Observation Report, dated April 13, 1989
- R-14 Respondent's letter to Rita Magi, dated March 20, 1989
- R-16 Performance Improvement/Development Plan, dated March 6, 1989
- R-17 Observation Report, dated January 12, 1989

- R-18 Observation Report., dated January 10, 1989
- R-19 Performance Improvement/Development Plan, dated September 30, 1987
- R-20 Observation Report, dated September 29, 1987
- R-21 Observation Report, dated November 1, 1984
- R-22 Observation - Evaluation Report, dated November 13, 1978
- R-23 Observation-Evaluation Report, dated February 1, 1977
- R-24 Observation-Evaluation Report, dated May 1975
- R-25 Observation-Evaluation Report, dated June 18, 1974
- R-26 Observation-Evaluation Report, dated May 1974
- R-27 Psychiatric Consultation Report of Dr. Jan Chrobok, D.O., dated September 8, 1992
- R-28 Report of Donna M. Byrne, ACSW, Senior Clinician, dated September 21, 1992
- R-29 Board of Education Policy Statement regarding unbecoming conduct
- R-30 Board of Education Policy Statement concerning child abuse and neglect

IN THE MATTER OF THE TENURE :
HEARING OF CARL A. HESS, III, :
SCHOOL DISTRICT OF THE TOWNSHIP COMMISSIONER OF EDUCATION
OF PARSIPPANY-TROY HILLS, MORRIS : DECISION
COUNTY. :
_____ :

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and the Board's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Respondent's exceptions urge that the penalty recommendation of the Administrative Law Judge (ALJ) is excessively harsh in light of the circumstances of this matter. He continues to assert that he harbored no lascivious intent when he engaged in the behavior at issue herein and only came to realize the inappropriateness of his actions during the course of therapy. He contends that although he exhibited poor judgment in the past, with the recognition he gained in therapy, he poses no threat to the students of the district, and even the ALJ agrees that he will not engage in the inappropriate conduct he is charged with again. He further argues that the recommended penalty fails to consider his 28-year unblemished teaching record prior to the initiation of the within charges. Finally, respondent asserts that "[w]hile his

transgression was serious, it was not lecherous, vicious, cruel nor insubordinate. In the instant case a penalty less than dismissal should be imposed." (Respondent's Exceptions, at p. 5)

In response, the Board argues that the penalty recommended by the ALJ in this matter is entirely appropriate. It asserts that the ALJ considered the "extenuating circumstances" which petitioner asserts exist in this matter and determined that they were nothing more than "unconvincing excuses and rationalizations for totally unacceptable behavior." (Board's Reply Exceptions, at pp. 2-3)

Upon a careful and independent review of the record in this matter, which includes transcripts of the four days of hearings before the ALJ, the Commissioner determines to affirm the decision of the ALJ for the reasons fully and clearly articulated therein. The Commissioner finds respondent's exception arguments urging mitigation of the ALJ's recommended penalty totally without merit. As aptly stated by the ALJ

In this matter, respondent, by his actions and conduct, has so clearly and unequivocally violated the public trust and has so clearly and unequivocally failed to carry out the duties and responsibilities of a teacher that cause for removal must be found. It does not matter that respondent's judgment was clouded when the conduct occurred, or that he did not realize the inappropriateness of his conduct***. Neither does it matter that this type of conduct will never occur again because respondent now realizes its inappropriateness. The fact remains that the complained of conduct occurred, and that it is the type of conduct that is so contrary to the nature of the position of teacher and so violative of the public trust that respondent's removal as a teacher is necessary. (Initial Decision, at p. 31)

Accordingly, the initial decision of the OAL is affirmed for the reasons expressed therein. Respondent is hereby terminated from his tenured position in the School District of the Township of

Parsipanny-Troy Hills as of the date of this decision. This matter shall be transmitted to the State Board of Examiners pursuant to the requirements of N.J.A.C. 6:11-3.6 for action against respondent's certificate as it deems appropriate.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

MARCH 27, 1995
DATE OF MAILING MARCH 27, 1995

LOUIS G. MANGIERI,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE	:	
BOROUGH OF CARTERET, AND MARK	:	
RESNICK, BOARD SECRETARY,	:	
MIDDLESEX COUNTY,	:	
	:	
RESPONDENTS.	:	
<hr/>		

SYNOPSIS

Petitioning candidate appealed manner in which Board designated positions of eight candidates remaining after withdrawal of candidate who had drawn first ballot position. Petitioner contended that candidates were entitled to retain position numbers originally drawn, that is, position numbers (2) through (9), notwithstanding that such positions were advanced by one place each on the actual ballot.

Commissioner found no basis in law for petitioner's claim and held that Board acted in accordance with the dictates of N.J.S.A. 18A:14-12.1 when it advanced the remaining eight candidates into the ballot positions designated as (1) through (8).

LOUIS G. MANGIERI, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
: DECISION
BOARD OF EDUCATION OF THE :
BOROUGH OF CARTERET, AND MARK :
RESNICK, BOARD SECRETARY, :
MIDDLESEX COUNTY, :
RESPONDENTS. :
_____ :

For Petitioner, Louis G. Mangieri, Pro Se

For Respondent, Viola S. Lordi, Esq. (Wilentz, Goldman
and Spitzer, P.C.)

This matter was opened before the Commissioner of Education on March 14, 1995, through the filing of a Petition of Appeal with Motion for Emergent Relief. Therein, petitioner alleged that respondents ("the Board") erred in the manner in which it handled the names of the remaining eight candidates upon withdrawal of the ninth candidate from the balloting for the annual school election to be held on April 18, 1995.

Responses were filed by the Board, and by the Deputy Attorney General on behalf of the Middlesex County Superintendent of Schools, who was named as a respondent in petitioner's filing.*

Initially, the Commissioner finds that the County Superintendent is not a proper party herein, as she did not take the action complained of, nor would she have had the authority to do so, notwithstanding that the Board may have conferred with her staff prior to making its own determination; neither would she

*Geraldine Callahan, DAG (Deborah T. Poritz, Attorney General) filed on behalf of the County Superintendent.

have any role in the relief sought, should petitioner prevail in his claim. Therefore, the County Superintendent is severed from this appeal.

The operative facts in this matter are not in dispute and are as follows: Ballot positions were drawn pursuant to N.J.S.A. 18A:14-13 on February 23, 1995, for the nine candidates who filed valid nominating petitions for membership on the Board; these positions were designated as positions (1A) through (9A), consistent with the manner in which position slots are labeled on the ballot, and one candidate was assigned to each position in turn. On February 27, 1995, the candidate who had drawn the first position withdrew his name from consideration pursuant to N.J.S.A. 18A:14-12.1. The Board secretary thereupon advanced each of the eight remaining candidates by one ballot position, so that these candidates now held the positions designated as (1A) through (8A).

Petitioner contends that N.J.S.A. 18A:14-12.1 "does not state that the candidates' numbers on the ballot change, they just move up in position retaining the same numbers." Petitioner further argues that, when a similar situation arose in the district fifteen years ago, the candidates' numbers remained unchanged.

The Board argues that it fully followed the directive of statute; that is, upon withdrawal of the candidate in first position, the Board advanced each of the remaining candidates into the position preceding the position he or she had previously drawn. Moreover, it acted in the manner that made the most

practical sense and would cause the least confusion for voters, as they would now be presented with a clear, coherent ballot listing eight candidates in eight sequential slots numbered from 1 to 8.

Upon review, the Commissioner finds that the Board has acted properly in this matter and that its actions do not constitute a violation of N.J.S.A. 18A:14-12.1 as claimed by petitioner.

The statute reads in pertinent part:

18A:14-12.1. Withdrawal of candidates. Any candidate may withdraw his name as a candidate for election at the annual school election***. The name of such candidate shall not be printed on the ballot. ***The names of any candidates originally designated on the ballot below the name of the withdrawn candidate shall be advanced one place each, respectively, on the ballot. (Emphasis supplied)

In the present instance, the Board's ballot consisted of nine numbered positions, and upon withdrawal of the candidate whose name was drawn for the first position, the remaining eight names were advanced one place each, causing the ninth position to be removed and the remaining names to shift into positions (1A) through (8A). This orderly progression is precisely the result intended by statute. Retaining the fixed numbering of the slots while advancing the names of candidates can in no way be found to be violative of the law; to the contrary, there is no basis whatsoever in the law for the result demanded by petitioner, that there now be eight slots bearing the designations (2A) through (9A) because candidates remain entitled to their originally drawn position numbers regardless of subsequent withdrawals and changes

in position. Such a result would, at the very least, be confusing to voters, particularly where breaks in the numbering sequence occur due to the withdrawal of candidates holding positions in the middle of, or scattered throughout the range of, the ballot to be presented to the public.

Accordingly, for the reasons expressed above, the Petition of Appeal and Motion for Emergent Relief are dismissed. The Commissioner notes petitioner's claim regarding the Board's handling of a similar situation in a prior election and finds that, even accepting petitioner's contention as true, arguendo, the result herein remains unaltered.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MARCH 28, 1995

DATE OF MAILING MARCH 28, 1995

DHP #119-95
SB #104-95

IN THE MATTER OF THE DISQUALIFI- : STATE BOARD OF EDUCATION
CATION FROM SCHOOL EMPLOYMENT : DECISION
OF LAMAR A. BOSTON. :

Decided by the Deputy Commissioner of Education, October 13, 1995

For the Petitioner-Appellant, Lamar A. Boston, pro se

For the Respondent-Respondent, Michelle Miller, Deputy Attorney General
(Deborah T. Poritz, Attorney General of New Jersey)

The decision of the Deputy Commissioner of Education disqualifying petitioner from school employment following a criminal history review conducted pursuant to N.J.S.A. 18A:6-7.1 is affirmed for the reasons expressed therein. We note that while the record before us does not include the results of a criminal record check conducted by the Federal Bureau of Investigation, see N.J.S.A. 18A:6-7.1, the criminal history review in the record, conducted by the State Bureau of Investigation, reveals a disqualifying offense under the statute, and we agree with the Deputy Commissioner that petitioner has failed to demonstrate his rehabilitation by clear and convincing evidence.

Wendel E. Daniels opposed.

May 1, 1996

MAY 03 1996

Date of mailing _____

(SB) 106-95

DHP #118-95
SB #106-95

IN THE MATTER OF THE DISQUALIFI- :
CATION FROM SCHOOL EMPLOYMENT :
OF ROLINDA DANIELS. :

STATE BOARD OF EDUCATION
DECISION

Decided by the Deputy Commissioner of Education, October 13, 1995

For the Petitioner-Appellant, Rolinda Daniels, pro se

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

March 6, 1996

Date of mailing MAR 08 1996

FRANK MONTAGNA, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN- : DECISION

SHIP OF BELLEVILLE, ESSEX COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioning citizen disputed the Board's determination to pay Board president's legal costs in a civil suit brought against him by petitioner. Moreover, petitioner contended Board violated the Open Public Meetings Act (OPMA) when it voted to defray such legal expenses in a private rather than a public session.

ALJ concluded that the Board was statutorily authorized to defray the Board president's legal expenses since petitioner's defamation and libel lawsuit against him was based on a comment made by him while acting within the scope of his duties as Board president. Likewise the ALJ concluded that the Board could also underwrite the legal costs associated with the crossclaim and counterclaim. ALJ further concluded that because this matter concerned litigation, the Board was not required to discuss the matter in an open public meeting. ALJ did, however, determine that there was a conflict of interest pursuant to the Rules of Professional Conduct when the opinion authorizing the payment of legal fees was drafted by the district's attorney, whose law firm would defend the Board president in the lawsuit. (RPC 1.7(b)) ALJ denied the Board's motion for summary judgment as to the charge of conflict of interest but granted the motion on all other counts. *OK*

Commissioner adopted findings and determination in the initial decision as his own with modification. Petitioner's charge of conflict of interest pursuant to the Rules of Professional Conduct was dismissed for lack of Commissioner jurisdiction. Summary decision was granted to the Board on each of the other charges and the petition was dismissed.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY JUDGMENT

OAL DKT. NO. EDU 7007-94

AGENCY DKT. NO. 163-5/94

FRANK MONTAGNA,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP

OF BELLEVILLE,

Respondent.

Frank Montagna, pro se

Frank Pomaco, Esq., for respondent (Gaccione, Pomaco & Beck, attorneys)

Record Closed: December 15, 1994

Decided: February 14, 1995

BEFORE IRENE JONES, ALJ:

Petitioner Frank Montagna, a resident of the Township of Belleville (Belleville or Township), contests the decision of the Belleville Board of Education (district or BOE) to retain legal counsel to defend its board president in an action commenced in the Superior Court.

Pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13, the Department of Education (DOE) transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case on July 21, 1994. On August 5, 1994, the DOE transmitted an amendment to the petition. On September 14 and November 14, 1994, petitioner filed second and third amendments to the petition.

A prehearing conference was held on September 14, 1994. Respondent filed a motion for summary judgment on November 17, 1994, and on December 8, 1994, petitioner filed a letter in opposition to the motion.

On December 15, 1994, the undersigned by telephone conference with the parties granted respondent's motion for summary judgment. The instant decision is a written memorialization of the findings articulated in the oral decision.

UNDISPUTED FACTS

On September 30, 1993, Suburban Cablevision aired a panel discussion on its cablevision program "Local Issues Live."¹ The topic presented was the cutback of courtesy busing in the district. The guest panelists were Reverend Lucius Williams, on behalf of the Valley section of Belleville, and Mr. Gabriel Nazziola, the president of the Belleville BOE.² At the outset of the panel discussion the host, Mr. Todd Goodman, advised the viewing public that the discussion would be limited to the issue of the district's cutback of courtesy busing. No other topic would be discussed.

Goodman invited the viewing public to participate in the discussion by phoning in their questions or comments. He reiterated that the topic would be limited to the issue of the cutback of courtesy busing.

¹ "Local Issues Live" is a weekly cablevision show featuring community representatives discussing local political issues.

² Mayor Marina Perna was also scheduled as a guest panelist, but due to other commitments she was not present. She did, however, phone in her comments during the program.

After numerous calls from viewers, petitioner called in and directed his comments to Nazziola. He identified himself as "Frank, vice president," and stated that he had attended the BOE meetings for some twenty years and that Nazziola knew him. Petitioner then charged Nazziola with certain ethical violations regarding his participation in the BOE's negotiations of the teachers' contract. Nazziola has two children who teach in the school district. Thus, petitioner asserted that it was unethical for him to participate in the contract negotiations where salary raises and other benefits were discussed. Petitioner then implied that there was an ethics committee investigation pending.³

In responding to the call, Nazziola identified the petitioner by his surname, "Montagna." Nazziola then stated, "[petitioner is] a sick man, a political antagonist, and lacking in any credibility with me." Exhibit J -1.

On March 22, 1994, petitioner filed a defamation and libel action in the Essex County Superior Court, Law Division, against Nazziola, Suburban Cablevision and Todd Goodman. On or about April 4, 1994, the BOE met in closed session and on the advise of the board attorney, Mr. Frank Pomaco, voted to pay Nazziola's legal expenses. Further, the vote authorized the law firm of Gaccione, Pomaco & Beck to represent Nazziola in the Superior Court action.

ISSUES

The petition raises several issues.⁴

The first issue is whether *N.J.S.A.* 18A:12-20 permits the payment of legal fees to defend a BOE member where the district is not a named party and the cause of

³ Petitioner's comments were cut short by the host, so a full sentence is not expressed in Exhibit J-1.

⁴ Respondent's answer to the petition alleged that the petition was out of time because the event complained of took place in July 1993. However, this issue is not raised in the summary judgment motion and thus is deemed abandoned. In any event, the petition is timely since the cause of action arose not on the date of the incident but on the date that the district voted to defray the board president's legal expenses, April 4, 1994. Petitioner filed the petition with the DOE in May 1994, well within the 90 days allowed by *N.J.A.C.* 6:24-1.2.

action is slander and libel. A collateral issue is whether the BOE can file a crossclaim and counterclaim where it is not a named party to the action.

The second issue is whether *N.J.S.A. 10:4-12* exempts from the Open Public Meetings Act a board meeting to discuss payment of Nazziola's legal fees.

The third issue is whether there exists a conflict of interest where the opinion authorizing payment of legal fees was drafted by the BOE attorney, whose law firm will defend the suit in the Superior Court action.

The amendments to the petition also raise several procedural and substantive issues. There is the primary question of whether the amendments are justiciable in this forum. Further, there is the question of whether the amendments are within the scope of the BOE's vote that caused the petitioner to bring the instant action.

The final issue is whether this matter is appropriate for summary judgment.

FINDINGS, DISCUSSION AND CONCLUSIONS

It is first necessary to define the scope of this proceeding and this tribunal's jurisdiction. Respondent contends that the petitioner's amendments to the petition are not reviewable because they were filed after it served the responsive pleadings. Petitioner sought neither the leave of the administrative law judge (ALJ) nor the consent of his adversary. *R. 4:9-1*. Further, the amendments refer to incidents that were not a part of the BOE's April 4, 1994 vote.

This proceeding is limited to the petition and the amendment transmitted by the Department of Education. Any amendment subsequent to transmittal is governed by the Uniform Administrative Procedure Rules (UAPR), which set forth the procedural conduct of contested cases before the OAL. See *N.J.A.C. 1:1-1.1 to -21.6*. Thus it is

the UAPR, not the New Jersey Court Rules, that will determine whether petitioner's amendments are cognizable.

N.J.A.C. 1:1-6.2 provides that unless an amendment is precluded by law or constitutional principle, pleadings may be freely amended when, in the discretion of the ALJ, an amendment would be in the interest of efficiency and expediency and would not create undue prejudice. This regulation, unlike *R.* 4:9-1, allows a party to freely amend pleadings subject to the limitations contained in the regulation. Inherent in an ALJ's determination to grant amended pleadings is whether the opposing party would be denied due process. Further, the amendment must be within the scope of the petition. Conversely, if the amendment sets forth a new set of facts, it should be denied. A brief review of counts six, seven and eight of the petition is necessary to determine whether petitioner's amendments are reviewable herein.

The first amendment, count six, alleges that in July 1993 Nazziola hurled vicious, scurrilous remarks at petitioner during a trial before the Honorable Leo Yanoff, J.S.C. The second amendment, count seven, alleges that beginning in June 1994 and continuing to the date of the instant filing, Nazziola continued to spread untruths about petitioner throughout the township. The third amendment, count eight, alleges that Nazziola made libelous remarks about petitioner in an article published in the *Star Ledger*. Further, in a Superior Court action in July 1993, Nazziola insinuated that petitioner was a criminal.

Petitioner's Superior Court complaint is attached to the OAL petition.⁵ In the Superior Court complaint, petitioner alleges that Nazziola slandered and libeled him during the cablevision program. Petitioner also alleges that on September 23, 1993, Nazziola made false and malicious statements about him to Reverend Williams. Further, that on September 28, 1993, Nazziola's false and malicious statements caused Todd Goodman to rescind his invitation to the petitioner to appear as a guest panelist

⁵The last three counts of the complaint alleges action against Goodman and Suburban Cablevision and thus not pertinent to this decision

on Local Issues Live. It is these alleged actions that caused the BOE to hire counsel to defend Nazziola in the Superior Court and to defray the legal expenses associated with the defense

Petitioner's action herein seeks to enjoin the Board's the April 4, 1994 that defrayed legal expenses arising out of the Superior Court action slander suit. Thus, since the BOE's vote was based on the Superior Court complaint, matters not pleaded in the Superior Court complaint are not a part of this proceeding. Applying *N.J.A.C. 1:1-6.2* and giving due consideration that petitioner is a *pro se* litigant, I **FIND** that the amendments are not cognizable in this proceeding since there was no board action regarding the matters pleaded in the amendments. The amendments further alleges new facts and personal conduct which the Board did not consider in its deliberations and may never consider given their personal nature. Respondent is correct that the amendments relate to incidents that are outside the district's vote that authorized the defrayal of Nazziola's legal expenses. Thus, this tribunal cannot give relief where there is no justiciable controversy.

The jurisdiction of this tribunal is limited to a determination of whether the district could authorize payment of Nazziola's legal fees for an action arising out his appearance on the cablevision program. Thus, this proceeding does not and cannot involve a determination of whether Nazziola slandered petitioner in any of the incidents alleged in the petition and the amendments thereto since there is no subject matter jurisdiction in this tribunal to hear slander and libel actions. Jurisdiction on issues of slander and libel lies exclusively with the Superior Court, where a complaint is now pending.

Assuming *arguendo* that petitioner sought leave to amend the Superior Court complaint to include the facts alleged in the amendments, it would not provide for efficiency and expediency. Count six and part of count eight allege conduct that took place in a judicial proceeding. It is well established that words uttered by witnesses,

attorneys, judges and parties to a judicial or quasi-judicial proceeding are absolutely privileged, even where the statements are made with bad motive or knowledge of falsity. Absolute immunity is designed to encourage those persons involved in a judicial or quasi-judicial proceeding to express themselves freely without fear of retribution. *Binkewitz v. Allstate Ins. Co.*, 222 N.J. Super. 501, 508 (App. Div. 1988). Thus, if petitioner were to amend the Superior Court complaint, respondent would be entitled to summary judgment at the OAL. Thus, any consideration of the amendments herein does not provide for efficiency and expediency. *N.J.A.C. 1:1-6.2*.

The next issue for determination is whether the district could authorize the use of public funds to pay the legal fees of the board president since the district is not a named party in the Superior Court action. Related thereto is whether the district had the authority to pay the legal fees associated with the filing of a counterclaim and crossclaim.

The resolution of this dispute first requires a review of *N.J.S.A. 18A:12-20*, which provides as follows:

Whenever a civil or a criminal action has been or shall be brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education, and in the case of a criminal action such action results in final disposition in favor of such person, the board of education shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom. Any board of education may arrange for and maintain appropriate insurance to cover all such damages, losses and expenses.

Thus the statute confers on the district the authority to pay the legal expenses of any board member involved in a civil or criminal proceeding so long as the proceeding arises out of an act or failure to act in the course of the performance of the board member's professional duties. In a criminal proceeding, the board member must be

exonerated before legal expenses can be paid by the district; in a civil proceeding the statute does not require a vindication.

Courts have generally considered several factors in determining whether the act complained of arose out of and during the course of the performance of an individual's duties as a member of a BOE. One factor is whether the board expressly granted the authority to the member to act. A second factor is whether a majority of the board "informally authorized" the act. A third factor is whether or not the act arose out of and in the course of the performance of the member's duties. *Errington v. Mansfield Township Bd. of Educ.*, 81 N.J. Super. 414 (App. Div. 1963), *certif. granted*, 41 N.J. 519 (1964), *rev'd and remanded for proceedings consistent with opinion*, 42 N.J. 320 (1964), *modified*, 100 N.J. Super. 130, 134, 135-36 (App. Div. 1968).

In this case Nazziola appeared and was introduced on the show as the board president. The sole purpose of the panel was to discuss the district's cutback of courtesy busing. This duty could be carried out by any board member and no express or informal authorization by the board was required. Indeed, there is no obligation or requirement that ministerial functions be preapproved by the BOE. An inherent responsibility of a BOE member is to attend local community events and community forums to discuss board policies and educational issues.

Moreover, while certain duties of the BOE are conferred by statute, the Legislature impliedly conferred local boards with the authority to govern their affairs as required. This implied and apparent authority allows a board member to engage in activities that disseminate information to the public explaining the board's policies and actions. *Cobb v. City of Cape May*, 113 N.J. Super. 598 (Law Div. 1971). Thus I **FIND** that Nazziola's appearance on "Local Issues Live" to discuss the Board's cutback of courtesy busing was within the scope of his duties as a member of the BOE.

The next issue requires a determination of whether Nazziola's alleged defamatory statement was made in the scope of Nazziola's duties as president of the

BOE. Put differently, did Nazziola cross the line separating acting as a BOE member and acting in a personal manner? Thus, the issue here is not whether Nazziola slandered petitioner, but whether the alleged defamatory statement was made while performing his duties as a member of the BOE.

The general rule is that "to warrant defense at the public expense, when a public official is sued individually for libel, it must be shown that he was performing in good faith a duty of his office or position in furtherance of the work of the board for which he was purportedly acting." *Errington, supra*, 81 N.J. Super. at 420. However, when a board member is acting pursuant to his duties, it is possible that his actions might be deemed personal if he oversteps the boundaries and acts only in a personal capacity. In such a situation, the district would have no authority to defray that board member's legal expenses. *Id.* at 418-21. In *Cobb*, the court held there should be no fine line drawn to distinguish when a public official, acting within the apparent sphere of his duties, is entitled to protection from lawsuits. 113 N.J. Super. at 602.

Based on the facts herein and a review of the videotape (Exhibit J-1), I **FIND** that Nazziola appeared on the program solely to discuss the district's busing program. This finding is supported by his introduction as the BOE president and the topic of discussion. Moreover, were it not for Nazziola's membership on the Board he would not have been an invited guest panelist. The guest panel was restricted to community representatives such as the mayor, Reverend Williams, and Nazziola on behalf of the BOE. Thus, but for his position on the Board, Nazziola and petitioner would not have engaged in the verbal exchange which is the subject of the civil action. Nazziola had no personal agenda, nor any personal gain to be obtained from his appearance on the show. *Cobb, supra*, 113 N.J. Super. 598; *Matawan Reg. Teachers Ass'n v. Board of Educ. of Matawan-Aberdeen Reg. Sch. Dist.*, OAL Dkt. No. EDU 5163-87 (June 16, 1988), *aff'd*, Comm'r of Educ. (July 28, 1988).

I **CONCLUDE** that Nazziola's appearance on the cable television program was in good faith and in furtherance of promoting and discussing board policy on the busing

issue. The videotape of the program reveals that during his dialogue with petitioner, Nazziola was acting in his capacity as board president. The statement petitioner alleges is defamatory was made in direct response to petitioner's allegations against and attacks on the school board. Further, at least a portion of the utterance ("political antagonist, and lacking in any credibility") was directed at petitioner's past and present disagreements with BOE policies and practices.⁶ Unlike the facts in *Errington*, at no time did Nazziola attempt to defend his personal reputation or act in a purely personal manner. I **CONCLUDE** that petitioner's "defamation and libel lawsuit" against Nazziola is based on a comment made by Nazziola while acting within the scope of his duties as board president. Therefore, I **CONCLUDE** that the school board is entitled to defray Nazziola's legal expenses in defending against this suit. The second issue presented is whether the BOE is entitled to pay the expenses associated with Nazziola's crossclaim and counterclaim in the Superior Court action. The provisions of *N.J.S.A. 18A:12-20* and *N.J.S.A. 18A:16-6* reveal an express legislative intent that BOE members are to be indemnified against any civil action brought against them in connection with the performance of their duties. The statute confers upon the BOE the express authority to defray legal expenses when appropriate on behalf of the BOE. Petitioner's contention that the statute does not allow the BOE to use public funds to countersue is without merit. This argument, if accepted, could substantially impede an attorney's ability to mount an effective defense for his client, thus stripping the statute of its intent to fully make whole, indemnify and hold harmless a BOE member involved in civil litigation simply because of his position.

N.J.S.A. 18A:11-1 gives the local board the general authority to perform all acts and do all things necessary for the lawful and proper conduct of the public schools. When read together, *N.J.S.A. 18A:12-20*, *N.J.S.A. 18A:16-6* and *N.J.S.A. 18A:11-1* express a clear legislative intent to allow the BOE to take all necessary and lawful measures to defend a lawsuit against an individual for acts arising out of and during the

⁶ Again it must be emphasized that no finding is made or intended on the question of whether the utterance defamed the petitioner. However, a discussion of the utterance is necessary to determine whether Nazziola crossed the line between acting in his professional capacity as the board president and acting in a personal manner. See *Errington, supra*, 81 *N.J. Super.* at 418.

course of the performance of the individual's duties as a member of the BOE. Absent a clear legislative prohibition, statutes will be accorded their literal and express legislative meaning. The Commissioner addressed this issue in *Matawan* and sustained the BOE's action of underwriting the legal expenses of a BOE member who brought suit against the teachers' association. Consequently, I **CONCLUDE** that if the BOE can underwrite the costs associated with the initiation of litigation, it is empowered to underwrite the legal costs associated with the crossclaim and counterclaim herein.

Petitioner claims that the Board violated the Open Public Meetings Act, *N.J.S.A.* 10:4-6 to -21, when it "authorized" in closed session the defrayal of Nazziola's legal expenses. Specifically, petitioner alleges that the BOE did not place a resolution on the public agenda. Respondent argues that the exceptions provided in *N.J.S.A.* 10:4-12(b) apply. *N.J.S.A.* 10:4-12(b), in pertinent part, states:

b. A public body may exclude the public only from that portion of a meeting at which the public body discusses:

.....

(7) Any pending or anticipated litigation or contract negotiation other than in subsection b. (4) herein in which the public body is, or may become a party.

Thus, while the Legislature expressly provided that public bodies shall open the meetings to the public (*N.J.S.A.* 10:4-12[a]), it also recognized that there exist certain sensitive matters which are privileged in nature (attorney-client privilege) and therefore are not proper for public disclosure. The exception, therefore, preserves the attorney-client privilege by recognizing that the discussion could involve litigation strategy which is confidential and thus not proper for public disclosure. However, the statutory exceptions should be strictly construed so as not to defeat the legislative intent. *Rice v. Union County Reg. High Sch. Bd. of Educ.*, 155 *N.J. Super.* 64, 70 (App. Div. 1977); *Houman v. Pompton Lakes*, 155 *N.J. Super.* 129, 145 (Law Div. 1977); *Caldwell v. Lambrou*, 161 *N.J. Super.* 284, 288-89 (Law Div. 1978).

Here, the subject matter of the civil libel action involves a board member who was acting in an official capacity as a representative of the Board. It is immaterial that the BOE is not a named party to the suit because the litigation involves the BOE president. See *Matawan, supra*, OAL Dkt. No. EDU 5163-87; *Cobb, supra*, 113 N.J. Super. 598. I **CONCLUDE** that the cited exception to the Open Public Meetings Act, N.J.S.A. 10:4-12(b)(7), governs in this matter. Thus, the district was not required by law to discuss this matter in an open public meeting.

Petitioner contends that there is a conflict of interest when the opinion authorizing payment of legal fees was drafted by the district's attorney, whose law firm will defend the board president in the lawsuit.

The *Rules of Professional Conduct* provide:

A lawyer shall not represent a client if the representation may be materially limited by responsibilities to another client or to a third person or by the lawyer's own interests.

[RPC 1.7(b)]

Further, RPC 1.7(c)(2) prohibits representation when there is but an appearance of impropriety rather than actual conflict. The New Jersey Supreme Court has held that when representation of public bodies is involved, the appearance of impropriety in representing multiple clients assumes an added dimension; positions of public trust call for even more circumspect conduct. *In re Opinion No. 415, New Jersey Supreme Court Advisory Comm. on Professional Ethics*, 81 N.J. 318, 324 (1979). The district is a public entity. Therefore, the attorneys herein must conform to a higher standard of conduct.

I **FIND** that Mr. Pomaco, or an attorney in his firm, drafted the opinion advising the district that it could defray the legal expenses of the board president. Thereafter, the district engaged Pomaco and his firm for the Superior Court action. Consequently,

Pomaco's opinion in effect authorized payments to his firm. Thus, I **FIND** and **CONCLUDE** that a conflict of interest exists which is prohibited by *RPC* 1.7(b).

I further **FIND** that under *RPC* 1.7(c)(2), there is an appearance of impropriety. An appearance of impropriety exists when the situation "would create an appearance of impropriety in the mind of a reasonable and informed citizen." *In re Opinion No. 653 of Advisory Comm. on Professional Ethics*, 132 N.J. 124, 133 (1993). Pomaco's dual representation creates an appearance of impropriety, since it appears that he is authorizing payments of public funds to himself.

In summary, I **CONCLUDE** that the BOE is statutorily authorized to defray Nazziola's legal expenses since the petitioner's defamation and libel lawsuit against Nazziola is based on a comment made by him while acting within the scope of his duties as BOE president. Likewise, the BOE is empowered to pay the legal expenses associated with the filing of the crossclaim and counterclaim. I further conclude that the BOE did not violate the Open Public Meetings Act when it voted in private session to defray Nazziola's legal expenses.

It is further concluded that the representation of Nazziola in the Superior Court action by the firm of Gaccione, Pomaco & Beck is a conflict of interest under *RPC* 1.7(b) and *RPC* 1.7(c)2.

Pursuant to *N.J.A.C.* 1:1-12.5(b) summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. I **FIND** and **CONCLUDE** that no genuine issue as to any material fact exists herein. Rather the issues presented herein are purely issues of law and thus summary judgment is appropriate. I, therefore, **grant** respondent's motion for summary judgment on Counts one, two, three, and five of the petition. I hereby **deny** summary judgment on Count four of the petition for the reasons expressed in this decision.


I hereby **dismiss** the first, second and third amendments since the acts complained of therein were not pleaded in the Superior Court action and thus were not a part of the BOE's April 4, 1994 vote.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.


This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must BOE sent to the judge and to the other parties.

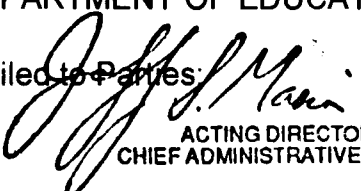
2/14/95
DATE


IRENE JONES, ALJ

2/16/95
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

FEB 16 1995
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

IJ/cb

FRANK MONTAGNA, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN- : DECISION
SHIP OF BELLEVILLE, ESSEX COUNTY, :
RESPONDENT. :
:

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions submitted by petitioner and the Board were untimely pursuant to N.J.A.C. 1:1-18.4, having been filed on March 3, 1995 and March 9, 1995, respectively, in response to an initial decision mailed to the parties on February 16, 1995, and are, therefore, not herein considered.¹

Upon a careful and independent review of the record, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ), for the reasons articulated by her in the initial decision, with respect to the procedural issues raised herein; the Board's authority to defray its president's legal expenses; its empowerment to pay the legal expenses associated with

¹ Subsequent to the issuance of her initial decision, the ALJ in this matter advised that paragraph 4 on page 13 of this decision should be corrected to read "I, therefore **grant** respondent's motion for summary judgment on Counts one, two, four, and five of the petition. I hereby **deny** summary judgment on Count three of the petition for the reasons expressed in this decision."

expenses associated with the filing of a crossclaim and counterclaim; and that the Board did not violate the Open Public Meetings Act when it voted to defray such legal expenses in private rather than public session. The Commissioner does not, however, comment or rule with respect to the ALJ's discussion regarding a challenge to the propriety of legal representation of the Board in another forum under the Rules of Professional Conduct. This issue is not appropriately before the Commissioner as it is outside of his jurisdictional purview and does not affect the adjudication of the educational issues before him.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter as modified above. Petitioner's charge with respect to a conflict of interest violating the Rules of Professional Conduct is dismissed for lack of jurisdiction. Summary decision is hereby granted to the Board on each of the other charges and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MARCH 29, 1995

DATE OF MAILING MARCH 29, 1995

106-95

KAREN WHITING,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE BOROUGH	:	DECISION
OF CLAYTON, GLOUCESTER COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

March 29, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8101-93

AGENCY DKT. NO. 279-7/93

KAREN WHITING,

Petitioner,

v.

BORAD OF EDUCATION OF THE

BOROUGH OF CLAYTON,

GLOUCESTER COUNTY,

Respondent.

Barry Chatzinoff, Esq., for petitioner (Weinberg, McCormick & Chatzinoff, attorneys)

Alan R. Schmoll, Esq., for respondent (Capehart & Scatchard, attorneys)

Record Closed: February 15, 1995

Decided: February 21, 1995

BEFORE ROBERT S. MILLER, ALJ:

This matter was transmitted to the Office of Administrative Law on August 26, 1993 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a settlement agreement and release indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

February 21, 1995
DATE

RM Miller
ROBERT S. MILLER, ALJ

Receipt Acknowledged:

Feb. 23, 1995
DATE

Hope R Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 28 1995
DATE

Jeff S. Main
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

tmp

SETTLEMENT AGREEMENT

AND

RELEASE

RECEIVED
ST. JOHNS COUNTY
FEB 10 10 11 AM '95

THIS AGREEMENT is by and between KAREN WHITING and CLAYTON BOARD OF EDUCATION as follows:

1. There is pending before the New Jersey Office of Administrative Law a petition entitled Karen Whiting v. Clayton Board of Education bearing Docket Number EDU-08101-93S, wherein the petitioner seeks various remedies, including a finding of a violation of tenure rights and reinstatement to a full time secretarial or clerical position.
2. The Clayton Board of Education has answered the petition and denied any legal obligation to Karen Whiting in any respect whatsoever.
3. The parties hereto have now agreed to amicably resolve their differences on the following terms and conditions:
 - a. The Clayton Board of Education will pay to Karen Whiting the sum of \$11,500 in full and complete settlement of the above litigation, including attorneys fees and costs. No portion of said payment is for back wages or benefits.
 - (1) The \$11,500 shall be paid on or before January 31, 1995;
 - b. The parties agree that none of the terms and conditions of this settlement shall be disclosed to any person or source except as such disclosure is required by law or compelled by legal process;
4. Karen Whiting hereby releases and forever discharges, on behalf of herself, her executors, heirs and assigns, the Clayton Board of Education and its members, agents, servants and employees from all claims of whatsoever kind, including all claims arising out of the allegations set forth in the petition described in paragraph 1 above.
5. Karen Whiting, upon receipt of the aforesaid sum of \$11,500., shall forthwith dismiss the petition with prejudice.

IN WITNESSETH WHEREOF, the parties have set their hands and seals on this 24th day of January, 1995.

Attest:

Clayton Board of Education

Helene B. Vail
Board Secretary

BY: Stephen L. Denton
President

John W. Whiting, Jr.
Witness

Karen Whiting
Karen Whiting

c:\letters>mms>745.de

KAREN WHITING, :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE BOROUGH : DECISION
 OF CLAYTON, GLOUCESTER COUNTY, :
 RESPONDENT. :
 _____ :

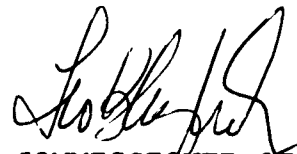
The record of this matter and the initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

It is noted that the within Board paid petitioner money pursuant to this settlement on or before January 31, 1995. Parties are hereby reminded that effectuating settlement terms prior to their approval by the Commissioner is improper and done at the peril of the parties.

Notwithstanding the above, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

March 29, 1995


 COMMISSIONER OF EDUCATION

DATE OF MAILING MARCH 29, 1995

107-95

LAWRENCE MAJOR, JR., LUIS LOPEZ, :
AND KENNETH BROWN, :

PETITIONERS, :

V. :

BOARD OF EDUCATION OF THE CITY :
OF NEWARK, ESSEX COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

March 29, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NOS. EDU 11613-94;
EDU 11614-94 and EDU 11615-94
AGENCY DKT. NOS. 373-9/94;
372-9/94 and 374-9/94
CONSOLIDATED

**LAWRENCE MAJOR, JR.,
LUIS LOPEZ and KENNETH BROWN,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE
CITY OF NEWARK, ESSEX COUNTY,**

Respondent.

Anthony P. Sciarrillo, Esq., for petitioners

Samuel M. Manigault, Associate Counsel, for respondent
(Marvin L. Comick, General Counsel)

Record Closed: February 14, 1995

Decided: February 22, 1995

BEFORE ELINOR R. REINER, ALJ:

On September 13, 1994, petitioners, tenured principals, filed verified petitions of appeal with the Commissioner of Education, alleging that respondent had illegally reduced their annual salaries by \$631, \$772 and \$631, respectively for the 1993-94 school year. On November 28, 1994, respondent filed answers and counterclaims to the petition alleging that the neglect of each petitioner caused a deficit in the school's 905 account in the amounts deducted from each petitioner's salary. On December 1,

1994, these matters were transmitted to the Office of Administrative Law as contested cases pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

After notice to all parties, these matters were consolidated and a telephone prehearing conference scheduled for March 23, 1995.

As a result of settlement conferences held between the parties, the parties have agreed to the settlements, and the prehearing conference was adjourned.

The parties have agreed to settle these matters and have prepared Orders and Stipulations of Settlement indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlements as evidenced by their signatures or their representatives' signatures.
2. The settlements fully dispose of all issues in controversy and are consistent with the law.

I **CONCLUDE** that these agreements meet the requirements of *N.J.A.C. 1:1-19.1* and that the settlements should be approved. I approve the settlements and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

February 22, 1995
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

2/24/95
DATE

W. R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties: Jeff J. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 28 1995
DATE
dgi/e

OFFICE OF ADMINISTRATIVE LAW

ANTHONY P. SCIARRILLO

COUNSELLOR AT LAW
Valley National Bank Building
381 Franklin Avenue
Belleville, New Jersey 07109-1703
(201) 450-9777
Telefax Number: (201) 450-9825

RECEIVED
STATE OF NJ
OFFICE OF ADMINISTRATIVE LAW
FEB 14 11 26 AM '95

KELLY M. MATTHEISS
PLEASE REPLY TO:
BELLEVILLE OFFICE

16 SUTTON PLACE
CRANFORD, NEW JERSEY 07016
(908) 272-0963

February 7, 1995

Honorable Elinor Reiner
OFFICE OF ADMINISTRATIVE LAW
185 Washington Street
Newark, NJ 07102

Re: Major v. Newark BOE, #373-9/94

Dear Judge Reiner:

This matter has been scheduled for prehearing on March 23, 1995. However, the parties have actively pursued a resolution of the matters and same was accomplished recently.

Enclosed are original and three copies of fully executed Stipulations of Settlement. Please process same for the closing out of this matter.

Thank you.

Respectfully,


ANTHONY P. SCIARRILLO

APS:lm
Enclosures

c: Gerald Samuels, CASA

RECEIVED
STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
FEB 14 11 26 AM '95

ANTHONY P. SCIARRILLO, ESQ.
381 Franklin Avenue
Nutley, New Jersey 07110
(201) 450-9777
Attorney for Petitioner

LAWRENCE MAJOR	:	STATE OF NEW JERSEY
	:	DEPARTMENT OF EDUCATION
Petitioner,	:	BEFORE THE COMMISSIONER
	:	OF EDUCATION
-vs-	:	
	:	DOCKET NO. 373-9/94
BOARD OF EDUCATION OF THE	:	
CITY OF NEWARK	:	ORDER
	:	and
Respondent.	:	STIPULATION OF SETTLEMENT

THIS matter having been commenced by the filing of a Verified Petition on behalf of Lawrence Major, the Petitioner, by his attorney Anthony P. Sciarrillo, Esq.;

WHEREAS, on or about September 13, 1994, Petitioner, Lawrence Major, filed the within matter; and

WHEREAS, Respondent has filed an answer and Counterclaim to the within Verified Petition; and

WHEREAS, Petitioner has filed an answer to the Counterclaim; and

WHEREAS, the parties advised the undersigned that this matter has been resolved between them as set forth below;

NOW THEREFORE, for good cause shown;

IT IS on this day of , 1994,

ORDERED:

1. The Respondent agrees to increase Petitioner's annual salary for 1993-1994 by \$772.

2. The parties shall withdraw the pleadings filed in the above captioned matter.

3. As Petitioner died on October 5, 1994, the Respondent shall make payment to the Estate of the Petitioner within 14 days of the date of the filing of this Stipulation.

4. Each party has entered into this Stipulation freely and voluntarily and without any inducement not contained in this document.

5. This Stipulation contains the entire Stipulation and understanding between the parties and constitutes full and final settlement of any and all issues arising out of this action between the Petitioner and Respondent.

6. This Stipulation shall be governed by the laws of the state of New Jersey.

7. The parties shall be bound by the terms and conditions of this Stipulation, finding it to be fair and equitable under all the circumstances surrounding this matter.

8. The parties have entered into this Stipulation with a full understanding of their rights and the contents of this Stipulation.

9. Each party has had an opportunity to consult with legal counsel concerning the terms and conditions of this Stipulation.

10. This Stipulation may not be altered, amended or modified except by a writing signed and duly executed by all parties.

Administration Law Judge

We hereby consent to the form and entry of the foregoing.

Gerald A. Samuels
GERALD A. SAMUELS, Grievance
Chairman, City Association of
Supervisors and Administrators

Marie M. Major
Lawrence Major, Petitioner
by MARIE MAJOR on behalf of the
Estate of Lawrence Major

Samuel M. Manigault
SAMUEL M. MANIGAULT
Associate Counsel
Newark Board of Education

RECEIVED

JAN 24 11 02 AM '95

STATE OF NEW JERSEY
OFFICE OF THE COMMISSIONER OF EDUCATION

ANTHONY P. SCIARRILLO, ESQ.
381 Franklin Avenue
Nutley, New Jersey 07110
(201) 450-9777
Attorney for Petitioner

LUIS LOPEZ	:	STATE OF NEW JERSEY
	:	DEPARTMENT OF EDUCATION
Petitioner,	:	BEFORE THE COMMISSIONER
	:	OF EDUCATION
-vs-	:	
	:	DOCKET NO. 372-9/94
BOARD OF EDUCATION OF THE	:	
CITY OF NEWARK	:	ORDER
	:	and
Respondent.	:	STIPULATION OF SETTLEMENT

THIS matter having been commenced by the filing of a Verified Petition on behalf of Luis Lopez, the Petitioner, by his attorney Anthony P. Sciarrillo, Esq.;

WHEREAS, on or about September 13, 1994, Petitioner, Luis Lopez, filed the within matter; and

WHEREAS, Respondent has filed an answer and Counterclaim to the within Verified Petition; and

WHEREAS, Petitioner has filed an answer to the Counterclaim; and

WHEREAS, the parties advised the undersigned that this matter has been resolved between them as set forth below;

NOW THEREFORE, for good cause shown;

IT IS on this day of , 1994,

ORDERED:

1. The Respondent agrees to increase Petitioner's annual salary for 1993-1994 by \$631.00.

2. The parties shall withdraw the pleadings filed in the above captioned matter.

3. The Respondent shall make payment to the Petitioner within 14 days of the date of the filing of this Stipulation.

4. Each party has entered into this Stipulation freely and voluntarily and without any inducement not contained in this document.

5. This Stipulation contains the entire Stipulation and understanding between the parties and constitutes full and final settlement of any and all issues arising out of this action between the Petitioner and Respondent.

6. This Stipulation shall be governed by the laws of the state of New Jersey.

7. The parties shall be bound by the terms and conditions of this Stipulation, finding it to be fair and equitable under all the circumstances surrounding this matter.


8. The parties have entered into this Stipulation with a full understanding of their rights and the contents of this Stipulation.

9. Each party has had an opportunity to consult with legal counsel concerning the terms and conditions of this Stipulation.


10. This Stipulation may not be altered, amended or modified except by a writing signed and duly executed by all parties.

Administration Law Judge

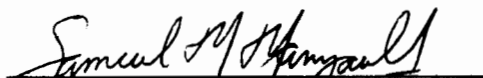
We hereby consent to the form and entry of the foregoing.



GERALD A. SAMUELS, Grievance
Chairman, City Association of
Supervisors and Administrators



LUIS LOPEZ, Petitioner



SAMUEL M. MANIGAULT
Associate Counsel
Newark Board of Education

RECEIVED

JAN 24 11 02 AM '95

STATE OF NEW JERSEY
OFFICE OF ATTORNEY GENERAL

ANTHONY P. SCIARRILLO, ESQ.
381 Franklin Avenue
Nutley, New Jersey 07110
(201) 450-9777
Attorney for Petitioner

KENNETH BROWN	:	STATE OF NEW JERSEY
	:	DEPARTMENT OF EDUCATION
Petitioner,	:	BEFORE THE COMMISSIONER
	:	OF EDUCATION
-vs-	:	
	:	DOCKET NO. 374-9/94
BOARD OF EDUCATION OF THE	:	
CITY OF NEWARK	:	ORDER
	:	and
Respondent.	:	STIPULATION OF SETTLEMENT

THIS matter having been commenced by the filing of a Verified Petition on behalf of Kenneth Brown, the Petitioner, by his attorney Anthony P. Sciarrillo, Esq.;

WHEREAS, on or about September 13, 1994, Petitioner, Kenneth Brown, filed the within matter; and

WHEREAS, Respondent has filed an answer and Counterclaim to the within Verified Petition; and

WHEREAS, the Petitioner has filed an answer to the Counterclaim; and

WHEREAS, the parties advised the undersigned that this matter has been resolved between them as set forth below;

NOW THEREFORE, for good cause shown;

IT IS on this day of , 1994,

6

ORDERED:


1. The Respondent agrees to increase Petitioner's annual salary for 1993-1994 by \$631.00.
2. The parties shall withdraw the pleadings filed in the above captioned matter.
3. The Respondent shall make payment to the Petitioner within 14 days of the date of the filing of this Stipulation.
4. Each party has entered into this Stipulation freely and voluntarily and without any inducement not contained in this document.
5. This Stipulation contains the entire Stipulation and understanding between the parties and constitutes full and final settlement of any and all issues arising out of this action between the Petitioner and Respondent.
6. This Stipulation shall be governed by the laws of the state of New Jersey.
7. The parties shall be bound by the terms and conditions of this Stipulation, finding it to be fair and equitable under all the circumstances surrounding this matter.
8. The parties have entered into this Stipulation with a full understanding of their rights and the contents of this Stipulation.
9. Each party has had an opportunity to consult with legal counsel concerning the terms and conditions of this Stipulation.

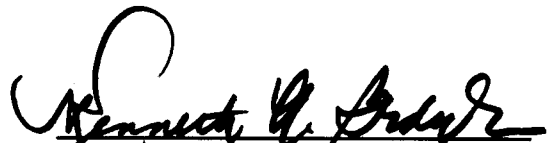
9. This Stipulation may not be altered, amended or modified except by a writing signed and duly executed by all parties.


10. This Stipulation may not be altered, amended or modified except by a writing signed and duly executed by all parties.

Administration Law Judge

We hereby consent to the form and entry of the foregoing.


GERALD A. SAMUELS, Grievance
Chairman, City Association of
Supervisors and Administrators


Kenneth Brown, Petitioner



SAMUEL M. MANIGAULT
Associate Counsel
Newark Board of Education

OAL DKT. NOS. EDU 11613-94, EDU 11614-94, AND EDU 11615-95
(Consolidated)

LAWRENCE MAJOR, JR., LUIS LOPEZ, :
AND KENNETH BROWN, :
PETITIONERS, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY :
OF NEWARK, ESSEX COUNTY, : DECISION
RESPONDENT. :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

March 29, 1995

DATE OF MAILING MARCH 29, 1995

108-95

ALICE WALSH, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF MIDDLESEX : DECISION

COUNTY VOCATIONAL AND TECHNICAL :
HIGH SCHOOLS, MIDDLESEX COUNTY, :

RESPONDENT, :

SYNOPSIS

Petitioning Teacher of Nursing appealed Board's refusal to rescind her resignation and reinstate her to her former position.

ALJ found that following petitioner's tendering of a resignation letter and the Board's accepting of that resignation, the Board had no obligation to reemploy her. She had not resigned under duress or contrary to terms set forth in a negotiated bargaining agreement. The Board had not acted in an arbitrary, capricious or unreasonable manner. ALJ denied petitioner's Motion for Summary Decision and dismissed the petition.

Commissioner adopted findings and determination in initial decision as his own.

MARCH 31, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3663-94

AGENCY DKT. NO. 35-3/94

ALICE WALSH,

Petitioner,

v.

**BOARD OF EDUCATION OF MIDDLESEX
COUNTY VOCATIONAL AND TECHNICAL
HIGH SCHOOLS, MIDDLESEX COUNTY,**

Respondent.

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

Anthony B. Vignuolo, Esq., for respondent (Borrus, Goldin, Foley, Vignuolo,
Hyman & Stahl, attorneys)

Record Closed: January 11, 1995

Decided: February 15, 1995

BEFORE **AUGUST E. THOMAS, ALJ** t/a:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner filed her appeal with the Commissioner of Education contesting the determination of the Board of Education of the Middlesex County Vocational and Technical Schools' (Board's) refusal to rescind her resignation and reinstate her to her former position. The Commissioner transmitted the matter to the Office of Administrative Law (OAL) as a contested case, pursuant to *N.J.S.A. 52:14F-1 to -13*.

After my telephone conference with the attorneys, petitioner filed a letter brief with her motion for Summary Decision, and respondent filed an answering letter brief. The salient facts are not in dispute and are set forth as follows:

Petitioner, a tenured teacher of nursing employed by the Board, tendered her resignation on October 29, 1993, effective January 4, 1994. Her resignation was predicated on her plan to relocate to Florida. The Board accepted petitioner's resignation on November 1, 1993. However, on December 8, 1993, petitioner delivered the following letter to the Board through its superintendent of schools:

I am asking that you please disregard my recent letter of resignation . . . and consider reinstating my contract. The buyer for my home has reneged and I am now unable to relocate.

I greatly appreciate you and the board for your prompt assistance in this matter.

Petitioner's rescission was denied by the Board on December 9, 1993, and her appeal was filed with the Commissioner on March 2, 1994.

DISCUSSION

Petitioner asserts that her position has not been filled by a full-time, permanent, duly certified teacher of nursing. The Board agrees, stating that the position was filled by substitute teachers and temporary relocation of other teaching staff for the remainder of the 1993-94 school year because of the difficulty in filling the position in the middle of the school year. Nevertheless, the Board contends that petitioner was offered employment beginning in September 1994, and she refused to accept such employment because she was in the process of relocating to Florida. Petitioner does not deny the Board's contention.

The petitioner asserts, however, and the Board denies, that the Board has a long-standing past practice of allowing staff members to rescind resignations that have been accepted by the

Board. Petitioner asserts further that the Board's determination not to continue her employment is arbitrary, capricious, in bad faith and in violation of her tenure rights. Therefore, based on all of the above, petitioner seeks a judgment ordering the Board to reinstate her with full back pay, benefits, and other emoluments of her office.

THE LAW

The Board seeks to dismiss this appeal, stating that it was filed out of time pursuant to *N.J.A.C. 6:24-1.2(c)*, which requires that appeals must be filed with the Commissioner no later than the ninetieth day from the date of receipt of notice of a final order, ruling or other action by the agency.

In my judgment, this matter was timely filed. The final action which triggered this appeal was the Board's determination on December 9, 1993, not to rescind petitioner's resignation. Prior to that action, there was nothing to appeal; consequently, petitioner's appeal filed on March 2, 1994, was within the ninety-day limit set by the above regulation.

Petitioner cites *Hall v. Jefferson Bd. of Educ.*, 125 N.J. 299 (1991), *Cutler v. Parsippany-Troy Hills Bd. of Educ.*, No. A-1464-90T3 (App. Div. Jan. 27, 1992), *reversing* 1990 S.L.D. 725, and *Evaul v. Board of Educ., City of Camden*, 35 N.J. 244 (1961), to support her claim to the position from which she resigned. In these decisions, the petitioners were reinstated to positions from which they either resigned or offered to resign. However, a reading of these decisions discloses that each is distinguishable from the present matter.

Hall was a tenured school secretary who advised the Jefferson Township Board of Education of her "intention to retire" at the end of the school year. Her decision was based on the local education association's collective bargaining agreement with the Board, which provided for longevity payments for employees meeting the contractual requirements in the bargaining agreement. When personal problems arose, Hall asked for a two-year extension of her retirement date. She was notified that any extension would be based on her performance during the remainder of that school year. After her supervisor's evaluation was submitted, Hall was advised

by the Board that her retirement would become effective at the end of the school year, and she appealed to the Commissioner.

In its review of the case, the Court found that the Board had a consistent past practice of allowing the “acceleration, extension, or rescission of twelve intended retirement dates” from May 1983 through the end of the 1985-86 school year without any conditions being imposed on the employees (*Hall, supra*, 125 N.J. at 304). Hall was the only employee during that time subjected to a performance evaluation as a condition of being permitted to continue in her tenured position. Additionally, the Court found that there was no provision in the contractual agreement with the education association which provided for any conditions to be imposed for the modification of an intended retirement date. Therefore, the Court found in Hall’s favor.

The *Cutler* controversy arose because of a provision in the teachers’ collective bargaining agreement which entitled them to receive a terminal leave pay upon retirement based upon their accumulated sick leave. Several teachers were involved and the Parsippany-Troy Hills Board of Education refused to allow rescission of their notices of intention to retire. However, the appellate division concluded as follows:

At each stage of this litigation, plaintiffs have contended that the Board’s acceptance of their conditional notices of intention to retire preserved to them the right to rescind. We are persuaded that as a matter of ordinary contract law plaintiffs are correct. Plaintiffs’ offers could only be accepted in accordance with their terms.

[No. A-1464-90T3 at 5.]

Accordingly, the appellate division found in favor of the plaintiffs.

Florence Evaul was a tenured teacher who asked the Camden Board of Education to rescind her resignation. The Board refused. The Court’s view of the case related to Evaul’s argument that her resignation was invalid because her offer to resign was the product of duress. Evaul had differences with her supervisor and other staff members which culminated in a meeting with the school principal, the school superintendent and the president of the local board of

education. That meeting, which lasted about forty minutes, "was heated and acrimonious." *Evaul, supra*, 35 N.J. at 246. At about 4 p.m. the same day, a Friday, a very distraught Evaul had a meeting with the superintendent and said that she was going to resign. He advised her not to be hasty and told her that she should wait until Monday before making up her mind. Nevertheless, she submitted her resignation. Unbeknownst to Evaul, a special meeting of the Board had been scheduled for that same evening at 8 p.m. Her resignation was presented to the Board and accepted. The Court held that her circumstances were unique in that "[i]t was an extraordinary concatenation of events which resulted in a loss to appellant of her tenure, seniority and pension rights acquired during twenty-five years of service." *Id.* at 249. The Court ordered her reinstatement.

In the present matter, petitioner tendered an ordinary resignation letter. Therefore, when her resignation was accepted, the Board had no further obligation to re-employ her. Unlike in *Hall and Cutler*, there was no obligation to petitioner pursuant to terms set forth in a negotiated bargaining agreement. And unlike in *Evaul*, there was no duress or "extraordinary concatenation of events" which caused her termination. For its own reasons, the Board chose not to re-employ petitioner for the remainder of the 1993-94 school year after it accepted her resignation. Accordingly, there is no relief to which petitioner is entitled.

Therefore, petitioner's motion for Summary Decision is **DENIED** and the case is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 15, 1995
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ t/a

Receipt Acknowledged:

2/21/95
DATE

[Signature]
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 24 1995
DATE
NJF

Jeff S. Marin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW


ALICE WALSH, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF MIDDLESEX : DECISION
COUNTY VOCATIONAL AND TECHNICAL :
HIGH SCHOOLS, MIDDLESEX COUNTY, :
RESPONDENT, :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that the Board's refusal to reemploy petitioner for the remainder of the 1993-94 school year after it had accepted her resignation was not arbitrary, capricious or unreasonable and, therefore, there is no relief to which petitioner is entitled.

Accordingly, petitioner's Motion for Summary Decision is denied and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MARCH 31, 1995

DATE OF MAILING MARCH 31, 1995

109-95

MARGARET MAY AND THE MILLTOWN :
EDUCATION ASSOCIATION, :
: PETITIONERS, :
: V. : COMMISSIONER OF EDUCATION :
: : :
BOARD OF EDUCATION OF THE : DECISION :
BOROUGH OF MILLTOWN AND WALTER : :
BORIGHT, SUPERINTENDENT, : :
MIDDLESEX COUNTY, : :
: RESPONDENTS. :

SYNOPSIS

Petitioning taxpayer/parent and Association contested the Board's action to reduce in force its entire professional and non-professional staff.

ALJ concluded that petitioners failed to demonstrate that the mere issuance of RIF notices to the entire teaching staff in April 1994 in any way affected the provision of a thorough and efficient education to the students of the district, in particular because all but four staff members were advised prior to the conclusion of the 1994-95 school year that they would not be affected by the RIF. ALJ found that the Board's actions were not unlawful and did not provide the basis for any relief to the four remaining individual petitioners. Summary Decision dismissing the petition was granted in favor of respondents.

Commissioner adopted findings and determination in the initial decision as his own.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 6579-94

AGENCY DKT. NO. 155-5/94

**MARGARET MAY AND THE MILLTOWN
EDUCATION ASSOCIATION,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE
BOROUGH OF MILLTOWN AND
WALTER BORIGHT, SUPERINTENDENT,
MIDDLESEX COUNTY,**

Respondents.

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

Anthony B. Vignuolo, Esq., for respondents (Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, attorneys)

Record Closed: January 9, 1995

Decided: February 23, 1995

BEFORE M. KATHLEEN DUNCAN, ALJ:

This matter commenced on May 16, 1994, when Margaret May, a resident taxpayer and parent of a student in the Milltown Public Schools, and the Milltown Education Association, a

labor organization in its own behalf and on behalf of its listed members, filed a petition of appeal with the Commissioner of Education seeking a determination declaring void a resolution adopted by respondent Board of Education on recommendation of respondent Boright to reduce in force the entire teaching, custodial, secretarial and clerical staff of the district. An answer was filed on behalf of the respondents on June 22, 1994 and on July 11, 1994 the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13.

A prehearing conference was conducted on October 12, 1994 at which time it was determined that the parties would file cross-motions for summary decision on or before December 15, 1994. It was agreed that replies, if any, would be filed no later than January 9, 1995. With the consent of the undersigned, both parties filed cross-motions on December 20, 1994. A reply on behalf of respondents was filed on December 22, 1994. No reply having been received on behalf of petitioners, the record closed on January 9, 1995.

FINDINGS OF FACT

The facts relevant to a determination of this matter are not in dispute and I therefore **FIND** the following as uncontested facts.

On or about April 15, 1994, each of the individual association-member petitioners in this case received the following notice:

MILLTOWN SCHOOL DISTRICT

Milltown, New Jersey 08850

Notice to Certificated Staff

April 15, 1994

Dear _____ RE: Non-renewal of
Employment

This is to advise you that the Milltown Board of Education voted by a majority of the full membership of the Board that you not be offered a contract for employment for the next academic year, September 1, 1994 to June 30, 1995 if a 10 month employee, or July 1, 1994 or June 30, 1995, if a 12 month employee. This action was officially taken on April 14, 1994.

The reasons for same are as follows:

1. reason of economy
2. reduction in the number of pupils at a given grade level
3. change in administrative or supervisory organization
4. change in educational program

If you desire to appear before the Board and make a presentation in your behalf, please advise the office of the Superintendent of Schools in writing within ten (10) days from your receipt of this letter. The informal appearance will then be scheduled.

If you have a negotiated representative, contact that representative concerning your rights.

Thereafter notices were sent on June 14, 1994 and June 21, 1994 reemploying all individual staff-member petitioners except for the following individuals: Christine Morris (tenured,home economics), Leslie Pruess (tenured, instrumental music), Susan Spyros (tenured,art) and Alice Yucht (tenured,librarian).

The uncontested certification of Walter Boright submitted with respondents' motion for summary decision explains that the district was experiencing budgetary problems affecting the 1994-95 school year and took the actions which it took in mid-April because at that point it was uncertain because of said economic problems what program and staffing needs would be for the following school year and because the negotiated agreement required notice of non-renewal to be given by April 30, each year. As soon as they were able, respondents made determinations concerning programming and staffing needs for 1994-1995 and reemployed all staff members with the exception of the four named individuals whose positions were terminated solely for reasons of economy.

APPLICABLE LAW AND DISCUSSION

N.J.A.C. 1:1-12.5, the rule governing motions for summary decision, provides:

(b) The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.

The now classic statement of the standards for granting or denying summary judgment set forth in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954), explains that the procedure is designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion, clearly shows not to present any genuine issue of material fact requiring disposition at a trial. In the present matter the parties agree that there are no material facts in dispute, and accordingly, this matter is ripe for summary decision.

N.J.S.A. 18A:28-9, the statutory provision governing reductions in force, states:

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

Petitioners argue that respondents' action issuing reduction in force notices to the entire tenured staff with the exception of the superintendent violates their obligations to provide a thorough and efficient education, pursuant to N.J.S.A. 18A:6-9, Article VIII, §IV, of the New Jersey Constitution, N.J.S.A. 18A:7A-1 (the Public School Education Act of 1975), N.J.S.A. 18A:11-1d (General mandatory powers and duties of a board of education to do all things necessary for the lawful and proper conduct of the public schools in the district) and N.J.A.C. 6:8-3.2 (requiring staffing of school districts to be based upon the specific instructional needs of pupils in the district and each school within the district). In support of their argument petitioners cite the following comments made by the State Board of Education in Edison Township Education Association v. Edison Township Board of Education, 1984 S.L.D. 1073, aff'd State Board 1984 S.L.D. 1085, aff'd Appellate Division (Docket No. A-2030-84T7, February 11, 1986):

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

Respondents point out that the comments of the State Board of Education are dicta and that the facts in Edison were entirely different from those herein since in the present matter all but four tenured teaching staff members were notified prior to the conclusion of the current school year that the reduction in force for the following September would not affect them. Respondents correctly point out that this case is moot with respect to all individual staff-member petitioners except for those four tenured teaching staff members who were, in fact, affected by the reduction in force, and with respect to those teaching staff members no factual basis has been offered to

support a legal challenge to respondents' decision to terminate these employees for reasons of economy.

Based upon all of the foregoing, I **CONCLUDE** that petitioners have failed to demonstrate that the mere issuance of RIF notices to the entire teaching staff in April 1994 in any way affected the provision of a thorough and efficient education to the students of the district. All but four of the individual staff-member petitioners were advised prior to the conclusion of the 1993-94 school year that they would not be affected by the reduction in force for the 1994-95 school year and accordingly, there was no interruption in the provision of their services. In the absence of any factual basis to the contrary, I am unable to conclude that thorough and efficient education in respondents' district was in any way affected by the reduction in force for reasons of economy which affected only four individuals. Respondents' actions herein, although they were probably psychologically upsetting to many staff members, merely provided respondent with two additional months to determine how necessary budgetary constraints could best be handled. The actions were not unlawful and do not provide the basis for any relief to the four remaining individual petitioners. Accordingly, for all of the foregoing reasons Summary Decision dismissing the petition is hereby **GRANTED** in favor of respondents.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions."** A copy of any exceptions must be sent to the judge and to the other parties.

Feb 23, 1995
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

Feb 23, 1994
DATE

John Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

Jeff S. Marin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

MAR 01 1995
DATE

cc

MARGARET MAY AND THE MILLTOWN	:	
EDUCATION ASSOCIATION,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
BOROUGH OF MILLTOWN AND WALTER	:	
BORIGHT, SUPERINTENDENT,	:	
MIDDLESEX COUNTY,	:	
	:	
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.


Upon a careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusion of the ALJ that, under the circumstances existing herein, the actions of the Board in issuing RIF notices to its entire teaching staff in April 1994 were not unlawful and do not provide a basis for any relief to petitioners.

Accordingly, the recommended decision of the Office of Administrative Law is adopted as the final decision in this matter for the reasons clearly articulated therein. Summary decision is hereby granted to respondents and the within Petition of Appeal is dismissed.

IT IS SO ORDERED.

MARCH 31, 1995

DATE OF MAILING MARCH 31, 1995


 COMMISSIONER OF EDUCATION

110-95

MARILYN BRUDER, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY : DECISION

OF PLAINFIELD, UNION COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner, nontenured elementary teacher, alleged that the Board's decision not to rehire her was motivated by discriminatory motives.

ALJ concluded that petitioner failed to prove that the Board's articulated reasons for not renewing her contract were pretexts. ALJ further concluded that the Board properly exercised its discretionary authority to not reemploy petitioner and that that decision was not motivated by improper racial and religious reasons; rather, it was based on classroom performance and excessive absenteeism. Moreover, ALJ concluded that the Board did not violate her due process rights. In addition, Board properly exercised its authority to terminate petitioner's employment while she was on work-related disability leave by giving her timely notice of nonrenewal. Petition was dismissed.

Upon careful review of the record, including transcripts of proceedings at OAL, the Commissioner concurred with the ALJ's dismissal of the petition. Commissioner adopted findings and determination in initial decision as his own.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8313-93

AGENCY DKT. NO. 229-6/93

MARILYN BRUDER,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
CITY OF PLAINFIELD, UNION COUNTY,**

Respondent.

Michael T. Barrett, Esq., for petitioner
(Bergman & Barrett, attorneys)

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

Record Closed: January 3, 1995

Decided: February 17, 1995

BEFORE MUMTAZ BARI-BROWN ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Marilyn Bruder, a nontenured teacher, was employed by respondent, Plainfield Board of Education ("Board" or "District"). The Board did not renew petitioner's employment contract for the 1993-94 school year. Petitioner alleges that the Board's decision was based on racial and religious discriminatory reasons. Petitioner is white and Jewish. Petitioner seeks

reinstatement in the position of a tenured teaching staff member in the Plainfield School district with full back pay and all additional emoluments of employment.

Respondent denies that its decision was based on discriminatory motives. Rather, its decision was based on petitioner's poor performance and absenteeism. Therefore, the decision was a proper exercise of discretionary authority.

Bruder filed a Notice of Appeal from the Board's denial of tenure. The matter was transmitted to the Office of Administrative Law (OAL) on September 1, 1993, as a contested case pursuant to *N.J.S.A. 52 :14B-1 to-15* and *N.J.S.A. 52:14F-1 to -13*. Prehearing conferences were held on January 12, and February 1, 1994. On or about February 19, 1994, the Board filed a motion to dismiss the petition for failure to comply with the "90 day rule" set forth in *N.J.A.C. 6:24-1.2*. On June 8, 1994, I denied the Board's motion. For good cause the hearings scheduled for May 3, 4 and 5, 1994, were adjourned to September 12, 22, 23, 28, 29 and October 6, 1994. The parties submitted post hearing briefs and the record closed on November 17, 1994.

The forty-five (45) day statutory period within which to file the initial decision with the Department of Education expired on January 3, 1995. Based on the complexity of the case and the administrative law judge's voluminous case load, an extension of time to complete the initial decision was granted until February 17, 1995. *N.J.S.A. 52:14B-10(c)* and *N.J.A.C. 1:1-18.8*.

ISSUES

1. Whether the Board's failure to rehire petitioner was based on religious and racial discrimination.

2. Whether petitioner was the victim of harassment and differential treatment in the workplace.
3. Whether petitioner received timely procedural due process entitlements before being nonrenewed.
4. Whether the Board can terminate petitioner while she was on Workers' Compensation Disability Leave

STIPULATED FACTS

The parties stipulated as follows:

Petitioner, Marilyn Bruder commenced her employment with the Board on January 2, 1991, as an elementary teacher, kindergarten, at the Emerson School. She was given salary credit for 18 years prior experience. Despite an initial recommendation of nonrenewal, which petitioner protested, the Board renewed her employment for the 1991-1992 school year. The next year, she was then assigned to the first grade at the Emerson School. Petitioner was reappointed for the 1992-93 school year, and assigned to the first grade at the Emerson School.

On December 14, 1992, petitioner was injured on school property during the course of her employment. She returned to work from January 8 to 12, 1993, but she has remained out of work since that time.

On March 31, 1993, petitioner was nonrenewed.

An Order entered by the Honorable Philip E. Bolstein declared petitioner temporarily disabled, for workers' compensation purposes, effective December 14, 1992. She remains temporarily disabled, for workers' compensation purposes, to the present. (J-1)

TESTIMONY

Petitioner presented six witnesses and respondent presented nine witnesses. Several witnesses testified about their association with Bruder and school administrators, Eloise Tinley and Doris Williams. Some described their impression of the relationship between Bruder and the school administrators.

Petitioner, Marilyn Bruder is a resident of Springfield, New Jersey. In December 1990, she applied for a teaching position with the Plainfield School District. She previously owned and operated a day care/nursery school in Westfield, New Jersey. Bruder was first interviewed by Tinley, Director of Personnel. Tinley questioned Bruder about her experience in inner city schools and her experience with children of diverse backgrounds. Bruder described Tinley's attitude as "curt." She also concluded that Tinley did not like her and appeared annoyed that she was applying for a position with the District.

Bruder then interviewed with Doris J. Williams, principal of Emerson Elementary School. They discussed Bruder's experiences. Williams appeared very excited about Bruder teaching at Emerson. Bruder informed Williams that if she accepted the position she needed time off to attend her daughter's law school graduation in New Orleans. Also, she was a subpoenaed witness and would be absent to attend a trial. Williams offered Bruder the position of full-time kindergarten teacher. Bruder began teaching at Emerson on January 18, 1991.

Bruder believes that her assignment to the kindergarten classroom was based on discriminatory motives; the room was large but it lacked adequate materials and supplies. Thus, she asked for floor mats for the children to sit on, a water and sand table, blocks, books, and games for the students. Williams

responded that Plainfield was a poor district and that there was no money for such supplies. Bruder saw these items in other kindergarten classrooms and concluded that Williams' response was not based on financial reasons. Rather, it was an implied criticism directed at Bruder because she was from a wealthy suburban school district. Bruder also perceived that Williams thought she was "spoiled brat."

Bruder alleged other acts of discrimination and differential treatment. For example, during a meeting Williams stated that, "I think you need to go back where you came from." Bruder interpreted Williams' statement and her other remarks about Springfield as discriminatory. The Township of Springfield, petitioner's residence, has a large middle-upper-class, white and Jewish population.

In another incident, Williams denied Bruder's request to take time off to attend her daughter's graduation. However, Williams granted leave time to an African-American teacher to attend her daughter's graduation in California. Another incident concerned Bruder's request to leave school early on a Jewish holiday so that she could arrive home and prepare a religious meal before sundown. The teachers' work schedule begins at 8:00 a.m. and ends at 3:00 p.m. Williams did not immediately respond and granted her request at 2:45 p.m.

Bruder also alleged several incidents of harassment. In 1991-92, Williams assigned Bruder to teach first grade. Bruder was hired as a full-time kindergarten teacher and had never taught first grade. The first grade classrooms and Williams' office are on the same side of the building. Therefore, Bruder believed that the reason she was reassigned was to allow Williams to keep an eye on her. Bruder accepted the new assignment and again asked for specific teaching supplies. She requested preparation aids for the California Achievement Test ("CAT") which was administered in the spring. Ms. Fern

Litwak, the first grade leader, responded that materials were not available. However, when Bruder was absent for several days during an illness, the substitute teacher, Mrs. Roundtree received CAT test supplies from Litwak. The Vice-Principal, Donald Frank did not respond when Bruder asked him why Roundtree was given the supplies and she was not.

Another alleged discriminatory act concerned Bruder's belief that many of her students had emotional and/or physical problems. For instance, one of the students constantly urinated in the classroom and another student regularly fell asleep at the desk and drooled from the mouth. Bruder reported these happenings to the administrators, but nothing was done. She also requested that certain first grade students who had exhibited learning deficiencies receive special tutoring or assistance. She was told that there was no one available to assist the students.

Another incident involved Williams response when Bruder decorated the classroom door. Bruder's students had won a District wide spelling contest. Bruder placed ribbons on the classroom door window to congratulate the students. Bruder knew that two-thirds of the window could not be covered, however, she believed this was a special occasion and that the children should be recognized for their accomplishment. Williams told her to remove the ribbons because it violated school regulations.

On another occasion, during a fire drill, the children appeared frightened by the sound of the fire alarm and were unprepared to respond accordingly. Bruder tripped over several children as she helped them exit the classroom and caused the desk to fall on her. A teacher's aide, Mrs. Carter, helped Bruder from the floor. Thereafter, Carter accompanied Bruder to the hospital and would not leave the examination room while Bruder was being treated by the physician. Carter informed Bruder that she was following school policy. Bruder believed,

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however, that Carter remained in the examination room to see whether she was really hurt from the fall.

Another incident occurred after Bruder addressed the Board about her contract renewal for the following school year. At the meeting, she also informed the Board about the repeated misuse of the bathroom in her classroom. Although regulations prevented students and teachers from using the same bathroom, teachers and other staff members constantly entered her room to use the bathroom. Also, at the end of the day, students from other classrooms used the bathroom to get water to wash the blackboard in their classrooms. She also told the Board that she was denied supplies. Further, she submitted letters from parents who supported her reappointment. The next day, the Vice-Principal, Donald Frank, "stormed" into the classroom and "angrily chastised" her about the statements that she had made before the Board.

Bruder alleged discriminatory treatment when she was denied assistance with classroom windows. The windows were stuck and the custodian opened them only once or twice. Moreover, the windows would not stay open without support, e.g., a book or a piece of wood. Consequently, the classroom had little ventilation and it was often hot and filled with stale air. Bruder offered to donate several window air conditioners to the school; one for her classroom, one for another classroom, and one for the teachers' room. She even offered to pay for the installation and the electric bill. Bruder believed that her offer was declined for discriminatory reasons.

Bruder alleged other incidents of harassment. She planned a field trip for her students, but she was not told about school procedure concerning parental consent. She inadvertently learned that Litwak gave permission forms to another teacher. Thereafter, Bruder hurriedly called the students' parents to obtain their consent for the field trip to the fire station. On another occasion she

was denied the use of the copying machine to make copies of lessons when workbooks were not delivered timely.

Eloise Tinley is the Supervisor of Personnel and the Affirmative Action Officer. Tinley was formerly employed in the positions of Supervisor of Nassau County Board of Cooperative Educational Services and Director of Personnel of Pratt Institute, both in New York. She has investigated and handled numerous complaints filed by students and staff alleging discrimination and sexual harassment.

Tinley screens the applicant and then refers the successful candidate to the building administrator or principal for a second interview. All applicants for teaching positions must take a basic skills test in math and language arts. The District instituted this policy in response to the students' poor test scores. Tinley also recommends termination of employees based on their performance evaluations.

Although Bruder refused to take the basic skills test, Tinley interviewed her for the kindergarten teacher position. Tinley perceived an apparent socio-economic difference between Bruder and the students in Plainfield. Thus, she was concerned whether Bruder could relate to the children. Many students lived in dysfunctional homes and were recipients of Aid to Families with Dependent Children (AFDC). Also, many students lacked exposure to cultural experiences. Some lacked social and moral virtues because they did not have positive role models. In contrast to children from middle-upper class families, these children faced greater obstacles to develop into independent and productive adults. To help the children overcome these barriers, the teacher must be aware of and sensitive to their needs. It was Tinley's job to hire teachers capable of meeting all the needs of the students.

During her interview, Bruder appeared insulted and annoyed that she was asked to take the test. Also, she became defensive to questions about her ability to relate to the children. Tinley believes that Bruder may have also felt uncomfortable being interviewed by an African-American. Tinley candidly described her experiences interviewing predominantly caucasian candidates. For some, it was their first relationship with an African-American in authority. They recognized that Tinley had the ability to control the outcome of the interview and they were uncomfortable with the situation.

Tinley was very impressed with Bruder's preschool experience, but she was mindful that Bruder had been the director of her own school program. Thus, she had reservations whether Bruder could make the transition from giving directions to taking directions. She concluded, however, that Bruder could be a good teacher and should be given the opportunity to demonstrate it.

Several weeks after Bruder began teaching, Tinley questioned Bruder's ability to adjust to the position. For example, Bruder complained that the steps were steep and unsafe and asked an assistant to take her class to the lunchroom. They discussed the matter at a meeting with Bruder and the union representative.

Tinley reviewed Bruder's performance evaluations and concluded that she was an ineffective teacher. At the Board meeting she recommended that Bruder's contract not be renewed. She also conceded making a statement that "this is Plainfield, not Springfield." Her remarks, however were made to rebut Bruder's assertion that in Springfield no one worried about students' test scores. Tinley believed that Bruder was lazy and had not made the transition from being the person in charge to being the one taking directions.

Doris Williams, Principal at Emerson School, has been employed by the Plainfield School District since 1978. She has taught special education students, the Educable Mentally Retarded ("EMR"), she was a resource room instructor and has been the vice-principal and the acting principal. Williams interviewed Bruder for the kindergarten teacher position. They discussed the children's needs and Williams' expectation from the teacher. Williams was excited about Bruder teaching in her school and she recommended that she be hired.

Williams described the kindergarten students assigned to Bruder's class as "energetic" and "ready to learn." Test results disclosed, however, that they had limitations in language stimulation and readiness skills. Although they were not labeled as "special needs" students, they did need more than the students in the regular half-day kindergarten class. Therefore, they were placed into Bruder's full day kindergarten class.

Bruder was formally evaluated in January, March and May 1991. Williams also observed Bruder in the classroom. Based on the formal evaluations and her observations, Williams did not recommend Bruder for reappointment for the 1991-92 school year. The Board, however, voted to renew her contract for another year. Williams reassigned Bruder to the first grade because she believed that Bruder would perform better with first grade students than she had with the kindergarten class.

Williams conceded that she remarked to Bruder that her "culottes" outfit looked like Bermuda shorts. Bruder insisted on a meeting with Williams and the union representative to discuss the dress code. Williams reprimanded Bruder for submitting an incorrect student attendance list, not for wearing culottes to work.

Williams denied withholding materials and supplies from Bruder. The District had materials for the staff, but Bruder never filled out the forms to request the materials. Williams would have ordered supplies had they been requested. Similarly, Bruder did not always follow procedure when she wanted time off for personal or religious reasons. Williams denied using the phrase "you people" or aspersions to refer to Bruder. Williams candidly stated that she did not believe that Bruder hurt herself when she fell.

Thomas Falocco, a teacher employed by the Board for twenty-six years, is the president of the Plainfield Education Association. He accompanied Bruder to several meetings with Williams. At one meeting, Williams expressed that the children in Plainfield did not come from the same socio-economic background as Bruder. Thus, Bruder should be more sensitive to their cultural background. Williams appeared "tight" and antagonistic.

Falocco attended another meeting in Williams' office about Bruder's attire. When Williams criticized Bruder for wearing culottes to school, Bruder charged that she was being singled out among other teachers because she is white and Jewish. Williams apologized for giving her that impression. Notwithstanding her apology, Falocco described Williams' body language as antagonistic, *e.g.*, she rolled her eyes and sucked her teeth. Falocco also described Bruder's culottes as a neat, loose-fitting outfit that fell below her knees. Other female teachers wore short skirts and revealing v-neck blouses. In comparison, Bruder's outfit was conservative and appropriate. Falocco concluded that Bruder was being singled out for minor incidences rather than major incidents such as being five minutes late for school and wanting to leave school early to observe a religious holiday.

Janet Banks, an art teacher employed by the Board since 1988, taught art in the students' regular classroom. She observed the overall condition of the

classrooms. Bruder's classroom was different from other classrooms. For example, the other classrooms had carpeting. However, other teachers voluntarily purchased supplies for their classroom. Often, she and Bruder ate their lunch in Bruder's classroom. Banks has never heard Williams make derogatory statements about Bruder. Williams was enthusiastic about hiring Bruder but treated her differently after she requested classroom materials. Banks described the relationship between Bruder and Williams as "rocky."

Banks also believes that Williams intimidated the faculty and that they were eager to please her. Thus, when Bruder fell in the classroom and called for help she could not depend on her coworkers to assist her. Banks conceded that she has had problems with Williams and described her as "mean-spirited." Banks has filed a federal civil rights complaint alleging sexual harassment against Williams.

Donald Frank is the principal of an elementary school in Manville, New Jersey. He was the vice-principal at Emerson School. Frank evaluated Bruder's teaching performance several times. He observed student behavior problems that had not existed with the prior teacher. He and Bruder discussed her concern about the behavior of several children and whether they should be evaluated by the Child Study Team (CST) for special education services. Frank responded that the situation should be investigated and informed Bruder to contact the parents.

Frank rated Bruder's performance as marginal in January 1991 and unsatisfactory in March and May, 1991. Board policy required that an independent evaluation be conducted following the teacher's unsatisfactory rating. Therefore, in January 1992, Anthony Dentino, a math supervisor assigned to another school building, evaluated Bruder and rated her

performance satisfactory. Frank evaluated Bruder in November 1991 and March 1992, and rated her satisfactory.

Frank also performed Bruder's annual evaluation summary in her second year of employment. He concluded that she had a pattern of being unprepared to teach the lessons. He identified consistent weaknesses in Bruder's performance. At the end of her second year of employment, Frank recommended that Bruder's contract not be renewed. He believed that Bruder could be an outstanding teacher, but she did not perform to her potential.

Marjorie Cohen and Judy Burgman are retired teachers who were formerly employed by the Board. Cohen was assigned to the classroom next to Bruder. She has never observed Williams act in a discriminatory manner towards any teacher including Bruder. Cohen is Jewish and white. She has received New Year's cards on the Jewish holiday from Williams.

Burgman worked in the District for twenty six years. She has observed Williams interact with her staff daily. Williams provided a warm and congenial atmosphere for the staff. Burgman is white and Jewish and she too, has received cards from Williams for the Jewish New Year.

Kimberly Ann Casey-Bailey and Diane Sylvester testified on rebuttal for petitioner. Bailey is a teacher's assistant at Emerson School. She heard Bruder complain that she was not getting materials and saw her crying in the kindergarten classroom. Bailey has not observed Williams mistreat any employees including Bruder. Sylvester is the New Jersey Educational Association representative. During a Board meeting, Sylvester heard Tinley remark, "this is not Springfield, this is Plainfield." Sylvester interpreted the statement to mean the Jewish population in Springfield. She perceived that

statement as a negative connotation and discriminatory. Sylvester has never witnessed Tinley make any discriminatory remarks towards any other person.

FINDINGS OF FACTS

Based on the evidence, I further **FIND** the following as **FACT**:

1. The Plainfield School District is a "special needs" district.¹ It contains grades kindergarten through 12 and has 6700 students enrolled in ten elementary schools, one primary special education school, two middle schools and one high school. The majority of students are African-Americans and Latinos with a small number of Caucasians and Asians. The Board employs several hundred employees. The majority of the teachers employed are white.

2. Prior to her employment with the District, Bruder owned and operated the Colonial Hill Learning Center, a day care/nursery school in Westfield, New Jersey, for twenty-three years. She also taught pre-kindergarten, second and third grades and she has implemented a head start program in Long Branch, New Jersey. She has worked for the Roselle school system. Bruder's students were of many ethnic backgrounds.

3. In the 1990-91 school year petitioner received three teacher observations/evaluations and an annual evaluation. She was rated marginal in January 1991, unsatisfactory in March 1991, and unsatisfactory in May 1991. (J-6; J-9; J-12). The annual evaluation commended petitioner's ability to integrate several subjects into one lesson. The evaluator also determined that there was need for improvement in experimenting with the use of motivational tools and in planning programs to meet the individual needs and abilities of students. Additional areas of need for improvement included

creating a classroom environment conducive to learning, guiding the learning toward achievement of curriculum goals,

¹ See *N.J.S.A. 18A:7-D3*

creating a classroom environment conducive to learning, guiding the learning toward achievement of curriculum goals, developing reasonable rules of classroom behavior and procedures, assisting in upholding school rules, supervising behavior for the safety and well being of students, attempting to establish a positive relationship with other primary grade teachers assuming cooperation on their part, adherence to school procedures.

[J-13]

4. On April 29, 1991, the personnel committee notified petitioner that it would recommend that the Board not renew her contract for school year 1991-92. Petitioner appeared at the Board's meeting and persuaded the Board to renew her contract.

5. On June 19, 1991, the Board voted to withhold petitioner's salary increment for the 1991-92 school year for the following reasons: unsatisfactory teaching performance; inability to develop effective and appropriate teaching strategies; ineffective classroom organization and management skills; poor classroom discipline and control. The Board considered the withholding of increment as potential recommendation for termination of employment. (J-15).

6. In the 1991-92 school year, Bruder had three teacher observations/evaluations. She was rated satisfactory in November 1991; January 1992, and March 1992.

7. Petitioner had been absent sixty-six days from the date of her initial employment, January 2, 1991, to March 31, 1993.

8. On March 25, 1993, during Bruder's third year of consecutive employment, the Board served notice that it would discuss her nonrenewal of employment at its meeting on March 31, 1993.

9. On March 31, 1993, petitioner and her attorney addressed the Board about her contract renewal. Also, parents and staff spoke in support of and against petitioner's contract renewal. The Board then voted that it would not renew her contract for the 1993-94 school year. (J-49).

10 On April 5, 1993, the Board notified petitioner that it would not offer her a contract of employment for the 1993-94 school year. (J-34).

11. On April 20, 1993, petitioner requested a written statement of reasons for non-reemployment. (J-35).

12. On April 27, 1993, Eloise Bryant Tinley, supervisor of personnel set forth the following reasons for the recommendation of nonrenewal:

Unsatisfactory teaching performance as evidenced by your;
-failure to establish, implement and maintain a
consistent discipline plan
-failure to establish classroom routines and procedures
-poor organizational skills
-ineffective planning and preparation
-unsatisfactory attendance

[J-36]

13. On April 30, 1993, petitioner requested an informal appearance before the Board which was scheduled for June 29, 1993.

14. On May 24, 1993, Bruder filed an appeal before the Commissioner.

15. At the request of petitioner's attorney, the parties agreed to adjourn the June 29, informal appearance before the Board. The informal appearance was not rescheduled.

DISCUSSION AND CONCLUSIONS

I

Petitioner's appeal from the Board's decision not to renew her employment contract includes allegations under the Law Against Discrimination (LAD). The school board has discretion to deny continued employment to its nontenured teachers provided the decision is not based on age, sex, race, religion, handicap, national origin or ethnic background. *Gilchrist v. Board of Ed. of Borough of Handdonfield, Camden County*, 155 N.J. Super. 358 (App. Div. 1978). The Department of Education has concurrent jurisdiction with the Division of Civil Rights to entertain the complaint. *Hinfey v. Matawan Regional Board of Ed.*, 77 N.J. 514 (1978).

Proof of discriminatory discharge requires the petitioner to establish a prima facie case by showing that she belongs to a protected class, she was qualified for the job, despite her qualifications she was terminated and that employees outside the protected class were more favorably treated. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), *Goodman v. London metal Exchange, Inc.* 86 N.J. 19, 30 (1981). To rebut the presumption of intentional discrimination, the burden of production shifts to the employer who must articulate, not prove, "some legitimate, nondiscriminatory reason" for petitioner's termination. Once the employer has articulated reasons for his decision, it is the employee's burden to prove that the employer's reasons are not true reasons but only pretexts. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 253-54, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

Employment discrimination is often difficult to prove. The ultimate issue in a disparate treatment complaint is whether the employer intentionally discriminated against the employee. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983). Most disparate treatment cases are determined on whether the employer's

reasons are pretextual. *Thornbrough v. Columbus and Greenville Railroad Co.*, 760 F.2d. 633 (3d Cir. 1985). In *Thornbrough*, the Court stated that:

Often, motivation and intent can only be proved through circumstantial evidence; determination regarding motivation and intent depend on complicated inferences from the evidence and are therefore peculiarly within the province of the factfinder.

[*Thornbrough v. Columbus and Greenville Railroad Co.*, at 641]

I have carefully observed the testimony and demeanor of Bruder, Tinley and Williams. Each appeared confident and strong-minded. I am convinced by their professional experiences and accomplishments that they are dedicated educators. Bruder had been the chief administrator of her own pre-school for many years. She described herself as a “[p]ersuasive, analytical and ambitious professional. . . . Bright, persistent and resourceful team-player, . . . Quietly assertive leader and persuasive negotiator who thrives on pressure. Possesses outstanding communication and excellent interpersonal skills.” J-103. Bruder, Tinley and Williams were authoritative figures and they each had formed opinions on matters concerning how to best educate children. Their opinions on some school matters differed. They also formed perceptions about each other based on how each viewed the other’s conduct. For example, at her job interview Bruder refused to take the basic skills test. Outside her office, Tinley overheard Bruder voice her objections to the secretary and inquired about the commotion. Bruder appeared annoyed. Notwithstanding Board policy, Bruder who had taught for many years questioned Tinley why the requirement applied to her. They continued with the interview and discussed Bruder’s background. Bruder sensed hostility from Tinley. She could not believe that Tinley would recommend her to Williams to hire her.

On the other hand, Bruder believes that Williams was “absolutely thrilled” with her background. She also believes that Williams’ later comments and attitude towards her were discriminatory. Bruder recalled Williams’ remarks,

such as: "This is Plainfield, not Springfield. This is a poor, inner-city school. These kids don't have anything...all they have is us...and we're doing the best we can and you're just used to a different kind of school."

Williams' comments were consistent with Tinley's description of the students and her perception of their needs. Many children in the Plainfield school district are economically and socially deprived. They had few cultural experiences and overall, they lacked exposure to music, art and literature. Further, I am persuaded by the testimony that Tinley and Williams were committed to offer the students more than an educational program needed to compete in the labor market. They believed that the children from poor working parents and AFDC families, like children from middle-upper class families, should have the opportunity to participate fully in society and articulate their views on music, art, and literature. They recognized, however, that these children had different needs that must be supplied, in large part by the teacher. When Tinley openly expressed her view on the socio-economic differences between the children from Plainfield and the children from affluent communities, Bruder perceived her attitude as hostile. She also concluded that Tinley did not like her. Williams made similar statements comparing Plainfield with affluent communities such as Springfield. Bruder perceived her attitude as hostile and discriminatory too.

In *Abbott v. Burke*, 119 N.J. 287, 363 (1990), the New Jersey Supreme Court acknowledged the glaring difference between public schools in poor districts and public school in affluent districts. Many school facilities in poor urban districts are poorly maintained and do not provide an environment in which children can learn. In contrast, "most schools in richer suburban districts are newer, cleaner, and safer. They provide an environment conducive to learning. They have sufficient space to accommodate the children's needs now and in the future." *Id.* at 363. The Court further announced that:

[T]here is solid agreement on the basic proposition that conventional education is totally inadequate to address the special problems of the urban poor. Something quite different is needed, something that deals not only with reading, writing and arithmetic, but the environment that shapes these students' lives and determines their educational needs.

[*Abbott v. Burke, supra*, 119 N.J. at 372.]

The Court also noted that students in poorer school districts often lack close family ties, community support, and positive role models; support networks readily available to students in richer school districts. *Id.* at 369.

I am persuaded that Tinley tried to close the disparity by hiring applicants with good teaching skills and certain life skills necessary to relate to the economically and socially deprived children who lived in the Plainfield school district. Indeed, “[p]oorer students need a special supportive educational effort in order to give them a chance to succeed as citizens and workers. Their educational needs are often dramatically different from those of students in affluent districts.” *Id.* at 302 (1990). Thus, Tinley had a legitimate concern about Bruder’s socio-economic background and whether she would supplement the children’s educational development. Tinley’s interest in Bruder’s ability to relate to the children was not unreasonable or unimportant.

Once hired, the Board had a continuing responsibility to determine if Bruder met its expectations before it granted her tenure. Indeed, the Board had broad discretion to decide who will teach its children. *Dore v. Bedminster Township Board of Education*, 185 N.J. Super. 447, 452 (App. Div. 1982). That decision may be based on criticisms not contained in formal evaluations pursuant to N.J.S.A. 18A:27-3.1 and N.J.A.C. 6:3-1.19, the implementing regulations. The board may reach its conclusion about a nontenured teacher “on a broad base of input received from a variety of people, including members of the public, parents of students and a board member’s own knowledge of a teacher even if that knowledge is acquired through having a child in the

teacher's class." *Id.* at 454. Observations of the board's employees, the personnel director and the building principal may also be considered. On the matter of tenure, the Board had virtually unlimited discretion to terminate a nontenured teacher.

[A]bsent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board.

[*Dore v. Bedminster Township Board of Education, supra*, 185 N.J. Super. at 456].

It is within this context that I have evaluated the conduct claimed by Bruder to be discriminatory. Discriminatory conduct must be determined from the totality of the circumstances. The mere use of ethnic slurs in casual conversation is insufficient to constitute discrimination; but a working environment dominated by racial slurs does suffice.

In considering whether there was a hostile work environment, one must not consider individual incidents in isolation, but rather must look at the overall scenario, considering not only the frequency of the offending conduct but also its gravity.

[*Dickerson v. State of New Jersey Dept. of Human Services*, 767 F. Supp. 605, 615 (D.N.J. 1991)].

Petitioner's witness, Janet Banks conceded that she has never heard Williams make discriminatory statements about Bruder. However, she believed that Williams made statements to "faculty members" about Bruder's fur coat, teaching abilities and that Bruder "did not belong in Plainfield." Under cross examination, she conceded that she did not know if the faculty member heard the statements from Williams or another person. Consequently, Banks' testimony lacks sufficient reliability to impute to Williams the alleged discriminatory statements. I am also mindful that Banks has filed a sexual harassment complaint against Williams. I am persuaded that Banks' testimony is influenced by the litigation pending between the parties.

On the other hand, Cohen and Burgman are former teachers who are no longer under Williams' administration. Neither Cohen or Burgman observed Williams make any discriminatory remarks or aspersions against Bruder; nor were they aware that she made disparaging comments about other employees' race or religion. Current employee, Fern Litwak is white and Jewish. She taught in Plainfield from 1973 to 1979. She returned in 1987. Williams has always accommodated her request to observe religious holidays. She has also observed Williams daily and has not experienced any improper conduct based on discrimination.

I have also considered the disputed testimony about Tinley's statement on March 31, 1993, at the Board meeting. Diane Sylvester is employed by the New Jersey Education Association and has attended many Board meetings. She has also participated in several contract negotiations with Tinley and observed her at many business meetings. Sylvester observed Tinley's and Bruder's presentation regarding Bruder's renewal. Sylvester perceived Tinley's remark, "this is not Springfield; this is Plainfield," as discriminatory because Springfield has a predominately Jewish population. Further, the statement had no relationship to the context of Tinley's presentation. She did not recall, however, whether Bruder spoke about Springfield during her presentation. Sylvester has never witnessed Tinley make any discriminatory remarks towards any other person. Sylvester's familiarity with the Springfield demographics and her observation of the presentation led her to conclude that the statement was directed at Bruder's race and religion.

On the other hand, Tinley maintained that her remarks about the communities of Plainfield and Springfield were in response to Bruder's assertion that "in Springfield no one worried about students' test scores." From the moment that they met, Tinley disclosed her strong reservations about Bruder's

ability to relate to the children in Plainfield. Her doubts were based on the notion that the children who attended Bruder's preschool were from middle-upper income families. She also believed that their needs were very different from the educational needs of Plainfield school children from low income families. The difference was a matter of wealth and social environment, not race or religion. Notwithstanding her skepticism and the real or perceived mutual animosity, Tinley referred Bruder to Williams for a second interview.

Sylvester and Tinley each gave straightforward but conflicting testimony. I am persuaded by the evidence that Tinley's statement was directed at Bruder's socio-economic status, not her race and religion.

[T]he term "burden of proof" refers to the "burden of persuasion"... The burden of persuasion entails more than merely producing evidence which would tend to put the court's mind in a state of equilibrium with respect to whether a certain fact exists or not and if, at the close of the evidence, this is the situation, then the decision must go against the party who has the burden of persuasion on the particular issue in question.

[*Johnson v. Barton*, 251 F. Supp. 474, 476 (W.D. Va 1966).]

Donald Frank presented credible testimony on his method of evaluating teachers. He weighed the teacher's cumulative assessments, not merely the evaluation of one day's performance. He recognized that although some teachers may perform well on one day, this is not reflective of their overall ability. Conversely, the poor performance of a teacher on one day does not necessarily reflect her teaching ability. Thus, Frank made formal and informal observations and he rated the teacher on her cumulative performances.

Bruder began teaching at Emerson in mid-year. Frank observed her performance and rated her once as marginal and twice as unsatisfactory. The following year she was evaluated once by Mr. Dentino and twice by Frank; she received three satisfactory evaluations, with suggestions for improvement. I am persuaded that Frank evaluated Bruder's performance as he did all teachers.

His decisions were based on Bruder's performance in the classroom, not her race or religion.

Bruder was absent 66 days from the day she began working to March 31, 1993. Thus, respondent had legitimate concerns about Bruder's attendance record each year of her employment. (J-31, J-36, J-40, J-41-J-42, J-4). Excessive absenteeism can interfere with the continuity of instruction for students and the efficient operation of schools. Notwithstanding legitimate excuses, high absenteeism is sufficient grounds for disciplinary action in tenure matters. In nontenure cases, "[p]rior absences certainly can be used as a predictor of future patterns of absences which may come forward." *Costanzo v Board of Ed. of the City of Rahway, Union County*, 93 N.J.A.R. 2d (Vol. 4B) 654, 661 (Dept. of Education).

Based on the whole of the record, I **CONCLUDE** that petitioner failed to prove that the Board's articulated reasons for not renewing her contract were pretexts. I further **CONCLUDE** that the Board properly exercised its discretionary authority to not reemploy Bruder, and its decision was not motivated by improper racial and religious reasons. Additionally, I **CONCLUDE** that petitioner was not subjected to disparate treatment or harassment based on race or religion. I **CONCLUDE** that the Board's decision for nonrenewal was based on classroom performance and excessive absenteeism.

II

Petitioner alleges that she was denied procedural due process to appear before the Board about the nonrenewal of her contract. On March 19, 1993, Bruder requested permission to speak at the public session of the Board's meeting on March 23, 1993. The meeting was rescheduled to March 31, 1993, and Bruder addressed the Board on that date. On April 5, the Board served

Bruder notice of the nonrenewal. On April 15, she request a written statement of reasons for its decision. The Board responded on April 27, 1993. On May 3, 1993, Bruder again requested permission to informally address the Board about her employment. The Board's meeting was scheduled on June 29, 1993, ten days beyond the thirty day time period. Bruder did not appear before the Board because she had filed her petition before the Commissioner.

Petitioner's argument that the Board's failure to timely set the date for her appearance constituted a denial of procedural due process is without merit. *N.J.A.C. 6:3-4.2* sets forth the procedure which allows the nontenured teacher to appear before the school board upon receipt of notice of nonreappointment. Informal appearances "shall be scheduled within 30 calendar days from receipt of the board's statement of reasons." *N.J.A.C. 6:3-4.2(b)*. Although the Board failed to respond within 30 days, I reject petitioner's assertion that the procedural deficiency denied her due process. "A lack of strict compliance with the regulation should not necessarily be read to convey an immediate right to be rehired to the petitioner." *Costanzo v Board of Ed. of the City of Rahway, Union County, supra*, 93 *N.J.A.R. 2d* at 661. Bruder addressed the Board on March 31 and tried to convince the members to reemploy her. She then requested another meeting after receiving the written reasons for the decision of nonrenewal. Bruder decided not to appear again because she had filed her petition before the Commissioner. Moreover, the proceeding before the OAL served to remedy any defects caused by Bruder's denial to informally appear before the Board on June 29, 1993. See *In re Darcy*, 114 *N.J. Super.* 454. (App. Div. 1971).

I **CONCLUDE** that the Board did not violate petitioner's procedural due process rights.

The final issue is whether the Board can terminate petitioner while she was on workers' compensation disability leave. Petitioner alleges that the Board acted improperly and illegally in failing to renew her contract when she was on workers' compensation disability. Petitioner's relies on *Kletzkin v. Bd. of Educ. of the Boro. of Spotswood*, 136 N.J. 275 (1994).

Petitioner's reliance on *Kletzkin* is not supported by the facts. In *Kletzkin*, the Court held that employment includes periods of sick leave and that a teaching staff member may acquire tenure while on a leave of absence because of a work related injury. *Kletzkin* began employment in the school district in January 1986. She was reemployed for the 1987-88 and 1988-89 school years. In November 1988, a work related injury resulted in a leave of absence. *Kletzkin* acquired tenure on January 14, 1989. On April 11, 1989, three months after she acquired tenure, the board terminated her employment. Thus, the termination violated her tenure rights. *Kletzkin* at 279.

Bruder began employment on January 2, 1991. The Board renewed her employment for the 1991-1992 and 1992-93 school year. On December 14, 1992, she was awarded an involuntary sick leave after she was injured on school property. On March 31, 1993, petitioner's contract was not renewed. Bruder would have acquired tenure in January 1994. See *N.J.S.A. 18A:28-5*. In *Kletzkin* the board terminated the petitioner after she acquired tenure, and thus violated her tenure rights. In this matter, the Board terminated Bruder in March 1993, well before she would have acquired tenure in January 1994.

The board has discretionary power and authority to terminate a teacher on disability leave if the board gives timely notice of its decision, and the board's reason is not discriminatory or in retaliation to the teacher's workers' compensation claim. Petitioner's contract was not renewed March 31, 1993. *N.J.S.A. 18A:27-10* provides that on or before May 15 in each year, the board

shall give each nontenured staff member written notice that employment for the succeeding year will not be offered. The board's failure to give timely notice of termination shall be deemed to be an offer of continued employment for the succeeding year *N.J.S.A. 18A:27-11*. Timely notice of termination precludes tenure. See *Winston v. State-Operated School District of Jersey City*, 94 *N.J.A.R. 2d*. (Vol. 4B) 44 (Dept. of Education). Here, the Board's notice of termination on March 31, 1993, was timely.

Based on the above, I **CONCLUDE** that the Board properly exercised its authority to terminate Bruder's employment while she was on a work related disability leave by giving her timely notice of termination on March 31, 1993, and prior to the date she would have acquired tenure in January 1994. I further **CONCLUDE** for the reasons discussed that the Board's action on March 31, 1993, was not based on improper discriminatory motives.

ORDER

It is **ORDERED** that the petition of Marilyn Bruder be and hereby is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 17, 1995
DATE

Mumtaz Bari Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

Feb 23, 1995
DATE

Ther R Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

Jeff J. Mann
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 28 1995

DATE

OFFICE OF ADMINISTRATIVE
LAW

cb

APPENDIX

Witnesses

For Petitioner:

Marilyn Bruder
Thomas Falocco
Janet Banks
Diane Sylvester
Doris Priester
Kimberly Ann Casey Bailey

For Respondent.

Eloise Bryant Tinley
Doris Williams
Donald Frank
Sonja Anderson
Fern Litwak
Marjorie Cohen
Judy Bergmann
Frances Stromsland
Nancy Tortorici-Dunham

Exhibits

- J-1 Stipulation of Facts - 2 pages
- J-2 Letter to Bruder from Tinley, dated December 20, 1990
- J-3 Page One Personnel Committee Agenda, dated January 8, 1991
- J-4 Employment Contract - For Certified Employees - Non-Tenure, 1990-1991
- J-5 Salary Adjustment Statement, dated January 17, 1991
- J-6 Teacher Observation Form dated, January 31, 1991 - 3 pages
- J-7 Letter to Bruder from Tinley, dated February 5, 1991

- J-8 Board of Education Payment Voucher, dated February 13, 1991
- J-9 Teacher Observation Form, dated March 26, 1991 - 5 pages including reply
- J-10 Summary of Attendance Conference-Form A, dated April 8, 1991
- J-11 Letter to Bruder from Tinley, dated April 29, 1991
- J-12 Teacher Observation Form, dated May 3, 1991 - 3 pages
- J-13 Annual Summary Evaluation, dated June 1991 - 3 pages
- J-14 Letter to Bruder from Tinley, dated June 3, 1991
- J-15 Letter to Bruder from Tinley, dated June 19, 1991
- J-16 Letter to Bruder from Tinley, dated August 13, 1991
- J-17 Teacher Observation Form, dated November 4, 1991 - 4 pages
- J-18 Teacher Observation Form, dated January 23, 1992 - 3 pages
- J-19 Teacher Observation Form, dated March 20, 1992 - 3 pages
- J-20 Notice to Nontenured Certificated Personnel, dated April 27, 1992
- J-21 Notice to Nontenured Certificated Personnel - completed form, dated April 27, 1992
- J-22 Notice of Employment to Bruder from Tinley, dated June 17, 1992
- J-23 Letter from to D. Williams from Bruder, dated June 22, 1992
- J-24 Cover Letter dated June 23, 1992, with attached Annual Summary Evaluation
- J-25 Memorandum to Bruder from Tinley with 2-page attachment, dated October 23, 1992
- J-26 Memorandum to Frank from Bruder, dated November 19, 1992
- J-27 Teacher Observation Form, dated November 12, 1992 - 9 pages

- J-28 Teacher Observation Form dated January 8, 1993 - 8 pages
- J-29 Memorandum to D. Williams from D. Frank, dated January 20, 1993
- J-30 Notice for Non-Renewal of Contract, dated February 24, 1992
- J-31 Personnel Action Data Sheet, dated February 26, 1993
- J-32 Letter to Ottmann from Bruder, dated March 19, 1993
- J-33 Letter to Barrett from King, dated March 24, 1993
- J-34 Letter to Bruder from Tinley, dated April 5, 1993
- J-35 Letter to Tinley from Barrett, dated April 20, 1993
- J-36 Letter to Bruder from Tinley, dated April 27, 1993
- J-37 Letter to Tinley from Barrett, dated April 29, 1993
- J-38 Letter to Barrett from Gary Ottmann, dated April 30, 1993
- J-39 Letter to BOE City of Plainfield from Bruder, dated April 30, 1993
- J-40 Bruder's Attendance Record 1990-1991
- J-41 Bruder's Attendance Record 1991-1992
- J-42 Bruder's Attendance Record 1992-1993
- J-43 Letter to Bruder from Tinley, dated April 23, 1992
- J-44 Letter to King from Tinley, dated August 24, 1994
- J-45 Chart of Evaluation Records, dated August 4, 1994
- J-46 Chart with Names of Individuals in Evaluation Records (undated)
- J-47 Letter to King from Tinley with 6-page attachment dated, April 5, 1993
- J-48 Certified Resolution of the Board dated March 31, 1993

- J-49 Minutes of the Board's Business Meeting held on March 31, 1993
- J-50 Agenda for Business Meeting on March 31, 1993
- J-51 Letter to Barrett from King, dated March 24, 1993
- J-52 Letter to Honorable Kenneth Springer, ALJ from B. Hunter, dated August 27, 1992
- J-53 Petition of Appeal, dated August 23, 1991
- J-54 Notice of Withdrawal, OAL Dkt. No. EDU 9411-91
- J-55 Note to Mrs. Bruder from D. Williams, dated October 16, 1992
- J-56 Memorandum to Bruder from D. Frank, dated September 30, 1992
- J-57 Memorandum to Mrs. Bruder from D. Frank, dated October 30, 1992
- J-58 Memorandum to Mrs. Bruder from D. Frank, dated February 24, 1993
- J-59 Memorandum to Bruder from A. Kearney, dated January 19, 1993
- J-60 Note to Bruder from D. Williams, dated October 19, 1992
- J-61 Two-page Letter from parent Mrs. Carter (undated)
- J-62 Card to Marilyn, Warren and Family from "Helen and Eli"
- J-63 Note from Art Teacher Janet Banks (undated)
- J-64 Letter from Mrs. Richardson, dated March 23, 1993
- J-65 Letter from Mrs. Patricia M. and John L. Holmes, dated May 1, 1991
- J-66 Letter from Mr. and Mrs. Monte Wise, dated May 7, 1991
- J-67 Letter from David and Annette Grubbs, dated May 5, 1991
- J-68 Memorandum to Plainfield BOE from Sonseeahray McLaughin

(undated)

- J-69 Letter to Plainfield BOE from Charlotte Hammond dated May 7, 1991
- J-70 Letter from parent Mrs. Carter, dated May 7, 1991
- J-71 Letter from Carmen Estremera (undated)
- J-72 Letter from Mr. Williams, dated May 1, 1991
- J-73 Letter from parent Mrs. Herb Joseph, dated May 1, 1991
- J-74 Letter from a parent unnamed and undated
- J-75 Note from Mr. Frank Livelle, dated May 1, 1991
- J-76 Note from Mr. and Mrs. Wendell Phillips (undated)
- J-77 Memorandum to Mrs. Williams from Mrs. Bruder, dated October 21, 1992
- J-78 Memorandum to Mrs. Williams from Mrs. Bruder, dated October 21, 1992
- J-79 Memorandum to Mrs. Williams from Mrs. Bruder, dated October 14, 1992 (re: fire drill)
- J-79a Memorandum to Mrs. Williams from Mrs. Bruder, dated October 14, 1992 (re: request for meeting)
- J-80 Memorandum to Mrs. Williams from Mrs. Bruder, dated October 14, 1992
- J-81 Memorandum to Mrs. Williams from Mrs. Bruder, dated October 14, 1992
- J-82 Memorandum to Mr. Frank from Mrs. Bruder, dated October 14, 1992
- J-83 Memorandum to Bruder from D. Frank, dated October 19, 1992
- J-84 Memorandum to Mrs. Williams from Mrs. Bruder, dated October 14, 1992

- J-85 Memorandum to Mrs. Bruder from Mrs. Williams, dated November 22, 1991
- J-86 Five-pages of notes from Mrs. Bruder (undated)
- J-87 Policy on Grievance Procedure - Title IX amended April 26, 1988
- J-88 Ten-page letter from Mr. and Mrs. Wendell & Shirley Phillips (undated)
- J-89 Six-page Letter from Leona D. Bush, dated October 22, 1992
- J-90 Letter to Ms. D. Williams from Patricia McLaughlin-Taylor, dated October 27, 1992
- J-91 Letter to Mrs. Williams from Janice Mitchell, dated January 25, 1993
- J-92 School Calendars dated: 1989-1990, 1990-1991, 1991-1992, 1992-1993, 1993-1994 and 1994-1995
- J-93 Memorandum to D. Kearney from D. Williams, dated January 7, 1992
- J-94 Employer's First Report of Accidental Injury or Occupational Illness dated December 14-15, 1992
- J-95 Order Division of Worker's Compensation, C.P. No. 93-008911 dated October 13, 1993
- J-96 Copy of Employer's First Report of Accidental Injury or Occupational Illness (includes additional information in box #27) dated December 14 -15, 1992
- J-97 Note to Anne Patty from D. Williams with attachment dated December 21, 1992
- J-98 Muhlenberg Regional Medical Center - Emergency Department General Information Sheet on Contusions (Bruises) dated December 14, 1992
- J-99 Muhlenberg Regional Medical Center - Emergency Department General Information Sheet on Sprains and Strains dated December 14, 1992

- J-100 Letter to Bruder from Raymond Wichowski, Administrator for Re-Insured Workers' Compensation Program for the Plainfield Board of Education dated January 28, 1993
- J-101 Application for Disability Benefits with attachment dated December 14, 1992
- J-102 Three-page Letter to Mrs. Williams from Mrs. Diane Gibbs dated June 20, 1991
- J-103 Resume of Marilyn Bruder
- J-104 Plainfield Public Schools Workshop on Affirmative Action Attendance Form dated December 7, 1992
- J-105 Emerson School Sign-In/Sign Out-Sheet dated September 30, 1991 with attachment
- J-106 Emerson School Equal Educational Opportunity/Affirmative Compliance Action Checklist with attachment dated November 13, 1991
- J-107 Plainfield Public Schools Candidate Interview Form re: Bruder dated December 11, 1990
- J-108 Collective Bargaining Agreement Booklet for Plainfield BOE 1992-1995
- J-109 Memorandum to A. Kearney from D. Williams regarding Marilyn Bruder dated March 16, 1993
- R-1 Not in Evidence
- R-2 Class Summary Sheet , Class #203 AM
- R-3 Class Summary Sheet, Class #203 PM
- R-4 Class Summary Sheet, Class: Kindergarten AM
- R-5 Class Summary Sheet, Class: Kindergarten PM
- R-6 Mrs. Tortorici-Dunham, 1990-1991 Class Sheet AM
- R-7 Mrs. Tortorici-Dunham, 1990-1991 Class Sheet PM

- R-8 ADK, 1990-1991 Class Sheet
- R-9 Test Schedule for Developmental Tasks for Kindergarten Readiness
- R-10 School Resource Committee Information Handbook, 1991-1992
- R-11 Pupil Assistance Committee Information Handbook, 1994-1995
- R-12 Plainfield Public Schools School Resource Committee Intevention Packet, 1991-1992

MARILYN BRUDER, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE CITY : DECISION
 OF PLAINFIELD, UNION COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions were timely filed by petitioner and the Board in accordance with N.J.A.C. 1:1-18.4.

Petitioner excepts to the Administrative Law Judge's (ALJ) conclusion that petitioner failed to prove the Board's reasons for not renewing her contract were merely pretextual, in that she was a victim of racial and religious discrimination who was subjected to harassment in her workplace. Petitioner asserts there was ample evidence adduced at trial to support these claims. Petitioner additionally excepts to the ALJ's finding that the Board did not violate her due process rights in failing to timely set the date for petitioner's informal Board appearance, in accordance with N.J.A.C. 6:3-4.2. Finally, petitioner excepts to the ALJ's conclusion that the Board properly exercised its authority to terminate petitioner's employment, while she was on work-related disability leave, by

giving her timely notice of nonrenewal. Inasmuch as each of these issues was fairly addressed and considered by the ALJ, the Commissioner does not further explicate the position of petitioner.

The Board urges that the ALJ's factual findings and conclusions of law be adopted by the Commissioner.

Upon careful and independent review of the record in this matter, which included the transcript of proceedings at OAL, the Commissioner concurs with and adopts as his own the initial decision of OAL ordering dismissal of the petition herein. The Commissioner accepts the credibility determinations of the ALJ, and concurs that petitioner has failed to prove that the Board's decision not to renew her contract was based on racial and religious discrimination, or that she was subjected to harassment and differential treatment in the workplace. As to the procedural deficiencies claimed by petitioner, the Commissioner agrees that the Board's actions did not constitute a violation of petitioner's due process rights.


Finally, the Commissioner determines that the Board properly exercised its authority to terminate petitioner's employment, notwithstanding that she was on disability leave, by serving her with timely notice pursuant to N.J.S.A. 18A:27-10, and that said determination puts to rest petitioner's claim that she is entitled to back pay pursuant to N.J.S.A. 18A:30-2.1.

Accordingly, the Commissioner adopts the initial decision of OAL dismissing the petition for the reasons expressed therein.

IT IS SO ORDERED.

APRIL 5, 1995

DATE OF MAILING APRIL 5, 1995


COMMISSIONER OF EDUCATION

EDU #8313-93
C # 110-95
SB # 57-95

MARILYN BRUDER, :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE CITY : DECISION
OF PLAINFIELD, UNION COUNTY, :

RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, April 5, 1995

For the Petitioner-Appellant, Bergman & Barrett
(Michael T. Barrett, Esq., of Counsel)

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

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

August 2, 1995

Date of mailing AUG 04 1995

PHYLLIS SPINELLI AND	:	
INES GARCIA KEIM,	:	
	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	
	:	DECISION
BOARD OF EDUCATION OF THE	:	
CITY OF HOBOKEN AND ANTHONY	:	
CURKO, BOARD SECRETARY,	:	
HUDSON COUNTY,	:	
	:	
RESPONDENTS.	:	
_____	:	

SYNOPSIS

Petitioners appealed action of Board Secretary to compel printing of their names on the ballot for the annual school election in the manner in which those names were listed on petitioners' voter registration forms, notwithstanding that petitioners had duly submitted valid nominating petitions using other forms of their names.

ALJ found that petitioners desired to use given, family or married names and that there was no intent to defraud or deceive the voters or otherwise engage in subterfuge. ALJ found Board Secretary exceeded his authority in attempting to compel petitioners to seek Board membership under the names appearing on their voter registration forms and enjoined action to print petitioners' names on the ballot in any manner other than that given on their nominating petitions.

Commissioner affirmed findings and determination of initial decision, clarifying ALJ's comments on the role of the Board Secretary in election matters.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL DECISION ON MOTION
FOR EMERGENT RELIEF

PHYLLIS SPINELLI,
Petitioner,

OAL DKT. NO. EDU 3245-95
AGENCY DKT. NO. 55-3/95

v.

**ANTHONY M. CURKO, BOARD
SECRETARY, BOARD OF EDUCATION
OF THE CITY OF HOBOKEN,
HUDSON COUNTY,**
Respondent.

INES GARCIA KEIM,
Petitioner,

OAL DKT. NO. EDU 3246-95
AGENCY DKT. NO. 56-3/95

v.

**ANTHONY M. CURKO, BOARD
SECRETARY, BOARD OF EDUCATION
OF THE CITY OF HOBOKEN,
HUDSON COUNTY,**
Respondent.

Gerald Krovatin, Esq., for petitioners

John O'Donnell, Esq., for respondent
(O'Donnell, Kennedy, Vespole, Piechta & Trifolius, attorneys)

Record Closed: April 3, 1995

Decided: April 3, 1995

This is a transcript of the administrative law judge's oral decision on motion rendered pursuant to *N.J.A.C. 1:1-18.2*.

BEFORE JAMES A. OSPENSON, ALJ:

I have listened to arguments in support of and in opposition to petitioners' motion for immediate emergent relief or mandatory injunction, if you will, preliminarily restraining . . . machine, absentee, military ballots to be accredited for the April 18, 1995 local school board election in the names of the two respective candidates, Spinelli and Keim, in any other form or manner than the form or manner in which their respective nominating petitions were presented to the Board secretary. There were stipulations here that the desire of petitioners to have their names presented to the electorate as those names appeared on their nominating petitions involved no intent to defraud, no deception, no subterfuge, simply the desire of each of them to go before the electorate as the same ones nominated for election or who served the Board before under those names. The parties have agreed, and I agree, there is no specific statute, regulation or Commissioner's decision that requires or permits the Board secretary in turn to compel nominees to go before the electorate only as their names appear on their voter registration as opposed to those names as they appear on their nominating petitions. The record is clear that in all other respects both petitioners are qualified to stand for election as to citizenship and residency, and of course there is no question the signatories on the nominating petitions are qualified themselves. To qualify, whether they are or whether they aren't, is a question not now before me. . . . Duties of the Board secretary in receiving petitions and directing preparation of the machine ballot are basically outlined in *N.J.S.A. 18A:14-10*. Once the Board secretary is satisfied as to names, residency and post office address, and once the Board secretary is satisfied as to qualifications of the petitioners, once he is satisfied the nominees are legally qualified to be elected to the office they would serve in, the Board secretary's duties essentially become ministerial in nature. That is to say, he has no residual duty to meet, nor is he required to make any [subjective] judgment as to whether the difference in names that are on the nominating petition and the voter registration would

foster confusion, or whether the differences of names would represent a chance there would not be a fair and impartial election. I think it would be presumptuous of the Board secretary to take upon himself, given statute, regulations and decisional authority, that sort of monitoring function. I think it represents a form of discretion that was not intended by the Legislature that he keep or possess, because the counter argument can be made that while he exercised such a subjective discretion that itself would perhaps risk the fairness, the impartiality of the election. I am impressed on this record that there is, again, no fraud, no deception, no subterfuge, no allegation of an intent to deceive the electorate or anybody else. I'm impressed that the names under which these petitioners seek to stand for election are actual names, that is to say, either given names or family names or married names. There is no alias here. I believe that each one of these petitioners has a right to stand for election under that form of their respective names as they see fit to stand before the electorate. Because I think the duties of the Board secretary are ministerial in nature, I think that any attempt to broaden his powers to make a personal inquiry as to whether or not the legitimate use of names such as here would risk or represent a danger to a fair and impartial election itself becomes an interference with the electoral process and that should not be. Counsel said no one has a constitutional right to run for office. . . . But I certainly think that it's a fundamental concept in a democracy that the citizen has a right to stand before the electorate for a particular office and that when someone does that, that someone has a right to do so as that person feels he or she is known. And so long as there is no attempt to deceive anyone, I think the choice has to be honored by the Board secretary in a case such as this. I am impressed that the effort here by these petitioners in seeking to stand for election as they want to stand for election is not an attempt to induce illegal votes to be cast and it's not an attempt to prevent legal votes from being cast. That's a familiar test in electoral matters in education law as I understand it, and it's important in one's attempting to construe what petitioners' obligations are and what their respective rights and duties are. I believe the motion to allow petitioners their emergent relief as demanded here satisfies the criteria and standards of the case of *Crowe v. DeGioia*, 90 N.J. 126 (1982). I am mindful that unless this matter is cleared up immediately there may be some risk as to whether or

not a judgment can be fulfilled because of the press of time and the need to have a decision entered so that the machine ballots as well as the other kinds of ballots can be printed in due season before election day. There will be judgments for the petitioners in the terms sought.

Mr. O'Donnell, did you have a chance to review the form of the order presented by Mr. Krovatin in his papers? . . .

END OF TRANSCRIPT, which has been edited as to form.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

I, Angela M. Robinson, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Ospenson's oral decision rendered in the above matter on April 3, 1995.

April 3, 1995
DATE

Angela M. Robinson
ANGELA M. ROBINSON

Receipt Acknowledged:

4/4/95
DATE

[Signature]
DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE
amr

OFFICE OF ADMINISTRATIVE LAW

RECEIVED
OFFICE OF ADMINISTRATIVE LAW
APR 3 1 06 PM '95

GERALD KROVATIN(GK4908)
PAUL F. CARVELLI(PC6079)
ANDREW E. ANSELMII(AA1768)
65 Livingston Avenue
Roseland, New Jersey 07068
(201) 992-8700
Attorneys for Petitioners
Phyllis Spinelli and
Inés García Keim

**BEFORE THE COMMISSIONER OF
EDUCATION OF NEW JERSEY**

PHYLLIS SPINELLI and
INÉS GARCÍA KEIM,

Petitioners,

v.

ANTHONY M. CURKO, Secretary of the
Hoboken Board of Education,

Respondent.

Office of Administrative Law

**ORDER FOR EMERGENT RELIEF
PURSUANT TO N.J.A.C. 6:24-1.5**

*DOAL DOCKET NO. EDU 3245-9
DOAL DOCKET EDU 3246-9
(CONSOLIDATED)
AGENCY DKTS NO. 55-3/95
NO. 56-3/95*

Administrative Law Judge

THIS MATTER having been opened to the ~~Commissioner of Education of New Jersey~~ *having referred the matter to the Office of Administrative Law, and the Director of the Bureau of Controversies and Disputes, New Jersey Department of Education, the Honorable James A. O'Spension, ALJ.* by Gerald Krovatin, Paul F. Carvelli and Andrew E. Anselmi, attorneys for petitioners Phyllis Spinelli and Inés García Keim (collectively, "Petitioner"), in the presence of John F. O'Donnell, Esq., attorneys for Respondent Anthony M. Curko, Secretary of the Hoboken Board of Education ("Curko"), and the Commissioner of Education of New Jersey, acting through the ~~Director of the Bureau of Controversies and Disputes, New Jersey Department of Education,~~ having considered the petitions and the supporting papers submitted and the oral arguments of

counsel, and having found good cause appearing for the relief requested;

IT IS ON THIS _____ day of March, 1995,

ORDERED that Respondent, Anthony M. Curko, Secretary of the Hoboken Board of Education, show cause at a hearing before the Director of the Bureau of Controversies and Disputes to occur prior to March 30, 1995, and more specifically at _____ o'clock in the _____ .m. on the _____ day of _____, 1995, or as soon thereafter as counsel may be heard, why an injunction should not be issued and an order be entered pursuant to N.J.A.C. 6:24-1.5 preliminarily and permanently enjoining and restraining Curko, his agents, employees, representatives or attorneys from printing or causing to be printed ballots for the April 18, 1995 Hoboken School Board Election that lists or names Spinelli or Garcia Keim as candidates in any form or manner other than that under which they were duly nominated by their respective petitions; and it is further

ORDERED that Curko shall, on or before _____, 1995, file and serve all memoranda, affidavits and exhibits in opposition to the instant Petitions for preliminary injunctive relief, and Petitioners may, on or before _____, 1995, serve any reply memoranda, affidavits and exhibits.

ORDER FOR EMERGENT INTERIM RELIEF

IT IS ~~FURTHER~~ **ORDERED** that pending the Commissioner's final determination, Curko, his agents, employees, representatives and attorneys, **BE** and hereby **ARE TEMPORARILY RESTRAINED AND ENJOINED** pursuant to N.J.A.C. 6:24-1.5, from printing or causing to be printed ballots for the April 18, 1995 Hoboken School Board Election that lists or names ^{Phyllis Inez} Spinelli or Garcia Keim as ~~a~~ candidates in any form or manner other than that under which they were duly nominated by their respective petitions; and it is further

~~**ORDERED** that valid service of this Order For Emergent Interim Relief, together with the Petitions and exhibits thereto upon which it has been granted, shall be accomplished upon counsel for Respondent, John F. O'Donnell, Esq., via telecopy and first class mail, and it is further~~

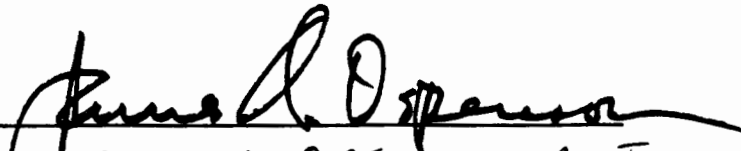
This order is entered pursuant and subject to NJAC 1:1-12.6 (h,i).

Findings and determinations made orally are adopted and included herein by reference. Certifications and documentation submitted are made part of the records on motion.

ORDERED that a true copy of this Order be served upon all counsel of record within 1 days from the date hereof.

SO ORDERED.

~~COMMISSIONER OF EDUCATION OF NEW JERSEY~~

By: 
~~_____~~ JAMES A. OPENSON, A.L.J.

PHYLLIS SPINELLI AND	:	
INES GARCIA KEIM,	:	
	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	
	:	DECISION
BOARD OF EDUCATION OF THE	:	
CITY OF HOBOKEN AND ANTHONY	:	
CURKO, BOARD SECRETARY,	:	
HUDSON COUNTY,	:	
	:	
RESPONDENTS.	:	
	:	

This matter was opened before the Commissioner of Education on March 20, 1995, through the filing of separate petitions of appeal, seeking, with respect to the ballot at the annual school election to be held on April 18, 1995, to have their names listed as candidates for Board membership as they had given them on their nominating petitions rather than as they are given on their voter registration records. Petitioners contend that there is no basis in law for respondents' insistence on using their names as they appear on petitioners' voter registration records, and that, even if there were, respondents' objections were raised too late to affect petitioners' candidacy.

Because the petitions involved identical questions of law and similar questions of material fact, they were consolidated for purposes of further proceedings herein. In order to obtain a decision prior to printing of ballots on or about April 5, 1995,

respondents filed an expedited answer on March 27, 1995, together with a Motion to Dismiss contending that their actions were both founded in law and timely taken. Petitioners' reply to this motion was filed on March 28, 1995. Upon review of the papers filed, the matter was transmitted to the Office of Administrative Law for hearing on an emergent basis, and an initial decision was issued on April 3, 1995 and filed with the Commissioner on April 4, 1995.

At hearing, it was stipulated that there was no intent on the part of petitioners to defraud, deceive or otherwise engage in subterfuge; rather, petitioners proposed to use names that were undisputedly actual names, that is, given names, family names or married names, not aliases or fictitious names. It was also stipulated that petitioners were qualified for candidacy and that such qualification was not at issue herein.

In the initial decision, the ALJ accepted petitioners' arguments as a matter of law, and having done so, did not reach to the question of whether any challenge to the form of petitioners' names was timely made, such determination being unnecessary in view of the legal conclusions drawn. In exceptions and replies to the ALJ's determination filed pursuant to N.J.A.C. 1:1-18.4 by respondents and petitioners, respectively, the arguments set forth in prior filings are referenced and briefly reiterated.

With respect to the central question of law raised by their claim, petitioners argue that the controlling statutes, specifically N.J.S.A. 18A:14-9 through 18A:14-12, confer on

respondents no authority to make a unilateral determination as to how candidates' names will appear on the ballot when they have been duly nominated by petition under the names by which they are commonly known in their personal, civic or professional capacities, notwithstanding that such names are not those appearing on their voter registration forms.

Respondents reply that candidates must certify that they meet the qualifications of Board membership set forth in N.J.S.A. 18A:12-1, including the requirement that they not be disqualified as voters pursuant to N.J.S.A. 19:4-1. That statute requires, among other things, that a person be "duly registered" in order to vote, and the court has held that a "qualified voter" is by definition a registered voter. Lesniak v. Budzash, 133 N.J. 1, 9 (1993) The official form for voter registration is found in N.J.S.A. 19:31-6.4, wherein it is required that the person's name be printed on the voter registration form, which includes a statement of the registrant's understanding that any false or fraudulent registration or attempted registration may subject the registrant to a fine, imprisonment or both. Thus, in order to register to vote, a person must certify that the name of registration is the person's true name. N.J.S.A. 19:31-3, 19:31-6 and 19:31-6.4 While petitioners argue that N.J.S.A. 18A:14-10 does not specifically require the name under which a person runs for board membership to be the same as that on the voter registration, to permit the result sought by petitioner would be contrary to common sense, and could open the nomination process to


all manner of abuse in the alteration, or even fabrication, of names so as to obtain some actual or perceived advantage on the ballot. Vittoria v. West Orange Board of Education, 122 N.J. Super. 340 (1973); State v. Toland, 123 N.J. Super. 286, 289 (App. Div. 1973)

Upon consideration of this matter, the Commissioner concurs with the conclusion of the ALJ that, in a situation such as is presented herein, there is no basis in law to compel a candidate's name to appear on the ballot for membership on a board of education in the manner in which it appears on his or her voter registration form. So long as there is no allegation of fraud, intent to deceive or use of fictitious or partisan name, and no question as to the identity of the candidate and his or her voter registration status for purposes of qualifying for board membership under N.J.S.A. 18A:12-1 and 18A:14-10, the Commissioner concurs that a candidate may choose to stand for election under the legitimate name of his or her choice notwithstanding that such name is not as given on the candidate's voter registration forms.

The Commissioner would, however, clarify that the ALJ's comments regarding the ministerial role of the Board Secretary, while appropriate in the context of a matter where there is no allegation of fraud, deception, misrepresentation or use of fictitious name, should not be construed as precluding a Secretary from taking further action as appropriate in situations where such allegations have been raised.

Accordingly, the initial decision of the Office of Administrative Law granting judgment to petitioners is affirmed for the reasons expressed therein as clarified above. Consequently, the Board is directed to print petitioners' names on the ballots for the 1995 annual school election in the School District of the City of Hoboken in the manner in which they appeared on petitioners' duly filed nominating petitions.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

APRIL 5, 1995
DATE OF MAILING APRIL 5, 1995

113-95


DAVID CLARK,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWN-	:	DECISION
SHIP OF NEPTUNE, MONMOUTH COUNTY,	:	
	:	
RESPONDENT.	:	
	:	
_____	:	

APRIL 7, 1995

DAVID CLARK, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN- : DECISION
SHIP OF NEPTUNE, MONMOUTH COUNTY,
RESPONDENT. :
_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

APRIL 7, 1995
DATE OF MAILING APRIL 7, 1995

114-95

DEBORAH ANN JENSEN, :

PETITIONER, :

V. :

NEW JERSEY STATE DEPARTMENT OF :

EDUCATION, STATE BOARD OF :

EXAMINERS, :

RESPONDENT. :


COMMISSIONER OF EDUCATION

DECISION

DEBORAH ANN JENSEN,	:	
	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
NEW JERSEY STATE DEPARTMENT OF	:	DECISION
EDUCATION, STATE BOARD OF	:	
EXAMINERS,	:	
	:	
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

APRIL 7, 1995

DATE OF MAILING APRIL 7, 1995

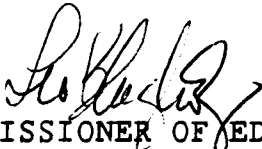
115-95

ROBERT W. GROOM,	:	
	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
NEW JERSEY STATE DEPARTMENT OF	:	DECISION
EDUCATION, STATE BOARD OF	:	
EXAMINERS,	:	
	:	
RESPONDENT .	:	
_____	:	

APRIL 7, 1995

ROBERT W. GROOM, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF : DECISION
EDUCATION, STATE BOARD OF :
EXAMINERS, :
RESPONDENT. :
_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.


COMMISSIONER OF EDUCATION

APRIL 7, 1995

DATE OF MAILING APRIL 7 1995

116-95

GLENN P. ODATO, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE BOROUGH :
 OF SOUTH RIVER, MIDDLESEX COUNTY, :

RESPONDENT. :


COMMISSIONER OF EDUCATION

DECISION

APRIL 7, 1995

GLENN P. ODATO, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH : DECISION
OF SOUTH RIVER, MIDDLESEX COUNTY, :
RESPONDENT. :
_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1-1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to a contested matter before the Commissioner and is dismissed with prejudice.


COMMISSIONER OF EDUCATION

117-95

MARY ELLEN ANDERSON, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

STATE OF NEW JERSEY, DEPARTMENT : DECISION

OF PERSONNEL AND THE STATE-

OPERATED SCHOOL DISTRICT OF :

JERSEY CITY, HUDSON COUNTY

RESPONDENTS. :

SYNOPSIS

Petitioning clerk/secretary alleged that she was terminated by the Board in violation of her tenure rights.

ALJ found that nonprofessional staff protected under Title 11 in school districts which have adopted the civil service law do not acquire separate tenure rights under Title 18A. Therefore, whatever employment rights petitioner possessed existed pursuant to the civil service law, rather than the education laws. ALJ ordered the petition pending before the Commissioner of Education dismissed for lack of jurisdiction.

Commissioner adopted findings and determination in initial decision as his own.

APRIL 10, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7006-94

AGENCY DKT. NO. 259-6/94

MARY ELLEN ANDERSON,

Petitioner,

v.

STATE OF NEW JERSEY,

DEPARTMENT OF PERSONNEL and

THE STATE-OPERATED SCHOOL

DISTRICT OF JERSEY CITY

Respondents.

Richard C. Leahey, Esq., for petitioner

June K. Forrest, Senior Deputy Attorney General, for respondent
New Jersey Department of Personnel
(Deborah T. Poritz, Attorney General of New Jersey, attorney)

Patricia A. Taylor, Assistant General Counsel, for respondent
State-Operated School District of Jersey City
(Charlotte Kitler, General Counsel, attorney)

Record Closed: January 17, 1995

Decided: February 28, 1995

BEFORE KEN R. SPRINGER, ALJ:

Statement of the Case

This is an appeal by a school employee who alleges that the termination of her employment as a clerk secretary on May 13, 1994 violates her tenure rights under N.J.S.A. 18A:17-2. Respondent State-Operated School District of Jersey City ("Jersey City") contends that the rights of clerical and secretarial staff in the Jersey City public school district are governed by civil service law rather than by education statutes. Accordingly, Jersey City has moved to dismiss the petition for lack of subject matter jurisdiction.

Procedural History

On June 27, 1994, petitioner Mary Ellen Anderson filed a verified petition with the Commissioner of Education ("Commissioner"), joining both the New Jersey Department of Personnel and Jersey City as respondents. Petitioner filed an amended petition with the Commissioner on June 30, 1994. Jersey City filed its answer to the amended petition on July 13, 1994. Subsequently, on July 21, 1994, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. Meanwhile, on or about August 27, 1994, Anderson filed a related appeal to the Merit System Board challenging her removal from the eligibility list for the title of principal clerk typist. By order entered on December 15, 1994, the OAL dismissed the Department of Personnel as not a proper party to the proceeding brought under Title 18A. On January 3, 1995, Jersey City filed the present motion to dismiss, together with a supporting affidavit and brief. Anderson filed opposing papers on January 17, 1995. The motion has been submitted for ruling on the papers.

Findings of Fact

Resolution of the jurisdictional issue is essentially a question of law. Most of the relevant information is a matter of public record. For purposes of this motion only, the facts alleged in petitioner's pleadings will be assumed true. **I FIND:**

Mary Ellen Anderson began her employment for Jersey City as a provisional clerk secretary on July 1, 1975. She has been employed by Jersey City for approximately twenty years serving in various clerical titles. Although she took three civil service exams, she ranked too low on the list to be appointed to a permanent position. Thus, she never achieved permanent status. In or about January 1994, she took a civil service test for the position of "principal clerk typist," but failed the typing portion of the test administered by the appointing authority. On August 26, 1994, the Department of Personnel upheld her removal from the employment list for principal clerk typist. Anderson filed a timely appeal to the Merit System Board, which matter is currently pending. Jersey City terminated Anderson from her provisional position effective June 30, 1994, "due to budgeting constraints and program adjustments."

For more than three decades, the nonprofessional staff of the Jersey City school district have been afforded civil service protection. As far back as November 1958, the electorate of Jersey City adopted a referendum that "non-instructional employees of the Board of Education are now covered by Title 11 of the New Jersey Statutes Annotated." New Jersey's highest court has taken judicial notice of the fact that "the Board of Education adopted the appropriate Civil Service Act in 1960." *Parrella v. Jersey City Bd. of Educ.*, 51 N.J. 323, 332 (1968).

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Commissioner of Education lacks subject matter jurisdiction over this dispute.

Local school districts are authorized to employ secretarial and clerical personnel and to fix their terms of employment. See *N.J.S.A. 18A:16-1* and *18A:17-2*. However, that authority is limited by *N.J.S.A. 18A:11-1*, which provides:

The board shall . . . make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, . . . for the employment, regulation of conduct and discharge of its employees, *subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes.* (Emphasis added).

Specifically, *N.J.S.A. 18A:28-2* provides that no person in the classified service pursuant to Title 11 shall be affected by the provisions of the education law concerning tenure.

Commissioner's decisions have consistently recognized that nonprofessional staff protected under Title 11 in school districts which have adopted the civil service law do not acquire separate tenure rights under Title 18A. Recently, in *Harp v. Newark Bd. of Educ.*, OAL Dkt. EDU 10918-94 (July 6, 1994), *adopted by silence*, a case virtually identical to our own, the Commissioner declared that "employment of school clerks in Newark is governed by civil service law," and "[a]ny appeal from a controversy arising under that law should be brought to the Merit System Board." (slip op. at 6). Similarly, in *Newark Attendance Counselors Ass'n v. Newark Bd. of Educ.*, 2 *N.J.A.R.* 346 (Comm'r Dec. 31, 1979), the Commissioner dismissed a layoff appeal by school attendance officers, holding that petitioners were classified civil service employees subject to competitive appointments. *Accord Plessis v. Newark Bd. of Educ.*, 1976 *S.L.D.* 1006 (Comm'r Dec. 20, 1976), where the Commissioner ruled that custodial workers are not teaching staff members and their dispute did not arise under the school laws.

Like the Newark school district, Jersey City has adopted the civil service law, and its nonprofessional staff are included in the "classified" service. *See Harp, supra*, at 4. Clerical staff are not "teaching staff members" who are excluded from civil service coverage. *N.J.S.A. 11A:3-5(g)*. Whatever employment rights Anderson may possess exist by virtue of the civil service law. Therefore, her remedy lies not with the Commissioner of Education, but exclusively with the Merit System Board.

Order

It is **ORDERED** that the appeal pending before the Commissioner of Education is dismissed for lack of jurisdiction.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration. This recommended decision may be adopted, Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Feb 28, 1995

DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

Hope R. [Signature]

DEPARTMENT OF EDUCATION

3/1/95

DATE

Mailed to Parties:

Jeff [Signature]
DEPUTY CHIEF OF STAFF AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

MAR 03 1995

DATE

al

MARY ELLEN ANDERSON, :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 STATE OF NEW JERSEY, DEPARTMENT : DECISION
 OF PERSONNEL AND THE STATE-
 OPERATED SCHOOL DISTRICT OF :
 JERSEY CITY, HUDSON COUNTY
 RESPONDENTS. :
 _____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that whatever employment rights petitioner may possess exist pursuant to civil service law, N.J.S.A. Title 11, rather than under the education laws. Consequently, the Commissioner of Education lacks subject matter jurisdiction over the within dispute.

Accordingly, the instant Petition of Appeal is hereby dismissed for lack of jurisdiction.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

EDU #7006-94
C # 117-95
SB # 61-95

MARY ELLEN ANDERSON, :

PETITIONER-APPELLANT, :

V. :

STATE BOARD OF EDUCATION

STATE OF NEW JERSEY, DEPART- :
MENT OF PERSONNEL AND THE :
STATE-OPERATED SCHOOL DISTRICT :
OF THE CITY OF JERSEY CITY, :
HUDSON COUNTY, :

DECISION

RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, April 10, 1995

For the Petitioner-Appellant, Richard C. Leahey, Jr., Esq.

For the Respondent-Respondent, Patricia A. Taylor, Esq.

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

September 6, 1995

Date of mailing SEP 08 1995

118-95

RAYMOND J. PEREZ, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN- : DECISION

SHIP OF WOODBRIDGE, MIDDLESEX :

COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner, tenured teaching staff member in respondent's district, sought determination that the Board had violated the provisions of N.J.A.C. 6:29-3.3 by failing to appoint him to the position of boys head soccer coach at Woodbridge High School.

ALJ found that petitioner did ~~not put any request for the coaching position in writing until August 23, 1993, after the position had already been awarded to someone else.~~ Moreover, citing Krupp Appellate Division decision, ALJ found that even if petitioner had submitted a written application for the position in question, he would have had no absolute right to the position. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11869-93

AGENCY DKT. NO. 350-10/93

RAYMOND J. PEREZ,

Petitioner,

v.

BOARD OF EDUCATION OF THE

TOWNSHIP OF WOODBRIDGE,

MIDDLESEX COUNTY,

Respondent.

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

Carl J. Palmisano, Esq., for respondent (Palmisano & Goodman, attorneys)

Record Closed: January 17, 1995

Decided: March 1, 1995

BEFORE M. KATHLEEN DUNCAN, ALJ:

This matter commenced on October 13, 1993 when Raymond J. Perez (hereinafter petitioner) filed a petition of appeal with the Commissioner of Education seeking a determination that Woodbridge Township Board of Education (hereinafter respondent) had violated the provisions of N.J.A.C. 6:29-3.3 by failing to appoint him to the position boys head soccer coach at Woodbridge High School. An answer on behalf of respondent was filed on December 1, 1993 and on December 14, 1993 the matter was transmitted to the Office of Administrative Law for

determination as a contested case, pursuant to N.J.S.A. 53:14F-1 to -13. On March 29, 1994, the attorneys for respondent filed a motion for summary decision with supporting papers. Petitioner filed a response and a cross-motion for summary decision with supporting papers on April 25, 1994. A reply on behalf of respondent was received May 11, 1994. Oral argument on the cross-motions for summary decision took place June 28, 1994 by telephone conference call. Thereafter, by letter dated August 9, 1994 the undersigned wrote to counsel for petitioner as follows:

During our last telephone conference call you indicated that you would consult with Mr. Perez concerning when exactly he asserts he told Mr. Kuchtyak that he wanted to be considered for the position boys head soccer coach at Woodbridge Senior High School. Please have Mr. Perez's affidavit reciting these relevant facts on my desk no later than 5 p.m. on August 19, 1994, so that I may determine whether we need a hearing in this matter. If I do not receive anything from you by that date, I shall assume that any such conversation which may have occurred between Mr. Perez and Mr. Kuchtyak took place after August 19, 1993, and I will then decide the matter on the cross-motions.

On August 19, 1994, counsel for petitioner transmitted a letter petitioner had written to counsel setting forth various factual assertions. That letter was replaced with petitioner's sworn affidavit on September 23, 1994. By letter order dated October 3, 1994, the undersigned advised the parties that the cross-motions for summary decision were denied and a plenary hearing was scheduled for October 31, 1994.

The hearing took place as scheduled at the Trenton office of the Office of Administrative Law and the record closed at the conclusion of the hearing. By letter dated December 9, 1994 the undersigned reopened the record to provide the parties with the opportunity to comment upon the court's decision in Krupp v. Board of Educ. of Union Cty. Reg. High Sch., 278 N.J. Super. 31 (App. Div. 1994)* which had been decided on December 6, 1994. A letter memorandum on behalf of respondent was received on January 6, 1995. No reply having been received from petitioner, the record closed on January 17, 1995.

* A petition for certification was filed December 22, 1994, Docket No. 39649, pending.

FINDINGS OF FACT

Some of the facts relevant to a determination of this matter are not in dispute and I therefore **FIND** the following as uncontested facts. On or about June 18, 1993, respondent posted coaching positions which were available for the school year 1993-94. The notice recited, in pertinent part,

Any employee wishing to apply for any of the coaching positions listed below must send a letter of application to the Personnel Office, School Street, Woodbridge, New Jersey, 07095:

. . . .

These positions are available for the school year 1993-94. All letters of application for any of these positions must be in the Personnel Office not later than July 2, 1993.

Although a letter of application for a similar position has been previously submitted, all interested personnel must reapply at this time. (J-1 in evidence)

Petitioner, a tenured teaching staff member in respondent's district, submitted written applications to the Personnel Office for the positions assistant soft ball coach at Colonia High School for the 1993-94 school year and boys head soccer coach at Colonia for the 1993-94 school year. Both applications were received in the Personnel Office on June 23, 1993. In or about mid-July 1994, petitioner, who had been the boys head soccer coach at Colonia High School for a number of years, was advised by Kenneth Kuchtyak, respondent's Assistant Superintendent for Personnel Services, that the head coach at Woodbridge High School was transferring to Colonia High School and would be assigned the positions boys head soccer coach and assistant soft-ball coach at Colonia. By letter dated July 14, 1993 petitioner wrote to the Director of Personnel stating, "Please reactivate my application for Director of Athletics at Woodbridge High School. I will be away on vacation until July 20. After that I will be available at your convenience for an interview." (J-7 in evidence) No other written application for coaching or athletic positions was

submitted by petitioner. On Sunday, July 25, 1993, respondent advertised in the Newark Star Ledger the existence of various coaching vacancies in Woodbridge Township School District. Applicants were instructed to send resumes to Mr. Kuchtyak. At its regular meeting on August 19, 1993, respondent appointed Albert Magliaro to be boys head soccer coach at Woodbridge High School. Mr. Magliaro was an out-of-district certificated teacher who had applied in response to the advertisement in the Star Ledger. Notwithstanding the fact that respondent had filled the position at its August 19, 1993 board meeting, on August 23, 1993 petitioner wrote to the Director of Personnel as follows:

As per my discussion with Mr. Kuchtyak, Mr. Peterson, and Mr. D'Orsi in July 1993, I am again expressing my interest in the Head Soccer Coach position at Woodbridge High School for the 1993 season.

Petitioner then filed the petition commencing the within matter. This concludes the recitation of uncontested facts.

Petitioner testified that after respondent's July 1993 board meeting Joseph D'Orsi, vice principal at Woodbridge High School, had asked him to stop over to his house to discuss a possible transfer to Woodbridge High School to teach health and to coach soccer. Petitioner testified that Mr. D'Orsi indicated petitioner would be doing him a favor in requesting a transfer. Petitioner testified that the day he spoke with Mr. D'Orsi was the day before he left for vacation; he thought the date was July 19, 1993. (However, see J-7 in evidence, petitioner's letter dated July 14, 1993 indicating that he would be away on vacation until July 20). Before he left for vacation, petitioner said, he hand-wrote a letter to Mr. D'Orsi indicating that he would like to transfer to Woodbridge High School to teach health. Although on two occasions during his testimony he indicated that the letter also stated that he would like to be appointed head soccer coach at Woodbridge, upon further questioning he acknowledged that the letter did not mention the position head soccer coach. Petitioner explained that he had assumed since he had expressed his interest to Mr. D'Orsi that the coaching position would go along with the teaching transfer. He did not expect respondents to advertise the position since he had indicated interest, he

testified, and he did not see the advertisement in the Star Ledger. Petitioner also testified that he had a subsequent conversation with Mr. Kuchtyak wherein he repeated his conversation with Mr. D'Orsi about the transfer to Woodbridge High School. Mr. Kuchtyak said he would look into it; "We'll see", petitioner quoted him as saying. Thereafter petitioner did go for an interview for the position Director of Athletics at Woodbridge High School. He acknowledged on cross-examination that he knew there was no possibility of being a coach and Director of Athletics at the same time. He did not question any one in the personnel office about the transfer to Woodbridge High School or the assignment of the boys head soccer coach position there, and he heard nothing from them until respondent took the actions complained of at its August 19, 1993 board meeting. No transfer for him was processed until September 1994, he said.

Kenneth Kuchtyak, Assistant Superintendent for Personnel Services, testified that he had searched his personnel files and had not located any letter from petitioner requesting a transfer to Woodbridge High School. He had no recollection of ever having seen such a letter. He testified that he had conducted the interview with petitioner for the Director of Athletics position and a transfer to teach at Woodbridge High School was never discussed. Mr. Kuchtyak acknowledged that petitioner had come to his office somewhere around July 15, 1993 and during that conversation petitioner had advised him that he was very upset that he was being replaced as head soccer coach at Colonia. Petitioner advised Mr. Kuchtyak that he had discussed the possibility of a transfer and coaching at Woodbridge High School with Mr. D'Orsi. Mr. Kuchtyak testified that he had requested petitioner to put his desires concerning the transfer and coaching position in writing, to which petitioner had responded that he was going on vacation and was going to go home and think about it. Mr. Kuchtyak testified that from this conversation he concluded that petitioner had not decided whether he wanted a transfer to Woodbridge High School or not. He indicated that he had had no further conversation with petitioner about a transfer or the coaching position before April 19, 1993.

With respect to the contested facts, I **FIND** that petitioner did not put any request to be appointed boys head soccer coach at Woodbridge High School in writing until August 23, 1993,

after the position had already been awarded to someone else. Although petitioner's testimony concerning his letter to Mr. D'Orsi in mid-July was internally inconsistent, he finally acknowledged, upon direct questioning from the undersigned, that the hand-written letter he gave to Mr. D'Orsi did not include any mention of the coaching position, but rather simply requested a transfer to Woodbridge High School to teach health. Mr. D'Orsi did not testify at the hearing herein and I am unable to make any finding concerning his receipt or disposition of the letter. I further **FIND**, however, that Mr. Kuchtyak never received the hand-written letter concerning a transfer request and that in the conversation petitioner had with Mr. Kuchtyak during July 1993, petitioner had indicated that he was unsure whether he would apply for a transfer and/or coaching job at Woodbridge High School. Mr. Kuchtyak was a candid, sincere and credible witness. I **FIND** that he advised petitioner on or about July 15, 1993 that he should put in writing his desires concerning a transfer and/or a coaching position at Woodbridge High School and with respect to the coaching position, at least, petitioner never did that. I **FURTHER FIND** that petitioner did not indicate to Mr. Kuchtyak his unequivocal interest in the position until after the position had been awarded at the August 19, 1993 board meeting.

APPLICABLE LAW AND DISCUSSION

N.J.A.C. 6:29-3.3, the regulation governing a determination of the within matter, provides:

- (a) Any person not certified as a teacher and not in the employ of a district board of education shall not be permitted to organize public school pupils during school time or during any recess in the school day for purposes of instruction, or coaching or for conducting games, events or contests in physical education or athletics.
- (b) School districts shall be permitted to employ any holder of a New Jersey teaching certificate to work in the interscholastic athletic program provided that the position has been advertised.
- (c) In the event there is no qualified and certified applicant, the holder of a county substitute certificate is authorized to serve as an athletic coach in the district in which he or she is employed for a designated sports season, provided that:

1. The district chief school administrator demonstrates to the county superintendent that:
 - i. The vacant coaching position had been advertised; and
 - ii. There was no qualified applicant based on the written standards of the district board of education;
2. The district chief school administrator will provide a letter to the county superintendent attesting to the prospective employee's knowledge and experience in the sport in which he or she will coach; and
3. Approval of the county superintendent shall be obtained prior to such employment by the district board of education. The 20-day limitation noted in N.J.A.C. 6:11-4.4(i) shall not apply to such coaching situations.

Until December 1994 the above quoted provisions had been consistently interpreted by the Commissioner and the State Board of Education to mean that if any teaching staff member within a district applied for a coaching position, then an employee of the district would have to be appointed and only if no in-district employee had applied could an out-of-district applicant be considered. See, e.g., Chambers v. Board of Education of the Township of Neptune, 1985 S.L.D. 1363; Norcross v. Board of Educ. of Hunterdon Regional High Sch. Dist., 1991 S.L.D. 1154. On December 6, 1994, however, the Appellate Division decided Krupp v. Board of Edu. of Union Cty Regional High School, 278 N.J. Super. 31 (App. Div. 1994) wherein it determined that the Commissioner and State Board had been misinterpreting the 1983 amendments to N.J.A.C. 6:29-3.3 (then designated N.J.A.C. 6:29-6.3). The court in Krupp reviewed the regulatory history of the 1983 amendments to the regulation and concluded that the amendments were intended to remove the absolute preference for an in-district employee. The court noted that subsection (b) of the regulation is clear on its face and permits districts to "employ any holder of a New Jersey teaching certificate" provided that the local board has advertised the vacant position.

In the within matter, I have found as a matter of fact, that petitioner did not submit a written application for the position boys head soccer coach at Woodbridge High School until August 23, 1993 after the position had already been filled. It is further clear from the facts that the last conversation Mr. Kuchtyak had with petitioner prior to the board's August 19, 1993 actions, left Mr. Kuchtyak with the reasonable impression that petitioner had not even made up his own mind concerning whether he wanted to coach at Woodbridge High School. Accordingly, even in the absence of the Appellate Division's opinion in Krupp, supra, petitioner would not be entitled to any relief herein. Both the posted notice (J-1 in evidence) and the Star Ledger advertisement required a written application, and petitioner did not submit one for the position for which he seeks compensation. The Krupp opinion has made it clear that even if petitioner had submitted a written application for the position in question, he would have had no absolute right to the position; respondent would have been free to appoint Mr. Magliaro, in any event.

For all of the foregoing reasons, I **CONCLUDE** that petitioner is not entitled to the relief which he seeks. It is therefore **ORDERED** that the petition of appeal is hereby **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 1, 1995

DATE

M. Kathleen Duncan

M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

3/3/95

DATE

Hope R. Blackburn

DEPARTMENT OF EDUCATION

Mailed to Parties:

Jeff S. Maini
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

MAR 08 1995

DATE

cc

EXHIBITS IN EVIDENCE

- J-1 June 18, 1993 advertisement for coaching positions for the school year 1993-94
- J-2 July 22, 1993 notice faxed to Star Ledger to run on Sunday, July 25, 1993
- J-3 Letter from petitioner to Personnel Office applying for position assistant soft ball coach at Colonia High School 1993-94
- J-4 Letter from petitioner to Personnel Office applying for position head soccer coach-boys at Colonia High School 1993-94
- J-5 Woodbridge Township Board of Education agenda August 19, 1993, Personnel Committee recommendations (5 pages)
- J-6 Letter from petitioner to Director of Personnel, dated August 23, 1993
- J-7 Letter from petitioner to Director of Personnel, dated July 14, 1993

WITNESSES

For petitioner:

Raymond J. Perez

For respondent:

Kenneth Kuchtyak

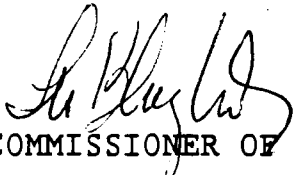
RAYMOND J. PEREZ,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWN-	:	DECISION
SHIP OF WOODBRIDGE, MIDDLESEX	:	
COUNTY,	:	
	:	
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge that pursuant to the Appellate Division decision, Krupp v. Board of Educ. of Union Cty. Reg. High Sch., 278 N.J. Super. 31 (App. Div. 1994), petitioner has no superior rights to the position of head soccer coach in question. Consequently, petitioner is not entitled to the relief which he seeks.

Accordingly, the initial decision of the Office of Administrative Law dismissing the within Petition of Appeal is affirmed for the reasons expressed therein.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

APRIL 10, 1995
DATE OF MAILING APRIL 10, 1995

119-95

M.G., on behalf of her minor son, C.G.,

PETITIONER,

V.

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF RIVERTON, BURLINGTON COUNTY,

DECISION

RESPONDENT.

SYNOPSIS

Petitioning parent challenged Board's denial of her request to provide her son, C.G., with instruction at home on the basis that it was not equivalent to that provided in the public schools. Petitioner filed her petition after the Board commenced municipal court action charging violation of N.J.S.A. 18A:38-25.

ALJ concluded that because action with respect to this matter was instituted in municipal court, the forum statutorily charged with enforcement of N.J.S.A. 18A:38-25, prior to the raising of claims in the instant petition, litigating the issue of "equivalent education" in this forum would violate the principles of the entire controversy doctrine. That doctrine reflects a strong policy in favor of the adjudication of all components of a legal controversy at one time in one litigation. ~~Petition~~ and counter petition were dismissed.

Commissioner adopted findings and determination in initial decision.

APRIL 10, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11262-94

AGENCY DKT. NO. 451-11/94

**M.G. ON BEHALF OF HER
MINOR SON C.G.,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE
BOROUGH OF RIVERTON,
BURLINGTON COUNTY,**

Respondent.

Jamie Epstein, Esq., for petitioner

Frank P. Cavallo, Jr., Esq., for respondent (Stephen J. Mushinski, attorney)

Record Closed: January 18, 1995

Decided: March 1, 1995

BEFORE M. KATHLEEN DUNCAN, ALJ:

This matter commenced on November 9, 1994, when M.G., mother of C.G., (hereinafter petitioner) filed a petition of appeal with the Commissioner of Education seeking a determination that the Board of Education of the Borough of Riverton (hereinafter respondent) had violated N.J.S.A. 18A:38-25 and the law established by the courts in New Jersey by denying petitioner's request that she be permitted to provide instruction equivalent to that provided in the public

school for C.G. at home. An answer and counter-claim was filed on behalf of respondent on November 21, 1994. On the same date respondent filed an application for emergent relief seeking an order from the Commissioner compelling C.G. to attend the Riverton Public School pending the outcome of the petition of appeal filed by the petitioner herein. Oral argument on respondent's application for emergent relief was conducted on November 30, 1994 and a letter order denying the request for emergent relief was issued on December 1, 1994. That order is attached hereto and made a part hereof as if set forth at length. By letter dated December 12, 1994, the undersigned directed both counsel to submit legal memoranda concerning why this matter should not be dismissed pursuant to the entire controversy doctrine because the identical issue between the same parties is currently pending in municipal court. Respondent's letter memorandum, dated January 17, 1995 was received on the same date. Petitioner's letter memorandum, dated January 17, 1995 was received on January 18, 1995 whereupon the record closed.

FINDINGS OF FACT

The facts relevant to a determination of this matter are not in dispute and I therefore find the following as uncontested facts.

A number of the underlying facts in this matter appear in the letter order denying respondent's request for emergent relief issued December 1, 1994 in this matter, incorporated herein by reference. In summary, petitioner advised respondent in September 1994 of her intention to educate C.G. at home. Respondent interpreted petitioner's communication as a request for permission for the parents to provide home schooling and by letter dated October 12, 1994 advised petitioner "that their request for home schooling had been denied". On October 19, 1994 respondent filed a complaint in municipal court charging C.G.'s parents with a violation of N.J.S.A. 18A:38-25 which requires parents to cause their children between the ages of six and sixteen years regularly to attend the public schools of the district or a day school in which there is given instruction equivalent to that provided in the public schools or to receive equivalent instruction elsewhere than at school. After respondent had commenced the municipal court action, petitioner filed the within action seeking "reversal of respondent's denial of petitioner's

request for home schooling.” The counter-claim filed in the within matter by respondent asks the Commissioner to determine that the education being provided to C.G. at home is not equivalent instruction and seeks an order compelling petitioner to return C.G. to the public school. Because it appears to the undersigned that the issues raised herein are identical to those issues pending before the municipal court, the parties have been asked to show cause why this matter should not be dismissed pursuant to the entire controversy doctrine.

APPLICABLE LAW AND DISCUSSION

N.J.S.A. 18A:38-25 provides:

Every parent, guardian or other person having custody and control of a child between the ages of six and 16 years shall cause such child regularly to attend the public schools of the district or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments or to receive equivalent instruction elsewhere than at school.

N.J.S.A. 18A:38-31 contains the statutory provisions for enforcement of N.J.S.A. 18A:38-25 and provides:

A parent, guardian or other person having charge and control of a child between the ages of 6 and 16 years, who shall fail to comply with any of the provisions of this article relating to his duties, shall be deemed to be a disorderly person and shall be subject to a fine of not more than \$25.00 for a first offense and not more than \$100.00 for each subsequent offense, in the discretion of the court.

Respondent commenced an action pursuant to N.J.S.A. 18A:38-31 in the Riverton Municipal Court and that case is proceeding to conclusion. There is absolutely no reason for the within matter to proceed simultaneously, and in fact, the entire controversy doctrine requires dismissal of both the petition and counter-petition in this matter.

“The entire controversy doctrine” reflects a strong policy in favor of the adjudication of all components of a legal controversy at one time in one litigation. The doctrine has been established both by case law and court rule. See Cogdell v. Hospital Center at Orange, 116 N.J. 7, 15-16 (1989) and R. 4:30A. The doctrine requires that a person assert all related claims against an adversary, including all affirmative defenses, counter claims and cross-claims or be estopped from later asserting an omitted component. Aetna Ins. Co. v. Gilchrist Brothers, Inc., 85 N.J. 550, 556-57 (1981). The entire controversy doctrine serves the aim of avoiding delay, expense and waste incident to the fragmentation of litigation. It promotes efficiency and fairness to the parties, prevents harassment, and avoids congestion in court calendars. “A disposition that reflects only a partial glimpse of the merits, . . . or that resolves only a segment of the controversy does not fully effectuate the judicial ideal of complete, not piecemeal adjudications. Cogdell, supra, at 23.

Respondent’s January 17, 1995 letter memorandum indicates that it concurs that the matter is appropriately addressed to the municipal court judge and does not object to dismissal of the pleadings in the within matter. Petitioner, however, argues that she is entitled to have the Commissioner address the issue of equivalent education under N.J.S.A. 18A:38-25. In support of her argument she cites Rockaway Township Board of Education v. Oostdyk, 1981 S.L.D. 260. In Oostdyk the administrative law judge concluded that the Commissioner had jurisdiction to determine whether the parents were violating the statutory provisions by failing to send their children to the public school. The Oostdyks refused to provide any information concerning what education, if any, they were providing to their children and the ALJ therefore concluded that they were violating the statute. In reviewing the administrative law judge’s determination, the Commissioner held:

Judge Samuels concludes that the Commissioner has concurrent jurisdiction with the Municipal Court in the enforcement of N.J.S.A. 18A:38-25 et seq. The Commissioner cannot agree. A judgment of violation of the Compulsory Education Law, N.J.S.A. 18A:38-31, declares a violator to be a disorderly person with fines to be levied according to the discretion of the court. Summons or a warrant shall be issued by the court as determined by circumstances.

In the judgment of the Commissioner, for him to enforce such a quasi-criminal proceeding simply does not conform with the express legislative scheme for the enforcement of school attendance. This does not mitigate the Commissioner's concern that children are herein forced into the role of truancy by the actions of recalcitrant parents. Such parents are not without proper recourse and due process. State v. Massa, 95 N.J. Super. 382 (Law Div. 1967) Such recourse however does not include making truants of their children.

The five named children shall be returned to school. Absent such action by their parents, the Board is directed to promptly institute proceedings in the appropriate judicial forum. Id. at 273.

The State Board of Education affirmed the Commissioner's decision "with the modification that directive (d) of the Administrative Law Judge be reinstated which reads:

"(d) that, in accordance with the authority of the Commissioner to enforce the school laws, respondents Jeanne Gandee, Robert Oostdyk and Janet Laurie Oostdyk are hereby **ORDERED** and directed to immediately cause their children, between the ages of 6 and 16 years, to be enrolled in and to attend the public schools of the petitioner school district or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments, or to receive equivalent instruction elsewhere than at school. In the event said respondents comply with this order by causing them to attend alternative schools or to receive equivalent education elsewhere than in the public schools of the district, specific and itemized proof of equivalency shall be furnished to the petitioner at the beginning of and periodically during such attendance or enrollment; such proof to be approved by and accepted as satisfactory by the petitioner." Id. at 275.

What is clear from the Oostdyk decision is that the municipal court is statutorily charged with enforcement of N.J.S.A. 18A:38-25. All the Commissioner was able to do was order the school board to initiate a case against the Oostdyks in municipal court, something which has already been done in the within matter. The State Board decision, affirming the Commissioner's, ordered the Oostdyks to cause their children to be enrolled in school or an equivalent day school

or to have them receive equivalent instruction elsewhere. The State Board also provided that proof of equivalent education was to be supplied to the Board of Education and if the proof of equivalency was unsatisfactory, the inescapable conclusion is that the Board would be required to file an action in municipal court, again something that they have already done in the within matter. Based upon all of the foregoing, I **CONCLUDE** that litigating the issue of “equivalent instruction” in the present matter would be a futile gesture and would violate the principles of the entire controversy doctrine, which requires parties, having joined issue in municipal court, to litigate all related claims against each other in that forum. For these reasons, it is hereby **ORDERED** that the petition of appeal and the counter petition of appeal are hereby **DISMISSED WITH PREJUDICE** and these proceedings are concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions."** A copy of any exceptions must be sent to the judge and to the other parties.

March 1, 1995
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

3/3/95
DATE

Al. P. Blockhuys
DEPARTMENT OF EDUCATION

Mailed to Parties:

Jeff S. Main
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

MAR 08 1995
DATE

cc



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakberbridge Plaza
CN 049
Trenton, New Jersey 08625
(609) 588-6633

M. Kathleen Duncan
Administrative Law Judge

December 1, 1994

Jamie Epstein, Esquire
38 West End Avenue
Haddonfield, New Jersey 08033

Frank P. Cavallo, Jr., Esquire
c/o Stephen J. Mushinski Law Office
110 Marter Avenue - Suite 411
Moorestown, New Jersey 08057

LETTER ORDER
Denying Request for
Emergent Relief

RE: C.G. by his Parents and Legal Guardians v.
Board of Education of Riverton
OAL DKT. NO. EDU 11262-94
Agency Dkt. No. 451-11/94

Dear Counsel:

As I indicated to you on the record yesterday, I have reviewed the Petition of Appeal filed with the Commissioner on November 9, 1994, the Answer and Counter-Claim filed by respondent on November 21, 1994, respondent's motion for temporary emergent relief and supporting papers requesting an order requiring petitioners to enroll C.G. in the Riverton Public School pending the outcome of a hearing on the merits, and petitioners' papers in opposition to the motion. The motion is denied for the following reasons.

Some uncontested facts appear from the papers. At the conclusion of the 1993-94 school year respondent advised petitioners that C.G. would not be promoted and would be retained in 6th grade. In September 1994 C.G.'s parents advised respondent of their intention to educate C.G. at home. By letter dated September 14, 1994 petitioners described their plans and requested

copies of the 6th and 7th grade curricula and a list of books and workbooks used for each grade. Although there is nothing in the letter written by Ms. G. which requests Board approval of their plans, respondent apparently interpreted this as a request for permission to educate C.G. at home (see Certification of Superintendent Randazzo so describing the September 14, 1994 note from Ms. G. and letter dated September 27, 1994 from Mr. Randazzo to Mr. & Ms. G. setting forth the costs for a copy of the curriculum and stating, "I will request Board approval for your request to have C. home schooled by you at their next regular meeting which will be held on October 11.") By letter dated October 12, 1994 respondent informed petitioners "that their request for home schooling had been denied." Certification of Mr. Randazzo. On October 19, 1994 respondent filed an action in municipal court charging petitioner's parents with a violation of N.J.S.A. 18A:38-25. That statute provides:

Every parent, guardian or other person having custody and control of a child between the ages of six and sixteen years shall cause such child regularly to attend the public schools of the district or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments or to receive equivalent instruction elsewhere than at school.

Parents who are convicted of violating these provisions are subject to penal sanctions pursuant to N.J.S.A. 18A:38-31. The procedures for the courts to follow in making a determination are set forth in State v. Vaughn, 44 N.J. 142 (1965) and State v. Massa, 95 N.J. Super. 382 (Co. 1967). The complainant must charge and substantiate that the guardians did not cause the child regularly to attend the public school; the defendants must then introduce evidence in support of either of the alternatives, *i.e.*, that the child attends a day school in which equivalent instruction is given or that the child is receiving equivalent instruction elsewhere than at school. The burden of moving forward with the evidence and the burden of proof then shift back to the complainant to show that the education being provided is not equivalent. "Equivalent" means only that the academic program is comparable; social development, extra-curricular activities, etc., are not part of the consideration.

Respondent has brought its claims against petitioners in a court of competent jurisdiction and the municipal court judge has begun hearing the case. The parties are not entirely in agreement concerning what the judge's rulings were on November 17, 1994, the first day of hearing, but there has been no order produced transferring the issue of "equivalent education" to the Commissioner of Education. The next hearing date in municipal court is December 1, 1994.

Clearly, the municipal court has jurisdiction to enforce the statutory provisions. In State v. Massa, *supra*, following a trial *de novo*, the county court reversed the municipal magistrate's finding of guilt and found that Mrs. Massa, a high school graduate, was self-educated and was qualified to teach her daughter the basic subjects from grades one through eight and concluded: "It is the opinion of this court that defendant's daughter has received and is receiving an education equivalent to that available in the Pequannock public schools." *Id.* at 391.

I see no reason why respondent board, having instituted its action in municipal court prior to raising its claims herein, should not be required to litigate the issue of equivalent education in the municipal court. New Jersey has adopted a strong policy in favor of the adjudication of all components of a legal controversy at one time in one litigation. The "entire controversy doctrine" has been established both by case law and court rule. See Cogdell v. Hospital Center at Orange, 116 N.J. 7, 15-16 (1989) and R. 4:30A. The doctrine requires that a person assert all related claims against an adversary, including all affirmative defenses, counter claims and cross-claims or be estopped from later asserting an omitted component. Aetna Ins. Co. v. Gilchrist Brothers, Inc., 85 N.J. 550, 556-57 (1981). The entire controversy doctrine serves the aim of avoiding delay, expense and waste incident to the fragmentation of litigation. It promotes efficiency and fairness to the parties, prevents harassment, and avoids congestion in court calendars. "A disposition that reflects only a partial glimpse of the merits, . . . or that resolves only a segment of the controversy does not fully effectuate the judicial ideal of complete, not piecemeal adjudications. Cogdell, supra, at 23. Respondent must seek complete relief for vindication of the wrong it charges and petitioners must assert all matters which will defeat the claims against them in one action. The Malaker Corp. v. First Jersey National Bank, 163 N.J. Super. 463, 496 (App. Div. 1978), certif. denied, 79 N.J. 488 (1979).

Furthermore, even if the Commissioner were to entertain respondent's claims that petitioners are violating N.J.S.A. 18A:38-25, the question of whether the education C.G. is receiving at home is equivalent to that which would be provided at the public school is not the sort of issue which could possibly be determined on a motion for temporary emergent relief; to prevail on such an application the moving party is required to demonstrate, inter alia, a strong likelihood of success on the merits and where, as here, the facts are contested, that would require a full-hearing on the merits.

In addition, the specific relief requested herein by respondent, i.e., "an order compelling petitioners to enroll C.G. in the Riverton Public School pending the outcome of the Petition of Appeal," could not be granted in any event. The Commissioner (like the municipal court judge) could only require the parents to comply with the statute by enrolling C.G. in the public school or a day school providing equivalent education or the equivalent educational program in some other setting. See Rockaway Twp. Bd. of Ed. v. Oostdyk, 1981 S.L.D. 260, 275. (The facts in that case are different from the present matter since petitioners herein assert that they are providing the equivalent educational program at home; the Oostdyks refused to provide any information concerning what education, if any, they were providing for their children). Even if the Commissioner assumed jurisdiction and found it appropriate to issue an order, respondent would still have to go to the courts for an enforcement order to obtain the assistance of the sheriff and/or local police, something which the municipal court, which has already assumed jurisdiction, can more easily accomplish.

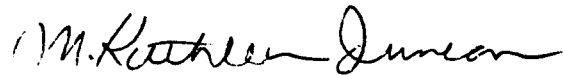
Finally, as I mentioned at oral argument yesterday, I am unaware of any legal requirement that a parent obtain the permission of a local board of education before commencing to provide an equivalent education elsewhere. If there is such a statutory or regulatory requirement, I would appreciate your promptly providing it, since as Director Blackburn stated in her November 14, 1994 letter to you, although the matter is not necessarily amicable to emergent relief, its nature demands that it be addressed expeditiously.

December 1, 1994

Accordingly, it is hereby **ORDERED** that respondent's request for temporary emergent relief is denied. I will be in touch with you shortly to ascertain the progress of your municipal court case and then to determine whether any issues remain for determination on the merits herein or whether the entire controversy doctrine requires dismissal of both the petition and counter-claim.

This order on application for emergency relief may be adopted, modified or rejected by the **Commissioner of Education**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **Commissioner** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

Very truly yours,



M. KATHLEEN DUNCAN
Administrative Law Judge

MKD:cc

Provided to parties by facsimile transmission:

Mr. Cavallo (609) 866-9576

Mr. Epstein (609) 547-4237

M.G., on behalf of her minor
son, C.G.,

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE
BOROUGH OF RIVERTON, BURLINGTON
COUNTY, :

DECISION

RESPONDENT. :


_____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that because action with respect to this matter was instituted in municipal court, the forum statutorily charged with enforcement of N.J.S.A. 18A:38-25, prior to the raising of claims in the instant Petition of Appeal, litigating the issue of "equivalent education" herein would violate the principles of the entire controversy doctrine.

Accordingly, the recommended decision of the Office of Administrative Law is adopted for the reasons articulated therein and the within Petition of Appeal is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

ALLAN AND NANCY BURKLEY, on	:	
behalf of their son, B.B.,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
MAINLAND REGIONAL HIGH SCHOOL	:	DECISION
DISTRICT, ATLANTIC COUNTY AND	:	
THE NEW JERSEY STATE INTERSCHO-	:	
LASTIC ATHLETIC ASSOCIATION,	:	
	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioning parents disputed NJSIAA's decision declaring their son, B.B., ineligible for baseball participation. Eligibility Appeals Committee (EAC) found that B.B. transferred for athletic advantage and petitioners misrepresented B.B.'s residency and family circumstances to avoid application of the 30-day waiting period set forth in Article V, Section 4K(2). Moreover, NJSIAA found that with respect to the illegal recruitment charges against the coach, since the EAC's determination had no effect on the athletic eligibility of B.B., petitioners had no standing to challenge that determination. Thus, B.B. was ineligible to participate in baseball at any NJSIAA member school in the future, including but not limited to Mainland Regional High School.

Following relaxation of 90-day rule in the interest of fairness to the parties who filed pro se and in light of testimony of witnesses, Commissioner found NJSIAA's decision determining B.B. ineligible to participate in baseball at any NJSIAA member school to be well-grounded on the facts and neither arbitrary, capricious nor unreasonable. Commissioner dismissed petition.

ALLAN AND NANCY BURKLEY, on	:	
behalf of their son, B.B.,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
MAINLAND REGIONAL HIGH SCHOOL	:	DECISION
DISTRICT, ATLANTIC COUNTY AND	:	
THE NEW JERSEY STATE INTERSCHO-	:	
LASTIC ATHLETIC ASSOCIATION,	:	
	:	
RESPONDENTS.	:	

For the Petitioners, Nancy and Allen Burkley, Pro Se

For the Respondent New Jersey State Interscholastic Athletic Association, Steven P. Goodell, Esq., of counsel (Picco, Mack, Herbert)

For the Respondent Mainland Regional High School, Louis J. Greco, Esq.

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education on December 16, 1994, by the filing of a Petition of Appeal wherein petitioners disputed the decision of Respondent New Jersey State Interscholastic Athletic Association (hereinafter "NJSIAA") declaring their son, B.B., ineligible for baseball participation. Petitioners were notified by the Bureau of Controversies and Disputes, in numerous letters, of procedural deficiencies in their submission, including failure to name NJSIAA as Respondent. Petitioners perfected their appeal on February 3, 1995.

FACTS

Based on a thorough review of the record, the essential facts of the matter are as follows:

- B.B. was a student-athlete at Mainland Regional High School (hereinafter "Mainland") during his freshman year. He subsequently attended Holy Spirit High School. B.B. returned to Mainland in February 1994 with the intention of playing baseball in the spring.
- B.B. did not play baseball as a starting member of the Mainland team as he expected. Petitioning parents subsequently filed charges with the NJSIAA alleging that B.B. had been improperly recruited by Mainland's baseball coach, Gary Hegh. The NJSIAA then requested that the Mainland principal, Dr. Judith Koru, conduct an investigation into this alleged recruitment matter. In her report to the NJSIAA, Dr. Koru concluded that there was no basis to the recruitment allegation.
- Petitioners requested that the matter continue to be investigated by NJSIAA. Accordingly, the NJSIAA informed the parties by letter that the NJSIAA's Eligibility Appeals Committee ("EAC") would conduct a hearing on September 21, 1994 to address two issues: 1) whether B.B. had transferred to Mainland for athletic advantage, and 2) whether he had been recruited by the Mainland coach.
- At the EAC hearing, the parties were given an opportunity to present evidence, testimony, and to cross-examine witnesses, with respect to the two issues.
- The EAC concluded that B.B. had transferred to Mainland for athletic advantage and misrepresented his residency and family circumstances so as to escape the 30-day waiting period, as set forth in Article V, Section 4K(2) of the NJSIAA Bylaws. Consequently, the EAC determined that B.B. would be ineligible to participate in baseball at any NJSIAA member school in the future, including, but not limited to, Mainland Regional High School.

ARGUMENTS OF THE PARTIES

In their appeal of this NJSIAA determination, petitioners contend that such determination was a "subjective and partial credibility determination which appeared to favor Mainland Regional High School." (Amended Petition, at p. 7) Petitioners further allege that the principal "refused to interview 3 students who she was told had direct evidence of student athlete recruitment."

An answer was duly filed by the NJSIAA on February 17, 1994, together with a brief and certified transcript of the proceedings before the EAC.

Mainland filed an answer generally denying the claims made by petitioners.

The NJSIAA's answer, asserts five affirmative defenses:

1. Petitioners' amended petition was filed out-of-time since the initial determination of the NJSIAA was dated September 22, 1994 and petitioners did not join the NJSIAA as a party until February 1, 1995 which was beyond the 90-day period for filing a petition as set forth at N.J.A.C. 6:24-1.2(c).
2. In response to petitioners' contention that NJSIAA should have been more diligent in investigating allegations against Coach Hegh, NJSIAA argues that petitioners lack standing to bring this charge since individual student-athletes only have standing to pursue matters involving their own eligibility. It asserts the actions taken by the NJSIAA regarding Coach Hegh have no effect on the athletic eligibility of B.B.
3. Petitioners were accorded due process in a hearing before the NJSIAA. NJSIAA argues that petitioners had the opportunity to be represented by counsel, present and cross-examine witnesses.
4. With respect to Petitioners' allegations that insufficient evidence regarding the recruiting charge was presented at the EAC hearing, NJSIAA asserts that as Petitioners had the opportunity at such hearing to include any and all witnesses they determined relevant to the proceeding, and, consequently, they are now estopped from complaining that insufficient evidence was presented.
5. The EAC's decision was not arbitrary or capricious in that such determination, i.e., that B.B. circumvented the rules in order to avoid the 30-day waiting period, was based on the sworn testimony of B.B. and his father.

DECISION

Initially, in considering the NJSIAA's arguments with respect to the contention that the petition was filed out-of-time, the Commissioner is mindful that petitioners are pro se and attempted to file a petition on December 16, 1994, within the 90-day

filing period for appeals. The subsequent filings were made to correct procedural deficiencies. Thus, the Commissioner determines that relaxation of the 90-day rule is required in the interest of fairness to the parties.


With respect to the illegal recruitment charges, the Commissioner concurs with the NJSIAA that since the EAC's determination on this issue has no effect on the athletic eligibility of B.B., B.B. and his parents have no standing to challenge this determination.

It is important to note that in cases involving the NJSIAA, the Commissioner's scope of review is limited in that he cannot overturn the Association's decision where it is neither arbitrary, capricious nor unreasonable. B.C. v. Cumberland Reg. Sch. Dist., 220 N.J. Super. 214, 231-232

In the present case, the Commissioner finds and determines that Petitioner B.B. received a full hearing before the EAC. The record substantiates that all parties were given the opportunity to be represented by counsel, present and cross-examine witnesses, and offer evidence on their behalf. It is noted that B.B. testified, as did his father. The EAC determined that B.B. transferred for athletic advantage based on petitioners' sworn testimony that B.B. did so in order to play on a more competitive baseball team, and that petitioners misrepresented B.B.'s residency and family circumstances to avoid application of the 30-day waiting period set forth in Article V, Section 4K(2) of the NJSIAA Bylaws.

In that the NJSIAA's decision that B.B. would be ineligible to participate in baseball on any NJSIAA member school was well-grounded on the aforementioned facts, which included direct

testimony of petitioners' intent to circumvent the NJSIAA rules, the Commissioner finds such decision is neither arbitrary, capricious nor unreasonable. Petition is hereby dismissed with prejudice.


COMMISSIONER OF EDUCATION

APRIL 12, 1995

DATE OF MAILING APRIL 12, 1995

121-95E

R.L. AND K.L., on behalf of their minor :
child, B.L.,

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE :
KINGSWAY REGIONAL HIGH SCHOOL :
DISTRICT, GLOUCESTER COUNTY, :

DECISION ON MOTION

RESPONDENT. :

_____ :

R.L. AND K.L., on behalf of their minor :
child, B.L.,

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE :
KINGSWAY REGIONAL HIGH SCHOOL :
DISTRICT, GLOUCESTER COUNTY, :

DECISION ON MOTION

RESPONDENT. :

_____ :

For Petitioners, John C. Eastlack, Esq. (Poplar & Eastlack)

For Respondent, Raymond J. Zane, Esq. (Zane & Lozuke)

This matter was opened before the Commissioner of Education by way of Petition of Appeal filed on February 21, 1995 and Motion for Emergent Relief filed on March 9, 1995, seeking B.L.'s immediate reinstatement as a full-time pupil at Kingsway Regional High School pending a final determination as to petitioners' claim that B.L. was improperly excluded from school. B.L. was initially excluded for an indeterminate period of time on January 13, 1995, then placed on suspension, after a February 1, 1995 hearing, for engaging in lewd, obscene and assaultive conduct, involving girls in the seventh and eighth grades. (Order, at p. 2) The matter was transmitted to the Office of Administrative Law (OAL) on March 10, 1995 for hearing as a contested matter. A hearing was conducted on March 16, 1995, and an Order by the Administrative Law Judge (ALJ) denying the requested relief was issued on March 17, 1995.


The record of this matter, together with the Order of the ALJ denying emergent relief to petitioner, have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record of this matter, and in consideration of the appropriate standard for granting emergent relief as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), the Commissioner determines to affirm the ALJ's Order denying the relief requested by petitioner.

Temporary relief may be granted where necessary to prevent irreparable harm, where the legal right underlying petitioner's claim is unsettled, where material facts are not in dispute, and where the relative hardship to petitioner favors granting such relief. Crowe, supra The Commissioner rejects petitioner's argument that irreparable harm will result if he is not permitted to return to the classroom and to his varsity tennis activities. The Board is providing petitioner with home instruction from the same teachers he had in the classroom, and petitioner appears to be maintaining his grade point average. (Order, at pp. 6, 7) Petitioner has failed to demonstrate that such instructional accommodation, together with deprivation of his ability to play tennis, will cause him to suffer irreparable harm. Moreover, the Commissioner does not find that a likelihood of success on the merits has been demonstrated. Here, the equities lie on the side of the Board, as it has a legitimate interest in maintaining a safe learning environment for its students.

Accordingly, as petitioner failed to meet the criteria for grant of emergent relief, the Commissioner adopts the Order of the ALJ denying such relief, and this matter shall duly proceed to a hearing on the merits of petitioner's plenary claims at the Office of Administrative Law.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

APRIL 12, 1995
DATE OF MAILING APRIL 12, 1995

122-95

ROBERT TAYLOR,	:	
	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH :		DECISION
OF WALDWICK, BERGEN COUNTY,		
	:	
RESPONDENT.	:	
_____	:	



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10752-93

AGENCY DKT. NO. 349-10/93

ROBERT TAYLOR,

Petitioner,

v.

**BOARD OF EDUCATION OF THE BOROUGH
OF WALDWICK, BERGEN COUNTY,**

Respondent.

Robert Taylor, petitioner, *pro se*

Rodney T. Hara, Esq., attorney for respondent (Fogarty & Hara, attorneys)

Record Closed: January 25, 1995

Decided: March 7, 1995

BEFORE MARIE P. SIMONELLI, A.L.J.

STATEMENT OF THE CASE

Petitioner, Robert Taylor (Mr. Taylor), appeals the decision of respondent Board of Education of the Borough of Waldwick, Bergen County (the Board) to reappoint Terrence Byrne (Mr. Byrne) as head varsity football coach for the 1993-94 school year, contrary to *N.J.A.C.*

6:29-3.3. Mr. Taylor requests that Mr. Byrne's reappointment be set aside and that he be awarded the position of head varsity football coach together with back pay, other benefits and emoluments and interest.

PROCEDURAL HISTORY

On October 13, 1993, Mr. Taylor filed a Verified Petition of Appeal with the Commissioner of Education (hereinafter referred to as *Taylor 1993-94*). On about October 28, 1993, the Board filed an Answer. The Department of Education transmitted the matter to the Office of Administrative Law (OAL) on November 8, 1993 for a hearing as a contested case.

The Honorable Marie P. Simonelli held a telephone Prehearing Conference on January 25, 1994, at which time she stayed *Taylor 1993-94* pending a final decision by the Honorable Stephen G. Weiss in the matter entitled, *Robert Taylor v. Board of Education of the Borough of Waldwick, Bergen County*, bearing OAL Docket No. EDU 1321-93 (hereinafter referred to as *Taylor 1992-93*). *Taylor 1992-93* involved the same issues as those in *Taylor 1993-94*.

Judge Simonelli scheduled a second telephone Prehearing Conference for June 6, 1994. Prior thereto, the attorney for the Board advised Judge Simonelli that Judge Weiss had rendered a final decision in *Taylor 1992-93*. Thereafter, on July 25, 1994, the Board filed a motion to dismiss *Taylor 1993-94* under the doctrine of *res judicata*.

On April 6, 1994, the Commissioner of Education adopted the findings and determination in Judge Weiss's Initial Decision and dismissed *Taylor 1992-93*. Mr. Taylor filed a Notice of Appeal with the State Board of Education on April 13, 1994.

By Order entered on September 8, 1994, Judge Simonelli denied the Board's motion to dismiss *Taylor 1993-94* without prejudice and stayed it pending the final determination of the appeal in *Taylor 1992-93*. On October 5, 1994, the State Board of Education affirmed the Commissioner of Education's dismissal of *Taylor 1992-93*. The time period for Mr. Taylor to file an Appeal with the Superior Court of New Jersey, Appellate Division, has expired.

FINDINGS OF FACT

Having reviewed all moving and opposing papers, I **FIND** the following **FACTS**:

On August 17, 1992, Mr. Taylor filed a Verified Petition of Appeal in *Taylor 1992-93*. Mr. Taylor challenged the Board's decision to reappoint Mr. Byrne as the head varsity football coach for the 1992-93 school year. Mr. Taylor claimed that Mr. Byrne's reappointment violated *N.J.A.C. 6:26-3.3*, *N.J.A.C. 6:29-3.3(c)(3)* and *N.J.S.A. 34:13A-23* because Mr. Byrne was out-of-district candidate and did not possess a New Jersey Teaching Certificate (See: Affidavit of Rodney T. Hara, Esq., dated January 20, 1995, Exhibit A).

On October 13, 1993, Mr. Taylor filed a Verified Petition of Appeal in *Taylor 1993-94*. Mr. Taylor again challenged the Board's decision to reappoint Mr. Byrne as the head varsity football coach for the 1993-94 school year (Hara Affidavit, Exhibit F). The allegations in *Taylor 1993-94* are the same as those in *Taylor 1992-93*, except that the allegations in *Taylor 1993-94* relate to the 1993-94 school year.

On February 18, 1994, Judge Weiss rendered an Initial Decision in *Taylor 1992-93*. Judge Weiss concluded that the Board properly had decided to reappoint Mr. Byrne. Judge Weiss dismissed *Taylor 1992-93* (Hara Affidavit, Exhibit B).

On April 6, 1994, the Commissioner of Education adopted Judge's Weiss's findings and determination in *Taylor 1992-93*. The Commissioner of Education dismissed *Taylor 1992-93* (Hara Affidavit, Exhibit C). Mr. Taylor filed a Notice of Appeal with the State Board of Education on April 13, 1994 (Hara Affidavit, Exhibit D).

On October 5, 1994, the State Board of Education affirmed the Commissioner of Education's dismissal of *Taylor 1992-93*. The State Board of Education could not conclude that Mr. Taylor had satisfied his burden of establishing that the Board acted arbitrarily, capriciously or unreasonably. The State Board of Education also could not conclude that Mr. Taylor had established that he had the prior coaching experience required by the job description, nor could it find that the Board acted in bad faith in adopting the job description (Hara Affidavit, Exhibit E).

Mr. Taylor did not file a Notice of Appeal with the Superior Court of New Jersey, Appellate Division in *Taylor 1992-93*. The Board, therefore, moves for dismissal of *Taylor 1993-94* under the doctrine of *res judicata* because both cases involve the same set of facts, the same

parties and the same issues. The only difference between the two cases is that one is for the 1992-93 school year and the other is for the 1993-94 school year.

LEGAL DISCUSSION AND CONCLUSION

The doctrine of *res judicata* is applicable in administrative actions. *City of Hackensack v. Winner*, 82 N.J. 1, 31-33 (1980); *Russell v. Tenafly Bd. of Adjustment*, 31 N.J. 58, 65-66 (1959). The purpose of the doctrine is to protect litigants from repetitious litigation and to protect the public against the serious burdens of such litigation. *Lubliner v. Bd. of Alcoholic Bev. Con., Paterson*, 33 N.J. 429, 435. Under this doctrine, a second action must be dismissed if it involves the same cause of action, issues, parties or their privies. *Eatough v. Bd. of Medical Examiners*, 191 N.J. Super. 166, 173.

Taylor 1992-93 and *Taylor 1993-94* involve the same cause of action, issues and parties. The only difference is that the two appeals relate to two different school years. This difference is insignificant for the purposes of *res judicata*. What is significant is that Mr. Taylor seeks the same relief against the same party in both appeals. Since a final determination has already been made by the State Department of Education in *Taylor 1992-93*, that decision is binding on *Taylor 1993-94*.

Based upon the foregoing, I **CONCLUDE** that the present appeal is barred by the doctrine of *res judicata*.

ORDER

Therefore, I **ORDER** that the Board's motion for dismissal of this matter be and hereby is **GRANTED** and the appeal be and hereby is **DISMISSED**.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 EAST STATE STREET, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the Judge and to the other parties.

March 7, 1995
DATE


MARIE P. SIMONELLI, A.L.J.

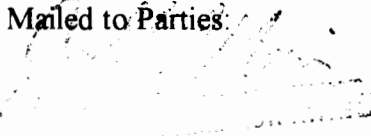
Receipt Acknowledged:

3/10/95
DATE

Hope R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 14 1995
DATE


OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Affidavit of Rodney T. Hara, Esq., dated January 20, 1995

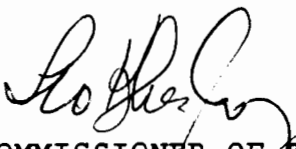
Reply Letter of Robert W. Taylor, dated January 27, 1995

ROBERT TAYLOR, :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE BOROUGH : DECISION
 OF WALDWICK, BERGEN COUNTY,
 RESPONDENT. :
 _____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that as the within matter involves the same set of facts, same parties and the same topics as Taylor 1992-93, supra., previously decided by the Commissioner on April 6, 1994 and affirmed by the State Board on October 5, 1994, relitigation of these matters in the instant petition is barred by the doctrine of res judicata.

Accordingly, the instant Petition of Appeal is hereby dismissed.


 COMMISSIONER OF EDUCATION

APRIL 12, 1995
DATE OF MAILING APRIL 12, 1995

123-95

IN THE MATTER OF THE TENURE :
 HEARING OF MARTIN FELICE, :
 SCHOOL DISTRICT OF THE : COMMISSIONER OF EDUCATION
 BOROUGH OF METUCHEN, : DECISION
 MIDDLESEX COUNTY. :
 _____:

APRIL 12, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12096-93

AGENCY DKT. NO. 391-11/93

**BOARD OF EDUCATION OF
THE BOROUGH OF METUCHEN,
MIDDLESEX COUNTY,**

Petitioner,

v.

MARTIN FELICE,

Respondent.

James E. Stahl, Esq., for petitioner (Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl,
attorneys)

Richard A. Friedman, Esq., for respondent (Zazzali, Zazzali, Fagella & Nowak,
attorneys)

Record Closed: January 30, 1995

Decided: March 8, 1995

BEFORE M. KATHLEEN DUNCAN, ALJ:

The within matter was commenced on November 22, 1993 by the Board of Education of the Borough of Metuchen (hereinafter petitioner) with the filing of tenure charges in accordance with the requirements of N.J.S.A. 18A:6-11 against Martin Felice (hereinafter respondent). Petitioner certified charges alleging unbecoming and unprofessional conduct and insubordinate conduct in that respondent fraternized and socialized with students in violation of board

directives. On December 15, 1993, respondent filed an answer in which he denied any wrongdoing. On December 21, 1993 the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -13. A prehearing conference was conducted on June 24, 1994 at which time hearing dates were scheduled for October 11, 12 and 14, 1994. Prior to the scheduled hearing dates, the parties advised that because petitioner was unable to produce a number of the witnesses needed to prove the charges, the parties would be attempting to resolve this matter without the necessity for a hearing. Following several telephone status conferences, on January 30, 1995, the parties forwarded a signed Settlement Agreement and Stipulation of Settlement and Dismissal which is attached hereto and made a part hereof as if set forth herein at length.

I have reviewed the record and the terms of settlement and I **CONCLUDE** that in view of all of the circumstances, it would not be improper for the Commissioner of Education to approve this settlement as an appropriate voluntary resolution of this matter entirely consistent with the law and the philosophy expressed in Cardonick v. Board of Education of the Borough of Brooklawn, EDU 7093-81, 7094-81 and 100-82, decided April 6, 1983 by the State Board of Education. The parties have set forth in their written settlement agreement all of the circumstances which have caused petitioner to conclude that a hearing on the merits in this matter would probably not serve the public interest. Petitioner has determined that respondent is unfit, but recognizes nonetheless that their charges must be established on the record by a preponderance of the competent and credible evidence. Because one former student is currently incarcerated as the result of a murder conviction and because others are beyond the boundaries of the Commissioner's subpoena power and/or are unwilling to testify, the possibility exists that a decision following a hearing on the merits might not result in the removal which petitioner seeks. Petitioner's resumption of salary payments to respondent pursuant to N.J.S.A. 18A:6-14 occurred long ago, and the attached Stipulation of Settlement provides for continuation of such payments only until June 1995, undoubtedly sooner than if this matter proceeded to a full hearing and determination on the merits. The Settlement Agreement, paragraph 9, indicates that respondent is aware of the possibility that the New Jersey State Board of Examiners might take action against his teaching certificates, and N.J.A.C. 6:11-3.5 ensures that petitioner will notify the State Board

of Examiners of the circumstances concluding the within matter. Assuming respondent is eligible for the ordinary disability retirement benefits for which he has agreed to apply, he will not be able to teach in the public schools in any event. Under all of the circumstances, the proposed Settlement Agreement and Stipulation of Dismissal appears to be an appropriate resolution of the matter.

I **CONCLUDE** that this Agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the Settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

March 8, 1995
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

3/8/95
DATE

Hope R Blackburn
DEPARTMENT OF EDUCATION

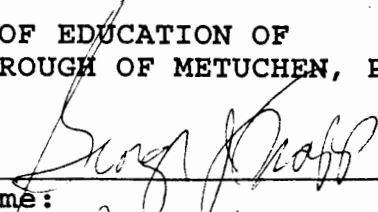
Mailed to Parties:

MAR 15 1995
DATE

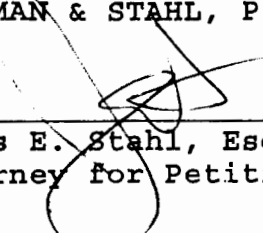
Jeff S. Maren
**ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**
OFFICE OF ADMINISTRATIVE LAW

cc

BOARD OF EDUCATION OF
THE BOROUGH OF METUCHEN, Petitioner

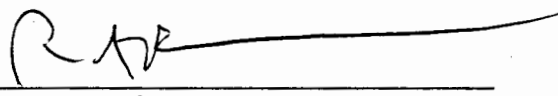
By: 
Name:
Title: *President*

BORRUS, GOLDIN, FOLEY, VIGNUOLO,
HYMAN & STAHL, P.C.

By: 
James E. Stahl, Esq.
Attorney for Petitioner


MARTIN FELICE, Respondent

ZAZZALI, ZAZZALI, FAGELLA & NOWAK, P.C.

By: 
Richard A. Friedman
Attorney for Respondent

P:\USERS\JES\WP51\PLEA\FELICE.SET

IN THE MATTER OF THE TENURE :
HEARING OF MARTIN FELICE, :
SCHOOL DISTRICT OF THE : COMMISSIONER OF EDUCATION
BOROUGH OF METUCHEN, : DECISION
MIDDLESEX COUNTY. :
_____:

The record of this matter and the initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

124-95

STANLEY R. MOONEY, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE CITY OF :
LONG BRANCH, MONMOUTH COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION


DECISION

APRIL 12, 1995

STANLEY R. MOONEY, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF : DECISION
LONG BRANCH, MONMOUTH COUNTY, :
RESPONDENT. :
_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

125-95-0

DEBORAH T. PORITZ
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Petitioner, Essex
County Superintendent of Elections
Richard J. Hughes Justice Complex
CN-112
Trenton, New Jersey 08625

By: ALAN C. STEPHENS
Deputy Attorney General
(609) 292-9246

NEW JERSEY DEPARTMENT OF EDUCATION
OFFICE OF THE COMMISSIONER

IN THE MATTER OF THE)
APPLICATION OF THE ESSEX)
COUNTY SUPERINTENDENT OF)
ELECTIONS FOR A RECHECK OF)
THE VOTING MACHINES TO BE)
USED IN THE 1995 SCHOOL)
BOARD ELECTIONS IN THE COUNTY)

Administrative Action

ORDER

This matter having been opened to the Honorable Leo F. Klagholz, New Jersey Commissioner of Education, by Deborah T. Poritz, Attorney General of New Jersey, by Alan C. Stephens, Deputy Attorney General, appearing, attorney for petitioner Essex County Superintendent of Elections, and the Commissioner having considered the Petition submitted in support herein; and for good cause shown;

IT IS on this day of , 1995,

ORDERED that a recheck of the voting machines used in the April 18, 1995 school board elections in Essex County be

RECHECK SCHEDULE

The recheck of the voting machines to be used on April 18, 1995 for the school districts set forth below, will be conducted on April 24, 1995 at 9:00 a.m. at the Essex County voting machine warehouse located at 640 Frelinghuysen Avenue, Newark.

Belleville
Bloomfield
Boro Caldwell/
W. Caldwell
Cedar Grove
Essex Fells
Boro Fairfield

Glen Ridge
Livingston
Millburn
Newark
No. Caldwell
Nutley

Roseland
So. Orange/Maplewood
Verona
West Orange

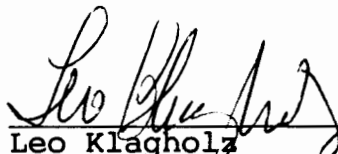
SCHEDULE (A)

conducted by the representatives of the Commissioner of Education, with the cooperation of the election officials, in accordance with N.J.S.A. 18A:14-63.5; such recheck to be conducted at the County's voting machine warehouse located at 640 Frelinghuysen Avenue, Newark, New Jersey, according to the dates and times set forth in Schedule "A" which is attached and whose terms are incorporated herewith; and

IT IS FURTHER ORDERED that the recheck is limited to the voting machines and if any candidate or ten voters of a school district desires a recount of the absentee ballots, a separate application must be made; and

IT IS FURTHER ORDERED that the Essex County Superintendent of Elections provide a copy of the Order to the County Superintendent of Schools, and the County Superintendent of Schools, if requested by the Superintendent of Elections, shall provide a copy of the Order to the affected school board secretaries; and

IT IS FURTHER ORDERED that the school board shall provide notice of the recheck to the affected school board candidates, by copy of this Order and by telephone notice, if necessary, in order to assure effective notice to the candidates.



Leo Klagholtz
Commissioner of Education

APRIL 17, 1995
DATE OF MAILING APRIL 17, 1995

126-95

BOARD OF EDUCATION OF	:	
THE TOWNSHIP OF BRICK, OCEAN	:	
COUNTY,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
EDWARD MERCER,	:	DECISION
	:	
RESPONDENT.	:	
	:	
_____	:	

SYNOPSIS

Petitioning Board sought declaratory ruling from Commissioner that respondent, newly seated Board member, should be disqualified from membership on the Board by virtue of a conflict of interest, pursuant to N.J.S.A. 18A:12-2, resulting from respondent's son's claim against the Board for injuries sustained on the Board's property while engaged in a game of basketball.

Following discussion of N.J.S.A. 18A:12-2 and N.J.S.A. 18A:12-24(j), ALJ found that respondent was not in conflict of interest and, therefore, not in violation of 12-2 as his son was emancipated and, moreover, the issue of his son's insurance claim would not likely arise before the Board. ALJ directed respondent to retain his seat. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4790-94

AGENCY REF. NO. 133-4/94

**BOARD OF EDUCATION OF THE
TOWNSHIP OF BRICK, OCEAN COUNTY,**

Petitioner,

v.

EDWARD MERCER,

Respondent.

Nicholas C. Montenegro, Esq., for petitioner (Wilbert and Montenegro, attorneys)

Martin Anton, Esq., for respondent

Record Closed: January 3, 1995

Decided: February 24, 1995

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Board of Education of the Township of Brick (Board) petitions the Commissioner of Education (Commissioner) for a declaratory ruling that respondent, Edward Mercer, is disqualified from membership on the Board by virtue of a conflict of interest, pursuant to N.J.S.A. 18A:12-2. Respondent denies that any conflict exists and prays that the Commissioner determine him to be qualified to serve the remainder of his term with the Board.

This matter was filed with the Commissioner on April 29, 1994, by way of Petition of Appeal, with the request that the Board's organization meeting scheduled for May 5, 1994, be stayed until the Commissioner made a determination as to Respondent Edward Mercer's capacity to take a seat on the Board. By way of letter from the Deputy Commissioner, dated May 5, 1994, the Board's request for a stay of its annual organization meeting was denied.

On May 16, 1994, the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A prehearing conference was held on September 1, 1994, at which, among other things, the issues to be determined were agreed upon by the parties and the hearing date established.

The hearing was held on November 28, 1994, at the Lakewood, New Jersey, Municipal Court. The parties requested, and were granted leave, to submit posthearing briefs. The last submission was received on January 3, 1994, which constitutes the close of the hearing record. Extensions were granted in order to execute this initial decision.

ISSUES

Pursuant to the Prehearing Order, the following issues are to be determined by this administrative tribunal:

1. Whether respondent is in conflict of interest, in violation of N.J.S.A. 18A:12-1

to N.J.S.A. 18A:12-2.2?

2. If a conflict is found, can it be cured?
3. Whether provisions of the School Ethics Act, N.J.S.A. 18A:12-21 to N.J.S.A. 18A:12-34, obviate any conflict resulting from respondent's son's claim against the Board?

BACKGROUND FACTS

On April 19, 1994, Respondent, Edward Mercer, was duly elected to a seat on the Board at the Board's annual school election. Prior thereto, on or about December 1, 1992, respondent's son, Christopher Mercer, was injured on the Board's property while engaged in a game of basketball as a student at the Brick Township High School. On December 4, 1992, a school accident claim form was prepared by the school nurse.

Christopher Mercer graduated from Brick Township High School in June 1993, at the age of 18 years. Christopher Mercer has maintained his residence with respondent following his graduation from high school.

Subsequent to his injuries, Christopher Mercer obtained, on his own initiative, medical treatment from a dentist, a physician and a chiropractor. Edward Mercer did not agree to make any payments to the health care providers who attended to his son, nor has he done so. During this period, Respondent Edward Mercer was in the business of processing medical claims and, therefore, offered to help Christopher process his claims. Edward Mercer wrote two letters to Robert McCloskey Insurance who was the Board's insurance carrier at the time. Edward Mercer's last letter to Robert McCloskey Insurance was written in September 1993. Robert McCloskey Insurance is no longer involved with Christopher's claim. The claim is now being handled by Utica Mutual Insurance, the Board's general liability carrier.

On November 23, 1993, Christopher Mercer's attorney, Martin J. Anton, Esquire, filed a Notice of Motion requesting an Order permitting the filing of a late notice of claim. On December 17, 1993, The Honorable Francis P. Piscal, J.S.C., granted Christopher's motion. On

November 2, 1994, Christopher Mercer filed his claim against the Board in the Law Division of Superior Court.

Following his graduation from high school, Christopher Mercer was enrolled in the DeVry Institute, Woodbridge, New Jersey, where he remained until November or December 1993. Respondent did not provide Christopher with financial assistance while he was enrolled at DeVry Institute. Christopher held a variety of part-time employment; i.e., with A to Z Video, Cost Cutters and Stickel Packaging Supply, Lakewood, New Jersey. After he left DeVry Institute, he has been employed full-time with Stickel Packaging Supply where he earns between \$300 to \$350 per week.

Respondent Edward Mercer claimed Christopher as a dependent on his 1992 and 1993 tax returns. Respondent does not intend to claim his son on his 1994 tax return. Christopher has maintained his own automobile insurance since February 1994. Prior thereto, respondent's wife carried Christopher on her automobile insurance. Respondent does not maintain health insurance for Christopher nor has he paid any of Christopher's expenses since Christopher graduated from high school in June 1993.

Respondent Edward Mercer and his wife, Susan Mercer, mother of Christopher Mercer, have each released the Board from any and all claims that they may have against the Board and its employees.

Concerning actions taken by the Board, Edward Mercer abstained to vote on two matters involving Robert McCloskey Insurance. He did, however, vote in the affirmative with respect to the reappointment of Utica Mutual as the Board's liability insurance carrier.

THE STATUTE

The statute at issue, N.J.S.A. 18A:12-2, reads as follows:

No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board, nor, in the

case of local and regional school districts, shall he hold office as mayor or as a member of the governing body of a municipality, nor, in the case of county vocational school districts, shall he hold office as a member of the governing body of a county.

**A SUMMARY OF THE
LEGAL ARGUMENTS OF THE PARTIES**

THE BOARD'S POSITION

POINT I

The Board argues, among other things, that since respondent is interested directly and/or indirectly in a claim against the Board, a conflict exists and respondent is therefore not qualified for board membership and should be removed. The Board concedes that a large body of decisional and case law exists which establish that a board member's claim against a board of education which he/she serves as a member, must be examined on a case by case basis and depends on the circumstances of a particular case. Aldom v. Borough of Roseland, 42 N.J. Super. 495, 503 (App. Div. 1956); Bd. of Ed. of the Twp. of Holmdel, Monmouth Cty. v. Stephen O'Connell, 1990 S.L.D. 674, 680.

In Aldom, the court held that:

The interest which disqualifies is not necessarily a direct pecuniary one, nor is the amount of such an interest of paramount importance. It may be indirect; it is such an interest as is covered by the moral rule: no man can serve two masters whose interests conflict. Basically, the question is whether the officer, by reason of a personal interest in the matter, is placed in a situation of temptation to serve his own purposes to the prejudice of those for whom the law authorizes him to act as a public official. And in the determination of the issue, too much refinement should not be engaged in by the courts in an effort to uphold the municipal action on the ground that his interest is so little or so indirect. Id. at 502.

The Aldom Court continued to state:

Such an approach gives recognition to the moral philosophy that next in importance to the duty of the officer to render a righteous judgment is that of doing it in such a manner as will beget no suspicion of the pureness and integrity of his action. Id. at 502 (citations omitted).

The Board asserts that the Holmdel matter specifically relates to a notice of tort claim against a board of education. In Holmdel the board member and his wife were plaintiffs per quod on behalf of their son who was alleged to have suffered emotional and mental distress as a result of participating in a game called “Twister” while nude in the football camp he attended. Id. at 677. The Commissioner, in Holmdel, ordered the board member to remove himself from the board of education as the tort claim notice and the resulting tort action against the board would, if successful, “result in a material gain to him personally.” Id. at 681.

The Board states that the issue before this administrative tribunal is whether the Tort Claim Notice and the recently filed Complaint by Christopher Mercer would disqualify Edward Mercer from membership on the Board, even though Edward Mercer has not filed a per quod claim but, rather, has assisted and will assist and be available to assist his son in the prosecuting of his son’s claim. It contends that while respondent will not directly receive a pecuniary gain, he will indirectly be benefiting since his son is a dependent living in respondent’s home. The Board further contends that respondent will have a psychological and/or personal interest in his son’s claim against the Board and, hence, an indirect interest against the Board in violation of N.J.S.A. 18A:12-2.

The Board relies, in part, upon the holding in the Aldom case where the Appellate bench held that a conflict of interest existed where a Borough Councilman voted in favor of an ordinance which favored the Councilman’s employer of twenty-three years. The Court voided the ordinance because of the employer-employee relationship and said, in part, that: “It is only natural to expect that over such a period of time a loyalty to his employer had developed and that to some extent it would pervade his general thinking.” Id. at 507. The Board contends that in the

instant matter there exists a relationship with stronger ties than those between employer-employee; i.e., a father-son relationship where the son resides in the father's household and where the son relies upon his father for parental guidance and his particular expertise in insurance matters. While loyalty between a parent and child cannot and should not be measured, such is a higher form of loyalty than found between employer-employee. Consequently, respondent cannot, under any circumstances, be impartial if and when his son's matter comes before the Board.

The Board asserts that respondent has access to Board information regarding other cases before the Board: e.g., (a) the types of injuries and the amounts of settlements and discussions relevant thereto; (b) the indications of the value for settlement purposes of a case of the type and nature of Christopher Mercer's claim; (c) with this type of information, respondent would be able to relate such to his son to the disadvantage of the Board concerning settlement discussions or trying the case against the Board; and, (d) respondent has access to numerous workers' compensation cases and negligence cases against the Board which creates a material and substantial conflict.

Further, other members of the Board may be affected by a suit by Christopher Mercer. In particular, the public's perception of a conflict which, standing alone, should also serve as a bar to respondent from continuing to sit on the Board. Even if respondent abstained from any discussion regarding his son's case, respondent would have to substantiate any monetary settlement awarded to his son for a dental injury. The question arises as to how would the public perceive such a settlement? Would the public perceive that respondent had anything to do with his son's claim? The Board asserts that these consequences would seriously impair the ongoing relationship between Board members themselves and with the public

The Board contends that respondent's abstention from voting regarding his son's case is not sufficient. The statute, N.J.S.A. 18A:12-2 is a disqualifying statute. It clearly relates to factors which would disqualify an individual from membership of a board of education and does not provide for a member with a conflict of interest to abstain on issues. The express language of the statute clearly state that a board member with a conflict of interest cannot hold office as a board member.

The Board argues that the releases respondent and his wife provided the Board do not settle the claim against it. The underlying claim by Christopher Mercer is not settled and still exists. The Board asserts that the releases do not release any of the other defendants to his son's claim; i.e., the teachers and coach. Therefore, it argues, a conflict still exists.

The Board argues that the School Ethics Act, N.J.S.A. 18A:12-21 to -34, is not applicable to the instant matter. The Board submits that its Complaint against respondent was filed with the Commissioner, pursuant to N.J.S.A. 18A:12-2 and was not filed before the Ethics Commission under N.J.S.A. 18A:12-24.

The Board contends that respondent's reliance on N.J.S.A. 18A:12-24 (j) is misplaced. Respondent argues that N.J.S.A. 18A:12-24 (j) does not operate as a bar to N.J.S.A. 18A:12-2, thereby overriding the statutory dictates of N.J.S.A. 18A:12-2 and creating authority to allow respondent to continue in a conflict situation. The Board argues, however, that the School Ethics Act should be reasonably construed in light of N.J.S.A. 18A:12-24 (c) and the other subsections which would allow a board member, as a parent, to go to school and discuss with teacher, administrators and even attend board of education meetings, the educational setting and environment for his own child. The School Ethics Act certainly does not relate to personal claims otherwise the intent, purpose and express language of N.J.S.A. 18A:12-2 would be rendered invalid. As a rule of statutory construction and interpretation, if the Legislature's intent was to abrogate the strong conflict statute under N.J.S.A. 18A:12-2, it would clearly have done so.

The Board contends that respondent's reference to N.J.S.A. 18A:12-24 fails to take heed of the other subsections of the statute. It argues that subsections a. through i. of the statute are applicable so as to bar respondent serving as a member of the Board. It specifically notes subsections b., c., e. and f., which express a prohibition against respondent from using his position as a board member to use information generally not available to members of the public, which he would receive during the course of his tenure as a board member, for the financial gain of his son. Respondent's reliance upon N.J.S.A. 18A:12-24 (j) is, therefore, erroneous. That clause does not serve as a cure-all to remedy respondent's conflict of interest.

For all of the foregoing reasons, the Board contends that respondent is in conflict of interest and requests that he be removed as a member of the Board.

RESPONDENT'S POSITION

Respondent asserts that the seminal decision interpreting N.J.S.A. 18A:12-2 is the matter in In Re Bayless, 1974 S.L.D. 595, rev'd State Board of Education, 1974 S.L.D. 603. In Bayless the issue was whether the fact that a board member's spouse was employed by the same school district would be a disqualifying interest under N.J.S.A. 18A:12-2. The State Board established a standard of review as follows:

In the circumstances of the instant matter we must determine whether the conflicting interest is substantially and materially sufficient to (1) disqualify Mrs. Bayless from holding her board seat; or (2) whether she may continue to serve as a duly elected member of the board, abstaining from participation in and voting on particular matters directly or indirectly affecting her husband. 1974 S.L.D. at 605. (Emphasis added).

The standard established in Bayless was adopted by the State Board from the general New Jersey Conflicts of Interest Law, which separates those conflicts which are unavoidable in a free society from those conflicts which are substantial and material or which bring government into disrepute. Jackson Twp. Board of Ed. v. Acevedo, 92 N.J.A.R. 2d (EDU) 163 (1992).

Respondent asserts that the instant matter is factually distinguishable from those cases decided since Bayless where conflicts were found to be substantial and material. For example, in Acevedo, supra., a board member's son was injured at school. The board member's wife brought suit on behalf of their son in which she and the board member joined in their own right, per quod. The board member and his wife stated in their complaint that they were responsible for the debts, care and maintenance of, and were entitled to the services and society of their son. 92 N.J.A.R. 2d (EDU) at 164. The Administrative Law Judge observed:

When, as in the case at bar, the board member is a party to a suit

against the board seeking monetary damages, whether compensatory or punitive, the finding of a conflict of interest sufficient to disqualify the board member seems inevitable because the material and substantial benefit to the claimant-board member is clear. That the board member's claim is per quod does not erase the personal financial benefit he will reap if the underlying suit is successful. 92 N.J.A.R. 2d (EDU) at 166.

In the matter of the Hawthorne Borough Board of Education v. Taliaferro, 94 N.J.A.R. 2d (EDU) 197 (1993), a board of education member's wife instituted formal complaints against the board for her non-reappointment to certain coaching positions. The board member's wife sought reinstatement, as well as monetary damages for economic loss, humiliation and mental pain and suffering. The Administrative Law Judge in Taliaferro focused on the economic benefit to the board member which could result from his wife's claims. The Administrative Law Judge observed the decisions in Holmdel, supra.; Acevedo, supra.; and Woodstown-Pilesgrove Regional Board of Education v. Ketas, 1979 S.L.D. 353, rev'd State Board of Education, 1980 S.L.D. 1563, which involved suits by board members against their boards of education for injuries to a family member. The decisions in those and other cases focused upon the actual or potential financial benefit which would flow to the board member were he or she successful in a suit for damages against the board. The Administrative Law Judge observed that:

In such circumstances the specter of a conflict of interest which could interfere with the duty of loyalty owed by the member of the board was readily apparent. 94 N.J.A.R. 2d (EDU) at 201.

Respondent contends that it is uncontroverted that he will not benefit financially from his son's suit against the Board. Unlike Acevedo where a minor child was involved, in the instant matter respondent's son is and has been emancipated prior to respondent taking his seat on the Board. Under New Jersey case law, a minor is rebuttably presumed to be emancipated at age 18 years. If the child is continuing his education or has a physical or mental hardship or similar factors exists, our courts have found that this may delay emancipation beyond the age of majority. See Newburgh v. Arrigo, 88 N.J. 529 (1982). No such factors exists in the instant matter. Christopher Mercer is not continuing his education, is fully employed and making his own way through life. Christopher Mercer was 18 years of age at the time of the incident he complains of,

which was December 1, 1992. Christopher Mercer has an attorney and is pursuing his own rights. Neither respondent nor his wife seek any compensation or damages from the Board and have released the Board from any possible claims.

Respondent contends that he has had no involvement in his son's matter for some time prior to his being sworn in a member of the Board. Respondent's son, while still residing in respondent's home, is financially independent earning approximately \$20,000 per year. He pays his own bills, maintains his own automobile insurance, pays for his own food and clothing, among other things. Respondent has not agreed to pay any of his son's medical bills and, in fact, has not paid anything toward such bills because they are Christopher Mercer's responsibility.

Respondent argues that there is no financial impact upon the Board which will result from Christopher Mercer's claim. The claim is now being handled through an insurance contract with Utica Mutual Insurance Company. He asserts that there is little likelihood that the matter of Christopher Mercer's claims will ever be before the Board for discussion or action. While the Board does become involved with worker compensation claims it does not involve itself with Tort Claim matters handled by its general liability carrier. The real party in interest is Utica Mutual which may have to pay Christopher Mercer's claim, not the Board. Utica Mutual will determine whether to settle the claim and what to settle for, not the Board.

Respondent argues that his interest in his son's claims, if any, are tangential and immaterial. He contends that as a member of the Board, there is little likelihood he would have any ability to influence the matter. The doctrine of abstention is appropriate in this case and was invoked by respondent on two occasions involving Robert McCloskey Insurance. The only time respondent may have voted on anything bearing some possible relation to his son's claim was his vote to continue insurance coverage with Utica Mutual. The Board's School Business Administrator did not advise respondent of any possible conflict, as respondent had instructed the Business Administrator to do. Respondent asserts that the public would have no perception of a conflict. Respondent's "yes" vote for Utica Mutual followed the Business Administrator's recommendation, therefore, showing a lack of hostility toward the carrier by respondent.

Respondent raises a factor which has not been addressed in prior conflict of interest cases; namely, the relatively new School Ethics Act. N.J.S.A. 18A: 12-24 (j) states:

Nothing shall prohibit any school official or members of his immediate family from representing himself or themselves in negotiations or proceedings concerning his or their own interests. (Emphasis added)

A “school official” as defined as a board member or administrator at N.J.S.A. 18A:12-23.

The School Ethics Act was intended to provide board members and administrators with the benefit of “specific standards to guide their conduct.” N.J.S.A. 18A:12-22. N.J.S.A. 18A: 12-24 sets forth a list of prohibited conduct which would heretofore have been largely covered by N.J.S.A. 18A:12-2. But in this very specific statute an exception is made as set forth above which by its plain language would permit members of a board member’s immediate family to engage in proceedings concerning their own interests. While this appears to be a departure from prior law, the Legislature is presumed to have been aware of its prior enactment’s and the reported decisions thereunder when the Act was passed. N.J.S.A. 18A:12-24 (j) should, therefore, be viewed as a modification of N.J.S.A. 18A:12-2.

For the reasons stated above, respondent requests the Petition seeking a declaratory ruling that Edward Mercer is ineligible to continue service as a member of the Brick Township Board of Education be denied.

DISCUSSION AND CONCLUSIONS

It is first necessary to address respondent’s argument that the School Ethics Act, N.J.S.A. 18A:12-21 to -34, somehow makes an exception to the conflicts of interest law as set forth in N.J.S.A. 18A:12-2. Although subsection (j) of N.J.S.A. 18A:12-24 provides that any school official, or members of his/her immediately family, may represent themselves in negotiations or proceedings concerning his/her own interests, this subsection of the statute does not amend nor supersede N.J.S.A. 18A:12-2. Rather, the School Ethics Act supplements Chapter 12 of Title

18A by “providing standards of ethical conduct for local school officials.” (Historical and Statutory Notes, N.J.S.A. 18A:12-21). The conflict of interest statute, N.J.S.A. 18A:12-2, is clear and unambiguous where it states, “No member of any board of education shall be interested directly or indirectly in any...claim against the board,...” As the Commissioner observed in Alfonsetti, et al. v. Lakewood Twp. Board of Ed., 1975 S.L.D. 297 at 299:

In every case involving the interpretation of a statute, it is the function of the court to ascertain the intention of the Legislature from the plain meaning of the statute and to apply it to the facts as it finds them, Carley v. Liberty Hat Mfg. Co., 81 N.J.L. 505, 507 (E. & A. 1910). A clear and unambiguous statute is not open to construction or interpretation, and to do so in a case where not required is to do violence to the doctrine of the separation of powers. Such a statute is clear in its meaning and no one need look beyond the literal dictates of the words and phrases used for the true intent and purpose in its creation. Watt v. Mayor and Council of Borough of Franklin, 21 N.J. 274 (1956) (at p. 277)

Where the wording of a statute is clear and explicit we are not permitted to indulge in any interpretation other than that called for by the express words set forth...Duke Power Co. v. Patten, 20 N.J. 42 (1955) (at p. 49).

The wording of N.J.S.A. 18A:12-2 is clear, explicit and unambiguous with respect to the prohibition of a board of education member having a claim against the board of education with which he/she serves. The Commissioner has, in fact, upheld the statute to remove board members who have been found to be in violation of N.J.S.A. 18A:12-2. Taliaferro, supra.; Holmdel, supra.

Accordingly, I **CONCLUDE** that respondent’s reliance upon N.J.S.A. 18A:12-24 (j) as an exception to N.J.S.A. 18A:12-2 is misplaced and is hereby **DISMISSED** as a defense in this matter.

The primary issue to be resolved in this matter is whether respondent is in conflict of interest and, thus, in violation of N.J.S.A. 18A:12-2. The Aldom Court observed that, “The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends on the circumstances of the particular case.” 42 N.J.Super., at 503 (Citations omitted). The decision is, therefore, sensitive to the unique facts of the matter.

Here, the facts demonstrate that respondent's son was involved in an accident while a student in the Board's high school. Respondent's son, Christopher Mercer, had attained his majority of 18 years of age when the accident occurred on or about December 1, 1992. He was, moreover, living at home and, therefore, was not emancipated until his graduation from high school in June 1993.

Christopher Mercer's emancipation is demonstrated by the facts that his parents did not support him while he was enrolled in DeVry Institute. Nor have they supported him financially since his graduation from high school. Christopher is presently gainfully employed and pays for his food, clothing, automobile insurance, and the necessities for living.

Christopher Mercer processed his claims against the Board's insurance carrier on his own accord and initiative. Respondent, who possesses expertise with insurance claims, assisted his son and, on two occasions, corresponded with the insurance carrier. Respondent's aid to his son occurred prior to respondent's election to a seat on the Board.

In Holmdel, the Commissioner said :

On its face, N.J.S.A. 18A:12-2 mandates that no board member may serve who has filed a claim against the board or education on which he sits. Case law has further established that any such claim must be examined on a case-by-case basis in arriving at a determination as to whether the circumstances in the matter demonstrate that the board member would benefit in a substantial and material way from said claim. If so, the statute should be applied and the board member disqualified from serving on said board. (Citations omitted) 1990 S.L.D. at 680.

In the instant matter, respondent Board member has no claim against the Board. In fact, he and his wife have executed releases to the Board, releasing it from any and all claims that might arise. Respondent's son, however, has a claim for an accident that occurred on school property while the son was a student under the Board's direction and control.

There has been no showing that respondent will benefit, either directly or indirectly, from his son's claims against the Board. It has been shown, moreover, that the likelihood of the Board getting involved in an insurance settlement, of the kind brought by respondent's son, is either remote or nil. Consequently, respondent will not even be placed in the situation where he will necessarily abstain from a vote because the issue of his son's insurance claim will not likely arise before the Board.

Having carefully considered the entire record in this matter, I **CONCLUDE** that respondent Edward Mercer is not in conflict of interest and, therefore, not in violation of N.J.S.A. 18A:12-2.

I **CONCLUDE**, therefore, that Edward Mercer is to retain his seat on the Brick Township Board of Education until the expiration of the term to which he was elected.

ORDER

Accordingly, it is **ORDERED** that the herein Petition of Appeal be and is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Feb. 24, 1995

DATE

Lillard E. Law

LILLARD E. LAW, ALJ

Receipt Acknowledged:

3/8/95

DATE

Hope R. Blackner

DEPARTMENT OF EDUCATION

Mailed to Parties

MAR 15 1995

DATE

Jeff S. Main
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

lmh

OAL DKT. NO. EDU 4790-94

BOARD OF EDUCATION OF :
THE TOWNSHIP OF BRICK, OCEAN :
COUNTY, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
EDWARD MERCER, : DECISION
RESPONDENT. :
_____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record, and in view of the particular circumstances existing in this matter, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge for the reasons articulated by him in the initial decision.

Accordingly, the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

APRIL 17, 1995
DATE OF MAILING APRIL 17, 1995

127-95

BARBARA LAPIN AND ATLANTIC :
CITY EDUCATION ASSOCIATION,

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE :
CITY OF ATLANTIC CITY, ATLANTIC :
COUNTY,

DECISION

RESPONDENT. :

_____ :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 532-94

AGENCY REF. NO. 397-11/93

**BARBARA LAPIN AND ATLANTIC
CITY EDUCATION ASSOCIATION,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE CITY
OF ATLANTIC CITY, ATLANTIC COUNTY,**

Respondent.

Allen S. Zeller, Esq., for petitioners, (Freeman, Zeller and Bryant, attorneys)

Joseph Jacobs, Esq., for respondent

Record Closed: January 23, 1995

Decided: March 9, 1995

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners allege that the action of the Board of Education of the City of Atlantic City (Board) to employ petitioner Barbara Lapin to fill a teaching vacancy for a long-term is in violation of N.J.S.A. 18A:16-1.1, among other education laws and regulations. Petitioners demands that the Commissioner of Education (Commissioner):

1. Designate her as a full-time art teacher at the high school and place her on the appropriate salary schedule of the collective bargaining agreement between the Board and the Atlantic City Education Association (ACEA);
2. Award petitioner seniority benefits received by other full-time teaching staff members, and all other emoluments to which she is entitled;
3. Award petitioner back pay in the amount of the difference between the salary paid to date and the salary designated on the appropriate salary schedule and,
4. Such other relief deemed equitable, appropriate and just.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On July 1, 1994, counsel for petitioner advised the OAL Deputy Clerk that Barbara Lapin no longer desired to be included as a named petitioner in the instant matter. As a consequence, counsel submitted an amended verified Petition of Appeal deleting Barbara Lapin as a petitioner. The amended petition seeks the same remedies as set forth above in the original petition with one addition, i.e., petitioner seeks an order from the Commissioner compelling the Board to strictly adhere to the provisions of the collective bargaining agreement between the parties.

MOTION

As a consequence of petitioner Barbara Lapin withdrawing from the matter, the Board filed a Notice of Motion to Dismiss the entire Petition of Appeal. The ACEA opposes the Board's Motion.

ARGUMENTS OF THE PARTIES

THE BOARD'S POSITION

FACTS

The respondent is a local school district of the State of New Jersey, County of Atlantic and City of Atlantic City as defined in N.J.S.A. 18A:8-1 et. seq. Pursuant to said legislation the respondent employs various professional staff members to include school teachers and support staff. On November 29, 1993, the petitioner filed a verified petition with the Commissioner of Education titled Barbara Lapin and Atlantic City Education Association, Petitioners v. Atlantic City Board of Education, Respondent. Petitioner Atlantic City Education Association is a collective bargaining unit for collective negotiations concerning the terms and conditions for professionally certified personnel employed full time by the Board, including only classroom teachers, nurses, special service personnel, but excluding all other employees of the Board. Petitioner, Atlantic City Education Association (hereinafter referred to as "ACEA"), filed this verified petition on behalf of Barbara Lapin, a substitute school teacher in the Atlantic City School System alleging that she contracted with the Atlantic City Board of Education for a full time teaching position as a regularly employed teacher and that the respondent improperly employed as a long term substitute teacher in violation of the New Jersey Statutes.

On December 13, 1993, the petitioner, Barbara Lapin, submitted a letter to the Atlantic City High School requesting withdrawal of her grievance "and all related actions with concern to that position. I do not want the Association to continue with the grievance." Also on December 14, 1993, the petitioner, Barbara Lapin addressed a letter to Dr. Mark Harris, Superintendent of Schools, Atlantic City School System referencing a conversation dated Friday, December 10, 1993 confirming that she had submitted a letter to Mrs. Falcon requesting withdrawal of her grievance. The petitioner's letter of December 14, 1993, to the Superintendent of Schools stated in pertinent part that:

I stated the fact that I do not want the association to continue with the grievance.

Thank you for your consideration in this matter.

By letter dated January 31, 1994, petitioner wrote to Mr. Eugene J. Sharp, UniServe Representative, New Jersey Education Association stating the following:

Dear Mr. Sharp:

Please accept this letter as my request that you remove my name effective immediately from all suits, petitions and grievances to Dr. R. Mark Harris and the Atlantic City Board of Education.

Finally, by correspondence dated June 24, 1994, the petitioner, Barbara Lapin, addressed a memorandum to Joanne M. Restivo, Deputy Clerk, stating the following:

Kindly check the correspondence and be advised that I have documented my cancellation in this matter.

On June 28, 1994, petitioner, ACEA, filed an Amended Verified Petition restating the claims set forth in the original verified petition in this matter but deleted petitioner Barbara Lapin's name as a named petitioner. All counts of the petition remain the same as the original petition submitted to the court in this matter.

ARGUMENT

I

The petitioner lacks standing to maintain this action on behalf of the withdrawing petitioner in the face of a clear and voluntary withdrawal of the complaint by the aggrieved school teacher.

Petitioner, ACEA asserts in paragraph 2 of the First Count of the Amended Verified Petition, that it is the duly recognized collective bargaining representative of teachers and other employees within the district. The remaining components of the petitioner's Amended Verified Petition assert alleged violations by the respondent against the originally named co-petitioner, Barbara Lapin, which can essentially be characterized as a grievance. Pursuant to N.J.S.A. 18A:16-1 boards of education:

.... shall employ and may dismiss a secretary or a school business administrator to act as secretary and may employ and dismiss a superintendent of schools, a treasure of school monies, when and as provided by section 18A:13-14 or 18A:17-31, and such principals, teachers, janitors and other officers and employees, as it shall determine, and fix and alter their compensation and the length of the terms of their employment.

The defendant is a signatory to an agreement with the remaining petitioner, ACEA, which agreement recognizes the petitioner herein as the collective bargaining unit for classroom teachers and other specified personnel in Article I, section 1.1. thereof.

Article III of the said collective bargaining agreement sets forth a grievance procedure. Article III, paragraph 3.11 defines a grievance as follows:

A grievance is a claim by a teacher that he has suffered harm by the interpretation, application or violation of policies, agreements or administrative decisions affecting her.

Article III, paragraph 3.2.4, provides pertinent part that:

The association may initiate a grievance on behalf of a group of employees

In this case, the petitioner initiated the complaint in conjunction with the named petitioner, Barbara Lapin, and instituted the action in its capacity as a collective bargaining agent of petitioner, Barbara Lapin. However, pursuant to Article III, paragraph 3.2.5.:

Any grievant may be represented at all stages of the grievance procedure by himself/herself or, at his/her option, by the association or a representative selected or approved by the association. (emphasis added).

Under the clear facts of this case, the petitioner on whose behalf the ACEA initiated the complaint has affirmatively and unequivocally communicated her withdrawal of her complaint and her wishes to cease further prosecution of this grievance. It is very clear in this case that the remaining petitioner, ACEA, has standing in this matter only in a derivative agency capacity

pursuant to the collective bargaining agreement with the respondent Board of Education. The remaining petitioner, ACEA, therefore does not stand to be tangibly benefited in any way by further prosecution of this complaint. There are no group or class issues set out in the verified petition or the amended verified petition filed by the petitioner in this case sufficient to justify the ACEA's continued prosecution of this matter on behalf of its principals. Accordingly, the complaint is due to be dismissed.

THE BOARD'S CONCLUSION

Petitioner, ACEA, commenced this action on behalf of a named grievant, Barbara Lapin, who has subsequently withdrawn the complaint and has requested that all further prosecution of the complaint cease. The petitioner's standing in the initial filing of the complaint rested on its status as the collective bargaining agent for professional staff and employees in Article 1.1 of the collective bargaining agreement. The petitioner's status is predicated only upon the filing and maintenance of a grievance by an aggrieved school teacher. Since the originally aggrieved party has unequivocally withdrawn her complaint the petitioner lacks standing to maintain this action. Accordingly, the amended verified petition filed in this matter is due to be dismissed.

THE ACEA'S POSITION

FACTS

Petitioner, ACEA, is the duly recognized collective bargaining representative of teachers and other employees within the Atlantic City School District. On November 29, 1993, ACEA filed a Verified Petition in this matter with the Commissioner of Education entitled Barbara Lapin and the Atlantic City Education Association v. Atlantic City Board of Education. Barbara Lapin is employed by the respondent in the Atlantic City School District. The petition stated that beginning in 1986, Barbara Lapin was employed by respondent as a substitute teacher in the District and that in or about August, 1993, respondent offered Ms. Lapin a full time teaching position within the District to teach art beginning with the September, 1993 school year. Ms. Lapin accepted the offer and commenced her full time employment with the respondent on or about September 1, 1993. Ms. Lapin was assigned to teach five classes in art and supervise a

detention period, job responsibilities and functions that accompany full time positions held by other art teachers employed by the respondent in the high school at issue.

Although Ms. Lapin was employed as a full time teaching staff member beginning in September of 1993, it was not until March 1994, that Ms. Lapin was placed on the salary schedule of the Collective Bargaining Agreement entered into between ACEA and respondent. Between September 1993 and March 1994, Ms. Lapin was only paid for a per diem rate as a substitute teacher, and did not receive any other benefits guaranteed by the Collective Bargaining Agreement as do other full time teachers. These benefits include, but are not limited to, paid health insurance, membership in the Teacher Pension and Annuity Fund, accrued time to be applied towards tenure, paid sick leave and paid public holidays.

In or about December 1993, Ms. Lapin was advised by the Atlantic City Board of Education, through its Superintendent that if she were to withdraw from the filed Verified Petition and discontinue her related grievance, the respondent would place her on the full time salary schedule of the Collective Bargaining Agreement and provide her with the other benefits guaranteed by the Collective Bargaining Agreement. Not surprisingly, and in an effort to secure her full time employment with the appropriate salary and benefits, Ms. Lapin discontinued her grievance and directed that she be withdrawn as a party to this Petition.

In effect, the respondent has "bought off" Ms. Lapin's claims that respondent violated the law in hiring her to fill a vacancy for a long term position, while paying her as a substitute teacher on a per diem rate with no benefits under the Collective Bargaining Agreement. However, the actions of the respondent are clearly in violation of the law including, but not limited to, N.J.S.A. 18A:16-1.1 of the education law, regulations of the State of New Jersey and in violation of the Collective Bargaining Agreement. In addition, respondent has not awarded Ms. Lapin seniority benefits received by other full time teachers or back pay in the amount of the difference between the salary paid to date and the salary designated on the appropriate salary schedule in the Collective Bargaining Agreement at issue.

An Amended Verified Petition in this matter was filed on July 7, 1994 listing the ACEA as the sole petitioner and restating the claims set forth in the Verified Petition. On August 4, 1994,

the respondent filed a Motion to Dismiss alleging that the ACEA had no standing to maintain the Petition in this matter.

ARGUMENT

THE ACEA HAS STANDING AS THE NAMED PETITIONER TO MAINTAIN THIS ACTION

The ACEA is the duly recognized collective bargaining representative of teachers and other employees within the Atlantic City School District. The concern of an exclusive representative of public employees with respect to matters touching their employment is tangible and genuine; it is an interest sufficient to enable such an entity to participate as a party in proceedings before the Commissioner of Education and the State Board of Education. Winston v. Bd. of Ed. So. Plainfield, 125 N.J. Super. 131, 142 (App. Div. 1973), *citing authority*.

Subsequent Commissioner of Education decisions and an appellate decision have accepted and expanded upon the Winston holding, routinely permitting teachers' unions to bring actions on behalf of their members. In Manalapan-Englishtown Education Association v. Board of Education of the Manalapan-Englishtown Regional School District, 187 N.J. Super. 426, (App. Div. 1981), the Association sued the Board of Education for its failure to certify disciplinary charges against a school principal. The Association brought the action in its name only on behalf of its members who were aggrieved by the acts of the principal. The Court accepted the Association's standing as the litigating party.

Likewise, the Commissioner of Education has accepted as routine the appearance of a teacher's union on behalf of its members. See East Brunswick Education Association on Behalf of 117 East Brunswick Teaching Staff Members v. Board of Education of East Brunswick Township, 1982 S.L.D. 236 (the Association appealed the Board's refusal to permit teachers who apparently participated in a work stoppage to be granted sick leave for that day); See also Board of Education of the Sussex County Vocational School District v. Board of Chosen Freeholder, Sussex County, 1979 S.L.D. 206 (teacher's association summarily allowed to intervene in action because its members would be vitally affected by the Board's closing of a school).

In Wyckoff Education Association v. Wyckoff Board of Education and the Bergen County Superintendent of Schools, 1981 S.L.D. (October 5), aff'd St. Bd. 1981 S.L.D. (May 5), the administrative law judge specifically addressed the Wyckoff's Board's contention that the teacher association lacked standing to assert that the Board was improperly allowing clerical aides to perform the duties of a school nurse. The administrative law judge determined that the association did have standing, saying that the association had a "direct, personal interest in protecting its members" and that it had "an interest in questioning the propriety of the Board's actions as those actions intimately and directly affect its association's members." Id. at p.4, ALJ opinion.

Labor unions have been the type of organization most frequently held to have the requisite standing to assert claims that could be asserted by its members individually. This is the very purpose of an employee organization. In Allee v. Madiano, 416 U.S. 802, 819, 40 L. Ed. 2d. 566, 582-583 (1974) the United States Supreme Court disposed of arguments similar to those implied by the respondent herein. In that case a labor organization went into federal court to contest the legality of arrests and prosecution being conducted by state officials in state court against individuals represented by the Union. The State officials claimed that any judgment obtained could only apply to enjoin prosecutions of those individuals who specifically joined the Union's federal suit. The United States Supreme Court disagreed and held that "the Union has standing as a named plaintiff to raise any of the claims that a member of the Union would have standing to raise." 40 L. Ed. at 582-83 (note 20-23).

The Amended Petition in this matter, which respondent states "can easily be characterized as a grievance" (respondent's brief at page 3), seeks a disposition of claims which will have an impact transcending the personal interest of any individual teacher or claimant and will have repercussions affecting other teachers and employees represented by the ACEA. Winston at 142. As is evidenced by the respondent's failure to cite any authority in support of its Motion to Dismiss, there is no basis in law that the very real interest of the ACEA should be negated in this matter and the ACEA shorn of its status to participate as a party in this Petition.

In addressing the issue of a teacher's association's standing in a grievance proceeding, the Court in Red Bk. Reg. Ed. Assn. v. Red Bk. High Sch. Bd. of Ed., 78 N.J. 122, at 136 and 137 (1978), held that when an employee elects to have his grievance presented through his majority representative, the grievance or claim may no longer be accurately viewed as solely the employee's grievance. It is then also the grievance of his unit, brought on behalf of the entire membership of the unit in the name of their chosen collective representative. Similarly, the claims asserted by ACEA in the Amended Verified Petition in this matter are claims which are being brought on behalf of ACEA's entire membership and are not solely the complaints of Barbara Lapin. Therefore, the issue raised in the respondent's brief that Ms. Lapin has dismissed her grievance against the Board of Education and has withdrawn as a named petitioner in this matter is of no consequence and does not affect the validity of viability of the ACEA's Amended Verified Petition.

Moreover, it is significant that the ACEA, motivated as it may be by the special associational interest and the rights of its members, also seeks to vindicate the public interest. That the ACEA and its members may derive special benefits from the outcome of this proceeding does not detract from the fact that the ACEA has raised serious issues of public administration and statutory interpretation, "which should always come as swiftly as possible to the attention of those administrative officials charged with regulating or overseeing an area of governmental concern." N.J.E.A., et al. v. Essex County Ed. Services Commission, et al., 5 N.J.A.R. 29 (1981). (OAL Dkt. No. EDU 4302-81).

As the court stated in N.J.E.A., et al. vs. Essex County Ed. Services Commission, et al., the Uniform Administrative Procedure Rules do not establish criteria governing standing. The Court noted that the teacher associations involved as petitioners in the proceeding had organizational rights and relationships which would be affected by the outcome of the proceedings and, "for that reason alone," the teacher associations should be accorded standing. Id. at 37. In concluding that the teacher associations had standing to petition the Commissioner of Education, the Court noted the following:

The rules of law or procedure which develop to govern the area [of governmental concern] should make it easier rather than more difficult for

a matter of public interest to come before a responsible public official in a way which requires him or her to act as quickly as the need for reflective determination allows. Restrictive principals of standing developed for good reason to apply in lawsuits between private parties should be applied with greater flexibility in the field of administrative law where, unavoidably, those who render final adjudications are also policy makers in their roles as overseers and regulators. *Id.* at 38, *citing authority*; (Emphasis added).

As the above cited authority indicates, the ACEA has standing to petition the Commissioner of Education in this matter for a declaratory ruling. In the brief submitted in support of its Motion to Dismiss, the respondent fails to cite any case law or statutes which supports its position that the ACEA does not have authority to petition the Commissioner in this matter. Instead, the respondent relies entirely upon the terms of the Collective Bargaining Agreement between the ACEA and respondent and asserts that insofar as Ms. Barbara Lapin has withdrawn her Petition in this matter, the ACEA has no standing to proceed in its own capacity. However, this unsupported and self-serving conclusion is simply incorrect.

Although dealing with a grievance and not a petition, the Court in Red Bank Reg. Education Association found that the question of consensual initiation of any organizational grievance is not a legitimate matter of concern for a public employer. The public employer's obligation to accept organizational grievances is not conditioned on the organization's verification that the affected employee has consented to the filing of the grievance, or in this instance, the Petition. As far as the public employer is concerned, all organizational grievances are consensual. Red Bank Reg. Ed. Assn. at 142.

In its Motion to Dismiss the respondent argues that the ACEA does not stand to be tangibly benefited in any way by further prosecution of this complaint. Respondent's brief at p. 3. However, the respondent ignores the fact that the ACEA exists to protect the rights of its individual members, and consequently, it may seek remedies which are individual in nature.

THE ACEA'S CONCLUSION

ACEA is the duly recognized collective bargaining representative of teachers and other employees within the Atlantic City School District. As such, there is no basis in law to deny the Association standing in this matter. Therefore, it is respectfully submitted that the respondent's Motion to Dismiss is without merit and should be denied.

DISCUSSION AND CONCLUSIONS

The primary issue for determination is whether the ACEA has standing to proceed with this litigation, under an Amended Petition of Appeal before the Commissioner, subsequent to Petitioner Barbara Lapin's voluntary withdrawal from the case. Or, in other words, whether the ACEA may maintain an action against the Board without the authority of the primary petitioner who will be affected by the outcome of the case?

There is no question that the ACEA had standing to bring the original Petition of Appeal on behalf of its member, Barbara Lapin. There exists a long list of Commissioner's decisions and case law to demonstrate the ACEA's standing and right to bring an action against the Board before the Commissioner and the courts on behalf of its membership. The cases and decisions, cited by the ACEA demonstrate that the local representative collective bargaining unit brought actions against an employer board of education on behalf of and, presumably, with the authority of its teaching staff members. Manalapan-Englishtown, supra.; Winston, supra.; Red Bank Regional Education Association, supra.; and, East Brunswick Education Association on Behalf of 117 East Brunswick Teaching Staff Members, supra. None of the above matters deal with the issue of the primary petitioner who has withdrawn from the litigation and the representative unit insists on proceeding to a final determination without the petitioner and in petitioner's behalf.

The Supreme Court, in Allee v. Madiano, 416 U.S. 802; 40 L.Ed. 2d. 566, is a civil rights class action brought by a labor union against State of Texas law enforcement officers, under 42

U.S.C.S. §§ 1983, 1985, for a declaratory judgment to invalidate certain criminal statutes under the First and Fourteenth Amendments of the United States Constitution. The Court held, among other things, that the union, as a named plaintiff, had standing to raise any of the claims that a member of the union would have standing to raise. Note, 40 L. Ed. 2d. at 582-583.

In Allee, the matter concerned a declaratory judgment class action to invalidate certain and specific Texas statutes which deprived the petitioning litigants of their rights under the United States Constitution. The instant matter, however, concerns a named petitioner who has voluntarily withdrawn from the case, and who does not wish to have the matter proceed in her name. In its Amended Petition of Appeal, the ACEA continues to seek remedies in Petitioner Lapin's behalf, which remedies she rejects. The ACEA did not seek a declaratory judgment with respect to the alleged statutory and regulatory violations, pursuant to N.J.A.C. 6:24-2.1 to -2.3. Rather, it merely modified the various counts in the Petition of Appeal while seeking the same remedies for Petitioner Lapin as appeared in the original Petition of Appeal.

The only remedy added in the Amended Petition of Appeal is the ACEA prayer to compel the Board to strictly adhere to the provisions of the collective bargaining agreement between it and the Board. This is a matter for consideration by the Public Employees Relations Commission (PERC).

Our New Jersey Supreme Court has long held that it will not render advisory opinions or function in the abstract. Nor will it entertain proceedings by plaintiffs who are more intermeddlers, interlopers or strangers to the dispute. Crescent Park Tenants Assoc. v. Realty Eq. Corp. of N.Y., 58 N.J. 98, 107 (1971). It continued to hold in Crescent Park that litigation is to be confined to those situations where the litigant's concern with the subject matter evidences sufficient stake and real adverseness, giving due weight to the interests of individual justice, along with the public interest. Id. 107-108.

In K.S.B. Tech. Sales v. No. Jersey Water Supply, 150 N.J. Super. 533, mod. & aff'd. 151 N.J. Super. 218, rev'd. 75 N.J. 272, appl. dism. 98 S. Ct. 1635, 435 U.S. 982, 56 L. Ed. 76 (1978), the Appellate bench cited, with approval, Crescent Park, supra. and stated that:

Standing requires a litigant to allege a sufficiently personal stake in the outcome of a controversy, a concrete adverseness, in order to insure effective presentation of the legal interests claimed to require judicial redress. Id. at 542.

None of these factors are extant here.

I **CONCLUDE** that Petitioner, Barbara Lapin, withdrew from this Petition of Appeal before the Commissioner of Education.

I **CONCLUDE** that the remedies sought by the ACEA are those which would, if granted, personally affect Barbara Lapin.

I **CONCLUDE**, due to Barbara Lapin's withdrawal from this litigation, there is no justiciable controversy before this administrative tribunal.

I **CONCLUDE**, therefore, that the ACEA does not have standing to pursue those claims against the Board on Barbara Lapin's behalf. Crescent Park, supra.; K.S.B. Tech. Sales, supra.

ORDER

Accordingly, the instant matter is hereby **DISMISSED** for lack of standing by the ACEA to pursue the remedies rejected by the primary petitioner, Barbara Lapin.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

MARCH 9, 1995
DATE

LILLARD E. LAW *by [Signature]*
LILLARD E. LAW, ALJ

Receipt Acknowledged:

3/10/95
DATE

[Signature]
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 16 1995
DATE

[Signature]
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

BARBARA LAPIN AND ATLANTIC :
CITY EDUCATION ASSOCIATION,

 PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION
CITY OF ATLANTIC CITY, ATLANTIC :
COUNTY, :

 RESPONDENT. :

_____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions of petitioner Atlantic City Education Association (ACEA) were timely filed in accordance with N.J.A.C. 1:1-18.4.


The exceptions advanced by the ACEA essentially recast and reiterate the arguments it proffered before the ALJ. Basically, it is the contention of the ACEA that the claims asserted herein are being brought on behalf of its entire membership and, as such, applicable Commissioner decisions and case law are clear that the ACEA has standing to independently bring such an action against the Board.

Upon a careful and independent review of the record in this matter, the Commissioner finds the exceptions of the ACEA without merit, and he concurs with the findings and conclusions of the ALJ that the ACEA lacks standing to maintain this action. The record

clearly demonstrates the relief sought and the facts pled by the ACEA in this matter, with the exception of a prayer for relief with respect to the parties' collective bargaining agreement which is not properly before the Commissioner of Education, are specific to one individual, Barbara Lapin. Therefore, with the withdrawal of Barbara Lapin from this litigation, the ACEA does not have standing to pursue these claims against the Board on her behalf.

Accordingly, the initial decision of the Office of Administrative Law is adopted as the final decision in this matter for the reasons clearly articulated therein, and the instant case is hereby dismissed for lack of standing.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

APRIL 17, 1995

DATE OF MAILING APRIL 17, 1995

129-95

JOHN KUFEL, JR.,	:	
	:	
PETITIONER,	:	
	:	
v.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
UNION COUNTY VOCATIONAL-	:	
TECHNICAL SCHOOL DISTRICT,	:	
UNION COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

SYNOPSIS

Petitioner, nontenured physical education teacher, appealed termination of his contract. He contended he was terminated without sufficient notice and for pretextual reasons.

ALJ found that there was no dispute as to material facts and decided upon summary motion. ALJ concluded petitioner failed to demonstrate that his termination was unreasonable. Employment contracts of nontenured teachers which contain provisions allowing for termination by either party upon a specified number of days notice may be terminated in accordance with the terms of the contract without the need to demonstrate good or just cause. ALJ concluded Board's reasons for termination were conduct-related and were neither arbitrary nor capricious. Termination of petitioner's contract was valid and effective. Petition was dismissed.

Citing Dore and emphasizing that the ALJ examined record in a light favorable to petitioner, Commissioner adopted findings and determination in initial decision as his own.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 11555-94

AGENCY DKT. NO. 345-8/94

JOHN KUFEL, JR.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
UNION COUNTY VOCATIONAL-TECHNICAL
SCHOOL DISTRICT, UNION COUNTY,**

Respondent.

Kimberly Sorrentino, Esq., for petitioner

Judith A. Babinski, Esq., for respondent (Bivona, Cohen, Kunzman, Coley,
Yospin, Bernstein & DiFrancesco, attorneys)

Record Closed: March 3, 1995

Decided: March 7, 1995

BEFORE EDITH KLINGER, ALJ:

Petitioner, John Kufel, Jr., filed a Petition of Appeal with the Commissioner of Education on August 16, 1994, appealing the termination of his employment contract by respondent, the Board of Education (Board) of the Union County Vocational-Technical School District (District). The Board filed its answer to the petition on November 4, 1994. At the same time it filed a motion for summary decision to dismiss the petition.

On November 3, 1994, the Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*. The transmittal was made based upon the determination that sufficient controversy existed between the parties to preclude the matter from being dismissed without further proceedings. However, it was specifically stated that the transmittal was not to be construed as precluding the Board from renewing its motion for summary decision before the administrative law judge.

Both the motion of the Board and the documents of petitioner in support of his claim were included with the transmittal. In addition, the Board renewed its motion before the undersigned on January 27, 1995.

By letter dated February 7, 1995, the parties were informed that the Board's motion would be considered before any further action was taken by the undersigned in this matter. Kufel was given the opportunity to submit additional papers by February 20, 1995, in opposition to the Board's motion. The record closed on March 3, 1995 when petitioner's response was received.

The record was originally closed on February 27, 1995 when the undersigned received no response to the motion and an Initial Decision was issued on March 1, 1995. However, it was discovered that newly-retained counsel for petitioner had requested an extension of time to provide a response before the decision was transmitted to the parties, and the record was reopened to consider the documents submitted.

THE UNDISPUTED FACTS

Petitioner's response did not change the facts which are material to making a decision in this matter. The information already submitted by petitioner with respect to

the incidents between himself and the Board were already considered in the light most favorable to him in rendering the prior decision. The additional documents submitted only amplified further the fact patterns of those incidents.

The material facts in this matter are undisputed.

On or about September 16, 1993, Kufel was hired by the Board as a non-tenured physical education teacher at the Union County Vocational-Technical School for the 1993-94 school year. The parties entered into an employment contract on that date which contains the following provision:

It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party giving to the other sixty days' notice after September 16, 1993 in writing of intention to terminate the same, but that in the absence of any provision herein for a definite number of days' notice the contract shall run for the full term named above.

On March 7, 1994, Kufel's supervisor, Patrick Mauro, the school's Director of Curriculum and Instruction, filed an Incident Reporting Form with Vito Gagliardi, superintendent of the District. The report states that Kufel behaved in an insubordinate and menacing way during a conference with Mauro that morning.

On March 14, 1994, a conference was held concerning Mauro's incident report, among other things. The conference was attended by Kufel, Gagliardi, John Paredes, the Business Administrator and Board Secretary, and John Crowley, president of the New Jersey Education Association (NJEA) for Union County Voc-Tech, on behalf of Kufel. As a result of the conference, Gagliardi and Kufel reached an agreement, the terms of which were later memorialized in a memorandum from Jack G. Spear, UNISERV representative, NJEA, to Gagliardi, dated March 21, 1994. A copy was sent to Kufel.

The terms of the agreement were as follows:

1. Mr. Koufel [sic] will receive sixty (60) days pay through May 14, 1994;
2. He is suspended with pay through the above date;
3. As of May 15, 1994, his employment with the district is terminated;
4. Mr. Koufel has agreed to those terms, thus waiving any further right to pursue the issue through the grievance system or alternate legal avenues.

Kufel denies that he actually entered into an agreement not to appeal the Board's action and, for the purposes of this motion only, his representation will be taken as true.

On March 15, 1994, Gagliardi served notice upon Kufel by overnight mail delivery that he was suspended with pay, effective that day, and that his employment was terminated as of May 14, 1994. This provided Kufel with the sixty days notice before termination required by his contract with the Board.

The reasons for termination were discussed at the conference of March 14 and listed in Gagliardi's letter. They were:

- Disagreement with supervisor's observation
- Questioning of management by administrators
- Perceived threats by supervisor by your words and/or actions
- Dissatisfaction with working at UCVTS

On March 16, 1994, the Board, by resolution, approved the termination of Kufel, effective May 14, 1994.

Kufel feels that his contract was terminated in retaliation for his defense of a fellow teacher, Joyce Papera, whom he believed had been unjustly accused by the Director of Personnel of being out of her classroom without good reason on October 21, 1993. Later that day, when Papera told Kufel that the accusation had been made against her, he insisted upon seeing the principal, Joyce Hopper, to inform her that

false accusations had been made against Papera. Hopper did not respond to Kufel's intervention in the manner he thought she should. She told him that it was none of his concern and threatened to report him to his supervisor. Some time after leaving Hopper's office, Kufel went to Gagliardi's office, without an appointment and without being announced, to bring the problem to his attention. He handed Gagliardi a memorandum discussing the accusation against Papera and his comments upon his interview that day with Hopper. The memorandum stated, among other things, that

Mrs. Hopper has difficulty relating to personalities. She seems very insecure.

On October 22, 1993, Gagliardi wrote a memorandum to Kufel complaining about the intrusion and stating that Kufel was interfering in a matter that, on its face, was none of his concern. He instructed Kufel to submit to him a detailed summary of what he wanted to say relating to the Papera matter within three days.

The preceding description is taken entirely from documents submitted by Kufel to the Commissioner of Education in support of his petition.

THE PETITION

Petitioner alleges that, pursuant to *N.J.S.A. 18A 54-20d*, only the Board, not the District superintendent, has the power to employ and dismiss teachers. Kufel was given notice by Gagliardi, not the Board, that his employment would terminate in sixty days. He alleges that both the manner in which he was notified of his termination and the fact that he was terminated without cause make his termination illegal. For these reasons, he claims that his contract requires that he be paid through June 30, 1994.

He further alleges that he never received notification from the Board, rather than the superintendent, that the District did not intend to employ him during the 1994-95 school year, as required by *N.J.S.A. 18A:27-10* and *Long Branch Education Association and William Cook v. Board of Education of City of Long Branch, Monmouth County*,

1975 S.L.D. 1029. He, therefore, seeks reemployment by the District for the 1994-95 school year pursuant to N.J.S.A. 18A:27-11. He also asks that the District reimburse him for the cost of benefits which he had to secure for himself from May 14, 1994.

THE BOARD'S MOTION

The Board has moved for summary decision in this matter on the grounds that the it had the right, pursuant to Kufel's employment contract, to terminate his employment with sixty days notice. It also argues that Kufel voluntarily waived his right to pursue an appeal at the conference of March 14, 1994 as evidenced by Spear's memorandum to Gagliardi, dated March 21, 1994, setting forth the agreement between the parties. This last ground will not be considered because petitioner disputes that there was ever such an agreement between the parties.

DISCUSSION OF LAW

Petitioner relies upon N.J.S.A. 18A:27-10 and *Long Branch Education Association and William Cook v. Board of Education of City of Long Branch, Monmouth County*, 1975 S.L.D. 1029 to support his claim that he did not receive the required notice before his contract was terminated. The case and the statute he cites, however, apply only where a non-tenured teacher's contract of employment is to be renewed or not renewed.

For purposes of deciding this matter, the distinction must be drawn between non-renewal and termination of contracts. The terms renewal and non-renewal refer to the intent of the parties to enter into a future contract. Termination reflects the intent of at least one of the parties to put an end to an existing contract before it expires by its own terms.

Employment contracts of non-tenured public school teachers which contain provisions allowing for termination by either party upon a specified number of days

notice may be terminated in accordance with the terms of the contract without the need to demonstrate "good" or "just" cause. *Mozier v. Board of Education of Cherry Hill Twp., Camden County*, 450 F. Supp. 742, 748 (D.N.J. 1977).

Petitioner was entitled to, and received, a statement of the reasons why the Board elected to terminate his contract to ensure that it was not arbitrary and capricious or done for "impermissible reasons." *Id.* at 749.

However, such review merely insures that impermissible reasons are not utilized in termination decisions. It in no way limits the multitude of acceptable termination rationales which fall well short of the "just cause" standard. That schools do not make employment decisions without reasons is to be expected. However, a non-arbitrary decision-making process does not create an expectancy of continued employment. [Citation omitted.] There is a vast difference between proscribing impermissible rationales, and establishing the "exclusive conditions under which an employee could be dismissed.

[*Id.* at 749.]

I **FIND** that Kufel's own version of the incident, together with Gagliardi's letter of March 15, 1994, show that there is no dispute as to material facts and give a clear picture of the reasons for his termination: among other things, he intervened forcefully, in a manner which was perceived by his supervisors as threatening, to question a management decision to discipline another employee, a matter which did not concern him. His argument with respect to the incident is that he believes that he was entitled to behave this way. I **FIND** that petitioner cannot carry his burden to demonstrate that no reasonable school district would terminate the employment contract of a non-tenured teacher for this type of conduct. Consequently, I **CONCLUDE** that the Board's reasons for termination were conduct-related and were neither arbitrary nor capricious, nor was petitioner terminated for impermissible reasons. The Board's decision lay squarely within its sound management discretion.

I, therefore, **CONCLUDE** that, since petitioner's contract contains a clause providing for termination upon sixty days notice, it may be terminated in accord with its provisions without the need to demonstrate "just cause." *Mozier, supra*.

Petitioner argues that the superintendent did not have the authority to invoke the terms of his contract without a resolution of the Board. However, under *N.J.S.A. 18A:17-20*, the superintendent is a representative of the board which employs him. Therefore, when Gagliardi notified Kufel of his suspension and gave him notice of the termination of his contract, he was acting as the agent of the Board for the purpose.

In Rockefeller v. Board of Education of the Borough of River Edge, Bergen County, 1975 S.L.D. 898, the Commissioner rejected Rockefeller's claim that the Board could not subsequently ratify the district superintendent's termination of a non-tenured teacher's contract. He stated that the superintendent's notification was valid, was a representation of the Board's decision and was authorized by the Board. *Rockefeller, 1975 S.L.D.*, at 907. He added that the subsequent ratification by the Board was unnecessary. *Id.* Finally, he stated that

the Board's action contravened herein was one grounded in the contractual agreement between petitioner and the Board and the contract could be terminated with "sixty days notice in writing" ... and the record provides ample proof that the decision to exercise that option was one the board made, as petitioner's employer, upon the recommendations of its Superintendent. This decision was not rendered *ultra vires* by procedural defects. . . .

Since the Board ratified Gagliardi's action one day after he notified Kufel, I **CONCLUDE** that, for all intents and purposes, it was the Board which notified, suspended and terminated petitioner on March 15, 1994. According to *Rockefeller, supra*, subsequent ratification was probably not even necessary.

I **CONCLUDE** that, as a matter of law, the termination of Kufel's employment as of May 15, 1994 was valid and effective. I further **CONCLUDE** that there was no obligation to notify Kufel of the Board's intent not to renew his contract for the 1994-95

school year since it severed its employment relationship with him on March 15, 1994, effective May 15, 1994. I **CONCLUDE** that from this date he was entitled to no other compensation, including the cost of benefits which he had to secure for himself. Based upon the foregoing I **CONCLUDE** that petitioner is entitled to no relief.

Pursuant to *N.J.A.C. 1:1-12.5* and *Judson v. People's Bank and Trust Co. of Westfield*, 17 N.J. 67, 74 (1954), summary decision should be granted if there is no genuine issue of material fact in dispute and the moving party is entitled to prevail as a matter of law. The materials submitted by both parties in this matter show that there is no material fact in dispute and respondent is entitled to prevail as a matter of law. Accordingly, I **CONCLUDE** that it is not necessary to conduct a full evidentiary proceeding to resolve this matter. I, therefore, **CONCLUDE** that the Board of Education of Union County Vocational-Technical Schools is entitled to summary decision dismissing the petition.

Accordingly, it is **ORDERED** that summary decision is hereby **GRANTED** to respondent and the petition of John Kufel, Jr. is **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton,**

New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 7, 1995
DATE

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

3/8/95
DATE

Hope R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 13 1995

Jeff S. Marin
ACTING DIRECTOR AND
ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

DATE
md

JOHN KUFEL, JR., :
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 PETITIONER, :
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 v. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 UNION COUNTY VOCATIONAL- :
 TECHNICAL SCHOOL DISTRICT, :
 UNION COUNTY, :
 :
 RESPONDENT. :
 :
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The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner filed timely exceptions pursuant to N.J.A.C. 1:1-18.4.

Petitioner primarily excepts to the ALJ's determination that there were no material facts in dispute, so as to make this matter ripe for summary decision. Instead, petitioner contends that there exists a dispute as to the reason for his termination. Petitioner asserts that while the Board maintains he was terminated pursuant to the events of March 1994 "in which they allege that he was permitting a student to eat in his class room," (Petitioner's Exceptions, at p. 1), his termination instead arose from an incident dating back to October 1993 in which he was defending another teacher who, he asserts, was being discriminated against by Mrs. Hopper, the

principal. (Id.) The facts of said incident are detailed in the initial decision and incorporated herein by reference. Petitioner argues,

“***That the Board of Education hired a replacement the very same night that they terminated Mr. Kufel shows that they had a premeditated agenda and supports Mr. Kufel’s version of the facts -- he was terminated in retaliations (sic) for the earlier October incident--a termination which apparently even the Board knew they could not support without being arbitrary or capricious.”

(Petitioner’s Exceptions, at p. 2)

Petitioner concludes that the ALJ’s determination that the Board’s actions were not arbitrary and capricious required reliance on disputed facts. To rely on the facts which petitioner asserts were the actual reasons for his termination would, he maintains, lead to the conclusion that he was terminated for impermissible reasons.

Further, petitioner excepts to the ALJ’s characterization of his conduct, prior to termination of employment. Petitioner denies that he “intervened forcefully” on behalf of a fellow staff member in October of 1993, or, that following said incident, he appeared “unannounced” and “without an appointment” at the superintendent’s office. (Petitioner’s Exceptions, at pp. 1-2)

Finally, petitioner argues that, with respect to ending the contractual relationship between a Board and a nontenured teacher, “***there is no difference between a non-renewal and a termination.” (Id., at p. 2)

Upon careful and independent review of the record of this matter, the Commissioner concurs with the ALJ that the Board properly acted within its managerial discretion when it terminated petitioner, a nontenured teacher, in accordance with applicable

provision in his contract. Initially, the Commissioner determines that the matter herein was properly decided upon summary review. The ALJ instructs:

Pursuant to N.J.A.C. 1:1-12.5 and Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954) summary decision should be granted if there is no genuine issue of material fact in dispute and the moving party is entitled to prevail as a matter of law.*** (emphasis added) (Initial Decision, at p. 9)

“Material fact’ means a fact legally consequential to a determination of an issue in the case.”

N.J.A.C. 1:1-2.1 In the instant matter, the facts which petitioner asserts to be significant are, instead, without legal consequence under these circumstances. As the ALJ notes,

Employment contracts of non-tenured public school teachers which contain provisions allowing for termination by either party upon a specified number of days notice may be terminated in accordance with the terms of the contract without the need to demonstrate “good” or “just” cause. Mozier v Board of Education of Cherry Hill Twp., Camden County, 450 F. Supp. 742, 748 (D.N.J. 1977) (emphasis added) (Initial Decision, at pp. 6-7)

As to the wide discretion a board enjoys in making employment decisions which concern non-tenured employees, case law further provides,

absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board. Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 456 (App. Div. 1982)

Moreover, the Commissioner recognizes that, contrary to petitioner’s assertions, the ALJ examined representations in a light most favorable to petitioner, including incorporating petitioner’s description of the October 1993 events entirely from his petition and supporting documents. (Initial Decision, at pp. 3, 5) The ALJ’s finding as to the reasons for petitioner’s termination clearly consider said documents:

I FIND that Kufel's own version of the incident, together with Gagliardi's letter of March 15, 1994, show that there is no dispute as to material facts and give a clear picture of the reasons for termination: among other things, he intervened forcefully, in a manner which was perceived by his supervisors as threatening, to question a management decision to discipline another employee, a matter which did not concern him.*** (Initial Decision, at p. 7)

Finally, the Commissioner rejects petitioner's unsubstantiated claim that "****there is no difference between a non-renewal and a termination" of a contract for a nontenured teacher, and likewise finds without merit petitioner's claim that the ALJ mischaracterized his conduct in the instant matter.

Accordingly, the Commissioner adopts as his own the findings and conclusions of law by the Administrative Law Judge in the initial decision, for the reasons expressed therein, and dismisses the petition with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

APRIL 19, 1995

DATE OF MAILING APRIL 19, 1995

EDU # 11555-94
C # 129-95
SB # 63-95

JOHN KUFEL, JR., :
PETITIONER-APPELLANT, :
V. : STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE UNION : DECISION
COUNTY VOCATIONAL-TECHNICAL :
SCHOOL DISTRICT, UNION COUNTY, :
RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, April 19, 1995

For the Petitioner-Appellant, Kimberly Sorrentino, Esq.

For the Respondent-Respondent, Bivona, Cohen, Kunzman, Coley, Yospin,
Bernstein & DiFrancesco (Judith A. Babinski, Esq., of Counsel)

John Kufel, Jr. (hereinafter "petitioner") was employed by the Board of Education of the Union County Vocational-Technical School District (hereinafter "Board") in September 1993 as a teacher of physical education and, consequently, had not yet achieved tenure at the time of the incidents resulting in this appeal. On March 7, 1994, petitioner's supervisor filed an incident report with the superintendent of schools in which he alleged that petitioner had acted in an insubordinate and menacing manner during a conference. As a result, on March 14, 1994, the superintendent met with petitioner and reached an agreement wherein petitioner would be suspended without pay through May 14 and his employment with the district terminated as of May 15. On

2/7/96

March 15, the superintendent served petitioner with notice of such suspension and termination by overnight mail. On March 16, the Board, by resolution, approved petitioner's termination.

Petitioner thereafter filed a petition with the Commissioner of Education alleging that the Board had actually terminated his employment in retaliation for an earlier incident in which he had come to the defense of another teacher who he believed had been unjustly accused of being out of her classroom without good reason. Petitioner maintained that both the manner in which he was terminated and the fact that he was terminated without just cause invalidated the Board's action.

On March 7, 1995, an Administrative Law Judge ("ALJ"), concluding that there was no dispute as to the material facts, recommended granting the Board's motion for summary decision and dismissing the petition. The ALJ found that petitioner had intervened in a management decision to discipline another employee in a manner perceived by his supervisors to be threatening, and that petitioner could not carry the burden of demonstrating that no reasonable school district would have terminated the employment of a non-tenured teacher for such conduct. Consequently, she concluded that the Board's reasons for petitioner's termination were conduct-related and were neither arbitrary nor capricious. She noted, in addition, that since petitioner's contract contained a clause providing for termination upon 60 days notice, his employment could be terminated in accordance with the contract without the need to demonstrate just cause. She also found that the superintendent was acting as an agent of the Board

when he gave petitioner notice of his termination and that the Board had ratified the superintendent's action one day later.

On April 19, 1995, the Commissioner adopted the findings and conclusions of the ALJ and dismissed the petition, agreeing that the Board had acted properly within its managerial discretion when it terminated petitioner.

Petitioner filed the instant appeal to the State Board of Education, contending, inter alia, that there were material facts in dispute concerning the incident leading to his termination which precluded a grant of summary decision.

After a thorough review of the record, we affirm the ultimate determination of the Commissioner to dismiss the petition. However, we modify that decision as follows.

It is now well-established that a district board has virtually unlimited discretion in hiring or renewing non-tenured teachers. Dore v. Bedminster Twp. Bd. of Ed., 185 N.J. Super. 447 (App. Div. 1982). “[A]bsent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board.” Id. at 456. Thus, where a non-tenured teacher challenges a district board's decision to terminate his employment on the grounds that the reasons provided by the board are not supported by the facts, he is entitled to litigate that question only if the facts he alleges, if true, would constitute a violation of constitutional or legislatively-conferred rights. Guerrero v. Board of Education of the Borough of Glen Rock, decided by the State Board, February 5, 1986, aff'd, Docket #A-3316-85T6 (App. Div. 1986). Petitioner, who was not tenured, has made no such

claim. Rather, he alleges that his termination was in retaliation for his actions on behalf of another teacher. Consequently, even accepting petitioner's allegations as true, the Board was entitled to summary decision as a matter of law.

We therefore affirm the ultimate determination of the Commissioner to dismiss the petition, as modified herein.

Donald C. Addison, Jr., Wendel E. Daniels and Thomas P. McGough abstained.

February 7, 1996

Date of mailing FEB 09 1996

DAVID HERRON, :

PETITIONER, :

COMMISSIONER OF EDUCATION

V. :

DECISION

BOARD OF EDUCATION OF THE :
TOWN OF MONTCLAIR, ESSEX :
COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioning parent sought to enjoin the Board from initiating a sliding scale tuition for its pre-kindergarten program. Board filed motion for summary decision contending that petitioner had no standing in the matter and, even if he did, he could not prevail upon the merits.

ALJ concluded petitioner did have standing to proceed with the appeal as his son was eligible for enrollment in the program. However, ALJ found that there is nothing in the Constitution or in the statutes which prohibits a district from charging tuition for pre-kindergarten programs, serving children under the age of five, as long as the charge is not imposed on an impermissibly discriminatory basis. Thus, there was no reason that the district could not maintain such a program. ALJ concluded that the Board was entitled to summary decision and dismissed petitioner's appeal adding if petitioner or his son are injured following his son's enrollment in the program, petitioner may bring an appeal as to his individual damages at the appropriate time. Petition was dismissed.

Commissioner adopted in part and reversed in part the initial decision of OAL. Commissioner concurred with the ALJ that petitioner had standing to proceed with this appeal and that the matter was ripe for summary judgment; but, the Commissioner could not concur with the ALJ as to the granting of summary judgment. Citing N.J.S.A. 18A:44-1, ALJ found that the record established neither express nor necessarily implied authority granting the Board the power to charge individuals tuition for the non-mandated preschool program. Absent such authorization, the Board may not charge tuition for the operation of such program. A board, however, would not be prohibited from leasing its facilities to a tuition-charging entity operating the program independent of the local school district. Summary judgment was granted to petitioner.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 7286-94

AGENCY DKT. NO. 85-4/94

DAVID HERRON,

Petitioner,

v.

**BOARD OF EDUCATION OF
THE TOWN OF MONTCLAIR,
ESSEX COUNTY,**

Respondent.

David Herron, *pro se*

Steven B. Hoskins, Esq., for respondent (McCarter & English, attorneys)

Record Closed: January 11, 1995

Decided: January 24, 1995

BEFORE EDITH KLINGER, ALJ:

On March 24, 1994, petitioner, David Herron, filed a Petition with the Commissioner of Education seeking to enjoin the Board of Education of Montclair from initiating a sliding scale tuition for its pre-kindergarten program.

In his petition, Herron alleges that if the Board charges tuition for its pre-kindergarten program,

- 1) it will undermine the integrity of the district's magnet program.
- 2) it will jeopardize Montclair's desegregation plan.
- 3) it will discourage African-American parents from participating in the program by further classifying and segregating their children.
- 4) it violates *N.J.S.A. 18A:44-4*.
- 5) teachers paid from private funds can't receive pension benefits from the state.
- 6) unequal treatment will polarize students based upon class, race and income.

On June 28, 1994, the Board filed its answer and on July 28, 1994, the Commissioner of Education transmitted the matter to the Office of Administrative Law for hearing pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*. Petitioner's application for emergent relief was denied in a decision by James Ospenson, ALJ, dated September 7, 1994, and the matter was assigned to the undersigned for plenary hearing.

On December 1, 1994, respondent filed a motion for summary decision on the grounds that petitioner has no standing to maintain this action and, even if he does, he can not prevail upon the merits. The Board alleged that:

- 1) This program does not jeopardize Montclair's desegregation plan because it, in fact, constitutes part of the Board's voluntary desegregation program.
- 2) Pre-kindergarten programs are not mandated by the state. The requirement that education be "free, public and accessible to all" does not apply to the education of children less than 5 years of age.

- 3) The tuition has, in practice, not discouraged African-American parents from enrolling their children in the program; enrollment is higher than it has ever been.
- 4) Chapter 1 students and students at risk of academic failure are already identified, in part, on the basis of their eligibility for free or reduced-price lunches. This eligibility is based upon family income.

In support of its motion the Board submitted the affidavit of Edna Harris, Board Secretary and School Business Administrator. In her affidavit, she sets forth the following facts.

1. The pre-kindergarten program is offered to all on a sliding fee basis.
2. Any household with an income of less than \$50,000 a year pays no tuition.
3. Any household with a yearly income of more than \$100,000 pays full tuition (\$3000).
4. Households with income between the two extremes pay tuition on a sliding scale.
5. Proof of income is based upon state or federal tax returns. Aid to Families with Dependent Children (AFDC) or food stamp recipients pay no tuition automatically when they provide their case numbers.
6. There is a confidential review of income documentation. The review is limited to two employees of the district. Not even the Board itself has access to the information. All documentation is returned to the parents immediately after review.
7. No parent has complained that the district has breached confidentiality with respect to financial information provided
8. The actual per-pupil cost of the program to the district is \$4041.
9. The district pays the cost of transportation for all children.

10. Funds received from tuition are treated in the same way as other funds received by the district: they go into the general district funds. The program's expenses are paid from the general funds.
11. Of the 429 pupils registered for 1994-95 school year, 220 pay full or partial tuition and 209 pay no tuition. Only about one-fourth of the students pay full tuition.
12. Of the 429 pupils enrolled, 230 are white, 169 are African-American, 16 are Hispanic, 13 are Asian/Pacific Islander and 1 is Native American.
13. Records show that the enrollment of African-American pupils was higher in the 1994-95 school year than it was in the three previous years. It increased from 27.5 to 34.6%.
14. There is no breakdown of tuition payers as opposed to non-tuition payers by racial or ethnic group.
15. The pre-kindergarten/kindergarten program was established to meet enrollment needs. Pre-kindergarten/kindergarten students in Montclair attend seven different schools. On January 31, 1994, the Board established a pre-kindergarten/kindergarten center in the Mount Hebron School for three kindergarten classes (73 students) and two pre-kindergarten classes (51 students). Mount Hebron is otherwise a middle school,
16. The decision to charge a fee for the 1994-95 pre-kindergarten program was based upon decreases in state aid, such as the anticipated loss of the annual desegregation grant, and an anticipated increase in enrollment.

The first basis of the Board's motion is that the petition does not contain a statement of petitioner's standing to bring the cause of action. He does not allege that he or any member of his family or any party whose interest he represents is a child or the parent of a child who is in or eligible for the pre-kindergarten program. He suggests a theoretical chance of harm but has not made any allegation which demonstrates the

real possibility that he or anyone else, has been, or will be, injured in any way. Consequently, he has no standing to pursue this cause of action.

On December 26, 1994, petitioner filed a certification stating that his son, aged three years, will be able to enroll in the pre-kindergarten program between March and June 1995. Therefore, by the time that there is a final decision in this matter, his son will be eligible for enrollment. I **CONCLUDE** that his certification confers standing upon him to proceed with this appeal.

The second basis for the Board's motion is that the petition is moot because any parent who wished to enroll a child in the pre-kindergarten program has already done so and the Board has already established and implemented a method of income verification and no parental privacy rights have been violated. In particular, no rights of petitioner have yet been violated so that the allegations of the petition are premature as they pertain to him.

Alternatively, the Board seeks summary decision on the grounds that its decision to establish a pre-kindergarten program and to charge a sliding scale tuition for the pre-kindergarten program is in full compliance with the applicable law. I **FIND** that petitioner's certification contains no facts which show that there is a dispute as to any relevant material fact.

Based upon the applicable law, I **CONCLUDE** that, even if petitioner has a sufficient stake in the outcome of his appeal to confer standing, he can not, as a matter of law, prevail upon the merits of his claim.

The Constitution of the State of New Jersey, Art. 8, § 4, ¶ 1, states that

The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.

N.J.S.A. 18A:38-1 requires a district to provide a free public education to certain persons over five and under twenty years of age.

Therefore, the district is under no constitutional or statutory obligation to provide a free pre-kindergarten education to a four year old child. However, a district may undertake to educate younger children voluntarily. Pursuant to *N.J.S.A. 18A:44-1*, a board of education may establish a nursery school or nursery department and admit any child who is under the age at which children are admitted to other schools in the district.

If a pre-kindergarten program is provided, the expenses of the program are to be "paid out of any moneys available for the general fund expenses of the schools, and in the same manner and under the same restrictions as the expenses of other schools or departments are paid." *N.J.S.A. 18A:44-4*. The Board has complied with this requirement. Neither this nor any other statute specifies that the general fund may not seek reimbursement of the expenses of providing a service which is not mandated.

I **CONCLUDE** that there is nothing in the constitution or in the statutes which prohibits a district from charging tuition for pre-kindergarten programs, serving children under the age of five, as long as the charge is not imposed on an impermissibly discriminatory basis. *The Constitution of the State of New Jersey, Art. 1, § 4, ¶ 5; N.J.S.A. 18A:36-20*. However, there is nothing inherently discriminatory about charging for a service based upon ability to pay. Petitioner himself has referred to the fact that the children's eligibility for free or reduced-price lunches is also based upon family income.

Petitioner's allegations are purely speculative and do not demonstrate that charging tuition on a sliding scale will, in any way, conflict with Montclair's desegregation plan, discourage African-American parents from participating in the program or single out minority pupils. In fact, the undisputed, actual data from the district, set forth in the affidavit of Edna Harris, Board Secretary and School Business

Administrator, submitted with its motion, indicates that exactly the opposite state of affairs is true. The program has led to increased, rather than decreased participation by African-American students. There has been no breach of confidentiality as to economic data. Students are not labeled or segregated along economic, racial or ethnic lines.

N.J.A.C. 1:1-12.5(b) provides that, when a motion for summary decision is made and supported, the adverse party must respond by affidavit to show that there are genuine issues of material fact which can only be resolved by means of an evidentiary hearing. If there is no such response, summary decision may be entered, if appropriate. In this case, petitioner's affidavit does not show that there is a dispute as to any material fact except those related to his standing to pursue the appeal and this issue was resolved in his favor.

Since there is no prohibition against the district establishing a pre-kindergarten program or charging tuition for it on a sliding scale based upon ability to pay and there is no factual dispute concerning his claim that the program violates privacy or illegally discriminates against any student or group of students, I **CONCLUDE** that there is no reason that the district can not maintain such a program.

Based upon the above, I **CONCLUDE** that the Board is entitled to summary decision, dismissing petitioner's appeal, because he can not prevail upon the merits. If he or his son are injured following his son's enrollment in the program, petitioner may bring an appeal as to his individual damages at the appropriate time. At the present time, there are none.

It is, therefore, **ORDERED** that petitioner's appeal is hereby **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 24, 1995
DATE

Edith Klinger
EDITH KLINGER, ALJO

Receipt Acknowledged:

1/27/95
DATE

[Signature]
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 31 1995

DATE
md

[Signature]
OFFICE OF ADMINISTRATIVE LAW

DAVID HERRON, :
 :
 PETITIONER, :
 :
 V. :
 :
 : COMMISSIONER OF EDUCATION
 :
 : DECISION
 :
 BOARD OF EDUCATION OF THE TOWN:
 OF MONTCLAIR, ESSEX COUNTY,
 :
 :
 RESPONDENT.
 :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were submitted by the respondent (“the Board”) pursuant to the provisions of N.J.A.C. 1:1-18.4. No exceptions were filed by the petitioner.

In its exceptions, the Board urges the Commissioner to adopt the Administrative Law Judge’s determination granting its motion for summary judgment dismissing the petition based on the conclusion that neither the statutes nor the New Jersey Constitution prohibit the district from charging tuition for pre-kindergarten programs. The Board, however, excepts to the language in the initial decision specifying that in the event petitioner “or his son are injured following his son’s enrollment in the program, petitioner may bring an appeal as to his individual damages at the appropriate time” as violative of the doctrines of res judicata, collateral estoppel and entire controversy. (Initial Decision, at p. 7)

Upon a careful and independent review of the record, the Commissioner concurs with the findings and conclusions of the ALJ that petitioner has standing to proceed with this appeal and that the matter is ripe for summary judgment. The Commissioner, however, cannot concur with

the findings and conclusions of the ALJ as to her determination that “the Board is entitled to summary decision *** because [petitioner] cannot prevail upon the merits.” (Id.)

Local boards of education are creatures of the State and, therefore, have only those powers granted to them by the Legislature, either expressly or by necessary implication. Fair Lawn Education Association v. Fair Lawn Board of Education, 79 N.J. 574, 579 (1979). The question to be resolved in this instance, therefore, is whether a local board of education has been granted the authority to charge tuition for children residing in the district for attendance in a pre-school program.

The Legislature has granted districts authority to charge tuition or fees for certain types of programs. For example, N.J.S.A. 18A:50-2 permits a local board of education to “*** charge and collect from persons taking such courses *** for tuition a sum not exceeding the actual cost per pupil as determined according to rules prescribed by the commissioner and approved by the state board.” (See N.J.A.C.6:30-1.1 et seq.) A local board may also charge tuition for summer enrichment programs, pursuant to N.J.S.A. 18A:54B-2, “*** subject to rules and regulations promulgated by the State board.” (See N.J.A.C. 6:8-8.1(c))

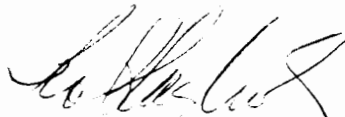
A local board of education is statutorily authorized to create a pre-kindergarten program pursuant to N.J.S.A.18A:44-1. This section provides that a district may “establish a nursery school or a nursery department in any school under its control, and shall admit to such nursery school or department any child who is under the age at which children are admitted to other schools or classes in such district.” Once a program has been established, N.J.S.A. 18A:44-4 requires that “[t]he expenses of nursery schools or departments *** shall be paid out of any

moneys available for the general fund expenses of the schools, and in the same manner and under the same restrictions as the expenses of other schools or departments are paid.”

The ALJ determined that the Board had complied with the requirement of 44-4 because “***[n]either this nor any other statute specifies that the general fund may not seek reimbursement of the expenses of providing a service which is not mandated.” (Initial Decision, at p. 6) The record has established, however, neither express nor necessarily implied authority granting the Board the power to charge individuals tuition for this type of nonmandated program. “Moneys available for the general fund of the schools,” consequently, must be read to refer to money obtained from local taxes, state and/or federal aid or other nontuition sources in the absence of a specific statute authorizing tuition to be charged for these purposes. Absent such authorization, the Board may not charge tuition for the operation of its preschool program. This does not, however, preclude a district from permitting its facilities to be utilized for the operation of a preschool program. Pursuant to N.J.S.A. 18A:20-8.2(a) a local board of education may resolve to lease its facilities to outside entities under certain conditions articulated therein. A board would not be prohibited from leasing its facilities to a nonprofit organization, independent of the local board of education, for the entity to operate a preschool program on school grounds subject to the availability of facilities within the district. The tuition-charging entity would have to actually be operating the program independent of the local school district.

Consequently, the Initial Decision of the Office of Administrative Law is adopted, in part, and reversed, in part, and summary judgment is granted to petitioner, as articulated herein.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

EDU #7286-94
C # 130-95
SB # 65-95

DAVID HERRON, :
 :
 PETITIONER-RESPONDENT, :
 :
 V. : STATE BOARD OF EDUCATION
 :
 BOARD OF EDUCATION OF THE TOWN : DECISION ON MOTION
 OF MONTCLAIR, ESSEX COUNTY, :
 :
 RESPONDENT-APPELLANT. :
 _____ :

Decided by the Commissioner of Education, April 19, 1995

For the Petitioner-Respondent, David Herron, pro se

For the Respondent-Appellant, McCarter & English
(Stephen B. Hoskins, Esq., of Counsel)

The State Board of Education grants the Board's motion to supplement the record on appeal pursuant to N.J.A.C. 6:2-1.9. Given our disposition of this motion, we direct the Board to file a brief in support of its appeal within twenty days of this decision.

August 2, 1995

Date of mailing AUG 04 1995

EDU #7286-94
C # 130-95
SB # 65-95

DAVID HERRON,	:	
	:	
PETITIONER-RESPONDENT,	:	
	:	
V.	:	STATE BOARD OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
TOWN OF MONTCLAIR, ESSEX	:	
COUNTY,	:	
	:	
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, April 19, 1995

For the Petitioner-Respondent, David Herron, pro se

For the Respondent-Appellant, McCarter & English (Steven B. Hoskins, Esq.,
of Counsel)

The central issue in this appeal is whether the Board of Education of the Town of Montclair (hereinafter "Board" or "Montclair Board") may charge tuition for four-year-olds enrolled in its Primary Unit Program.¹ As follows, although we agree with the Commissioner that it may not charge tuition, our conclusion is predicated on entirely different grounds.

There has been no dispute concerning the facts in this matter. From the mid-1970's, the Montclair Board has offered the Primary Unit Program. This program was

¹ We note that although counsel for the Board refers to the program as a "pre-kindergarten program," as subsequently discussed, the program at issue is the Board's "Primary Unit Program."

12/4/96

developed as part of the District's voluntary desegregation plan. Until 1994-95, the program was offered free of charge to all four-year-olds who lived in Montclair. Effective September 1994, the Board determined to charge tuition on a sliding scale basis to those families whose income exceeded \$50,000 per year. While the per pupil cost to the Board for 1994-95 was \$4,041, the maximum that it charged under its sliding scale was \$3,000 in those cases where a family's annual income exceeded \$100,000.² Tuition payments were applied to the Board's general fund,³ from which the expenses of the program were paid in the same manner as all other expenses incurred by the District.

Petitioner is a Montclair resident and the father of three children, one of whom was to turn four in September 1995. He challenged the Board's determination to charge for the program by filing a petition of appeal to the Commissioner of Education in March 1994, alleging that the Board's tuition charge was contrary to law and the fundamental tenets of public education, and that the charge constituted illegal discrimination.

In response, the Board filed a motion to dismiss the petition, asserting that petitioner lacked the standing to bring such action because his child was not registered for the program. In the alternative, the Board sought summary decision in the matter, contending that its program was in compliance with the law.

The Administrative Law Judge ("ALJ") rejected the Board's assertion that petitioner lacked the standing to bring the action, reasoning that the fact that petitioner's

² We note that the Board represents in its brief in support of this appeal that 200 students out of a total enrollment of 429 in 1994-95 paid tuition and that 122 of the total were charged the \$3,000 maximum.

³ The Board states in its brief that tuition payments for 1994-95 totaled approximately \$564,000.

son was to turn four and would be eligible for the program in 1995-96 was sufficient to confer standing. Accordingly, she denied the Board's motion for dismissal. The ALJ however granted summary decision in favor of the Board, finding that its actions were in compliance with law.

The Commissioner adopted the ALJ's determination that petitioner had standing, but rejected her determination that the Board's program was in compliance with law. Rather, the Commissioner concluded that the Board was without the authority to charge tuition for this program. In support of his conclusion, the Commissioner pointed to N.J.S.A. 18A:50-2, which authorizes district boards of education to charge tuition for adult education courses not in excess of actual per pupil cost and N.J.S.A. 18A:54B-2, which expressly authorizes school districts to charge for non-credit summer enrichment courses.

The Commissioner then made the assumption that the Board had established the program at issue pursuant to N.J.S.A. 18A:44-1, which authorizes school districts to establish nursery schools.⁴ Based on this assumption, the Commissioner reasoned that because that statute does not include the express authority to charge tuition, and because N.J.S.A. 18A:44-4 requires that the costs must be paid from "moneys available for the general fund expenses of the schools" once such a program is established, in the absence of a specific statute authorizing tuition to be charged for these purposes, the term "moneys available for the general fund" had to be read to refer to nontuition sources. Therefore, finding that a district board had the option of leasing its facilities to

⁴ We note that while counsel for the Montclair Board referred to the program as a "pre-kindergarten" program as it pertained to the four-year-olds enrolled therein, he did not assert that it was a nursery school or that it had been established pursuant to N.J.S.A. 18A:44-1. See, e.g., the Board's brief in support of this appeal and its answer to the Petition of Appeal to the Commissioner.

a non-profit organization under certain circumstances and that such an entity could in turn charge tuition, the Commissioner rejected the ALJ's determination and granted summary decision to the petitioner.

The Montclair Board appealed both aspects of the Commissioner's decision to the State Board. It renewed its claim that petitioner did not have the requisite standing to bring this action because his child was neither enrolled nor eligible to enroll in the program at the time he filed his petition. The Board also argued that any standing petitioner may have had was in any event vitiated by the fact that he had not enrolled his son in the program for 1995-96 when he became eligible. The Board further contended that the program involved here was not within the mandate for the provision of a thorough and efficient system of free public education, and asserted that its general enabling legislation provided authority for its action in the absence of any legal prohibition against charging tuition for what the Board characterizes as a "pre-kindergarten" program. The Board also argues that, in the event that the State Board finds to the contrary, the ruling should apply prospectively because the issue is a novel one.

Before we turn to the merits of this matter, we are compelled to reject the Board's contention that petitioner did not have the requisite standing to bring this action. Ridgewood Educ. v. Ridgewood Bd., 284 N.J. Super. 427 (App. Div. 1995).

Accordingly, we now consider the merits of the Board's appeal. Initially, we agree with the Board that the Commissioner erred in his reading of N.J.S.A. 18A:44-4. However, as follows, this does not change the ultimate outcome because N.J.S.A. 18A:44-4 does not provide any resolution to this controversy.

N.J.S.A. 18A:44-4 provides that:

The expenses of nursery schools or departments or of kindergarten schools or departments shall be paid out of any moneys available for the general fund expenses of the schools, and in the same manner and under the same restrictions as the expenses of other schools or departments are paid.

As the Board argued in its brief to us, the Commissioner did not provide any authority to support his legal conclusion that:

[the phrase] “moneys available from the general fund of the schools” must be read to refer to money obtained from local taxes, state and/or federal aid or other nontuition sources....

Exhaustive review of the education statutes has failed to reveal any basis to support this conclusion. In 1993, those statutes specifying the budget adoption process, State education aid, and various statutes pertaining to expenditures, such as the one involved here, were amended to replace the term “current expense” with the term “general fund.” L. 1993, c. 83. Although the statutes do not define that term, N.J.A.C. 6:20-2.A(c)(1)(i) provides that the general fund shall include general current expenses, capital outlay, and any other current expense categories which the Commissioner may designate. Simply put, the general fund is used to account for all of a district’s current expenses and capital outlay, and there is nothing that would limit the resources that must be accounted for by the general fund to amounts raised from local taxes and State and/or federal aid. N.J.A.C. 6:20-2A.2.⁵

⁵ We note that prior to the enactment of the Quality Education Act, N.J.S.A. 18A:7D-1 et seq., our system of school finance used the concept of “net current expense budget” in determining State aid to be given to the districts, and that such amounts were limited to revenues raised by local taxation and State aid. While this might account for the confusion, this concept was eliminated from the statutory framework by the Quality Education Act. Compare N.J.S.A. 18A:7A-3 (repealed L. 1990 c. 52, effective July 1, 1990) with N.J.S.A. 18A:7D-3.

Without anything more, we find that N.J.S.A. 18A:44-4 merely prescribes the manner in which the expenses of both nursery and kindergarten programs must be paid. Hence, our conclusions in this respect do not resolve the question of whether the Montclair Board may charge tuition for the program at issue herein.

As the ALJ found, the starting point for resolving this question is our Constitution's mandate that the State establish and maintain a thorough and efficient system of free public schools for children between the ages of five and eighteen. N.J. Const., Art. 8, Sec. 4, Para. 1. Consistent with this obligation, the Legislature has mandated by statute that a district's public schools must be free to all people over five and under eighteen who meet residency requirements. N.J.S.A. 18A:38-1. At the same time, the Legislature has provided that no child under the age of five may be admitted to any public school, except as may be provided by law. N.J.S.A. 18A:38-5.

Chapter 44 of the New Jersey Statutes provides two exceptions to N.J.S.A. 18A:38-5. N.J.S.A. 18A:44-1, which the Commissioner presumed had provided the Montclair Board with the authority to establish the program at issue, permits district boards to establish nursery school programs in any school under their control and provides the authority for them to admit children who are "under the age at which children are admitted to other schools or classes in such district." However, in providing district boards with the authority to establish kindergarten schools or departments, N.J.S.A. 18A:44-2 provides another exception which permits such districts to admit children between the ages of four and five.

Our review of prior Commissioner decisions has revealed that, contrary to the Commissioner's conclusion, the program at issue in this case is a kindergarten program

operated under authority of N.J.S.A. 18A:44-2, rather than a nursery school program. In fact, this very question was litigated in Lundy v. Board of Education of the Township of Montclair, decided by the Commissioner on December 31, 1984, to which the Montclair Board was a party. In Lundy, a resident of the district, who also was a teacher employed by the Montclair Board, alleged that the Montclair program was being conducted in violation of the law because the District was employing teachers who did not have nursery school endorsements. The sole question involved in that litigation was whether the Board's program necessarily included a nursery program, and the Montclair Board presented extensive documentary evidence and testimony at hearing to establish that the program was a two-year kindergarten program operated under N.J.S.A. 18A:44-2 rather than a nursery school program under N.J.S.A. 18A:44-1.

That evidence included the testimony of Dr. Mary Lee Fitzgerald, who was then the Superintendent of the Montclair District. She testified as to the nature of the program, recounting that it was:

...an early childhood program for 4, 5 and 6 year old children...developed as part of the district's desegregation plan. It was a magnet program to draw children out of their natural neighborhoods to two or three elementary schools....It was designed as a developmental program, non-graded, so that children could pass through it at their own developmental rate. The program...[was] designed to accommodate, for example, early readers to [sic] progress faster than slower children....The curriculum was developed by specialists in the central district office....The district has no definition generally of "kindergarten." For identification purposes, the term "Primary Unit," signifying a two-year program allowing children to pass through more or less rapidly, as the case may be, is of common usage. To petitioner's question whether there is in the district an established "nursery school"...there is no nursery school incorporated as such in the Primary Unit Program....The district program is an academic one with a written

curriculum, which differentiates it, commonly, from many private nursery school programs....

Lundy, supra, slip op. at 5.

The ALJ in that case found that the evidence did not show the establishment of a nursery program under N.J.S.A. 18A:44-1, but rather of a kindergarten school or department under N.J.S.A. 18A:44-2 for the education of children over the age of four and under the age of five. The Commissioner adopted the ALJ's determination. See also Lucia C. Miller v. Hoboken Board of Education, decided by the Commissioner, 92 N.J.A.R. 2d (EDU) 21 (1991).

The Board's submissions in this case show that the program involved herein is the same program that was challenged in Lundy. See, e.g., Board's brief in support of appeal, appendix at A-27. While we grant the Board's motion to supplement the record with the certification of William L. Libera, Montclair's current superintendent, nothing in that certification or in the Board's exceptions to our Legal Committee's report call into question our conclusion that the Montclair Board has not acted to change the character of the program since the Lundy decision was rendered. In this respect, we stress that although the Board points to changes in the delivery of its program, such as teaching four- and five-year-olds in separate classes in some cases, it states clearly that both the curriculum and the philosophy of the program have remained the same. Board's Exceptions, at 3. See also Miller v. Hoboken, supra (relying on Lundy to conclude that the petitioner in that case was not required to hold nursery school certification since Hoboken's "pre-kindergarten" program, like the Montclair program, appeared to be an academic program with a written curriculum).

That being the case, and in the absence of any express authority to charge tuition, it is clear that the District may not charge tuition to those four-year-olds enrolled in the program.

Examination of the current funding statutes supports this conclusion. N.J.S.A. 18A:7D-6, which specifies the program and grade categories for purposes of determining the foundation aid to which a district may be entitled, provides for a foundation weight of 1.00 for the grade category of "Full Day Kindergarten or preschool" and a foundation weight of 0.50 for the grade category of "Half Day Kindergarten or preschool." The State Board's regulations requiring the Commissioner to prepare a school register for recording pupil attendance at all of the public schools in New Jersey operated by district boards except adult high schools, and which provide the basis for calculating State foundation aid under the current system, provide that registers must be kept for AM kindergarten, PM kindergarten and Full day kindergarten. N.J.A.C. 6:20-1.1. They further specify that kindergarten is "over four years and less than six years." N.J.A.C. 6:20-1.2 (c). Hence, under our current system of school funding, children enrolled in programs like that in Montclair are counted for purposes of State aid to the district.

We recognize that the Legislature has not extended the scope of the constitutional mandate for the provision of a thorough and efficient system of free public schools to include all early childhood programs. However, by enacting N.J.S.A. 18A:44-2, the Legislature recognized the importance of kindergarten programs for four-year-olds and, by adopting N.J.S.A. 18A:7D-6, it has assured that where a district establishes such a program, it will be supported by State aid as part of the system of

public education provided by the district. We believe that sound education policy supports this result. Further, given the terms of N.J.S.A. 18A:44-2, which provides the authority for establishing kindergartens generally, we can find no educationally sound basis to distinguish between programs such as Montclair's Primary Unit Program and other kindergarten programs operated by district boards of education so as to permit the Montclair Board to charge tuition for its program.

Therefore, for the reasons we have expressed, we affirm the Commissioner's ultimate conclusion as modified herein. We also reject the District's argument that the ruling should only apply prospectively. As a party to the prior litigation involving this specific program, the District has long had notice that its Primary Unit Program was a kindergarten program.

Attorney exceptions are noted.

December 4, 1996

Date of mailing DEC 6 8 1996

132-95

IN THE MATTER OF THE BRANCHBURG :
TOWNSHIP BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
APPLICATION FOR APPROVAL OF : DECISION
LEASE PURCHASE AGREEMENT, :
SOMERSET COUNTY. :

SYNOPSIS

Petitioning citizen contended proposed lease purchase agreement was a "financing" requiring voter approval under N.J.S.A. 18A:20-4.2 and that the specific terms of the agreement further violated state education law and the Constitution.

ALJ concluded that the proposed lease purchase transaction was a valid exercise of authority granted it by statute, that the controlling agreement did not create a "debt" requiring voter approval, and that this agreement was not otherwise contrary to statutory or constitutional law.

Subsequent to issuance of the initial decision, petitioner advised that the lease purchase application in dispute had been rendered moot by passage of a building referendum at the annual school election on April 18, 1995. Accordingly, the Commissioner made no determination with respect to the initial decision and dismissed the appeal as moot.

APRIL 24, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

ON CROSS MOTION FOR

SUMMARY DECISION

OAL DKT. NO. EDU 10722-94

AGENCY DKT. NO. 204-6/94

**IN THE MATTER OF THE BRANCBURG
TOWNSHIP BOARD OF EDUCATION
APPLICATION FOR APPROVAL OF
LEASE PURCHASE AGREEMENT,
SOMERSET COUNTY**

Mark G. Yates, Esq., for petitioner Thomas Christensen

David W. Carroll, Esq., for the Board of Education of the Township of Branchburg
(Carroll & Weiss, attorneys)

Record Closed: February 9, 1995

Decided: March 6, 1995

BEFORE DANIEL B. MC KEOWN, ALJ t/a:

INTRODUCTION

This matter is before the Office of Administrative Law on remand to the Commissioner of Education from the State Board of Education. The Branchburg Township Board of Education (Board) operates a Type II K-8 school district with three school buildings. The Old York school

houses grades kindergarten through second, the Stony Brook school has grades three through five, and the Central school houses grades six through eight. Branchburg pupils attend high school on a tuition basis at the Somerville High School. Thomas Christensen (petitioner) is a parent, resident and taxpayer of the Township of Branchburg. He claims that the lease purchase transaction intended to be entered by the Board and as already approved by the Commissioner of Education and the Local Finance Board of the Department of Community Affairs is a transaction not authorized by law.¹ The Board maintains that it is fully authorized by legislative authority to enter the controverted lease purchase transaction.

PROCEDURAL HISTORY

The following procedural history of the matter is not in dispute between the parties² and is based upon, if not directly taken from, their respective submissions.

Between 1990 and 1992 three referenda presented by the Board to its electorate which addressed the issues of present and future overcrowding of its three existing school buildings and the respective needs of each facility were defeated. It is inferred that after the last defeat and into and through 1993 the Board began to seriously consider a lease purchase agreement as a solution to its facility needs. During January and again in February 1994, the Board held public hearings on the issue of construction of a fourth school building on land it already owns and to make additions and modifications to its three existing buildings through lease purchase under *N.J.S.A.* 18A:20-4.2(f).

On February 22, 1994, the Board adopted a resolution to seek approval from the Local Finance Board of the Department of Community Affairs for the issuance of Certificates of Participation (COPs) in the amount of \$24.75 million to address its facility needs through lease purchase. It planned one new school building on vacant land it already owns and additions and

¹ The New Jersey Superior Court, Appellate Division, issued a Stay of the Commissioner's approval which prohibits the Board from closing on the transaction pending final disposition of this appeal. See *infra*.

² See Board's Brief, page 1.

modifications to the three existing buildings. On March 15, 1994, the Board submitted an application (J-1) for approval of the lease purchase agreement to the Commissioner of Education and, on March 22, 1994, it submitted an application for approval of the proposed agreement's financial terms to the Local Finance Board at the Department of Community Affairs.

On April 8, 1994, petitioner filed a Petition of Appeal³ before the Commissioner of Education seeking to be heard on his claim that the agreement as submitted for approval by the Board was not an agreement authorized by law.

The Petition was returned to petitioner by the Acting Director of the Bureau of Controversies and Disputes of the Department of Education with a cover letter dated April 20, 1994, who advised that no mechanism existed under *N.J.S.A.* 18A:20-4.2(f) nor the regulations, *N.J.A.C.* 6:22A-1.1 *et seq.*, for the Commissioner to entertain a challenge to the Board's proposed lease purchase agreement, nor for a public hearing before the Commissioner on the Board's application then pending. Finally, the Department took the position that because the Commissioner had not yet ruled on the Board's application for approval of its proposed lease purchase transaction no "final agency" action had occurred under *N.J.S.A.* 18A:6-9 which would be reviewable by the Commissioner. In short, petitioner was advised that his opportunity to be heard on the Board's application for approval would arise when the Commissioner issued a final decision and an appeal of that decision was taken to the State Board of Education. Petitioner appealed the Commissioner's denial to be heard before the approval decision was reached to the State Board of Education.

In the meantime, the Commissioner determined on April 20, 1994, to approve the Board's proposed lease purchase transaction.⁴ On May 10, 1994, the Local Finance Board (see J-2) of the Department of Community Affairs also approved the financial proposals contained within the

³ The Township Committee of Branchburg filed a separate Petition seeking to challenge the proposed lease purchase agreement. The Township Committee has since been dismissed by the State Board of Education for lack of standing.

⁴ See Certificate of Endorsement signed on April 20, 1994, by the Commissioner of Education attached to a letter to the Board President on the same date.

lease purchase transaction. The Commissioner, through his Deputy Commissioner, denied petitioner's application to stay the approval granted the Board's lease purchase transaction.⁵ Petitioner appealed the denial of the requested stay to the State Board of Education which denied this appeal on June 1, 1994. On June 6, 1994, a three-judge panel of New Jersey Superior Court, Appellate Division, summarily reversed the State Board and granted petitioner's application for a temporary restraint against the Board from closing on the lease purchase transaction as approved by the Commissioner on April 20 pending final decision by the State Board on petitioner's challenges.⁶

Thereafter the State Board of Education entertained arguments on petitioner's original appeal to it challenging the Department of Education's refusal to allow him to be heard prior to the Commissioner granting approval to the then pending application of the Board. On October 5, 1994, the State Board, in addition to dismissing the Township Committee as a party, held as follows:

...

The Acting Director [of the Bureau of Controversies and Disputes] erred both in "returning" the petition and in her conclusion as to the scope of the Commissioner's jurisdiction. The substantive determination to refuse to entertain a petition made to the Commissioner of Education pursuant to his authority under N.J.S.A. 18A:6-9 is such that the responsibility entrusted to him requires that he render a final decision in the matter. *In re Masiello*, 25 N.J. 590 (1958); *Laba v. Newark Board of Education*, 23 N.J. 363 (1957). Hence, the Commissioner was required to render a decision with respect to the petition at issue here even if he had agreed that the petition should be dismissed. N.J.S.A. 18A:6-9.

...

In this case, [petitioner] challenged the district Board's action in seeking approval of the proposed lease purchase transaction, as well as to the validity of the transaction. In doing so, he presented

⁵ See Letter Decision from Deputy Commissioner of Education, May 27, 1994.

⁶ See Order on Emergent Application, N.J. Super. (App. Div.) June 6, 1994.

a controversy under the education laws, which must now be heard and decided [citation omitted].

We reiterate that the approval process before the Commissioner of Education is specifically designed to focus on the educational necessity of a proposed lease purchase transaction. Consequently, the current process does not guarantee that there is no legal impediment to the transaction.

We have no doubt that our adjudicative responsibility requires that we resolve any questions as to whether the transaction proposed by a district board conforms with the requirements of the education laws. [In a footnote the State Board observes that under *N.J.S.A.* 18A:20-4.2(f) the Local Finance Board determines issues of fiscal reasonableness of the transaction and that in this case that board approved the lease purchase.] [Petitioner] attempted to invoke the Commissioner's jurisdiction under *N.J.S.A.* 18A:6-9 to hear such questions before the Commissioner approved the project pursuant [to] *N.J.S.A.* 18A:20-4.2(f). Given that those questions have not yet been heard, the proper recourse is to remand the matter.

Finally, we reiterate that we are remanding this matter for resolution of [petitioner's] claim that the proposed project would contravene the education laws. This requires examination of the terms of the agreement, including those providing for remedy in case of default by the school district, in order to assure that the District's ability to provide a thorough and efficient education to its students is not placed in jeopardy. [Citing *Citizens Advocating referendum for Education ("CARE") v. Board of Education of the Township of Passaic*, decided by the Commissioner, March 2, 1989, appeal dismissed, State Board, July 5, 1990.]⁷

On November 3, 1994, the Commissioner of Education transferred the matter on remand to the Office of Administrative Law as a contested case under the provisions of *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13. On December 26, 1994, this administrative law judge was assigned the matter, on a temporarily assigned basis (t/a), and a telephone prehearing

⁷ It is noted that petitioner had also sought an Order from the State Board that the Commissioner recuse himself from deciding this appeal. The State Board remanded that issue directly to the Commissioner for determination in the first instance, but petitioner subsequently withdrew that motion.

conference was conducted January 4, 1995. A prehearing order was entered the same day, and amended by consent the following day, which lists among other items certain agreed upon legal and factual issues to be decided regarding the \$24.75 million lease purchase transaction. It was also agreed that the legal issues would be decided on cross-motions for summary decision, that a burden of proof issue presented by petitioner would be decided before hearing, and that the factual issues would be heard February 14 through 17 at the Office of Administrative Law in Mercerville.

During January 1995 counsel filed briefs in support of their respective positions on the agreed upon legal issues. Eventually the scheduled hearing was canceled and the burden of proof issue became moot due to the following circumstances.

On January 26, 1995, the Board adopted a resolution by which it acknowledges its proposed lease purchase transaction, already approved by the Commissioner and the Local Finance Board in the total amount of \$24.75 million, was based on pupil enrollment projections prepared by a professional consultant it engaged and whose projections it relied upon, but that actual enrollments in 1994-95 were significantly lower than predicted. The Board, because of the lower than projected 1994-95 enrollments, directed the consultant to prepare revised projections which incorporate actual 1994-95 enrollment data. The revised projections became available during January 1995 which, the Board says, supports the need for new facilities due to enrollment growth "but at a slower rate than predicted in April 1994." Therefore, the Board resolved to modify its school facility needs with respect to the lease purchase transaction and reduce the total amount of anticipated necessary financing from \$24.75 million to \$14.175 million. Rather than constructing one new school together with additions and modifications to all three existing schoolhouses, the Board now plans to construct the one new school building and to make additions and modifications to one of the three existing schoolhouses. Board counsel represents that the modified plan and lower financing has been submitted to the Commissioner for approval.⁸

⁸ See *N.J.A.C.* 6:22-1.2.

As a consequence of the modification of the proposed transaction, petitioner takes the position that while the legal issues already briefed by the parties during January need to be resolved all factual issues are rendered moot and, therefore, a plenary hearing is not necessary. Furthermore, petitioner voluntarily waives with prejudice any factual challenges he may otherwise make with respect to the modified proposal. Petitioner writes as follows:

As I indicated in my earlier correspondence, it appears that the Branchburg Township Board of Education is in the process of modifying the \$24.75 million lease purchase plan and that after modification, the cost of the project will be reduced by at least \$10 million. As a consequence, it is the position of this office that all of the factual issues (issue #3) related to the initial plan are now moot. Therefore, there is no need for a hearing on these issues.

As to the modified plan, and after further consideration of the matter, [petitioner] will not be raising any factual challenges other than the legality of the modified lease purchase plan (the issues of legality are the same as issues #1 and #2 as specified in the Pre-Hearing Order). This waiver is to be deemed to be with prejudice. ([Petitioner], however, is retaining the right to make written submissions directly to the Department of Education relative to the modified plan.)⁹

Board counsel agrees¹⁰ a hearing is not necessary in light of petitioner's voluntary waiver with prejudice of any factual claims he may otherwise make regarding the proposed modified lease purchase transaction. He also agrees, however, that the legal issues need to be determined.

It is noted that the record of the case through its transfer to the Office of Administrative Law is as stated on the attached Exhibit A and as presumably prepared by the Department of Education on behalf of the State Board of Education. Documents which are notated in that Exhibit but specifically relied upon in this initial decision are, where and when appropriate, referenced as "J" exhibits in the text or in the specific associated footnote despite the reference number in the attached Exhibit A. Counsel to the parties argued the summary decision motion on

⁹ See letter dated February 7, 1995, from petitioner's counsel sent by facsimile transmission.

¹⁰ See letter dated February 8, 1995, from Board counsel sent by facsimile transmission.

the basis of what may be called “working” unsigned copies of the entire lease purchase agreement. These unsigned “working” documents are to be found in a white binder and include the following:

- J-1 Application to Department of Education
- J-2 Application to Local Finance Board
- J-3 Official Statement
- J-4 Lease Purchase Agreement
- J-5 Ground Lease Agreement
- J-6 Agent Agreement
- J-7 Certificate and Agreement as to Arbitrage and Tax Matters
- J-8 Assignment Agreement
- J-9 Commitment for Bond Insurance
- J-10 Decision in *Citizens Advocating Referendum for Education v. Board of Education of Passaic Township*

LEGAL ISSUES

The agreed upon legal issues as stated in the Prehearing Order, numbers one and two, and as amended by consent, are these:

1. Is the proposed lease purchase agreement a “financing” which requires voter approval under *N.J.S.A.* 18A:20-4.2(d), and
2. Do any of the specific terms of the proposed lease purchase agreement violate the education laws (*N.J.S.A.* 18A:1-1, *et seq.*) or either the state or federal constitution. This issue, the parties agree, includes the concern of the State Board of Education as stated in its decision with respect to the remedy section of the Agreement.

Petitioner’s major legal arguments as presented in his brief are that the controverted lease purchase transaction, either under the original \$24.75 million plan or the modified plan, is a

borrowing transaction not authorized by statute without voter approval; that the lease purchase transaction is a source or tax exempt borrowing without voter approval and that as such it is “redundant”; and, that the lease purchase transaction contains provisions which violate certain education laws and the New Jersey Constitution.

FACTS

The parties agree that the facts necessary to resolve the stated issues are these.¹¹ The Board currently holds title to certain property in Branchburg Township. One parcel is vacant upon which the new school would be constructed, while additions and modifications would have been made to the three existing school buildings. Under the modified plan, the new school is still to be constructed on the vacant parcel and an addition is to be added to one schoolhouse. Barring a default on the lease purchase agreement (see J-4), title to the properties would remain with the Board at all times. In order to facilitate the transaction, a for-profit corporation known as the Lamington Funding Corporation has been retained to serve as the nominal lessor. Lamington and the agent, which is First Fidelity Bank, National Association, New Jersey (or agent), are third party lease purchase financing sources without any title to the Project, but subject only to the security interest set forth in the lease.

The Board is to enter a ground lease (J-5) pursuant to which the Board will demise and lease to the lessor its vacant land and the three existing school building properties. The purpose of the ground lease is to provide security to lessor, its assignees and to the owners of the Certificates of Participation “for the payment of principal and interest on the aforesaid Certificates. . .” (J-5).

Simultaneous to the execution of the ground lease, the Board and lessor will enter a lease purchase agreement (J-4) through which the Board will lease from lessor for a maximum 30 years, with an Option to Purchase, the new school building to be constructed, as well as leasing the three existing school buildings to which additions and modifications are to be made as the result of the

¹¹ The agreement of the parties as to the facts is stated in their respective briefs; the agreement is not through a formal Stipulation of Fact.

result of the lease purchase transaction. As pointed out by petitioner, the Board shall retain title to the real property; it will repay the amounts advanced by the COP holders with interest; it will arrange for and is solely responsible under the entire lease purchase agreement for all construction; and, it will indemnify lessor from all actions and liability.

The lessor, simultaneous to the execution of the ground lease and the lease purchase agreement, will enter an agent agreement (J-6) with the designated agent, First Fidelity Bank, and will assign its right, title and interest to First Fidelity on behalf of the COP holders. The agent shall be indemnified for any liability other than that arising from the transfer of funds.

First Fidelity and the underwriters will sell the Certificates of Participation in the public market. The underwriters are senior underwriting manager Printon, Kane Group, Inc. and co-manager Ferris, Baker Watts. They were recommended by the Board's financial advisor for the entire transaction, Municipal Advisory Partners, Inc. from among six inquiries received following the Board's public solicitation for Request for Proposal to provide underwriting services. The Board accepted the recommendation of its financial advisor and made the appointments.

The agent, First Fidelity, will facilitate the flow of funds between COP holders and the Board. The agent will hold the proceeds from the sale of the COPs in escrow, establish the required reserves, and make funds available to the Board for, under the modified plan, the construction of the new school building and modifications to the existing school building.¹² The Board will pay the holders of the COPs "rent" on a semi-annual basis, comprised of principal and interest, which begins to accrue upon closing. Bond counsel for the transaction is of the legal opinion that the interest portion is exempt from federal income taxation under the Internal Revenue Code, Section 103, 26 *U.S.C.A.* 103. The Municipal Bond Investors Assurance Corporation provided the Board with a Commitment to provide it insurance for the total transaction (J-9).

¹² Construction contracts to be let must be by competitive bid under *N.J.S.A.* 18A:20-4.2.

The Board shall provide funds for the semi-annual payments out of each annual budget adopted for the operation of the school district. Thus, the payment of the “rent” is subject to an annual appropriation by the Board as approved by its electorate or as established by the governing body, subject to appeal to the Commissioner, if the electorate defeats the proposed budget. Under Section 303 of the Agreement, the Board has the right to cancel the lease at the end of any fiscal year if for any reason it does not or is not authorized to appropriate sufficient funds to make the “rent” payment.

Should the lease be terminated for nonappropriation or in the event of default, paragraph (b) of Section 303 provides that the Board will not “. . . to the extent permitted by law . . . (i) purchase, lease, rent or procure other functionally similar real or personal property from any third party or (ii) procure services from a third party, which services are functionally similar to the utilization of the Project by the [Board]. . . .” Upon termination of the lease by the Board through default or nonappropriation, it shall surrender possession of property subject to the lease. Finally, an acceleration clause of the Agent Agreement at Article VII, Section 7.02, provides for the payment of the balance of principal which remains outstanding and interest accrued thereon to the date of such acceleration.

ARGUMENTS OF THE PARTIES

Petitioner’s Arguments

Petitioner argues that the financial essence of the contested lease purchase transaction constitutes a “borrowing” of monies by the Board not authorized by law without voter approval. Petitioner asserts that the statute authorizing lease purchase transactions, *N.J.S.A.* 18A:20-4.2, provides only for a board of education to make present rental payments to an owner of property to occupy that property with the goal of acquiring title at some future time. Petitioner contends that because the “borrowing” in this transaction requires voter approval pursuant to *N.J.S.A.* 18A:24-12(b), the proposal the Board successfully put to the Commissioner of Education for approval is invalid and, therefore, the approval given by the Commissioner is also invalid. Petitioner argues that the lease purchase agreement is not as authorized at *N.J.S.A.* 18A:20-4.2(f)

and cites *Bulman v. McCrane*, 64 N.J. 105 (1973). Petitioner, relying upon *Bulman*, is of the view that for this lease purchase agreement to be valid the Board would be required to solicit bids from contractors to accomplish the construction and modifications contemplated here. The contractor would obtain his/her own financing for the total project, complete the project and then enter a lease with the Board for a definite period of time - as an example for 25 years. At the end of that time, the Board would then have the right to take title of all the property upon the payment of a nominal consideration to the contractor.

Petitioner argues that if the sole purpose of the lease purchase statute, N.J.S.A. 18A:20-4.2, is to provide a means to boards of education for capital financing without voter approval then the statute would be "redundant" for this reason. The New Jersey Supreme Court, in *Upper Freehold Regional School District*, 86 N.J. 265 (1981), confronted a school building with a roof in serious disrepair, but the electorate defeated three referenda to raise the funds necessary for repair. The Court, despite the defeat of the referenda, found that the Commissioner had the implied power to approve the issuance of bonds, despite the respective defeats, where the purpose was to insure that the district's pupils would have the opportunity to receive a thorough and efficient program of education. Petitioner notes that the Commissioner has since exercised that authority to authorize the issuance of bonds without voter approval, when necessary, and cites *Contini v. Board of Education of the Southern Gloucester Regional School District*, 1986 S.L.D. 62, 86.

In addition to his other arguments addressed or soon to be addressed, petitioner also argues that because the ground lease is to provide security for the payment of principal and interest it creates a security interest in the real property. Consequently, petitioner asserts the ground lease, despite the use of the term "lease," is a mortgage at law or an equitable mortgage which lessor may foreclose upon in the event of default or nonappropriation. This feature, petitioner contends, shows that the instant lease purchase transaction is a "borrowing" which requires voter approval and, he reasons further, that this entire disputed transaction must be governed by N.J.S.A. 18A:20-4.2(d).

OAL DKT. NO. EDU 10722-94

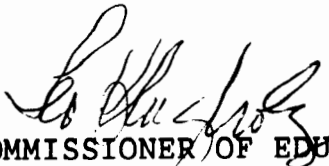
IN THE MATTER OF THE BRANCHBURG :
TOWNSHIP BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
APPLICATION FOR APPROVAL OF : DECISION
LEASE PURCHASE AGREEMENT, :
SOMERSET COUNTY. :
_____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner, as was a reply by the Board.

Subsequent to expiration of the exception period but prior to the due date for issuance of the Commissioner's decision, petitioner requested dismissal of the within appeal on grounds that passage of a referendum at the annual school election on April 18, 1995 had rendered moot all questions relating to the lease purchase application in dispute herein.

Upon review and consideration, the Commissioner concurs that this matter no longer constitutes a controversy before him pursuant to N.J.S.A. 18A:6-9. Accordingly, the Commissioner makes no determination with respect to the findings and conclusions of the initial decision and dismisses the appeal for reason of mootness.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

APRIL 24, 1995
DATE OF MAILING APRIL 26, 1995

133-95

IN THE MATTER OF THE ANNUAL SCHOOL :
 ELECTION HELD IN THE SCHOOL : COMMISSIONER OF EDUCATION
 DISTRICT OF THE TOWNSHIP OF : DECISION
 HILLSBOROUGH, SOMERSET COUNTY. :
 _____ :

IN THE MATTER OF THE ANNUAL SCHOOL :
 ELECTION HELD IN THE SCHOOL : COMMISSIONER OF EDUCATION
 DISTRICT OF THE TOWNSHIP OF : DECISION
 HILLSBOROUGH, SOMERSET COUNTY. :
 _____ :

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held on April 18, 1995 in the Hillsborough Township School District were as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Aletia H. Morgan	1191	1	1192
Elizabeth R. Callahan	1154	4	1158
Edward Plaskon	1063	4	1067
Thomas J. Rebbin	1059	6	1065
Blair R. Meiser	1007	8	1015
Amy Duff	1006	9	1015
Hal Brown (write-in)	4	0	4
Dom Perone (write-in)	1	0	1
Ralph Wykoff (write-in)	1	0	1
Sunny Loricco (write-in)	1	0	1

The announced results of the balloting for one member of the Board of Education for an unexpired term of one year at the annual school election held on April 18, 1995 in the Hillsborough Township School District were as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Michael D. Nee	1155	3	1158
Abbie M. Sutherlin	950	8	958

The announced results of the balloting for the General Fund question of the Board of Education at the annual school election held on April 18, 1995 in the Hillsborough Township School District were as follows:

<u>POLLING DISTRICT</u>	<u>FOR</u>	<u>AGAINST</u>
#1 - Hillsborough Municipal Building	194	182
#2 - Hillsborough Elementary School	104	125
#3 - Sunnymeade Elementary School	68	152
#4 - Hillsborough Elementary School	148	134
#5 - Woods Road Elementary School	179	116
#6 - Hillsborough Municipal Building	147	131
#7 - Amsterdam Elementary School	100	120
Absentee Votes	7	5
TOTAL:	947	965

Pursuant to a letter request from Thomas J. Rebbin, dated and filed on April 19, 1995, and a letter request from twelve qualified voters, also dated and filed on April 19, 1995, an authorized representative of the Commissioner from the Office of the Somerset County Superintendent of Schools was directed to conduct a recount of machine ballots cast for members of the Board pursuant to N.J.S.A. 18A:14-63.2 and for the General Fund question pursuant to N.J.S.A. 18A:14-63.3. The recount was conducted on April 24, 1995 at the Somerset County Board of Elections Voting Machine Warehouse in Hillsborough and at the Office of the Somerset County Superintendent of Schools in Somerville. Absentee ballot counts were provided by the Somerset County Board of Elections.

At the conclusion of the recount, the tallies stood as follows:

For Members of the Board for Full Terms of Three Years Each

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Aletia H. Morgan	1191	1	1192
Elizabeth R. Callahan	1154	4	1158
Edward Plaskon	1063	4	1067
Thomas J. Rebbin	1059	6	1065
Blair R. Meiser	1007	8	1015
Amy Duff	1006	9	1015

Hal Brown (write-in)	4	0	4
Dom Perone (write-in)	1	0	1
Ralph Wykoff (write-in)	1	0	1
Sunny Loricco (write-in)	1	0	1

For One Member of the Board for an Unexpired Term of One Year

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Michael D. Nee	1155	3	1158
Abbie M. Sutherlin	951	8	959

For the General Fund Question

<u>POLLING DISTRICT</u>	<u>FOR</u>	<u>AGAINST</u>
#1 - Hillsborough Municipal Building	182	194
#2 - Hillsborough Elementary School	104	125
#3 - Sunnymead Elementary School	68	152
#4 - Hillsborough Elementary School	148	134
#5 - Woods Road Elementary School	179	116
#6 - Hillsborough Municipal Building	147	131
#7 - Amsterdam Elementary School	168	120
Absentee Votes	7	5
TOTAL:	1003	977

As indicated above, there was no change in tally for three-year terms and a minor change in tally for the one-year term, which did not affect the outcome of the election.

However, on the General Fund question, workers at Polling District #1 reversed the votes For and Against, recording 194 votes For, instead of 182, and 182 votes Against, instead of 194; workers at Polling District #7 incorrectly read the total votes For as 100 rather than 168. Consequently, the tally of votes For was increased on recount by 56, and the tally of votes Against by 12, bringing the total tallies to 1003 For and 977 Against, thereby altering the announced result of the balloting.

At the time of the recount, the sealed election packets received from the school district were individually opened for the

purpose of comparing, for each polling place, the number of ballots cast (public and protective counters) to the number of voter authorities issued and voter names on the poll list. The results of this comparison, covering 2,410 votes cast, revealed no discrepancies of any significance and were specifically as follows:

<u>POLLING PLACE</u>	<u>PUBLIC COUNTERS</u>	<u>PROTECTIVE COUNTERS</u>	<u>POLL LIST</u>	<u>VOTING AUTHORITIES</u>	<u>VOIDED AUTHORITIES</u>
#1	445	445	444	444	0
#2	279	279	279	277	0
#3	260	260	259	258	0
#4	347	347	348	339	0
#5	387	387	388	387	1
#6	336	336	337	336	0
#7	356	356	356	355	0

This concludes the report of the Commissioner's representative.

* * * * *

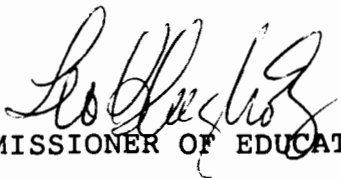
The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions set forth therein.

Accordingly, the Commissioner finds and determines that, as originally announced at the conclusion of the election, Aletia H. Morgan, Elizabeth R. Callahan and Edward Plaskon were elected to full terms of three years each, and that Michael D. Nee to an unexpired term of one year, on the Board of Education of the Township of Hillsborough.

However, the Commissioner further finds and determines that the announced results of the voting for the General Fund question of the Board were in error, and that, in actuality, the

General Fund question of the Board of Education of the Township of Hillsborough was approved by the voters.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

APRIL 26, 1995
DATE OF MAILING APRIL 26, 1995

134-95

IN THE MATTER OF THE ANNUAL SCHOOL :
 ELECTION HELD IN THE SCHOOL : COMMISSIONER OF EDUCATION
 DISTRICT OF THE CITY OF MILLVILLE, : DECISION
 CUMBERLAND COUNTY. :
 _____ :

APRIL 27, 1995

IN THE MATTER OF THE ANNUAL SCHOOL :
 ELECTION HELD IN THE SCHOOL : COMMISSIONER OF EDUCATION
 DISTRICT OF THE CITY OF MILLVILLE, : DECISION
 CUMBERLAND COUNTY. :
 _____ :

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held on April 18, 1995 in the School District of the City of Millville were as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Glenn R. Nickerson	767	57	824
Dale L. Finch	534	41	575
Michael Whilden	351	38	389
Robbin Hargrove	369	19	388
Barbara R. Boyle	364	17	381
Ann Simpson	341	14	355
C. Paul Briada	235	11	246

Pursuant to a letter request from Robbin Hargrove dated April 20, 1995 and filed on April 24, 1995, an authorized representative of the Commissioner from the Office of the Cumberland County Superintendent of Schools was directed to conduct a recount of machine ballots cast for members of the Board pursuant to N.J.S.A. 18A:14-63.2. The recount was conducted on April 25, 1995 at the fourteen polling districts used during the election. Absentee ballots were recounted on the same date by the Cumberland County Board of Elections.

At the conclusion of the recount, the tally stood as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Glenn R. Nickerson	767	57	824
Dale L. Finch	534	42	576
Michael Whilden	351	38	389
Robbin Hargrove	369	20	389
Barbara R. Boyle	364	17	381
Ann Simpson	341	15	356
C. Paul Briada	235	11	246

There were two absentee ballots that were not counted in the announced results of the election. The County Board of Elections and the representatives of the Board appeared before a Judge of the Superior Court in Bridgeton on April 25, 1995, to determine disposition of the two absentee ballots. The judge rejected one ballot, since it was received by the County Board of Elections on April 19, 1995, but counted the other, since it was delivered to a polling place during the election on April 18, 1995. The ballot which was counted included one additional vote for Robbin Hargrove. Thus, on recount, in addition to other minor changes in tally, a tie has resulted between Robin Hargrove and Michael Whilden. The Commissioner's representative, therefore, recommends that a special election be ordered as required by N.J.S.A. 18A:12-15(c).

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions set forth therein.

Accordingly, the Commissioner finds and determines that Glenn R. Nickerson and Dale L. Finch were elected to full terms of three years each on the Board of Education of the City of Millville and that a tie vote exists for the remaining term.

Therefore, in accordance with N.J.S.A. 18A:12-15(c), the Commissioner directs that a special election shall be held to fill the resultant vacancy, such election to be limited to candidates Robbin Hargrove and Michael Whilden and to be held on the earliest date possible in view of the prohibition on special elections within 20 days before or after the June 1995 primary election pursuant to N.J.S.A. 18A:14-3 and the need to accommodate absentee ballot notices pursuant to N.J.S.A. 18A:14-25.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

April 27, 1995

135-95

S.J.S., on behalf of his minor grandchild, J.S., :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE : DECISION
 BOROUGH OF WOODBURY HEIGHTS,
 GLOUCESTER COUNTY, :
 RESPONDENT. :
 _____ :

SYNOPSIS

Petitioning grandparent, a resident of Woodbury Heights, challenged Board's determination that his grandson, J.S., was not domiciled in the district. Board sought reimbursement for tuition.

Having reviewed testimony of investigators and documents submitted, ALJ found that although petitioner was a resident of the district, his grandson was not. ALJ concluded Board could pursue appropriate action to recover tuition funds.

Commissioner concurred with ALJ's findings and determination that J.S. was not domiciled in respondent's district and directed petitioner to remit to the Board tuition for J.S., pro-rated to the time of his ineligible attendance in the district.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10636-94

AGENCY DOCKET NO. 385-9/94

S.J.S. ON BEHALF OF HIS MINOR

GRANDCHILD, J.S.,

Petitioner,

v.

**THE BOARD OF EDUCATION OF THE BOROUGH
OF WOODBURY HEIGHTS, GLOUCESTER COUNTY,**

Respondent.

S.J.S., petitioner, pro se

Russell J. Paul, Esq., for respondent

Record Closed: January 30, 1995

Decided: March 10, 1995

BEFORE KATHRYN A. CLARK, ALJ:

At the start of the hearing, petitioner asked for a continuance because his attorney could not be present. As neither this tribunal nor respondent had been given any indication prior to the commencement of the hearing of an appearance by counsel for petitioner, and as petitioner could not produce any documentation, such as a business card or a note, from the purported counsel, this request for a continuance was denied.

Petitioner said that he was the grandfather and legal guardian of J.S., but had no court order or other proof of guardianship, other than petitioner's Natural Parent/Guardian Affidavit (R-1), which was not notarized, as required.

Counsel for respondent moved for summary decision, which was not granted. The respondent proceeded by calling Mary Smith, Superintendent of Woodbury Heights School, who said that she had been advised that three students possibly were not living in the Woodbury Heights school district. She said that she asked for verification from the parents of these three children, and that the parents of two of these children provided the necessary verification within the time required.

The verification for the third student, J.S., was not provided by the due date (June 1, 1994). The afore-mentioned affidavit (R-1) of petitioner was sent to the school district on June 7, 1994. No documentation accompanied the affidavit.

Ms. Smith said that she then sent a further request for the information to J.S.'s mother, C.S.S., the daughter of petitioner, at 108 C. Avenue, Woodbury Heights, dated July 15, 1994, asking for proof of residency, such as a driver's license, credit card bills, income tax documents, etc. (P-1 at page 9). Ms. Smith received a telephone call from petitioner who offered her the opportunity to view J.S.'s bedroom at the 108 C. Avenue residence. On September 22, 1994, when Ms. Smith called petitioner to take advantage of the opportunity offered to her to view the child's bedroom, petitioner declined.

After not receiving the requested documentation, Ms. Smith sent C.S.S. a letter on August 25, 1994, advising her that the matter would be discussed at the September 1, 1994 meeting of the Woodbury Heights Board of Education. Ms. Smith again requested documentation, and offered an opportunity to appear to discuss the matter (P-1 at page 9).

At its September 1, 1994 meeting, the Woodbury Heights Board of Education voted to exclude J.S. from Woodbury Heights School. C.S.S. was sent a certified letter notifying her of this, and she and petitioner appealed (P-1 at page 5). The Board decided to allow J.S. to remain in Woodbury Heights School until the matter was ultimately resolved (P-1 at page 2).

C.S.S. claimed that since the letters sent to her by Ms. Smith asking for information and advising her of the September 1, 1994 meeting were not certified, she did not receive them. C.S.S. said that is why she and petitioner (her father) did not attend the meeting at which her son was excluded from Woodbury Heights school. C.S.S. said that when she told Ms. Smith that "she had (her) number", she did not mean it in a threatening way. Ms. Smith reported the comment to the police.

In September, Ms. Smith received a copy of J.S.'s mother's (C.S.S.'s) driver's license with the address of 108 C. Avenue (R-3), and a copy of a joint bank statement of C.S.S. and S.J.S., also giving the address of 108 C. Avenue (R-2). Also, J.S.'s mother, C.S.S., said that she had been a registered voter in Woodbury Heights since 1994 (no proof was offered of this). C.S.S. provided an affidavit, signed June 7, 1994, saying that she was living at 108 C. Avenue (S.J.S.'s address) and that she was the sole support of J.S (R-5). The affidavit of C.S.S. was notarized by her sister, M.A.S. Additionally, a copy of S.J.S.'s 1992 tax return (R-4) was provided, which listed both J.S. and C.S.S. as dependents of petitioner. No tax returns for 1993 or 1994 for either petitioner or C.S.S. were provided. No evidence of the provision of the necessities of life for J.S. by either petitioner or by C.S.S. were provided.

C.S.S. said that she stayed in an apartment in Knightsbridge Apartments in Westville anywhere from two to five nights a week. C.S.S. said that J.S. stayed at S.J.S.'s house in Woodbury Heights except on weekends when he stayed with her at Knightsbridge Apartments, or except when he was on visits with his father. Petitioner said that J.S. had a fever and stayed with his mother for a few days during the last two weeks, but his mother could not recall this.

Respondent next called Jane McKinney, who said she was J.S.'s teacher in the second and third grades. She said that when she was teaching the children to memorize their addresses and telephone numbers, in case of emergency, J.S. gave his address as Knightsbridge Apartments. She said that she asked him again, and he said he was sure he lived at Knightsbridge Apartments. Later, J.S. got a dog, and told Ms. McKinney that he knew the exact number of steps from his second floor apartment to take the dog out for a walk. J.S. also told Ms. McKinney that he had a pool, and that his baby-sitter took him to the pool. Petitioner said that the steps J.S. recalled, and

the dog, were at his (S.J.S.'s) house. Petitioner offered no response regarding J.S.'s comments about the second floor apartment, or the baby-sitter, or the pool.

Respondent next called Patricia Borelli, who said that her investigation firm had been hired by the Woodbury Heights School District to verify the residence of J.S. Ms. Borelli said that she placed C.S.S.'s apartment at Knightsbridge Apartments in Westville under surveillance. Her report was admitted as R-7, and a photograph of J.S., which Ms. Borelli used to identify the child, was admitted as R-8. Ms. Borelli began her surveillance on January 17, 1995, at 6:12 a.m. Ms. Borelli observed C.S.S. and J.S. leave the apartment at 8:00 a.m., and observed C.S.S. and J.S. drive away in the direction of Woodbury Heights. Again, on January 19, 1995, at 6:28 a.m., Ms. Borelli arrived and observed C.S.S. and J.S. leave the apartment at 8:09 a.m., and observed C.S.S. and J.S. drive away in the direction of Woodbury Heights. Further, on January 20, 1995, at 6:25 a.m., Ms. Borelli arrived and observed C.S.S. leave the apartment at 8:11 a.m., and pull up to the door of the apartment, and pick up J.S. Ms. Borelli then observed C.S.S. and J.S. drive away in the direction of Woodbury Heights. Lastly, on January 26, 1995, at 8:10 a.m., Ms. Borelli observed C.S.S. leave the apartment at 8:10 a.m., and observed C.S.S. pull up to the door of the apartment, and pick up J.S.

The next to testify for respondent was Willard Brown, head of the investigation firm. Mr. Brown said that he did not wish to have Ms. Borelli follow C.S.S. from Knightsbridge every day, so he placed a second investigator at 108 C. Avenue (petitioner's address), on January 17, 18, 20, and 26. Mr. Brown himself was present surveilling the Knightsbridge Apartments on January 26, 1995, and arrived at the Knightsbridge Apartments at 7:28 a.m. At 8:09 a.m., he observed C.S.S. leave the apartment and drive up to the door of the apartment, and pick up J.S. Following that, Mr. Brown followed C.S.S. and J.S. to a convenience store. C.S.S. went into the store, returned to the car, and drove to Redbank Avenue, where she picked up another passenger. After that, C.S.S., the passenger and J.S. drove to Woodbury Heights School, arriving at 8:27 a.m. Mr. Brown said that he identified by J.S. by J.S.'s picture (R-8.)

Randy Schwartz, another investigator for the same firm, said that he was the investigator assigned to watch for J.S. at 108 C. Avenue. Mr. Schwartz, who had seen the picture of J.S. (R-8), saw no boy being dropped off or leaving that building between 6:15 a.m. to 8:40 a.m. on

January 17, although he saw petitioner put out the trash. On January 19, Mr. Schwartz saw no boy being dropped off or leaving that building between 6:15 a.m. to 8:40 a.m., although he again saw petitioner put out the trash. On January 26, Mr. Schwartz saw no boy being dropped off or leaving that building between 6:50 a.m. to 8:45 a.m., although he saw petitioner make two short trips in his gray Lincoln. Mr. Schwartz denied being in a county vehicle while making these observations, although petitioner said he observed a county vehicle apparently watching his home at this time. Any surveillance the county government might have undertaken regarding petitioner is irrelevant to these proceedings.

Ms. Smith was recalled to testify that J.S. had been present in Woodbury Heights school on January 17, 19, 20, and 26, 1995.

As of the time of the hearing, no evidence of who provides the necessities of life for J.S. was ever provided, other than petitioner saying he paid all his bills in cash. Petitioner claimed that Ms. Smith has a vendetta against him. Petitioner also said that he owned all the cars driven by C.S.S. on the days she was under surveillance. Petitioner said that the residence at 108 C. Avenue was owned by his daughter, C.S.S. Petitioner offered no proof of any of these statements.

J.S. has been at Woodbury Heights School throughout the second grade and the third grade and, to date, the fourth grade. Respondent said that the actual tuition for J.S.'s education during 1992-1993 was \$6,190, and that the actual tuition for J.S.'s education during 1993-1994 was \$6,190, and that the estimated tuition for J.S.'s education during 1994-1995 was \$3,095, for an approximate total due to the district of \$15,475. Respondent said that the district is seeking reimbursement for tuition, in the event that J.S. is found not to be a domiciliary.

FINDINGS OF FACT

1. No evidence of the provision of the necessities of life for J.S. by either petitioner or by C.S.S. was provided.
2. The Natural Parent/Guardian Affidavit (R-1) signed by petitioner, was not notarized, as required, and was delivered to Woodbury Heights School at least eight days after the deadline for submission.
3. No tax returns for 1993 or 1994 for either petitioner or C.S.S. were provided..
4. J.S. gave his address to Ms. McKinney as Knightsbridge Apartments. Ms. McKinney said that she asked him twice, and he said he was sure he lived at Knightsbridge Apartments. Later, J.S. told Ms. McKinney that he knew the exact number of steps from his second floor apartment to take his dog out for a walk. J.S. also told Ms. McKinney that he had a pool, and that his baby-sitter took him to the pool. No proof was offered that the dog or the pool or the baby-sitter were anywhere else but at the Knightsbridge Apartments.
5. The combined testimony of three private investigators confirmed that J.S. left from the Knightsbridge Apartments in the mornings on four separate occasions to go to school, and that he did not leave from the 108 C. Avenue address.

DISCUSSION AND CONCLUSION

The assertions that Ms. Smith acted from an improper motive in ascertaining the residence of J.S. were completely without foundation or proof. Indeed, it is part of her responsibility to the Woodbury Heights School District to make sure that the funds collected from the taxpayers of the Woodbury Heights School District are spent appropriately on the education of the children who reside in the district. Petitioner does reside in the district and is a domiciliary thereof, but his grandson J.S. is not.

I **FIND** and **CONCLUDE** that not only is J. S. not a domiciliary of Woodbury Heights, he is not even a resident of Woodbury Heights.

Respondent may now pursue an appropriate action before the Superior Court for the recovery of the tuition funds due to it.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 19, 1995
DATE

Kathryn A. Clark
KATHRYN A. CLARK, ALJ

3/16/95
DATE

Receipt Acknowledged:

Hope R Blackburn
DEPARTMENT OF EDUCATION

MAR 21 1995
DATE

Mailed to Parties:

Jeff S. Main
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

ej

WITNESSES

For petitioner:

S.J.S., petitioner
C.S.S., mother of J.S.

For respondent:

Mary Smith, Superintendent, Woodbury Heights School
Jane McKinney, Woodbury Heights Elementary School teacher
Patricia Borelli, private investigator
Willard Brown, president of W. A. Brown Investigations
Randy Schwartz, private investigator

DOCUMENTS IN EVIDENCE

For petitioner:

P-1 Petitioner's packet

For respondent:

R-1 Natural Parent/Guardian Affidavit, S. J. S. (3 pages)
R-2 bank statement, C. S. S.
R-3 photocopy of driver's license, C.S.S.
R-4 IRS Form 1040, 1992, for S.J.S.
R-5 residency affidavit, C.S.S. (3 pages)
R-6 handwritten note
R-7 surveillance report (3 pages)
R-8 photograph of J.S.

OAL DKT. NO. EDU 10636-94

S.J.S., on behalf of his minor
grandchild, J.S., :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE
BOROUGH OF WOODBURY HEIGHTS,
GLOUCESTER COUNTY, :

DECISION

RESPONDENT. :


_____ :

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ's finding that petitioner's grandson, J.S., is not domiciled in respondent's district, and is, therefore, not entitled to a free public education in that district.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein, and, pursuant to N.J.S.A. 18A:38-1b(1), the Commissioner directs that petitioner remit to the Board tuition for J.S., pro-rated to the time of his ineligible attendance in the district.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

APRIL 28, 1995

DATE OF MAILING APRIL 28, 1995

EDU # 10636-94
C # 135-95
SB # 95-95

S.J.S., on behalf of his minor grandchild,
J.S.,

PETITIONER-APPELLANT,

V.

STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE
BOROUGH OF WOODBURY HEIGHTS,
GLOUCESTER COUNTY,

DECISION ON MOTION

RESPONDENT-RESPONDENT.

Decided by the Commissioner of Education, April 28, 1995

For the Petitioner-Appellant, Christopher C. Cona, Esq.

For the Respondent-Respondent, Russell Paul, Esq.

On April 28, 1995, the Commissioner of Education determined that petitioner's grandson was not domiciled in the School District of the Borough of Woodbury Heights and directed that petitioner remit payment for his grandson's tuition to the Woodbury Heights Board of Education (hereinafter "Board").

On May 8, 1995, petitioner, acting pro se, wrote to the Commissioner of Education. This letter states that petitioner had previously sent an "appeal" in writing to the Department of Education and that he hadn't received any response. He indicated that he was appealing again and that he had contacted a lawyer for this appeal.

Dec. 6, 1995

However, it was not until September 1, 1995, that the State Board Appeals Office was notified that petitioner was attempting to appeal. At that point, the time limit for filing an appeal from the Commissioner's decision had long passed. See N.J.S.A. 18A:6-28. Accordingly, Counsel to the State Board notified the parties that petitioner's correspondence to the Commissioner was being referred to the State Board's Legal Committee for an assessment of whether petitioner had made a timely appeal. The briefing schedule was placed in abeyance.

By letter of September 21, 1995, Counsel to the State Board notified the parties that petitioner's correspondence did constitute notice of appeal for purposes of establishing the timeliness of the appeal, and, hence, the appeal was timely. The briefing schedule was reestablished.

By correspondence dated September 26, 1995, counsel for the Woodbury Heights Board communicated his vehement objection to the "recommendation" of the Legal Committee that was allowing petitioner's appeal.

By letter of October 5, 1995, Counsel to the State Board notified the parties that the correspondence from the Board's counsel was being considered as a motion to dismiss the appeal. The briefing schedule was once again placed in abeyance, this time pending disposition of the motion to dismiss.

On October 6, 1995, Christopher C. Cona, Esquire filed notice with the State Board that he was representing petitioner, who, until that point, had been acting

on his own behalf. Petitioner's counsel did not, however, file an answer to the Board's motion to dismiss.¹

The thrust of the Board's motion is that petitioner's appeal should not be considered timely because his filing consisted of letters directed to the Commissioner rather than the filing of a notice of appeal addressed to the Legal Committee as specified by N.J.A.C. 6:2-1 et seq. He further contends that the appeal should be dismissed because petitioner did not serve him with notice and that because of the length of time that has passed, it is unfair to the Board to allow the appeal to proceed. Additionally, the Board's counsel urges that the decision to allow the appeal to proceed should have been made by the State Board of Education en banc.

Initially, we take cognizance of the fact that the materials which petitioner submitted included a Receipt for Certified Mail indicating that his letter of May 8, 1995, to the Commissioner was in fact received by the Department of Education on May 10, 1995. This was sufficient to establish that petitioner had made a timely appeal. The fact that petitioner directed his letter to the Commissioner, who is also secretary of the State Board, see N.J.S.A. 18A:4-9, was not a fatal defect, and the contents of the petitioner's May 8 letter clearly reflect that he was attempting to appeal from the Commissioner's decision in the case. Nor does the fact that petitioner failed to provide proof of service on the Board's counsel dictate dismissal. N.J.A.C. 6:2-1.17.

Any prejudice to the Board is the result of the fact that petitioner's letter of May 8 was not referred to the State Board Appeals Office. Petitioner was in no way

¹ In that petitioner was acting pro se when the Board's counsel filed his motion to dismiss, the Board's counsel served petitioner rather than Mr. Cona with the papers relating to the motion.

responsible for this delay, and we decline to be party to the injustice that would occur were we to dismiss petitioner's appeal without considering the merits. N.J.A.C. 6:2-1.19.

Additionally, we stress that it was entirely appropriate for our Legal Committee to examine the circumstances of petitioner's filing and to direct that briefing on the merits of the appeal commence. The determination that petitioner's appeal was timely filed in no way constituted a final resolution of the appeal so as to require that action be taken by the State Board in open public meeting. N.J.S.A. 18A:6-28 and N.J.S.A. 18A:6-29; N.J.A.C. 6:2-3.4(a).

For the reasons stated, we deny the motion to dismiss. Consistent with our determination, we direct that the briefing schedule be reestablished so as to permit us to consider the merits of petitioner's appeal and that petitioner file his appeal brief within twenty days of this decision.

December 6, 1995

Date of mailing DEC 08 1995

EDU # 10636-94
C # 135-95
SB # 95-95

S.J.S., on behalf of his minor grandchild, :
J.S., :

PETITIONER-APPELLANT, :

V. :

STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE :
BOROUGH OF WOODBURY HEIGHTS, :
GLOUCESTER COUNTY, :

DECISION ON MOTION

RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, April 28, 1995

Decision on motion by the State Board of Education, December 6, 1995

For the Petitioner-Appellant, Christopher C. Cona, Esq.

For the Respondent-Respondent, Russell Paul, Esq.

On December 6, 1995, we denied the Board's motion to dismiss this appeal as untimely and directed that petitioner file his appeal brief within twenty days so that we could consider the merits of his appeal. In making this decision, we were sensitive to the fact that petitioner had been acting on his own behalf when he first attempted to appeal from the Commissioner's determination directing him to remit payment for his grandson's tuition to the Board because his grandson was not domiciled in the district.

By the time we acted to deny the Board's motion, petitioner was represented by counsel. Following receipt of our decision, petitioner's counsel

3/6/96

requested an extension of time in which to file his appeal brief. As petitioner's counsel confirmed in his letter of January 2, 1996, the Board's attorney consented to an extension until January 17, 1996. Petitioner's counsel committed himself to submit his brief by January 17, and on that basis, we extended the time for filing until that date. However, petitioner's counsel did not file a brief by that date or otherwise communicate with us.

On January 25, 1996, counsel for the Board renewed his motion to dismiss the appeal. Petitioner's counsel did not respond to the motion. Consequently, we advised petitioner's counsel by letter of February 13, 1996, that his failure to perfect the appeal by filing his appeal brief would be reviewed by the Legal Committee at its meeting on February 21 when it considered the Board's motion to dismiss the appeal. Petitioner's counsel did not respond to our letter.

The State Board of Education therefore grants the Board's motion, and we dismiss the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a).

March 6, 1996

Date of mailing MAR 08 1996

136-95

BARBARA OXFELD, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY :
OF NEW BRUNSWICK, MIDDLESEX :
COUNTY, :

DECISION

RESPONDENT. :

_____ :


APRIL 28, 1995

OAL DKT. NO. EDU 7646-94

BARBARA OXFELD, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE CITY : DECISION
 OF NEW BRUNSWICK, MIDDLESEX :
 COUNTY, :
 :
 RESPONDENT. :
 :
 _____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

APRIL 28, 1995

DATE OF MAILING APRIL 28, 1995

137-95

MELVYN DUCHIN, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE :
SCHOOL DISTRICT OF THE CITY :
OF PLAINFIELD, UNION COUNTY, :

DECISION

RESPONDENT. :

_____ :

APRIL 28, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8484-92

AGENCY DKT. NO. 442-9/92

MELVYN DUCHIN,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
SCHOOL DISTRICT OF THE CITY
OF PLAINFIELD,**

Respondent.

James M. Weinberg, Esq., for petitioner
(Weinberg and Weinberg, P.A., attorneys)

Howard N. Nirenberg, Esq., for respondent
(Ostrager, Fieldman, Kachmar & Nirenberg, attorneys)

Record Closed: March 28, 1995

Decided: April 6, 1995

BEFORE RICHARD MCGILL, ALJ:

Melvyn Duchin filed a petition with the Commissioner of Education, seeking reimbursement from the Board of Education of the School District of the City of Plainfield for attorney's fees and other costs and expenses related the defense of criminal charges pursuant to *N.J.S.A. 18A:16-6.1*. The matter was transmitted to the Office of Administrative Law on October 29, 1992 for determination as a contested case.

Prior to hearing, the parties agreed to an amicable resolution of the matter and submitted a Settlement Agreement and Release. Having reviewed the record and settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** my decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision on this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14b-10.

Within seven (7) days from the date on which this recommended decision is received by the parties, any party may file exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Apr. 6, 1995
DATE

Richard McGill
RICHARD MCGILL, ALJ

Receipt Acknowledged:

4/7/95
DATE

Hope R. Blackburn
DEPARTMENT OF EDUCATION

APR 10 1995
DATE

Mailed to Parties:
J. J. Marin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

am

WEINBERG AND KAPLOW, P.A.
A Professional Corporation
80 Morris Avenue
Springfield, New Jersey 07081
(201) 379-5757
Attorneys for Petitioner

BEFORE THE STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

Petitioner, :

MELVYN DUCHIN :

vs. :

Respondent, :

BOARD OF EDUCATION OF :
THE SCHOOL DISTRICT OF :
PLAINFIELD, NEW JERSEY :

OAL Docket No. EDUOR 08484-92N

Agency Ref. No. EDU 422-9/92

CIVIL ACTION

**SETTLEMENT AGREEMENT
AND RELEASE**

THIS AGREEMENT, made this 1st day of December, 1994, by and between the parties, Melvyn Duchin, residing at 18 Morningside Road, Colonia, New Jersey 07067 (hereafter referred to as "Duchin") and Plainfield Board of Education, with principal offices located at 504 Madison Avenue, Plainfield, New Jersey (hereafter referred to as "Board"),

WITNESSETH:

WHEREAS, Duchin, a tenured teaching staff member, sought reimbursement for legal fees from the Board pursuant to N.J.S.A. 18A:16-6.1; and

WHEREAS, notice of request for said reimbursement was timely provided to the Board by Duchin with supporting documentation; and

WHEREAS, a Petition was thereafter filed by Duchin against the Board for the said reimbursement under the terms and conditions of N.J.S.A. 18A:16-6.1; and

WHEREAS, both the Board and Duchin desire to enter into this Agreement as full and final settlement of all claims arising between them;

NOW, THEREFORE, in consideration of the mutual promises of the parties contained herein, it is mutually agreed as follows:

1. Subject to approval by the Administrative Law Judge and the Commissioner of Education, the Board agrees to pay to Duchin the amount of \$50,000.00, representing payment of legal services provided Duchin for criminal charges brought against him in the matter of State v. Duchin, Union County Indictment No. 91-05-0864, of which he was acquitted after trial by jury; said payment to be made payable to Weinberg and Kaplow, P.A.

2. Duchin agrees to execute all necessary documents for the judicial matter with O Docket No. EDUOR-08484-92N/Agency Ref. No. 442-9/92 pending before the Commissioner of Education to be dismissed with prejudice and without costs.

3. It is specifically acknowledged and understood by all parties hereto that none of the parties is to be regarded as the prevailing party for any purposes. It is understood and agreed that this Settlement is the compromise of a disputed claim and is not and should not be construed as an admission by either party of any liability or the violation of law, statute, ordinance, regulation or legal or moral duty whatsoever, nor be cited as precedent, nor used in any manner by any party in the future in any judicial or administrative proceeding.

4. Duchin expressly acknowledges that he has had opportunity to consult with competent legal counsel concerning the terms and conditions of this settlement, that he knows and

understands the contents of this settlement agreement and release, and that he enters into it of his own free will and without any inducement not contained herein.

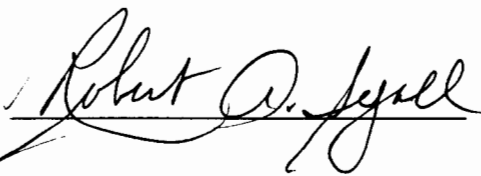
5. This Settlement Agreement and Release contains the entire agreement and understanding between the parties and constitutes full and final settlement to all claims. This Release and Settlement Agreement shall be governed by the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties have set their hands and seals as of the date first above written.

WITNESS:



WITNESS:



BOARD OF EDUCATION OF THE
DISTRICT OF PLAINFIELD

By: 

Howard M. Nirenberg, Esq.
Ostrager, Fieldman, Kachmar &
Nirenberg
Attorneys for Board of Education
of the District of Plainfield

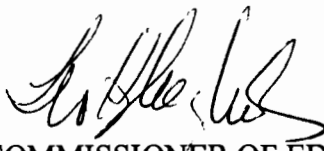


MELVYN DUCHIN

MELVYN DUCHIN, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 SCHOOL DISTRICT OF THE CITY :
 OF PLAINFIELD, UNION COUNTY, :
 :
 RESPONDENT. :
 :
 _____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

APRIL 28, 1995

DATE OF MAILING APRIL 28, 1995

138-95

IN THE MATTER OF THE TENURE :
HEARING OF NORMA MC AFEE, :
SCHOOL DISTRICT OF THE BOROUGH : COMMISSIONER OF EDUCATION
OF COLLINGSWOOD, CAMDEN : DECISION
COUNTY. :
_____ :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING RESPONDENT'S
MOTION TO DISMISS THE
APPEAL AS MOOT

OAL DKT. NO. EDU 7287-94

AGENCY DKT. NO. 168-5/94

**THE SCHOOL DISTRICT OF THE
BOROUGH OF COLLINGSWOOD,
CAMDEN COUNTY**

Petitioner,

v.

NORMA MCAFEE,

Respondent.

Malachi J. Kenny, Esq., on behalf of petitioner (Kenny, Grossman, McDonough & Steven, attorneys)

Michael C. Damm, Esq., on behalf of respondent (Selikoff & Cohen, attorneys)

Record Closed: March 9, 1995

Decided: March 16, 1995

BEFORE STEVEN C. REBACK, ALJ:

This is an appeal by the respondent, Norma McAfee, from her removal from her tenured position as a secretary with the Collingswood Board of Education on charges. Tenure charges

were filed against the respondent by the respondent (Board) on May 25, 1994, alleging inefficiency. Her answer was filed on June 24, 1995, denying all of the charges.

On June 28, 1994, the matter was transmitted to the Office of Administrative Law by the Commissioner of Education as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13 and N.J.S.A. 52:14B-1 to -15. Thereafter, on September 21, 1994, a prehearing conference was conducted in the matter and, on September 23, 1994, the matter was scheduled to proceed to hearing. The scheduled hearing was cancelled at the joint request of counsel. On March 9, 1995, my office received a motion submitted by Mr. Damm on behalf of Ms. McAfee to dismiss the matter as moot. He bases his motion on a certification which he submitted dated March 3, 1995. Mr. McAfee represents that on January 20, 1995, Ms. McAfee voluntarily resigned from her position as a secretary, effective January 23, 1995. He then notes that as a consequence of her voluntary resignation from the position, which is the subject matter of her appeal, and the institution of tenure charges, her employment is no longer at issue and therefore seeks that the matter be dismissed as moot. He notes at paragraph 7 of the certification that he has spoken with Mr. Malachi J. Kenny, Esq., counsel to the Board, who advises that he does not oppose the motion "but in fact joins with McAfee in requesting that the matter be dismissed" (Certification of Michael C. Damm, paragraph 7).

Based upon the representations of Mr. Damm in his certification that the respondent is no longer in the employ of the petitioner's school district and based further upon the representation that he is joined in the motion to dismiss with counsel for the school district, I **CONCLUDE** that the matter sub judice be and is hereby moot.

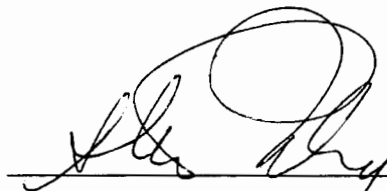
It is therefore **ORDERED** that the matter be and is hereby **DISMISSED WITH PREJUDICE AS MOOT**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

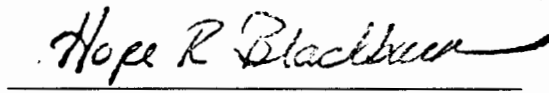
3/16/95
DATE



STEVEN C. REBACK, ALJ

3/21/95
DATE

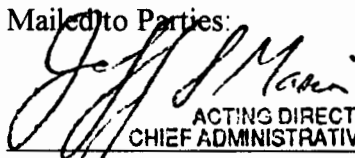
Receipt Acknowledged:



DEPARTMENT OF EDUCATION

MAR 24 1995

DATE

Mailed to Parties:


**ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**
OFFICE OF ADMINISTRATIVE LAW

jz


IN THE MATTER OF THE TENURE :
HEARING OF NORMA MC AFEE, :
SCHOOL DISTRICT OF THE BOROUGH : COMMISSIONER OF EDUCATION
OF COLLINGSWOOD, CAMDEN : DECISION
COUNTY. :
_____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record, and in view of the particular circumstances existing in this matter, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge for the reasons articulated by him in the initial decision.

Accordingly, the within Petition of Appeal is dismissed as moot, with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

139-95

IN THE MATTER OF THE ANNUAL SCHOOL :
 ELECTION HELD IN THE SCHOOL : COMMISSIONER OF EDUCATION
 DISTRICT OF THE BOROUGH OF : DECISION
 WOODCLIFF LAKE, BERGEN COUNTY. :
 _____ :

MAY 2, 1995

IN THE MATTER OF THE ANNUAL SCHOOL :
 ELECTION HELD IN THE SCHOOL : COMMISSIONER OF EDUCATION
 DISTRICT OF THE BOROUGH OF : DECISION
 WOODCLIFF LAKE, BERGEN COUNTY. :
 _____ :

The announced results of the balloting for two members of the Board of Education for full terms of three years each at the annual school election held on April 18, 1995 in the School District of the Borough of Woodcliff Lake were as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Nancyellen Strobel	502	7	509
Joseph T. LaPaglia	471	24	495
Paula Star	488	7	495
Raymond J. Mitchell	454	24	478

Pursuant to N.J.S.A. 18A:12-15(c), which requires the Commissioner to conduct a recount where two or more candidates qualified by law receive an equal number of votes, an authorized representative of the Commissioner from the Office of the Bergen County Superintendent of Schools duly conducted a recount of machine ballots cast for members of the Board. The recount was conducted on April 25, 1995 at the County Voting Machine Warehouse in Carlstadt.

At the conclusion of the recount, the tally stood unchanged, remaining as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Nancyellen Strobel	502	7	509
Joseph T. LaPaglia	471	24	495
Paula Star	488	7	495
Raymond J. Mitchell	454	24	478

Absentee tallies on recount are as reported by the Bergen County Board of Elections. No application for a recount of absentee ballots had been made to Superior Court as of the date of the Commissioner's recheck of the voting machines. Thus, a tie remains between candidates LaPaglia and Star.


This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions set forth therein.

Accordingly, the Commissioner finds and determines that a tie remains between candidates Joseph T. LaPaglia and Paula Star, and, pursuant to N.J.S.A. 18A:12-15(c), directs that a special election be held to fill the resultant vacancy, limited to candidates LaPaglia and Star and to be held on the earliest date possible in view of the prohibition on special elections within 20 days before or after the June 1995 primary election pursuant to N.J.S.A. 18A:14-3 and the need to accommodate absentee ballot notices pursuant to N.J.S.A. 18A:14-25.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MAY 2, 1995

DATE OF MAILING MAY 3, 1995

140-95

DONALD WOLLMAN, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY : DECISION
OF TRENTON, MERCER COUNTY,

RESPONDENT. :

_____ :

SYNOPSIS

Petitioner, former tenured Assistant Manager for Safety/Loss Control and Custodians, alleged his subsequent position of Assistant Director of Buildings and Grounds was unlawfully abolished by the State Fiscal Monitor.

ALJ concluded that the Commissioner had ample authority to appoint the Fiscal Monitor and the Fiscal Monitor has the authority to "terminate or promote any of those Board of Education employees under the supervision of the Board secretary or school business administrator without approval of the Board of Education, but in accordance with the applicable contractual or statutory procedures." (Administrative Consent Order) Moreover, the Board authorized the Fiscal Monitor's action by adopting the Deloitte and Touche report on the Business Office and the Buildings and Grounds Department. Also, the ALJ found that the requirements of the Veterans' Tenure Act did not apply since petitioner's position was terminated for reasons of efficiency not conduct.

Commissioner adopted findings and determination in initial decision as his own.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11871-93

AGENCY DKT. NO. 366-11/93

DONALD WOLLMAN,

Petitioner,

v.

BOARD OF EDUCATION OF

THE CITY OF TRENTON,

MERCER COUNTY,

Respondent.

Robert M. Schwartz, Esq., on behalf of petitioner (Lake and Schwartz, attorneys)

Thomas W. Sumners, Jr., Esq., on behalf of respondent (Sumners, Council, George & Dortch, attorneys)

Record Closed: March 1, 1995

Decided: March 17, 1995

BEFORE STEVEN C. REBACK, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was initiated by the petitioner, Donald Wollman, by the filing before the Commissioner of Education of a petition of appeal on November 3, 1993. Mr. Wollman alleges that respondent, Board of Education of the City of Trenton, Mercer County ("Board" or "Trenton") unlawfully abolished his tenured position of Assistant Director of Buildings and

Grounds on or about October 15, 1993, following various actions taken shortly before that date, by both respondent Board as well as the State Fiscal Monitor appointed by the Commissioner of Education to oversee various aspects of respondent's business office and business affairs. Mr. Wollman contends that the action which abolished his position contravened N.J.S.A. 18A:28-9 and was in violation of N.J.S.A. 38:16-1 -16-6, the Veterans Tenure Act. More specifically, Mr. Wollman argues that the abolition of his position was inconsistent with the statutory authority conferred upon boards of education under the former statute to abolish positions for reasons of economy and other good cause, and essentially argues that such statutory authority is not conferred upon the State Fiscal Monitor who purportedly acted in lieu of authority exercised by the Trenton Board of Education to abolish his position.

On November 23, 1993, respondent filed its answer before the Commission of Education essentially denying that the action undertaken by respondent directly, or indirectly, through the State Fiscal Monitor was improper or contravened applicable statutory education law or regulations.

Thereafter, on or about December 14, 1993, the Commissioner transmitted the matter to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 14F-1 to 13.

On May 4, 1994, a telephone prehearing conference was conducted with counsel and a prehearing order was issued on May 27, 1994. The reason for the delay in the issuance of the prehearing order was that counsel, at the time of the conference, were not in a position to schedule the matter for hearing and thus my office waited until they could provide scheduling dates which would be consistent with my calendar. The matter was then scheduled to proceed to hearing to July 22 and July 25, 1994 at the Office of Administrative Law, Mercerville, New Jersey. The matter did proceed as scheduled; however, the factual record remained open because the parties desired to execute a stipulation of facts and attachments but had been unable to do so as of that date. Accordingly, it was also agreed that a telephone conference be conducted, which was held on September 1, 1994 in respect to scheduling the submission of the stipulation of facts as well as scheduling the submission of post-hearing legal argument. On September 23, 1994, my office received by cover letter from Mr. Schwartz, an executed and signed stipulation of facts

with attachments, which I thereafter entered into evidence as joint exhibit one (J-1). The document was received by my office on September 28, 1994, and on that date the evidential record in these proceedings closed.

Thereafter, on September 10, 1994, Mr. Schwartz submitted his initial brief and on December 5, 1994, Mr. Sumners submitted his brief on behalf of respondent. On December 16, 1994, Mr. Schwartz executed a reply brief which was received by office on December 19, 1994. By telephone call placed to his office on December 23, 1994, Mr. Sumners advised that he had nothing further to submit by way of legal argument.

After making an initial assessment of the post-hearing legal arguments submitted in these matters, it was my judgment that in Mr. Schwartz's reply brief of December 15, 1994, he ostensibly raised an issue which had not been raised either during the course of prehearing discussions or in the course of discussing the initial post-hearing submissions. That issue appeared to engender an argument that under the applicable statutes, the Commissioner of Education lacked the authority to create the title of Fiscal Monitor or to allow the Monitor to exercise the statutory authority normally attributed to local school boards. Having read that brief, I recontacted counsel and after bringing it to Mr. Sumners's attention he indicated an inclination to provide legal argument addressing itself specifically to the appointment and the authority of the Fiscal Monitor. Thereafter, on January 30, 1995, I received the respondent's letter brief in reply to Mr. Schwartz's response.

After receiving Mr. Sumners's brief, and after being advised by Mr. Schwartz that he had nothing further to offer, I again made a second review of the legal arguments and again addressed myself to the letter brief submitted by Mr. Schwartz by way of response dated December 15, 1994. After perusing the document for a second time, I discerned that pages of the document may have been missing although the letter was correctly paginated. I placed a telephone call to Mr. Schwartz and, after his own review of the document, he agreed that several pages were indeed missing. As a result, he faxed to me the completed responsive brief which I received on March 1, 1995. The record therefore closed on the latter date, March 1, 1995.

ISSUES AND BURDEN OF PROOF

The fundamental issue to be addressed in these proceedings is whether the abolition of Mr. Wollman's position with respondent, Assistant Director for Buildings and Grounds, which was effected on or about October 15, 1993, was consistent with statute and regulation, specifically N.J.S.A. 18A:28-9. In respect to this issue, the burden rests exclusively upon the petitioner: Mr. Wollman must demonstrate by a preponderance of the relevant credible evidence that the abolition of his position was in contravention of law. More specifically, the petitioner must demonstrate the action undertaken by the respondent Board, in conjunction with the State Fiscal Monitor was unauthorized under statute. As a corollary petitioner must also establish that the abolition of his position was arbitrary and capricious and not undertaken for reasons of economy, efficiency or for other good cause.

In addition to the fundamental issue presented in this matter, addressing itself to whether the abolition of Mr. Wollman's position was effectuated for good cause and for reasons of economy or efficiency by the Trenton Board of Education, which is a mixed question of law and fact, there are also several issues that may be described as exclusively legal raised by Mr. Schwartz which also are addressed in this decision:

(1) Does the Commissioner of Education have the legal authority to create a Fiscal Monitor?

(2) Assuming arguendo that he does, does the fiscal monitor have the authority to unilaterally remove an employee, absent Board authorization?

(3) Does the Fiscal Monitor have the authority to abolish a position absent Board authorization?

(4) Did the Board of Education ratify the action undertaken by the Fiscal Monitor to either abolish a position or to remove the employee if arguendo the Fiscal Monitor could not act unilaterally?

(5) Were the actions undertaken by the Trenton Board of Education in this matter in violation of the petitioner's rights under the Veteran's Tenure Act, N.J.S.A. 38:16-1 - 16-6.

In respect to all of these additional issues as well, the burden rests exclusively upon Mr. Wollman to establish the propriety of his position by a preponderance of the relevant, credible evidence.

THE FACTS

Unless otherwise indicated, the following is a substantially uncontradicted narrative of the operative facts in these proceedings. Where a factual issue is presented, I shall set forth its adversarial basis, arrive at an explicit finding of fact, and provide reasons to support that finding. Accordingly, **I FIND:**

The petitioner, Donald Wollman, has been employed by the Board since 1987, initially commencing his employment in the title, Assistant Manager of Safety and Loss Control and Custodians. Effective July of 1992, Mr. Wollman's title was changed to Assistant Director of Buildings and Grounds. The basic responsibilities of that position are set forth as exhibit A of joint exhibit 1 (J-1). They cover a broad range of undertakings with the supervision of custodial services, maintenance employees, security staff, administrative responsibilities, and other duties under the general umbrella of assisting the Administrator of Buildings and Grounds. The various responsibilities that are delegated to Mr. Wollman in his capacity of Assistant Director of Buildings and Grounds, were presumably identical to those conferred upon him when he served under the title of Assistant Manager of Safety and Loss.

Following a variety of administrative title changes, which have no direct bearing on these proceedings, Mr. Wollman was eventually reassigned to the title Assistant Director of Buildings and Grounds and continued to serve in that capacity until October 15, 1993 when the title was eliminated, such action serving as the gravamen of the current appeal.

On April 7, 1993, the Commissioner of Education issued an order to show cause (R-2) against the Board of Education of the City of Trenton accompanied by a verified petition of appeal directing respondent to show cause why the Commissioner should not appoint a Fiscal Monitor. Following the issuance of the order to show cause and certain interim actions, on May 7, 1993, the City of Trenton and the Commissioner of Education entered into an administrative consent order (J-1 exhibit E) appointing Ms. Elizabeth E. De Matteo as Fiscal Monitor. The order, which was adopted by Board resolution, provided that the Office of Fiscal Monitor for the City of Trenton be established to “oversee and control the fiscal operations of respondent Board of Education . . .” The Fiscal Monitor was given the authority to, among other things, order respondent Board and its agents and officers to make appropriate budgetary changes as deemed necessary by her, to assure that the district has adequate fiscal and technical services to address a variety of deficiencies which had been identified. She was given the authority to order modification, development, and implementation of any changes in the procedures and operations of the fiscal affairs of Trenton which she deemed to create “an efficient fiscal administration . . .” J-1 exhibit E at 3.

The Fiscal Monitor was conferred with the authority to appoint or reassign permanent personnel to make the district more efficient and to order the appointment or reassignment of employees under the supervision of either the Board secretary or the school business administrator. She was also conferred with the authority to contract with outside auditors or accountants to assist her in making the decisions that she was charged with making. She was also given the authority to “terminate or promote any of those Board of Education employees under the supervision of the Board secretary or school business administrator without approval of the Board of Education, but in accordance with the applicable contractual or statutory procedures.” *Id* at paragraph I The full plenary powers of the Fiscal Monitor as set forth in the administrative order, are incorporated by reference into this opinion.

On March 10, 1993, Ms. De Matteo began serving as Fiscal Monitor in the District. (She terminated her responsibilities in that position one year later on May 10, 1994). The first six months on the job, Ms. De Matteo worked in the business office on a daily basis she found the office “to be in crisis” and saw as her first and primary responsibility its reorganization. Pursuant to her authority under the administrative order to reach out for outside assistance, Ms. De Matteo

retained the services of the public accounting firm of Deloitte and Touche. The firm's first involvement with the district occurred in May 1993 when approximately eight people came into the district to assess the business office. Eventually, up to some 20 staff personnel from Deloitte and Touche were involved in the on-hands assessment of the office. Their work concluded in or about September of 1993, with some follow-up.

Ms. Kathleen Meyerhoff supervised the Deloitte and Touche study of the Trenton Board of Education's business office as well as the Buildings and Grounds Department. Ms. Meyerhoff testified on behalf of the Board of Education. She has undergraduate degree in economics as well as an MBA degree in finance. She has been employed with Deloitte and Touche for some six years and at the time of her testimony indicated that she was about to be promoted to senior manager.

Ms. Meyerhoff specializes in educational consulting within the management consulting division of Deloitte and Touche. She has served as a consultant on behalf of Deloitte and Touche for approximately one dozen school districts, several of which are located in New Jersey. She was qualified as an expert in educational operations.

Ms. Meyerhoff estimated that Deloitte and Touche expended 1300 hours in reviewing the Buildings and Grounds Department with a view towards its efficiency and operation. On November 1, 1993, the firm issued its report on the Buildings and Grounds Department (R-1) a six-part document containing approximately 114 pages and 19 pages of appendices. The report, among other things, concluded that the petitioner's position should be abolished and that his employment be terminated. The report concluded specifically that the position of Assistant Director of Buildings and Grounds be abolished and that two coordinator positions be created in its place. The report gives as a rationale for this decision the following:

Improve efficiency and control of daily operations (standardization of practices, accessible management for crisis prevention/intervention, coordination of technical training, budget development/administration, supplies/product performance monitoring, site inspection program monitoring, attendance incentive program, etc.)

Improve lines of communication by clearly defining responsibilities

Lower operational spans of control to more appropriate levels

Support direct accountability for all major functional responsibilities of the department

Enhance the department's capacity for conducting strategic initiatives (planned preventive maintenance programs, Facilities Master Plan development, capital improvement project planning, resource utilization planning, etc.).

[R-1 at pages 1 - 2]

No evidence was offered by Mr. Wollman by way of testimony or documents which even attempted to demonstrate that the report of Deloitte and Touche was any fashion undertaken for reasons other than this well respected firm's objective of proposing to make the Department of Buildings and Grounds more efficient and organizationally sound. Additionally, no evidence or testimony was offered to suggest or even attempt to demonstrate that the Fiscal Monitor's actions in both appointing Deloitte and Touche to undertake its study or to follow-up on Deloitte and Touche's recommendations was in any way motivated by bad faith or was arbitrary or capricious. As was noted, the report recommended that in addition to abolishing the position that Mr. Wollman had occupied, Assistant Director of Buildings and Grounds, the two new positions, "Coordinator, maintenance and capital projects," and "Coordinator, custodial and grounds," be created.

On October 1, 1993, prior to any official action undertaken by the Trenton Board of Education, Ms. De Matteo implemented these recommendations. She notified Mr. Wollman that as a consequence of the recommendation of Deloitte and Touche with respect to reorganizing the Department of Buildings and Grounds, his position was being abolished effective October 15, 1993. Because Mr. Wollman retained keys to a variety of facilities and offices within the Trenton School District, Ms. De Matteo advised him that he would be terminated effective October 1, 1993 so that he would be relinquishing those keys but that his salary would be continued through October 15th.

On October 5, 1993, Ms. De Matteo submitted a resolution to the Board abolishing Mr. Wollman's position and terminating him from employment. The Board did not move and vote on

the resolution; however, the Fiscal Monitor, under her authority pursuant to the administrative order, read the resolution into the record and declared that Mr. Wollman's position was abolished and his employment terminated.

On November 18, 1993, the Trenton Board accepted the Deloitte and Touche report (R-1) addressing itself to the Buildings and Grounds Department and containing the recommendations at issue without exceptions. The Board adopted a resolution stating: "resolved, the Trenton Board of Education accepts the proposal as prepared by Deloitte and Touche and supports the implementation of same in the District by the State Fiscal Monitor." (R-1)

ANALYSIS

I shall address first the issue of whether the decisions to abolish Mr. Wollman's position and terminate him were done in good faith. I shall reserve for subsequent discussion the legal issues with respect to the authority of the Fiscal Monitor to act and the circumstances under which such action was effected.

Pursuant to N.J.S.A. 18A:28-9 a Board of Education may reduce the number of its employees if it can be demonstrated that in the judgment of the Board it is "advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the District or for good cause" See *Klinger v. Board of Education of Cranbury Township*, 190 *N.J. Super.* 354 (App. Div. 1982), cert. denied 93 N.J. 277 (1982); *In re Maywood Board of Education*, 168 *N.J. Super.* 45, 51-52 (App. Div. 1979). The courts, as Mr. Sumners notes in his post-hearing briefs, have also acknowledged a presumption of correctness and propriety of the action of a local board in respect to decisions reducing staff. Thus, in order for an aggrieved party to prevail where there has been a reduction in force, it is necessary that he or she demonstrate that the decision is clearly improper, arbitrary and capricious and he will be generally not prevail in situations where there exists any reasonable justification for the reduction of force absent such proof of bad faith. See *Klig v. Board of Education of the Borough of Palisades Park, Bergen County*, 1975 *S.L.D.* 168, 173-174. *In re Maywood Board of Education, Supra.*

In the current matter, in my judgment, no demonstrable proof has been elicited from the petitioner, upon whom the burden rests, to demonstrate that the actions, either of the Fiscal Monitor, the Trenton Board of Education or, the accounting firm of Deloitte and Touche upon whom both the Fiscal Monitor and the Board reasonably relied, which recommended the abolition of Mr. Wollman's position and his termination was anything but reasonable, couched in expertise and ostensibly directed towards making the Department of Buildings and Grounds more efficient and economically sound. Whether in the long term the recommendations adopted by the school district to abolish the position of Assistant Director of Buildings and Grounds and to redistribute any or all the responsibilities under that title to two separate positions fulfills the objective of the Fiscal Monitor remains to be seen; however, for purposes of the current appeal, the issue before me is not whether the result of the actions taken by the local school board and the Fiscal Monitor make Trenton a more efficient entity and place it on economically more stable ground. The issue rather is whether the determinations which were made resulting the termination of Mr. Wollman and the abolition of his position were grounded upon reasonable considerations rather than motivated by bad faith, arbitrariness and capricious.

In the current matter, based upon the totality of facts it is clear that the petitioner has been unable to even remotely demonstrate that the actions of the respondent in abolishing his position and terminating him were grounded in anything other than good faith, prompted by reasons of economy and efficiency, and thus conferred upon the Board good cause to take the action that it did. Accordingly, **I CONCLUDE** that the petitioner has failed to demonstrate by a preponderance of the relevant, credible evidence that the abolition of his position, Assistant Director of Buildings and Grounds and his termination from employment with the respondent was undertaken in bad faith, or was arbitrary and capricious or were in any fashion contrary to the dictates of N.J.S.A. 18A:28-9.

I shall now address the other legal issues raised by petitioner essentially by way of his post-hearing arguments.

(A)

The Commissioner's authority to appoint a fiscal monitor.

Petitioner's argument in respect to this issues is somewhat ambiguous. In his post-hearing reply brief, petitioner notes that "[n]othing in N.J.S.A. 18A:7A-1 et seq. . . . authorizes the creation of the title of the fiscal monitor" but also acknowledges that the statute creates an implied authority in the Commissioner to create a Fiscal Monitor. Petitioner's central point appears to be that a Fiscal Monitor may not act in the place of a board of education.

Nevertheless, the reply brief gives some indication that petitioner is challenging the very appointment of a Fiscal Monitor. To the extent that petitioner argues that the appointment of a fiscal monitor is in and of itself impermissible, he is incorrect. The appellate division and Supreme Court have decided that the appointment of a monitor with general supervisory powers is valid under Title 18A. *In the Matter of the Board of Education of Trenton*, 176 N.J. Super. 553 (App. Div. 1980), aff'd per curiam 86 N.J. 327 (1981). The ALJ relied in part on that case when he ordered that the Commissioner recommend to the State Board the appointment of a fiscal monitor. *McCarroll v. Bd. of Education of E. Orange*, OAL Dkt. No. 7777-84 (Oct. 31, 1984), adopted Commissioner of Education (Nov. 7, 1984).

If petitioner is arguing that the appointment of a Fiscal Monitor must conform to the procedural requirements necessary to establish a state-operated school system. Those procedural requirements were followed insofar as the Commissioner issued an order to show cause and gave the Trenton Board of Education an opportunity for a hearing at OAL (the hearing never took place because the Commissioner and the Board entered into the consent agreement). The procedural requirement for establishment of a state-operated school system that was not followed was approval by the State Board. Here, the State Board apparently did not approve the administrative order establishing the fiscal monitor. The question thus is whether the requirement that the State Board approve a state takeover of a school system applies to the appointment of a fiscal monitor.

Petitioner asserts that, given the authority of a Fiscal Monitor to control the school system's financial affairs, the appointment of a fiscal monitor is tantamount to a state takeover. This argument is also rejected. Respondent correctly notes that the appointment of a monitor differs from a state takeover in a variety of ways. For example, when the Fiscal Monitor is appointed, the board and administration remain in their positions and the board retains control over non-fiscal matters. See N.J.S.A. 18A:7A-15.1; N.J.S.A. 18A:7A-34.

Furthermore, the terms of N.J.S.A. 18A:7A-15 preclude petitioner from arguing that orders of the Commissioner that do not establish a state-operated school system must be approved by the State Board. N.J.S.A. 18A:7A-15 provides that:

If, after a plenary hearing, the commissioner determines that it is necessary to take corrective action, the commissioner shall have the power to order necessary budgetary changes within the district or other measures the commissioner deems appropriate to establish a thorough and efficient system of education with the exception of the creation of a state-operated school district. . . . If the commissioner determines that the district has failed to take or is unable to take the corrective actions necessary to establish a thorough and efficient system of education, the commissioner shall recommend to the State board that it issue an administrative order creating a State-operated school district.

[Emphasis added.]

The statute sets up two scenarios. In an order to effectuate a state takeover of a school system, the State Board must issue the order. In all other cases, the Commissioner has the power to act on his or her own initiative.¹

¹ In *In the Matter of the Board of Education of Trenton*, supra, the corrective action plan, which included appointment of a monitor, was approved by the State Board. Likewise, in *McConnell*, supra, the Commissioner's decision merely recommended to the State Board the appointment of a Fiscal Monitor. This may be because, prior to 1988, the language of N.J.S.A. 18A:7A-15 provided the Commissioner with less latitude. ("If, after a plenary hearing, the commissioner determines that it is necessary to take corrective action, he shall have the power to order necessary budgetary changes within the school district, to order in-service training programs for teachers and other school personnel, or both. If he determines that such corrective actions are insufficient, he shall have the power to recommend to the State board that it take appropriate action [including issuance of] an administrative order specifying a remedial plan to the local board

(B)

The Fiscal Monitor's authority to abolish Mr. Wollman's position and to terminate him.

- a. Authority under the administrative order.

Petitioner grounds his argument that the Fiscal Monitor is acting beyond the scope of the order on the following language in the order:

The Fiscal Monitor's powers shall include the authority to

- ...
i. terminate or promote any of those Board of Education employees under the supervision of the Board Secretary or School Business Administrator without approval of the Board of Education but in accordance with applicable contractual or statutory procedures. [Administrative Order at 4.]

Petitioner argues that the Fiscal Monitor did not act in accordance with applicable statutory procedures because N.J.S.A. 18A:28-9 allows only the local board to terminate employees for reasons of economy or efficiency.²

The difficulty with this interpretation is manifest. It disregards the language of the order stating that termination may occur "without the approval of the Board of Education."³ Further, the intent of N.J.S.A. 18A:28-9 is not to exclude a Fiscal Monitor from making decisions a board would ordinarily make. The statute likely does not even contemplate a Fiscal Monitor acting in lieu of a board because Fiscal Monitors are rare and because the statute was adopted in 1967,

of education, which plan may include budgetary changes or other measures the State board determines to be appropriate.")

² None of petitioner's written submissions advances the argument that Mr. Wollman's dismissal would have been illegitimate had the Board acted rather than the monitor, with the exception of the Veterans' Tenure Act claim. "[R]education in force is entirely within the authority of the board if done for reasons of economy." *Klinger v. Bd. of Education of Cranbury*, 190 N.J. Super. 354 (App. Div. 1982).

³ Contrast this provision with subsection l, which governs employees not under the supervision of the Board Secretary or the School Business Administrator. The Fiscal Monitor may only recommend the termination or promotion of such employees.

long before the appointment of any monitor. A more reasonable interpretation of the language of the order is to infer that a Fiscal Monitor, like a board, cannot disregard the tenure laws if he or she wishes to terminate an employee (e.g., she cannot fire a tenured employee without a reason).

Pursuant to this analysis, the administrative order clearly authorized the Fiscal Monitor to terminate Wollman. The order, however, does not specifically confer the power to abolish positions. Given the scope of powers conferred by the order and the existence of the power to terminate, it must reasonably be inferred that such power exists. See, e.g., Administrative Order at 2 (“The Fiscal Monitor . . . is to assume control and supervision over all fiscal operations” Fiscal operations include supervision of buildings and grounds. Id. at 5). The list of powers includes the authority to order the Board to make budgetary changes, to veto any expenditure of funds or any personnel action, to order changes in the operations of the fiscal affairs of the district, and to appoint auditors (pursuant to whose recommendation Wollman’s position was abolished). All of these provisions provide support for the Monitor’s authority to abolish a position for efficiency reasons.

b. Authority under the statute

Petitioner also appears to be arguing that the order itself is defective insofar as the Commissioner lacks the authority to appoint a fiscal monitor who can terminate employees. This is distinct from the argument discussed, *supra*, which considered whether the Commissioner could appoint a fiscal monitor at all.

No legal authority was discovered that squarely addresses the issue of whether a Fiscal Monitor can or cannot terminate an employee. There is however, considerable authority affirming the Commissioner’s authority to insure a thorough and efficient education by whatever means he or she deems appropriate.

The Commissioner has broad remedial powers. See, e.g., *Bd. of Education of Elizabeth v. City Council of Elizabeth*, 55 N.J. 501 (1970); *In the Matter of the Application of the Bd. of Education of Upper Freehold Regional School Dist.*, 86 N.J. 265, 274-275 (1981)

(Commissioner and State Board have the authority to direct a local board to issue bonds for a capital project, even though the local voters had rejected referenda to finance the project.) The Commissioner also has a responsibility to effectuate a thorough and efficient system of education. *Robinson v. Cahill*, 69 N.J. 449, 459-60 (1976).

The need for the Commissioner to exercise broad authority increases when a monitor is appointed. The appointment of a monitor occurs only under extraordinary circumstances. *In the Matter of the Bd. of Education of Trenton, supra*, 86 N.J. at 329; *McCarroll v. Bd. of Education of E. Orange*, OAL Dkt. No. 7777-84 at 5 (ALJ approves appointment of a Fiscal Monitor based on the existence of “fundamental problems and irregularities regarding . . . fiscal operation and management.”) Presumably, the greater the plight of the school system, the greater the discretion needed by the Commissioner to implement solutions to the problems. This explains the broad discretion conferred by N.J.S.A. 18A:7A-15:

If, after a plenary hearing, the commissioner determines that it is necessary to take corrective action, the commissioner shall have the power to order necessary budgetary changes within the district or other measures the commissioner deems appropriate to establish a thorough and efficient system of education with the exception of the creation of a State-operated school district. [Emphasis added.]

It is compelling therefore to conclude that the Commissioner’s authority is sufficiently broad to encompass the appointment of a Fiscal Monitor with the power to abolish a position and terminate an employee.

4. Board ratification of the Fiscal Monitor’s act.

Since I have concluded the Fiscal Monitor had the authority to terminate Mr. Wollman, the question of the Board’s ability to ratify is moot; however, assuming that the Fiscal Monitor was not authorized to terminate Wollman, the question becomes whether either 1) the Board’s silence during the Fiscal Monitor’s reading of the resolution or 2) the Board’s adoption of the Deloitte & Touche report constitutes ratification.

a. The Board’s silence as ratification

In general, ratification requires full knowledge of material facts on the part of ratifying entity. *Capano v. Stone Harbor*, 530 *F.Supp.* 1254 (D.N.J. 1982). Since the relevant discussion was carried on before the Board, the Board presumably had full knowledge. A municipality can ratify a contract entered into by an authorized agent, and the intent to ratify an unauthorized transaction may be inferred from a failure to repudiate it. *Johnson v. Hospital Service Plan of N.J.*, 25 *N.J.* 134 (1957).

Nevertheless, implying ratification in this case poses two problems. First, it is unclear whether the Board's silence was intended as a ratification. Petitioner's case implied that the Board refused to abolish Wollman's position at the October 5th meeting, which cuts against an inference that the Board intended to ratify the Fiscal Monitor's action.

Second, although no law directly on point was found, there is reason to believe that a board of education may not abolish a position merely by remaining silent as an unauthorized person reads a resolution into the record. The ratification of the termination of an employee pursuant to a statute requiring board action may differ from the implied ratification of a contract. It might, for example, be inappropriate for a board's meeting to consist of the superintendent reading resolutions which the board adopts by virtue of its silence. In *Bond v. Bd. of Education of Camden*, 93 *N.J.A.R.* 2d (EDU) 577, a plan reassigning students was not voted on by the board because the board had given the superintendent authority to effect reassignments after only discussion with the board. The ALJ held that this arrangement was illegitimate. Although *Bond* poses an issue of improper delegation rather than the scope of ratification, the ALJ's rationale applies here. "[A] final decision should provide for public participation and a vote by the board." *Id.* at 579. Ratification without a vote may decrease the accountability of board members, who would not be required to answer for their position on the issue.⁴

b. Ratification at the November 18th meeting

⁴ The foregoing discussion about the importance of board voting refers only to ratifying the acts of an unauthorized agent. If, as was noted, the Fiscal Monitor does have authority to act, that usurpation of a board function would be authorized by statute.

Respondent argues that even if the October 5th termination is invalid, the November 18th resolution by the Board accepting the Deloitte & Touche report ratified petitioner's termination. The Board resolution accepted the Deloitte & Touche report (which had recommended abolition of Wollman's position) and supported the implementation of it by the Fiscal Monitor. Petitioner has in my view presented no argument as to why this action by the Board, as opposed to the purported ratification by silence, is invalid.

Assuming that the Board could and did ratify the Fiscal Monitor's action, that resolution validates Wollman's termination. Wollman has not argued in the written submissions that his termination would have been invalid had it been done by the Board, with the exception of the Veterans' Tenure Act claim that shall next be addressed.

5. Veterans' Tenure Act

Count Two of Wollman's petition alleges 1) that Wollman, a veteran, was denied a hearing prior to his termination in violation of N.J.S.A. 38:16-1 - N.J.S.A. 38:16-6 and 2) that the abolition of Wollman's position was made for the express purpose of terminating him, in violation of N.J.S.A. 38:16-3.

The issue posed by petitioner is whether N.J.S.A. 38:16-1 requires a hearing prior to termination, even if termination occurs pursuant to the abolition of petitioner's position. N.J.S.A. 38:16-1 provides that a veteran employed by the government (including a board of education) shall not "be removed from such employment . . . except for good cause shown after a fair and impartial hearing, but such person shall hold his employment . . . during good behavior, and shall not be removed for political reasons." The statute does not protect the employment of veterans when their positions are abolished, *Dobbs v. Pierce*, 76 N.J. Super. 64 (Law Div. 1962), but abolition may not be used as a pretext for terminating a veteran. N.J.S.A. 38:16-3.

There are two arguments militating against petitioner's conclusion that although abolition does not trigger the protections of the Act, the statute still requires a hearing prior to termination. First, N.J.S.A. 38:16-2 provides that prior to dismissal of a veteran covered by N.J.S.A. 38:16-1, "charges shall be preferred against him, a copy of which shall be served upon him and a time set

for the hearing of same.” If a veteran’s position is abolished, there is obviously no need for charges to be preferred. The statute, in my view, contemplates a hearing only when the employee’s conduct is at issue.

Second, long-standing precedent holds that a hearing is not required prior to the abolition of a veteran’s position. *See Burney v. Paterson*, 3 *N.J. Misc.* 1197 (S. Ct. 1925) (answering yes to the question of whether a position held by a veteran can be abolished by a municipality, acting in good faith and for the purpose of economy, without notice and hearing to the occupant thereof); *Ziegler v. City Council of Hackensack*, 113 *N.J.L.* 215 (S. Ct. 1934), *aff’d* 114 *N.J.L.* 186 (Ct. Err. 1935). (Fire chief’s position abolished without a hearing and pursuant to reorganization. Dismissal upheld). For cases in which abolition of a veteran’s position occurred and the procedural history makes no mention of a hearing having taken place prior to abolition, *see Dobbs v. Pierce*, 76 *N.J. Super.* 64 (Law Div. 1962) (Camden board of assessors abolished); *Moresch v. Bd. of Education of Bayonne*, 52 *N.J. Super.* 105 (App. Div. 1958) (elimination of vice-principalships by reason of the Board); *Barringer v. Miele*, 6 *N.J.* 139 (1951) (veterans who were employees of the Superintendent of Elections and the Commissioner of Registration terminated after the offices were combined); *Greco v. Smith*, 40 *N.J. Super.* 182 (App. Div. 1956) (Belleville building inspector proved that bad faith rather than economy motivated his termination. The court did not criticize or even mention the absence of a hearing prior to Greco’s termination.). Of course, an unauthorized termination can take place in the guise of abolition of a position, and a pre-termination hearing could presumably prevent that. Nevertheless, the precedent indicates that a municipality’s right to control the structure and size of its government enables it to abolish positions without a preliminary hearing. I have, of course, concluded that Wollman’s termination and the abolition of his position were not undertaken in bad faith. The legal arguments raised by petitioner post-hearing are without merit.

CONCLUSION:

The Commissioner had ample authority to appoint the Fiscal Monitor and the Fiscal Monitor had the authority to abolish petitioner’s position and terminate his employment. The Board authorized the Fiscal Monitor’s action by adopting the Deloitte & Touche

recommendations. The requirements of the Veterans' Tenure Act do not apply since Wollman was terminated for reasons of efficiency.

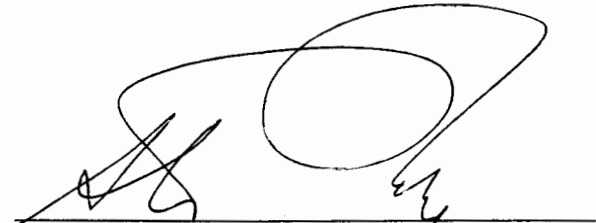
Accordingly, and based upon the foregoing, it is **ORDERED** that the appeal of the petitioner be and is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.


Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

3/17/95
DATE



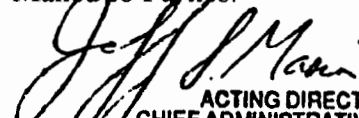
STEVEN C. REBACK, ALJ

3/21/95
DATE

Receipt Acknowledged:


DEPARTMENT OF EDUCATION

MAR 24 1995
DATE

Mailed to Parties:


ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

tmp

WITNESSES

On Behalf of Petitioner:

Donald Wollman

On Behalf of Respondent:

Kathleen Meyerhoff
Elizabeth De Matteo

EXHIBITS

Jointly Submitted:

J-1 Stipulation of Facts, signed by counsel with attached exhibits A through K (excluding exhibit J)

On Behalf of Petitioner:

None

On Behalf of Respondent:

- R-1 Review of the buildings and grounds department report prepared by Deloitte and Touche, November 1, 1993
- R-2 Order to Show Cause issued by the Commissioner of Education against the Board of Education of the City of Trenton, April 7, 1993
- R-3 Verified Petition of Appeal for Administrative Order issued by the Commissioner of Education against the Board of Education of the City of Trenton, April 7, 1993
- R-4 Stipulation of Consent to Entry of Administrative Order, April 7, 1993

DONALD WOLLMAN, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE CITY : DECISION
 OF TRENTON, MERCER COUNTY, :
 :
 RESPONDENT. :
 :
 _____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Respondent Board's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioner's exceptions essentially recast and reiterate his arguments advanced before the Administrative Law Judge (ALJ), again contending, *inter alia*, that the Trenton Board of Education unlawfully abolished petitioner's tenured position of Assistant Director of Buildings and Grounds following action of a State Fiscal Monitor appointed by the Commissioner. Petitioner argues that the Commissioner's administrative order appointing the Fiscal Monitor did not provide the Fiscal Monitor with the authority to effectuate reorganizations or reductions in force. Alternatively, petitioner argues that he is entitled to back pay from the date that he was fired until the date that the Board took action adopting an auditor's report which suggested the elimination of his position.

Respondent's reply exceptions urge the Commissioner to adopt the findings of the ALJ as they are correctly based upon applicable law and supported by the factual testimony presented at the hearing.

Upon a careful and independent review of the record in this matter, the Commissioner agrees with the findings and conclusions of the ALJ as articulated in the initial decision. The Commissioner finds that petitioner's exception arguments were fully and fairly considered and addressed at length by the ALJ in his initial decision and need not be herein reviewed. The ALJ concluded, and the Commissioner concurs, that the Fiscal Monitor was duly appointed for the purpose of overseeing the fiscal operations of the Board, making appropriate budget changes as deemed necessary by her and appointing or reassigning permanent personnel to make the district more effective. The Commissioner finds and determines that the Fiscal Monitor acted in accordance with this authority in eliminating petitioner's position, thereby terminating his employment. The Commissioner further concurs with the ALJ that petitioner failed to demonstrate by a preponderance of the evidence that abolition of his position was arbitrary, capricious or improper or taken in bad faith.

The Commissioner expresses no opinion on the alternatives raised in petitioner's exceptions since he agrees with the ALJ's determination that the Fiscal Monitor had the authority to abolish petitioner's position.

Accordingly, for the reasons well-expressed therein, the Commissioner affirms the initial decision of the Office of Administrative Law dismissing the within Petition of Appeal.


COMMISSIONER OF EDUCATION

MAY 3, 1995

DATE OF MAILING MAY 3 1995

EDU #11871-93
C # 140-95
SB # 62-95

DONALD WOLLMAN, :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE CITY : DECISION
OF TRENTON, MERCER COUNTY, :

RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, May 3, 1995

For the Petitioner-Appellant, Robert M. Schwartz, Esq.

For the Respondent-Respondent, Sumners, Council, George & Dortch
(Thomas W. Sumners, Jr., Esq., of Counsel)

The basic facts herein are not in dispute. Donald Wollman (hereinafter "petitioner") began his employment with the Board of Education of the City of Trenton (hereinafter "Board" or "Trenton Board") in January 1987 as the Assistant Manager of Safety and Loss Control and Custodians. In July 1992, petitioner's title was changed to Assistant Director of Buildings and Grounds.

On May 7, 1993, the Board consented to an administrative order issued by the Commissioner of Education appointing a Fiscal Monitor "to oversee and control the fiscal operations" of the Board. That order provided the Fiscal Monitor with the authority, in consultation with the County Superintendent and the Assistant Commissioners of Finance and Urban and Field Services, to make budgetary changes

JAN. 7, 1998

as deemed necessary in order to assure that the district had adequate fiscal and technical resources to address the deficiencies identified in Level II monitoring; veto any expenditure of funds submitted to the Board for approval; veto personnel actions; contract with outside auditors or accounting firms; order the training, evaluation, appointment or reassignment of Board employees under the supervision of the Board secretary or school business administrator; direct and supervise Board employees under the supervision of the Board secretary or school business administrator; and terminate or promote such employees without approval of the Board but in accordance with applicable contractual or statutory procedures.

On October 5, 1993, the Fiscal Monitor, acting on the basis of a proposal by a public accounting firm she had retained, submitted a resolution to the Board recommending that the Buildings and Grounds Department be reorganized and that petitioner's position as Assistant Director of Buildings and Grounds be abolished effective October 15. The resolution was presented to the Board as a recommendation from the Fiscal Monitor, and included signature lines for the president of the Board and the Board's acting secretary. The Board, however, neither moved to adopt that resolution nor passed a resolution approving such action. Nor did it take independent action to abolish petitioner's position. Nonetheless, his position was, in fact, eliminated on October 15.

On November 1, 1993, the public accounting firm retained by the Fiscal Monitor issued a written report, "Review of the Building & Grounds Department," in which it proposed, inter alia, that petitioner's position be abolished and replaced with two new coordinator positions in order to improve efficiency and control of daily operations. On

November 18, 1993, the Board adopted a resolution accepting the accounting firm's proposal and supporting the implementation of that proposal by the Fiscal Monitor.

On November 3, 1993, petitioner filed the instant petition with the Commissioner alleging that his position had been improperly abolished. Petitioner contended that the Board's failure to adopt a formal resolution abolishing his position pursuant to N.J.S.A. 18A:28-9 had rendered the Fiscal Monitor's action ultra vires. Petitioner further contended that, as a veteran, he was entitled to a hearing pursuant to N.J.S.A. 38:16-1 before his employment could be terminated.

On March 17, 1995, following a hearing, an Administrative Law Judge ("ALJ") concluded that petitioner had failed to demonstrate that the abolishment of his position was arbitrary, capricious or taken in bad faith. The ALJ found that the Commissioner had not acted improperly in appointing a Fiscal Monitor, and that the Fiscal Monitor's authority to abolish positions for reasons of efficiency could reasonably be inferred from the "scope of powers conferred by the order and the existence of the power to terminate." Initial Decision, slip op. at 14. He further found that the Commissioner's authority was sufficiently broad to encompass the appointment of a Fiscal Monitor with the power to abolish positions and terminate employees. He noted that, while not necessary, the Board had authorized the Fiscal Monitor's action by formally adopting the accounting firm's recommendation.

The ALJ also rejected petitioner's contention that, as a veteran, he had been entitled to a hearing. The ALJ observed that N.J.S.A. 38:16-1 contemplated a hearing only when the employee's conduct was at issue, and not prior to the abolishment of a position. He therefore recommended dismissing the petition.

On May 3, 1995, the Commissioner adopted the ALJ's recommended decision and dismissed the petition. The Commissioner agreed that the Fiscal Monitor had acted in accordance with her authority when she eliminated petitioner's position, and that petitioner had failed to demonstrate that the abolishment of his position was arbitrary, capricious or taken in bad faith.

Petitioner filed the instant appeal to the State Board.

After a thorough review of the record, we reverse the determination of the Commissioner to dismiss the petition. Unlike the Commissioner, we conclude that the authority of the Fiscal Monitor to abolish positions without the approval of the Trenton Board cannot reasonably be inferred from the terms of the administrative order. However, we find that petitioner's entitlement to back pay as the result of the improper abolishment of his position by the Fiscal Monitor is limited to the period between October 15, 1993 and November 18, 1993.

A review of the petition of appeal which resulted in the administrative order at issue herein is instructive. That petition, which was filed against the Trenton Board in April 1993 by the Assistant Commissioners of Finance and Urban and Field Services, indicated that an External Review Team had identified multiple deficiencies in the fiscal management of the district. The petitioners therein alleged that the Board's 1992-93 budget was lacking in detail, frustrating any attempt to determine whether the sums appropriated therein were sufficient to enable the Board to carry out its Level II Corrective Action Plan, and that its 1993-94 budget could not be approved because the documentation provided in support thereof was insufficient to provide a basis for evaluation. The petitioners further alleged that an External Auditor had found that the

purchasing system utilized by the Board was archaic, cumbersome and in violation of statute, code and good school management practice. The External Auditor also found that the Board's payroll system was rife with errors. Nor had the Board made provision to switch its accounting procedures to Generally Accepted Accounting Principles in 1993-94 as required by statute. The External Auditor also indicated that the district lacked adequate supervision of several departments, including Buildings and Grounds. Petitioners alleged that without immediate implementation of processes to establish a sound fiscal management system, the Board would not be able to implement its Corrective Action Plan and provide a thorough and efficient education for its students. They therefore sought an order appointing a Fiscal Monitor to assume control and supervision of all fiscal operations of the district.

Our review of the petition and resultant order leads us to conclude that the authority to abolish positions without Board approval cannot reasonably be inferred from the scope of powers conferred on the Fiscal Monitor. The intent of the administrative order, as set forth in the petition of appeal, was to assume control of the district's fiscal operations, thereby addressing deficiencies in the fiscal management of the district and implementing processes for the establishment of a sound fiscal management system. In furtherance of that objective, and in view of the allegation that the district lacked adequate supervision of its Buildings and Grounds department, the order provided the Fiscal Monitor with the authority to direct and supervise employees in that department and to terminate or promote such employees without approval from the Board. The petition did not seek and the order did not provide the Fiscal Monitor with unrestricted control over the district's operations and structure.

Nor do we find that such authority can reasonably be inferred from the provision in the order authorizing the Fiscal Monitor to “terminate or promote any board of education employees under the supervision of the board secretary or school business administrator without approval of the board of education....” The authority to “terminate or promote” expressly involves individual employees under the Fiscal Monitor’s supervision; the authority to abolish positions involves control of the district’s organizational structure. This is not a distinction without a difference. The Fiscal Monitor’s authority to terminate or promote individual employees under her supervision without the approval of the Board cannot, in itself, be read to abrogate the Board’s jurisdiction over the district’s general organization. Moreover, the use of the word “promote” in conjunction with “terminate” reinforces our belief that the intent of such provision was to permit the Fiscal Monitor to take appropriate personnel action with regard to those employees under her supervision without the necessity for seeking approval from the Board, rather than to eliminate entire positions without approval.

Thus, while the Fiscal Monitor had express authority under the terms of the administrative order to terminate petitioner’s employment without the approval of the Board, we agree with petitioner that the Fiscal Monitor did not have authority, express or implied, to abolish his position without approval. As a result, such action was ultra vires.¹

¹ Contrast Dearden v. Board of Education of the City of Trenton, decided by the Commissioner of Education, August 2, 1995, aff’d by the State Board of Education, February 7, 1996, aff’d, Docket #A-4151-95-T5 (App. Div. 1997), in which the Trenton Board adopted a formal resolution accepting the Fiscal Monitor’s recommendation to abolish Mr. Dearden’s position as part of a reorganization of the district’s business office. We found it unnecessary in that case to pass upon the Fiscal Monitor’s authority since it was the action of the Board, rather than of the Fiscal Monitor, which was being challenged.

We turn therefore to consideration of the remedy to which petitioner is entitled as a result of such action. Although petitioner's position was improperly abolished without Board approval on October 15, 1993, the Board, as previously noted, formally adopted a resolution on November 18, 1993 accepting the accounting firm's proposal, which included a recommendation that petitioner's position be abolished. Thus, while we find that the October 15 abolishment of petitioner's position was ultra vires, the Board did thereafter take action to ratify a proposal to abolish that position.

Consequently, we reverse the Commissioner's determination to dismiss the petition and direct the Board to compensate petitioner for his back pay and other emoluments, less mitigation, for the period between October 15, 1993, the effective date of the abolishment of his position by the Fiscal Monitor, and November 18, 1993, when the Board formally acted to abolish his position. In so doing, we reject, for the reasons well expressed by the ALJ and adopted by the Commissioner, petitioner's contention that, as a veteran, he was entitled to a hearing pursuant to N.J.S.A. 38:16-1 et seq. before his position could be abolished. Nor has petitioner demonstrated that the Board abolished his position for the purpose of terminating his services. N.J.S.A. 38:16-3.

Donald C. Addison, Jr., abstained.

Attorney exceptions are noted.

January 7, 1998

Date of mailing JAN 09 1998

141-95

EVELYN HOBBS, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE CITY OF :
 NEWARK, ESSEX COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

MAY 3, 1995

EVELYN HOBBS, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF : DECISION
NEWARK, ESSEX COUNTY, :
RESPONDENT. :
_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

142-95

BOARD OF EDUCATION OF THE :
TOWNSHIP OF COLTS NECK, :
MONMOUTH COUNTY, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE :
BOROUGH OF TINTON FALLS, :
MONMOUTH COUNTY AND MR. AND :
MRS. D., :

DECISION

RESPONDENTS. :

_____ :

OAL DKT. NO. EDU 8016-94

BOARD OF EDUCATION OF THE :
TOWNSHIP OF COLTS NECK, :
MONMOUTH COUNTY, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION


BOARD OF EDUCATION OF THE :
BOROUGH OF TINTON FALLS, :
MONMOUTH COUNTY AND MR. AND :
MRS. D., :

DECISION

RESPONDENTS. :
_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

143-95

SHIRLEY D. MOSLEY, mother and :
guardian ad litem of DAVID MOSLEY, :
AND DAVID MOSLEY, individually, :

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

THOMAS C. LANE, IV, SUPERINTEN- :
DENT OF SCHOOLS, CITY OF :
BRIDGETON BOARD OF EDUCATION :
AND HELEN BURGER, PRESIDENT OF :
THE CITY OF BRIDGETON BOARD :
OF EDUCATION, CUMBERLAND :
COUNTY, :

DECISION

RESPONDENTS. :

_____ :

MAY 8, 1995

SHIRLEY D. MOSLEY, mother and :
guardian ad litem of DAVID MOSLEY, :
AND DAVID MOSLEY, individually, :

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

THOMAS C. LANE, IV, SUPERINTEN- :
DENT OF SCHOOLS, CITY OF :
BRIDGETON BOARD OF EDUCATION :
AND HELEN BURGER, PRESIDENT OF :
THE CITY OF BRIDGETON BOARD :
OF EDUCATION, CUMBERLAND :
COUNTY, :

DECISION

RESPONDENTS. :

_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

144-95

LAN LIU, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

STATE-OPERATED SCHOOL DISTRICT :
OF JERSEY CITY, HUDSON COUNTY,

DECISION

RESPONDENT. :

_____ :

MAY 8, 1995

OAL DKT. NO. EDU 10160-94

LAN LIU, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT : DECISION
OF JERSEY CITY, HUDSON COUNTY,
RESPONDENT. :
_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MAY 8, 1995 --
DATE OF MAILING MAY 8, 1995

145-95

M.M., on behalf of L.S., :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY :
OF CLIFTON, PASSAIC COUNTY,

DECISION

RESPONDENT. :

_____ :

OAL DKT. NO. EDU 11970-94

M.M., on behalf of L.S., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY : DECISION
OF CLIFTON, PASSAIC COUNTY,
RESPONDENT. :
_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MAY 8, 1995
DATE OF MAILING MAY 8, 1995

149-95

IN THE MATTER OF THE ANNUAL SCHOOL :
 ELECTION HELD IN THE SCHOOL : COMMISSIONER OF EDUCATION
 DISTRICT OF THE BOROUGH OF : DECISION
 BELLMAWR, CAMDEN COUNTY. :
 _____ :

MAY 9, 1995

IN THE MATTER OF THE ANNUAL SCHOOL :
 ELECTION HELD IN THE SCHOOL : COMMISSIONER OF EDUCATION
 DISTRICT OF THE BOROUGH OF : DECISION
 BELLMAWR, CAMDEN COUNTY. :
 _____ :

The announced results of the balloting for two members of the Board of Education for full terms of three years each at the annual school election held on April 18, 1995 in the School District of the Borough of Bellmawr were as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Bill Evans	394	4	398
Ken Murray	329	3	332
Betty Sheppard	325	7	332

Pursuant to N.J.S.A. 18A:12-15(c), which requires the Commissioner to conduct a recount where two or more candidates qualified by law receive an equal number of votes, an authorized representative of the Commissioner from the Office of the Camden County Superintendent of Schools duly conducted a recount of machine ballots cast for members of the Board. The recount was conducted on May 5, 1995 at the Voting Machine Warehouse, South Port Corporation, Camden. Absentee ballots were recounted by the Camden County Board of Elections on the same date.

At the conclusion of the recount, the tally stood unchanged, remaining as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Bill Evans	394	4	398
Ken Murray	329	3	332
Betty Sheppard	325	7	332

It is noted that, both in the original tally and on recount, candidate Ken Murray received one write-in vote which was not counted because Murray's name appeared on the official ballot. Thus, a tie remains between candidates Murray and Sheppard.

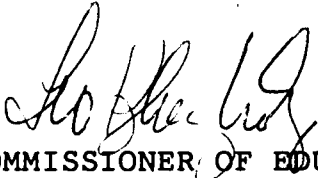
This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions set forth therein.

Accordingly, the Commissioner finds and determines that a tie remains between candidates Ken Murray and Betty Sheppard, and, pursuant to N.J.S.A. 18A:12-15(c), directs that a special election be held to fill the resultant vacancy, limited to candidates Murray and Sheppard, and to be held on the earliest date possible in view of the prohibition on special elections within 20 days before or after the June 1995 primary election pursuant to N.J.S.A. 18A:14-3 and the need to accommodate absentee ballot notices pursuant to N.J.S.A. 18A:14-25.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MAY 9, 1995

-2-

DATE OF MAILING MAY 9, 1995

150-95

IN THE MATTER OF THE ANNUAL SCHOOL :
ELECTION HELD IN THE SCHOOL : COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF : DECISION
KINGWOOD, HUNTERDON COUNTY. :
_____ :

MAY 10, 1995

IN THE MATTER OF THE ANNUAL SCHOOL :
 ELECTION HELD IN THE SCHOOL : COMMISSIONER OF EDUCATION
 DISTRICT OF THE TOWNSHIP OF : DECISION
 KINGWOOD, HUNTERDON COUNTY. :
 _____ :

The announced results of the balloting for the General Fund question of the Board of Education at the annual school election held on April 18, 1995 in the Kingwood Township School District were as follows:

<u>POLLING DISTRICT</u>	<u>FOR</u>	<u>AGAINST</u>
Voting District #1	64	76
Absentee Votes	10	1
TOTAL:	74	77

Pursuant to a letter request from the Board of Education dated and filed on April 27, 1995, an authorized representative of the Commissioner from the Office of the Hunterdon County Superintendent of Schools was directed to conduct a recount of machine ballots cast for the General Fund question pursuant to N.J.S.A. 18A:14-63.3. The recount was conducted on May 2, 1995 at the Hunterdon County Board of Elections Voting Machine Warehouse and at the Office of the Hunterdon County Superintendent of Schools. A recount of absentee ballots was conducted, at the Board's request, by the Hunterdon County Board of Elections.

At the conclusion of the recount, the tally for the General Fund question stood as follows:

<u>POLLING DISTRICT</u>	<u>FOR</u>	<u>AGAINST</u>
Voting District #1	64	76
Absentee Votes	9	1
TOTAL:	73	77

At the time of the recount, the sealed election packets received from the school district were individually opened for the purpose of comparing the number of ballots cast (public and protective counters) to the number of voter authorities issued and voter names on the poll list. The results of this comparison showed no discrepancies in the election count.

It is noted that the verified recount of absentee ballots resulted in one less vote for the General Fund question. However, the outcome of the election remains the same.


This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions set forth therein.

Accordingly, the Commissioner determines that, as originally announced, the General Fund question of the Board of Education of Kingwood Township was defeated by the voters pursuant to N.J.S.A. 18A:14-58.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

MAY 10, 1995

DATE OF MAILING MAY 10, 1995

151-95

DONALD C. PICOT, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

WARREN COUNTY VOCATIONAL- : DECISION

TECHNICAL SCHOOL DISTRICT, :

WARREN COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner, tenured teacher reemployed on the occurrence of a job vacancy, challenged Board's placement of him on the salary guide. Petitioner contended he was entitled to full recognition of his prior years of service. Matter was submitted to arbitration. Arbitrator found for petitioner. When the Board declined to accept arbitrator's recommendation of salary award of \$43,843, petitioner filed this appeal with the Commissioner of Education for enforcement.

ALJ concluded that the arbitrator's determination of the appropriate salary amount represented full recognition of petitioner's previous years of service. However, primary jurisdiction for enforcement rests with the courts rather than the Commissioner. Petition was dismissed for lack of jurisdiction, without prejudice to petitioner's right to relief in an appropriate judicial forum.

Commissioner adopted findings and determination in initial decision as his own.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11445-93
AGENCY DKT. NO. 364-11/93

DONALD C. PICOT,
Petitioner,

v.

**WARREN COUNTY VOCATIONAL-
TECHNICAL SCHOOL DISTRICT,**
Respondent.

Stephen E. Klausner, Esq., for petitioner
(Klausner, Hunter, Cige & Seid, attorneys)

Thomas K. Thorp, Esq., for respondent
(Thorp & Thorp, attorneys)

Record Closed: March 22, 1995

Decided: March 29, 1995

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

Statement of the Case

This is an appeal by a tenured teacher who contends that the board of education failed to reinstate him to the appropriate salary level in connection with his statutory reemployment rights. Under *N.J.S.A. 18A:28-12*, a tenured teacher previously dismissed for reasons of economy and thereafter reemployed on the occurrence of a job vacancy is entitled to "full recognition" of prior years of service. Petitioner Donald Picot ("Picot") alleges that his 1993-94 salary, including accumulated "off-guide" salary

increases, should be \$45,322.¹ But the Board of Education of the Warren County Vocational-Technical School District ("Board") put him at the top of the guide, commensurate with his educational qualifications and years of service, at a salary of \$39,103.

Procedural History

Before the bringing of this appeal, the teachers' majority representative and the Board had submitted the identical question to nonbinding arbitration by the American Arbitration Association. On August 4, 1993, the arbitrator issued a written opinion in which he sustained the grievance and recommended a salary award of \$43,843. When the Board declined to accept this recommendation, Picot filed this appeal with the Commissioner of Education ("Commissioner") on November 1, 1993. The Board filed its answer on November 23, 1993. Subsequently, on December 1, 1993, the Commissioner transmitted this matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held a hearing on September 12, 1994. Witnesses and exhibits are listed in the appendix. Petitioner submitted a brief on the jurisdictional issue on March 25, 1995.

Findings of Fact

All of the relevant facts are undisputed. **I FIND:**

Donald C. Picot began working for the district as a machine shop instructor in September 1969. At the time of initial hire, he received credit for four years of prior industrial experience and, thus, began on the fifth step of the salary guide.² Over the years, Picot progressed up the salary guide. In 1980-81, Picot reached the top of the

¹Both parties agree that Picot is entitled to a 1993-94 longevity allowance of \$559. For clarity, comparisons of salary amounts will be made in terms of base salary, exclusive of the longevity allowance.

²Although the Board initially denied that Picot should receive salary credit for work experience, it actually gave him credit for these four extra years. Both sides now agree that Picot should receive credit for twenty-one years of past service.

guide, which at that time consisted of sixteen steps. Later, in 1982-83, the collective agreement added an additional step and Picot reached step seventeen. For the next two years, he remained at the maximum step of the seventeen-step guide. As of 1985-86, the last full year in which Picot worked for the Board, the district restructured the guide into only twelve steps by collapsing the first five steps into a single first step and consolidating the last two steps into a final twelfth step.³ Accordingly, Picot was placed on the top of the guide at step "L" or twelve. By the end of June 1986, Picot had accrued twenty-one years of service in the district, including his four-years credit for work experience.

At the start of 1986-87, Picot stayed at the top of the guide, which had been redesignated step "M" or thirteen. Picot's salary was \$30,478 plus a longevity allowance of \$100 or a total of \$30,578. Shortly thereafter, however, the Board abolished his position, effective December 31, 1986, for reasons of economy and efficiency.⁴ Meanwhile, the Board put Picot on a preferred eligibility list for reemployment in the event that any position for which he was qualified should become available. In exchange for obtaining Picot's release, the Board promised that any future offer of reemployment would be "without loss of years of service, step on the salary guide or accumulated sick leave."

After Picot left the Board's employ, the top of the guide continued at step "M" or thirteen until 1990-91, when it again reverted to a maximum twelve-step guide. Although salaries for each step rose regularly every year, teachers at the maximum level could not advance to a higher step (there being none.) Starting in 1988-89, however, the Board initiated "off guide" increases for teachers already at or above the

³Presumably, this change was a response to enactment of the Teacher Quality Employment Act, *N.J.S.A.* 18A:29-5 to 5.12, which repealed the statutory schedule of minimum teachers' salaries set forth at *N.J.S.A.* 18A:29-7 and established a minimum starting salary of \$18,500 for all new teachers. *L.* 1985, c. 321 (effective Sept. 9, 1985).

⁴Under the collective agreement, a teacher must work at least half the school year in order to receive any credit towards a salary increment. Since Picot only worked four months in 1986-87, both parties agree that he is not entitled to any credit for that year.

maximum. That year, for example, anyone at the top of the guide during the preceding year received an "off guide" increase of \$2,200. In every year which followed, the Board granted cumulative "off guide" increases, each added to the increase from the year before.

On August 4, 1993, the Board notified Picot that a job as a machine shop instructor was about to open and offered him employment for 1993-94 at a salary of \$39,103, corresponding to step twelve on a twelve-step guide, plus a longevity allowance of \$559, "bringing the total to \$39,662." While Picot accepted the employment offer, he contends that he is legally entitled to a larger salary. Picot maintains that he should be treated equally with other teachers who have twenty-one years of continuous service. Significantly, he is not seeking credit for the seven-year gap in his employment by the district. In other words, he is not claiming credit for twenty-eight years of service, but only for the twenty-one years which he had at the time of the reduction in force.

Meaningful comparisons of salaries paid to various teachers are difficult, due to different starting dates, qualifications and other variables. It is not particularly helpful to compare Picot's salary to that of newly-hired teachers, since the law authorizes local school districts to place new teachers at any initial starting point on the salary guide.⁵ Both parties point to other long-time teachers whose situations are said to be sufficiently analogous to aid in ascertaining Picot's appropriate salary for 1993-94. Picot refers to special education teacher Alan J. Kares, who began working for the district in September 1973 and, as of September 1993, had twenty years of service. Despite the fact that he had one year less service than Picot, Kares earned a 1993-94 "off guide" salary of \$43,022, excluding the amount of any longevity allowance. Originally, Picot urged that he should get the same salary as Kares plus the 1993-94 "off-guide" increase of \$2,300, amounting to \$45,322.⁶ On the other hand, the Board

⁵See *N.J.S.A.* 18A:29-9.

⁶By the time of the administrative hearing, however, Picot had retreated from his original position and was willing to accept the lesser amount awarded by the arbitrator.

refers to Louis Oravec, a food service instructor who, like Picot, was hired in September 1969 and also received four years credit for work experience. Unlike Picot, however, Oravec has worked uninterruptedly for the district and has a total of twenty-eight years of service (compared to Picot's twenty-one years). Oravec's "off guide" salary for 1993-94 was \$47,578. According to the Board, Oravec's seven most recent annual increases must be deducted from Picot's salary, which would put Picot at the top of the guide with a 1993-94 salary of \$39,103. In practical effect, this approach would deprive Picot of the benefit of all "off guide" increases awarded over the last six years.

Rejecting both comparisons, the arbitrator adopted a middle ground. He declined to follow the Kares example in order to avoid giving Picot two "off-guide" increases of \$2,300 in 1993-94. Similarly, he distinguished the Board's reliance on the Oravec example by noting that "it fails to take into consideration the fact that there were years when the teachers were at the top of the salary guide and there were no 'off guide' increases." (*Arbitrator Award*, at 12). Instead, the arbitrator awarded Picot the same salary as a teacher who was beginning his twenty-second year of service in the district in 1993. Using a chart prepared by the Board, the arbitrator ascertained that a teacher who commenced employment in the district in 1972-73 would have earned \$43,843 in 1993-94. Accordingly, the arbitrator concluded that \$43,843 represents "full recognition" of the previous years of service to which Picot is contractually entitled. *Id.*

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the well-reasoned opinion of the arbitrator is fully consistent with the school laws, but that primary jurisdiction for enforcement rests with the courts rather than the Commissioner.

N.J.S.A. 18A:28-12 provides that any teaching staff member dismissed as the result of a reduction in force shall

. . . remain upon a preferred eligibility list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and shall be reemployed by the body causing dismissal, if and when such vacancy occurs and in determining seniority, and in computing length of service for reemployment, *full recognition shall be given to previous years of service.* (Emphasis Added).

Generally, disputes concerning a teacher's appropriate placement on the salary guide are governed by contract rather than statute. Initial placement on the salary guide is not a managerial prerogative, but rather a term and condition of employment within the scope of negotiability. *Belleville Educ. Ass'n v. Belleville Bd. of Educ.*, 209 *N.J. Super.* 93 (App. Div. 1986). Picot tries to bring himself within the jurisdiction of the Commissioner by seeking protection of the statutory rights conferred by *N.J.S.A.* 18A:28-12. However, the Appellate Division has limited the "full recognition" provision of *N.J.S.A.* 18A:28-12 to seniority for reemployment purposes and has refused to extend its coverage to salary disputes. Thus, in *Whalen v. Sayreville Bd. of Educ.*, 192 *N.J. Super.* 453, (App. Div. 1983), *certif. den.* 96 *N.J.* 312 (1984), a case on which petitioner relies, the Appellate Division decided that a teacher recalled after dismissal has no statutory entitlement to salary credit for two years of teaching in another district. Emphasizing that the issue in *Whalen* concerned salary and not seniority, the Appellate Division expressed the view that *N.J.S.A.* 18A:28-12 "only specifies a rule to determine seniority for hiring purposes." Consequently, "a local board is free to negotiate salary guides which are not less than those required by State law." *Whalen*, at 457. In light of the fact that the statutory minimum teacher salary schedule has since been repealed, see *L. 1985, c. 321, §16*, Picot's rights in the matter under review are purely a question of contractual construction.

Other cases cited by petitioner in support of the Commissioner's jurisdiction relate to priority of reemployment as distinguished from computation of salary. *In re Maywood Board of Education*, 168 *N.J. Super.* 45 (App. Div. 1979), *certif. den.* 81 *N.J.* 292 (1979), for instance, held that the Commissioner has exclusive statutory authority to establish seniority standards for reemployment lists and, consequently, that the criteria and procedures for reemployment are nonnegotiable. It does not, however,

speak to the separate issue of what salary must be paid to a teacher who properly exercises reemployment rights. Likewise, *Kaprow v. Berkeley Twp. Bd. of Educ.*, 131 N.J. 572 (1993) involves the Commissioner's jurisdiction to ascertain whether a former school employee has rehiring rights to particular position and does not deal with salary guide placement. *Lammers v. Point Pleasant Bd of Educ.*, 134 N.J. 264 (1993) involves the question of what constitutes a "vacancy" triggering a laid-off teacher's reemployment rights. Again, it has nothing to do with a recalled teacher's salary. Here, of course, Picot's right to reemployment is unquestioned. The Board itself recognized his preferred claim to the job and invited him back.

It is noteworthy, however, that Commissioner's decisions, insofar as they have bearing on the salary issue, are fully supportive of the arbitrator's reasoning. Indeed, one earlier school law decision interpreted N.J.S.A. 18A:28-12 as giving a returning teacher the same salary rights as a teacher "who uninterruptedly continued with the school system." *Scavelli v. Clayton Bd. of Educ.*, 1978 S.L.D. 440, 441 (Comm'r April 28, 1978). In *Scavelli*, the Commissioner found that a reemployed teacher should receive the same "off guide" salary increases that are payable to any other teachers with equivalent service in the district. In reaching that conclusion, the Commissioner held that N.J.S.A. 18A:28-12 requires full recognition of previous service which "had clearly been performed and which the Board [had] recognized at the time of petitioner's separation[.]" 1978 S.L.D. at 442. Applied to the present facts, the Commissioner's rationale provides strong support for the arbitrator's decision that Picot should receive the same salary as other teachers entering their twenty-second year of employment in the district.

In conclusion, if the Commissioner did possess proper jurisdiction, the precedent clearly favors the result reached by the arbitrator. Nevertheless, where a board of education refuses to comply with nonbinding arbitration in an area not considered a managerial prerogative, "the forum for enforcement is in the courts, not before the Commissioner of Education." *Belleville Educ. Ass'n*, at 98. "That arbitration is nonbinding does not convert a dispute within the scope of arbitrability into a school law dispute subject to the Commissioner's primary jurisdiction." *Id.*

Order

It is **ORDERED** that the petition is dismissed for lack of jurisdiction, without prejudice to Picot's right to relief in an appropriate judicial forum.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 29, 1995

DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

3/30/95
DATE

Receipt Acknowledged:

Hope R. Blackburn
DEPARTMENT OF EDUCATION

APR 6 1995

DATE

al

Jeff J. Mason
Mailed to Parties DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

List of Witnesses

1. Alan J. Kares, teacher and past president of the Warren County Vocational-Technical Education Association
2. Frank T. Mancuso, superintendent of schools, Warren County Vocational-Technical School District

List of Exhibits

No.	Description
J-1	Copies of employment contract of Alvin Geist for 1978-79 to 1990-92
J-2	Copies of employment contracts of Alan Kares for 1973-74 to 1993-94
J-3	Copies of employment contracts of Lewis F. Oravec, Sr. for 1969-70 to 1993-94
J-4	Copies of employment contracts of Edward Yarusinsky for 1978-79 to 1993-94
J-5	Copies of salary guides for the Warren County Vocational-Technical School District for 1970-1971 to 1993-94
J-6	Copy of petitioner's answers to interrogatories propounded by respondent, certified as of April 29, 1994
J-7	Copies of employment contracts of Donald C. Picot for 1969-70 to 1986-87

- J-8 Copy of list of employees and 1993-94 salary increases
- J-9 Excerpt from the elective negotiating agreement between Warren County Vocational-Technical School Board of Education and the Warren Tech. Education Association, covering July 1, 1992 to June 30, 1994
- J-10 Copies of employment contracts of Brian Coopersmith for 1992-93 to 1993-94
- J-11 Copies of employment contracts of George Radeschi for 1991-92 to 1993-94
- J-12 Copy of employment contracts of Charles Price for 1985-96 to 1993-94
- P-1 Copy of arbitrators award entitled In re Arbitration Between Warren Vo-Tech. Education Association and Warren County Vocational-Technical Board of Education, dated August 4, 1994
- P-2 Id. Copy of release between Donald Picot and the Warren County Vocational School District, dated October 29, 1986
- R-1 Copy of chart of salary calculations for Donald Picot

DONALD C. PICOT, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

WARREN COUNTY VOCATIONAL- : DECISION

TECHNICAL SCHOOL DISTRICT, :

WARREN COUNTY, :

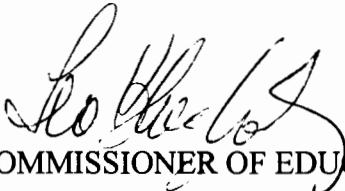
RESPONDENT. :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that this matter is not within the jurisdictional purview of the Commissioner of Education for the reasons clearly articulated in the initial decision.

Accordingly, the initial decision of the Office of Administrative Law is adopted as the final decision in this matter and the instant Petition of Appeal is hereby dismissed for lack of jurisdiction, without prejudice to petitioner's right to relief in an appropriate judicial forum.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

MAY 10, 1995

DATE OF MAILING MAY 10, 1995

152-95

WHASUN LEE, as parent and guardian :
of V.L. and Albert Lee, individually,

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE :
TOWNSHIP OF HOLMDEL, :
MONMOUTH COUNTY, :

DECISION

RESPONDENT. :

_____ :

SYNOPSIS

Petitioning parent and two sons challenged Board's determination that they were not domiciled in the district and, thus, were not entitled to attend schools in respondent's district free of charge. The Board cross-claimed for tuition due and owing. Petitioners contended that the Board should be equitably estopped from removing the Lee students and from asserting its tuition claim.

ALJ found, in light of the representations made by the superintendent that owning real estate and paying taxes in Holmdel was sufficient to entitle the Lees to attend school in the district, the Lees re-enrolled their children in the Holmdel school in October 1987. Therefore, ALJ concluded that equitable principles prevented respondent from requiring tuition payments for the period of time October 1987 up to the date of the sale of the Holmdel residence in 1989. ALJ did order petitioners to compensate the Board in an amount equal to the tuition due and owing for the attendance of Albert Lee and V.L. commencing with the date of sale of the Holmdel residence, through and including December 1993, as ALJ found that in January 1994 the Lees started to use as a residence the condominium they owned in Holmdel, but previously rented. ALJ found that tuition was not due after January 1994, pursuant to N.J.S.A. 18A:38-1d.

Commissioner adopted in part, and modified in part, the initial decision. Commissioner determined that no tuition was due from October 1987 through December 1989 as the Board and the ALJ agreed to this for reasons of equity. Citing Rowley and In re Morrison (no obligation arises for the Commissioner to review transcripts not provided to him), Commissioner determined that petitioners were obligated to pay respondent tuition for January 1990 through December 1993. Commissioner, however, modified ALJ's finding as to period commencing January 1994. Since the ALJ found that the Holmdel condominium was not the Lees' true, fixed and permanent home and it was not their domicile, petitioners owed tuition from January 1990 to date. Commissioner ordered petitioners to compensate the Board.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO EDU 4176-94

AGENCY DKT. NO. 67-4/94

**WHASUN LEE, as parent and guardian
of V.L., and ALBERT LEE, individually,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF HOLMDEL,
MONMOUTH COUNTY,**

Respondent.

Peter P. Kalac, Esq., for petitioners (Kalac, Newman, Lavender & Campbell, attorneys)

Martin M. Barger, Esq., for respondent (Reussille, Mausner, Carotenuto, Bruno & Barger, attorneys)

Record Closed: February 8, 1995

Decided: March 24, 1995

BEFORE M. KATHLEEN DUNCAN, ALJ:

This matter commenced on April 11, 1994, when Whasun Lee, as parent and guardian of V.L., and Albert Lee, individually (hereinafter petitioners) filed a petition of appeal with the Commissioner of Education contesting the March 23, 1994 determination of the Holmdel

Township Board of Education (hereinafter respondent) pursuant to P.L. 1993, Chapter 380, that Albert Lee and V.L., his brother, were not entitled to attend the public schools of the district free of charge. An answer and counterclaim were filed on behalf of respondent on April 18, 1994. On April 27, 1994, petitioners filed an answer to the counterclaim, and on May 2, 1994 the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13.

A prehearing conference was conducted on July 5, 1994 at which time the following were identified as issues for determination at hearing:

1. Have Albert Lee and V.L. been domiciled continuously in respondent's school district from 1979 to the present?
2. If the answer to the previous question is no, were A.L. and V.L. nevertheless entitled to attend the schools in respondent's district free of charge pursuant to N.J.S.A. 18A:38-1d?
3. If the answers to questions 1 and 2 are no, is respondent equitably estopped from collecting retroactive tuition payments from petitioners?
4. If the answer to issue question 3 is no, what is the amount of tuition payments owed by petitioners for the time of the students' ineligible attendance in the schools?

With the consent of his adversary and permission from the undersigned, on October 18, 1994 counsel for petitioners filed an amended answer to the counterclaim; the amendment added a fourth affirmative defense asserting that the counterclaim was untimely pursuant to N.J.A.C. 6:24-1.2. The hearing took place as scheduled on November 2, 3, and 4, 1994. Following the close of testimony, the record remained open for the receipt of written submissions. A post-hearing brief on behalf of petitioners was received on January 24, 1995. Respondent's written summation was received on January 25, 1995. A reply on behalf of petitioners was received on February 7, 1995, and a reply memorandum on behalf of respondents was received on February 8, 1995, whereupon the record closed.

FINDINGS OF FACT

Some of the facts relevant to a determination of the within matter are not in dispute and I therefore find the following as uncontested facts.

Until October 1987 Whasun Lee and her husband Dr. Chi L. Lee and their three minor children resided at 23 Rambling Brook Drive, Holmdel, New Jersey. All three boys attended the public schools in respondent's district. In October 1987 the family moved to Colts Neck, New Jersey, and the children were enrolled in the Colts Neck public schools. Two days later, petitioner Whasun Lee, had a conversation with Dr. Timothy C. Brennan, Jr., then superintendent of schools for respondent's district, wherein she informed Dr. Brennan that she was dissatisfied with the Colts Neck schools, and when he learned that the house at 23 Rambling Brook Drive in Holmdel had not been sold, he indicated to petitioner that she could re-enroll her children. Thereafter, the oldest son, Mark, and the youngest son, V. were re-enrolled immediately; Albert Lee attended a private school, St. Leo's, until January 1988 when he was re-registered in respondent's district. The oldest son, Mark, thereafter attended respondent's schools continuously until he graduated from high school in 1990. His attendance in respondent's district is not the subject of the within proceeding. Albert and his brother, V.L., have also continuously attended school in respondent's district. Albert graduated from high school in 1994 and is currently a student at Harvard University. V.L. is a senior who will graduate in June 1995.*

After petitioners moved to Colts Neck in 1987, they did nothing to hide their Colts Neck address from school personnel. Their home in Colts Neck was common knowledge among faculty; members of the faculty mentioned the fact that petitioners were living in Colts Neck to Dr. Brennan, the person responsible for implementing respondent's residency/domicile policies. In fact, the address and telephone number listed in school records for the family were those in

* Respondent indicated at the prehearing conference in July 1994 that there was no need to expedite the hearing in this matter; since V.L. was a senior they would not press to remove him from the district, but would seek tuition payments only.

Colts Neck. In the fall of 1989 Ralph Blumenthal, a member of respondent's school board who later became its president, told Dr. Brennan that petitioners were living in Colts Neck; he learned this because his son, P.B., had visited in the Colts Neck home with Albert and Dr. Blumenthal's wife had picked up their son there.

In 1989 petitioners sold their house at 23 Rambling Brook Drive and shortly thereafter received a letter from respondent indicating that the boys could no longer attend the Holmdel public schools. No copy of this letter is currently available. In response to the letter, petitioner Whasun Lee contacted Dr. Brennan, who advised her to come to his office and discuss the matter and to bring with her a person who was fluent in English. Mrs. Lee's native language is Korean and she speaks English with a heavy accent. The specifics of the discussion which took place in Dr. Brennan's office among Dr. Brennan, Mrs. Lee and her friend, Mrs. Chu, on December 12, 1989 are in dispute; however, directly following the discussion, Mrs. Lee and Mrs. Chu, who happens to be a real estate agent, went to look at a new town house condominium complex which had just been built in Holmdel and thereafter returned to Dr. Brennan's office with a signed contract of sale on a two-bedroom unit located at 156 Northhampton Drive, Holmdel, New Jersey. Dr. Brennan took a copy of the contract of sale and indicated to Mrs. Lee that the children could continue to attend school in Holmdel.

In July 1993, Dr. Susan Steadman LaGlise, became the new superintendent of schools in respondent's district. At her direction, in December 1993 counsel for respondent advised petitioners that since they were not domiciled in Holmdel, they would be required to remove the children from the Holmdel school system. In early January 1994, petitioners spoke with Dr. LaGlise in her office and Dr. LaGlise explained to them that "domicile" meant more than owning property and paying taxes in Holmdel. She explained to them that they had to actually live in Holmdel, sleep in Holmdel, take their meals in Holmdel, etc.

From the time petitioners purchased the townhouse at 156 Northhampton Drive in February 1990 until December 1993, the unit was occupied by tenants. The last tenants moved out in December 1993, and following the conversation with Dr. LaGlise in early January 1994,

petitioners began to occupy the unit themselves. On March 10, 1994, respondent forwarded a letter to petitioners advising them of the board's position that the boys were not residing at the condominium in Holmdel and that a hearing would be conducted before the full board on Wednesday, March 23, 1994 in this regard. Petitioners chose not to attend the hearing. On March 23, 1994, respondent determined that Albert Lee and V.L. were not entitled to attend the schools of the district free of charge and advised petitioners of their rights to contest the determination by filing a petition with the Commissioner of Education pursuant to N.J.S.A. 18A:38-1(b)(2). The within matter followed. This concludes the recitation of the uncontested facts.

Whasun Lee testified that when her family moved to Colts Neck in October 1987, they had retained the house at 23 Rambling Brook Drive in Holmdel for sentimental reasons; this had been the first house they had purchased after coming to the United States from Korea; her children had been babies in the house and had grown up there and she had an oriental garden which she had made on the premises. She testified that a letter had come when she had finally sold the house in Holmdel which said that the children could no longer attend the Holmdel schools. She indicated that she had called Dr. Brennan and that later she and Mrs. Chu had gone to see him. She took Mrs. Chu with her because Mrs. Chu was better at speaking English, she indicated. According to petitioner, Dr. Brennan said, "You sold the house; you have to buy something right away." Petitioner said that she was upset, but that she and Mrs. Chu had gone directly to look at a new development of townhouse condominiums. There was no choice, she indicated; there was only one and she had signed the contract of sale right away. She testified that she had then gone back to Dr. Brennan's office and had showed him the contract and he had said, O.K. According to petitioner, Mrs. Chu who is in real estate, suggested that "she knew what to do in this situation," and Mrs. Chu had promptly rented the condo out for her.

Mrs. Chu took care of the condo and petitioner did not even go to the address again until January 1994 after her conversation with Dr. LaGlise. Since that time, she testified, she has kept her clothes in the condo. She has two telephones at the condo. She receives her mail at the condo. The address on her driver's license is 156 Northhampton Drive, Holmdel, and she has

registered to vote from that address and, in fact, she voted in the last school board election from that address. In addition, she testified, commencing in January 1994, she and Albert (before he went off to Harvard) and V.L. have slept at 156 Northhampton Drive four or five nights a week. Daily, after school they go to the Colts Neck address so that the boys can practice their musical instruments; one plays a piano and the other a cello and the condominium is not an appropriate place for practicing either of these instruments, she indicated. Frequently it is 10 p.m. or later when the three of them return to the condominium to spend the night. There were nights, for example during snow storms or other bad weather, when they did not sleep at the condominium, she acknowledged. On the mornings following the four or five nights per week when petitioners sleep in the condominium, they eat breakfast at that address. Lunch is almost always taken elsewhere since they are all out during the day. Occasionally they eat dinner at the condominium although many nights dinner is eaten at a fast food restaurant or in the car. Occasionally they eat dinner, even during the week, at the Colts Neck address. Weekends are always spent at the Colts Neck address, where her husband, Dr. Lee resides. Occasionally Dr. Lee has spent the night in the condominium with them, she testified.

Dr. Brennan testified that he was aware that petitioners had moved in October 1987 to a house in Colts Neck. He nevertheless thought that petitioners were entitled to attend the Holmdel schools free of charge, he said, because they had retained their house at 23 Rambling Brook Drive and it was his impression that they still occupied the house in some significant way. When he was asked upon what facts this impression was based, he indicated that from conversations he had with Mrs. Lee he believed there was still furniture in the house, that she had told him there was a popcorn maker there and he believed that they practiced their instruments there sometimes. Upon further questioning, he acknowledged that he did not think there was a piano in the house at Holmdel; for some reason he thought that the instrument involved was a flute, he said. He further testified that he had a great deal of difficulty understanding Mrs. Lee. He estimated that approximately 75% of the time he could not understand what she saying. This was why he had asked her in December of 1989 to bring with her someone who was fluent in English. Mrs. Chu spoke and understood English very well, he said, and he was certain she had understood when he indicated to her on or about December 12, 1989 that "proof positive" that petitioners were not

living in Holmdel would be if they rented the condominium to someone else. Dr. Brennan further testified that he was virtually certain that Mrs. Lee also understood that the condominium could not be rented out to someone else, although at one point during cross-examination he agreed that it was conceivable that she had left thinking that owning property was sufficient.

He explained that the procedures which he used to identify "angle shooters," parents who do not live in Holmdel and send their children to the Holmdel schools notwithstanding the fact that they are not entitled to do so, consisted of checking the tax records for the address in question to see whether the parent was the taxpayer at that address and checking with the transportation coordinator to see whether anyone else was boarding the bus at the address in question. Apparently, these procedures failed to disclose to Dr. Brennan that the premises at 156 Northhampton were rented out almost immediately after they were purchased in February 1990; he testified that he was upset and disappointed when he learned of the rental a few days before his testimony. On several occasions he denied that he had ever indicated to petitioners that merely owning real estate and paying taxes in Holmdel was sufficient to qualify for free public education; he maintained consistently that in addition it was necessary for them to personally use the property as a residence in some meaningful way.

V.L. testified and confirmed the facts offered by his mother concerning use of 156 Northhampton Drive. Most of the other witnesses offered testimony to indicate that Dr. Brennan was aware the petitioners were living in Colts Neck; since Dr. Brennan did not deny this, their testimony is not particularly relevant to determination of any of the issues, with the exception of the following testimony offered by Dr. Richard White, former principal of the high school, now retired, wherein he was describing a conversation he had with Dr. Brennan in 1987 concerning domicile and whether petitioners should be entitled to attend the Holmdel schools free of charge:

The reason I happened to remember this conversation is because it was essentially what I had learned in my school law course. He called me up to tell me that the Lees were coming back, and to just re-register Mark or whatever, no questions asked. I said, wait a minute. I thought they just moved to Colts Neck. He said, they did. And I said, but don't you have to live in the same community

where you go to school. And he said, well, not exactly. And I said, well, that's always been my understanding. He said, "well, if you own property and you don't use that property as income property, it remains vacant, you pay taxes on it, you're allowed to send your children to school in that community."

Dr. Brennan insisted that he applied the same residency/domiciliary criteria to everyone, although he readily acknowledged, when asked, that he had wished to keep petitioners in the Holmdel school system because the boys were extraordinary students who excelled both academically and in extracurricular activities; they were a credit to the school system.

On rebuttal, Mrs. Lee testified that all of the furniture had been moved out of 23 Rambling Brook Drive to the Colts Neck residence when the family moved in October of 1987. She also testified that she has never owned a popcorn maker.

With respect to the facts in dispute, I am persuaded that Dr. Brennan clearly articulated to Mrs. Chu and Mrs. Lee on December 12, 1989, his position that petitioners had to use the condominium at 156 Northhampton Drive as a residence in some meaningful fashion; specifically, I **FIND** that he told them that it would be "proof positive" that they were not living there if he were to find out that the property was rented to someone else. Dr. Brennan's testimony in this regard was internally consistent; he never wavered from his version of the conversation. On one occasion during cross-examination he did say that it was conceivable that Mrs. Lee walked away from the conversation thinking that purchase and ownership was enough. I do not believe that this was the case; however, even if Mrs. Lee did walk away with that impression, the fault for the misimpression was her own and not Dr. Brennan's. He had asked her to bring with her someone who was fluent in English. Curiously, although Mrs. Chu was fluent in English, she did not speak Korean, so how she was to interpret for Mrs. Lee what Dr. Brennan was saying is not clear. I do not view Dr. Brennan's testimony that Mrs. Chu and Mrs. Lee spoke to one another in a foreign language as diminishing Dr. Brennan's credibility; Mrs. Lee's accent is so heavy that when she speaks quickly it can sound like a foreign language. This finding concerning what Dr. Brennan said at the December 12, 1989 meeting is further supported by Dr. White's testimony, quoted

hereinabove, that Dr. Brennan had told him that taxpayers in Holmdel who do not rent out their properties to someone else were entitled to send their children to the Holmdel schools free of charge. The fact that petitioners did not call Mrs. Chu as a witness also supports this finding; her unexplained absence as a witness indicates to me that she would have been unable to testify truthfully that Dr. Brennan did not warn them not to rent the property.

With respect to the other areas which are in dispute, I **FIND** that commencing in January 1994, petitioners personally used the property at 156 Northhampton Drive during four or five days of the week as they described in their testimony. None of the evidence offered by respondent in opposition to these assertions disproves the direct testimony of Mrs. Lee or V.L. in any way. The fact that respondent's investigators observed petitioners coming and going from the house in Colts Neck upon occasion, is not inconsistent with the finding that petitioners used 156 Northhampton Drive as a residence.

With respect to the other issues in dispute, I do not believe that Dr. Brennan falsified his testimony concerning the "popcorn machine" or the furniture at the house located at 23 Rambling Brook Drive. I think the likely explanation for this testimony is that he simply misunderstood something which Mrs. Lee said to him. By his own testimony he had difficulty understanding her 75% of the time. During the hearing in this matter the undersigned misunderstood her to say that she had come to this country from Taiwan. Even after listening to the hearing tape several times since then, the word still sounds like Taiwan although Mrs. Lee assured that it was not and that she had lived in Seoul, Korea prior to coming to this country.

APPLICABLE LAW AND DISCUSSION

N.J.S.A. 18A:38-1, the statute relevant to a determination in this matter, provides in pertinent part:

Public schools shall be free to the following persons over five and under 20 years of age:

- a. Any person who is domiciled within the school district;
-
- d. Any person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein, but any person who has had or shall have his all-year-round dwelling place within the district for one year or longer shall be deemed to be domiciled within the district for the purposes of this section;
-

An individual may have many residences, if he or she is financially able to do so, but can have only one domicile. Miller vs. U.S. Fidel. & Guar. Co., 127 N.J. Super. 37, 42 (App. Div. 1974); Continos v. Parsekian, 68 N.J. Super. 54, 58-59 (App. Div. 1961); DiFiore v. Erie-Lackawanna R.R. Co., 67 N.J. Super. 267 (Law Div. 1961).

“The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. . . . Home is the place where a person dwells and which is the center of his domestic, social and civil life. . . . Thus, the concepts of home and domicile mean more than physical residence. They also embody the subject’s objective and subjective relationship to that residence.” Matter of Unanue, 255 N.J. Super. 362, 374-5 (Law Div. 1991); See also, In re Jaffe, 74 N.J. 86, 90-91 (1977).

With respect to issue number one articulated in the prehearing order - - Have Albert Lee and V.L. been domiciled continuously in respondent’s school district from 1979 to the present? - - I **CONCLUDE** that commencing in October 1987, when the family moved to the house in Colts Neck, the domicile of all family members has been Colts Neck. Although I have found as a matter of fact that Mrs. Lee and Albert and V.L. have used 156 Northhampton Drive in Holmdel as a residence on a regular basis four or five days per week, the Holmdel condo cannot be described as

a true, fixed, or permanent home. Every day of the week the Colts Neck home is used for practicing musical instruments; it is used every weekend; it is where Dr. Lee, husband and father of petitioners, lives year round. It is the family's true, fixed, and permanent home. Accordingly, Albert and V.L. are not entitled to attend the public schools in respondent's district free of charge, pursuant to N.J.S.A. 18A:38-1(a).

With respect to issue number two articulated in the prehearing order - - If the answer to the previous question is no, were A.L. and V.L. nevertheless entitled to attend the schools in respondent's district free of charge, pursuant to N.J.S.A. 18A:38-1(d) - - I **CONCLUDE** that the answer is "yes" commencing with January 1994, when Mrs. Lee and the boys began to use 156 Northhampton Drive as a residence. (Perhaps sub-paragraph d. of N.J.S.A. 18A:38-1 was the source of Dr. Brennan's somewhat flexible concept concerning those who were entitled to attend the Holmdel schools free of charge.) Commencing with January 1994, after Dr. LaGlise explained the concept of "domicile" to petitioners, I **CONCLUDE** that their use of 156 Northhampton Drive qualified as a residence even though they were domiciled elsewhere.

"Residence, on the other hand, though parallel in many respects to domicile, is something quite different in that the elements of permanency, continuity and kinship with the physical, cultural, social and political attributes which inhere in a 'home' according to our accepted understanding, are missing. Intention adequately manifested is the catalyst which converts a residence from a mere place in which a person lives to a domicile. Where a person has two homes in which he lives and between which he divides his time, it is still his intention which creates one or the other as his domicile." State v. Benny, 20 N.J. 238, 251 (1955).

With respect to the period of time commencing in October 1987 through and including December 1993, the third issue articulated in the prehearing order - - If the answers to questions number one and two are no, is respondent equitably estopped from collecting retroactive tuition payments from petitioners? - - must be addressed.

Estoppel is an equitable principle requiring good faith reliance on an official action or inaction to the detriment of the person seeking to invoke the principle. In Tubridy v. Consolidated, etc., Pension Com., 84 N.J. Super. 257, 264 (App. Div. 1964), the court stated:

The applicability of the doctrine of estoppel against public agencies and officials is quite limited, to guard against use thereof to injure the public interest. Although there is growing liberality in entertaining the rule in certain areas, see Gruber v. Mayor and Tp. Com. of Raritan Tp., 39 N.J. 1, 18 (1962), each case stands on its own facts. "The precise nature and extent" of the plaintiff's "good faith reliance" on the official action or inaction relied on must be weighed against the public interests involved.

Petitioners assert that they relied upon the representations of Dr. Brennan, that owning real estate and paying taxes in Holmdel was sufficient to entitle them to attend the schools in the district. I have found as a matter of fact that Dr. Brennan made clear to petitioners in December 1989 his position that the property could not be rented to someone else and the petitioners must in fact use it themselves in some meaningful way. With respect to the time period October 1987 up until the house at 23 Rambling Brook Drive was sold, however, it appears that Dr. Brennan simply made certain assumptions concerning actual use of the house by petitioners and advised petitioners upon their inquiry concerning return to the system that since they had not sold their residence at 23 Rambling Brook Drive, it would be "no problem" to re-register. Petitioners relied upon this representation by re-enrolling their children in the district and did not explore other possibilities as alternatives to the Colts Neck system with which they were unhappy. If Dr. Brennan had advised petitioners correctly in October 1987, they could have made informed decisions concerning expenditure of tuition dollars. Although there is no indication in the record that board of education members during the period of time October 1987 until the house was sold in 1989, were aware that petitioners were actually living in Colts Neck, there is also no evidence in the record that the board members did not know. Testimony from various individuals during the hearing indicated that it was "common knowledge" that the petitioners were living in Colts Neck. If that were the case, the likelihood is that board members were aware of the situation and acquiesced. Clearly, commencing sometime during 1989 Dr. Blumenthal, a member of the board who ultimately became its president,

was aware of the situation. He apparently took no action either then or later to correct it. Since Dr. Brennan was the chief school administrator and had actual authority to act on behalf of the board in many matters, it was not unreasonable for petitioners to rely upon his representations and to assume that he had the authority of the board behind him. Accordingly, for these reasons I **CONCLUDE** that equitable principles prevent respondent from requiring tuition payments for the period of time October 1987 up to the date of sale of the residence at 23 Rambling Brook Drive*

Other equitable principles, however, preclude the invocation by petitioners of the doctrine of equitable estoppel with respect to the period of time commencing with the sale of the 23 Rambling Brook Drive residence and continuing through to January 1994. The basic equitable maxim of unclean hands “gives expression to the equitable principle that a court should not grant relief to one who is a wrongdoer with respect to the subject matter in suit.” Faustin v. Lewis, 85 N.J. 507, 511 (1981); Rolnick v. Rolnick, 262 N.J. Super. 343, 361 (App. Div. 1993). When petitioners sold the house at 23 Rambling Brook Drive in Holmdel in 1989 they were fully aware that even under Dr. Brennan’s flexible concepts, they were no longer entitled to attend the schools in Holmdel free of charge. Petitioners did not contact respondent to advise it of the sale; they did not remove their students from the school system as they ought to have done. Instead, they simply waited for respondent to discover that they had sold the house, and only when they received the letter from respondent advising them that the children could no longer attend the schools, did they take some measures to attempt to comply with Dr. Brennan’s directives. Then, instead of making an effort to use the townhouse at 156 Northhampton Drive in some meaningful way as Dr. Brennan had instructed, they rented it to someone else, notwithstanding the fact that Dr. Brennan had specifically instructed them not to do this. Those who seek equity must do equity and permitting petitioners to escape payment for the education they have received contrary to the law and at the expense of Holmdel taxpayers, particularly since they were receiving rental income on the property for the entire period of time, would be inequitable.

* This sale apparently occurred sometime during 1989; although the specific date of sale was requested at the hearing, it has not been provided.

Petitioners argument that respondent may not collect any tuition monies because the counterclaim in this matter seeking payment for the services rendered was filed beyond the ninety day limitation period set forth in N.J.A.C. 6:24-1.2 is likewise without merit. Although N.J.A.C. 6:24-1.2, which requires a petition of appeal to be filed no later than the ninetieth day from receipt of notice of the action contested, has been held to apply to counterclaims as well, in the instant matter the entitlement to reimbursement for the cost of petitioners' education arises not from the counterclaim which was filed but rather from the provisions of N.J.S.A. 18A:38-1b(2), which provides in pertinent part:

... The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the parent or guardian in writing of his right to contest the decision within 21 days. No child shall be removed from school during the 21-day period in which the parent may contest the board's decision or during the pendency of the proceedings before the commissioner. If in the judgment of the commissioner the evidence does not support the claim of the parent or guardian, the commissioner shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced.

Because of the provisions of the statute, respondent was not really even required to file a counterclaim for tuition. Even if the statutory limitation period applied, the counterclaim would not be out of time since petitioners' violation with respect to the attendance of Albert and V.L. is and has been a continuing one; the requirement for filing not later than the ninetieth day after notice of the act challenged is not a restriction on damages, and respondent may be compensated

for the entire period of ineligible attendance. See, e.g., Terry v. Mercer County Board of Chosen Freeholders, 173 N.J. Super. 249 (App. Div. 1980), modified on other grounds 86 N.J. 141 (1981).

Petitioners' argument concerning an alleged violation of the Open Public Meetings Act, N.J.S.A. 10:4-6 to 4-21, was raised for the first time in these proceedings in their post-hearing written submission. Accordingly, the issue is not properly before this forum; the assertion would be untimely, in any event. See N.J.S.A. 10:4-15 which requires challenges to actions allegedly in violation of the act to be brought within forty-five days after the action sought to be avoided.

For all of the foregoing reasons, it is hereby **ORDERED** that petitioners compensate respondent in an amount equal to the tuition due and owing for the attendance of Albert Lee and V.L. in respondent's school district commencing with the date of sale of the residence at 23 Rambling Brook Drive, Holmdel, through and including December 1993. I am unable to calculate the exact amount due and owing because the date of sale of the 23 Rambling Brook Drive residence has not been provided, and calculations provided by respondent commence with February 1990, the date of the purchase of the condominium which obviously took place several months after the sale of the Rambling Brook Drive residence. The calculations provided by respondent also include the entire 1993-94 school year for both students and the entire 1994-95 school year for V.L. If the parties are unable to agree upon the exact dollar amounts due and owing pursuant to the foregoing opinion, the matter may be re-transmitted to the Office of Administrative Law by the Commissioner for an additional hearing on damages.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is

otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 24, 1995
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

3/27/95
DATE

Hope R. Blackman
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 31 1995
DATE

Jeff S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

EXHIBITS IN EVIDENCE

Joint:

- J-1 Executive session minutes, March 23, 1994
- J-2 Executive session minutes, March 9, 1994

For petitioners:

- P-1 Pupil transfer card for V.L. from Colts Neck schools to Indian Hill School, Holmdel, New Jersey, dated 10/8/87.

For respondent:

- R-1 Surveillance log, dated February 8, 1994 (2 pages)
- R-2 Photographic log, dated February 8, 1994 with envelope containing six photos.
- R-3 Surveillance log, dated February 16, 1994 (2 pages)
- R-4 Surveillance log, dated February 17, 1994 (2 pages)
- R-5 Photographic log, dated February 17, 1994 with envelope containing fourteen photographs.
- R-6 Surveillance log, dated March 9, 1994 (3 pages)
- R-7 Surveillance log, dated May 12, 1994 (3 pages)
- R-8 Envelope containing two photographs of 156 Northhampton Drive taken May 12, 1994.

WITNESSES

For petitioners:

Susan Steadman LaGlise, Ed.D.

Whasun Lee

V.L. Lee

Dennis L. Bye

For respondent:

Richard H. White, Ed. D.

Paul W. Hart

Mark Roussell

Timothy C. Brennan, Jr., Ed. D.

WHASUN LEE, as parent and guardian :
of V.L. and Albert Lee, individually, :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF HOLMDEL, :
MONMOUTH COUNTY, :

RESPONDENT. :

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Both petitioners and respondent filed timely exceptions, and petitioners filed a reply pursuant to N.J.A.C. 1:1-18.4.

Petitioners assert that the initial decision is “***legally unsound and amounts to a nonsequitur in view of the findings of fact [made by the ALJ].” (Petitioners’ Exceptions, at p. 1) Petitioners first contend that, in view of the facts which the ALJ found to be undisputed, it should be apparent that the superintendent of Holmdel “created a fiction” in order to justify permitting the Lees to reregister their children in the Holmdel school system in October 1987, after they had purchased a home and moved to Colts Neck. That fiction, petitioners argue, was that the Lees’ children could remain in the Holmdel schools as long as the Lees were owners of property and taxpayers in that community.

Moreover, petitioners aver, the fiction was continued in 1989 when the superintendent, after learning that the Lees had sold their home in Holmdel, permitted the Lee children to remain in the school system. Petitioners remind that all during the time that the Lees were residing in Colts Neck, they made no attempt to conceal their residence; school records contained the Colts Neck address and telephone number. Petitioners further argue that the superintendent's motive for permitting the Lees' children to remain in school, as established during the hearing, was that they were model students with superior academic achievements who were actively involved in student government and other activities. Petitioners maintain,

Clearly, the Superintendent used the Lee brothers as showpieces for the Holmdel school system, knowing full well that they did not reside within the district. He did this by assuring Mrs. Lee that her sons could attend the district schools if she merely owned property and was a taxpayer in Holmdel. (Petitioners' Exceptions, at p. 3)

Second, petitioners except to the ALJ's failure to apply the doctrine of equitable estoppel for the years 1989 through 1993, while apparently applying the doctrine for the years 1987 through 1989. Petitioners reason that, in view of the uncontested facts, the "****[ALJ] incorrectly truncates the application of the doctrine of equitable estoppel in 1989 because of what she was convinced occurred at a meeting between the Superintendent, Mrs. Lee and a realtor, Mrs. Chu, immediately prior to the Lees' purchasing the premises at 156 Northhampton****." (Id., at p. 4) Petitioners contend that there is no rational basis for the ALJ's finding that, at that meeting of December 12, 1989, the superintendent made clear his position that the Northampton property must be used by the Lees in some meaningful way, and could not be rented. Petitioners challenge the ALJ's credibility determinations on this issue with respect to Mrs. Lee and Superintendent Brennan.

Next, petitioners object to the ALJ's inference that they did not call Mrs. Chu as a witness in these proceedings because her testimony would not have supported their view of the December 12, 1989 meeting:

What the Administrative Law Judge is suggesting is that Mrs. Chu, had she testified, would have had to confirm that at the meeting of December 12, 1989, the Superintendent advised Mrs. Lee that if she rented that condominium, that would be evidence of her not being domiciled in Holmdel and her sons would be precluded from attending the Holmdel schools. (Id., at p. 5)

Yet, petitioners continue, such an inference is not logical when the record shows that Mrs. Lee left the meeting and immediately signed a contract of sale for the condominium on Northampton Drive. Petitioners argue that the reasonable inference to be drawn is that Mrs. Lee was prompted to make the purchase “***because she was apprised by the Superintendent that for her sons to attend the Holmdel school system, she need only be a property owner and taxpayer in Holmdel.” (Id., at p. 6) This inference, petitioners hold, is supported by the ALJ's observance that Superintendent Brennan, on cross-examination, said “***that it was conceivable that Mrs. Lee walked away from the conversation thinking that purchase and ownership was enough.” (Petitioners' Exceptions, at p. 6; Initial Decision, at p. 8)

Additionally, petitioners object to the ALJ's conclusion that Board member Blumenthal was aware of the situation, but “***apparently took no action either then or later to correct it.***” (Initial Decision, at p. 13, cited in Petitioners' Exceptions, at p. 6) Rather, petitioners contend that this Board member took action by bringing the matter to the attention of Superintendent Brennan, who thereafter did nothing to correct the situation.

Finally, petitioners advise that attention not be focused on Superintendent Brennan's ability to understand Mrs. Lee, a woman with a heavy accent. Rather, the focus

should be on Mrs. Lee's understanding, from her conversations with Superintendent Brennan, of the implications of living in Colts Neck and sending her children to Holmdel schools. Here, petitioners assert:

Mrs. Lee understood Mr. Brennan, and on that score, there seems to be no doubt. Mrs. Lee fully understood that despite the fact she was living in Colts Neck with her family, Brennan permitted her to re-enroll her children in the Holmdel school system. Likewise, she purchased a condominium, not because she did not understand what Brennan was communicating, but precisely because she did understand.

(Petitioners' Exceptions, at p. 7)

Petitioners urge that a miscarriage of justice will result if the ALJ's decision with respect to the time period 1989 to 1993 is not reversed in that they have relied to their detriment on representations of a veteran superintendent, and that said superintendent wanted to "****bend the law as it pertained to domicile***in order to allow two brilliant, versatile and well-rounded students to remain in the Holmdel school system." (*Id.*, at p. 7) It is significant, they argue, that within months after Dr. LeGlise, Dr. Brennan's successor as superintendent, arrived in Holmdel in 1993, the Lees were told that they were not domiciled in the township, and they would have to remove their children from the school system.

In its exceptions, the Board concedes that tuition should not be charged to the Lees for the years 1987 to December 1989, "for reasons of equity." (Respondent's Exceptions, at p. 2) Further, the Board concurs with the ALJ's finding that tuition must be due and owing for the second portion of the 1989-1990 school year, through December 1993. However, the Board excepts to the ALJ's determination that tuition should not be due from January 1994 through the current school year.

The Board urges that, since the ALJ found that the Lees resided at the Holmdel condominium commencing January 1994, but were nevertheless domiciled in Colts Neck during that time, pursuant to N.J.S.A. 18A:38-1a, they were not entitled to a free public education in the respondent district from January 1994, to date. Challenging the significance of renting the condominium unit in Holmdel, the Board asserts:

Judge Duncan charged the Lee family tuition so long as they were receiving rent for the unit (December, 1989 - December, 1993) and, from a financial standpoint, there is much to be said for this conclusion. However, there is nothing in the legislation which so limits the tuition, and tuition is clearly due and payable whether the Lee family received rent or not.*** (Respondents' Exceptions, at p. 4)

In response to the Board's exceptions, petitioners acknowledge the Board's concession as to the equitable reasons which preclude charging them tuition for the time period October 1987 through 1989. However, they maintain that the same reasons which called for the application of equitable estoppel continued through January 1994. These reasons were articulated in petitioners' exceptions, supra. While petitioners agree with the Board that "[t]he standard of rent/no rent' should play no part in this case," they add that said standard "****cannot be used as an instrument for truncating the doctrine of equitable estoppel****after finding that the doctrine was applicable from 1987 through 1989." (Petitioners' Reply, at p. 3) Once the ALJ applied the equitable estoppel doctrine, petitioners assert, the impact of that doctrine could only be concluded by a finding that the Lees no longer relied on Superintendent Brennan's assurance that real property ownership and being a taxpayer were sufficient for attendance in the Holmdel school system.

Moreover, petitioners counter, there is no inconsistency in the ALJ's finding that tuition is not due from January 1994 to date pursuant to N.J.S.A. 18A:38-1d. It is possible,

petitioners argue, for one to qualify for a free public education under one section of the statute (i.e., N.J.S.A. 18A:38-1d), yet fail to qualify under another (i.e., N.J.S.A. 18A:38-1a).

Upon careful and independent review of the record, the Commissioner adopts in part, and modifies in part, the initial decision of the ALJ in this matter. Initially, the Commissioner concurs with the ALJ's conclusion that, commencing in October 1987, when the Lee family moved to Colts Neck, the domicile of the family has been Colts Neck. (Initial Decision, at p. 10) However, the Commissioner finds significant the respondent's concession that tuition should not be charged from October 1987 through December 1989 for reasons of equity. Inasmuch as this concession agrees with the ALJ's conclusion as to this time period, the Commissioner determines that no tuition is due.¹

Petitioners' exceptions challenge the findings of the ALJ which lead her to conclude that invocation of the doctrine of equitable estoppel is precluded by the principle of unclean hands for the time period commencing with the sale of petitioners' home at 23 Rambling Brook Drive and continuing through January 1994. (Initial Decision, at p. 13) The Commissioner recognizes that the application of equitable principles which might bar the recovery of tuition rests both on factual and credibility determinations. However, the Commissioner further recognizes that he cannot properly reject the ALJ's findings of fact without reviewing those portions of the transcript(s) relevant to petitioners' exceptions. Rowley v. Board of Education of Manalapan-Englishtown, 205 N.J. Super. 65, 75 (App. Div. 1985); In re Morrison, 216 N.J. Super. 143, 159 (App. Div. 1987). Inasmuch as it was petitioners' duty to provide the Commissioner with such portions of the transcript, Morrison, at 158, and petitioners


¹ The Commissioner recognizes that the ALJ concluded that equitable principles barred respondent from requiring tuition payments from October 1987 up to the date of sale of the petitioners' residence at 23 Rambling Brook Drive, Holmdel. The record failed to disclose the date of said sale. (Initial Decision, at p. 13, footnote) However, since respondent's concession extends to December 1989, the Commissioner's determination incorporates that date.

failed to do so, no obligation arises for the Commissioner to review them before rendering a final decision regarding the findings and recommendations of the ALJ.² Accordingly, accepting the factual findings of the ALJ, the Commissioner determines that petitioners are obligated to respondent for tuition due and owing for the attendance of Albert Lee and V.L. in respondent's school district, commencing January 1990 through and including December 1993.³ The Commissioner notes that this determination is made without drawing a conclusion as to the failure of Mrs. Chu to testify for petitioners.

Finally, the Commissioner concurs with the ALJ's finding that, although petitioners used the condominium in Holmdel as a residence on a regular basis beginning in January 1994, that condominium is not petitioners' domicile in that it is not their true, fixed and permanent home. (Initial Decision, at p. 11) The Commissioner does not find, however, that N.J.S.A. 18A:38-1d permits petitioners, under the circumstances herein, to attend the Holmdel schools free of charge, commencing in January 1994.

Accordingly, the Commissioner adopts in part, and modifies in part, the initial decision of the ALJ and orders that petitioners compensate respondent in an amount equal to tuition due and owing for the attendance of Albert Lee and V.L. in respondent's school district commencing January 1990, to date.⁴

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

² The hearing in this matter took place on November 2, 3 and 4, 1994. A transcript of only the second day of the hearing, November 3, 1994, was provided to the Commissioner for review.

³ The ALJ's order in this regard spans the date of sale of the residence at 23 Rambling Brook Drive, Holmdel, through and including December 1993. (Initial Decision, at p. 15) The order herein is modified to activate petitioners' obligation in January 1990. See footnote 1.

⁴ The initial decision indicates that V.L., a senior, will complete the 1994-95 school year in the Holmdel school district. Consequently, tuition will be due and owing through June 1995.

EDU #4176-94
C # 152-95
SB # 70-95

WHASUN LEE, as parent and guardian of :
V.L., and ALBERT LEE, individually, :

PETITIONERS-APPELLANTS, :

V. :

STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF HOLMDEL, MONMOUTH :
COUNTY, :

DECISION

RESPONDENT-RESPONDENT. :
_____ :

Decided by the Commissioner of Education, May 11, 1995

For the Petitioners-Appellants, Kalac, Newman, Lavender & Campbell
(Peter P. Kalac, Esq., of Counsel)

For the Respondent-Respondent, Reusille, Mausner, Carotenuto, Bruno &
Barger (Martin M. Barger, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed as clarified herein. The Commissioner, without providing his rationale, rejected the conclusion of the Administrative Law Judge ("ALJ") that petitioners had been entitled to a free public education in the Holmdel school district commencing in January 1994. Petitioners do not contend that they were "domiciled" in Holmdel. Rather, they maintain that, by virtue of residing in their condominium in Holmdel four or five nights a week since January 1994, they were entitled to attend public school in the district free of charge during that

SEPT. 6, 1995

period pursuant to N.J.S.A. 18A:38-1(d). While we agree with the Commissioner's conclusion rejecting such claim, we find it necessary to clarify the basis for that result.

N.J.S.A. 18A:38-1 provides, in relevant part:

Public schools shall be free to the following persons over five and under 20 years of age:

a. Any person who is domiciled within the school district;
b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child...

. . .
d. Any person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein, but any person who has had or shall have his all year-round dwelling place within the district for one year or longer shall be deemed to be domiciled within the district for the purposes of this section.

It is apparent from the statutory scheme that subsection (d) is an exception to the general rule providing free public school attendance only to those individuals who are "domiciled within the school district." (Emphasis added.) As pointed out by the ALJ, an individual can have more than one "residence," but can only have one true "domicile." "Domicile" is the place where a person "has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning....Residence, on the other hand, though parallel in many respects to domicile, is something quite different in that the elements of permanency, continuity and kinship with the physical, cultural, social and political attributes which inhere in a 'home' according to our accepted understanding, are missing. Intention adequately manifested is the catalyst which converts a residence from a mere place in which a person lives to a domicile." State v. Benny, 20 N.J. 238, 250-51 (1955).

In enacting the legislation now codified in N.J.S.A. 18A:38-1(a), the Legislature expressed its clear and unambiguous determination that public school attendance would be free only to those individuals who were actually domiciled in the district, i.e., had their true, fixed and permanent home therein. Mere residency was not sufficient. The Legislature did, however, provide a limited exception for those students "whose parent or guardian" (emphasis added), although not domiciled in the district, was temporarily residing therein. In proposing such legislation, the bill's sponsor indicated that:

Children whose parents were engaged in farm labor in this State during the war period were entitled to free public education under the provisions of chapter 91, P.L. 1943. This privilege expires at the official close of the war. The proposed bill continues to provide educational opportunity for the children of migrant farm laborers and for other children residing temporarily in the State with their parents or guardians.

Statement accompanying S. 216, L. 1947, c. 138.

Given the express language and intent of the statute, it is evident that the limited exception to the domicile rule provided by the Legislature in N.J.S.A. 18A:38-1(d) was not designed to enable the petitioners herein to receive a free public education in the Holmdel school district while continuing to maintain a domicile in Colts Neck. The record in this case indicates that petitioners Albert Lee and his brother V.L. were occupying their family's condominium in Holmdel four or five nights a week, while spending their weekends at their home in Colts Neck, in order to attend public school in Holmdel. And while their mother testified that she had stayed with them during that period, she also acknowledged that their father had continued to live in Colts Neck.

The express domicile requirement of the statute would be rendered meaningless by an interpretation of subsection (d) which permitted petitioners, who do not dispute that they were domiciled in Colts Neck, to attend public school in Holmdel free of charge simply by taking up part-time residency within the district for that purpose.

Consequently, we affirm with clarification that portion of the Commissioner's decision concluding that N.J.S.A. 18A:38-1 did not authorize petitioners to receive a free public education in Holmdel commencing in January 1994. In all other respects, we affirm the decision of the Commissioner on the points of appeal before us for the reasons expressed therein.

S. David Brandt and Daniel Moroney opposed.

September 6, 1995

Date of mailing SEP 07 1995

152-95

EDU # 4176-94
C # 152-95
SB # 70-95
APP. DIV. #A-653-95T5

WHASUN LEE, as parent and guardian of :
V.L., and ALBERT LEE, individually, :

PETITIONERS-APPELLANTS, :

V. :

STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF HOLMDEL, MONMOUTH :
COUNTY, :

DECISION

RESPONDENT-RESPONDENT. :
_____ :

Decided by the Commissioner of Education, May 11, 1995

Decided by the State Board of Education, September 6, 1995

Remanded by the Appellate Division, October 9, 1996

For the Petitioners-Appellants, Kalac, Newman, Lavender & Campbell
(Peter P. Kalac, Esq., of Counsel)

For the Respondent-Respondent, Reusille, Mausner, Carotenuto, Bruno &
Barger (Martin M. Barger, Esq., of Counsel)

This matter is before us pursuant to a remand by the Appellate Division.

The case ~~was~~ initiated when the Holmdel school district sought retroactive reimbursement from the Lees for tuition for the period from October 1987 through January 1994. Until October 1987, the family had been domiciled in Holmdel. After that, the Lees moved to Colts Neck where they have been domiciled ever since. However, they retained their property in Holmdel until 1989, at which point they sold it

12/4/96

and purchased a condominium. The two Lee children continued to attend school in Holmdel until January 1994, but paid no tuition.

The Lees contended that they were not obligated to pay tuition because school officials in Holmdel had been fully aware of the family's change in domicile in 1987. The Lees maintained that when they were told of the problem in 1989, school officials had led Mrs. Lee to understand that purchase of the condominium would be enough to entitle the Lee children to a free public education in Holmdel. They further contended that school officials had not made it clear to them until January 1994 that ownership of the condominium was not alone sufficient to create such an entitlement. At that point, the Lee children and their mother took up part-time residency during the week at the condominium, but the family continued to be domiciled in Colts Neck.

The Commissioner and the State Board concluded that the Lee children had not been entitled to a free public education in Holmdel because their domicile had been in Colts Neck during the entire period relevant to the litigation. However, both the Commissioner and State Board found that equitable estoppel applied so as to bar Holmdel from collecting tuition for the period between 1987 and 1989 on the grounds that the District had acquiesced to the situation until 1989 when the superintendent met with Mrs. Lee. Both the Commissioner and State Board concurred with the ALJ's conclusion that the Lees were fully aware in December 1989 that they were no longer entitled to attend school in Holmdel free of charge so that equitable estoppel should not be applied to excuse them from their obligation to pay tuition to Holmdel after that date.

While affirming our determination that equitable estoppel applied for the period between October 1987 and December 1989, as well as our legal conclusion that

N.J.S.A. 18A:38-1(d) did not provide the Lees' children with an entitlement to a free public education in Holmdel from January 1994 to June 1995, the Court remanded for consideration of whether equitable estoppel should also preclude Holmdel from collecting tuition during that period. The Court further found that the ALJ, the Commissioner and the State Board had not adequately resolved whether Mrs. Lee had in fact understood that owning property in Holmdel did not alone entitle her children to attend school in the district free of charge, and it remanded for additional factual findings on this issue and for determination of whether equitable estoppel should be applied to the period between January 1990 and January 1994.

In view of the Court's decision, the State Board of Education remands this matter to the Commissioner for such proceedings as may be required to fulfill the terms of that decision. We do not retain jurisdiction.

December 4, 1996

Date of mailing DEC 06 1996

152-95

EDU # 4176-94
C # 152-95
SB # 70-95
APP. DIV. #A-653-95T5
EDU # 164-97
C # 633-97R
SB # 2-98

WHASUN LEE, as parent and guardian of
V.L., and ALBERT LEE, individually,

PETITIONERS-APPELLANTS,

V.

STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE TOWN-
SHIP OF HOLMDEL, MONMOUTH
COUNTY,

DECISION

RESPONDENT-CROSS/APPELLANT.

Decided by the Commissioner of Education, May 11, 1995

Decided by the State Board of Education, September 6, 1995

Remanded by the Appellate Division, October 9, 1996

Decision on remand by the Commissioner of Education, December 8,
1997

For the Petitioners-Appellants, Kalac, Newman, Lavender & Campbell
(Peter P. Kalac, Esq., of Counsel)

For the Respondent-Cross/Appellant, Reusille, Mausner, Carotenuto,
Barger & Steel (Martin M. Barger, Esq., of Counsel)

This case began in 1994 when Whasun Lee (hereinafter "petitioner" or "Mrs. Lee") filed a petition with the Commissioner of Education challenging the determination of the Board of Education of the Township of Holmdel (hereinafter "Board" or "Holmdel Board") that her children were not entitled to a free public education in the Holmdel

JUNE 2, 1999

district. The Board filed a counterclaim seeking reimbursement for tuition for the period from October 1987 through January 1994.¹

The record indicated that petitioner and her family had been domiciled in Holmdel until October 1987, when they moved to Colts Neck. However, they retained their house in Holmdel until 1989, when they sold it and bought a condominium in Holmdel. Petitioner alleged that she had purchased the condominium after she had been told by the superintendent of the Holmdel school district, Dr. Timothy Brennan, that ownership of property in Holmdel was sufficient to allow her children to continue to attend school in that district free of charge. Petitioner's children continued to attend public school in Holmdel, although the family was domiciled in Colts Neck during all times relevant to this case.

Petitioner contended that she was not obligated to pay tuition because school officials in Holmdel had been aware of the family's change in domicile in 1987. Petitioner maintained that when school officials were advised of the situation in 1989, they had led her to believe that purchasing a condominium in Holmdel would be enough to entitle her children to a free public education in that district. She further contended that school officials had not made it clear to her until January 1994 that ownership of the condominium was not alone sufficient to create such an entitlement. At that time, petitioner and her children took up part-time residency during the week at the condominium, although the family continued to be domiciled in Colts Neck.

On May 11, 1995, the Commissioner determined that petitioner's children had not been entitled to a free public education in Holmdel since their domicile had been in

¹ During the proceedings in the Office of Administrative Law, the Board increased its request to include tuition through June 1995.

Colts Neck during the entire period relevant to this litigation. However, he concluded that equitable estoppel applied so as to prevent the Holmdel Board from collecting tuition for the period between October 1987 and December 1989, finding that the Board had acquiesced to the situation during that period. The Commissioner concluded that equitable estoppel should not be applied to excuse petitioner from her obligation to pay tuition to the Holmdel Board after that date, finding that petitioner had been aware in December 1989 that her children were no longer entitled to attend school in Holmdel free of charge. Consequently, he assessed tuition for the period from January 1990 through June 1995. On September 6, 1995, we affirmed the Commissioner's decision with clarification.

On October 9, 1996, the Appellate Division remanded for further proceedings. The Court found that this agency had not adequately resolved whether petitioner had understood that owning property in Holmdel did not alone entitle her children to attend school in the district free of charge. Consequently, it remanded this matter for additional factual findings and for determination of whether the doctrine of "unclean hands" barred the application of equitable estoppel for the period from January 1990 to January 1994. The Court also remanded for consideration of whether equitable estoppel should preclude Holmdel from collecting tuition for the period from January 1994 to June 1995. The Court affirmed our determination that equitable estoppel applied so as to preclude Holmdel from collecting tuition for the period between October 1987 and December 1989.

On October 21, 1997, following additional hearings on remand, which included the testimony of petitioner and Julia Chu, a real estate agent who had assisted petitioner in purchasing and renting out the Holmdel condominium, the Administrative

Law Judge ("ALJ") determined that equitable estoppel would not apply so as to prevent the Board from collecting tuition for the period after December 1989. According to the

ALJ:

Because Dr. Brennan advised Mrs. Lee not to rent out the condominium, and I am convinced she understood that instruction, and because notwithstanding the Lees rented out the condominium almost immediately and continuing until January 1994 when Dr. Le Glise [the new superintendent] advised them of the requirements of domicile, the equities do not weigh in favor of the Lees.

Initial Decision on Remand, slip op. at 12.

The ALJ continued:

I have found as a fact Dr. Brennan said to Mrs. Lee, in Mrs. Chu's presence, that she had to use the condominium in some meaningful way and that it would be proof positive that she was not so using it if she rented it out. Mrs. Lee's English language difficulty manifested itself throughout the hearing with a heavy accent which makes it difficult for others to understand her. I saw little evidence that she had difficulty understanding others when they spoke to her in English. If Mrs. Chu had testified that she explained to Mrs. Lee at or after the meeting that she should not rent out the condo, that would also have been relevant evidence of Mrs. Lee's knowledge. Of course, Mrs. Chu did not so testify, but the...testimony she did give on that issue when I asked her the question directly was so evasive and unresponsive as to permit the conclusion that she did have such a conversation with Mrs. Lee wherein she advised Mrs. Lee that she should not rent the condo.

Id. at 14.

The ALJ recommended that petitioner be directed to pay tuition to the Holmdel Board for the period from January 1990 through June 1995.

On December 8, 1997, the Commissioner adopted in part and rejected in part the ALJ's recommendation. The Commissioner agreed that petitioner had failed to meet her burden of showing that equitable principles should bar the Board from recovering

tuition after January 1994. However, the Commissioner was “unwilling to ascribe bad faith, wrongdoing or fraudulent conduct to Mrs. Lee, in that such a label would presuppose that Mrs. Lee knew what the correct course of action would be.” Commissioner’s Decision on Remand, slip op. at 28. The Commissioner found that Dr. Brennan did not “possess an accurate understanding of the relevant law,” *id.* at 25, and “did not appreciate the distinction between a residence and a domicile.” *Id.* at 27. The Commissioner therefore directed petitioner to reimburse the Holmdel Board for tuition only for the period from January 1994 through June 1995.

Petitioner filed an appeal from that decision to the State Board, and the Holmdel Board filed a cross-appeal.

On December 16, 1998, our Legal Committee issued its initial report in this matter, in which it recommended affirming in part and reversing in part the decision of the Commissioner. The Legal Committee agreed with the Commissioner’s determination that equitable principles would not apply so as to bar the Holmdel Board from collecting tuition for the period from January 1994 through June 1995. However, it disagreed with the Commissioner’s conclusion that equitable principles would apply to prevent the Board from collecting tuition for the period from January 1990 until January 1994, concurring with the ALJ’s conclusion that the petitioner came into these proceedings with “unclean hands” and, therefore, could not avail herself of equitable principles.

Upon further reflection of the record in light of exceptions filed to that report, the Legal Committee found it necessary to issue a revised report. The Committee issued its revised report on April 21, 1999, in which it recommended affirming with clarification the Commissioner’s decision. Both parties filed exceptions to that revised report.

After a careful review of the record, we affirm the decision of the Commissioner as clarified herein. We conclude that the record before us does not permit a finding that petitioner had understood prior to January 1994 that owning property in Holmdel did not alone entitle her children to attend school in the district free of charge.

The events pivotal to this issue occurred in December 1989 at a meeting between Dr. Brennan and petitioner, which was also attended by Julia Chu. Dr. Brennan testified during the initial hearing in this matter that he had misunderstood the requirements of domicile, believing that ownership of property in the district while "spending time there and living there in some sense," tr. 11/4/94, at 44, was sufficient.² In essence, Dr. Brennan lowered the standard for "domicile." Indeed, he acknowledged the possibility that petitioner could have left their meeting with the understanding that owning a home and paying taxes in Holmdel would be sufficient to entitle her children to attend school in that district. Id. at 71-72.

Dr. Brennan, however, also testified that he had advised petitioner that she could not rent out the Holmdel property. Petitioner denied any awareness of such an instruction. The ALJ found in favor of the Board on the basis of the testimony of Chu, who had accompanied petitioner to the meeting with Dr. Brennan and had assisted petitioner in purchasing a condominium in Holmdel and renting it out. Although the ALJ

² It is now well established that an individual can have more than one "residence," but can only have one true "domicile." "Domicile" is the place where a person "has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning." State v. Benny, 20 N.J. 238, 250 (1955), quoting Story, Conflict of Laws (8th ed.), § 41, p. 40. "Residence, on the other hand, though parallel in many respects to domicile, is something quite different in that the elements of permanency, continuity and kinship with the physical, cultural, social and political attributes which inhere in a 'home' according to our accepted understanding, are missing. Intention adequately manifested is the catalyst which converts a residence from a mere place in which a person lives to a domicile." Id. at 251. In enacting the legislation now codified in N.J.S.A. 18A:38-1, the Legislature provided that public school attendance would be free only to those individuals who were actually domiciled in the district, i.e., had their true, fixed and permanent home therein. Mere residency was not sufficient.

found that Chu's testimony was so evasive as to "permit the conclusion that she did have a conversation with Mrs. Lee wherein she advised Mrs. Lee that she should not rent the condo," initial decision on remand, slip op. at 14, we find, upon further review, that the evidence in support of the ALJ's conclusion is simply too tenuous to permit such a finding. Although we agree with the ALJ that Chu appears to have been evasive in responding to questioning, in the absence of other evidence supporting the conclusion that petitioner had, in fact, understood that she could not rent out the Holmdel condominium, we are unwilling to ascribe such understanding to her. We note, moreover, in considering the equities of this matter, that Chu had been employed part-time as a teacher by the Holmdel Board in September 1996 and that she was still serving in such capacity at the time she was called as a witness by the Board in April 1997. Tr. 4/28/97, at 12.

Under these circumstances, we are unable to conclude on the basis of the record before us that the doctrine of "unclean hands" barred petitioner from applying equitable estoppel for the period from January 1990 to January 1994. We therefore affirm, as clarified herein, the decision of the Commissioner directing the petitioner to reimburse the Holmdel Board for tuition only for the period from January 1994 through June 1995, agreeing with the Commissioner that equitable principles would not apply so as to preclude the Board from collecting tuition for that period.

Attorney exceptions are noted.

S. David Brandt opposed.

Anne S. Dillman abstained.

June 2, 1999

Date of mailing JUN 04 1999

153-95

BOARD OF EDUCATION OF THE :
TOWNSHIP OF BRICK, OCEAN :
COUNTY, :

PETITIONER, :

V. :

EDWARD MUELLER, :

RESPONDENT. :

AND : COMMISSIONER OF EDUCATION

FRANK PANNUCCI, : DECISION

PETITIONER, :

V. :

EDWARD MUELLER, :

RESPONDENT. :

_____ :

SYNOPSIS

In consolidated matters, petitioning Board and Board member sought to disqualify newly seated Board member for conflict of interest (N.J.S.A. 18A:12-2) due to his ownership of the Town newspaper.

As respondent ignored the court's order to provide answers to interrogatories served upon him, pursuant to R. 4:23-5(a)2, the ALJ concluded that respondent's answers to the pleadings were dismissed and petitioners' assertions and allegations were adopted as true. Therefore, ALJ found that respondent was in conflict of interest by virtue of his ownership and operation of the only newspaper within the Board's jurisdiction. Respondent was disqualified from holding a seat on the Board and was ordered to vacate his seat for reason of conflict of interest.

Citing N.J.A.C. 6:24-1.10(b), N.J.A.C. 1:1-1.3 and R. 4:23-5(a)2, Commissioner found that the ALJ's dismissal of this matter based on respondent's failure to respond to interrogatories was appropriate and adopted findings and determination in initial decision as his own.

May 12, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4789-94

AGENCY REF. NO. 132-4/94

**BOARD OF EDUCATION OF THE
TOWNSHIP OF BRICK, OCEAN COUNTY,**

Petitioner,

v.

EDWARD MUELLER,

Respondent.

AND

CONSOLIDATED WITH

FRANK PANNUCCI,

Petitioner,

v.

EDWARD MUELLER,

Respondent.

OAL DKT. NO. EDU 7178-94

AGENCY REF. NO. 147-5/94

Nicholas C. Montenegro, Esq., for petitioner Board of Education, (Wilbert and Montenegro, attorneys)

Michael C. Paxton, Esq., for petitioner Frank Pannucci, (Shea and Novy, attorneys)

Edward C. Mueller, respondent, pro se

Record Closed: January 30, 1995

Decided: March 23, 1995

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, Board of Education of the Township of Brick (Board) and Frank Pannucci, allege that Edward Mueller, a member of the Board, is in conflict of interest and seeks an order from the Commissioner of Education (Commissioner) to disqualify Edward Mueller from continuing to hold a seat on the Board.

The matters were transmitted to the Office of Administrative Law (OAL) on May 16, 1994 and July 27, 1994, for determination as contested cases, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, with the recommendation that the two matters be consolidated.

On April 28, 1994, petitioners sought injunctive relief from the Commissioner to prevent respondent from taking the oath of office and a seat on the Board. On May 5, 1994, by way of letter decision, the Deputy Commissioner denied petitioners application for emergent relief asserting that the relief requested; *i.e.*, to delay the Board's statutorily mandated reorganization meeting, was beyond the Commissioner's authority.

On September 15, 1994, a prehearing conference was held, with all parties represented, after which a Prehearing Order issued on September 22, 1994. The Prehearing Order states, in part, as follows:

NATURE OF PROCEEDINGS AND ISSUES TO BE RESOLVED:

Nature of Proceedings:

Respondent, Edward Mueller, was elected to a seat on the Board of Education of the Township of Brick (Board) on April 19, 1994. Respondent is the publisher, owner and operator of the only newspaper printed and published in the Township of Brick. New Jersey statutes mandate certain notices be published in a newspaper in the municipality of the school district. The Board alleges, among other things, that respondent is in potential conflict of interest and in violations of the School Ethics Act, N.J.S.A. 18A:12-21 to -34, due to his direct financial advantage as sole owner and publisher of the newspaper.

The Board alleges that on or about April 11, 1994, respondent filed a lawsuit, in Superior Court, against the President of the Board, the Board's Secretary and its former Superintendent of Schools. The Board

alleges that respondent is in violation of N.J.S.A. 18A:12-2, conflict of interest.

Petitioner Pannucci seeks a Declaratory Judgment by the Commissioner that respondent is in conflict of interest (N.J.S.A. 18A:12-2) due to respondent's ownership of the only local newspaper.

Issues to be Determined:

1. Whether respondent Mueller, the owner, publisher and operator of the only local newspaper in the school district is in violation of the School Ethics Act, N.J.S.A. 18A:12-21 to -34?
2. Whether, at the time of the annual school election, respondent was in violation of the School Ethics Act as a result of a claim against the Board before Superior Court?
3. Whether the Board has standing to raise the issue of respondent's alleged violation of the School Ethics Act?

Also at the prehearing conference, respondent insisted that the Board, the Commissioner and/or the OAL supply respondent with legal counsel. Respondent was advised that neither the Commissioner nor the OAL provided legal counsel to litigants. Legal representation is the responsibility of the litigant, unless otherwise provided by statute or regulation. Therefore, respondent's request was denied.

On October 6, 1994, a telephone conference call was conducted with counsel for petitioners and respondent at which, the Board requested that respondent comply with discovery and answer interrogatories served upon him by the Board on September 10, 1994. Respondent asserted that he had answered some of the questions which appeared in the Board's Interrogatories, however, he refused to supply the answers to the Board without the assistance of an attorney. Respondent again requested that the Board or the OAL provide him with legal counsel. Respondent was again advised that there are no provisions, either by statute or regulation, which authorized the OAL to provide legal counsel to a litigant in an administrative proceeding. Respondent was also advised that if he failed or refused to answer the Board's Interrogatories, without good cause, this tribunal would entertain an appropriate motion from the Board.

On October 11, 1994, this tribunal executed an Order to Compel respondent, Edward C. Mueller, to immediately provide the Board with answers propounded upon him on September 10, 1994. Such answers to Interrogatories were to be submitted to the Board on or before October 14, 1994.

Respondent failed to answer the Board's Interrogatories on or before October 14, 1994, without good cause. This tribunal then executed an Order dated October 28, 1994, to suppress and dismiss respondent's Answers to the Petition for Declaratory Judgment and his defenses.

On December 13, 1994, the undersigned was in receipt of Petitioner Frank Pannucci's Motion for Summary Decision, pursuant to N.J.A.C. 1:1-12.5, with a supporting memorandum of law. On January 3, 1995, the Board joined in the Motion for Summary Decision submitted by Pannucci, together with a memorandum of law and the certification of Frank Pannucci and Dr. Philip W. Nicastro, the Board's Business Administrator/Board Secretary. A conference call followed with counsel for petitioners and respondent. The court explained the summary decision procedure to respondent and advised him that he had the opportunity to respond.

On January 18, 1995, the undersigned was in receipt of respondent's sworn statement, in lieu of a legal memorandum. Respondent opposed petitioners motion for summary decision contending that there were facts in dispute which required a full and fair plenary hearing.

As a consequence of respondent's objections to the motions for summary decision, this tribunal advised the parties, by letter dated January 18, 1995, that the matter, presumably, did not meet the criteria for summary decision as set forth in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954). Therefore, the matter would move forward to the plenary hearing scheduled for January 30, 1995.

PETITIONERS STATEMENT OF FACTS

The respondent was elected to the Board on April 19, 1994, at the school's annual election. The respondent is also the publisher, owner and operator of the sole newspaper published in Brick Township, The Brick Township Town News & Sampler (hereinafter the

“Town News”). The Board designated the Town News as its official newspaper based on the directives of the respondent and the statutes which mandate that certain Board notices be placed in a newspaper published in the municipality of the school district. N.J.S.A. 18A:14-19 and N.J.S.A. 18A:22-11.

In the foregoing capacity, the respondent publishes all of the Board’s legal notices. Specifically, the newspaper publishes school board election notices and notices of public hearings on proposed school budgets, pursuant to the provisions of N.J.S.A. 18A:14-19 and N.J.S.A. 18A:22-11. The respondent himself demanded that the Brick Township school district publish their bid notices and other notices in the Town News. Further, the respondent has urged the district to purchase subscriptions to his newspaper. Therefore, the respondent derives a direct financial benefit and economically profits from the designation of the Town News as the Board’s only and official newspaper. In addition, respondent has used his position as Board member to obtain information not available to the public and published same in his newspaper.

In a letter addressed to the Board’s School Business Administrator/Board Secretary, dated March 3, 1993, respondent, as editor and publisher of the Brick Township Town News and Sampler, stated the following:

Dear Dr. Nicastro:

As you are aware, our newspaper is the official organ of the township and school district, franchised by law to publish all legal notices emanating therefrom. However, while all other notices have been properly presented for publication, Bid Notices or Requests for Proposals have not.

The issue of whether Bid Notices should be inserted in the Town News went uncontested until about a year ago when a Court agreement with the township was reached whereby at the very least copies of advertisements would be supplied to us. Recently, the township has come around to the thinking that these advertisements should, in fact, be published locally.

Therefore, I am requesting that your office follow the example of Municipal Purchasing Agent Richard MacDonald in submitting Bid Notices and Requests for Proposals for legal publication in the Town

News. Or, in the alternative, a statute citation or case law indicating an exemption from this practice.

I note that the bid request for Irrigation and trees/shrubs at Drum Point School and Lake Riveria appeared in the Asbury Park Press (not a legal newspaper for Ocean County public affairs) and did not reach Construction Data Corporation for publication until three days before the bid date.

This contract appears to be well within the production capabilities of numerous landscapers and garden center operators based within the township. Failure to publish locally in our more visible space, coupled with the fact that we would have done a news story on the project, seems exclusionary and quite possibly more costly to the taxpayers.

May we reach an agreement in this matter without litigation?

Very truly yours,

(signed)

Edward C. Mueller
Editor & Publisher

(Board's Exhibit G)

In response to the petitioners Motions for Summary Decision, respondent's certification, in lieu of brief, states:

I, Edward C. Mueller, residing at 526 Jackson Avenue, Brick Township, County of Ocean, State of New Jersey, certifies:

1. That I am a member of the Brick Township Board of Education and the publisher and 99.5% owner of the *Brick Town News* and the respondent in the above-captioned petition.
2. That I have read the Certification and Motion for Summary Judgment dated December 30.
3. That I oppose for the following reasons and matter of law, any summary decision in the above-captioned decision.

(a) No contract between the Brick Township Town News and the Brick Township Board of Education exists--and petitioners have not demonstrated otherwise--thus, petitioners' allegations require a full and fair plenary hearing.

(b) No proof is shown that respondent has violated any trust within the purview of the original complaint of the office of member, a Board of Education, or of the greater trust as a representative of the First Amendment of the Constitution of the United States. Thus, petitioners' allegations require a full and fair plenary hearing.

(c) The facts, as interpreted by counsel to petitioners are in dispute. Thus, petitioners' allegations require a full and fair plenary hearing.

(d) The petitioners are in conflict of interest having voted in part or in full to deny qualified counsel to respondent while having accepted same, *fait accompli*, without a vote of the Board of Education they pretend to represent. Thus, petitioners' allegations require a full and fair plenary hearing.

(e) Petitioners' papers and respondent's research indicates no precedent for the disqualification for non-criminal reasons of any *bona fide* citizen duly elected by the registered voters of a United States political subdivision. Petitioners indicate no criminal activity on the part of the respondent. Thus, petitioners' allegations require a full and fair plenary hearing.

**MOTION TO STRIKE RESPONDENT'S
DEFENSES FOR FAILURE TO ANSWER
INTERROGATORIES AND MOTION FOR
SUMMARY DECISION**

At the hearing held on January 30, 1995, at the Lakewood, New Jersey, Municipal Building, petitioners moved to strike respondent Mueller's defenses and to bar him from presenting an opening statement, a closing statement or evidence at the hearing, based upon his failure to provide petitioners' with answers to interrogatories.

The petitioners argued, among other things, that under the holding in Perry v. Crunden, 79 N.J. Super. 285 (Essex Co. Ct. 1963) a defaulting defendant is prohibited from presenting either an opening statement or a closing statement to the court. Id. at 292.

In Jugan v. Pollen, 253 N.J. Super. 123, (App. Div. 1992), which held, among other things, that the defendant, who was held in default by failing to participate in discovery at the trial level, was properly foreclosed from making an opening or closing statement and precluded from

presenting evidence. Id. 133. In Douglas v. Harris, 35 N.J. 270 (1961), our Supreme Court held, at 276, 277, that pursuant to then Rule, R.R. 4:56-1, that the clerk shall enter a default when a party has failed to “plead or otherwise defend.” The Douglas court continued to state:

R.R. 4:27-2, provides the penalties which may be inflicted upon a party for failure to obey an order requiring him to answer questions or make other discovery antecedent to trial. Among the sanctions which may be imposed, the court is authorized by R.R. 4:27-2(b) (3) to make “an order striking out the pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering a judgment by default against the party who fails to obey.” Id. 277. (emphasis supplied)

Petitioners argue that respondent has ignored orders of this court to complete discovery. As of the day of the hearing the Interrogatories remain unanswered by respondent.

Petitioners seek to have respondent disqualified as a member of the Board grounded upon respondent’s conflict of interest.

Respondent admitted, on the hearing record, that he had not supplied petitioners with his answer to their interrogatories. Respondent further asserted he would not supply petitioners with such answers without the advice of legal counsel. Respondent insisted that either the Board or the OAL provide him with an attorney. Respondent’s request was denied for lack of authority.

DISCUSSION AND CONCLUSIONS WITH RESPECT TO THE MOTION TO STRIKE

In his text, Civil Procedure (Little, Brown and Company, 1965), Fleming James, Jr., discusses the federal discovery rules and observes that sanctions may be imposed upon a party who fails to answer interrogatories. At 191, he states:

The duty of a party to answer interrogatories is imposed by the rules themselves without need of a court order. The sanction for failure to answer is provided by Rule 37(d): “the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the

action or proceeding or any part thereof, or enter judgment by default against that party.” (emphasis supplied).

The Rules Governing the Courts of the State of New Jersey, at Rule 4:23-5(a)2., provides that a matter may be dismissed, with prejudice, for the failure of a party to serve answers to interrogatories.

Respondent was in receipt of this court’s ORDER dated October 11, 1994, to provide answers to Interrogatories served upon him on September 10, 1994. Respondent ignored the ORDER and failed to provide the answers to petitioners.

Subsequently, respondent was in receipt of this court’s ORDER to suppress and dismiss his Answer to the Petition of Appeal and his defenses.

Respondent did not move before this court to vacate the dismissal and suppression order. Nor did he than attempt to comply with the ORDER, dated October 11, 1994, and provide petitioners with the required answers to Interrogatories. Rather, respondent elected to ignore the directions of this tribunal

I **CONCLUDE**, therefore, pursuant to R. 4:23-5(a)2., that respondent’s Answers to the pleadings are hereby **DISMISSED** and petitioners assertions and allegations are adopted as true, in fact.

Consequently, I **FIND AND CONCLUDE** that respondent Edward C. Mueller, is found to be in conflict of interest by virtue of his ownership and operation of the only newspaper within the Board’s jurisdiction and which, by statute N.J.S.A. 18A:14-19 and N.J.S.A. 18A:22-11, the Board is mandated to publish its official notice for its annual school election and annual school budget, among other things.

ORDER

Accordingly, it is **HELD** that Edward C. Mueller is **DISQUALIFIED** from holding a seat on the Board of Education of the Township of Brick, and it is therefore **ORDERED** that Edward C. Mueller **VACATE** the seat to which he was elected on April 18, 1994, for the reason of **CONFLICT OF INTEREST**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

23 March 1995
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

3/28/95
DATE

Receipt Acknowledged:

Hops R. Blackburn
DEPARTMENT OF EDUCATION

MAR 31 1995
DATE

Mailed to Parties:

Jeff S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

BOARD OF EDUCATION OF THE :
TOWNSHIP OF BRICK, OCEAN :
COUNTY, :
PETITIONER, :
V. :
EDWARD MUELLER, :
RESPONDENT. :
AND : COMMISSIONER OF EDUCATION
FRANK PANNUCCI, : DECISION
PETITIONER, :
V. :
EDWARD MUELLER, :
RESPONDENT. :
_____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Respondent's exceptions were timely filed in accordance with N.J.A.C. 1:1-18.4. Petitioner's reply exceptions were untimely filed on May 4, 1995, in response to exceptions received by petitioner's own admission on April 25, 1995, and thus, are not considered herein.

Respondent's exceptions address both substantive and procedural issues. In that the ALJ does not reach the substantive issues of the case, these are not considered herein. Respondent excepts that the ALJ erred in dismissing this case for his failure to respond to interrogatories since N.J.A.C. 6:24-1 et seq. does not require that a respondent respond to interrogatories. Further, respondent contends that the Commissioner of Education should relax the rules under N.J.A.C. 6:24-1.15 to prevent dismissal of this case in the interest of justice.

Upon a careful and independent review of the record in this matter, the Commissioner agrees with the findings and conclusions of the ALJ with respect to each of the charges against respondent for the reasons clearly articulated in the initial decision.

The Commissioner finds that the ALJ was justified in finding that respondent's failure to comply with court rules sufficiently warranted dismissal of the instant case. New Jersey Rules of Courts, State and Federal, at Rule 4:23-5(a)2, provide that a matter may be dismissed, with prejudice, for the failure of a party to serve answers to interrogatories. Administrative law judges are authorized to proceed under these New Jersey Court Rules. N.J.A.C. 1:1-1.3. As such, once the Commissioner transmits a proceeding to the Office of Administrative Law for a hearing, it must be conducted under the Uniform Administrative Procedure Rules of Practice set forth at N.J.A.C. 1:1. N.J.A.C. 6:24-1.10(b). Thus, the Commissioner finds that the ALJ's dismissal of this matter based on respondent's failure to respond to interrogatories was appropriate in light of these provisions.

Finally, although the Commissioner has discretion to relax the rules in order to prevent injustice, this case does not warrant such action as respondent was afforded a full opportunity to offer a defense to the allegations filed against him at a judicial hearing and refused to comply with court rules so as to avail himself of this opportunity. For the Commissioner to

allow respondent to now raise defenses, after the fact of his dismissal, the broader concerns giving rise to the creation of the rules would be eroded. While it is recognized that removal from elected office is a harsh penalty, petitioner's conduct of deliberately violating court orders so as to prevent development of a full factual record leaves the Commissioner little alternative but to affirm the ALJ's initial decision.

Accordingly, for the reasons well-expressed therein, the Commissioner affirms the initial decision of the Office of Administrative Law. Respondent is hereby removed from his position on the Brick Township Board of Education as of the date of this decision.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

GEORGE WEBER, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE :
BOROUGH OF WOOD-RIDGE, :
ROBERT E. SMITH, REGINA WHITE :
AND CHARLES DELORENZO, :
individually and as President of the Board :
of Education of the Borough of Wood- :
Ridge, BERGEN COUNTY, :

COMMISSIONER OF EDUCATION

DECISION

RESPONDENTS. :
_____ :

May 15, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL WITH PREJUDICE

OAL DKT. NO. EDU 10603-94

AGENCY REF. NO. 403-9/94

GEORGE WEBER,

Petitioner,

v.

**BOARD OF EDUCATION OF THE BOROUGH
OF WOODRIDGE, ROBERT E. SMITH,
REGINA WHITE and CHARLES DE LORENZO,
Individually and as President of the Board of
Education of the Borough of Wood Ridge,
Bergen County,**

Respondents

**Alan S. Goldberger, Esq., for petitioner
(Goldberger & Goldberger, attorneys)**

Mark T. Janeczko, Esq., for respondents

Record Closed: March 16, 1995

Decided: March 30, 1995

BEFORE: JEFFREY A. GERSON, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 31, 1994 for a hearing pursuant to *N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Stipulation of Dismissal with Prejudice.

Having reviewed the contents of the attached Stipulation of Dismissal with Prejudice, I **FIND** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached Stipulation of Dismissal with Prejudice meets the requirements of *N.J.S.A. 1:19.1* and I **HEREBY** approve same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

MARCH 30 95

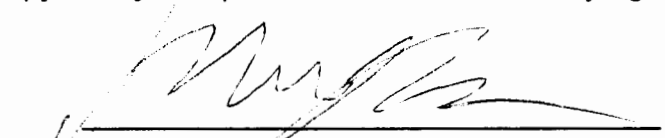
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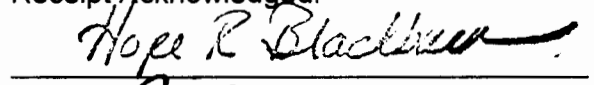
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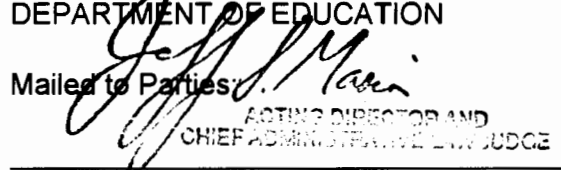
JEFFREY A. GERSON, ALJ

Receipt Acknowledged:



DEPARTMENT OF EDUCATION

Mailed to Parties:


ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

ADMINISTRATIVE LAW

Mar 16 1 10 PM '95

ALAN S. GOLDBERGER
GOLDBERGER & GOLDBERGER
1373 Broad Street
P.O. Box 447
Clifton, New Jersey 07015
(201) 471-9200
Attorneys for Petitioner

WEBER, GEORGE	:	STATE OF NEW JERSEY
	:	OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
	:	DOCKET NO. EDUOA 10603-94N
vs.	:	
	:	CIVIL ACTION
BOARD OF EDUCATION OF THE	:	
BOROUGH OF WOOD-RIDGE, et als	:	STIPULATION OF DISMISSAL
	:	W. PREJUDICE
Respondents	:	

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed with prejudice, without costs against either party.

Date: January , 1995



MARK T. JANECKO
Attorney for Respondents:
BOARD OF EDUCATION OF THE
BOROUGH OF WOOD-RIDGE, ROBERT
E. SMITH, REGINA WHITE AND
CHARLES DELORENZO, individually
and as President of the Board of
Education of the Borough of Wood-
Ridge

GOLDBERGER & GOLDBERGER
Attorney for Petitioner,
GEORGE WEBER

By 
ALAN S. GOLDBERGER

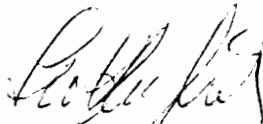
GEORGE WEBER, :
 :
 PETITIONER, :
 :
 V. :
 :
 BOARD OF EDUCATION OF THE : COMMISSIONER OF EDUCATION
 BOROUGH OF WOOD-RIDGE, :
 ROBERT E. SMITH, REGINA WHITE : DECISION
 AND CHARLES DELORENZO, :
 individually and as President of the Board :
 of Education of the Borough of Wood- :
 Ridge, BERGEN COUNTY, :
 :
 RESPONDENTS. :
 :
 _____ :

The record of this matter and the initial decision of the Office of Administrative Law, incorporating a "Stipulation of Dismissal" based on the parties' having "amicably adjusted" their differences, have been reviewed.

Upon such review, the Commissioner finds no basis on which he can ascertain the terms of the resolution reached by the parties in this matter, notwithstanding that the specific terms of any settlement must be spread on the record pursuant to N.J.A.C. 1:1-19.1 so that the Commissioner may review them prior to making a final decision on the recommendation of the ALJ.

Accordingly, the initial decision of the Office of Administrative Law is remanded for supplementation of the record consistent with N.J.A.C. 1:1-19.1.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MAY 15, 1995
DATE OF MAILING MAY 16, 1995

156-95

T.M. AND C.M., on behalf of their :
minor child, A.M., :

PETITIONERS, :

V. :

BOARD OF EDUCATION OF THE CITY :
OF RUTHERFORD ET AL., BERGEN :
COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION
DECISION

MAY 16, 1995

T.M. AND C.M., on behalf of their :
minor child, A.M., :

PETITIONERS, :

V. :

BOARD OF EDUCATION OF THE CITY :
OF RUTHERFORD ET AL., BERGEN :
COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

The record and notice of withdrawal transmitted to the Commissioner of Education by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.



COMMISSIONER OF EDUCATION

G.R. AND N.R., on behalf of their minor :
nephew, R.R.,

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY :
OF CLIFTON, PASSAIC COUNTY,

DECISION

RESPONDENT. :

_____ :

MAY 16, 1995

OAL DKT. NO. EDU 10609-94

G.R. AND N.R., on behalf of their minor :
nephew, R.R.,

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY :
OF CLIFTON, PASSAIC COUNTY,

DECISION

RESPONDENT. :

_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MAY 16, 1995
DATE OF MAILING MAY 16, 1995

158-95

NORA DONALDSON *et al.*, :

PETITIONERS, :

V. :

BOARD OF EDUCATION OF THE :
BOROUGH OF BOGOTA, BERGEN :
COUNTY, :

COMMISSIONER OF EDUCATION

DECISION

RESPONDENT. :

_____ :


May 16, 1995

OAL DKT. NO. EDU 10606-94

NORA DONALDSON et al., :
 :
 PETITIONERS, :
 :
 V. :
 :
 BOARD OF EDUCATION OF THE : COMMISSIONER OF EDUCATION
 BOROUGH OF BOGOTA, BERGEN :
 COUNTY, : DECISION
 :
 RESPONDENT. :
 :
 _____ :

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-14.4, along with copies of notifications sent to the parties by OAL on March 21, 1995 providing them ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the parties, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MAY 16, 1995

DATE OF MAILING MAY 16, 1995

159-95

IN THE MATTER OF THE ANNUAL SCHOOL :
ELECTION HELD IN THE LOWER CAMDEN : COMMISSIONER OF EDUCATION
COUNTY REGIONAL SCHOOL DISTRICT, : DECISION
CAMDEN COUNTY. :
_____ :

MAY 18, 1995

IN THE MATTER OF THE ANNUAL SCHOOL :
 ELECTION HELD IN THE LOWER CAMDEN : COMMISSIONER OF EDUCATION
 COUNTY REGIONAL SCHOOL DISTRICT, : DECISION
 CAMDEN COUNTY. :
 _____ :

The announced results of the balloting for the General Fund question of the Lower Camden County Regional Board of Education at the annual school election held on April 18, 1995 in the Lower Camden County Regional School District were as follows:

<u>GENERAL FUND TAX LEVY</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
YES Votes	2001	38	2039
NO Votes	2083	26	2109

Pursuant to a letter request from the Board of Education filed on April 21, 1995, an authorized representative of the Commissioner from the Office of the Camden County Superintendent of Schools was directed to conduct a recount of machine ballots cast for the General Fund question pursuant to N.J.S.A. 18A:14-63.3. The recount was conducted on May 5, 1995 at the Voting Machine Warehouse, South Jersey Port Corporation, Camden. No request for a recount of absentee ballots was made to Superior Court by the Board, as the number of such ballots was insufficient to have affected the outcome of the election.

At the conclusion of the recount, the tally for the General Fund question stood unchanged, remaining as follows:

<u>GENERAL FUND TAX LEVY</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
YES Votes	2001	38	2039
NO Votes	2083	26	2109

There being no changes on recount, the outcome of the election is unaltered.

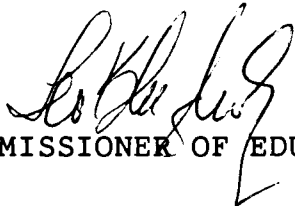
This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions set forth therein.

Accordingly, the Commissioner determines that, as originally announced, the General Fund question of the Board of Education of the Lower Camden County Regional School District was defeated by the voters pursuant to N.J.S.A. 18A:14-58.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MAY 18, 1995

DATE OF MAILING MAY 18, 1995

160-95

FRANCES TALIERCIO, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE :
BOROUGH OF GLEN RIDGE, :
ESSEX COUNTY, :

DECISION

RESPONDENT. :

_____ :

May 16, 1995



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7872-94

AGENCY DKT. NO. 292-7/94

FRANCES TALIERCIO,

Petitioner,

v.

GLEN RIDGE BOARD OF

EDUCATION,

Respondent.

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

Derlys Maria Gutierrez, Esq., for respondent
Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: March 30, 1995

Decided: March 30, 1995

BEFORE: KEN R. SPRINGER, ALJ:

Statement of the Case

This matter was transmitted to the Office of Administrative Law on August 16, 1994, for determination as a contested case, pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The parties have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 30, 1995

DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

April 5, 1995

DATE

Receipt Acknowledged:

Walter R. Diackbe
DEPARTMENT OF EDUCATION

APR 6 1995

DATE

al

J. P. Mason
Mailed to Parties DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

SILLS CUMMIS ZUCKERMAN RADIN
TISCHMAN EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-6500
(201) 643-7000
Attorneys for Respondent
Glen Ridge Board of Education

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MAR 30 12 57 PM '95

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FRANCES TALIERCIO,	:	BEFORE THE COMMISSIONER
	:	OF EDUCATION
Petitioner,	:	
	:	Agency Ref. No. 292-7/94
-vs-	:	
	:	OAL Docket No. EDU-07872-94N
GLEN RIDGE BOARD OF	:	
EDUCATION,	:	
	:	<u>SETTLEMENT AGREEMENT</u>
Respondent.	:	

-----X

THIS AGREEMENT and GENERAL RELEASE, dated MARCH 27, 1995, is made by and between Frances Taliercio ("Taliercio") and the Glen Ridge Board of Education ("Board"). In consideration of the mutual promises and undertakings contained in this Agreement, Taliercio and the Board agree as follows:

1. Taliercio shall withdraw her petition of appeal before the Commissioner of Education by making the appropriate application to the Honorable Kenneth R. Springer, A.L.J.

2. COMPENSATION

In exchange for the promises and release described in this Agreement, the parties agree that the Board will pay Taliercio the sum total of One Thousand Two Hundred and Fifty Dollars and no cents (\$1,250.00) after the parties have executed the settlement documents and the Commissioner of Education approves the settlement agreement.

3. GENERAL RELEASE

In exchange for the consideration provided in paragraph 2 above, the adequacy of which is hereby acknowledged, Taliercio, on behalf of herself, heirs, successors and assigns, hereby fully releases and forever discharges the Board and its legal representatives, successors, assigns, agents, directors and employees, for any and all actions, claims and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, that she ever had or may now have against them or any of them, including, without limitation, any and all claims directly or indirectly related to or arising out of her employment by the Board or the termination of that employment. These releases specifically include, but are not limited to, claims under the New Jersey education laws and regulations, Civil Rights Act of 1991, sex discrimination claims and federal or state civil rights claims, including claims of age discrimination.

4. NO ADMISSION OF LIABILITY

Liability for any and all claims surrounding Taliercio's employment and separation from employment which she may now have, whether known or unknown, is expressly denied by the Board. It is understood and agreed between the parties that this is a compromise of a disputed claim or claims, and that neither this Agreement itself, nor the furnishing of the consideration of this Agreement, will be deemed or construed at any time, for any purpose, as an admission of anyone's liability or responsibility for any wrongdoing of any kind.

5. MODIFICATIONS

This Agreement constitutes the entire understanding of the parties on the subjects covered, and supersedes any and all previous agreement on these subjects. The parties agree

that this Agreement will not be terminated or modified except in writing signed by Taliercio and the President of the Board.

6. This Agreement shall not constitute a precedent for any other matter involving other employees.

7. This Agreement shall only be effective upon approval by the Commissioner of Education.

For Petitioner:

Frances Taliercio
FRANCES TALIERCIO


For Respondent,
GLEN RIDGE BOARD OF EDUCATION

Shayne A. Bennett
BOARD PRESIDENT

FRANCES TALIERCIO, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 BOROUGH OF GLEN RIDGE, :
 ESSEX COUNTY, :
 :
 RESPONDENT. :
 :
 _____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

MAY 16, 1995
DATE OF MAILING MAY 16, 1995

161-95

MARIA RIVARA, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

STATE-OPERATED SCHOOL DISTRICT :
OF PATERSON, PASSAIC COUNTY,

DECISION

RESPONDENT. :

_____ :

OAL DKT. NO. EDU 8142-94

MARIA RIVARA, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT : DECISION
OF PATERSON, PASSAIC COUNTY,
RESPONDENT. :
_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MAY 19, 1995

DATE OF MAILING MAY 19, 1995

162-95

PETER B. CONTINI, ASSISTANT
COMMISSIONER, DIVISION OF FIELD
SERVICES, NEW JERSEY STATE
DEPARTMENT OF EDUCATION, :

Petitioner, :

V. :

BOARD OF EDUCATION OF THE CITY
OF NEWARK, ESSEX COUNTY, :

Respondent. :

COMMISSIONER OF EDUCATION

DECISION

MAY 19, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7010-94

AGENCY DKT. NO. 285-7/94

**PETER B. CONTINI, ASSISTANT COMMISSIONER
DIVISION OF FIELD SERVICES,
NEW JERSEY DEPARTMENT OF EDUCATION,**

Petitioner,

v.

BOARD OF EDUCATION OF NEWARK,

Respondent.

Sally Ann Fields, Senior Deputy Attorney General, and
Kevin M. Schatz, Deputy Attorney General,
(**Deborah T. Poritz**, Attorney General of New Jersey, attorney),
for petitioner

Raymond M. Brown, Esq. (Brown and Brown, attorneys) and
Alan Dexter Bowman, Esq., (Alan Dexter Bowman, P.A.)
for respondent.

Record Closed: April 5, 1995

Decided: April 13, 1995

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

BACKGROUND AND PROCEDURAL HISTORY

Pending before me in this matter is a motion filed pursuant to *N.J.A.C. 1:1-12.5* by petitioner, Peter B. Contini, Assistant Commissioner of Education for summary decision or, in the alternative, for a declaration that he has made out a *prima facie* case as to all or substantially all of the facts alleged in the Verified Petition and that the burden should therefore shift to the respondent to demonstrate that a decision by the Commissioner of Education to recommend to the State Board of Education that there be a takeover of Newark's Public Schools would be arbitrary, capricious or unreasonable. Briefs in support of and in opposition to the motion, accompanied by multi-volume appendices, were filed in February 1995 and March 1995 and oral argument was conducted on April 5, 1995. Since I previously scheduled lengthy plenary hearings to begin on April 24, 1995, I am issuing this summary decision well within the 45 day time period permitted under *N.J.A.C. 1:1-12.5(c)* and *1:1-12.3(c)*.

This case, informally referred to as the "Newark School Takeover Case", was commenced on July 22, 1994 by the filing of a Verified Petition for Administrative Order by Peter B. Contini, who is the Assistant Commissioner, Division of Field Services, New Jersey Department of Education. The Board of Education of Newark is the respondent. The Verified Petition set forth in essential part that in January 1984, pursuant to the provisions of *N.J.S.A. 18A:7A-1 et seq.* and *N.J.A.C. 6:8-4.1 et seq.* the Department began a comprehensive monitoring process to determine whether the respondent was providing a "thorough and efficient system of free public education" as required by the New Jersey Constitution, ART. VIII, § IV, Para.1 and State law. The respondent (hereafter "Newark", the "District" or the "Board"), together with all the other school districts in this State, were to be monitored and evaluated with respect to ten general categories or "elements". Within these elements there were a total of fifty-one "indicators" designed to assess the thoroughness and the efficiency of each district's educational system and to determine whether each district should be certified by the State Board of Education as meeting prescribed state standards. In the first instance, a

school district was expected to successfully pass what is known as "Level I" monitoring in which case it would be certified for a period of five years. If a district failed Level I monitoring it would move to a "Level II" wherein it would be required to appoint a self-study committee and within three months design an improvement plan to correct the deficiencies identified during the Level I review. If, as a result of its Level II activities, a district successfully demonstrated the deficiencies were subject to correction, certification would then take place. If, on the other hand, a district failed to correct the deficiencies during Level II, it then would move to "Level III" wherein a comprehensive assessment would be made in order to determine whether the district was able to take necessary corrective action to overcome the deficiencies which interfered with its ability to deliver a thorough and efficient system of free public education to its pupils. If, as a result of Level III monitoring activities, it was determined that conditions within the school district did not permit implementation of a corrective plan, the Commissioner then could order a "comprehensive compliance investigation" into the district's educational programs, fiscal practices, governance and management leading, if necessary, to a State "Takeover" and the creation of a State-operated school district. See, *N.J.S.A.* 18A:7A-14, 18A:7-15, 18A:7-15-1, 18A:7A-34, 18A:7A-35, *N.J.A.C.* 6:8-5.2 to 8:5A.6.

The Verified Petition went on to allege that with respect to Newark the Level I review procedure resulted in a determination that respondent's performance was "unacceptable" with respect to 7 of the 10 elements and 13 of the 51 indicators. After failing Level I Newark then moved into Level II and in December 1987 the District again received unacceptable ratings with respect to 7 of the 10 elements and now 16 of the 51 indicators. Thus, no certification was issued to it. Thereafter, continued monitoring took place with respect to all aspects of the respondent's operations and on May 13, 1993 the Commissioner, after reviewing a Level III external review report, determined that conditions existed within the District which might preclude successful implementation of a corrective plan. Thus, Newark was put on written notice that a "Comprehensive Compliance Investigation" (CCI) would take place. That investigation was conducted and, as a result, a determination was made that Newark was deficient in a variety of major areas, including a demonstrated inability to govern and manage in a

way reasonably calculated to provide a thorough and efficient system of public education, an inability to have a consistently effective and efficient system in place for the delivery of educational programs and services for students, and an inability to operate an efficient, effective and appropriate system of finance. The Verified Petition then alleged that as a result of the adverse findings and pursuant to the provisions of various statutes, and under the authority of the Commissioner and State Board of Education, there existed as of July 1994 such major uncorrected deficiencies in the operation of the District as to prevent it from providing a thorough and efficient system of free public schools. Thus, the Verified Petition requested that the Commissioner of Education recommend to the State Board of Education pursuant to the provisions of *N.J.S.A. 18A:7A-15* and *N.J.S.A. 18A:7A-34* that it issue an Administrative Order removing the elected Board members and creating a State-operated school district under the supervision of a State District Superintendent empowered to take all action necessary to assure the delivery of a constitutionally acceptable level of educational services. Accompanying the Verified Petition was an Order to Show Cause requiring respondent to demonstrate why the relief sought in the Verified Petition should not be granted. Certification of Peter B. Contini, Pa1 - Pa4.¹

Immediately following the filing of the Verified Petition and Order to Show Cause the file was transmitted by the Department of Education to the Office of Administrative Law (OAL) as a contested case. On August 16, 1994 the Board filed a Verified Answer admitting many of the factual background allegations but denying many of the conclusions which alleged that it had failed to deliver a thorough and efficient system of free public education. An in-person prehearing conference was conducted on October 5, 1994 and a prehearing order was issued the following day. Paragraph B(1) of the prehearing order identifies the issues as follows: (1) whether as of July 22, 1994 the respondent had failed to take or was unable to take the corrective actions necessary to establish a thorough and efficient system of education in Newark; and (2) whether the recommended administrative order creating a State-operated school district was arbitrary, unreasonable or capricious in view of the facts as of the date of the verified

¹ References to "Pa" relate to Petitioner's Appendix and Supplemental Appendix accompanying its motion briefs. "Ra" references relate to the Board's Appendix

petition - July 22, 1994. Thereafter, on motion by the petitioner, the undersigned ruled that the "scope" of the evidentiary proceedings would be confined to the state of facts in existence on or before July 22, 1994 and no substantive activities after that date would be considered. See, Order Granting Petitioner's Motion for ruling *In limine*, Nov. 29, 1994.²

The plenary hearing originally was scheduled to commence on February 27, 1995 and to continue essentially on a four day per week basis until completed. For the convenience of the parties, presentation of proofs on behalf of the petitioner was scheduled to take place at the Quakerbridge Office of the Office of Administrative Law because of its proximity to Trenton. See *N.J.S.A. 52:14F-5(n)* At such time as the respondent's case was to be presented, it was agreed that the locale would be in Newark.

During the next few months following the October 1994 prehearing conference discovery began and certain preliminary matters were addressed and resolved; in particular, my ruling on the motion *in limine* as to "scope". However, in early February 1995, within weeks of the scheduled commencement of the plenary hearings, the petitioner moved for summary decision or, in the alternative, for a determination that he had made out a *prima facie* case. In light of the proximity of the filing of the motion to the scheduled hearings, and following a conference with counsel, a schedule was established for the filing of responsive and reply briefs and the start of the hearing was adjourned to April 10, 1995. Thereafter, as a result of certain delays in the filing of briefs and the scheduling of oral argument for April 5, 1995, it was agreed that the start of the hearings would be adjourned until April 24, 1995, assuming a hearing was necessary. Oral argument in connection with the summary decision motion was presented as scheduled on April 5, 1995 and the following constitutes my initial decision on that motion.

² Although my Order expressly provided respondent with an opportunity promptly to seek interlocutory review of my *in limine* ruling pursuant to *N.J.A.C. 1:1-14-10* because of the strictures it placed on the scope of proofs I intended to permit at the plenary hearing, no such request was made to the agency head.

DISCUSSION

A. Introduction

At the outset I again note that the initial brief filed by the petitioner, the reply filed by the Board and the response filed by the petitioner included voluminous materials contained in multivolume appendices. Reference to pertinent portions of those documents will be made as appropriate throughout the course of this initial decision. Based upon my review and consideration of the briefs and supporting documents submitted in connection with the motion, including the appendices and various certifications, and after taking into account, as well, the points made by counsel during oral argument, I have determined for the reasons which follow that petitioner Contini's motion for summary decision should be granted.

Legislation pertaining to a State "takeover" of a local school district is contained in *N.J.S.A. 18A:7A-14, 18A:7A-15 and 18A:7A-34*. Prescribed procedures for the governance of State-operated school districts following "takeover" may be found in *N.J.S.A. 18A:7A-34 to 7A-52*. See also, *N.J.S.A. 18A:9-1 and 18A:10-1*. Major litigation arising out of the takeover legislation involving the School District of Jersey City soon followed passage of amendatory legislation and culminated in an initial decision on July 26, 1989 in *McCarroll v. Bd. of Ed. of Jersey City*, by Administrative Law Judge Ken R. Springer. His detailed initial determination recommending a takeover was affirmed by the Acting Commissioner on August 31, 1989, and by the State Board of Education on October 4, 1989. See, *McCarroll v. Bd. of Ed. of Jersey City*, 13 *N.J.A.R.* 1 through 94. There has in New Jersey been a long history of home rule and local control of public education by State delegation to local school districts. Thus, a State "takeover" involves action which is not to be treated lightly. The legitimate interests of a wide range of constituencies built up over many years plainly is implicated by such State action including, but not limited to, parents, teachers, administrators, Board members, employee associations and perhaps most importantly, the public school students themselves. Since Newark is the largest school district in the State, both in terms of numbers of pupils and staff members, the State's proposed

action in this case must closely be scrutinized in order to protect against a result which might interfere with the rights and reasonable expectations of those various constituencies. See *e.g.*, *N.J.S.A. 18A:7A-44*. Nonetheless, responsibility for substantive education is "squarely and completely committed to the State", *Abbott by Abbott, v. Burke*, 136 N.J. 444, 455 (1994), and it is the State's duty to step in where it believes it reasonably must.³

B. Propriety of the Motion for Summary Decision

Although not framed as an issue in the prehearing order, the present posture of this matter has given rise in the first instance to a preliminary procedural question; namely, do I have jurisdiction to entertain the instant motion, no less dispose of this case in summary fashion? The petitioner has moved for summary decision expressly pursuant to *N.J.A.C. 1:1-12.5*, Newark maintains that the specific language used in the takeover legislation precludes summary disposition and insists that there must be a plenary hearing as a condition precedent to any State takeover. Of course, assuming that the Board does not prevail with respect to that procedural argument, it maintains that the necessary predicate for entry of a summary decision does not exist in any case.

The takeover legislation specifically refers to the conduct of a "plenary" hearing. In particular, *N.J.S.A. 18A:7A-14e* provides that following certain preliminary procedural events the Commissioner shall order the local Board to show cause why an administrative order, subject to *N.J.S.A. 18A:7-15* and *N.J.S.A. 18A:7A-34*, should not be implemented and thereafter there shall be a "plenary hearing before a judge of the Office of Administrative Law, pursuant to the 'Administrative Procedure Act', *N.J.S.A. 52:14B-1, et. seq.*" *N.J.S.A. 18A:7A-15* then provides that the Commissioner may determine it is necessary to take certain corrective action if, after a plenary hearing, such corrective action appears to be appropriate.

³ In his initial decision in *McCarroll, supra.*, Judge Springer cited specific prior examples of where such authority has been exercised by the Commissioner. See *McCarroll v. Board of Educ. of Jersey City*, 13 N.J.A.R. at 62-63.

According to the respondent, the Legislature therefore very carefully and wisely provided that no takeover be implemented unless there first was a plenary hearing and opportunity afforded to the respondent to have access to the full panoply of rights attendant thereto. In support of that position the Board points to the distinctly different definitions of "hearing" and "plenary hearing" contained in *N.J.A.C. 1:1-2.1*. Thus, a "hearing" is described as a proceeding conducted by a judge for the purpose, "of determining disputed issues of fact, law or disposition". On the other hand, a "plenary hearing" excludes summary disposition since it is defined as a "complete and full proceeding conducted before a judge, providing the parties with discovery, the opportunity to present evidence, to give sworn testimony, to cross-examine witnesses and to make argument". Accordingly, respondent argues that since the takeover of a public school district has substantial and long lasting consequences for the several constituencies mentioned above, the Legislature deliberately intended that there be no disposition by way of summary decision.

Petitioner, of course, rejects this assertion and also points to specific language in the takeover legislation which he contends supports the view that summary disposition is perfectly appropriate here. In particular, *N.J.S.A. 18A:7A-14e* immediately qualifies the requirement for a "plenary hearing" with specific reference to the fact that it shall be conducted not only "pursuant to the 'Administrative Procedure Act' " but, in addition, in the manner prescribed by subdivision B of article 2 of chapter 6 of Title 18A of the *New Jersey Statutes (N.J.S.A. 18A:6-9 et seq.)*. The chapter 6 reference relates, of course, to the jurisdiction of the Commissioner to hear "controversies and disputes arising under the school laws". Although not mentioned by petitioner in response to the Board's argument, the State Board's implementing administrative regulations pertaining to hearings of "controversies and disputes" expressly provide that following transmittal of a contested case to OAL the conduct of the proceedings shall be governed by the Uniform Administrative Procedural Rules contained in *N.J.A.C. 1:1-1 et seq.* See *N.J.S.A. 18A:6-26; N.J.A.C. 6:24-1.10(b)*. Those rules specifically include, of course, *N.J.A.C. 1:1-12.5* regarding motions for summary decision.

In my view, no extended discussion is necessary in connection with the procedural issue. While the State's takeover of a local public school system potentially has very substantial consequences for pupils, parents, teachers, administrators, Board members and others, the specific reference by the Legislature in *N.J.S.A. 18A:7A-14e* to the Administrative Procedure Act and to the "controversies and disputes" section of the education statutes compels the conclusion that summary disposition is permitted in a case of this sort. If the respondent's view were to prevail then by logical extension it must argue (as, indeed, Board counsel did at oral argument) that once a "takeover" case is instituted it can only be decided after a plenary hearing and not only is summary disposition on motion improper, so too would a consent agreement be improper. I disagree with that point of view and would point to the consensual takeover in 1991 of the Paterson School District. In short, pursuant to the provisions of the takeover legislation, the Administrative Procedure Act and the Department of Education Rules, OAL has jurisdiction to entertain petitioner's motion for summary disposition.

C. The "Merits" of the Petitioner's Summary Decision Motion

The next and primary issue, then, is whether there is a basis for me to render summary disposition in petitioner's favor. As noted above, I believe the answer to that question, for reasons which follow, is in the affirmative.

The cases in both this State and on the federal level are legion with regard to the principles that commonly apply in connection with motions for summary "judgment" or its administrative law equivalent, the summary "decision". As specifically articulated in *N.J.A.C. 1:1-12.5(b)*, disposition of a matter in summary fashion is appropriate only where it is demonstrated by the moving party that there is no genuine issue as to any material fact challenged and that it is entitled to prevail as a matter of law. Of course, in analyzing the merits of such a motion judges are directed to "indulge" the party opposing the motion and to grant the motion only sparingly and with caution. See generally, *Judson v. Peoples Bank and Trust Co. of Westfield*, 17 N.J. 67 (1954) and its progeny.

Thus, the well-established case law, not to mention the OAL rule itself, makes plain that the summary disposition of litigation is not encouraged and while judges should not display excessive timidity with respect to granting such motions, where appropriate, the exercise should take place sparingly so that a litigant's rights to a full hearing is not impermissibly eliminated. However, with respect to whether summary decision is appropriate in this particular type of case, I believe there is an aspect which deserves special attention. According to the petitioner, unlike the usual context of summary decision motions, the burden placed upon it in this case is not to eliminate all genuine issues of material fact in order to establish its right to a decision in summary fashion by a preponderance of the credible evidence. Rather, in light of the legislatively prescribed burden of proof as set forth in *N.J.S.A. 18A:7A-14e*, it is petitioner's position that summary decision is appropriate here, even if fact issues arguably exist, if they only give rise to reasonable differences of opinion. Put another way, the ultimate issue is to determine whether the petitioner reasonably can demonstrate the existence of any rational basis to support his determination to recommend a State takeover..

According to the Board, a close look at the relevant underlying circumstances must lead to the conclusion that summary decision in favor of a State takeover would be highly inappropriate and tantamount to my placing a stamp of approval on, "the essence of caprice". I disagree. I take my lead, in the first instance, from the *McCarroll* decision wherein Judge Springer noted nearly at the outset of his initial decision that since the State's burden in a proposed takeover is to demonstrate that its action is neither arbitrary, unreasonable nor capricious, the scope of the inquiry immediately becomes narrow and limited. The issue, he said, "...is not whether the Commissioner of Education ... and his staff are necessarily correct in their analysis, but merely whether there is enough evidence for a reasonable person to reach the same conclusion". *McCarroll v. Bd. of Ed. of Jersey City, supra*, 13 *N.J.A.R.* at 4-5, 64-66. That "limited" burden of proof standard was approved by both the Acting Commissioner in his affirmance of Judge Springer's initial decision (13 *N.J.A.R.* at 71) and by the State Board of Education in its decision as well. (13 *N.J.A.R.* at 89) Thus, I submit that the special, limited nature of the scope of this type of proceeding is to be found not

only with respect to temporal concerns (no post-July 22, 1994 activities are relevant), but with respect as well to the substantially modified onus that the State must carry on a motion for summary decision.

Thus, although our case law is replete with decisions by the Supreme Court, the Appellate Division and trial courts to the effect that summary judgment motions are to be granted with caution and in the usual case a genuine "dispute" is easy to identify, that is not the case here. A situation more analogous to the instant matter may be found in the decision in *City of Newark v. N. J. Turnpike Authority*, 12 N.J. Super. 523 (Chan. Div. 1951), *aff'd* 7 N.J. 377 (1951) which involved a dispute between the municipality and the Authority concerning the method chosen by the agency with respect to the location and manner of construction of an interchange in Newark. The trial court decision was rendered by Judge (later Justice) Francis who pertinently observed that in analyzing the propriety of the Authority's exercise of discretion in that summary judgment context, the existence of a "contrariety of opinion" was not the determining factor. Rather, the proper question to be asked was whether the affidavits and exhibits on file show not only a contrariety of opinion or disputed facts, but such contrariety or dispute which would, "create an issue on which a finding might be made that the Authority was guilty of a palpable abuse of discretion". *City of Newark v. N.J. Turnpike Authority, supra*, 12 N.J. Super. at 530 (Emphasis added). The New Jersey Supreme Court certified the pending appeal and affirmed that result. It expressly rejected Newark's contention that summary judgment should have been denied because the pleadings, affidavits and exhibits raised genuine issues of fact requiring a trial. To the contrary, since there was no dispute that the Authority was acting within the scope of its statutory powers concerning location and mode of construction of interchanges, Judge Francis properly framed the issue to be whether there was a "palpable abuse of discretion". In fact, with reference to the use of the adjective "palpable", Chief Justice Vanderbilt, speaking for a unanimous Court, noted that this was a proper use of the word since it was synonymous with whether the exercise of discretion was "arbitrary" or "unreasonable". While he agreed that the discretionary power of the Authority was not absolute; nevertheless, whether there had been a "palpable abuse of discretion" did not turn on the existence of what clearly was only a

difference of opinion as to what the best method of construction would be. A mere contrary view did not equate with arbitrary, capricious or unreasonable action. Rather, the obligation placed upon the City in opposing the motion was "...to raise a real question as to whether the Authority's plans were so far from right as to be a manifest abuse of discretion ...". *City of Newark v. N.J. Turnpike Authority, supra*, 7 N.J. at 383 (Emphasis added). That, I submit, is decidedly not "classic" summary judgment language. See also, *Worthington v. Fauver*, 88 N.J. 183 (1982).

I believe that the thrust of the Supreme Court's decision in the Turnpike Authority case is of particular significance in this case. A determination as to whether the State as part of the carrying out of its constitutionally mandated duties may take over a local public school district in order to assure delivery of a thorough and efficient system of free public education is a matter which the Legislature clearly committed to the State's discretion in the takeover statutes. Any doubt with respect to the vesting of such discretion was removed not only by the decision in the *McCarroll* case, but from the very language of N.J.S.A. 18A:7A-14e itself. To put it another way, whether or not Newark agrees or disagrees with the soundness of the State's decision is not relevant. What is important is whether or not the exercise of the discretion was attended by reasonableness and unless it can be said that no conceivable rational basis exists to sustain the action, then it must be upheld. Whether Newark, or I for that matter, agree personally or not with the judgment is not important for, "where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." *Bayshore Sewerage Co. v. D.E.P.*, 122 N.J. Super. 184, 199 (Chan. Div. 1973); *aff'd*. 131 N.J. Super. 37 (App.Div. 1974).

In order to determine whether enough evidence of an abuse of discretion was raised by the Board sufficient to defeat the motion, an analysis must be made of what the Department did in this case, how and why it did it and whether the conclusions it reached transcend mere differences of opinion and spill over into the prohibited area of arbitrary, capricious and unreasonable action. In other words, what were the bases for the State's action in this case and can reasonable minds differ with respect to the

appropriateness of its action. If the proofs reveal that the discretion was exercised within proper bounds, summary decision is appropriate and no need for a lengthy, expensive and potentially heated plenary hearing exists.

Perhaps the most crucial prong upon which the petitioner rests its motion has to do with what it describes as the abysmal record of performance by Newark's students as measured by outcomes on standardized tests, particularly in relation to the 29 other "special needs" districts in New Jersey. Thus, in his original moving papers filed in early February 1995, an item highlighted by petitioner as particularly significant had to do with the performance, or lack thereof, by Newark's students on various standardized tests including, in particular, the Grade 8 Early Warning Test (EWT) and the Grade 11 High School Proficiency Test. (HSPT) Those statistics, which reflect the numbers of students involved in taking those tests, the numbers that passed and the percentages are not meaningfully in dispute. Indeed, many actually were provided by the Board. Thus, in October 1993, only one 11th grade student in four passed the reading, writing and mathematic sections of the HSPT. In April 1994 the test was administered primarily to students who had failed one or more sections in the Fall. Out of the 1852 11th graders enrolled in the Fall, slightly more than only 42% passed all three sections. More importantly in terms of overall impact, 438 students, or only 13.4% of the 8th grade student population in 1990-91, remained and passed the HSPT in October 1993, and 786 students, or only 24.1%, passed the October and April tests combined. See, *Certification of Dr. Gerald E. DeMauro* (Pa.11 to 12). In short, the percentage of Newark students passing the HSPT in 1993-1994 (including the retest) as 11th graders represented less than 25% of the class which had been 8th graders in 1990-91. That is a description of failure on a very large scale, and if "abysmal" is too strong a description, it most certainly is distressing to contemplate.

Additional pertinent statistical data reflecting the District's woeful failure with respect to preparing its students for achievement on standardized tests may be found in the test results for the 8th graders who took the Early Warning Test⁴ in March 1994.

⁴ The EWT is administered pursuant to *N.J.S.A. 18A:7A-6.2*. Development of the EWT and the HSPT was described by Dr. DeMauro, who is Director of the Bureau of Assessment (Pa5-14).

Those results reflected that in 20 of 38 schools with an 8th grade, over half of the total number, not one qualified for Level I on all three test sections. Level I refers to the making of satisfactory progress towards mastery of the subject, or "clearly competent". This means that in terms of numbers of 8th grade students in those 20 schools, 1266 failed to demonstrate "clear competency" in the subject matter. In fact, the results of the same test reflected that in 23 of the 38 schools, 1% or less of the students demonstrated they were "clearly competent" in all 3 sections and only four of the 38 schools had more than 10% of its 8th graders qualifying at that level. See *March 1994, Grade 8 EWT State Summary*, (Pa. 11,58a). Statewide, including Newark, nearly 24% of all regularly enrolled 8th graders qualified for Level I in all three sections (Pa12,58a). Even worse, the undisputed proofs demonstrate that in 1993 only 7% of all Newark's 8th graders demonstrated clear competence in all three test sections, and that number decreased to less than 3% in 1994. Put another way, out of 3057 students regularly enrolled in the 8th grade in 1993-94, only 87 qualified as "clearly competent" in reading, writing and mathematics, and nearly 2118 (69.3%) of that total number could not demonstrate even "minimal competence" on the March 1994 EWT test. (Pa 12). Such results clearly are intolerable.

The statistics with respect to the performance of Newark students in 1992-93 at the 3rd grade level also are dismal. Out of the 30 special needs school districts, Newark ranked next to last in percentage of students meeting the Minimal Level of Proficiency (MLP) in reading and last in meeting the 3rd grade level in mathematics. With respect to percentage of students achieving MLP in language arts, Newark also ranked lowest. Thus, in two of the three areas assessed, Newark's performance was last and in the third area, its performance was next to last. (Pa833-834).

Additional statistics for 3rd grade "achievement" are equally grim. In 1990-91 Newark had the lowest percentage of 3rd grade students meeting State minimum levels of proficiency in reading and mathematics and the second lowest in the area of language arts. Furthermore, although Newark's "growth rate" among special needs districts in terms of percent of third graders reaching State minimum proficiency levels between 1990-91 and 1992-93 reflects that Newark moved up to 9th out of 30 (about

51% to slightly more than 62%). However, as the petitioner aptly observes in his reply brief with respect to that particular set of statistics, "Little satisfaction should be derived from the fact that even when motivated by the intense scrutiny of a decade of State monitoring, the best Newark could muster was less than 2-3rds of its 3rd graders achieving minimum proficiency" the worst performance of any school district in the State." This observation is mindful of the comment in *McCarroll, supra*, that Jersey City's boast that "only" 302 students in the LEP Program were being denied services was "a defense" of "dubious cloth" and "trivialized" the serious deficiencies in that program. See 13 *N.J.A.R.* at 78-79

Similarly, with respect to the results of the 6th grade testing for minimum levels of proficiency in reading, mathematics and language arts for the 1992-93 school year, Newark students ranked third lowest in reading, second lowest in mathematics and fourth lowest in language arts. (Pa 834, 845-847). Even here, in light of the greater number of 6th grade students in Newark's schools, it appears that the numbers of students who failed to achieve MLP exceeded the combined total of all 6th grade students who took language arts in three lower achieving districts, a fact which underscores that the failure rate in a district the size of Newark affects more children than a higher failure rate in much smaller school districts.

The conclusions drawn by the State with respect to the EWT and other test results adverted to above was challenged by the Board in its response to petitioner's motion. For example, the affidavit of Steven G. Block, Newark's Executive Director of Accountability and Quality Assurance, noted that in 1994 three other school districts had even higher percentages of schools with 8th grade populations producing no students with Level I competence than did Newark. (Ra3-4). However, as the petitioner's response to that arguments points out, those districts are smaller than Newark and the three specifically highlighted (Trenton, Irvington and Burlington) have a total of only nine schools with an 8th grade population as compared to 38 such schools in Newark. Indeed, those other districts had a total of 1103 pupils enrolled in those 9 schools, which was less than the 1266 students enrolled in the 20 schools in Newark that had no students achieving Level I on all three test sections. (Pa826-848). In sum,

as the petitioner explains it in his reply brief, since: " ... more 8th grade students were enrolled in schools that did not produce a single student achieving Level I on all three tests in Newark than in the other three districts combined", Newark's failure rate has a compounding negative impact because of the greater number of students adversely affected.

Another startling statistic with respect to poor 8th Grade EWT results in 1994 is that of all the 30 special needs districts, a total of 36 out of 123 8th grade schools outside of Newark (about 30%) had no students achieving Level I in all three sections; whereas, in Newark in nearly 53% of those schools, (20 out of 38) not one student was able to achieve Level I status. Put another way, of the 56 schools in all the special needs districts producing not even one student who achieved Level I in all three sections, 20, or 35.7% were in Newark, even though it had only 23.6% of all the schools in those districts (Pa 830). Accordingly, as petitioner again points out, Newark's percentage of schools with no students achieving Level I on all three sections is disproportionately high when compared to the combined performance of all other special needs districts.

Dr. DeMauro also provided a matrix which describes Newark's 8th Grade student performance versus other special needs districts insofar as achievement of MLP is concerned. It also reflects that the percentage of students in Newark achieving Level I on all three tests was lower substantially than the other special needs districts. In particular, only 2.8% of Newark's 8th graders achieved Level I on all tests as opposed to 4.3% in all of the other special needs districts, a difference of nearly 50% on that basis alone (Pa 828). If more statistics are needed to demonstrate this point I would point out, as did the petitioner, that over 29% of all enrolled 8th graders in the special needs districts failing to achieve Level I attended Newark schools even though Newark had only 18.9% of the total 8th grade enrollment (Pa 830).

To be sure, the Board countered with the assertion, for example, that the 8th Grade EWT scores cited by petitioner do not combine the total numbers of students meeting Levels I and II, and similarly neglect with respect to the 11th grade HSPT to

aggregate the scores over two years. See Certification of Elaine M. Walker (Ra 1 to 6). However, as the petitioner then aptly observes in reply, that is merely a function of how one tinkers with the statistics to try and make the results seem less severe - an essentially non-substantive matter of interpretation only. In fact, Newark's interpretation only reinforces the regrettable conclusion that, overall, the scores are unacceptably low in many school districts, not only in Newark. As Dr. DeMauro further pointed out in his reply affidavit (Pa 827-834a), however one combines the numbers, many of Newark's 8th graders demonstrably continue to fail to meet minimum levels of competence as measured by the EWT and the District consistently performs at or near the bottom of all the school districts in the State. While Assistant Commissioner McCarroll was cited by Judge Springer for the proposition that reliance should not solely be placed on poor test scores to justify a State takeover, *McCarroll v. Bd. of Ed. of Jersey City, supra*, at 48, I believe there are some occasions, as here, when those scores are so poor and of such paramount significance as to "speak volumes" about a Board's failures.

Many other statistical comparisons made in the briefs and supporting documents were the subject of opinion and I need not lengthen this decision with reference to all of them. Suffice it to say that they reflect nothing more than that - a difference of opinion as to the significance of the percentages, particularly in the special needs school districts. Nevertheless, the underlying statistical data essentially remain undisputed and reveal the very severe deficiencies infecting Newark.

Before leaving the test score area additional reference must again be made to the poor performance of the 11th grade students who were 8th graders in 1990-91. As the State observes, the data sadly reflects that expectations of 8th graders in Newark to eventually take and pass the HSPT in 11th grade is extremely low, even if they remain in school. Specifically, with respect to all 30 special needs districts in the Fall of 1993, while 4001 students passed all three sections of the HSPT only 438 of those students were from Newark. That figure, as noted, represents just 13.4% of Newark's 8th grade enrollment in 1990-91. However, as to the other 3563 students enrolled in all of the other special needs districts who passed all three test sections, they constituted 28% of

their original 8th grade regular enrollment. Thus, the ability of Newark to educate its 8th grade students ultimately to take and pass the critically important HSPT in 11th grade appears on the basis of those statistics to be less than half as effective on a percentage basis as all of the other special needs districts combined. When Newark performs among the worst of the 30 special needs district, it therefore performs among the worst of all of 590 active school districts in the State. Hence, I agree with the petitioner that by any valid measure students in Newark, generally, are failing in large numbers to meet even minimal State standards of competence and thereby are not being prepared to function adequately in society. Of course, there are a universe of factors which contribute to that situation and include societal based components which may have little or nothing to do with the ability of a school system adequately to deliver educational services. However, that is no reason to permit palpable educational failure to persist if remedial action through a State takeover can help to meet the problems where the local school officials have proven not to be up to that vital task. That view is not "Big Brotherism", nor misguided paternalism, it is plain common sense.⁵

Another factor somewhat related to the low test scores has to do with the District's attendance and "drop-out" figures. In 1991-92, Newark's daily student attendance was the second lowest of the 30 special needs districts. In 1992-93, it was the lowest. Moreover in addition to the low attendance figure is the more important fact that with respect to loss of enrollment on a percentage basis for special needs districts, Newark has a very high rate. Thus, although in 1990-91 there were over 3250 8th grade students regularly enrolled in Newark, by 11th grade that number had decreased by about 44 percent to about 1850. The State suggests that this diminution reflects that students essentially may be "voting with their feet" with respect to high school attendance in Newark. However, apparently no accurate statistics have been kept with respect to tracking those pupils to identify the precise reasons why they leave the Newark school system. On the other hand, I agree with the State insofar as it rejects outright the remarkable position taken by the Board that apparently completion of 8th grade and receipt of a diploma at that stage somehow vests a Newark student with the

⁵ The State Board observed in its affirmation in *McCarroll, supra*, that the existence of general societal conditions actually heightens rather than dilutes an urban school board's responsibility to provide effective leadership. See 13 *N.J.A.R.* at 92.

ability to attend any school district outside Newark he or she pleases. Indeed, the observation by Shirley Grundey-Harris, Newark's Director of Guidance Services, that with an "8th grade diploma" Newark students almost are expected to search out high schools outside of Newark to better satisfy their educational needs truly is astonishing (Ra41 to Ra 45). Putting aside the legal requirement that a non-tuition pupil must demonstrate that he or she honestly is resident in the district where he or she wants to attend high school, see generally, *N.J.S.A. 18A:38-1*, the Board apparently concedes that many of its students are expected (encouraged?) to look elsewhere for a high school education. This very nearly is an admission that they cannot receive the education they need if they remain in Newark beyond 8th grade and the implications of the Director of Guidance Services' acceptance of that situation is disturbing.

One can argue, of course, over the meaning of the statistics cited by both sides in this case. However, even taking them in their "best light", to me they reveal a situation which is nothing short of damning with regard to whether students in Newark are receiving the education they deserve and which the State Constitution mandates for them. In truth, despite Assistant Commissioner McCarroll's observation and especially when viewed in the dropout rate context, the test scores, alone, in this case arguably do provide a rational basis for the State to take the action that it proposes without other factors even having to be taken into account. Again, the test in connection with a summary decision motion in a case of this sort is whether the State had any rational basis to seek to take the proposed action. Differences of opinion or of interpretation with respect to the meaning of the statistics, and with regard to what the causes for the discrepancies may be, are of academic interest. But they do not support a contention that the proposed action is arbitrary, unreasonable or capricious and they do not constitute a legal basis to resist a motion of this sort and thereby delay further the delivery of an acceptable level of education services to students who for too long have been deprived of the same in a District which borders on the dysfunctional.

In addition to the test score - drop-out problem, which I find to be most significant, other factors do exist upon which the petitioner relies and which also are relevant to the question of whether as of July 22, 1994 the District has failed to or is

unable to provide a thorough and efficient system of public education. These include such tangible factors as the deplorable condition of some of the physical facilities, and such intangible factors as the demonstrated attitude of the Board members and senior administrators with respect to responding timely to problems with which they are expected to deal. In the first instance, sight should not be lost of the fact that the July 22, 1994 issuance of the Verified Petition was not the product of some "11th hour" whim on the part of the State. To the contrary, it represented the culmination of an intensive ten year monitoring effort compelled by statute and regulation designed to assure that school districts in this State pass muster with respect to their legal obligations. Although the specific factual contents of the five volume CCI Report generated by the monitoring and the compliance investigation are not strictly relied upon by the State in connection with its motion for summary decision, many of the findings therein are corroborated by the State's sworn documents. The successive school boards and administrative staff which have operated Newark's school system since at least 1984 consistently have been made acutely aware of the variety of problem areas with which they must deal, and although certainly in some respects they have made sincere efforts to try to meet and overcome the particular difficulties which special needs districts like Newark face, there are many aspects which reflect a nearly total failure on their part to do so. Between 1984 when the monitoring process began, and late 1987, Newark was evaluated and found deficient at both Level I and Level II monitoring. Five years later an external review team conducted an examination of the District's operations including, in particular, those indicators which were found to have been unacceptable after the Level II monitoring. In April 1993 the team issued a report identifying the conditions which continued to prevent the District from achieving certification. A portion of the contents of that report was cited by the State in its initial brief and bears verbatim repeating:

"For almost a decade, the Newark School District has failed to achieve acceptable marks on a number of indicators needed to meet New Jersey Certification Standards. In large measure, those standards are a gauge, a measure of a school district's capacity to provide students with effective educational programs.

"The conditions of many of the facilities are decaying, not unlike many neighborhoods which exude evidence of urban decay.

"But outside factors cannot entirely account for the condition of public education in Newark. The district's plight should have been a call to decisive, creative action, What the situation cried out for was "excellence", - to reenergize the system and city sapped by years of indifference. Instead, the "outcry" over Newark's plight was slow and muted. As the Newark system struggles under the cumulative weight of poor performance on the part of many students, neglected buildings, charges of mismanagement, nepotism, cronyism, and rampant political interference, a sense of resignation prevails.

"The Board and the Administration seem like ships passing in the night. Each leaves a wake that has minimal influence on what the other does. There seems to be no sense of teamwork and unity of purpose."

That situation continued into mid-1994. Indeed, as noted, during 1993-94 a comprehensive compliance investigation was conducted under the supervision of an assistant commissioner and a core team of department staff. Moreover, the investigation also included participation by two respected outside consulting firms, Towers Perrin and Arthur Anderson & Company. Although the specifics of some of their findings were challenged, and I make no judgment concerning them here, the report which was submitted to Newark and to the Department contained findings which were highly critical, to say the least, of the District's inability with regard to governance, management of its operations, delivery of its educational programs and the carrying out of its fiscal affairs.

In addition to the abysmal test score results, the body of data reviewed by the Department preliminary to the issuance of the Verified Petition in July 1994 alarmingly revealed that the largest school district in this State, with an annual budget of about \$525 million, clearly was in a state of distress. On a per pupil expenditure alone, not necessarily the best indicator but certainly capable of appropriate reference, Newark was a failure. Thus, for the school years 1991-92 and 1992-93 the average expenditure per student for the State as a whole, including Newark, increased by \$687 from \$7884 to \$8571. In Newark, however, the average per pupil expenditure increased by \$1,550 from \$9150 to \$10,700. In other words, on average for those two

years, per pupil expenditures for students in Newark increased at two and one-half times and exceeded the statewide average (including Newark's figures) by about 20%. Given such increasingly high expenditures per student one legitimately could expect that Newark students would begin to meet or at least approach the requirement that 85% of its district students pass all three sections of the 11th grade HSPT. Newark did not come close.⁶ So, too, Newark's ratio of students per administrator in 1991-92 was the lowest of all the special needs districts and it consistently has remained the lowest or near to the lowest. In other words, Newark has an overabundance of administrative personnel as measured on a per student basis. Similarly, with respect to student per non-certified employee, Newark's ratio in 1991-92 again was the lowest of all the special needs districts (14.3) and substantially below the average of 26.8. For some reason, Newark seems to employ an inordinate number of non-instructional employees, which of course raises criticisms of the sort of mentioned by the CCI Report such as nepotism, cronyism and the like. Standing alone, the hiring of friends and/or relatives of Board members or senior administrators is not necessarily a reason for inquiry, no less for implementing such drastic action as a school takeover. However, the hiring statistics do raise serious questions about the manner of this school district's operations which fully justified consideration by the Department as part of its overall review.⁷

The State also devoted a substantial amount of attention to an assertion that Board members regularly take unnecessary and expensive trips, treat themselves to expensive dinners and have free use of Board-owned vehicles and that the monies devoted to those activities serve only to drain accounts which are much more important, such as text books, supplies, libraries and the like. (See Pa 162 to Pa165; Pa892 to Pa921) In reaching the conclusion I do in this case I have not given any weight to those assertions since they are particularly fact-sensitive and it would not be appropriate for me to draw any firm conclusions about those charges in this summary

⁶ I am aware, of course, that it is expected that more money than the average will be spent in special needs districts in order to help students overcome their special disadvantages. However, the grant of additional monies does not assure that they will be well spent. and if that occurs the State's responsibility actually increases. See *Abbott by Abbott v. Burke*, 136 N.J. 444, 455 (1994),

⁷ The Board's anti-nepotism policy (Pa 888-889) was not adopted until September 28, 1993 and "grandfathered" all persons regularly employed as of that date.

decision context. Whether or not trips to conferences in St. Thomas, Paradise Island or Hawaii, for example, advance the best interests of the school system are matters which although pertinent subjects for review cannot be determined unless close scrutiny is paid to the precise facts. The particular context of this summary decision motion does not lend itself to such an inquiry. Thus, I have given no weight to the State's contentions in this respect although, as noted, there are ample enough other reasons to support the takeover action

Another area to which particular attention was devoted by petitioner in the summary decision motion had to do with the contention that Newark's substantially belated claim that finally it is taking "reform" steps was nothing more than mere payment of "lip service" and upon close examination lacked any substance whatsoever. To that end the State pointed out that as late as April 1994 the Board, after a very short review period and in a desperate attempt to seek a magical solution after years of neglect, agreed to an outside consultant's plan and advertised for proposals to assist the District to develop a program designed to accelerate instructional performance. When contracts which would have committed about \$4.4 million to the project were about to be awarded without proper review by the Office of the Auditor General, the Commissioner of Education directed that the process be halted. Thus, as of the date of the issuance of the Verified Petition, July 22, 1994, some two and one half months later, even after ongoing technical assistance from the Auditor General was provided, the District still had proven unable to compile an acceptable reform plan. See Certification of Marie Nuccetelli, Acting Auditor General from 6/6/94 to 1/2/95 (Pa536-542; See also Pa712-714).

Finally, some of the Board's answers to interrogatories further exposed the unfocused, amorphous and wholly inadequate effort it made to deal with its severe problems. Thus, when the Board was asked to explain why it denied the State's claim that its efforts in the area of strategic planning had been "superficial", the Board merely replied that it had outlined a plan, attended staff retreats where plans were finalized, and that the Executive Superintendent was told to report his accomplishments both at regular Board meetings and at committee meetings (Pa 717). No specific facts to

flesh out how any strategic plan was intended to be implemented was provided nor was any identification made of the goals of the plan together with how the District would achieve them. This, after 10 years of monitoring. Similarly, another interrogatory asked the Board to provide the factual basis for the denial of the allegation that it had failed to demonstrate a “sense of urgency” for improvement. The Board answered that it had demonstrated such a sense by expressing a willingness to deal with complex and sensitive issues such as violence in the schools and condom distribution. (Pa 718). Nowhere in that answer, nor anywhere else were specific facts provided to clarify if not explain what specific steps the Board demanded be taken by the senior administration to address the District’s huge deficiencies. Similar such vague answers appear throughout the interrogatory responses (Pa 715 to Pa 751) lending credence to the reasonable belief that implementation of meaningful change in this school district has not been of major concern, no less a top priority (See, e.g., Pa723, 727, 733, 742). While I am not prepared to make a specific finding on this record that Board members regularly demonstrated that they were more interested in their own personal affairs and those of their families rather than the best interests of Newark’s students, the Board’s answers to the interrogatories reflect generally a litigant which more often than not has been unable to provide any meaningful specific facts to support its mostly mechanical denials despite the great deal of time given to it to develop and articulate such facts.

Taken together the pleadings, briefs, reply briefs, appendices and other materials submitted in support of, and in opposition to this motion for summary decision take up several hundred pages and several cartons. In reviewing those materials it became clear that the need for a State takeover was obvious. Shortly, I will list those specific facts which I believe essentially are undisputed and which dictate the result I reach here. Even if some of the allegations upon which Findings of Fact are made are not admitted, the level of “dispute” does not adversely impair the underpinning for my conclusion that in the context of this case summary disposition not only is warranted, it is demanded. I will not repeat the many deficiencies which the petitioner has cited and which support the State’s proposed action. I must, however, return to what I believe to be a poignant example of what this case may be about; namely, the “justification” by Ms. Grundy-Harris to try to explain the somewhat harrowing drop-out statistics. She

seems to entirely have missed the point which the State did not - many students who move beyond the 8th grade in Newark are almost desperate to go elsewhere (if at all) in order to have at least some chance to learn the necessary skills to function adequately in a society which does not always provide help in overcoming a lack of needed skills. What could she possibly have meant when she related that students leave the Newark system to seek a high school education that will better satisfy their needs? The answer to this phenomenon, I believe, clearly suggests itself. Those students fortunate enough to be able to go elsewhere to find a proper education do so. Those that cannot leave either remain in a failing system or drop out altogether. The message she bears is one of despair and the time has come to take whatever steps are necessary to end that despair. Whether this effort ultimately will be successful cannot be gauged at this point. However, the process now must promptly begin. Newark's Board and its senior administrative staff have for manifold reasons, some not always of their own making, failed the students despite having been given many years and substantial support to make changes to correct the deficiencies.

FINDINGS OF FACT

Accordingly, in light of the foregoing discussion I herewith make the following specific Findings of Fact and reach the following Conclusions of Law:

1. Petitioner, Peter B. Contini, is the Assistant Commissioner, Division of Field Services, New Jersey Department of Education. In that capacity he has primary supervisory responsibility over the Department's statutory responsibility to monitor school districts to determine whether they will be certified by the State Board of Education as providing the thorough and efficient system of free public education which the New Jersey Constitution prescribes.
2. Statutory authority has been given to the Department, through the Commissioner of Education and the State Board of Education, to develop

and administer a uniform, statewide system for the evaluation of the thoroughness and efficiency of the public schools of this State as required by the New Jersey Constitution. *N.J.S.A. 18A:7A-10* and *N.J.S.A. 18A:7A-1 et seq.*; *N.J.A.C. 6:8-1.1 et seq.*

3. In order to meet its constitutional, statutory and regulatory obligations to evaluate the public schools in the State the Department, in January 1984, initiated a comprehensive monitoring process designed to determine whether each school district in the State was meeting prescribed standards.
4. Between March 1984 and August 1984, the Essex County Superintendent of Schools monitored the Newark School District pursuant to the "Level I" procedure under *N.J.S.A. 18A:7A-1 et seq.* and *N.J.A.C. 6:8-4.1, et seq.*
5. As a result, the District was rated "unacceptable" on 7 of 10 elements and on 13 of 51 indicators necessary for a thorough and efficient system of education. The 13 indicators for which the District received a rating of unacceptable in the Level I review were as follows:

Indicator 1.3: The plan has been reviewed and discussed by the Board of Education at a public meeting by September 30. Bates number 1129.⁸

Indicator 4.1: Average daily attendance rate for the district is 90 percent or higher. Bates number 1144.

Indicator 4.3: Average daily attendance rate for each school is 85 percent or higher. Bates number 1145.

⁸ The five volume CCI Report contains 1,798 "Bates" numbered pages. Accordingly, Bates number references from 1 - 1,798, inclusive, refer to the CCI Report.

Indicator 4.4: An attendance improvement plan has been implemented for each school where the average daily attendance rate is below 84.9 percent.

Indicator 5.1: There is evidence that a multi-year comprehensive maintenance plan exists and has been implemented.

Indicator 6.1: All professional staff members are certified in their area(s) of assignment. Bates number 1153.

Indicator 6.2: The annual rate of staff (teaching and administrative) occasional absenteeism does not exceed five percent. Bates number 1154.

Indicator 7.1: The Basic Skills Improvement (BSI) Plan has been approved by the county superintendent. Bates number 1159.

Indicator 7.3: The bilingual/ESL Education Plan has been approved by the county superintendent. Bates numbers 1161.

Indicator 7.5: The Annual Special Education Plan has been approved by the county superintendent. Bates numbers 1163-1166.

Indicator 8.1: Seventy-five percent (75%) of the pupils tested in grade nine in each school have passed the state's 9th grade Minimum Basic Skills test (score of 65 in math, 75 in reading). Bates number 1169.

Indicator 8.2: Seventy-five percent (75%) of the pupils in grades three and six in each school equal or exceed: (a) state-prescribed percentile scores in both reading and math on standardized commercial tests, or (b) state-prescribed scores on department approved local criterion reference tests. Bates number 1170.

Indicator 10.2: There is accurate and timely submission of fiscal and statistical reports to county state and federal offices. Bates number 1177.

6. Since the District failed Level I, it was not certified by the State Board of Education.
7. Respondent never formally challenged the Level I findings.
8. "Level II" required the District to develop and implement an improvement plan to correct the deficiencies noted in Level I. On August 13, 1984, the District was directed to prepare an improvement plan for Department review and approval and on March 18, 1985, the District was authorized to proceed with implementation of its improvement plan.
9. Between August 1986 and February 1987, the Essex County Superintendent of Schools conducted Level II monitoring.
10. In December 1987 the District having received "unacceptable" ratings on 7 of the 10 elements and on 16 of the 51 indicators, therefore failed to achieve certification from the State Board of Education. The indicators for which Newark received an unacceptable rating in the Level II review were as follows:

Indicator 3.2: The curriculum is being implemented. Bates numbers 1209-1219.

Indicator 4.1: Average daily attendance rate for the district is 90% or higher. Bates numbers 1129-1132.

Indicator 4.3: Average daily attendance rate for each school is 85% or higher. Bates number 1 234-1236.

Indicator 5.1: There is evidence that a multi-year comprehensive maintenance plan exists and has been implemented. Bates number 1241.

Indicator 5.2: Building inspections have been performed by the district within the last year to ensure adherence to health and safety laws. Bates numbers 1242-1285.

Indicator 5.3: The district has a board-approved plan to upgrade or eliminate all substandard classrooms. Bates number 1285.

Indicator 6.1: All professional staff members are certified in their area(s) of assignment. Bates numbers 1287-1302.

Indicator 6.2: The annual rate of staff (teaching and administrative) occasional absenteeism does not exceed five percent. Bates numbers 1303-1304.

Indicator 6.4: Tenured and nontenured teaching and administrative staff are observed and evaluated according to law. Bates numbers 1306-1307.

Indicator 7.1: The Basic Skills Improvement (BSI) Plan has been approved by the County Superintendent. Bates numbers 1310-1312.

Indicator 7.3: The Bilingual/ESL Education Plan has been approved by the County Superintendent. Bates numbers 1314-1322.

Indicator 7.5: The Annual Special Education Plan has been approved by the County Superintendent. Bates numbers 1324-1334.

Initiator 8.1: Seventy-five percent (75%) of the pupils tested in grade nine in each school have passed the state's 9th grade Minimum Basic Skills Test. Bates numbers 1336-1339.

Indicator 8.2: Seventy-five percent (75%) of the pupils in grades three and six in each school equal or exceed (a) stated prescribed percentile scores in both reading and math on standardized commercial tests or (b) state prescribed score on department approved local criterion reference tests. Bates numbers 1340-1348.

Indicator 9.2: There is an annual review of progress toward the objectives cited in the state approved affirmative action plan (Classroom/Employment Practices. Bates numbers 1352-1353.

Indicator 9.3: The desegregation plan, where applicable and the Affirmative Action Plans, including in-service, are implemented annually. Bates numbers 1354-1356.

11. Newark never formally challenged the Level II findings, never formally submitted a discrepancy analysis in opposition to the Level II findings and never appealed the Essex County Superintendent's determination requiring it to enter "Level III" monitoring.
12. As a preliminary to Level III monitoring, a Verification Review was performed during October and November 1992. The Level III Verification Review report, although not graded as acceptable, unacceptable or not applicable, contains substantive findings as to various indicators. Bates numbers 1495-1588. In addition to recognizing the District's continued failure to educate its students to a level of minimum proficiency, as measured by standardized tests, Bates numbers 1563-1570, other findings contained in the reported stated:

Indicator 5.1: The district board of education shall develop and implement a five-year comprehensive maintenance plan.

Findings: . . . in 1990-91 the plan identified the proposed expenditure of \$23,805,000; however, in addition to the maintenance account only \$2,608,876 was expended from the capital projects fund. Additionally, in 1991-92 the plan proposed the expenditure of \$21,457,000; however, the actual expenditure in addition to the maintenance account was \$3,037,554 from the capital outlay account and \$6,280,999 from the capital projects fund . . . The 1991-92 annual audit reflects an unexpended authorization of \$112,672,530 in capital projects fund.”
Bates number 1528.

Indicator 5.2: The district shall perform an annual inspection of buildings to insure adherence to health and safety laws.

Findings: Since the district was unable to provide current documentation of the required annual report of the local fire official, seventy-five of the seventy-six (99%) schools were rated non-compliant with this item. The only building rated compliant was the New Jersey Regional Day School . . .
“ . Bates number 1530.

“Twenty-three schools (30%) did not have current health certificates verifying the annual inspection of kitchens and/or cafeterias. . . Eight schools (11%) were not compliant with the annual inspections of boilers.”
Bates number 1531.

“Lavatories must be provided with soap, paper tissue, and paper towels for sanitary purposes.” Bates number 1535.

Indicator 5.3: The district board of education shall approve and implement a plan to upgrade or eliminate all substandard classrooms pursuant to law and rule.

"Findings: A review of the written documentation indicated the district has no substandard instructional areas approved for use in 1992-93. Of the 76 schools visited by the monitoring team, 65 schools were identified as using unapproved substandard instructional areas. The number of substandard areas exceeded 240 locations with many locations housing multiple substandard instructional settings." Bates number 1536.

13. Pursuant to *N.J.S.A. 18A:7A-14c*, an external review team was then appointed to conduct the Level III monitoring. Co-chairing the team were Floretta Dukes McKenzie, former Superintendent of Schools, Washington, D.C., and William H. Tremayne, Senior Vice President, The Prudential Company. From December 1992 to March 1993 the team examined all aspects of the District's operations including a review of all areas in which indicators were determined to be unacceptable after the Level II monitoring.

14. On April 16, 1993, the External Review Team issued its report to the Commissioner (Bates numbers 1589-1798) identifying those conditions which continued to prevent the District from achieving certification. The introduction to the report states in pertinent part:

"For almost a decade, the Newark School District has failed to receive acceptable marks on a number of indicators needed to meet New Jersey certification standards. In large measure, those standards are a gauge, a measure of a school district's capacity to provide students with effective educational programs. . .

“ . . . The conditions of many of the facilities are decaying, not unlike many neighborhoods which exude evidence of urban decay . . .

“ But outside factors cannot entirely account for the condition of public education in Newark. The district's plight should have been a call to decisive, creative action, . . . What the situation cried out for was “excellence,” to re-energize a system and city sapped by years of indifference. Instead, the “outcry” over Newark's plight was slow and muted. As the Newark system struggles under the cumulative weight of poor performance on the part of many students, neglected buildings, charges of mismanagement, nepotism, cronyism, and rampant political interference, a sense of resignation prevails . . .

“ The Board and the Administration seem like ships passing in the night. Each leaves a wake that has minimal influence on what the other does . . . There seems to be no sense of teamwork and unity of purpose.” Bates number 1598-1603.

15. Although the District prepared a “discrepancy analysis” in response to this report, it never formally protested or otherwise exercised its right to appeal its findings as provided by *N.J.S.A. 18A:7A-14c(3)*.
16. On May 13, 1993, following a review of the Level III External Review Report, the Commissioner determined that conditions persisted within the school district which seemed to preclude successful implementation of a corrective action plan and by written notice to the District pursuant to *N.J.S.A. 18A:7A-14c(4)* the Commissioner initiated a Comprehensive Compliance Investigation (“CCI”).
17. The CCI was conducted under the overall direction of an Assistant Commissioner. Initially, a core team of Department of Education staff was assigned to the investigation as generalists for the purpose of discerning

the underlying causes for the District's continued failure to provide students with a thorough and efficient system of education. Staff members from throughout the Department grouped into teams for the purpose of performing a thorough and detailed examination of the District's educational programs, management practices, and fiscal activities.

18. The CCI also included investigations by two respected outside consulting firms under contract to the Department, Towers Perrin, a firm with extensive experience in the analysis of governance, management, and the organizational structure of educational institutions, and Arthur Andersen and Company which conducted an investigation of selected fiscal practices of the District.
19. As a result of the CCI, and pursuant to *N.J.S.A. 18A:7A-14e*, a five volume report (the "CCI Report") was prepared and issued in July 1994. Among the findings contained in the CCI Report were, "Numerous deficiencies and irregularities in the governance and management operations, educational programs, and fiscal practices of the District" which the CCI Report concluded, "prevented the District from providing a thorough and efficient system of education for the children residing within the District."
20. An "Executive Summary of Findings" set out at the beginning of Volume I of the CCI Report synthesizes the results found by the core team. Those Findings were as follows:

"The Newark School District, with approximately 48,000 students in 1993-94, is the largest in the State. Its average per pupil cost of \$10,700 in 1992-93, the latest year for which statewide per pupil costs have been analyzed, places it well above the statewide average, in the top ten percent of all New Jersey districts. It is also the largest of the State's 30 "Special Needs" districts, which is the designated term for a district which includes a very high percentage of children from low-income families. The overwhelming majority of Newark's students also belong to racial and ethnic minority groups. Sixty-three percent are African-American; twenty

seven percent are Hispanic; approximately nine percent are white; and one percent are Asian or other racial-ethnic category. Already at risk of school failure because of economic disadvantage, children in the Newark public schools are placed at greater risk by school district personnel who fail to provide them with the opportunity to achieve academically in a safe, healthful environment.

"The Newark School District has been at best flagrantly delinquent and at worst deceptive in discharging its obligations to the children enrolled in the public schools. The numerous deficiencies found throughout the district are the result of the Newark Board of Education's failure to meet its governance responsibilities and the Executive Superintendent's failure to lead and manage effectively.

"Although individuals on the Board acknowledge that "Things aren't working," and that "Major changes are needed," the Board, as a body, has been unable to summon either the sense of urgency or the willingness to take decisive action necessary for change to occur. This complacency in the face of massive and increasing challenges is reflected at every level of the organization. The Board has also failed to hold the Executive Superintendent accountable for achieving necessary improvements in the district's performance, despite clear evidence that current leadership and management approaches are inadequate.

"Although formal governance processes are generally in place and the Board formally approves all major plans and administrative decisions, its involvement in strategic planning and other important affairs of the district is superficial. The Board is unengaged with and cannot define critical challenges facing the district; therefore, they are unable to respond appropriately to the urgent need to correct deficiencies. Board members are unfamiliar with the contents of the strategic plan they approved five years ago, unfamiliar with the details of their own budget, unfamiliar with objective data regarding the District's performance, and unfamiliar and uninvolved with fundamental strategic issues in curriculum, instruction, human resources and accountability.

"When the Board does pay close attention to an issue, its focus is often misguided. Faced with a recent cutback in external funding for the Chapter I remedial program, for example, the Board concerned itself primarily with staff assignments and job security rather than with the impact on children's learning.

"The Board's committee structure has been ineffectual and even counterproductive in dealing with key issues. Examinations of Board committee minutes showed few discussions of anything other than the merits of individual cases or proposals. The primary function of the committees has been to limit discussion and promote faster movement through the agenda at meetings of the full Board.

"Also strongly deficient in the Board's style of governance is its failure to support or promote parental involvement at the school level, despite general knowledge of the importance of such involvement to school environments and student learning.

"Clearly, the current governance, leadership and management of the district are inadequate to achieve major improvements in student performance. The need to make such improvements is crucial. Even judging by the narrow standard of achievement test results, evidence shows that the longer children remain in the Newark public schools, the less likely they are to succeed academically.

"The percentage of children meeting State minimum achievement levels on standardized tests of basic skills is lower at grade six than at grade three. While this pattern is evident throughout the State, the differential between grades three and six is greater in Newark than in any other New Jersey school district. By the eighth grade, the performance of Newark's students on New Jersey's Early Warning Test in reading, writing and mathematics should alert school officials to the urgency of the need for improvement, yet results on the State's grade eleven High School Proficiency Test (HSPT11) in the same subjects are alarmingly low. As a consequence, the majority of youngsters who remain in Newark's schools through twelfth grade are in danger of leaving high school without diplomas.

"In 1992-93, average daily student attendance was approximately 90 percent, according to the district's report to the NJDOE. This figure was one of the lowest reported attendance rates of any district in the State. The actual rate may be even lower. CCI site visits uncovered numerous examples of careless or non-existent attendance reporting, discrepancies in reported and filed copies of attendance data, and overaccounting of enrolled and attending students. Overstated enrollments in four high schools, for example, resulted in a potential State aid reduction of nearly two million dollars.

"The investigation uncovered further examples of neglect, mismanagement, and misrepresentation at almost every turn.

"Staff records are maintained carelessly. Employees sign-in sheets receive little oversight by building principals, and some staff sign in and out at the same time. Names remain on payroll lists after individuals have transferred to other schools.

"School buildings are filthy and in disrepair, despite the presence of numerous maintenance personnel. Fire and safety precautions are ignored. Lavatories lack toilet paper, soap, and paper towels; in many

schools, it is difficult to find a drinking fountain that works. School cafeterias, although well staffed, often do not provide the size of portions or the nutritional components described in their published menus. School libraries lack enough appropriate materials to support even a modestly challenging curriculum for mainstream students and virtually no native-language materials for bilingual/ESL students.

"A long-standing deficiency still evident in many school is the lack of sufficient, appropriate instructional materials, equipment and supplies in classrooms. Ordering and delivery processes and operations are not structured to provide timely services to schools.

"Classrooms, for the most part, are dirty and ill-equipped, and instruction is unchallenging and often misdirected or inappropriate. Few instances were found in any classroom, regardless of the subject or grade level, of children being encouraged to generate their own ideas, to collaborate in problem-solving activities, to write in class, to read widely and independently or to use skills and facts in context. Science laboratories lack basic equipment and show no evidence or recent use. Little science instruction takes place below the seventh grade; where science teaching does occur, students are rarely given "hands-on" experience.

"A number of teachers and other professional staff members are uncertified or inappropriately certified for their current assignments; some were observed to lack an understanding of the subjects they were teaching and to give misinformation for children to copy into their notebooks.

Services to special education, bilingual education, vocational education, and Chapter I program students are notably deficient and violate state and federal requirements. These programs are planned and directed from the district central office, with little input from parents, principals or teachers.

"The special education program in the Newark School District abuses the rights of parents and children by flagrantly violating state and federal mandates. The District receives nearly three million dollars in federal I.D.E.A. special education funding, but its commitment to the needs of children with disabilities is marked by misrepresentation, mismanagement and misuse of funds. Pupils have been overcounted in the application of federal funds; funds have been forfeited while preschool children and others with disabilities were denied services; and funds intended for special education have been used for general education. Parents' rights to information and input are routinely violated, and the District fails to evaluate pupils with disabilities properly and in a timely manner. As a consequence, educational programs for individual children are developed without essential information about the children's status and needs.

"Most disturbing in the blatant segregation of special education students. Pupils with disabilities are instructed in separate school buildings, according to their disability classification, rather than in integrated settings in their neighborhood schools as required by federal and state law. This same violation was cited in a 1987 investigation by the federal Office of Civil Rights. The district's practices regarding these "least restrictive environment" mandates are, at best, 20 years behind the times.

"The bilingual education program, which is supposed to parallel the regular program of the school, cannot do so because native-language materials and bilingual/ESL curricula are not available. No bilingual or ESL instruction strand is included in the program of the district's Staff Development School. The district has also ignored State mandates regarding entry and exit criteria, as well as the grouping of children with different language backgrounds in the same class when there are enough children to form a separate bilingual class in English and one native language. Bilingual and ESL classes in many of the schools are relegated to basements or other sub-standard spaces in the buildings.

"Vocational education deficiencies that have existed for years are still in evidence, despite infusions of funds and the availability of technical assistance. With the full knowledge that a high percentage of students in the district do not go on to college and that many who do go to college do not finish, the district has continued to function as if this fact were not true. Programs that exist are of poor quality and do not contain mandated components. Students with disabilities are deprived of meaningful, appropriate participation and of the support and resources they require. Shops and laboratories are obsolete and in disrepair. Students and staff are exposed to numerous safety and health hazards, which could result in injury or serious illness.

"The Chapter I program, as observed, is not being implemented as described in the District's approved application for funds. Some staff members are uncertified; some do not teach for the amount of time approved in the District's application. Schoolwide Projects and Program Improvement Projects are not being implemented as described. Individual student improvement plans, required to guide instruction, are riddled with errors in the recording of achievement data. Also found in the Chapter I program were ineligible students served with Chapter I funds on more than the incidental basis allowed by federal guidelines, and unexpended capital expense and program improvement funds that must be returned to the State.

"Investigators were shocked by the careless delivery of health services in the schools. Required screenings and examinations are performed inconsistently and recorded with extreme and potentially harmful carelessness. Medicines and dangerous chemicals are in unlocked storage areas, accessible to children. No district policy exists to ensure that adrenaline is on hand in case of adverse reactions to the substance

injected during tuberculosis testing. The district requires parents to sign a blanket form, offered in English only, allowing district personnel to perform "any ... procedures [it] deems necessary for the child's [well] being," throughout the child's school life.

"Pupil transportation is hazardous, largely due to the District's failure to provide oversight to contractors providing the services. Children are riding in school buses that are operated by improperly licensed drivers, that lack the proper safety equipment and that have not been properly inspected. Many safety violations occurred in the presence of CCI site visitors, such as buses left unattended with children on board and children allowed to run freely in the area, without adult supervision, while buses were arriving, departing and backing up.

"The food service program, essential to the maintenance of adequate nutrition in a district where thousands of children are eligible for free and reduced-price lunches, is not properly monitored by district administrators. The CCI Team found numerous violations of State and federal regulations designed to ensure the quality and integrity of the program. Meal count figures are changed to correspond to applications on file; meals for which the district claims reimbursement from the State lack required nutritional components or portion sizes; a system for collecting money from children who are supposed to pay full or reduced prices for their meals is not in evidence; current food inventories are not maintained; and items planned and shown on the menu are frequently not offered for sale.

"The school buildings themselves are unsafe. Codes established to protect the health, safety, and welfare of individuals are routinely violated. Unapproved construction was observed throughout the investigation. The district allows renovation and remodeling to take place without submitted for approval the educational specifications or construction documents to the Bureau of Facility Planning. Requirements of both the Administrative Code, Title 6, Chapter 22, and the Uniform Construction Code (UCC) are ignored. The district also consistently fails to apply for Certificates of Occupancy.

"The CCI Team found two worlds during its investigation of the Newark School District: the world of the schools themselves, with misdirected instruction, badly neglected buildings, inefficient practices, and inequitable distribution of even the most basic resources; and the world of comfortable offices and important-sounding titles in the District central office, detached from the everyday reality of the schools. The activities that take place in the District central office accomplish little of value and drain needed resources from students.

"Uncovered in the District were conflicts of interest, falsification of reports, willful violation of New Jersey's election and bidding laws, misused and mismanaged federal, local and state monies, mismanaged personnel

matters, loose control over cash, a significant backlog of uncompleted capital improvement projects, and many other irregular and deficient practices.

"Examples of such practices include the continued leasing of an unsafe, rat-infested, converted factory building for use as a school, although inspection reports dating back to 1973 urge that the building be vacated. Two employees of the Newark Board of Education receive remuneration through a conduit relationship for the rental of the building. The annual rent is in excess of \$175,000. The Board also leases, at \$18,000 annually, space in a hangar at Newark Airport and pays a full-time coordinator \$54,000 annually for an "aerospace project" in which little activity is evident.

"The CCI Team also learned that prospective vendors to the Board of Education are strongly pressured to contribute \$1000 or more to an "Executive Superintendent's Scholarship Fund," with the understanding that without such contribution they will not do business with the Board of Education.

"Investigation of the District's routine fiscal management uncovered many other practices with the potential for fraud and abuse. Among these practices were the Board of Education's failure to monitor uninvested balances and inactive bank accounts; the failure to prepare reports and account reconciliations on a timely basis; the failure to stamp and log in checks when received; the securing of blank checks and signature plates in the same location; and differences between the bank's and the District's records of authorized signatures.

"Numerous plans to improve district performance have been developed over the years, but what is lacking above all in the Newark School District is an effective, integrated improvement strategy and the corresponding will and ability to make it happen.

"In the spring of 1994, CCI investigators were told by the Board, the Executive Superintendent and senior staff that the district's new strategic planning process would pave the way for systemic change. Interviews with these district leaders, however, revealed the same lack of vision and confusion about direction that have characterized district leadership in the past. The planning they described in November 1993, with one particular consultant and model of school reform, had changed by March 1994 to a different consultant, planning assistance from outside organizations, a different set of identified needs and a different model for change.

"District leaders are floundering. It is clear that the pressure of a strong state presence, the investigation itself and the imminence of a decision regarding action after the conclusion of the CCI have precipitated a last-minute search for solution to problems that the Newark Board of Education and senior administrators have failed to acknowledge, let alone

confront, for years. It is highly unlikely, however, that such "eleventh hour" remedies, applied by the same leaders, will be able to bring about the major change needed if the students in Newark's public schools are to receive the educational services they deserve.

"Recommendation

Over the last decade, the Newark School District has failed repeatedly to achieve State Board of Education certification. The conditions which have precluded the district, and continue to preclude the district from implementing a corrective action plan to achieve certification, include severe governance deficiencies on the part of the Board and inadequate leadership and management by district administrators. The combination of these severe governance and management deficiencies translates into failures in the schools and in the classrooms. The multitude of plans for improvement which have been developed at the district's central office have not resulted in either corrections of the district's deficiencies or substantive changes in the education of Newark's students. The Board's lack of urgency to correct the district's many deficiencies is demonstrated in its failure to hold Executive Superintendent strictly accountable for achieving necessary improvements in the district's performance. coupled with the Board's failure to hold the district's chief administrator accountable is the lack of an effective, integrated strategy for instructional change on the part of the district's management.

Based upon the findings and conclusions of the CCI, the Newark Board of Education has failed or has been unable to take corrective actions necessary to establish a thorough and efficient system of education. In order to achieve the constitutional mandate of providing a thorough and efficient system of education for the children in Newark, the State must withdraw its delegation of that important responsibility to the Newark Board of Education. Accordingly, the assistant commissioner for the Division of Field Services recommends the creation of a State-operated school district in the City of Newark." Bates numbers 0009 to 0016.

21. Thereafter, following his review of the CCI Report, petitioner determined as a result of: (1) the District's failure to be certified for a decade; (2) the consistently poor performance of District students on standardized tests; and (3) numerous other deficiencies uncovered by the CCI and identified in the CCI Report, that a Verified Petition for Administrative Order and Order to Show Cause should be filed pursuant to *N.J.S.A. 18A:7A-14e* seeking judgment against respondent and requesting the Commissioner of Education to recommend pursuant to *N.J.S.A. 18A:7A-15* that the State

Board of Education issue an Administrative Order that the District become a State-operated school district. See, Certification of Peter B. Contini, Feb. 6, 1995 (Pa1-Pa4).

22. During the course of the CCI members of the team took photographs of various interior and exterior conditions at the schools and other District facilities, all of which depicted the deteriorated state of the properties (Pa752 to Pa819). They also video taped various interior and exterior sites at the schools and at other facilities visited within the District, all of which depicted unclean and/or unsafe conditions (Pa752-Pa820).
23. Newark has approximately 48,000 students and 4,200 teachers and is the largest school district in the State of New Jersey. It is also the largest "special needs" school district in the State as defined in the Quality Education Act of 1990, *N.J.S.A. 18A:7D-3*. As such, it also has the largest annual budget of any school district in the State -- approximately \$525 million for the school year 1993-1994.
24. In 1991-1992, Newark spent \$9,150 per student; in 1992-1993, it spent \$10,700 per student. In 1991-1992 and 1992-1993, the average expenditure per student, for the State as a whole, including Newark, was \$7,884 and \$8,571, respectively. Bates numbers 1605; 1109.
25. In 1991-1992, Newark's ratio of students per administrator was 103, the lowest such ratio of all the special needs districts. The average ratio of students per administrator for special needs districts in 1991-1992 was 157.9. In 1992-1993, Newark's ratio rose to 163.9 per administrator, the third lowest of all the special needs districts. The average ratio of students per administrator for special needs districts was 273.1 in 1992-1993. Bates number 1110.

26. In 1991-1992, Newark ratio of 14.3 students per non-certified employer was the lowest ratio of all special needs districts. The average for the special needs district was 26.8. Bates number 1611. Hence, Newark had less students per non-certified employee than any other special needs district in the State.
27. *N.J.S.A. 18A:12-24* prohibits a school official from "us[ing] his official position to secure ... employment for himself, members of his immediate family or others,". Nevertheless, many Newark Board members, as well as key District employees, have many family members who are employed by the District (Pa747; Pa750-Pa751; Ra45-Ra48).
28. Each Board member has at least one relative on this District's payroll, most of whom were appointed after these members were first elected to the Board (Pa747; Ra45-Ra48).
29. Executive Superintendent, Eugene Campbell has ten relatives on the District's payroll (Pa749; Ra46), eight of whom were hired after he was appointed to the position of Executive Superintendent on November 28, 1984 (Pa853).
30. Daniel Gutmore was appointed Assistant Executive Superintendent on February 16, 1988. His cousin was hired on September 6, 1989 (Pa858).
31. Two relatives of Eugene Foti, Deputy Executive Superintendent, were hired after he was appointed to that position. on November 28, 1984 (Pa858).

32. The following Board members had relatives hired by the District after their date of election (Pa859-Pa860)⁹:

<u>Board Member</u>	<u>Date of Election</u>	<u>Dates of Relative's Hire</u>
Eleanor George	1981	09/08/92
Charles A. Bell	1970	09/01/71 10/17/83 03/14/88
Guillermina Cruz	1991	05/18/92 05/02/94 10/28/94
Kim Thompson-Gaddy	1992	07/06/93
Evelyn Williams	1985	04/22/86 10/05/87

33. In a memorandum dated August 26, 1991, Executive Superintendent Campbell set forth the library budgets for Newark's high school libraries for each school year from 1987-1988 through 1991-1992 as follows (Pa880-Pa881):

<u>School</u>	<u>1991-92</u>	<u>1990-91</u>	<u>1989-90</u>	<u>1988-89</u>	<u>1987-88</u>
Barringer	\$ 6,000	6,000	6,000	3,000	1,000
Central	4,000	4,000	4,000	3,500	7,000
East Side	8,950	10,250	8,650	8,650	8,275
Science	1,000	1,000	1,000	850	1,000
Shabazz	5,000	5,000	6,000	1,000	5,000
University	1,500	1,500	1,440	1,000	1,000
Weequahic	4,000	4,000	4,000	3,000	8,000
West Side	<u>3,000</u>	<u>4,000</u>	<u>4,000</u>	<u>3,800</u>	<u>2,300</u>
	\$33,450	\$35,750	\$35,090	\$24,800	\$33,575

34. In a memorandum dated September 10, 1990 from Joyce Burt, Chief Clerk (Pa882), to Virginia Haskins DeVane, Executive Director, Ms. Burt

⁹ I have deleted the names of the relatives for privacy purposes. They do appear in the petitioner's proposed Findings of Fact. Also, purposefully I have made Findings of Fact *vis-à-vis* relatives even though my decision is not based on this situation since petitioner may wish to "except" to my decision and ask that this data be considered in connection with the review of my initial decision.

listed Board member expenses for dues, travel, meals, fees, etc., for the 14-month period from July 1, 1989 to August 31, 1990 as follows:

Ivette Alfonso	\$ 4,719.21
Charles A. Bell	11,673.18
Mary Darden	6,658.57
Eleanor George	4,602.57
William A. Good	5,744.52
Dennis LaScala	5,498.17
John Mavilla	11,580.82
Rev. Simmons	4,235.06
Evelyn Williams	14,362.54
Louis Turco (to 5/1/90)	<u>8,337.54</u>
	\$ 77,412.18

This amount was \$40,000 to \$50,000 more than was budgeted for each of the five school years referred in Paragraph 33.

35. In October and November 1992 the District conducted a "needs audit" to assess the status of school supplies in the classrooms (Pa892-Pa922). The needs illustrated that even after two months into the year schools had inadequate supplies, or the budget with which to purchase supplies. For example, the submission made by the principal of the Alexander Street School, dated October 22, 1992 demonstrates:

"NEEDS Third grade reading books, workbooks. Teacher['] kit for reading. Math books, workbooks, teacher['] kit, Language arts book and workbooks/ Spelling book and workbooks. About 35 books on each level, for reading, math language arts. Art books for all the grades about 30 books for each grade and teacher['] edition for each grade, 1st to 5th and teacher[']s edition for each grade 1st to 5th.

"RATIONALE We started a new 3rd grade class this year because of the high enrollment of students in that grade. Art. Music books are due to the fact that there isn't enough money in the budget for the books (Pa893).

36. The submission for the Arlington Avenue School, dated October 22, 1992 provides:

"NEEDS

1. Reading Level -> (10) Workbooks

...

3. 90 Spelling book[s] ... Grade 5

(Pa894)."

37. The submission for the Roberto Clemente School indicates that:

"NEEDS Ginn English Workbooks K = 50; 1st = 125, 2nd = 125; 3rd = 75; and 4th = 50. Science textbooks K = 200 Science Workbooks, K = 200; 1st = 50; 2nd = 50; 3rd = 30; 4th = 30 ..."
(Pa986).

38. The rationale of the principal of Belmont Runyon School underlying his request for supplies is that, "this school budget does not adequately supply the school with the necessary textwork and workbooks and supplies because it is based on enrollment" (Pa895). Similar comments were made by other principals. See Dayton Street School (Pa897), Bergen Street School (Pa 910), Broadway Elementary School (Pa913), Hawkins Street School (Pa919); and Miller Street School (Pa920).

39. Other rationales provided by school principals were: "Due to an extreme overcrowding situation we are in need of the above written supplies ... " First Avenue School (Pa899); "Furniture, equipment and instructional supplies for our new Prekindergarten and Kindergarten classes that were organized this school year have not been received." Branch Brook School (Pa912).

40. William Demetroulakos, Principal of the Dr. William Horton School commented:

"As you can see by the accompanying [sic] delivery sheets, numerous books were to have been delivered to this school and many books were delivered. Yet, many, many are no where to be found. ..."

There are entire grade levels without Math Workbooks or Reading Workbooks (Pa892).

41. Executive Superintendent Campbell's memorandum of August 26, 1991 indicates that at the time it was written, the American Library Association recommended 20 books per high school student (Pa880). His memorandum inventoried the number of books in the high school libraries as of that date as follows:

<u>School</u>	<u>Books</u>	<u>Books per Student</u>
Barringer	10,157	8
Central	9,650	10
East Side	16,401	8
Science	2,940	6
Shabazz	12,660	13
University	7,000	13
Weequahic	13,285	12
West Side	8,713	5

42. N.J.S.A. 18A:7C-6.2 requires that 8th grade students are to be administered the Early Warning Test in March. The 11th grade High School Proficiency Test ("HSPT11") is given twice each school year, October and April. The April administration of HSPT11 primarily is given to students who had not passed all sections of the test given in October.
43. Newark's daily student attendance for 1991-1992 was 90.5% (second lowest) and 89.7% in 1992-1993, the lowest of all special needs districts in the State. Bates number 1111. Newark had 3259 regular students enrolled in the 8th grade class that took the 1991 EWT, Spring 1991 Grade 8 Early Warning Test State Summary (Pa58B). Three years later, the same class had only 1,852 regular enrolled students in the 11th grade class that took the HSPT, October 1993 Grade 11 High School Proficiency Test State Summary (Pa22), resulting in a loss of 43.2%

44. The percentage of 11th grade students who passed all three test sections (reading, writing and math) of the HSPT11 test in October 1993 was less than 25%, second lowest of all special needs districts. (Pa22). When the results of the April 1994 test, which is taken primarily by students failing one or more sections of the October 1993 test, are included, only 42.4% of Newark's 1,852 11th graders enrolled as of October 1993 passed all three sections. April 1994 Grade 11 HSPT State Summary (Pa53). Of those Newark students re-taking any of the HSPT11 sections in April 1994, 41.9 passed reading; 43.7% passed math; and only 30.9% passed writing. Thus, of the 3,259 students who were enrolled as 8th graders in the 1990-1991 school year, only 438 (13.4%) remained and passed the HSPT11 in October 1993, and only 786 (24.1%) remained and passed the HSPT11 even after the April 1994 re-testing results are incorporated (Pa11; Pa22; Pa53). In other words, even though 3,259 8th graders were enrolled in Newark in 1990-1991, more than 75% failed the HSPT11 in 1993-1994.
45. As it relates to the 8th grade EWT, Level I refers to students making satisfactory progress toward mastery (clearly competent), Level II refers to students making marginal progress toward mastery (minimally competent), and Level III refers to students who make no satisfactory progress toward mastery (not competent).
46. Of 38 Newark schools whose 8th graders were tested in the March 1994 EWT, 20 of those schools (52.6%) had not even one of their 1,266 8th graders qualified for Level I in all three test sections, *i.e.* demonstrated clear competency in reading, writing and math (Pa58).
47. On the March 1994 EWT, the total of 38 schools with 8th graders, only four had more than 10% of its pupils qualify as clearly competent in all three sections. March 1994 Grade 8 EWT State Summary (Pa58).

- 48. In 1993, Newark's students' average scores on the Scholastic Aptitude Test (SAT) was 674, combined for verbal and math. The State average was 892 and the national average was 902. Bates number 1117.
- 49. In 1990-1991, only 50.9% of Newark's third grade students reached the State's minimum proficiency level for math; making Newark the lowest achieving district in the State.
- 50. In 1992-1993, Newark had only 62.4% of its third grade students reach the State's minimum proficiency level for math. For the 1992-1993 school year, Newark was the lowest achieving district in the State.
- 51. Across all 30 special needs districts, 656 students achieved Level I (clearly competent) scores on all three sections of the Early Warning Test in 1994, (Pa58, Table 3). Only 87 Newark students achieved Level I status on all three sections of an enrollment of 3,057 (2.8 percent). This figure is lower than the total figure for all the other special needs districts, which had 569 out of 13,110 students enrolled achieve Level I on all three sections of the test. These figures are expressed in matrix format as follows:

	Number Regular Grade 8 <u>Enrolled</u>	Number Achieving Level I on <u>All Tests</u>	Percent Achieving Level I on <u>All Tests</u>
Newark	3,057	87	2.8
Other Special Needs Dist.	13,110	569	4.3
Total Spec. Needs Dist.	16,167	656	4.1

52. Of all the 16,167 regular eighth grade students enrolled in 1994 in the special needs districts, including Newark, 5,714 (35.3 percent) achieved either Level I or Level II (minimally competent) on all three sections (Pa58; Table 2). However, Newark had only 939 (30.7 percent) achieve this status. In the special needs districts outside of Newark, 4,775 students (36.4 percent) achieved Level I or Level II on all three tests (Pa58; Table 2). This data is illustrated in matrix form as follows:

	<u>Number Regular Grade 8 Enrolled</u>	<u>Number Achieving Level I or Level II on All Tests</u>	<u>Percent Achieving Level I or Level II on All Tests</u>
Newark	3,057	939	30.7
Other Special Needs Dist.	13,110	4,775	36.4
Total Spec. Needs Dist.	16,167	5,714	35.3

53. Concerning three school districts that had a higher percentage of schools with eighth grade students that had no students in Level I on all three test sections than did Newark (Irvington, Trenton and Burlington City), one had five schools, one had four schools, and one had only one school, as compared to 38 schools in Newark. All together, the other three school districts had 1,103 students enrolled in these 10 schools (6.8 percent of the state special needs districts enrollment) ,as compared to the 1,266 students enrolled in the 20 Newark schools that had 0.0 percent of the students achieving Level I on all three test sections (7.8 percent of the state special needs enrollment). In other words, 163 more eighth grade students in Newark were enrolled in schools that did not produce a single student achieving Level I on all three tests than in the other three districts combined (Pa58, Summary Reports Section, pp. 2, 6-7, 8, 11).

54. Across the 29 special needs districts excluding Newark, a total of 36 of the 123 eighth-grade schools (29.3 percent) had 0.0 percent of the students achieve Level I in all three sections of the EWT. In Newark, in 20 of 38 of the eighth-grade schools (52.6 percent) not one student was able to achieve Level I status on all three sections of the EWT. Of all the schools in all the special needs districts with no eighth grades achieving Level I, 35.7 percent were in Newark even though Newark had only 23.6 percent of all the eighth-grade schools. Newark's percentage of schools with 0.0 percent of the students achieving Level I on all three sections of the EWT therefore is disproportionately high when compared to the combined performance of all other special needs districts.
55. The total enrollment of students in schools in special needs districts in which no students achieved Level I on all three sections of the test in 1994 was 4,336 (Pa58, Summary Reports Section, pp. 1-23). Of this enrollment, 29.2 percent consisted of students attending Newark schools even though Newark has only 18.9 percent of the special needs districts' total eighth-grade enrollment. Outside Newark, 3,070 students in special needs districts (23.4 percent of the enrollment) attended schools in which not one child achieved Level I on all three sections of the test. In Newark, this percentage was 41.4 percent.
56. Of all the schools with eighth grades in the 30 special needs districts 67 had one percent or less of the tested population achieving Level I on all three sections of the 1994 EWT (Pa58, Summary Reports Section, pp. 1-23). Twenty-three of these schools (34.3 percent) were in Newark. This difference far exceeds the statistical expectation of 18.9 percent, which represents Newark's percentage of the total eighth grade enrollment in the special needs districts.

57. Among all the special needs districts, a total of 23 schools had 10 percent of the tested population achieve Level I on all three test sections in 1994 (Pa58, Summary Reports Section, pp. 1-23). Of these schools, only four were in Newark.
58. The combination of the loss of students by 1993-94 who were enrolled as eighth-graders in Newark in 1990-91, and the low passing rate on the October 1993 HSPT11, means that the expectation of an eighth grader in Newark ever passing the HSPT11 is very low. Across all 30 special needs districts, 4,001 students passed all three sections of the eleventh grade HSPT in October 1993. Of these students, 438 were from Newark (Pa885). This number represents only 13.4 percent of Newark's total eighth grade enrollment as of 1990-91 (Pa58B, Summary Reports Section, p. 5). Among students enrolled in all the other special needs districts, 3,563 passed all three test sections. This number represents 28 percent of the original 1990-91 eighth grade regular enrollment of 12,729 (Pa841). Thus, the number of Newark students who were in eighth grade in 1990-91 and who ultimately passed the HSPT11 in 1993-94 was less than half, on a percentage basis, when compared to all other special needs districts in the state:

	Regular Grade 8 1990-91 <u>Enrolled</u>	Number Achieving HSPT11 Competency on All Tests in <u>October 1993</u>	Percent Achieving HSPT11 Competency on All Tests in <u>1993-94</u>
Newark	3,259	438	13.4
Other Special Needs Dist.	12,729	3,563	28.0
Total	15,988	4,001	25.0

59. Of the 30 special needs districts, Newark ranked second lowest in percentage of students meeting the minimum level of proficiency (MLP) in

third grade Reading in 1992-93 (75.9 percent) (Pa842), lowest in meeting the third grade MLP in Mathematics (62.4 percent) (Pa843), and was well below district monitoring standards in both (Pa841). Newark also ranked lowest in the percentage of students achieving the MLP in Language Arts (75.0 percent) (Pa844). Thus, in two of the three areas assessed Newark's performance was last; and in the third area, Newark's performance was second worst among the lowest scoring districts in the state.

60. In 1990-91 Newark had only 50.9 percent of its third grade students achieve the MLP in mathematics, resulting in Newark being the lowest ranking special needs district. The second-lowest scoring district was Trenton with 66.2 percent of its third grade students achieving the MLP in that subject (Pa842-Pa844).
61. Of the 30 special needs districts, Newark ranked third lowest in meeting the sixth grade MLP in Reading in 1992-93, second lowest in Mathematics, and fourth lowest in Language Arts. Relative to the other special needs districts, Newark's best sixth grade performance was in Language Arts. However, the number of students who failed to achieve the MLP in this area in Newark (952) exceeds the combined total of sixth grade students who took Language Arts tests in the three lower-achieving districts (Pa845-Pa847).
62. In a cover memorandum dated April 22, 1994, Executive Superintendent Campbell advised the Board that he would request that it adopt a strategic reform plan at the April 26, 1994 Board meeting, just four days hence (Pa631) The strategic plan was developed by an outside consultant, Dr. Robert Peterkin.¹⁰ (Pa634).

¹⁰ Dr. Peterkin's belated "corrected certification" was submitted quite late and was the subject of a cross-motion by petitioner to suppress. Since it is not sworn, the petitioner argued it should not be considered on this motion. However, I have considered it and it does not contain any data which would militate against the decision I have made.

63. Earlier, on March 7 and March 14, 1994, the Auditor General had requested information from the Board on the hiring of educational consultants (Pa537-Pa538). On May 18, 1994, about two months later, Alonzo Kittrels, Senior Executive Director, provided the Auditor General for the first time with the Request for Proposal ("RFP") for the support services for the strategic plan (Pa537-Pa538; Pa580-Pa597). The proposed Board resolution, if passed, would have committed approximately \$4.4 million to the consultants to implement the strategic plan (Pa539; Pa689).
64. On May 23, 1994, the Commissioner directed the District to defer action on the \$4.4 million resolution in order to allow the Auditor General to review fully the issues pertaining to the strategic plan (Pa539; Pa683).
65. By letter dated June 28, 1994, the Acting Auditor General informed the Board that it was not authorized to enter into contracts with consultants whom the District sought to use to implement the strategic plan because the District had failed to show that the contracts were to be awarded pursuant to the competitive bidding process required by the Public School Contracts Law, *N.J.S.A. 18A:18A-1 et seq.* (Pa540; Pa698-Pa700).
66. As of July 21, 1994, despite having received ongoing technical assistance from the Office of The Auditor General, the District still had failed or was unable to compile an RFP which met the requirements of the Public Schools Contracts Law, *N.J.S.A. 18A:18A-1, et seq.* (Pa541).¹¹

¹¹ The series of communications pertinent to the "RFP" activities between April 1994 and July 1994 may be found at Pa631 to Pa714.

CONCLUSIONS OF LAW

Accordingly, based upon the foregoing Discussion and Findings of Fact, and as a result of my review and consideration of the documentary materials submitted by both sides in connection with the petitioner's summary decision motion, I believe that the petitioner unquestionably has demonstrated that a State takeover of Newark's public school system would not be arbitrary, capricious, unreasonable or otherwise in violation of law. Indeed, given the mandate imposed by the New Jersey Constitution upon the State to see to it that a thorough and efficient system of free public education is delivered to all eligible public school students, I believe the State would be derelict in its duty if it did not take the proposed action.

Both sides have made reference to the language used by our Supreme Court in *Abbott by Abbott, v. Burke, supra*, wherein the court stressed that since it is the State's obligation to carry out the "thorough and efficient" mandate contained in the Constitution, it is the State which ultimately must to take whatever steps may be necessary to see that this result is accomplished. *Abbott by Abbott v. Burke*, 136 N.J. 444, 454-456 (1994). Thus, the State's decision to seek to take control of the public school system in Newark clearly was not the product of any whim or caprice. Rather, it was the culmination of at least ten years of examination, study and investigation of the many deficiencies that are rampant throughout the District and which compel State action pursuant to that constitutional mandate. More than thirty years ago the New Jersey Supreme Court observed with respect to *de facto* racial discrimination in Plainfield's public schools that curative measures to deal with that problem could not await progress toward curing other social ills involving housing, employment and other factors which bear upon the creation of racially imbalanced schools. See, *Booker v. Board of Education of Plainfield*, 45 N.J. 161,171 (1963). So too, in 1995 the State cannot continue to stand aside for another year, no less ten, while the school system in its largest city continues demonstrably to deteriorate. Certainly, the ills of urban society manifest themselves not only in our schools, but on our streets and in our homes as well. But the failure or inability of government to deal promptly or adequately

with those problems is no reason to refrain from undertaking legitimate efforts to move forward on the education front at least. There are no golden promises attached to a State takeover. It is not a panacea. Indeed, it may be that the State's efforts in Newark will not prove to be successful at all. That, however, is not the issue before me. Based upon essentially undisputed facts the school officials in Newark have failed their students and it is time for the State to step in for as the Supreme Court also observed in *Abbott by Abbott v. Burke, supra*, it is a given that students in special needs districts are not able fairly to compete and to function effectively as citizens in our society unless they have an enhanced opportunity for an education capable of and specially designed to give them that opportunity, *Abbott by Abbott v. Burke*, 136 N.J. at 454. Where students in special needs districts like Newark are shown as here to be suffering educationally, it is the State which must remedy that failing and delegation of any part of the obligation to the local school district does not dilute the State's responsibility at all. *Abbott by Abbot v. Burke*, 136 N.J. at 455. Thus, where the delegation of the educational function to the local school district demonstrably has proven to be inadequate the State is obliged step in, take over the educational functions and see to it that the services which the New Jersey Constitution commands are delivered. The public school children in Newark labor under heavy enough burdens of social and economic disadvantage. We should not add to those burdens by continuing to tolerate the severe inadequacies which have marked the local school district's "efforts", particularly in the past ten years where specific monitoring to identify those deficiencies and to analyze what appropriate corrective action must take place has occurred. As the Supreme Court in the "first" *Abbott* case observed, it is not just that the future of the 48,000 public school pupils in Newark depends on the actions of the State for, more importantly, "the State's future depends on them." *Abbott v. Burke*, 119 N.J. 287, 392 (1990).

Finally, I am not unaware that disposal of this case on motion in summary fashion has deprived the Board of the opportunity to put the State to its proofs on the witness stand, under oath, subject to the rigors of cross-examination. The Board, I suspect, therefore will criticize this summary decision as a "rush to judgment" in a sensitive area of intergovernmental relations. Nevertheless, if this is a "rush" I believe

it is warranted as the time for corrective action to attempt to interdict the many areas of concern identified in the proofs is fast slipping away. The State's determination in light of the proofs was anything but arbitrary, unreasonable or capricious. To the contrary, it was and is the only sensible course of action left if Newark's students are to receive the statutory and constitutional educational entitlements which are due to them.

Accordingly, for the reasons set forth herein, I **CONCLUDE** that: (1) The Office of Administrative Law has jurisdiction pursuant to the provisions of *N.J.S.A. 18A:7A-14e*, the Administrative Procedure Act, (*N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*), and implementing regulations, particularly *N.J.A.C. 1:1-12.5*, to entertain petitioner's motion for summary decision; (2) The petitioner's motion for summary decision should be granted as there are no material facts genuinely in dispute as to petitioner's determination as a matter of law that as of July 22, 1994 respondent failed to take or is unable to take the corrective actions necessary to establish a through and efficient system of public education for its 48,000 students. Thus, I **FURTHER CONCLUDE** that the petitioner's determination to take over the Newark public school system for the several reasons set forth in the Verified Petition for Administrative Order was neither arbitrary, unreasonable nor capricious and summary decision therefore is **GRANTED**.

ORDER

I herewith **ORDER** that the Commissioner of Education recommend pursuant to *N.J.S.A. 18A:7A-14*, *-15*, *-15.1* and *7A-34* that the State Board of Education: (1) issue an Administrative Order removing the District's Board and creating a State-operated school district; and (2) take such other steps pursuant to law as are necessary and appropriate to implement the same.

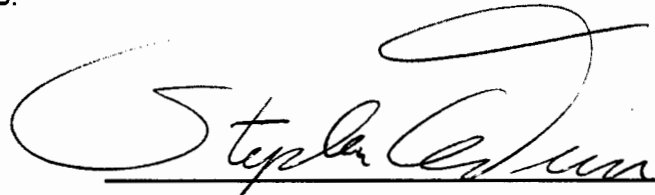
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

APRIL 13, 1995

DATE



STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

4/17/95

DATE

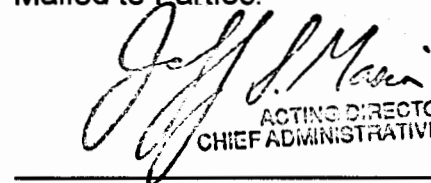


DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 17 1995

DATE


**ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**

OFFICE OF ADMINISTRATIVE LAW

mh

PETER B. CONTINI, ASSISTANT	:	
COMMISSIONER, DIVISION OF FIELD	:	
SERVICES, NEW JERSEY STATE	:	
DEPARTMENT OF EDUCATION,	:	
	:	COMMISSIONER OF EDUCATION
Petitioner,	:	
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE CITY	:	
OF NEWARK, ESSEX COUNTY,	:	
	:	
Respondent.	:	

The record in this matter and the Initial Decision of the Office of Administrative Law (OAL) granting summary decision to petitioner have been reviewed. Respondent's exceptions and petitioner's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4 inasmuch as the OAL indicated that the date of mailing was April 17, 1995, instead of April 13, 1995, the date on which the decision was actually released to the parties.

The Commissioner of Education is being asked to consider whether it is necessary to recommend that the State Board of Education issue an order creating a State-operated school district in order to uphold the constitutional mandate for providing a thorough and efficient system of education to children residing in a municipality of this State. As a preliminary matter, a review of my responsibilities and duties as Commissioner will assist in placing this case in the proper context.

STATUTORY AND CONSTITUTIONAL OBLIGATIONS

Any review of the record in this proceeding must be accomplished within the broader parameters of my statutory and constitutional obligations to the children of the State of New Jersey. Those children are constitutionally guaranteed a thorough and efficient system of education. N.J. Const., Art. VIII, sec. IV, par. 1. The State Constitution places the obligation of providing for such a system on the State Legislature, which, in turn, has established shared State and local responsibility for its fulfillment. Robinson v. Cahill, 69 N.J. 449 (1975) (Robinson V). The legislative scheme and Supreme Court decisions make it clear that the ultimate responsibility for that educational system is upon the State. “The responsibility for substantive education is squarely and completely committed to the State; delegation of any part of the educational function to school districts does not dilute that State responsibility at all....” Abbott by Abbott v. Burke, 136 N.J. 444, 455 (1994) (Abbott III).

As Commissioner of Education, I serve as a legislative agent with the obligation to assure that this constitutional promise is met. Robinson V, supra. at 461. The obstacles to meeting this responsibility in poor urban districts are well-documented, as is the compelling need to do so. Abbott v. Burke, 119 N.J. 287 (1990) (Abbott II). For, as recently noted by the Supreme Court, it is not just the “plight of these students, whose education and lives are at stake...also at stake is the future of the State and the rest of its citizens....” Abbott III at 456.

The Commissioner is statutorily and constitutionally responsible for implementing a monitoring system which is designed, ultimately, to correct deficiencies in failing school districts so that the constitutional guarantee is realized. N.J.S.A. 18A:7A-14. If throughout the various steps of the monitoring process, a local school board demonstrates an inability to correct the

identified deficiencies in that school district, the State eventually must rescind the delegation to that school board of any educational functions and directly assume the responsibility of correcting those deficiencies.

In the instant matter, I am faced with the question of whether the Newark Board of Education has failed or is unable to take the necessary steps to establish a thorough and efficient system of education, thereby requiring the State to rescind its delegation of authority to the Newark School Board and directly assume the constitutional obligation to establish such a system.

The Administrative Law Judge (ALJ) made sixty-six specific Findings of Fact which form the basis for his conclusion that summary decision should be granted to petitioner in this matter and that a State-operated school district should be created in the City of Newark. As a legal matter, he found that the OAL has the jurisdiction to entertain petitioner's Motion for Summary Decision. He also found that petitioner's Motion for Summary Decision should be granted because there are no material facts genuinely in dispute as to the determination that as of July 22, 1994, the Board had failed to take or was unable to take the corrective actions necessary to establish a thorough and efficient system of education for Newark's 48,000 students. Finally, he found that the decision to create a State-operated school district in the City of Newark was neither arbitrary, capricious nor unreasonable. Initial Decision at 57.

In its exceptions to the ALJ's decision the Board challenged both the appropriateness of entertaining a summary decision motion within the context of an action for the creation of a State-operated district and the majority of the Findings of Fact as not being based upon competent legal evidence. Before reaching the merits of the ALJ's recommendation regarding

the creation of a State-operated school district in the City of Newark, these two issues must be addressed.

APPROPRIATENESS OF SUMMARY DECISION

Based on the reference in N.J.S.A. 18A:7A-14 and 15 to a “plenary hearing,” respondent contends that the statutory scheme precludes the use of the procedural mechanism of summary decision in this matter.¹ However, as petitioner notes, the “plenary hearing” referenced is to be conducted in accordance with the Administrative Procedures Act (APA) and N.J.S.A. 18A:6-9; the APA and the school laws permit summary decisions in matters if material facts are not in dispute. See N.J.S.A. 52:14B-10(a) (“...Any party ... may present his case or defense by oral and documentary evidence, submit rebuttal evidence and conduct such cross-examination as may be required, in the discretion of the administrative law judge, for a full and true disclosure of the facts”); N.J.A.C. 1:1-12.5 (“...a party may move for summary decision upon all or any of the substantive issues...”); N.J.A.C. 6:24-1.10(b) (contested cases before the Commissioner shall be

¹ Respondent also argues that summary decision is inappropriate due to petitioner’s failure to provide discovery. Respondent alleges that it did not receive access to materials which underlie the comprehensive compliance investigation in a timely manner and that the Board has, therefore, been prevented from a meaningful opportunity to respond to the summary decision motion. However, respondent has not set forth any justifiable reasons for denying summary judgment based on the discovery issue. Respondent has submitted nothing which would support a conclusion that further discovery will provide respondent with any documents that would create material disputes of fact, especially since petitioner is not relying upon the non-statistical facts in the CCI report which these materials address. Respondent has had access to the requested material since January and has had copies of all the materials since March 23, 1995. Yet, in its exceptions in support of this argument, the Board identifies the same classroom observations set forth in its response brief as support for its argument. Mere requests for further discovery cannot defeat a motion for summary decision; rather, respondent has to demonstrate the possibility that further discovery will be productive in identifying material disputes of fact. Respondent has failed to make that demonstration here.

governed by the Uniform Administrative Procedure Rules of Practice, N.J.A.C. 1:1). Thus, the statutory language, read as a whole, clearly permits summary decision.

Moreover, to read the statute as a bar to summary decision would be inconsistent with the spirit of the law, as well as the constitutional promise it was designed to effectuate. “The primary rule for construing a statute is to read it so as to effectuate the probable purpose with which it was enacted.” Tozzo v. Universal Underwriters Ins. Co., 261 N.J. Super. 586, 589 (App. Div. 1993). The purpose of the statutes authorizing the creation of a State-operated district is to provide timely relief to children who are being victimized by intolerable educational circumstances. It would be inimical to the underlying statutory purpose to conduct a full trial in those instances where no material facts are in dispute. Such a procedure would exalt form over substance while delaying desperately needed relief for months or even years.² Nothing in the language of the statute requires such a meaningless exercise; to mandate such a process would be an injustice both to the children the statute was designed to protect and the constitutional guarantee the statute is implementing. Accordingly, I find that the policies and purpose of N.J.S.A. 18A:7A-14 and 15 are best effectuated by construing the right to a “plenary” hearing consistent with the provisions of the APA, thereby permitting summary decision where appropriate. See Cedar Cove, Inc. v. Stanzione, 122 N.J. 202, 213 (1991) (“...The construction that will best effectuate the statute’s ultimate objective is to be preferred.”)

The standards for granting summary decision are analogous to those governing summary judgment. Compare N.J.A.C. 1:1-12.5 with R. 4:46. Summary judgment is appropriate “...where

² It should be noted that almost ten months have already passed since the Order to Show Cause in this matter was signed.

the pleadings, depositions, answers to interrogatories and affidavits, if any, show that there are no genuine issues as to any material fact challenged and that the moving party is entitled to judgment as a matter of law.” Kopp, Inc. v. United Technologies, 223 N.J. Super. 548, 554-555 (App. Div. 1988). The purpose of summary judgment is “...to avoid trials which would serve no useful purpose and to afford deserving litigants immediate relief.” Id. at 555. The movant has the burden of excluding any doubt as to the existence of any genuine issue of material fact and “[t]he record presented must be considered in a light most favorable to the opponent of the motion....” Swarts v. Sherwin-Williams Co., 244 N.J. Super. 170, 178(App. Div. 1990).

However, once a movant has made out a “prima facie” right to summary judgment, the party opposing the motion must “show by competent evidential material that a genuine issue of material fact” exists. Ziemba v. Riverview Medical Center, 275 N.J. Super. 293, 301 (App. Div. 1994). Disputes as to facts which are irrelevant or immaterial will not bar summary judgment. Johnson v. City of Hackensack, 200 N.J. Super. 185, 189 (App. Div. 1985) (disputes as to the uses which plaintiff contended violated the restrictions in the grant were not material because those uses were not substantial enough to result in forfeiture). See also Ziemba, supra., 275 N.J. at 301 (“facts which are immaterial or of an insubstantial nature, a mere scintilla, ‘fanciful, frivolous, gauzy or merely suspicious’ [citation omitted] ” are not sufficient to preclude summary judgment); Swarts, supra., 244 N.J. Super. at 178 (opponent to summary judgment motion “cannot defeat the motion by raising a misguided subjective belief, without more, to create the existence of material... fact”). Moreover, disputes as to the conclusions to be drawn from the facts, as opposed to the facts themselves, will not defeat a motion for summary judgment. Lima & Sons, Inc. v. Borough of Ramsey, 269 N.J. Super. 469, 478 (App. Div. 1994) (“Where there is

only one reasonably justifiable conclusion to be made from the undisputed operative facts, a summary disposition is proper.”) Finally, the appropriate standard of proof is a relevant consideration in reviewing a motion for summary judgment. See Costello v. Ocean County Observer, 136 N.J. 594 (1994) (given the heightened standard of proof in defamation actions, plaintiff failed to produce the “substantial evidence” needed to survive a summary judgment motion); City of Newark v. New Jersey Turnpike Authority, 12 N.J. Super. 523, 530 (Ch. Div. 1951), aff’d 7 N.J. 377 (1951) (“contrariety of opinion” not enough to defeat summary judgment where non-movant required to show abuse of discretion).

In an intervention action, the statutory standard of proof is whether the proposed action is arbitrary, unreasonable or capricious. N.J.S.A. 18A:7A-14. Based on undisputed facts in the record, the ALJ found that petitioner met his burden of proving that the creation of a State-operated school district in the City of Newark meets this standard. The ALJ further found, based on that record, that the Newark school district had “failed to take or is unable to take the corrective actions necessary to provide a thorough and efficient system of public education....” Initial Decision at 57; N.J.S.A. 18A:7A-15.

In its exceptions to the Initial Decision, the Board asserts that the Findings of Fact are not based upon credible legal evidence and, therefore, cannot form the basis of the determination that petitioner has met his burden of showing that summary decision is proper in this matter. Specifically, the Board asserts that Findings of Fact #17-66 are erroneous because either there is no evidence in the record to support the finding or the evidence supporting the finding is based upon hearsay. Petitioner in his reply asserts that all of the evidence is legally admissible; in each instance he points to evidence in the record and a specific evidentiary rule supporting the finding.

Upon review of the record, the Initial Decision and the arguments of the parties, I find that each Finding of Fact is supported by credible admissible evidence either in affidavits, certifications or documentary form. See N.J.R.E. 803(c)(8)(public records, reports, and findings); N.J.R.E. 803(c)(6)(records of regularly conducted activity); N.J.R.E. 803(b)(statement by party-opponent). Consequently, for the reasons set forth in the Initial Decision as well as the additional reasons set forth below, I adopt the findings and conclusions of the ALJ and recommend that the State Board create a State-operated school district in the City of Newark.

ALJ'S FINDINGS OF FACTS

The Board asserts in its exceptions that material issues of fact remain to be decided by a trier of fact. However, simply stating that material issues of fact exist or that all non-statistical facts are disputed is not sufficient to defeat a motion for summary decision. Rather, respondent has an obligation to set forth the specific material facts that are in dispute supported by affidavits or certifications. The Board has failed to do so in this case.

In its exceptions, the Board does not specifically identify any material factual disputes.³ The "Disputed Findings of Fact" section in the exceptions merely questions the competency and authenticity of the evidence presented in support of the summary judgment motion. Yet, many of the facts found by the ALJ are supported by respondent's own certifications or affidavits. For example, respondent challenges Finding #22 which states that :

During the course of the CCI members of the team took photographs of various interior and exterior conditions at the schools and other District facilities, all of which depicted the deteriorated state of the properties (Pa752 to Pa819). They also video taped various interior and exterior sites at the schools and at other

³ Respondent does appear to contest the fact set forth in Finding #18 that Towers Perrin and Arthur Anderson are "respected" consulting firms. The characterization of those firms, however, is not a material issue in the present proceedings.

facilities visited within the District, all of which depicted unclean and/or unsafe conditions (Pa752-Pa820). [Initial Decision at 42.]

Petitioner submitted the certification of Thomas J. King in support of his motion; Mr. King identified these photographs and described the video tape. In response, the Board submitted the certification of William E. Belott, Senior Executive Director of Facilities Service Operations for the Newark School District. Mr. Belott's certification acknowledges, among other things, the graffiti, the locked exit doors, the drainage problem, the broken heating unit, the missing bathroom doors and the debris in the school yard. Further, respondent submitted photographs (unattached to any certification or affidavit) which purported to "update photographs of the alleged unsafe areas" showing that the "conditions were corrected." Respondent's Brief at 13.

Then, in its exceptions, the Board states that there is no evidence to support Finding #22, noting that "[t]here is no basis for concluding that the photographs actually depict any facility of respondent. The photographs have not been authenticated." Board's Exceptions at 26. However, respondent not only did not challenge the authenticity of these photographs and videotaped pictures through affidavits or certifications, but its own evidence submitted in response to the summary decision motion acknowledges the authenticity and accuracy of the photographic depictions.

Respondent also challenges Findings #27-32 regarding Board member's hiring by asserting that the record does not contain any evidence "that any school official used his position to secure employment for family members. Further, there is no evidence that any person hired is unqualified, unfit, incompetent or has performed below standard." Board's Exceptions at 26. However, none of the ALJ's findings reached those conclusions. Rather, Findings #27-32 simply

contain information regarding Board members and district employees that is confirmed in affidavits or certifications submitted on behalf of respondent.

Respondent's challenges to other Findings are similarly devoid of merit. Respondent asserts that it does not dispute the statistical evidence but then contests the Findings based on test scores as being unsupported by any evidence in the record. These "contested" test scores are not only established as competent evidence through the certification of Gerald E. DeMauro submitted on behalf of petitioner, but the scores are also accepted and relied upon in the certification of Steven Block submitted by respondent.

Respondent also contests Findings #33-37 which are based on respondent's own documents and further contests the Findings related to the Comprehensive Compliance Investigation (CCI). Some of the CCI-related findings are statistical evidence which respondent asserted were not being disputed or are simply indisputable background information. Findings #23-26. Other CCI-related Findings merely restate the purpose of a CCI, (Finding #17), what the Newark CCI concluded, (Findings #19 and 20), or the steps taken by the Department as a result of the Newark CCI (Finding #21). Background data on the district, as well as the purpose, content and consequences of the CCI, are not rationally subject to dispute nor, if disputed, would that dispute be material to the outcome of this case.

Finally, as noted above, respondent excepts to many of the Findings based on a claim that the evidence submitted to support the Finding is hearsay. Findings #38-66. The petitioner, however, has identified hearsay exceptions that apply to each and every factual finding challenged on that basis. Thus, even if hearsay were not permissible in OAL, competent evidence exists to support the ALJ's decision. See N.J.A.C. 1:1-15.5.

In light of this review, I am left with no alternative but to conclude that there are no genuine issues of fact left to be decided. Were there genuine issues of fact which would warrant a hearing, the Board was obligated to have raised them in opposition to the Motion for Summary Decision. Having failed to do so, it cannot now defeat the motion by unsupported and, at times, self-contradictory statements that they exist. The only real disputes identified by respondent are as to the conclusions to be drawn from the facts; that type of dispute does not preclude summary decision. See Ziema, supra. Consequently, in accordance with the determination of the ALJ, I find that summary decision is appropriate as there are no genuine issues of material fact remaining to be determined at a hearing. In so concluding, I now turn to the substantive issue of whether the facts warrant the grant of summary decision to petitioner.

DISTRICT CHARACTERISTICS

It is not genuinely disputed that the Newark school district is the largest school district in the State, far exceeding the enrollment of the second largest district, Jersey City. See Block Certification at 6. Newark has approximately 48,000 students, 4,200 teachers and is a special needs district which serves a very large number of disadvantaged students. Initial Decision at 42. In fact, given the large numbers of poor children served by this district, the task we face in that district is all the more critical. As opined by the Supreme Court in Abbott II, "...[c]ertainly the urban poor need more than education, but it is hard to believe that their isolation and society's division can be reversed without it. That part of the constitutional standard, then, requiring an education sufficient to enable students to assume their proper roles as citizens takes on new significance." Abbott II at 393.

Newark also has the largest annual budget of any school district in the State -- approximately \$525 million for the 1993-94 school year with per-pupil expenditures above the State average. In 1991-92, Newark spent \$9,150 per student, while the State average for that year was \$7,884. During this same year, Newark had the lowest ratio of students to administrators (103:1) and of students to non-certified employees (14.3:1). This is compared with the average for special needs districts in that year of 157.9:1 and 26.8:1 respectively. In 1992-93, Newark's per-pupil expenditure rose to \$10,700 per student, while the State average was \$8,571. During that year, its ratio of students to administrators rose to 163.9:1; the average ratio in special needs district that year was 273.1:1. Initial Decision at 42-43.

HISTORY OF MONITORING IN NEWARK

Despite its above-average expenditures, the record in this case shows the undeniable (and essentially undenied) decade of failure by the Newark Board of Education, responsible for educating the largest number of children in the State, to meet the State's minimum standards for certification as providing a thorough and efficient system of education.⁴

In 1984, the school district failed Level I of the monitoring process. The district failed seven out of ten elements and thirteen of fifty-one indicators. Initial Decision at 26. The district was directed to prepare a corrective action plan and, in March 1985, the district was authorized to proceed with its implementation. Initial Decision at 28. By March 1985, Eugene Campbell had been appointed Executive Superintendent. Pa 715.

⁴ Problems in the Newark school district can be identified well before the monitoring of the Newark school began in 1984. As early as 1975, in response to a report on the district, the Legislature established a unique governance structure for Newark which includes a State presence in the district through an auditor general. N.J.S.A. 18:17A-1 et seq.

Between August 1986 and February 1987, Level II monitoring was conducted and again the district failed to become certified. Although the district passed certain indicators that it had previously failed, it failed other indicators that it had passed in Level I. Overall, the district failed the same number of elements but more indicators in Level II monitoring. In Level II monitoring, the district failed sixteen of the fifty-one indicators. Initial Decision at 28. Although the district prepared a "discrepancy analysis", the Level II findings were not formally appealed. As a result of the findings in Level II monitoring, the district was directed into Level III. Initial Decision at 30.

In the Fall of 1992, a verification review team was sent to the district to conduct a preliminary assessment prior to Level III monitoring by the External Review Team. Initial Decision at 30; Gutmore certification. Again, the district prepared a "discrepancy analysis" of the findings. See attachment to Gutmore certification.

At the conclusion of the Level III monitoring, the district once more failed to attain certification. Another "discrepancy analysis" was prepared by the district. See attachment to Gutmore certification. No formal challenge was taken to the Level III findings. Initial Decision at 33.

In response to the External Team Report, the Commissioner ordered a CCI that found, in part, that children in Newark,

Already at risk of school failure because of economic disadvantage...are placed at greater risk by school district personnel who fail to provide them with the opportunity to achieve academically in a safe, healthful environment.

The Newark school district has been at best flagrantly delinquent and at worst deceptive in discharging its obligations to the children enrolled in the public schools." [Initial Decision at 35.]

The CCI findings ultimately led to the Order to Show Cause in this matter. Initial Decision at 41-42.

PUPIL PERFORMANCE

The Board's ability to provide its students with the skills necessary to meet State standards in Reading, Writing and Mathematics is a central focus of our inquiry. In addition to certain uncontested statistical data in the CCI report, petitioner has submitted statistical evidence regarding student performance in the Newark school district during the past few years; respondent has confirmed that statistical data through its own certification. Compare DeMauro and Block certifications. What this pupil performance data indicates is an utter failure by the Board to prepare its students to function as citizens and workers in society. Not only are the students failing to meet minimal State standards of performance, but they are doing so in staggeringly large degrees in both numbers and percentages. The students' test scores, alone, indicate a severe failure in educating the children in this district.⁵

As more extensively discussed in the Initial Decision, the Newark school district stands out among even the other special needs districts in its failure in pupil performance on the eleventh grade High School Proficiency Test (HSPT), the eighth grade Early Warning Test (EWT) and the third and sixth grade standardized tests. As articulated by the ALJ in his Initial Decision, the test scores of the district, demonstrate the complete failure, or the inability of the

⁵ Although test scores in the district have shown slight improvement in the past two years of intense state scrutiny, this similar occurrence took place in Jersey City "which had the highest or second highest increase in passing rates in the State" just prior to the institution of the State intervention action. As aptly stated in McCarroll v. Board of Education of the City of Jersey City, "while any improvement is laudable, the impressiveness of this accomplishment is tarnished by the low starting point for the calculations and by the distance that [the district] has to go." 1989 S.L.D. 2337, 2423.

district, to meet the levels established by the State as consistent with the provision of a thorough and efficient system of education. As aptly articulated by the ALJ:

[I]n October 1993, only one 11th grade student in four passed the reading, writing and mathematics sections of the HSPT. In April 1994 the test was administered primarily to students who had failed one or more sections in the Fall. Out of the 1852 11th graders enrolled in the Fall, slightly more than only 42% passed all three sections. More importantly in terms of overall impact, 438 students, or only 13.4% of the 8th grade student population in 1990-91, remained and passed the HSPT in October 1993, and 786 students, or only 24.1%, passed the October and April tests combined.... In short, the percentage of Newark students passing the HSPT in 1993-94 (including the retest) as 11th graders represented less than 25% of the class which had been 8th graders in 1990-91. That is a description of failure on a very large scale, and... most certainly is distressing to contemplate. [Initial Decision at 13. (emphasis in text)]

The Board submitted its own interpretation of the test data through the certification of Steven G. Block, Ph. D., Director of the Office of Accountability and Quality Assurance for the Newark Board of Education. In his certification, Dr. Block confirms the dismal results as shown on the test scores by arguing that although the district scores are among the lowest in the State, they are not the lowest. In other words, rather than challenge the accuracy of the test data, the Board contests the relative ranking of the district as compared to other special needs districts. In so arguing, the district clearly misperceives the nature of the present proceedings. The degree of the district's failure as it relates to other special needs districts, is not the relevant inquiry when determining the appropriateness of State intervention. Rather, the inquiry is whether this district has failed or is unable to take the corrective action necessary to provide children with the constitutionally mandated education. Here, the Newark school district's pupil performance data makes its failure incontrovertible.

In defense of the tragically low test scores and, in what may only be characterized as a disingenuous protest, Dr. Block asserts that:

Comparisons of special needs districts are of particular importance in this case because the State has characterized Newark test scores and achievement levels as “abysmally low.” Webster’s Ninth New Collegiate Dictionary defines “abysmal” as “immeasurably low or wretched.” Such characterization has no statistical validity since by definition “immeasurably low or wretched” has no quantifiable equivalent. [Block Certification attached to the Respondent’s opposition to the Motion for Summary Decision, par.5].

This assertion surely misses the point. While “abysmal” may have no statistical significance, the lack of achievement represented by these failing scores surely has great significance upon the lives of the students for whom this district is supposed to be providing an education. It cannot be legitimately contested that since monitoring of Newark began in 1984, the district has been unable to meet the minimum state standard for pupil performance on either the HSPT or the EWT. Further, scores on the third and sixth grade tests provide no indication that this will be remedied anytime soon. See Initial Decision at 52-53.

Not only are the test scores in the Newark school district reflective of an abject failure by the Board to provide a thorough and efficient system of education over the past decade, but the test scores are only part of the picture. Drop-out rates also support this conclusion. The certification of Shirley Grundy-Harris, Director of Guidance Services for the Newark Board of Education, confirms that “[a] large number of Newark elementary school’s eighth grade students do not attend their district high schools.” Certification of Shirley Grundy-Harris, par. 2. While she calculates the drop-out rates from between 8.2% to 9.7% for the past five years, she specifies that the Newark Guidance Office does not track eighth grade students to grade eleven. The drop-out picture established by another document submitted on behalf of the Board, however, paints a much bleaker picture. In the uncertified statement of Robert S. Peterkin, a Board consultant, the

“four year drop-out rate” was asserted to be a dramatically higher 35%.⁶ Combined with information on drop-out-rates, student test scores are even more disturbing. See Initial Decision at 47-48.

The undisputed data leave me with but one conclusion -- that the test scores alone in this district, without more, are sufficiently “abysmal” to require immediate State intervention. My constitutional responsibility as Commissioner of Education demands no less. Nevertheless, my recommendation in this matter is further supported by the Board’s failure to develop systematic solutions to problems in the area of school facilities so as to meet its affirmative obligation to provide clean and safe facilities for the children in its charge.

SCHOOL ENVIRONMENT

It is well recognized that an environment which is conducive to learning -- clean and safe facilities -- is an integral component of a thorough and efficient system of education. As the Supreme Court noted, “deficient facilities are conducive to a deficient education.” Abbott II at 363. Respondent’s contention notwithstanding, the record contains sufficient undisputed facts to justify only one reasonable conclusion -- the Board has been unable to systematically address the district’s facilities problems.

The photographs and video tape taken during the CCI, as identified in the certification of Thomas J. King, vividly depict schools with crumbling ceilings, warped floors, unlocked supply closets, overflowing sinks, inoperable toilets, exposed wires, and filthy grounds. Similar to the findings by the Level III verification team which were attached to a certification submitted on

⁶ As noted by the ALJ, Dr. Peterkin’s “certification” was not sworn, Although technically the statement is not competent evidence, the ALJ considered it as part of the record and I have done likewise. Initial Decision at 53

behalf of respondent, fire exits were locked and bathrooms had missing stall doors and lacked the most basic sanitary supplies such as soap, toilet paper and paper towels. See Certification of Daniel Gutmore, Newark Board of Education, Discrepancy Analysis of New Jersey State Department of Education, Verification of Data Findings (January 1993) at 6 (noting that all the listed items, except for limited handicapped accessibility, “have or are in the process of being addressed”). A particularly disturbing indication of an unaddressed systemic facilities problem is the picture of a toilet paper holder installed in the hallway; toilet paper was only available in the hall, not in the bathroom. Certification of Thomas J. King, par. 4(m).

While Mr. Belott, Senior Executive Director of Facilities Operations for the Newark School District, states that most of these problems were corrected, the very existence of these appalling conditions -- even for a relatively short time -- demonstrates the Board’s failure and inability to systematically address facilities issues that have been identified through the monitoring process. Further, some of the identified deficiencies appear to be the result of long-standing neglect rather than a temporary condition . See e.g. Certification of Thomas King, par. 4(a), (l), (r), (aa), (dd), (ee) and (nn); 5(c), (e) and (f). While these conditions may not be representative of all the schools in the district, their very existence is nonetheless alarming.⁷ The pictures depict filthy and dangerous conditions that are simply unacceptable in the public schools of the State, even if subsequently corrected. Based on the undisputed evidence in the record, it is clear that the Board has been unable to assure the children of Newark that the school facilities

⁷ A good example are the pictures identified by Mr. King as depicting a “pipe from waste drain being run through the cafeteria, across a supervisor’s desk , out the window, over a lawn, over the sidewalk and out into the street to drain the waste.” Certification of Thomas J. King, at par.(j). According to Mr. Belott, the repair and maintenance project creating this situation was completed “within five days.” Belott certification at para. 10. However, allowing this condition to exist at all is unconscionable.

they attend will provide “an environment in which children can learn; indeed, the safety of children in these schools is threatened.” Abbott II at 362.

BOARD MEMBER EXPENDITURES

The historic failure of the district to achieve certification through the monitoring process, the exceedingly low test scores of the students attending many of the schools in Newark and the Board’s inability to meet its affirmative obligation to ensure safe and clean facilities in the district lead me to conclude that the district has failed and is unable to take the corrective action necessary to provide a thorough and efficient education to its students. This failure, however, is made all the more troubling by the proofs submitted on behalf of petitioner and respondent regarding the expenditures by Board members for meals, trips, cars and flowers. Apparently, the district was aware of the need to devote more resources to such items as student materials and staff development. Certification of Daniel Gutmore, Newark Public Schools, Discrepancy Analysis of the Level III External Review at E76 (“As adequate funding becomes available from the State, the district will make every effort to provide increased materials/equipment necessary for learning”) and M40 (“The district based on availability of funds will provide more resources to staff development”). Yet, the Board members continued to expend substantial sums on themselves rather than redirecting those funds into the classrooms to directly address obvious problems in pupil performance and facilities.

In response to petitioner’s submissions regarding Board members’ expenditures, eight members of the Board submitted certifications which explained some of those expenditures. A review of the charges for meals by these Board members provide a clear example of the members’ misplaced priorities. Between March 1991 and June 1992, Board members Cruz,

Mavilla, Bell, Williams, Darden and LaScala individually charged more than 70 meals in restaurants to the school district. The certifications identify the “board related matters” discussed at these meetings. These included, but by no means were limited to:

- A meeting on December 17, 1991, “concerning payment of personnel who worked at the Polls for the School Board Election,” at a cost of \$157.80. Certification of Charles Bell, par. 19.
- A meeting with the Director of the Physical Education Department “on the Annual Golf Outing for the purpose of reviewing the schedule,” at a cost of \$36.45. Certification of Charles Bell, par. 14.
- A meeting with six parents and a community activist to discuss “improvements needed in the district’s Special Education program”, at a cost of \$237.90. Certification of Guillermina Cruz, par.5.
- A meeting with three “supervisors” to discuss the “district-wide elimination of the supervisor positions,” at a cost of \$102.70. Certification of John Mavilla, par. 5.
- A meeting with a “supervisor” to discuss “the creation of Central Office Supervisors”, at a cost of \$38.25. Certification of John Mavilla, par. 7.
- A meeting to discuss repairs of school facilities and Chapter II Block Grants with two principals and the Senior Executive Director of Facilities, at a cost of \$154.80. Certification of John Mavilla, par. 6.
- Three meetings to discuss concerns regarding overcrowded schools -- May 11, 1991, at a cost of \$167.50; January 31, 1992, at a cost of \$161.80; and April 26, 1992, at a cost of \$242.45. Certification of Dennis LaScala, pars. 4, 5 and 6.

- A meeting with two parents to discuss a “Parent and Teacher Meeting ...regarding bake sales and other activities that could involve parents” at a cost of \$52. Certification of Evelyn Williams, par. 4.
- A meeting with two homeowners to discuss the school “Budget and how it will affect their taxes,” at a cost of \$22. Certification of Evelyn Williams, par. 7.⁸

What is conspicuously absent from the Board members’ certifications is any reason why it was necessary to conduct these meetings, as well as more than sixty other meetings, at restaurants over meals paid for by the taxpayers.

The expenditures on meals for Board members combined with the other expenditures on their behalf for cars, flowers, lap-top computers, conferences and cellular phones may not appear large in comparison to the overall budget of the Newark school district. However, the comparisons drawn by petitioner between the Board members’ expenditures on themselves and the budgets for high school libraries place those expenditures in the proper perspective.

From July 1, 1989 to August 31, 1990, the district calculated Board members’ expenses as exceeding \$77,000. Initial Decision at 45. The Executive Superintendent identified the budgets for high school libraries in the district for the 1989-90 school year as approximately \$35,000. Initial Decision at 44. During the 1991-92 school year, the Board members spent \$4,493.75 on an inaugural reception; according to the memorandum by the Executive Superintendent, only three of the district’s eight high schools had library budgets for the entire year which exceeded the expenditure on that reception. Ibid. These comparisons are particularly

⁸ It should be noted that Ms. Williams’ certification does not acknowledge the fact that this meal, or the other twenty-nine meals she individually charged to the district, were in any way related to these homeowners’ concerns about taxes.

disturbing given the Executive Superintendent's inventory of the number of books in these libraries. According to his memorandum, as of August 26, 1991, not one of the district's high schools had the twenty books per student recommended by the American Library Association. Initial Decision at 47. In fact, only three out of eight high schools had more than 10 books per student. Ibid. Thus, a clearly identified unmet need existed in the libraries at the same time Board members were increasing expenditures on meals and flowers.⁹

Regardless of the Board members' motivation in expending substantial sums of money on flowers, cars, meals and conferences, I cannot ignore the fact that while the Board members were meeting with other Board members, district employees or community members over lunch and dinner, children in Newark were attending schools that were unsafe, unhealthy and underequipped. Given the students' extremely poor performance on standardized tests, Board members should have been aggressively and demonstrably focused on redirecting funds to support a concerted effort to improve student achievement, not expending resources on perquisites for Board members.

CONCLUSION

Based on the undisputed and indisputable facts in the record before me, I adopt the Findings of Fact and Conclusions of Law of the ALJ as my own, for the reasons articulated herein and I conclude, pursuant to N.J.S.A. 18A:7A-15, that the Board of Education of the City of Newark has failed to take or is unable to take the necessary corrective action to establish a thorough and efficient system of education for the students in that district. Given the district's

⁹ In 1991-92, the district spent \$4,493.75 on the inaugural reception while in 1992-93, the expenditure for this event was \$5,399.25. Pa110; Certification of Charles Bell. Flower expenditures in 1991-92 were \$424.53; that amount increased to \$823.00 in 1992-93. Pa 95-114, Pa133-147.

obvious and continued failure to meet its obligations, the State must now intervene and directly assume its fundamental responsibility to provide a thorough and efficient system of education. For too many years, that constitutionally guaranteed education has been denied too many students. Therefore, I am obligated by my constitutional responsibility and statutory authority to recommend the creation of a State-operated school district in the City of Newark.

Although the creation of a State-operated school district is often referred to as a “State takeover,” I find that term to be an unfortunate and inaccurate descriptor of the role the State must seek to play. State intervention does not and cannot mean the elimination of local involvement. Community participation and support, at both the district and school levels, is essential to any effort to correct problems in the district. Parents, as well as other citizens and leaders of a community, have legitimate interests in decisions that concern the education of the community’s children. The success of schools depends in no small measure on their willingness to solicit ideas and support from members of their communities, and to respond to the legitimate hopes and expectations of parents and other citizens.

A State-operated school district administration, like any other, can succeed only by uniting major segments of the community in support of a concerted attempt to improve the education of children. Therefore, State assumption of the governance and administration of a school district must be accomplished in conjunction with a significant effort to continually inform and involve the local community.

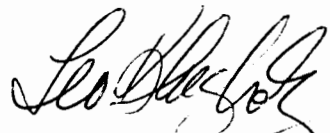
The children in Newark have been served by a failing school district for too long. It is our responsibility to these children to turn this failure into a success.

Success in a State-operated school district, or in any school district, is measured by the opportunities the schools provide to children and the results that those children achieve. The children of Newark deserve an opportunity, equal to that provided to children in other communities, to acquire the knowledge and skills they will need to flourish as citizens and workers in our society. They deserve a chance to pursue a curriculum that reflects high standards and holds forth high expectations for academic achievement. They deserve a chance to do so in safe, clean facilities that are conducive to learning. They deserve a chance to attend schools and classrooms that are adequately supplied and equipped to offer high-quality instruction in all subjects at all grade levels. Success, instead of failure, means approximately 48,000 children in Newark will have a chance to pursue their life's goals by participating to the fullest possible extent in our American society.

Finally, success in a State-operated school district can only be achieved if professionals in each school and classroom are free to provide students with the type of education they need. These professionals must be unequivocally supported in those efforts.

"After all the analyses are completed, we are still left with these students and their lives. They are not being educated. Our constitution says they must." Abbott II, supra. at 394. To meet our constitutional responsibility to the children of Newark, I am asking the State Board of Education to act expeditiously to create, through issuance of an administrative order, a State-operated school district in that city.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MAY 19, 1995
DATE OF MAILING MAY 19, 1995

EDU #701C-94
C # 162-95
SB # 64-95

PETER B. CONTINI, ASSISTANT	:	
COMMISSIONER, DIVISION OF	:	
FIELD SERVICES, NEW JERSEY	:	
DEPARTMENT OF EDUCATION,	:	
	:	
PETITIONER,	:	STATE BOARD OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE CITY	:	
OF NEWARK, ESSEX COUNTY,	:	
	:	
RESPONDENT.	:	

Decided by the Commissioner of Education, May 19, 1995

For the Petitioner, Sally Ann Fields, Senior Deputy Attorney General and Kevin Marc Schatz, Deputy Attorney General (Deborah T. Poritz, Attorney General of New Jersey)

For the Respondent, Brown & Brown (Raymond M. Brown, Esq., of Counsel) and Alan Dexter Bowman, P.A. (Allan Dexter Bowman, Esq., of Counsel)

This matter is before us today on recommendation of Commissioner Leo Klagholz made pursuant to N.J.S.A. 18A:7A-15. As embodied in his decision, Commissioner Klagholz has determined that the school district of the City of Newark has failed to take or is unwilling to take the corrective actions necessary to establish a thorough and efficient system of education in the

July 5, 1995

district. Consequently, as mandated by N.J.S.A. 18A:7A-15, Commissioner Klagholz is recommending that the State Board of Education exercise the authority entrusted to us by that statute to issue an administrative order directing the removal of the district board and the creation of a State-operated school district whose functions, funding and authority are defined in N.J.S.A. 18A:7A-34 et seq.

The Commissioner is making this recommendation following a long history of failure by the Newark school district to meet the educational standards established by the State to measure whether each local school district in New Jersey is minimally meeting its constitutional obligation to provide a thorough and efficient system of education to its students.

Newark's first formal evaluation took place in 1984, when the State undertook to systematically evaluate each school district in the state. Under the criteria that applied to all of New Jersey's school districts, the Newark school district failed Level I monitoring.¹ In Newark's case, the school district

¹ We note that pursuant to the regulations under which Newark's Level I and Level II monitoring was conducted, a district's performance was required to be rated as acceptable in 40 required indicators out of a total of 51 indicators in ten categories in order for the district to be certified. See N.J.A.C. 6:8-2 et seq. (adopted 1976; readopted with amendments 1984). While failure to be rated as acceptable in the other 11 indicators would result in remediation, certification was not denied on the basis of unacceptable ratings for the 11 non-required indicators. However, a failure to be rated as acceptable for even one of the 40 required indicators meant that the district could not be certified. Id.

failed seven out of ten elements and 13 out of 51 indicators. The deficiencies identified in that report included major health and safety violations at the district's schools, student performance below required levels in State-mandated basic skills, poor student and staff member attendance, and the fact that 694 of the district's 4,422 teaching staff members were not properly certified for their assignments.

Under the process as then in effect, the District was directed to prepare a corrective action plan. It did so, and was authorized to proceed with the plan in March 1985.

Between August 1986 and February 1987, Level II monitoring was conducted by the Department of Education. Although the District's corrective action plan was in effect during this period, the District failed 16 out of 51 indicators in Level II, including many of the same indicators it had failed in its 1984 Level I assessment. Pupil test scores in State-mandated basic skills again failed to meet minimal State standards. A large number of dangerous conditions were identified at the District's schools, including chained exit doors, broken and missing fire extinguishers, flammables stored in boiler rooms and unsafe playground conditions. Many of the District's school buildings were in need of extensive repair and the District had no comprehensive long-range maintenance plan.

The Level II monitoring further indicated that the delivery of mandated educational programs was inconsistent with the District's approved basic skills program. Staff members were not properly certified, components of the basic skills program were not implemented in a timely fashion, substitute teachers were not employed when basic skills teachers were absent, the delivery of bilingual/ESL educational programs was inconsistent with the District's approved plan and serious deficiencies were identified in the delivery of special education programs.

Other deficiencies included a lack of operable equipment, inequitable delivery of educational services, and student attendance below required State levels. The Level II report indicated that staff absenteeism was in excess of the required State standard, and that the District had failed to properly observe and evaluate its staff as required by law.

As a result of the Level II findings, the Newark school district was directed into Level III.

In the fall of 1992, a verification review team conducted a preliminary assessment, following which Level III monitoring was conducted by the External Review Team.

At the conclusion of Level III monitoring, the District still was not meeting minimal State standards. The External Review Team concluded that there was a lack of administrative and

teacher accountability, that there were no written procedures for the development, revision and/or dissemination of Board policies, and that there was a lack of mechanisms to implement those policies. The External Review Team found that organizational responsibilities and administrative procedures were neither clearly defined nor articulated, and that the Board often did not comply with its own policies and regulations related to district governance.

The External Review Team's report indicated that there was a shortage of textbooks, instructional materials and supplies, and a failure to implement recommendations made by the District's central office for changes in instruction targeted at improving performance on proficiency tests. The report found a breakdown in the transfer of student performance information from central administrative staff to the individual schools, and that teachers were not being held accountable for implementation of the curriculum alignment. Although the minimal acceptable rate of attendance was 90%, six of the District's schools continued to have attendance rates between 80 and 84 percent, and five of its schools had attendance rates below 80 percent. The District's official dropout rate for 1991-92 was reported as 7.8 percent, and the District had lost approximately 30 percent of its students during their four years of high school.

Significant health and safety violations were again identified. Most schools had exposed ceiling plumbing, electrical wires and poor heating. Many classrooms had large exposed ceiling areas and water leaks. The report found that four of the District's buildings had not been approved for use as school buildings and that 92 percent of the remaining schools had ceilings, walls or floors with holes, sags, damage or other hazards. Moreover, 75 of the District's 76 schools were unable to provide current documentation of the required annual report of the local fire official. The report found that capital expenditures had fallen far short of projected needs, and concluded that little had changed to provide any positive momentum to improve building maintenance.

On the basis of the severe deficiencies reported by the External Review Team, Commissioner Mary Lee Fitzgerald determined that extensive systemic problems existed within the Newark school district which might preclude successful implementation of a corrective plan. Accordingly, and stressing her fundamental obligation to protect and preserve the rights of the school children of New Jersey, on May 13, 1993, she initiated a Comprehensive Compliance Investigation (CCI) and expanded the Office of Auditor General.

The CCI Report was issued as required by statute. The Report indicated that, as reflected in the Level III Report, Newark continued to be deficient in a variety of major areas. In addition, the CCI Report reflected that the District's extensive systemic problems had continued and documented many areas of serious concern which had been revealed by the compliance investigation.²

Based on the results of the CCI Report, Peter B. Contini, Assistant Commissioner for the Division of Field Services filed a verified petition with the Commissioner of Education on July 21, 1994, alleging serious and wide ranging deficiencies in the Newark school district and requesting that Commissioner Leo Klagholz recommend to the State Board the issuance of an Administrative Order pursuant to N.J.S.A. 18A:7A-15.

As described by the Administrative Law Judge (ALJ) in his Initial Decision, the filing of the petition and accompanying Order to Show Cause signed by Commissioner Klagholz initiated proceedings before the Office of Administrative Law (OAL). A prehearing conference was conducted on October 5, 1994, and a

² We note that the CCI Report was not submitted by either party as part of the evidence in this matter. Accordingly, we are not considering the contents of the CCI in deciding the matter. However, we can not ignore that a show cause order would not have been issued had such investigation not occurred or had the results been positive.

prehearing order was issued the following day. The prehearing order specified that the issues involved in this matter were: 1) whether, as of July 22, 1994, the respondent Newark school district had failed to take or was unable to take the corrective actions necessary to establish a thorough and efficient system of education in Newark; and 2) whether the recommended administrative order creating a State-operated school district was arbitrary, unreasonable or capricious in view of the facts as of July 22, 1994.

A plenary hearing was scheduled to begin on February 27, 1995, and discovery began on the basis of the prehearing order.

In early February, petitioner filed a motion with the ALJ seeking a summary decision or, in the alternative, a ruling that it had made out a prima facie case with respect to the issues established in the prehearing order. Following the submission of briefs by both parties and oral argument, the ALJ issued his decision, granting petitioner's motion for summary decision and recommending to the Commissioner that he recommend to the State Board that it issue an administrative order establishing a State-operated school district in the City of Newark.

Commissioner Klagholz began his consideration of the ALJ's recommended decision by stressing his constitutional obligations to the students of Newark. The Commissioner concluded that the inability of the Newark school district to correct its identified deficiencies had been demonstrated throughout the various stages of the monitoring process. Finding that he had the legal authority to render a summary decision in this case, the Commissioner agreed with the ALJ that the Newark Board had failed to identify any factual disputes that were material to resolving the issues in this matter.

The Commissioner found that the only real disputes identified by the Newark Board related to the conclusions to be drawn from the facts as admitted by Newark. Following examination of those facts, the Commissioner adopted the ALJ's findings of facts and conclusions of law. As summarized by the Commissioner:

Given the district's obvious and continued failure to meet its obligations, the State must now intervene and directly assume its fundamental responsibility to provide a thorough and efficient education. For too many years, that constitutionally guaranteed education has been denied too many students. Therefore, I am obligated by my constitutional responsibility and statutory authority to recommend the creation of a state-operated school district in the City of Newark.

Commissioner's Decision, slip op. at 23.

On May 25, 1995, the Newark Board filed a notice of its intent to contest the Commissioner's recommendation, as provided by our regulations. N.J.A.C. 6:2-2.6. On June 9, 1995, Newark filed its written exceptions to the recommendation. Petitioner filed its response on June 16, 1995.

Newark's objections to the Commissioner's recommendation are almost entirely procedural. The lynchpin of its objections is that the recommendation follows from summary proceedings. The Newark Board contends that it is absolutely entitled to a full evidentiary hearing by the terms of N.J.S.A. 18A:7A-14 and -15. The Newark Board also maintains that the ALJ's findings were based on hearsay and are not supported by competent evidence.

In support of its position, the Newark Board lists by number the factual findings which it seeks to dispute, accompanying each number with a sentence or phrase specifying the grounds on which it is disputing the finding. Respondent's exceptions, June 8, 1995, at 24-26. Additionally, the Newark Board asserts that the Commissioner's recommendation is essentially based on test scores alone, and it points to Jersey City as countering the Commissioner's conclusion that immediate State intervention is required in Newark.

In short, it is Newark's position that:

Had a hearing been conducted as is absolutely required in the absence of a waiver, an alternative corrective action may have emerged from expert or other testimony. The educational imperialist view of the commissioner may result in colonization of school systems. History has taught that colonization leads to exploitation, subsequent rebellion and long-term struggle after liberation. Intense cooperative monitoring; replacement of clearly identified ineffective management and administration; motivation and training of qualified teachers and application of social services to socio-economically deprived students in our view will effect a more positive circumstance than state-takeover.

Newark's exceptions, June 8, 1995, at 28.

In response, petitioner reiterates that no material facts are in dispute and that issuance of an administrative order is the proper course for the State Board to follow at this juncture.

The responsibility with which we are charged is a great one, and the breadth of the accompanying power is equally great.

As set forth in N.J.S.A. 18A:7A-15:

....Notwithstanding any other provision of law to the contrary and upon its determining that the school district is not providing a thorough and efficient system of education, the State board may direct the removal of the district board of education and the creation of a State-operated school district whose function, funding and authority are defined

in P.L.1987, c. 399 (C. 18A:7A-34
et seq.)....

The only limitation which the statute places on our authority is to prohibit the creation of a State-operated school district solely on the basis of a district's failure to correct substandard facilities. N.J.S.A. 18A:7A-15.

The Legislature's broad grant of authority is reinforced by N.J.S.A. 18A:7A-34, which provides that:

Whenever the Commissioner of Education shall determine after the issuance of an administrative order that a local school district has failed to assure a thorough and efficient system of education, the State Board of Education may issue an administrative order as set forth in section 15 of P.L.1975, c. 212 (C. 18A:7A-15) which shall remove the district board of education and create a State-operated school district. The State-operated school district shall become effective immediately upon issuance of the administrative order by the State Board.

The Legislature's purpose is to maximize the ability of the State Board of Education to fulfill its delegated responsibility to insure that our Constitution's mandate for the provision of a thorough and efficient system of education is fulfilled. As we have previously stated:

The terms of N.J.S.A. 18A:7A-14 and -15 leave no doubt that these statutes and their particular provisions are components in the "interlocking whole" of the statutory fabric that insures that our constitution's mandate

for the provision of a thorough and efficient education will be fulfilled. In re Trenton Bd. of Ed., 86 N.J. [327, 330 (1981)]. Quite simply, by these provisions, the Legislature has mandated that local school districts are to be held accountable for meeting their substantive obligation to provide a thorough and efficient education. Statutory provision for identification of deficiencies and remediation is aimed at insuring that deficiencies will be corrected. Viewing district performance on a progression, the statutes recognize the need for greater direction from the Commissioner and the State Department of Education where a district fails to make reasonable progress in correcting deficiencies or where conditions are such as to preclude the success of efforts at self-correction. However, at each step of the process and in every situation the over-riding statutory objective is the same: Insuring that each school district in New Jersey satisfies the standards of performance showing that it is meeting its obligation to provide a thorough and efficient education to its students, thereby achieving state certification.

McCarroll v. Board of Education of the City of Jersey City, grant of emergent relief affirmed by the State Board, December 1, 1988, slip op. at 13.

The seriousness of the Legislature's commitment to ensuring that students in failing districts receive their constitutional due is embodied in N.J.S.A. 18A:7A-16, which requires the State Board of Education to seek judicial enforcement of any Administrative Order issued under N.J.S.A.

18A:7A-15 where the district board fails to or refuses to comply.

As set forth in N.J.S.A. 18A:7A-16:

Should the local board of education fail or refuse to comply with an administrative order issued pursuant to section 15 of this act, the State board shall apply to the Superior Court by a proceeding in lieu of prerogative writ for an order directing the local school board to comply with such administrative order.

See also Application of Board of Ed. of Upper Freehold Regional School Dist., 86 N.J. 265 (1981) (authority of State Board to obtain court order in proceeding in lieu of prerogative writ should not preclude application by the State Board to the Appellate Division for an order enforcing its administrative order).

In sum, by the terms of N.J.S.A. 18A:7A-15, the Legislature has entrusted the State Board of Education with the ultimate responsibility for making the educational judgment in cases of extreme failure by local authorities to fulfill their delegated responsibilities as to whether creation of a State-operated school district is the appropriate course to follow in order to correct the situation. In fulfilling this responsibility, we must be always mindful that the right of the students of our state to a thorough and efficient education is of such significance that it is enshrined in our state's

Constitution. N.J. Const. Art. III, Sec. IV, Par. 1. In re Upper Freehold Reg'l School Dist., 86 N.J. 265, 272 (1981). School districts, in contrast, are creatures of statute. N.J.S.A. 18A:8-1 et seq.

The ultimate judgment with which we have been entrusted is an educational one. However, given the terms of the pertinent statutes, and the importance we place on procedural fairness, we would be remiss if we did not first carefully consider the legal objections which the Newark Board has raised in these proceedings.

We reject the contention that a full evidentiary hearing was required in this case before the Commissioner could arrive at the conclusion that the school district had either failed or was unwilling to provide a thorough and efficient education. In this, we fully concur with the Commissioner that the reference to a "plenary hearing" in N.J.S.A. 18A:7A-14 and -15 does not create an automatic entitlement to a full evidentiary hearing. Rather, both the terms of the statutes and the purpose for which they were enacted leave no question that the hearing that is required is one which is conducted in accordance with the Administrative Procedure Act (APA) and N.J.S.A. 18A:6-9.

N.J.S.A. 18A:7A-14(e) provides, in pertinent part:

The commissioner shall also order the local board to show cause why an administrative order, subject to the provisions of [18A:7-15] and... (C. 18A:7A-34) should not be implemented. The plenary hearing before a judge of the Office of Administrative Law, pursuant to the 'Administrative Procedure Act,'... (C. 52:14B-1 et seq.), upon said order to show cause shall be conducted in the manner prescribed by [N.J.S.A. 18A:6-9].

N.J.S.A. 18A:7A-15 further references the "plenary hearing" but merely as a point of departure for describing the Commissioner's responsibilities after the hearing.

Thus, it is N.J.S.A. 18A:7A-14(e) which establishes a district's right to a hearing when an order to show cause is issued. This provision specifically provides that the hearing is to be conducted pursuant to the Administrative Procedure Act and N.J.S.A. 18A:6-9. N.J.S.A. 18A:6-9 gives the Commissioner the authority to hear and determine controversies and disputes arising under the school laws. Under the implementing regulations that govern contested cases before the Commissioner, all such cases are subject to the Uniform Administrative Procedure Rules of Practice, N.J.A.C. 1:1. N.J.A.C. 6:24-1.10(b). Thus, all hearings before the Commissioner under

N.J.S.A. 18A:6-9 et seq. must be conducted in accordance with the Administrative Procedure Act.³

The Administrative Procedure Act does not provide a substantive right to hearing, but rather prescribes the procedures to be followed when a hearing is provided for by statute. N.J.S.A. 52:14B-2(b); N.J.S.A. 52:14B-10(c); Spalt v. New Jersey D.E.P., 237 N.J. Super 206, 212 (App. Div. 1989) certif. den. 122 N.J. 140 (1990). The regulations implementing the APA specifically authorize an ALJ to resolve cases by summary decision when a full evidentiary hearing is not required to decide the matter. N.J.A.C. 1:1-12.5. This procedural regulation incorporates the judicially established precept that an evidentiary hearing is not necessary when the material facts are not in dispute. Cunningham v. Dept. of Civil Service, 69 N.J. 13 (1975); Bally Mfg. Corp v. N.J. Casino Control Commission, 85 N.J. 325, 334 (1981).

³ During oral argument, Newark raised for the first time the argument that it is entitled to an evidentiary hearing on the basis of the terms of N.J.S.A. 18A:6-20. Newark reasons that because N.J.S.A. 18A:7A-14(e) references N.J.S.A. 18A:6-9. et seq., and because N.J.S.A. 18A:6-20 sets forth a procedure for the Commissioner to use when conducting a hearing, N.J.S.A. 18A:7A-14(e) must be read to automatically require a full evidentiary hearing.

Newark is mistaken. First, N.J.S.A. 18A:6-20 was enacted in 1968 to provide the Commissioner with authority to conduct hearings and subpoena witnesses. It was enacted at the same time the Legislature enacted the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10. This was before the Administrative Procedure Act was enacted. The fact that N.J.S.A. 18A:6-20 provided the authority and procedures for the Commissioner to conduct hearings prior to enactment of the APA can not be read to mandate a full evidentiary hearing in this case.

When material facts are undisputed, due process does not require a full evidentiary hearing. Rather, the due process that must be afforded in such cases is that the parties must be provided with the opportunity to be heard, either orally or in writing, as to why the proposed action should not be taken. In re Solid Waste Utility Customer Lists, 106 N.J. 508, 520 (1987).

We reject Newark's contention that amendment of N.J.S.A. 18A:7A-14(e) in 1987 alters this conclusion. While that amendment incorporates the language that a "plenary hearing" is required, the terms of the amendment also expressly provide that the hearing is to be conducted before an ALJ and in accordance with the APA. Thus, the amendment implements the Legislature's intent that an Administrative Law Judge, rather than the Commissioner, conduct the hearing. It does not require an evidentiary hearing to be conducted when there are no material facts in dispute.

Review of the Newark Board's arguments and independent examination of the record has eliminated any doubt as to the propriety of a summary decision in this case.

New Jersey was among the first states to make summary judgment procedures available and, consequently, the standards which the New Jersey courts apply when deciding whether to grant a summary judgment are well established. Judson v. Peoples Bank

& Trust Co. of Westfield, 17 N.J. 67 (1954). As described by the Court, summary judgment

...is designed to provide a prompt, business-like and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial....

The standards of decision governing the grant or denial of a summary judgment emphasize that a party opposing a motion is not to be denied a trial unless the moving party sustains the burden of showing clearly the absence of a genuine issue of material fact....

...[I]t is the movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact....

Id. at 74 (citations omitted).

The summary judgment standards articulated in Judson are analogous to those which govern the granting of summary decision in proceedings involving the Office of Administrative Law. Compare N.J.A.C. 1:1-12.5 with R. 4:46. In both instances, the moving party has the burden of removing any doubt as to the existence of any material fact and the record must be considered in the light most favorable to the opposing party. Swarts v. Sherwin-Williams Co. 244 N.J. Super. 170, 178 (App. Div. 1990).

Summary judgment is appropriate only where the pleadings, depositions, answers to interrogatories and affidavits, if any, show that there are no genuine issues as to any material fact challenged. Kopps Inc. v. United Technologies, 223 N.J. Super. 548, 554-555 (App. Div. 1988). Answers to interrogatories which contain admissions and which were not amended can be considered admissions of fact. Unrebutted affidavits or admissions contained in answers to interrogatories may be sufficient standing alone to support the grant of summary judgment. United Rental Equipment Co. v. Aetna Life and Cas. Ins. Co., 74 N.J. 92, 100 (1977). Once the moving party has made out a prima facie case for summary judgment, the opposing party must "show by competent evidential material that a genuine issue of material fact" exists. Ziemba v. Riverview Medical Center, 275, N.J. Super. 293, 301 (App. Div. 1994). Disputes as to facts which are irrelevant or immaterial will not bar summary judgment. Johnson v. City of Hackensack, 200 N.J. Super. 185, 189 (App. Div. 1985); Ziemba v. Riverview Medical Center, supra. Also, disputes as to the conclusions to be drawn from the facts, as opposed to the facts themselves, will not defeat a summary judgment motion. Lima and Sons, Inc. v. Borough of Ramsey, 269 N.J. Super. 469, 478 (App. Div. 1994).

We reject the Newark Board's argument that summary decision should have been denied because petitioner had "failed to make full disclosure by way of discovery of significant documents essential to respondent's preparation and defense of the motion." Newark's exceptions, at 20. Our review of the record indicates that, in preparation for the scheduled hearings on the merits of the instant petition, the Newark Board filed a motion with the ALJ on February 6, 1995, requesting an adjournment of those hearings pending receipt of additional discovery.⁴ Following a telephone conference with the parties, the ALJ in a letter to the parties dated February 8, 1995, acknowledged a question regarding the relevancy of such documents to the petitioner's instant motion for summary decision and stated that "[w]ith respect to the Board's motion to compel production of documents it is my understanding that the State is making the necessary logistical arrangements to photocopy over 100,000 documents or pages of documents and to provide the same to Board counsel as soon as reasonably possible." The ALJ did not enter an order or otherwise direct the petitioner to produce such documents, as the Newark Board's papers suggest. Moreover, in a certification filed by counsel for the petitioner in

⁴ We note such motion was prepared and filed by the Newark Board prior to or simultaneously with the petitioner's motion for summary decision, which was also dated February 6, 1995.

response to Newark's exceptions to the Commissioner's recommendation, she avers that "[b]etween February 3, 1995 and March 15, 1995, petitioner provided respondent with copies of all of the Bates stamped documents referenced in its answers to respondent's interrogatories with the exception of approximately 100 documents which were provided on March 23, 1995." Certification of Sally Ann Fields, at 4.

The Newark Board has not specified that it is disputing any "critical facts [which] are peculiarly within the moving party's knowledge." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193 (1988), quoting Martin v. Educational Testing Serv., Inc., 179 N.J. Super. 317, 326 (Ch. Div. 1981). Rather, the Board challenges "virtually every non-statistical fact set forth in the CCI report," Newark's exceptions, at 21, and "the interpretation and conclusions petitioner would draw from the data compiled in the report." Id. We reiterate that the CCI Report was not submitted by either party as part of the evidence in this matter and that we are not considering the contents of that report in deciding the matter. See, supra, n.2. Moreover, as indicated in United Rental Equipment Co. v. Aetna Life and Cas. Ins. Co., supra, un rebutted affidavits or the admissions contained in answers to interrogatories are sufficient standing alone to support the grant of summary decision. Accordingly,

under the circumstances, we find no justification for denying petitioner's motion for summary judgment on the basis of discovery.

As set forth in the prehearing order in this case, and as we reiterated in our letter directing that oral argument be conducted, the facts material to deciding this matter are those which show whether the District is providing a thorough and efficient education and whether it has taken the corrective actions necessary to provide such an education.

As detailed in the Administrative Law Judge's initial determination, petitioner has presented much evidence that the Newark Board has failed to provide a thorough and efficient education and that it has failed to correct its deficiencies. See Initial Decision, slip op. at 13-19. In order to be entitled to an evidentiary hearing, the Newark Board must demonstrate to us by competent evidential material that a genuine issue of material fact exists as to these issues. Careful assessment of their claims fails to disclose any such dispute.

Of particular significance is the fact that Newark's submissions do not claim that the District is providing a thorough and efficient education to its students. For example, faced with a direct question at oral argument as to whether the Newark Board was currently providing a thorough and efficient

education, its counsel responded by asserting only that "[t]here has not been a lawful determination of whether or not Newark is providing a thorough and efficient education to its students," Transcript of Oral Argument at Special Public Meeting of the State Board, June 21, 1995 (hereinafter "tr. 6/21/95"), at 43, and that such a determination could not properly be made in the absence of a plenary hearing. Counsel added that "it is a belief that [the Newark Board] is both capable and able to deliver and is in the process of doing so." Id. at 44.

Nor does Newark contest the fact that it has not provided a thorough and efficient education for the past decade as measured by minimal State standards. As previously discussed, the results of monitoring by the State since 1984 establish that the Newark Board has consistently failed to satisfy those standards.

Rather than litigating facts material to deciding this matter, Newark wants the opportunity to challenge the State's educational standards and to explore through litigation various other educational standards by which it would like its performance to be measured. See, for example, tr. 6/21/95, at 33 and 49. However, the District has failed to support even this effort by competent evidential materials. For example, in its answers to petitioner's interrogatories, Newark provided a list

of expert witnesses upon which it indicated it would rely at hearing to support its position. That list included Robert S. Peterkin, Ed.D. However, in these proceedings, the District submitted only Dr. Peterkin's uncertified statement that Newark should be compared with "the other Great City School districts of this country, not exclusively with the other special districts of New Jersey." "Certification" of Robert S. Peterkin, at 2. He further maintains that such review should include an analysis of additional indicators published by the Council of the Great City Schools. Id. at 3.

However, the fact that other urban school districts in various parts of the country may be more educationally deficient than Newark can not be used to excuse Newark from failing to meet the minimal State standards designed to ensure that New Jersey's local school districts fulfill the constitutional responsibilities that have been delegated to them.

This failure is reflected in the performance of Newark's students on standardized tests, which was detailed in the ALJ's initial decision. The Commissioner found that Newark's test score data indicates "an utter failure by the Board to prepare its students to function as citizens and workers in society. Not only are the students failing to meet minimal State standards of performance, but they are doing so in staggeringly

large degrees in both numbers and percentages." Commissioner's Decision, slip op. at 4.⁵

The Newark Board attempts to counter this with the statement of its Executive Director of Accountability and Quality Assurance comparing the performance of its students against the other special needs districts. See Certification of Steven G. Block. However, even giving Newark the benefit of all reasonable inferences, we agree with the ALJ and Commissioner that the performance of its students in State-mandated basic skills is abysmal.

Again, Newark does not dispute the raw data or the accuracy of the scores that show its performance on all standardized tests is among the worst of New Jersey's special needs districts. Rather, it would like us to look at that data differently. However, even if we were to accept Newark's view that its performance should be judged by the combined number of students qualifying for Level I and Level II of the HSPT and even if we combined the results of different administrations of the test as they would like us to do, the fact remains that Newark's

⁵ We note that, contrary to the Newark Board's contention, the Commissioner did not base his decision to recommend a State takeover on test scores alone. While the Commissioner indicated that "the test scores alone in this district, without more, are sufficiently 'abysmal' to require immediate State intervention," Commissioner's decision, slip op. at 17, he added that his recommendation was "further supported by the Board's failure to develop systematic solutions to problems in the area of school facilities....," as well as other deficiencies in the Newark school system. Id.

students are failing to meet minimal State standards of competence. This fact cannot be changed by limiting the comparison of Newark's performance to those school districts around the country which are as educationally deficient as Newark. To the contrary, were we to do so, we would be guilty of accepting educational failure.

We stress that this matter is before us as a result of the Newark school district's deficient performance which led to the issuance of an order directing the Newark Board to demonstrate why we should not establish a State-operated school district in Newark. As this agency's ultimate fact-finder in contested cases, In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478 (App. Div. 1989), certif. den., 121 N.J. 615 (1990); Dore v. Redminster Tp. Bd. of Ed., 185 N.J. Super. 447, 452 (App. Div. 1982), we must answer the question of whether the school district of Newark has shown that it has met its statutory obligation to provide its students with the thorough and efficient education to which they are constitutionally entitled. Given the history of this District and its performance as demonstrated by its own submissions, no such conclusion is reasonably possible.

As previously discussed, a full evidentiary hearing is not required in this matter given the strength of petitioner's

submissions, the findings of fact by the ALJ and the Commissioner, and the failure of the Newark Board, despite ample opportunity, to set forth contrary material facts. Furthermore, Newark has failed to present us with anything to suggest that a remand for further hearing would result in any conclusion other than that it has failed to provide a thorough and efficient education for over a decade.

For us to direct a remand given such circumstances would not be reasonable. Not only would such a remand be unjustified and costly, but such action would have the real potential to further compound the educational deprivation of Newark's school children. A remand is neither necessary nor warranted on this record, and, in our opinion, would be an empty exercise under these circumstances.

The nature and extent of this district's failure has long been a matter of public record. As described in detail in our decision in Gibson v. Board of Education of the City of Newark, decided by the State Board, May 6, 1986, aff'd, Dockets #A-5209-83T6 and #A-3111-84T5 (App. Div. 1986) (prior history omitted), the Newark school district has failed to function properly for decades. Despite the fact that the State has taken various approaches over the years to assist the Newark Board in addressing its problems, the record before us eliminates any

question that Newark has made virtually no progress in either correcting its governance problems or improving its educational outcomes.

As detailed in Gibson, supra, the State's involvement in Newark predates the enactment of the Public School Education Act of 1975. Even at that point, the severity of Newark's problems had become so obvious that Education Commissioner Fred Burke directed an investigation and, on the basis of the outcome of that investigation, issued an administrative order directing the Newark school district to reform its organization and to adopt and implement remedial measures. The administration of the District was in such chaos at that point that Governor Brendan Byrne appointed a special agent to oversee the implementation of that order.

As a result of that intervention, the Legislature acted to establish by statute the unique administrative structure under which the Newark school system has functioned since 1975. Despite this approach and a subsequent change in governance structure from an appointed board to an elected board, Newark's administrative problems continued.

In Gibson, the Department of Education was confronted with claims made against the Newark Board by a former member of that board centering on its failure to conform the District's

operations to the requirements of the statutory scheme that the Legislature had enacted to enable the District to provide a quality education to its students. Ultimately, we were called upon to consider those claims. On the basis of the record presented to us in that case, we issued a detailed opinion aimed at communicating to the Newark school district the requirements of law which it was expected to follow and its responsibilities thereunder to ensure that its students received the benefits of a thorough and efficient education. It would be denying reality were we to ignore that the record in this matter demonstrates that Newark has not corrected the serious problems we confronted in Gibson.

In short, the fact that Newark has not met the minimal educational standards set by the State for over a decade can not be disputed. We must now determine the best course to follow to insure that the situation is remedied. This involves making an educational judgment as to whether the constitutional right of the school children of Newark to a thorough and efficient education is furthered, and their educational interests best served, by ordering the creation of a State-operated school district.

Newark's failures are serious and long-standing, and even the District concedes that something must be done to address

them. However, we can not ignore the fact that the District itself failed to develop and implement an effective corrective program during the last ten years. After closely examining the District's response in these proceedings, we are convinced that the Newark Board does not yet understand its obligations and can not be entrusted any longer to fulfill its delegated responsibilities.

The record is replete with glaring examples of Newark's failure to grasp its obligations and to comprehend what is required of it in order to fulfill them. One of the most telling examples is the District's response to the undisputed fact that each member of the Newark Board, as well as many of its high ranking administrators, has at least one relative on the District's payroll, and that ten of the current Executive Superintendent's relatives are employed by the District.

A detailed list of those relatives was submitted in response to petitioner's motion for summary judgment in an uncertified statement by Concette Caponegro which Newark appended to its response. According to the list submitted by Newark, two of these individuals were hired as late as 1994.

In its exceptions to us in response to the Commissioner's recommendation, Newark takes issue with the ALJ's

finding with respect to its employment of relatives (finding #27) as follows:

There is no evidence in the record that any school official used his position to secure employment for family members. Further, there is no evidence that any person hired is unqualified, unfit, incompetent or has performed below standards.

Respondent's exceptions, June 8, 1995, at 25.

This is the same response the District offered to the Commissioner in its exceptions to the Administrative Law Judge's decision. Respondent's exceptions, April 28, 1995, at 26.

Newark apparently is not disturbed by the fact that it has acted to employ the relatives of school board members in significant numbers or to employ ten of its Executive Superintendent's relatives. Even assuming that no Newark official actually used his or her position to secure employment for relatives and that all the relatives who were hired were qualified, Newark is oblivious to a situation which should be causing it a great deal of concern.

The appearance created by such employment alone should be disturbing to Newark. However, even more troublesome is the District's apparent ignorance of and disregard for the requirements of law.

Until September 28, 1993, the Newark Board's policy expressly permitted its members to vote for their own relatives. Newark's list shows that this policy was still in effect when several relatives were hired in 1992 and 1993. We asked Newark about this at oral argument.

STATE BOARD MEMBER: I found one policy that was changed in 1993 that really should have been changed earlier. The School Ethics Act was passed and took effect in 1992, which prohibits the school Board member from voting on the employment and application of certain relatives, but as of 1993, the Board finally changed the policy. I was wondering if that is something that you have had problems with and if you did have a problem with the policy [committee], well, how did you rectify it....

NEWARK: ...[T]he Ethics Act was enacted in '92 but its first year of implementation was in '93. As of this date, which is one of the questions I have personally seen though I have not conducted it myself; but there's been a complete review of all the policies, the policy manuals as well as policy requirements as well as those circulars that flow from them are updated and current.

STATE BOARD MEMBER:I'd like you to look at the statute, because I think you might be wrong on the Ethics statute....

NEWARK: In terms of which aspect of it do you think we might be --

STATE BOARD MEMBER: Implementation of it. Timing of when it was to be implemented....

NEWARK: ...[I]f I read corrected, the Act became effective in April of 1992, and next school year in these kinds of determinations

would have been made as '92-'93, and that's what we meant to say is that the first --

STATE BOARD MEMBER: That's what you meant to say, that's okay.

NEWARK: We thought that was clear. When the year starts in September, we meant '92, '93, I suppose.

STATE BOARD MEMBER: And you enacted it in September of '93?....

NEWARK: We believe that the -- our statement was correct. It's not artfully posed, I suppose.⁶

Tr. 6/21/95, at 39-42.

This exchange reflects how little importance Newark attaches to conforming with the requirements of the law. The record clearly shows that Newark's cavalier attitude is not limited to conformance with the School Ethics Act.

In Gibson, supra, we went to great lengths to communicate to the Newark Board the importance of conforming with the requirements of the Public Contracts Law. Nonetheless, the District subsequently lost \$2,968,953 in State aid for transportation because it violated the bidding laws. In its response to petitioner's interrogatories, the District seeks to avoid responsibility by denying that any violation was willful,

⁶ We note that the Newark Policy Manual indicates that it actually did not adopt its policy to expressly conform with the School Ethics Act until April 1994.

stating that "any failure to comply with the law was the result of inadvertence or misunderstanding relative to requirements." Answer to Interrogatory, #31. This is the same attitude the District expressed in its response to this finding in its "Discrepancy Review." Respondent's Appendix to its Response to Petitioner's Motion for Summary Decision, Volume II.

Although Newark's Executive Superintendent acknowledges the loss of this State aid in a certification seeking to use a portion of the 1993-94 fund balance, the sole concern he expresses is that he must get access to more money. Letter from Eugene Campbell to Essex County Superintendent of Schools, February 1, 1995, and undated certification of Eugene Campbell, Respondent's Appendix to its Response to Petitioner's Motion for Summary Decision, Volume IV.

Nowhere does Newark demonstrate that it recognizes its responsibility to conform with the law. For example, Executive Superintendent Campbell wrote to Commissioner Klagholz on March 17, 1995, informing the Commissioner that he could "no longer, in good conscience, permit agents and employees of your department to continue to hamper the function [sic] of the Newark School District." Id. One of Executive Superintendent Campbell's specific concerns in this letter was to "move the district forward" by proceeding with an RFP/contract for the

District's "Education Reform Project." In this context, Executive Superintendent Campbell characterizes the actions by the Auditor General to insure compliance with the Public Contracts Law for the \$4 million proposal as harassment and an attempt to "usurp the power of the Board to determine education policy for the district." Letter of March 17, 1995. What is missing here is any acknowledgment that compliance with the law was the District's responsibility in the first place and that it was the District's failure to do what was required of it that necessitated intervention by the Auditor General.

Seen in this context, the concern expressed by Executive Superintendent Campbell to Commissioner Klagholz as to the educational deficit the students would suffer if he could not utilize the District's surplus is disingenuous.

Newark's denial of responsibility permeates its submissions. The District's verification of the "Data Discrepancy Review" based upon the Level III External Review Monitoring Report is replete with acknowledgments that the Level III findings are accurate, in response to which the District offers only excuses for its failures to meet the criteria. What is most striking is the fact that, from the District's perspective, there was not a single failure that was caused by anything that was within the District's control. For example,

the fact that the District was not in compliance with requirements to have current documentation of annual fire inspections was the Fire Department's fault, and the failure of its schools to have health certificates was the Health Department's fault. The District took no responsibility for the fact that the External Review Report found that the district had not, as required, transmitted a copy of the corrective action plan and audit synopsis to the New Jersey Department of Education because, in the District's words, "the [was] no identification of the corrective action plan of reference."

From the District's perspective, the fact that the 1991-92 annual audit reflected an unexpended authorization of \$112,672,530 in capital projects was not cause for concern. The District sought to explain the situation away in its Discrepancy Review as follows:

It is noted that the 1991-92 Annual Audit reflected unexpended authorizations of one hundred twelve million dollars as of June 30, 1991. However, many contracts were still in progress as of June 30, 1991, payments of which were not reflected until after June 30, 1991. Fourteen million dollars is a more accurate assessment of what was encumbered and later expended for the period as opposed to the six million dollars reflected in the 1991-1992 audit report.

It should also be noted that priorities changed in concert with the revitalization of the city which precipitated a housing boom in

certain areas of the city. This housing boom, in turn, is necessitating the immediate upgrading of existing facilities to accommodate new students as soon as possible. Originally these facilities were to be replaced rather than upgraded....

This explanation does not change the fact that the District failed to spend significant amounts on capital projects while it was supposed to be remedying serious long-term facilities problems. Nor is it consistent with the fact that, at the same time, it was complaining about lack of money.

In the same "Discrepancy Analysis" the District stated that it was in agreement with the findings of the Level III monitoring that 4 of 80 of its buildings had not been approved as school buildings based on New Jersey Department of Education standards, that 53 of 76 schools did not meet minimal criteria, and that 92% of the schools (70 of 76) had ceilings, walls or floors with holes, sags, damage, or other hazards.

From this record, it is apparent that Newark does not yet understand that there is something wrong with its approach. It is not the fact that Board members may have attended a conference in Hawaii, or eaten in a nice restaurant, or sent flowers at Board expense which in and of itself is disturbing. Rather, what is alarming is the fact that the District spends its

money in this manner while budgeting lesser amounts for such items as school libraries.

The District's cavalier attitude is further reflected by its facile response to petitioner's allegation that it leases an unsafe, vermin infested building for use as a school for which it pays annual rent in excess of \$175,000 and for which two Board employees receive remuneration through a conduit relationship. In its answer to petitioner's interrogatories, Newark responded that:

...the Board of Education does not lease an "unsafe, vermin infested building" for use as a school. It follows therefore, that the Board does not pay in excess of \$1750,000 per year for such a facility. If the reference intended is to the Clemente Annex, it should be noted that for most years (those before 1991) payments did not exceed \$175,000.

Answer to Interrogatory #30.

Another example is its answer when confronted with the allegation that it leases classroom space in a hangar at Newark Airport at \$18,000 annually and employs a full-time coordinator at \$54,000 annually for an Aerospace Program which shows little evidence of activity. To this allegation, Newark responded that it does lease the space at approximately \$18,000 per year, but that "[s]ignificant Aerospace programs have been conducted at this location..." Answer to Interrogatory #28.

The District's denial of responsibility extends to the delivery of the District's educational programs. The District's Discrepancy Analysis views monitoring as something to which the District has been "subjected." Its answers to petitioner's interrogatories show that, in Newark's view, the District has fulfilled its responsibility to ensure that principals ensure that students have sufficient textbooks, supplies, equipment and course offerings merely by the act of directing the principals to complete annual orders, to submit emergency orders, to review mandated course offerings and to instruct administrative personnel to schedule students for appropriate courses. Answer to Interrogatory #44. Similarly, Newark feels that it has assigned and supervised staff in a manner that "facilitates effective instruction" when it has directed the principals to observe staff, review lesson plans and evaluate staff. Answer to interrogatory #43.

In response to petitioner's allegations that there was no evidence the District was providing its students with opportunities to discuss mathematics and that many teachers lack a necessary understanding of the subject to allow for instruction beyond rote memorization, Newark answered:

...[I]t is true that many of the District's teachers are finding it difficult to move away from some of our traditional practices

like mere memorization of procedures or even recognizing the value of calculators and technology.

However, the need for a paradigm shift; to conceptual development, communicating mathematics, problem solving and engaging students has been the mission of the Office of Mathematics for the past five years.

There is much evidence that this reform effort has borne root in the District. Continued staff development and an increased comfort level with the new series will further enhance our teachers [sic] ability to provide a quality instructional experience for all of our teachers [sic].

Answer to Interrogatory #73.

Unfortunately, despite the promise of future improvement, the District has provided nothing to show us that there has actually been any significant improvement.

At oral argument, when the State Board asked Newark for an offer of proof in relation to statistics concerning student performance, Newark responded:

...[I]n terms of the past, from 1989 to 1993, there was progress made pursuant to reforms made in the teaching of mathematics. There were improvement in Stanford scores and improvement in HSPT9 scores with respect to math in the school district. The dynamics of that change in restructuring in terms of the math department, the specific changes in terms of compartmentalization, this emphasis on higher order thinking, retraining of teachers, needs to be developed in detail. Both as a paradigm of how we might go from

here, and as evidence of how and in what way this district has been making efforts, does have that spark perhaps that Commissioner Cooperman spoke of, and also because it is relevant to the issue of how you evaluate what's being done in Newark, and whether it can be done again duplicated, expanded.

Tr. 6/21/95, at 23.

Examination of the District's math scores, however, fails to indicate that the District's approach has been successful. The kinds of "improvement" to which the District points include the fact that the percent of its students achieving minimum proficiency levels in third grade math increased from 50.9% in 1990-91 to 62.4% in 1992-93. While it is true that this represented an 11.5% increase for Newark, and was the largest percentage increase on this test by any of the special needs districts, this "improvement" merely allowed Newark to maintain its position as having the worst performance on this test of any special needs district. In point of fact, the degree by which Newark's performance was the worst of any special needs district increased from 9.3% in 1990-91 to 10.1% in 1992-93. This can not be read as a great improvement by any standard.

In sum, the Newark Board has failed its children. The undisputed evidence shows a clear and unbroken record of severe educational failure. The Newark school district is without question a prime example of dismal educational failure regardless

of what test is applied. The Newark Board's responses in these proceedings show an appalling lack of understanding and appreciation of the pivotal role which a district board plays in assuring that the children who live in that district are provided with a thorough and efficient education. Given the record here and the right of the students of Newark to a constitutionally adequate education, the tired excuses and promises to do better in the future which the Newark Board is now offering us are not sufficient.

In the face of continued and glaring long-term failure, the Newark Board has responded with business as usual for too long. As both the ALJ and the Commissioner found, the responses and the behavior of the Newark Board in these proceedings has shown little or no recognition of the educational crisis in the District. In fact, the Newark Board has shown itself to be an impediment to correcting the constitutional failure in the school district. We can no longer close our eyes to this fact.

We take no pleasure in the Newark Board's failure. However, we can not countenance its continued hold on Newark's school children. We would be ignoring our own obligations if we were to allow this situation to continue any longer. Our constitutional responsibility compels us to take action to

rectify the situation. Robinson v. Cahill, 62 N.J. 473 (1973);
Robinson v. Cahill, 69 N.J. 478 (1976).

Given the grave educational failure in Newark, it is imperative that we delay no longer in insuring that the constitutional right of the children of the school district of Newark can be effectuated. Robinson v. Cahill, 62 N.J. 473 (1973); Robinson v. Cahill, 69 N.J. 478 (1976). We therefore direct the President of the State Board of Education to immediately execute the administrative order appended to this decision, by which we direct the removal of the district Board of Education of the City of Newark and the creation of a State-operated school district whose functions, funding and authority are defined in N.J.S.A. 18A:7A-34 et seq.

S. David Brandt opposed.

July 5, 1995

Date of mailing JUL 05 1995

STATE OF NEW JERSEY
STATE BOARD OF EDUCATION
STATE BOARD DOCKET NO. 64-95

PETER B. CONTINI, ASSISTANT :
COMMISSIONER, DIVISION OF :
FIELD SERVICES, NEW JERSEY :
DEPARTMENT OF EDUCATION, :
 :
PETITIONER, :
 : ADMINISTRATIVE ORDER
V. :
 :
BOARD OF EDUCATION OF THE CITY :
OF NEWARK, ESSEX COUNTY, :
 :
RESPONDENT. :

This matter having been opened before the Commissioner of Education by the filing of an Order to Show Cause and a Verified Petition by the Attorney General of New Jersey, attorney for petitioner, Peter B. Contini, Assistant Commissioner, Division of Field Services, by Sally Ann Fields, Senior Deputy Attorney General; and said Petition having been answered by Brown and Brown, Esqs., by Raymond M. Brown, Esq., and by Alan Dexter Bowman, Esq., attorneys for respondent Board of Education of the City of Newark; and an Order to Show Cause having been entered by the Commissioner of Education on July 21, 1994; and the Office of Administrative Law having issued an Initial Decision on April 13,

1995 recommending that a State-operated school district be created; and the Commissioner of Education having adopted the Initial Decision on May 19, 1995 and having recommended the issuance of an Administrative Order; and the State Board of Education having considered same and having determined that the school district of the City of Newark is not providing a thorough and efficient education, and that determination having been embodied in a written decision issued on July 5, 1995, and the basis of that decision not being solely the district's failure to correct substandard facilities,

It is on this 5th day of July, 1995,

ORDERED that pursuant to N.J.S.A. 18A:7A-15, N.J.S.A. 18A:7A-15.1 and N.J.S.A. 18A:7A-34, the Board of Education of the City of Newark be removed; and it is further

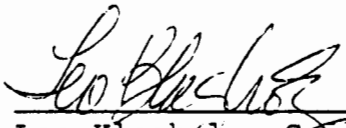
ORDERED that pursuant to N.J.S.A. 18A:7A-15, N.J.S.A. 18A:7A-15.1 and N.J.S.A. 18A:7A-34, a State-operated school district be created whose functions, funding and authority are defined in N.J.S.A. 18A:7A-34 et seq.; and it is further

ORDERED that pursuant to N.J.S.A. 18A:7A-35, the Commissioner of Education recommend an individual qualified by training and experience for appointment by the State Board of Education pursuant to N.J.S.A. 18A:7A-15.1 as State district

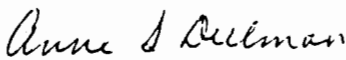
superintendent of schools to direct all operations of the district; and it is further

ORDERED that the Commissioner of Education take all other actions as are necessary to implement the provisions of N.J.S.A. 18A:7A-34 et seq.; and it is further

ORDERED that this Administrative Order shall remain in effect until lifted by the State Board of Education upon application and recommendation of the Commissioner of Education made pursuant to N.J.S.A. 18A:7A-49(b).



Leo Klagoz, Secretary
State Board of Education



Anne S. Dillman, President
State Board of Education

163-95

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF HIGH BRIDGE, : DECISION
HUNTERDON COUNTY. :
_____ :

MAY 19, 1995

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
 SCHOOL DISTRICT OF HIGH BRIDGE, : DECISION
 HUNTERDON COUNTY. :
 _____ :

The announced results of the balloting for the General Fund question of the Board of Education at the annual school election held on April 18, 1995 in the High Bridge School District were as follows:

	<u>FOR</u>	<u>AGAINST</u>
Voting District #1 Machine Count	225	228
Voting District #1 Paper Ballot Count	10	24
Absentee Votes	24	7
TOTAL:	259	259

Pursuant to a letter request from the Board of Education dated April 25, 1995, an authorized representative of the Commissioner from the Office of the Hunterdon County Superintendent of Schools was directed to conduct a recount of machine and paper ballots cast for the General Fund question pursuant to N.J.S.A. 18A:14-63.3. The recount was conducted on May 2, 1995 at the Hunterdon County Board of Elections Voting Machine Warehouse and at the

Office of the Hunterdon County Superintendent of Schools. A recount of absentee ballots was conducted, at the Board's request, by the Hunterdon County Board of Elections.

At the conclusion of the recount, the tally for the General Fund question stood as follows:

	<u>FOR</u>	<u>AGAINST</u>
Voting District #1 Machine Count	225	228
Voting District #1 Paper Ballot Count	10	24
Absentee Votes	24	7
TOTAL:	259	259

In that a dual voting process was required on election day due to a malfunction of the voting machine, this election recount required counting both machine and paper ballots. As indicated by both the public counter and protective counter number of the voting machine, 588 voters cast machine ballots. Forty votes were cast using paper ballots. At the time of the recount, the sealed election packet received from the school district was opened to compare the number of voting authorities issued and voter names appearing on the poll lists to the number of ballots cast either by machine or paper ballot. There were no discrepancies in the comparison made of the protective counter, public counter, poll lists, paper ballots and voting authorities.

The Commissioner's representative found no change in the count for the General Fund question. As such, the Question remains defeated.


This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions set forth therein.

Accordingly, the Commissioner determines that, as originally announced, because it does not attain a plurality of votes, the General Fund question of the Board of Education of High Bridge was defeated by the voters pursuant to N.J.S.A. 18A:14-58.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MAY 19, 1995

DATE OF MAILING MAY 19, 1995

164-95

IN THE MATTER OF THE ANNUAL SCHOOL :
 ELECTION HELD IN THE SCHOOL : COMMISSIONER OF EDUCATION
 DISTRICT OF THE TOWNSHIP OF : DECISION
 BERKELEY, OCEAN COUNTY. :
 _____ :

MAY 19, 1995

IN THE MATTER OF THE ANNUAL SCHOOL :
 ELECTION HELD IN THE SCHOOL : COMMISSIONER OF EDUCATION
 DISTRICT OF THE TOWNSHIP OF : DECISION
 BERKELEY, OCEAN COUNTY. :
 _____ :

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held on April 18, 1995 in the School District of the Township of Berkeley were as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Muriel E. Beekman	1,574	93	1,667
Georgette McNerney	1,499	63	1,562
Denise Pavone Wilson	1,415	98	1,513
Cliff M. Besett	1,436	66	1,502
Herman J. Geiger	1,401	60	1,461
Sam Kalmanowitz	1,328	85	1,413

Pursuant to a letter request from candidate Cliff M. Besett filed on April 25, 1995, an authorized representative of the Commissioner from the Office of the Ocean County Superintendent of Schools was directed to conduct a recount of machine ballots cast for members of the Board pursuant to N.J.S.A. 18A:14-63.2. The recount was conducted on May 3, 1995 at the Ocean County Voting Machine Warehouse in Dover Township. Absentee ballots were recounted by the Ocean County Board of Elections pursuant to N.J.S.A. 19:57-24.

At the conclusion of the recount, the tally stood as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Muriel E. Beekman	1,574	92	1,666
Georgette McNerney	1,499	63	1,562
Denise Pavone Wilson	1,410	98	1,508
Cliff M. Besett	1,436	66	1,502
Herman J. Geiger	1,401	60	1,461
Sam Kalmanowitz	1,328	84	1,412

The results of the machine tally changed by 5 votes less for candidate Wilson, while the results of the absentee ballot tally changed by one vote less each for candidates Beekman and Kalmanowitz. Overall, however, the outcome of the election was not altered by the recount.

This concludes the report of the Commissioner's representative.


* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions set forth therein.

Accordingly, the Commissioner finds and determines that, as originally announced, Muriel E. Beekman, Georgette McNerney and Denise Pavone Wilson have been elected to full terms of three years each on the Board of Education of the Township of Berkeley.

The Commissioner further directs that a copy of this decision be transmitted to the Office of Administrative Law where an inquiry is pending into the conduct of the above-captioned election.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

MAY 19, 1995

165-95

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
 SCHOOL DISTRICT OF THE CITY : DECISION
 OF SOUTH AMBOY, MIDDLESEX :
 COUNTY :
 _____ :

MAY 22, 1995

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY : DECISION
OF SOUTH AMBOY, MIDDLESEX :
COUNTY :
_____ :

The announced results of the balloting for three members of the Board of Education for full terms of three years each, one member for a term of two years, and one member for a term of one year at the annual school election held on April 18, 1995 in the School District of the City of South Amboy were as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
<u>3-Year Term</u>			
Edward Campbell	471	20	491
Robert J. Kelly, Jr.	424	18	442
Cindy Coughlin-Zammit	418	19	437
Raymond T. Durski	399	15	414
Guy Peters	388	15	403
Thomas Brinamen	309	16	325
<u>2-Year Term</u>			
Patricia Olexa	453	16	469
Nancy McLaughlin	368	21	389
<u>1-Year Term</u>			
Michael J. Felice	464	21	485
William Hall (Write-in)	1	-	1

Pursuant to a letter request from Raymond T. Durski dated April 19, 1995 and filed on April 21, 1995, an authorized representative of the Commissioner from the Office of the Middlesex County Superintendent of Schools was directed to conduct a recount of machine ballots cast for members of the Board pursuant to N.J.S.A. 18A:14-63.2. The recount was conducted on May 2, 1995 at the Edison Voting Machine Warehouse.

At the conclusion of the recount, the tally stood unchanged, remaining as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
<u>3-Year Term</u>			
Edward Campbell	471	20	491
Robert J. Kelly, Jr.	424	18	442
Cindy Coughlin-Zammit	418	19	437
Raymond T. Durski	399	15	414
Guy Peters	388	15	403
Thomas Brinamen	309	16	325
<u>2-Year Term</u>			
Patricia Olexa	453	16	469
Nancy McLaughlin	368	21	389
<u>1-Year Term</u>			
Michael J. Felice	464	21	485
William Hall (Write-in)	1	-	1

Absentee tallies on recount are as reported by the County Board of Elections. No application for a recount of absentee ballots had been made to Superior Court as of the date of the Commissioner's recheck of the voting machines.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions set forth therein.

Accordingly, the Commissioner determines that, as originally announced at the conclusion of the election, Edward Campbell, Robert J. Kelly, Jr., and Cindy Coughlin-Zammit were elected to full terms of three years each, Patricia Olexa was elected to a two- year term, and Michael J. Felice was elected to a one-year term on the South Amboy Board of Education.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MAY 22, 1995

DATE OF MAILING MAY 22, 1995

166-95

LORETTA LANE, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE :
BOROUGH OF BERNARDSVILLE, :
SOMERSET COUNTY, :

DECISION

RESPONDENT. :

_____ :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2396-93

AGENCY DKT. NO. 41-3/93

LORETTA LANE,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
BOROUGH OF BERNARDSVILLE,
SOMERSET COUNTY,**

Respondent.

Stephen E. Klausner, Esq., for petitioner (Klausner, Hunter, Cige & Seid,
attorneys)

Nathanya G. Simon, Esq., for respondent (Schwartz, Simon & Edelstein, attorneys)

Record Closed: March 31, 1995

Decided: April 3, 1995

BEFORE ROBERT S. MILLER, ALJ:

This matter was transmitted to the Office of Administrative Law on March 18, 1993, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement, as evidenced by a signed agreement dated September 1, 1993 and by correspondence among counsel and myself which is attached hereto and fully incorporated herein.

I have reviewed the record and the terms of settlement and **I FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I CONCLUDE that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

April 3, 1995
DATE

Robert S. Miller
ROBERT S. MILLER, ALJ

4/7/95
DATE

Receipt Acknowledged:
Hope R. Blackman
DEPARTMENT OF EDUCATION

APR 12 1995
DATE

Mailed to Parties:
Jeff S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

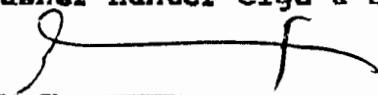
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September 1, 1993

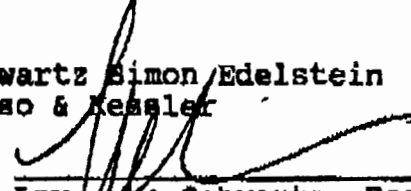
It will be agreed to by the parties and placed on the record that Lori Lane shall submit and agree to be examined by a Board Certified psychiatrist to be selected by the Administrative Law Judge, and said psychiatrist shall examine and evaluate Ms. Lane. The basis for the selection of the psychiatrist shall be left solely up to the Administrative Law Judge, however, the psychiatrist selected shall not have dealt with any of the parties at any other time. The attorney for the Board of Education and the attorney for Lori Lane shall make available to this psychiatrist any and all material pertaining to Lane, that is germane to this evaluation. This examination shall take place within thirty (30) days of the placing on the record of this agreement. Costs for the examination shall be borne solely by the Board of Education.

It is further agreed that if Lori Lane receives an evaluation and is found by the psychiatrist to be fully capable of performing all of her duties, and does not show evidence of deviance from normal mental health, the Board shall then reinstate her to the position of 5th grade Science Teacher and Science Specialist for 1993-94 school year. However, other than the reinstatement, nothing shall foreclose the Board from exercising any of its managerial prerogatives and nothing shall foreclose either party from exercising any of its rights under the statutes of New Jersey.

Klausner Hunter Cige & Seid

By: 
Stephen Klausner, Esq.
Attorney for Lori Lane

Schwartz Simon Edelstein
Celso & Kessler

By: 
Lawrence Schwartz, Esq.
Attorney for Bernardville
Board of Education

SCHWARTZ SIMON
EDELSTEIN CELSO &
KESSLER

COUNSELLORS AT LAW

(A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION)

RECEIVED
STATE BAR OF NEW JERSEY
SEP 13 12 00 PM '94

PRESIDENTIAL CENTER
SUITE 300
293 EISENHOWER PARKWAY
LIVINGSTON, NEW JERSEY 07039
(201) 740-1600
TELECOPIER
(201) 740-0891

SANCTUARY CENTRE, SUITE 105E
4800 NORTH FEDERAL HIGHWAY
BOCA RATON, FLORIDA 33431
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LAWRENCE S. SCHWARTZ
STEPHEN J. EDELSTEIN
NATHANYA G. SIMON*
NICHOLAS CELSO, III
DONALD A. KESSLER
MICHAEL S. RUBIN

SCOTT A. ELK +
MIGUEL A. MAZA⁰
OF COUNSEL

* ALSO MEMBER OF NY BAR
+ ALSO MEMBER OF PA BAR
+ MEMBER OF FL BAR ONLY
0 ALSO MEMBER OF PR BAR
□ ALSO MEMBER OF DC BAR

DENISE P. COLEMAN
ALAN R. NIEDZ
ANDREW B. BROWN
JOHN B. MARIANO, JR. †
JEFFREY A. BENNETT †
KENNETH A. SCHOEN*
PAMELA T. HANBACK
THOMAS RUSSO
STEPHEN G. DOHERTY*
JOSEPH R. MORANO*
MARK A. TABAKIN
DAVID SCHNEIDER
DWAYNE D. WARREN □
JOANN L. LYNCH
BRADLEY K. SCLAR

September 16, 1994

Honorable Robert S. Miller
Administrative Law Judge
Office of Administrative Law
9 Quakerbridge Plaza
CN-049, Building #9
Trenton, NJ 08625

Re: Lane v. Bernardsville Board of Education
OAL Docket No: EDU 2396-93

Dear Judge Miller:

It is the position of the Bernardsville Board of Education, that this matter should be closed by way of an Initial Decision adopting the settlement, which has been fully implemented at this time. The psychiatric examination has taken place by the independent psychiatrist, and Ms. Lane has been restored to full employment within the Bernardsville school system. Accordingly, with respect to the issues raised in the petition pending before Your Honor, the settlement is a full and final disposition on all issues. I trust, therefore, that an Initial Decision will be issued so that the matter can be closed at the Commissioner's office.

If you require anything further, please feel free to contact me. Thank you very much for your attention in this matter.

Respectfully submitted,

Nathanya G. Simon

NGS/mm
CC: Stephen Klausner, Esq.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
CN 049
Trenton, New Jersey 08625
(609) 588-6548

ROBERT S. MILLER
ADMINISTRATIVE LAW JUDGE

March 20, 1995

Stephen E. Klausner, Esquire
Klausner, Hunter, Cige & Seid
63 East High Street
P.O. Box 1012
Somerville, New Jersey 08876

Nathanya G. Simon, Esquire
Schwartz, Simon & Edlestein
293 Eisenhower Parkway, Suite 300
Livingston, New Jersey 07039

**Re: Loretta Lane v. Board of Education of the Borough
Bernardsville, Somerset County
OAL DKT. NO. EDU 2396-93**

Dear Counsel:

It is my understanding that this case is no longer a contested matter, that it has in fact been settled, and that the terms of the settlement have been fully implemented.

Please be advised that if I do not hear any objection from counsel by March 31, 1995, I will prepare an Initial Decision approving the settlement and closing the case.

Very truly yours,

A handwritten signature in cursive script, appearing to read "R. Miller".

Robert S. Miller
Administrative Law Judge

tmp

OAL DKT. NO. EDU 2396-93

LORETTA LANE, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 BOROUGH OF BERNARDSVILLE, :
 SOMERSET COUNTY, :
 :
 RESPONDENT. :
 :
 _____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner finds that the September 1993 agreement reached between the parties, the terms of which he determines to be acceptable, together with the subsequent course of events, have rendered this matter moot as a controversy before him. Accordingly, the matter is hereby dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MAY 22, 1995

DATE OF MAILING MAY 22, 1995

167-95

D.W., on behalf of her minor grandchild, :
P.M., JR, and P.M., SR., father of :
P.M., JR., :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF GREATER : DECISION
EGG HARBOR REGIONAL, ATLANTIC :
COUNTY, :

RESPONDENT. :

_____ :

SYNOPSIS

Petitioning parent and grandparent challenged Board's determination that P.M., Jr. was not legally domiciled within the Board's school district.

ALJ found that P.M., Jr.'s parents were not domiciled within the district and his grandmother, who was in the district, was not supporting him. Petitioners failed to demonstrate by a preponderance of credible evidence that P.M., Jr. was entitled to a free and appropriate education in the district. ALJ upheld action of Board seeking costs for his education for school years 1992-93 through 1994-95.

Commissioner adopted findings and determination in initial decision and directed petitioners remit to Board tuition for P.M., Jr., pro-rated to the time of his ineligible attendance in the district.

MAY 22, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11722-94

AGENCY DKT. NO. 456-11/94

**D. W. ON BEHALF OF HER MINOR
GRANDCHILD P. M., JR. and P. M., SR.,
FATHER OF P. M., JR.**

Petitioners,

v.

**THE BOARD OF EDUCATION OF
GREATER EGG HARBOR REGIONAL,
ATLANTIC COUNTY,**

Respondent.

D. W. and P. M., Sr., petitioners *pro se*

Louis J. Greco, Esquire, for respondent

Record Closed: March 10, 1995

Decided: March 30, 1995

BEFORE JOSEPH E. KANE, ALJ:

STATEMENT OF THE CASE
AND PROCEDURAL HISTORY

The petitioners were notified by the Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County (the Board) that P.M., Jr. could no longer attend the Absegami High School because he is not legally domiciled within the school district. Petitioners disagreed with this determination and on December 5, 1994, the matter was transmitted to the Office of Administrative Law (OAL) to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

A hearing was conducted at the Atlantic City OAL, 1201 Bacharach Boulevard, Atlantic City, New Jersey on March 3, 1995. At that time P. M., Sr., the father of P. M., Jr. agreed with a motion made by the respondent that P. M., Sr. should be included as a party to this matter since he, rather than P. M., Jr.'s grandmother, D. W., filed the original petition with the Absegami High School. The motion was granted thus including P. M., Sr. as well as D. W. as petitioners in this matter. The record was held open until March 10, 1995 in order to permit the filing of an affidavit on behalf of the Board. A decision was rendered on March 30, 1995.

ISSUE

WHETHER PURSUANT TO THE CRITERIA SET FORTH AT
N.J.S.A. 18A:38-1 ET. SEQ. P. M., JR. IS LEGALLY
DOMICILED WITHIN THE BOARD'S SCHOOL DISTRICT.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

P. M., Jr. is the son P. M., Sr. and R. M. D.W. is P. M., Jr.'s grandmother and resides within the Board's school district. P. M., Jr. has been attending the Absegami High School since the second semester of his freshman year. As of the date of the hearing, P. M., Jr. is a junior in his second semester.

In August, 1994, the Board notified the petitioners that in its opinion P. M., Jr. did not legally reside in its school district and thus, he was not entitled to a free education at Absegami High School.

Petitioners argue that D. W. is the legal guardian of P. M., Jr. and he has been residing with her since the Spring of 1992, in order to assist her with her disability. The Board does not disagree that D. W. is disabled, but contends instead that her disability does not serve as a legal basis under N.J.S.A. 18A:38-1 for P.M., Jr. to receive a free education within its district.

It is undisputed that P. M., Jr.'s parents have been divorced since April of 1992 and that both parents live outside of the Board's school district. D. W., the grandmother of P. M., Jr. lives within the Board's school district.

D. W. testified that due to a hip problem she has been disabled since the Spring of 1992. It was at that time she claims that P. M., Jr. came to reside with her in her Galloway Township apartment in order to assist her with shopping, food preparation and other daily living requirements. D. W. testified that the only income she receives is federal Social Security Supplement Income (SSI) and that she does not provide P. M., Jr. with any support. In April of 1994, her landlord advised her that if P. M., Jr. was going to reside with her he would have to be on the lease. Because of this requirement D. W. testified that P. M., Jr.'s parents turned over legal custody via a Superior Court Order to D. W. on April 6, 1994.

Both D. W. and P. M., Sr. testified that custody was not given to D. W. because P. M., Jr. could no longer reside with P. M., Sr. or because DYFS removed him from the home. According to both D. W. and P. M., Sr. legal custody was given to D. W. only so that P. M., Jr. could legally be on D. W.'s lease.

Having had an opportunity to consider the testimony of D. W. I found her to be unsure as to the amount of time that P. M., Jr. resides in her residence. She indicated at one point that he was always going back to his father's house and that when she brought this to the attention of P. M., Jr.'s mother, R. M., R. M. advised her to have the police bring him back to her residence in Galloway Township.

P. M., Sr. testified that he sometimes picks up P. M., Jr. after school on Wednesdays and returns him to D. W.'s apartment in the evening. He also indicated that he picks him up on Saturday mornings and sometimes P. M., Jr. will stay overnight into Sunday while other times he will return Saturday night and again be picked up by P. M., Sr. on Sunday morning, at which time they go to church and he is then returned to D. W.'s apartment on Sunday evening. After listening to this testimony, D. W. testified that P. M., Sr. "does not know what he is talking about", that P. M., Jr. is there with her during the whole week and sometimes goes with P. M., Sr. on weekends.

In the petition for relief filed by P. M., Sr., P. M., Sr. stated: "The reason I wanted him to attend Absegami was because there were too many gangs in my school district and I fear for his safety". P. M., Sr. claims that although that may have been a reason the primary motivation for placing him with D. W. was to help D. W. with her disability. P. M., Sr. also agreed with D. W.'s testimony that the only reason that custody was transferred by P. M., Sr. and R. M. to D. W. was because D. W.'s landlord was requiring P. M., Jr. to be on the lease. P. M., Sr. earns approximately \$30,000 per year while R. M. earns approximately \$18,600 per year. P. M., Sr. was unable to demonstrate whether or not he claimed P. M., Jr. as a dependent on his federal income tax since he testified that despite the fact he has been employed full time, he has not filed income tax statements since 1986.

On September 12, 1994, P. M., Sr. met with Mr. Ralph Martin, the Board Secretary and Business Administrator. In response to questions posed to P. M., Sr. by Mr. Martin, P. M., Sr. indicated that he supplies P. M., Jr. with food, clothing and funds throughout the school year. He further indicated that he claimed his son as a deduction on his federal income tax. When Mr. Martin asked why P. M., Jr. was attending Absegami High School, Mr. Martin testified that P. M., Sr. stated that he did not want his son to attend Pleasantville High School. Mr. Martin noted that during this entire meeting P. M., Sr. did not mention that he wanted P. M., Jr. to reside with D. W. to assist her with her disability.

I FIND that Mr. Martin's testimony and investigation was corroborated by a letter filed with the Board by D. W. on November 1, 1994. D. W. at that time wrote:

... They asked if I supported him and claimed him on my income taxes. I told them I was on disability and his father supports him. They denied him entrance to Absegami due to this fact. Perry is on my lease and whether they deny him entrance there, he still lives with me in Absecon due to the fact I need him to live here due to my disability and I am his legal guardian. His parents gave me the rights to be his legal guardian for these two reasons. He cannot reside in Absecon which he will be doing regardless of their decision not to let him return there and attend school in another city without paying tuition which I cannot afford. This is the long and short of this situation.

Andrea Mariner is the attendance officer for Absegami High School. At the end of the 1993/94 school year she received reports that P. M., Jr. was not attending school or was often very late. In response, Ms. Mariner testified that she went to D. W.'s apartment on at least four separate occasions when P. M., Jr. was not in school and did not find D. W. or P. M. to be at home. Finally after leaving her card at D. W.'s apartment on several occasions, D. W. called Mrs. Mariner. During this conversation which took place in the Spring of 1994, Mrs. Mariner testified that D. W. stated that she had no control over P. M., Jr. and that he was home with his father in Pleasantville.

Mrs. Mariner was charged by the Board with delivering a letter notifying P. M., Sr. and R. M. that their son could no longer attend Absegami High School. Mrs. Mariner testified that when arriving at P. M., Sr.'s home in Pleasantville, New Jersey she found two young boys present in the home. She asked them on at least two occasions if P. M., Jr. lived there to which they replied yes.

Whether a student can attend a school free of charge depends upon the criteria set forth in N.J.S.A. 18A:38-1. The statute requires that education shall be provided to students free of charge in the event certain enumerated criteria are met. The burden is upon the petitioners to demonstrate by a preponderance of the credible evidence that P. M., Jr. meets all the enumerated criteria.

The statute reads in relevant part:

Public schools shall be free to the following persons over five and under 20 years of age:

- a. Any person who is domiciled within the school district;
- b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child. . .

Based upon the testimony set forth above, I **DO NOT FIND** that the petitioners have made a prima facie showing that D. W. is supporting P. M., Jr. By her own admission which was corroborated by the statement P. M., Sr. made to Mr. Martin on September 12, 1994, P. M., Jr., although on D. W.'s lease, is being supported by P. M., Sr.

I **FIND** that the element of support by P. M., Sr. of P. M., Jr. is further evident in the health benefits contract submitted into evidence wherein it clearly indicates that P. M., Sr. has as one of the named beneficiaries P. M. Jr. In addition, the basis set forth in the petition for relief that P. M., Jr. attend Absegami High School because of a gang problem in the Pleasantville School District does not constitute a basis for relief under the above cited statute. It is clear from the record that P. M., Jr.'s parents are not domiciled within the school district nor was P. M., Jr. placed within the district through any action of the Division of Youth & Family Services.

In conclusion, I **FIND** that the petitioners have failed to demonstrate by a preponderance of the credible evidence that P. M., Jr. is entitled to a free and appropriate education within the Absegami School District. The cost for educating a student within this district was filed by Affidavit by Mr. Ralph Martin who has been the Board Secretary and Business Administrator with this district for 37 years. The cost figures were not disputed by the petitioners. According to Mr. Martin the cost of educating a student within the Absegami School District is as follows:

School Year 1992-93	\$ 9,105.00 certified
School Year 1993-94	\$ 8,000.00 estimated
School Year 1994-95	\$ 8,500.00 estimated

Accordingly, I herein **UPHOLD** the action proposed by the Board.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 30, 1995
DATE

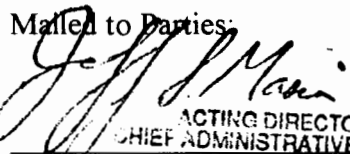

JOSEPH E. KANE, ALJ

Receipt Acknowledged:

4/5/95
DATE


DEPARTMENT OF EDUCATION

APR 10 1995
DATE
psa

Mailed to Parties: 007

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

DOCUMENTS IN EVIDENCE

FOR PETITIONER:

P-1 LETTER DATED SEPTEMBER 2, 1993 WITH ATTACHMENTS
P-2 BETTY BACHARACH REHABILITATION HOSPITAL DISCHARGE SUMMARY

FOR RESPONDENT:

R-1 HANDWRITTEN DOCUMENT DATED NOVEMBER 1, 1994

JOINT EXHIBITS:

J-1 INDEX OF PERRY MAYS DOCUMENTS (CONSISTING OF 29 PAGES)

WITNESSES

FOR PETITIONER:

DORIS WILLIAMS
PERRY MAYS, SR.

FOR RESPONDENT:

RALPH MARTIN
ANDREA MARINER

D.W., on behalf of her minor grandchild, :
P.M., JR, and P.M., SR., father of :
P.M., JR., :

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF GREATER :
EGG HARBOR REGIONAL, ATLANTIC :
COUNTY, :

DECISION

RESPONDENT. :

_____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ's finding that petitioners have failed to prove that P.M., Jr. is entitled to a free public education in respondent's district. Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein; and pursuant to N.J.S.A. 18A:38-1b(1), the Commissioner directs that petitioners remit to the Board tuition for P.M., Jr., pro-rated to the time of his ineligible attendance in the district.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MAY 22, 1995

DATE OF MAILING MAY 22, 1995

167-95

EDU # 11722-94
C # 167-95
SB # 71-95

D.W., on behalf of her minor grandchild,
P.M., JR., and P.M., SR., father of P.M.,
JR., :

PETITIONERS-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION
GREATER EGG HARBOR REGIONAL
SCHOOL DISTRICT, ATLANTIC COUNTY, :

RESPONDENT-RESPONDENT. :

_____ :

Decided by the Commissioner of Education, May 22, 1995

For the Petitioner-Appellant, P.M., Sr., pro se

For the Petitioner, D.W., pro se

For the Respondent-Respondent, Louis J. Greco, Esq.

This matter was initiated in October 1994 when P.M., Sr. (hereinafter "appellant") filed a petition of appeal with the Commissioner of Education challenging the determination of the Greater Egg Harbor Regional Board of Education that his son, P.M., Jr., was not domiciled within the district and therefore not entitled to a free public education therein. See N.J.S.A. 18A:38-1. Appellant claimed that his son was entitled to attend the district's schools free of charge since he resided with his grandmother, D.W., his legal guardian, within the district. By letter dated October 24, 1994 from the

Oct. 5, 1995

director of the Bureau of Controversies and Disputes in the Department of Education, appellant was advised that it would be necessary to amend the petition so as to include D.W. On November 7, 1994, D.W. filed her petition with the Commissioner.

During the proceedings in the Office of Administrative Law, the appellant agreed to a motion by the Board to include him as a party to this matter since he had filed the original petition. On March 30, 1995, the Administrative Law Judge ("ALJ") determined that petitioners had failed to establish that P.M., Jr. was entitled to a free public education in the district under the criteria of N.J.S.A. 18A:38-1. In particular, the ALJ found that petitioners had failed to demonstrate that D.W. supported P.M., Jr. On May 22, 1995, the Commissioner adopted the recommended decision of the ALJ.

On June 6, 1995, the appellant filed a notice of appeal to the State Board of Education.¹ On June 12, appellant was advised that his appeal was deficient in that he had failed to provide proof of service on either his adversary or the Commissioner as required by N.J.A.C. 6:2-1.6. In that appellant did not include his address in the notice, the letter was sent to his work address shown on the envelope. He was given until June 22 to cure the defect.

Pursuant to N.J.A.C. 6:2-1.11(a), appellant's brief in support of the appeal was due by June 26, 1995, 20 days after the appeal was filed. Appellant, however, failed to file a brief by that date. Nor did he cure the deficiency. By letter dated July 6, 1995, appellant was notified of his failure to file a brief in support of the appeal and advised that this matter was being referred to our Legal Committee for consideration of his

¹ We note that D.W. did not file an appeal from the Commissioner's decision or join in the instant appeal filed by P.M., Sr.

failure to perfect the appeal. When appellant's home address was determined, he was again notified by letter dated August 18, 1995 of his failure to file a brief and provided with yet another opportunity to file and to correct the deficiency. He was given until September 8, 1995 to comply. Appellant, however, failed to file a brief in support of his appeal or to provide proof of service of his notice of appeal. Nor did he request an extension of time for such filing or provide any explanation for the delay.

On September 18, appellant called the State Board Appeals Office to relate that the Greater Egg Harbor Regional District had barred his son from further attendance. He also indicated that neither D.W. nor his son still resided in the district, and acknowledged that he had received our letters sent to his work address. Appellant was informed that, despite his failure to respond to the previous correspondence, he could file his argument and an affidavit as to why he had failed to respond by September 20, when the Legal Committee would be considering this matter. A letter was mailed and faxed to appellant on September 18 confirming the substance of that discussion. Appellant thereupon faxed a letter indicating that he had received the August 18 letter and

didn't want to appeal this 'particular' item. Instead I wanted to keep my son in school due to senior privileges. I was told by some-one [sic] in your offices that due to the 'new' development I had to start a 'new' case. This is the reason why I didn't appeal this particular item or case from my previous appeal.

Appellant faxed another letter on September 27, again expressing concern that his son was not being permitted to attend school in the district.

In consideration of appellant's pro se status, we provided him with repeated opportunities to submit the required documents. Despite his acknowledged receipt of our letters to his home and work addresses notifying him of his failure to file an appeal brief, appellant has still failed to file a brief in support of his appeal. Nor has he corrected the deficiency in his notice of appeal by providing a proof of service. Indeed, appellant contacted us only after the district prohibited his son, who apparently no longer resides within the district, from attending school therein. Appellant's desire to pursue a new challenge to the district's action based upon "senior privileges" does not excuse his failure to comply with our regulations in pursuing the instant appeal or provide any basis for relaxing the filing requirement in this case.

The State Board of Education therefore dismisses the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a).

October 5, 1995

Date of mailing OCT 10 1995

168-95

R.M.S, on behalf of K.W.S., JR., :

PETITIONER, :

V.

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE :
TOWNSHIP OF GLOUCESTER, :
CAMDEN COUNTY, :

DECISION

RESPONDENT. :

_____ :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9909-94

AGENCY DKT. NO. #412-10/94

R.M.S. ON BEHALF OF K.W.S., JR.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF GLOUCESTER,
CAMDEN COUNTY,**

Respondent.

R.M.S., petitioner, pro se

John D. Wade, Esq., for the respondent (Ferreri and Wade, attorneys)

Record Closed: March 24, 1995

Decided: April 4, 1995

BEFORE **ROBERT S. MILLER**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 13, 1994, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

April 7, 1995
DATE

Robert S. Miller
ROBERT S. MILLER, ALJ

4/7/95
DATE

Receipt Acknowledged:
Hope R. Block
DEPARTMENT OF EDUCATION

APR 12 1995
DATE

Mailed to Parties:
Jeff S. Main
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

None

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

FERRERI & WADE, P.C.
1250 Chews Landing Road
Laurel Springs, New Jersey 08021
(609) 346-2800
John D. Wade, Esquire
Attorneys for Respondents

RECEIVED
STATE OF N.J.
OFFICE OF ADMINISTRATIVE LAW
MAR 24 11 31 AM '95

ROSE M. SCRIBONI, as parent and	:	OFFICE OF ADMINISTRATIVE LAW
natural guardian of KENNETH W.	:	
SCRIBONI, JR., a minor	:	OAL DOCKET NO. EDU 09909-94S
	:	
Petitioner,	:	
	:	
vs.	:	STIPULATION OF SETTLEMENT
	:	
GLOUCESTER TOWNSHIP BOARD	:	
OF EDUCATION, et al	:	
	:	
Respondents.	:	

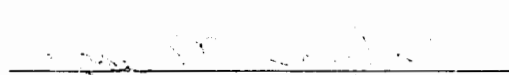
It is stipulated and agreed by and between the parties that the above action be settled as follows:

1. Both parties waive any rights that either may have against the other.
2. Neither party admits that either has acted incorrectly or fraudulently.
3. Both parties waive any costs of suit for prosecution or defense to which either may be entitled from the other.
4. Petitioners withdraw their petition.
5. The parties warrant that this Stipulation contains all the representations, promises, agreements and understandings made by and between them; that there are no other claims, representations, promises, agreements or understandings not herein contained, either oral or written, which shall or may be charged or enforced or enforceable, unless reduced to writing and signed by each of the parties hereto; and the waiver of any term, condition, clause or provision of this Stipulation shall in no way be deemed to be considered a waiver of the other terms,

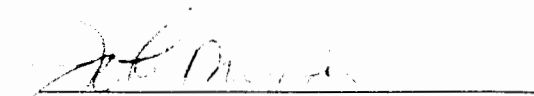
conditions, clauses or provisions of this Stipulation.

6. The parties acknowledge that this Stipulation of Settlement has been entered into freely and voluntarily and that the execution of this Stipulation is not the result of any duress or undue influence.

IN WITNESS WHEREOF, the parties have executed and delivered this Stipulation on the 22nd day of MARCH, 1995.



Rose M. Scriboni, pro se
Petitioner



John D. Wade, Esquire
Counsel for Respondents

R.M.S, on behalf of K.W.S., JR., :

PETITIONER, :

V.

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE :
TOWNSHIP OF GLOUCESTER, :
CAMDEN COUNTY, :


DECISION

RESPONDENT. :

_____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

MAY 22, 1995

DATE OF MAILING MAY 22, 1995

169-95

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE :
 SCHOOL DISTRICT OF TOMS : COMMISSIONER OF EDUCATION
 RIVER REGIONAL HIGH SCHOOL, : DECISION
 OCEAN COUNTY. :
 _____ :

MAY 22, 1995

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE :
 SCHOOL DISTRICT OF TOMS : COMMISSIONER OF EDUCATION
 RIVER REGIONAL HIGH SCHOOL, : DECISION
 OCEAN COUNTY. :
 _____ :

The announced results of the balloting for one member of the Toms River Regional Board of Education for a full term of three years representing Dover Township at the annual school election held on April 18, 1995 in the Regional School District of Toms River were as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Thomas Baxter	2,478	798	3,276
Michael J. Hrehovcik	2,810	107	2,917

Pursuant to a letter request from Michael J. Hrehovcik dated April 20, 1995 and filed April 21, 1995, an authorized representative of the Commissioner from the Office of the Ocean County Superintendent of Schools was directed to conduct a recount of machine ballots cast for Board member pursuant to N.J.S.A. 18A:14-63.2. The recount was conducted on May 3, 1995 at the Ocean County Voting Machine Warehouse.

At the conclusion of the recount, the tally stood unchanged, remaining as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Thomas Baxter	2,478	798	3,276
Michael J. Hrehovcik	2,810	107	2,917

Absentee ballots were recounted by the Ocean County Board of Elections pursuant to N.J.S.A. 19:57-24.

Therefore, it is recommended by the Commissioner's representative that the results, as announced at the conclusion of the election, remain unaltered.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts the findings and conclusions as his own.

Accordingly, the Commissioner finds and determines that, as announced at the conclusion of the election, Thomas Baxter was elected to a full term of three years on the Toms River Board of Education representing Dover Township.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

MAY 22, 1995

DATE OF MAILING MAY 22, 1995

170-95

BITS N' BYTES, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF RED
BANK REGIONAL HIGH SCHOOL
DISTRICT, MONMOUTH COUNTY AND :
P.C. CARE, INC.,

DECISION

RESPONDENTS. :

_____ :

MAY 23, 1995

OAL DKT. NO. EDU 6394-94

BITS N' BYTES, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF RED : DECISION
BANK REGIONAL HIGH SCHOOL
DISTRICT, MONMOUTH COUNTY AND :
P.C. CARE, INC.,
RESPONDENTS. :
_____ :

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-14.4, along with copies of notifications sent to the parties by OAL on December 5, 1994 providing them ten (10) days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the parties, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MAY 23, 1995
DATE OF MAILING MAY 24, 1995

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
 SCHOOL DISTRICT OF THE CITY OF : DECISION
 ATLANTIC CITY, ATLANTIC :
 COUNTY. :
 _____:

SYNOPSIS

Petitioner, defeated candidate, alleged there were irregularities and/or violations of law in the conduct of the annual school election.

ALJ concluded that while petitioner demonstrated there were irregularities in the manner in which voter absentee ballots were applied for, petitioner did not show that any of the contested absentee ballots were cast or those that were cast were cast improperly. Moreover, ALJ found that petitioner failed to show, by parol evidence, that any affiant not qualified to vote did, in fact, cast a ballot at the election. ALJ did find that the Board failed to provide poll lists at the polling places in violation of N.J.S.A. 18A:14-48. ALJ admonished the Board to comport to the School Election Laws. However, since petitioner failed to show that the will of the electorate was thwarted, petition was dismissed and the results of the election, pursuant to recount, were ordered to stand.

Commissioner adopted findings and determination in initial decision, emphasizing the admonition to the Board to comply with School Election Laws.

May 23, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4533-94

AGENCY REF. NO. 125-4/94

**IN THE MATTER OF THE ANNUAL
SCHOOL ELECTION HELD IN THE
SCHOOL DISTRICT OF THE CITY OF
ATLANTIC CITY, ATLANTIC COUNTY,,**

Patrick Casey, Esq., for petitioner, John Dollard

Lillian Waters, petitioner, pro se

Joseph Jacobs, Esq. for respondent Board of Education of the City of Atlantic City

Record Closed: February 28, 1995

Decided: April 13, 1995

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Two letter complaints dated April 27, 1994, were filed by John P. Dollard and Lillian Waters, defeated candidates for membership on the Board of Education of the City of Atlantic City (Board), alleging irregularities in the conduct of the annual school election held on April 19, 1994. Petitioners requests that the Commissioner of Education (Commissioner) conduct a recount of the ballots cast at the election and convene an inquiry into the alleged election irregularities.

The matter was transmitted to the Office of Administrative Law (OAL) on May 11, 1994, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. In the transmission to the OAL, the Commissioner requested that the matter be given priority scheduling.

On May 16, 1995, the Commissioner issued his Decision with respect to petitioners' request for a recount of the election results of the annual school election held on April 19, 1994. The representatives of the Atlantic County Superintendent of Schools found that although there were some minor changes [in the results of the balloting], the names of the three winning candidates remained the same as those derived from the balloting of April 19, 1994. The Commissioner, therefore, accepted the representatives recommendation that the results announced at the conclusion of the election remain unaltered. (Commissioner Decision, May 16, 1994, slip op. at p.2).

This matter was originally scheduled for hearing on July 5, 1994, John West, Esquire, appearing for petitioner Dollard. On July 5, 1994, Mr. West requested an adjournment of the hearing asserting that there were problems with discovery. The Board did not object and the hearing was adjourned and rescheduled to be heard on August 2, 1994.

On August 1, 1994, petitioner requested an adjournment of the August 2, 1994, hearing asserting that Mr. West's parents had passed away and that his attorney was not available for the hearing. Petitioner also represented that he would retain substitute counsel.

On August 26, 1994, this tribunal was advised that petitioner Dollard had retained Louis P. McFadden, Jr., Esquire, as his legal counsel in substitution for John C. West, III. The instant matter was scheduled to be heard on October 21, 1994. However, on October 4, 1994, this tribunal was advised that Mr. McFadden was scheduled to be out of the State of New Jersey and, therefore, would not be available for the hearing scheduled for October 21, 1994. All parties agreed to an adjournment.

On October 20, 1994, this tribunal initiated a conference call to advise the parties that the matter must move forward as soon as possible. This tribunal learned that Patrick Casey, Esquire, would be substitute counsel for Mr. McFadden who would act as co-counsel. The parties were advised that this matter was getting stale and that the decision had the possibility of running into the 1995 school election scheduled for April 18, 1995. The only date available to all of the parties was January 3, 1995, therefore, the hearing was scheduled for that date.

On December 29, 1994, this tribunal was advised that there was an attorney conflict for the January 3, 1995 hearing date. All parties agreed to adjourn the hearing date.

The matter was rescheduled for and heard on February 27, 1995, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey. The hearing record closed on February 27, 1995.

BACKGROUND FACTS

The results of the recount of the election are as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Michael P. Toland	1,636	67	1,703
Jeffree M. Fauntleroy	1,474	65	1,539
Alma Y. Dobson	1,392	54	1,446
John P. Dollard	1,345	38	1,383
Lillian E. Waters	893	21	914
Sabina M. Walsh	757	18	775
Nancy Anna Brennan	596	21	617
Gregorio "Buddy" Maturgo	412	12	424

(Slip Op. at 2)

TESTIMONIAL AND DOCUMENTARY EVIDENCE

Victoria Sumbillo, who as resided at 1508 Bellfield Street, Atlantic City, since 1988, was called by petitioners to testify. Ms. Sumbillo is in the business of providing writing and clerical service for others as an independent contractor. She is not a United States citizen and is not registered to vote. She asserts she is not a paid political consultant.

Ms. Sumbillo testified that in April 1994, she personally registered more than 100 individuals for voter absentee ballots. She visited and registered absentee voters in the King David Nursing Home, Ocean Side Convalescent Center, Eastern Pines Nursing Home, Seashore Gardens Nursing Home, Caring, a day care center, Upper Rise condominium, Lower Rise condominium, New York Avenue Apartments and the Ritz Condominium.

Ms. Sumbillo testified she registered more than 100 individuals for absentee ballots at King David in three days of visits. At Eastern Pines, she spent two days but could not recall how many voters she had registered. She asserted she visited the patients at Eastern Pines with the director of the facility. She admitted that some of the applications for absentee ballots were completed in her handwriting and that she witnessed all of the applicants sign their respective applications.

Mr. Sumbillo testified she met with individual patients at the Seashore Gardens where she personally completed 30 applications for voter absentee ballots. She spent three days registering absentee voters, who were patients at the Caring Day Care Center. Similarly, she devoted three days registering 100 plus absentee voters at the Upper Rise Condo.

Ms. Sumbillo testified that she was not paid to register absentee voters. Rather, she asserted she performed the service on a strictly voluntary basis. She stated she never discussed candidates running for election with the patients she registered. She further testified she personally sent the voter absentee ballot applications to the Atlantic County Board of Elections through the United States Post Office at her own expense.

Ms. Sumbillo testified that Henry Geiger signed the Civilian Absentee Ballot Application in her presence for the election to be held on April 19, 1994. (P-2) Ms. Sumbillo could not explain how Mr. Geiger's death was recorded as July 2, 1993, pursuant to the Certified Death Certificate, dated February 15, 1995. (P-3)

A Civilian Absentee Ballot Application for Eugene Tillman was completed in Ms. Sumbillo's handwriting for the school election to be held on April 19, 1994 (P-4). Ms. Sumbillo could not explain the Certified Death Certificate for Mr. Eugene Henry Tillman which demonstrated that his death occurred on December 19, 1993. (P-5)

The record shows that Ms. Sumbillo executed Civilian Absentee Ballot Application for: Madeline H. Rowley who died January 4, 1994, (P-7); Charles Boyce who died September 2, 1993 (P-9); Charles Clifton Everett, Sr., who died September 8, 1993 (P-11); and, James Franklin Brown who died December 31, 1993 (P-12).

Ms. Sumbillo testified that she encountered no problems in gaining access to patients at the various nursing homes and convalescence centers. In fact, she asserted, she was provided a table and space with which to work with the patients at some of the facilities. She stated that when she arrived at each of the facilities, the director of the facility would announce Ms. Sumbillo's presence and those who wanted to vote by absentee ballot were registered to vote.

Miriam Newlon, Director of Social Services for the Oceanside Convalescence Home (Oceanside), testified for petitioner. Ms. Newlon testified that in the Spring of 1994 she had contact with Ms. Sumbillo who was working for a political candidate interested in running for the position of mayor of Atlantic City. Ms. Sumbillo telephoned Ms. Newlon and asked if she could bring three men running for seats on the Atlantic City Board of Education to Oceanside. Ms. Newlon told Ms. Sumbillo that it would be a waste of time to do so. Despite Ms. Newlon's statement, Ms. Sumbillo arrived at Oceanside with three men running as a team in support of the Atlantic City Superintendent of Schools. After their arrival, Ms. Newlon again told the visitors that it would be a waste of their time to talk with the patients at Oceanside. Ms. Sumbill and the

three men left the facility. Ms. Sumbillo left campaign material. The campaign material was discarded by Ms. Newlon.

In April 1994, Oceanside had 95 resident patients in the facility, 25 of whom were not competent. Ms. Newlon asserted that Ms. Sumbillo was not permitted to register the patients for voter absentee ballots. However, on one day prior to April 1994, Ms. Sumbillo managed to get into the facility, without Ms. Newlon's knowledge. Ms. Sumbillo had telephoned the facility approximately ten times prior to the April election seeking permission to register the patients for absentee ballots. Ms. Sumbillo arrived at Oceanside on three occasions, however, Ms. Newlon blocked Ms. Sumbillo from going onto the patient floors.

Ms. Newlon testified that prior to the April 1994 school election, she received a call from the Oceanside receptionist who told Ms. Newlon that Ms. Sumbillo was in the facility. Ms. Newlon asserted that Ms. Sumbillo appeared at Ms. Newlon's second floor office and handed Ms. Newlon an envelope. The envelope contained a \$100 gift certificate for Macy's Department Store. Ms. Newlon got to Ms. Sumbillo before Ms. Sumbillo left the facility and returned the envelope to her. Thereafter, Ms. Newlon telephoned the Atlantic County Board of Elections to report the incident.

Ms. Newlon testified that she did not assist Ms. Sumbillo in completing any applications for absentee voter ballots. Nor did she provide Ms. Sumbillo with a table or room in which to register Oceanside patients for absentee voter ballots. Ms. Sumbillo was not permitted by Ms. Newlon to go to the patients floors. She did not know how Ms. Sumbillo had made her way onto the patients floor nor how long she was there before she left.

Ms. Newlon testified that Ms. Sumbillo asserted she had completed an absentee voter ballot application for Madeline Rowley when Ms. Sumbillo visited Oceanside in April 1994. Ms. Newlon contended, however, that Ms. Rowley was deceased on January 6, 1994. (P-7)

Charles Hawn, Jr., Atlantic City Board of Education Secretary and School Business Administrator, was called by petitioner who testified, among other things, that he was in charge of the Board's annual school election. Mr. Hawn asserted that he caused to be published, the notice

of the annual school election and the notice for civilian and military absentee ballots. He stated that 500 absentee ballots were printed and sent to the Atlantic County Board of Elections.

The Board Secretary testified that election signature registers were delivered to each of the school election polling places. He asserted that the poll workers were instructed as to the procedure to follow during the election; i.e., that the poll list prepared and delivered to the polling place was to be compared with the individual voter signature. The poll list became the voters authorization to vote.

With respect to affidavit votes, Mr. Hawn testified that the statutory provisions were followed by the poll workers (N.J.S.A. 18A:14-51.3 incorporating N.J.S.A. 19:32-10). After the election, it was brought to Mr. Hawn's attention that certain people who voted by affidavit were not authorized to vote. Mr. Hawn testified that the Regular/Combined Statement of the Results of the School Election would not alter the results if the absentee ballots case were eliminated. (R-1) He admitted, however, that R-1 in evidence did not breakdown the affidavit votes which were cast. He contended that persons names who cast an affidavit vote were to be checked against the poll list.

Mr. Hawn asserted that the polling places for the annual school election were not the same polling places for the municipal election or the general election. He conceded that it was possible for a voter who voted by affidavit to also vote at the regular polling place.

Mr. Hawn testified that in the Third Ward, where there were 239 registered voters, 42 affidavit votes were cast. By comparison, the Second District, with 700 plus registered voters, no affidavit votes were cast. Mr. Hawn asserted that there was no way of knowing for which candidates the affidavit voters cast their votes.

Lillian F. Waters, a petitioner-complainant in this matter testified that she did not observe any irregularities at the polling place during the election held on April 19, 1994. She was a candidate for a seat on the Board and was defeated by 532 votes.

Ms. Waters based her complaint of voting irregularities upon hearsay statements made by Catherine Hunter, who was not available to testify due to illness. Ms. Waters testified that Ms. Hunter had suffered a stroke and was hospitalized at the time of the hearing.

Rosemary Devine, Director of Recreation and Volunteer Services at Seashore Gardens, testified on behalf of petitioner Dollard. She had daily contact with the 180 to 200 patients who reside at Seashore Gardens. She stated that prior to each election, candidates for elected office would call her to request permission to visit the facility and handout campaign literature to the residents. Ms. Devine stated that Seashore Gardens has a policy which requires that each candidate bring a computer printout of the registered voters residing at the facility.

In 1994, Ms. Sumbillo visited Seashore Gardens on one or two occasions and was instructed to bring the registered voters list in order that Ms. Devine could cross out the names of patients who had died or were incompetent. Ms. Sumbillo was aware of the Seashore Gardens policy but, Ms. Devine asserted, Ms. Sumbillo attempted to get around the policy when she visited the facility.

Ms. Devine testified that Ms. Sumbillo was alone when she visited Seashore Gardens and did not appear to represent any candidate. Ms. Sumbillo was always accompanied by a Seashore staff member when she visited the patients to apply for absentee ballots. Subsequent to the patients application for absentee ballots, the ballots were delivered directly to the patients. Ms. Devine contended that the Seashore Gardens staff members did not sign the patients absentee applications or ballots.

Ms. Devine testified she did not know how many Seashore Gardens residents requested absentee ballots. Nor did she know whether the patients voted or for whom they voted.

Ms. Devine asserted that Henry Geiger was a former patient at Seashore Gardens. The record shows that his Civilian Absentee Ballot Application was received by Atlantic County (presumably the Board of Elections) on March 23, 1994 (P-2). Ms. Devine contended that Mr. Geiger could not have voted in the April 19, 1994, school election because he died on July 2, 1993 (P-3).

Barbara Cohler, Assistant Director of Recreation at Seashore Gardens, testified that she had come in contact with Ms. Sumbillo several times prior to the 1994 school election. Ms. Cohler asserted that she was with Ms. Sumbillo at all times during Sumbillo's visit at Seashore Gardens. Ms. Cohler would take Ms. Sumbillo up to the patients floor and was present when Ms. Sumbillo presented or helped a patient complete the absentee ballot application. Ms. Cohler asserted that Ms. Sumbillo took the absentee ballots with her when she left the facility. Subsequently, Ms. Sumbillo would return to Seashore Gardens with the absentee ballot and provide it to the patient. Again Ms. Cohler was present with Ms. Sumbillo.

Ms. Cohler asserted that at times, Ms. Sumbillo would attempt to register incompetent patients. Ms. Sumbillo was unsuccessful because Ms. Cohler or Ms. Devine prevented Sumbillo from registering the incompetent patients.

Ms. Cohler testified that Ms. Sumbillo never attempted to campaign for any candidates when she registered or delivered the absentee ballots to patients. Both Ms. Cohler and Ms. Devine testified that Ms. Sumbillo never offered them money or gifts to register the patients at Seashore Gardens.

Betsy Ann Bartholomew, an investigator with the Atlantic County Prosecutor's Office, testified she was involved in an investigation of Victoria Sumbillo. The Prosecutor's Office had received information that absentee ballot applications had been forged by Ms. Sumbillo which caused Sergeant Bartholomew to interview Ms. Sumbillo at Sumbillo's home.

Initially, Ms. Sumbillo told the Investigator that she was not working for any candidate for elective office. Ms. Sumbillo then stated, however, that she had worked for individuals named Wheland (Mayor of Atlantic City), Cooper (Dolores Cooper, former New Jersey Assembly member), Tom Russo, Mike Toland, Dobison and Fauntleroy (candidates for the Atlantic City Board of Education).

Sergeant Bartholomew found uncompleted absentee voter applications on Ms. Sumbillo's desk. Ms. Sumbillo told the Investigator that the applications had been signed sometime before

by the individuals requesting voter absentee ballots. Ms. Sumbillo explained that she had gone to several nursing homes and condominiums to have individuals apply for voter absentee ballots.

The Atlantic County Clerk advised the Atlantic County Prosecutor's Office that the reason for the requested Civilian Absentee Ballot Applications, as stated, by Ms. Sumbillo, was that the individual applicant was disabled. The Atlantic County Clerk checked on one individual absentee ballot application and determined that the individual who claimed to be disabled was at work. Ms. Sumbillo had no explanation for this finding.

Sergeant Bartholomew advised Ms. Sumbillo that eight individuals who had applied for absentee ballots, were all dead. Ms. Sumbillo responded that no one had told her the individuals had died. Ms. Sumbillo admitted to the Investigator that she would have an applicant sign more than one application for an absentee ballot.

Sergeant Bartholomew testified that she visited Altman Terrace and spoke with the manager of the facility who stated that Ms. Sumbillo had set up a table and registered many of its residents to vote. Sergeant Bartholomew spoke with Teresa Hanson, a woman 92 years of age. Sergeant Bartholomew observed Ms. Hanson's absentee voter application on Ms. Sumbillo's desk when she had visited Sumbillo. The Investigator asked Ms. Hanson if she recalled the application. Ms. Hanson replied that she did not recall such an application and asserted that she had never voted in her lifetime. Ms. Hanson had difficulty with her eyesight. Therefore, she could not state whether the signature on the application Sergeant Bartholomew offered her was her signature.

George Drozdowski, a representative of the Department of Education, Atlantic County and Cape May County Superintendent's offices, testified, among other things, that he was familiar with the election law provisions under Title 18A, Education. He asserted that he reviewed the voter Affidavit Forms of the 13 voting districts in the Board's annual school election. He asserted that an affidavit voter must execute a sworn statement which is witnessed by an election worker or a notary. He asserted that the Affidavit Form of Juan J. Shepperson (P-20) was not signed by the voter. The Board's counsel stipulated that the remaining Affidavit forms were not properly processed. (P-20)

John P. Dollard, petitioner-complaint, testified that he was one of a total of eight candidates for a seat on the Board at the April 19, 1994, annual school election. There were three seats to be filled at the election. Mr. Dollard placed in the fourth position, 47 votes behind the individual who was the third highest vote tally.

Mr. Dollard testified that where a voters name did not appear in the voter registration book, that individual was permitted to vote by affidavit. He asserted that the affidavit was to be witnessed by a poll worker. He further asserted that there were no poll lists provided to the poll workers nor were the voters permitted to sign the voter registration book.

Mr. Dollard personally inspected the voter Affidavit Forms (P-20) to determine whether or not the affiant was a registered voter. He contended that the prospective voter was required to register with the Atlantic County Board of Elections 30 days prior to the annual school election held on April 19, 1994. Subsequent to his inspection of the Affidavit Forms Mr. Dollard determined that some of the affidavit voters were not registered to vote. (P-20)

Mr. Dollard testified that five affidavit voters who voted in District No. 2, were either not registered voters or failed to sign the affidavit. With regard to District No. 5, he asserted there were eight affidavit voters who were not registered and that two of the individuals also voted by absentee ballot.

Mr. Dollard asserted there were three affidavit voters in District No. 6, who were not registered to vote. Similarly, there were five affidavit voters in District No. 3, who were not registered to vote in the annual school election.

On cross-examination Mr. Dollard testified that 47 votes at the polls separated him from the third place candidate. Mr. Dollard admitted that he received 38 absentee votes while the third place candidate received 54 absentee ballots. Therefore, there were 63 total number of votes cast which separated Mr. Dollard from the third place and successful candidate for a seat on the Board.

Mr. Dollard testified that Bertha Boone and Billy Hall voted by way of absentee ballot and affidavit, yet neither individual was a registered voter. Mr. Dollard admitted that it was the Atlantic County Board of Elections which determined whether an individual is a registered voter. He admitted, further, that it was the Board of Elections which sent both individuals absentee ballots. Mr. Dollard further asserted that he did not know who the improperly affidavit or absentee voters voted for.

Mr. Dollard testified that as a result of the Board of Elections recount of the absentee ballots, neither his absentee total votes changed nor did the tally of the third place candidate.

FINDINGS OF FACT

Based upon the testimony and other evidence adduced at the hearing, and having given fair weight thereto, I **FIND** the following **FACTS** and arrive at the following **CONCLUSIONS**:

Ms. Sumbillo's testimony that she volunteered her time to provide absentee ballot applications to senior citizens and disabled individuals was compromised by her admission to Sergeant Bartholomew that she had, in fact, worked for individuals seeking public elective office. Her testimony before this tribunal was that she did not work for any candidate, while she admitted to Sergeant Bartholomew that she had, in fact, worked for candidates seeking seats on the Board, as well as other political candidates.

The fact that Civilian Absence Ballot Applications for the April 9, 1994, annual school elections were completed with Ms. Sumbillo's admitted aid and direction of individuals who were deceased prior to the application raises the issue as to her credibility. A case in point is the absentee ballot application of Henry Geiger for the April 19, 1994, annual school election, which was received by the Atlantic County Board of Elections on March 23, 1994 (P-2). The death certificate for Henry Geiger, who resided at Seashore Gardens, Atlantic City, demonstrates that he died on July 2, 1993. (P-3). Similar irregularities involved applications and death certificates for Eugene Henry Tillman (P-4, P-5), James Franklin Brown (P-10, P-12), Charles Clifton Everett, Sr. (P-10, P-11), among others, who were registered to vote by absentee ballot for the

April 19, 1994, annual school election after their respective deaths. There was no showing however, that any absentee votes were cast in the names of the deceased.

The record also demonstrates that there were irregularities with the affidavit votes at the annual school election. At least 30 votes were cast by affidavit vote by individuals who were either not registered to vote or, did not sign the affidavit.

Petitioner-complainant alleges that there were no poll lists at the polling places for the annual school election held on April 19, 1994. If true, the Board was clearly in violation of the School Election Laws, specifically N.J.S.A. 18A:14-48.

I **CONCLUDE** that while petitioner-complainant demonstrated there were irregularities in the manner in which voter absentee ballots were applied for, I **FIND** that petitioner did not show that any of the contested absentee ballots were cast or those that were cast were cast improperly. The statute, under N.J.S.A. 19:57-12, requires the Atlantic County Clerk to keep a list of requests for absentee ballots and show the disposition of each request. This list was available to petitioner-complainant pursuant to law, however, he did not produce it at the hearing to support his claim that irregular or illegal absentee ballots were cast in the annual school election.

I **CONCLUDE** that petitioner demonstrated that Affidavit Forms were executed by individuals not registered to vote at the April 19, 1994, annual school election or, were improperly completed by the affiant. I **FIND** that petitioner-complainant, however, failed to show, by parol evidence, that any affiant not qualified to vote did, in fact, cast a ballot at the annual school election held on April 19, 1994.

The statute at N.J.S.A. 18A:14-48 provides as follows:

The board of education shall provide, and one of the election officers, designated by the judge of election, and acting, as clerk of the election shall keep at each polling place, for each school election, a poll list arranged in a column or columns appropriately headed so as to indicate the election, the date thereof, and the school district and election district in which the same is used, in such manner that each voter voting in the polling place at the election may sign his name and state his address

therein and the number of his official ballot may be indicated opposite the signature. (Emphasis added).

Petitioner-complainant alleges, without contradiction, that poll lists were not available at the polling places for the Board's annual school election. I **FIND and CONCLUDE** that the Board's failure to provide such poll lists was a violation of the statute.

There is little question that voting irregularities occurred with the Board's annual school election held on April 19, 1994. As the Commissioner said In the Matter of the Annual School Election Held in the School District of the Township of Bedminster, Somerset, County, 1976 S.L.D. 438, 441:

While the Commissioner cannot condone irregularities which occur during an annual school election, he finds nothing in the record before him which would lead to a conclusion that the circumstances of the irregularity resulted in the will of the voters being thwarted. All qualified citizens possess the right to participate fully in the electoral process, but not one has the right to act in a manner contrary to the letter and intent of statutory prescription.

I too find nothing in this record to conclude that the circumstances of the irregularities resulted in the will of the voters being thwarted. However, the Commissioner and courts have steadfastly held that a strict and meticulous observance of the school election laws is required. The Commissioner has cautioned local boards of education and, most particularly, the members of the election board to give scrupulous attention to and conform with the statutes governing school elections. See: In the Matter of the School Election Held in the Township of Pittsgrove, Salem County, 1976 S.L.D. 585, 589. We repeat the Commissioners' admonition here and caution the Atlantic City Board of Education to comport to the School Election Laws.

It is well established that an election will be given effect and will not be set aside unless it is shown that the will of the people was thwarted, was not fairly expressed, or could not properly be determined. Love v. Board of Chosen Freeholders, 35 N.J.L. 269 (Sup. Ct. 1871); Petition of Clee, 119 N.J.L. 310 (Sup.Ct. 1938); Application of Wene, 26 N.J. Super. 363 (Law Div. 1953), aff'd 13 N.J. 185 (1953). Petitioner-complainant has failed to make such a showing.

ORDER

Accordingly, the results, pursuant to the recount, of the annual school election held on April 19, 1994, for seats on the Board of Education of the City of Atlantic City shall stand and the herein Complaint **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 13, 1995

DATE

Lillard E. Law / JJJ

LILLARD E. LAW, ALJ

Receipt Acknowledged:

4/13/95

DATE

Hope R. Blackburn
DEPARTMENT OF EDUCATION

APR 20 1995

DATE

Mailed to Parties:

Jeff J. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

PETITIONER-COMPLAINANT

VICTORIA SUMBILLO
MIRIAM NEWLON
CHARLES HAWN, JR.
LILLIAN E. WATERS
ROSEMARY DEVINE
BARBARA COHLER
BETSY ANN BARTHOLOMEW
GEORGE DROZDOWSKI
JOHN DOLLARD

RESPONDENT

NONE

DOCUMENTS IN EVIDENCE

PETITIONER

- P-1 CIVILIAN ABSENTEE BALLOT APPLICATION
- P-2 CIVILIAN ABSENTEE BALLOT APPLICATION
- P-3 CITY OF ATLANTIC CITY, OFFICE OF REGISTRAR OF VITAL STATISTICS
- P-4 CIVILIAN ABSENTEE BALLOT APPLICATION
- P-5 CITY OF ATLANTIC CITY, OFFICE OF REGISTRAR OF VITAL STATISTICS
- P-6 CIVILIAN ABSENTEE BALLOT APPLICATION
- P-7 CITY OF ATLANTIC CITY, OFFICE OF REGISTRAR OF VITAL STATISTICS
- P-8 CIVILIAN OF ABSENTEE BALLOT APPLICATION
- P-9 CITY OF ATLANTIC CITY, OFFICE OF REGISTRAR OF VITAL STATISTICS
- P-10 TWO CIVILIAN ABSENTEE BALLOT APPLICATIONS
- P-11 CITY OF ATLANTIC CITY, OFFICE OF REGISTRAR OF VITAL STATISTICS
- P-12 CITY OF ATLANTIC CITY, OFFICE OF REGISTRAR OF VITAL STATISTICS
- P-13 ABSENTEE BALLOT APPLICATION MARKED "VOTED"

- P-14 ABSENTEE BALLOT APPLICATION MARKED "VOTED"
- P-15 ABSENTEE BALLOT APPLICATION MARKED "VOTED"
- P-16 ABSENTEE BALLOT APPLICATION MARKED "VOTED"
- P-17 ABSENTEE BALLOT APPLICATION MARKED "VOTED"
- P-18 ABSENTEE BALLOT APPLICATION MARKED "VOTED"
- P-19 ABSENTEE BALLOT APPLICATION MARKED "VOTED"
- P-20 AFFIDAVIT OF JUAN J. SHEPPERSON, ET AL (5)
- P-21 AFFIDAVIT OF PEARL ROBINSON, ET AL (5)
- P-22 AFFIDAVIT OF BERTHA BOONE, ET AL (8)
- P-23 AFFIDAVIT OF CLEVELAND JONES, ET AL (3)
- P-24 AFFIDAVIT OF CHRISTINA L. JOHNSON (5)
- P-25 AFFIDAVIT OF YANIRA MARTINEZ (24)

RESPONDENT


- R-1 REGULAR/COMBINED STATEMENT OF RESULTS OF SCHOOL ELECTION

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
ATLANTIC CITY, ATLANTIC :
COUNTY. :
_____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record in this matter, the Commissioner concurs with, and adopts as his own, the credibility determinations, findings and conclusions of the ALJ. The Commissioner emphasizes that while the petition herein is dismissed for failure of petitioner to meet the necessary burden of proof, findings as to the statutory violation and voting irregularities which transpired demand attention and remedy. In accordance with the ALJ's admonition to the Atlantic City Board of Education to comply with the School Election Laws, the Board is hereby directed to review said statutes with the Office of the Atlantic County Superintendent of Schools and take necessary steps to address deficient procedures.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE :
BERGEN COUNTY SPECIAL SERVICES :
SCHOOL DISTRICT, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

DECISION

COUNTY OF BERGEN AND WILLIAM :
"PAT" SCHUBER, :

RESPONDENTS. :

_____ :

MAY 23, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2487-95

AGENCY DKT. NO. 42-3/95

**BOARD OF EDUCATION
OF THE BERGEN COUNTY
SPECIAL SERVICES
SCHOOL DISTRICT,**

Petitioner,

v.

**COUNTY OF BERGEN AND
WILLIAM "PAT" SCHUBER,**

Respondents.

Sidney A. Sayovitz, Esq., for petitioner
(Young, Dimiero & Sayovitz, P.A., attorneys)

Anthony DeCandia, Assistant County Counsel, for respondents
(Murshell Johnson Bland, County Counsel, attorney)

Record Closed: April 10, 1995

Decided: April 11, 1995

BEFORE DIANA C. SUKOVICH, ALJ

On March 7, 1995, the Board of Education of the Bergen County Special Services School District (petitioner) filed a petition for emergent relief with the Department of Education (Department) pertaining to a controversy which had arisen between petitioner and the County of Bergen (respondent) and William "Pat" Schuber (respondent), the Bergen County Executive. The Department transmitted the matter to the Office of Administrative Law on March 9, 1995 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

Several telephone conferences were conducted, and various hearing dates were adjourned at the request of the parties, pending efforts to achieve a resolution of the matter. An executed Stipulation of Settlement was filed on April 10, 1995, on which date the record was closed.

Petitioner contested letters dated February 16, 1995 from the County Executive to five of the six trustees of petitioner, rescinding their respective appointments as board members. The Stipulation of Settlement provides that respondents agree to rescind the removal letters and, with certain specifications, to not seek the removal of the individuals in question from serving on the Board of Education of the Bergen County Special Services School District prior to the expiration of their current terms. Petitioner agrees to certain conditions and limitations on its actions. Attached herewith is a copy of the Stipulation of Settlement.

I have reviewed the record and the terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and the signatures of their representatives.
2. The settlement fully disposes of all the issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

April 11, 1995
DATE

4/13/95
DATE

APR 17 1995

DATE
le

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

Hope R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

[Signature]
**ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**
OFFICE OF ADMINISTRATIVE LAW

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
APR 10 11 17 AM '95

YOUNG, DIMIERO & SAYOVITZ, P.A.
Skyline Plaza
414 Eagle Rock Avenue
West Orange, New Jersey 07052
(201) 736-5200
Attorneys for Petitioner

BOARD OF EDUCATION OF THE : STATE OF NEW JERSEY
BERGEN COUNTY SPECIAL : COMMISSIONER OF EDUCATION
SERVICES SCHOOL DISTRICT :
 : AGENCY DKT. NO. 42-3/95
 : EDU 02487-95N
 :
Petitioner, :
 :
 :
vs. :
 :
 :
COUNTY OF BERGEN AND :
WILLIAM "PAT" SCHUBER, :
COUNTY EXECUTIVE OF BERGEN :
COUNTY :
 :
Respondents. :
 :

It is hereby stipulated by and between the undersigned counsel for the respective parties as follows:

1. Respondents agree to rescind the February 16, 1995 letters from William "Pat" Schuber to Phyllis Hay, Bruno Arietta, Eleanor Gallagher, Robyn Erickson and Ruth Pixley, and further agree that, with respect to any Board of Education actions or omissions known as of the date of this Stipulation and which relate to the administration of Dr. James B. Lederer, Respondents shall not seek the removal of the aforementioned individuals from serving on the Board of Education of the Bergen County Special Services School District prior to the expiration of their current terms.

2. Petitioner agrees to cooperate with all ongoing investigations of any matters relating to Dr. James B. Lederer and further agrees to cooperate with all reasonable requests of the Bergen County "roving auditor" and Public Works Department Oversight Team.

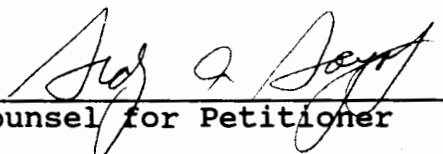
3. Petitioner shall supply monthly financial reports to the Bergen County Board of Chosen Freeholders for the months of March, April, May and June 1995.

4. Petitioner shall not advertise for, interview or hire any individual to fill any of the following positions until July 1, 1995: Superintendent, Assistant Superintendent and School Business Administrator/Board Secretary.

5. Petitioner shall not engage in the expenditure of any monies for "new capital projects" until July 1, 1995. It is understood that the Rocco Montesano construction project is not deemed a "new capital project" for purposes of the within settlement agreement.

6. Upon final approval of this Settlement Agreement by the Court, Petitioner shall forthwith withdraw the within Verified Petition.

Dated: April 3, 1995


Counsel for Petitioner


Counsel for Respondents

OAL DKT. NO. EDU 2487-95

BOARD OF EDUCATION OF THE :
BERGEN COUNTY SPECIAL SERVICES :
SCHOOL DISTRICT, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
: DECISION
COUNTY OF BERGEN AND WILLIAM :
"PAT" SCHUBER, :
RESPONDENTS. :
_____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

MAY 23, 1995
DATE OF MAILING MAY 24, 1995

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICTS OF ESSEX : DECISION
COUNTY. :
_____ :

MAY 23, 1995

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICTS OF ESSEX : DECISION
COUNTY. :
_____ :

The announced results of the balloting at the annual school election held April 18, 1995 in the Type II School Districts of Essex County were reported to the Essex County Superintendent of Schools, in accordance with statute, on Form A-33, Regular/Combined Statement of Result of School Election.

Pursuant to a request of the Attorney General of New Jersey and the Deputy Attorney General on behalf of the Essex County Board of Elections, the Commissioner of Education issued an administrative order releasing the election machines upon the conduct of a recheck of all election machines utilized in the April 18, 1995 school election.

The Essex County Superintendent of Schools Office, as an authorized representative of the Commissioner of Education, conducted a recheck of the voting machines in cooperation with the Essex County Board of Elections and the Board Secretaries in the affected districts. The recheck was conducted on April 24, 1995.

Following the recheck, the tallies of the election were unchanged in the following

districts:

Cedar Grove	Livingston	Roseland
Essex Fells	Millburn	S. Orange/Maplewood
Fairfield	North Caldwell	Verona
Glen Ridge	Nutley	West Essex Regional
		West Orange

Following the recheck, the tallies were modified in the listed districts as follows;

BELLEVILLE Candidates vote adjusted as follows:

<u>CANDIDATE</u>	<u>REPORTED</u>	<u>ADJUSTMENT</u>	<u>REVISED</u>
Jude Luongo	1,012	+5	1,017 No Change in Outcome

BLOOMFIELD Candidates vote adjusted as follows:

<u>CANDIDATE</u>	<u>REPORTED</u>	<u>ADJUSTMENT</u>	<u>REVISED</u>
Jay J. Baumgardner	1,172	-6	1,166 No Change in Outcome

<u>GENERAL FUND</u>	<u>REPORTED</u>	<u>ADJUSTMENT</u>	<u>REVISED</u>
Yes	1,584	-2	1,582 No Change in Outcome
No	1,299		1,299 No Change in Outcome

CALDWELL-WEST CALDWELL Candidates vote adjusted as follows:

<u>CANDIDATE</u>	<u>REPORTED</u>	<u>ADJUSTMENT</u>	<u>REVISED</u>
Tom Coticchio	613	-3	610 No Change in Outcome

<u>GENERAL FUND</u>	<u>REPORTED</u>	<u>ADJUSTMENT</u>	<u>REVISED</u>
Yes	544	-1	543 No Change in Outcome
No	267	-1	266 No Change in Outcome

NEWARK Candidates vote adjusted as follows:

<u>CANDIDATE</u>	<u>REPORTED</u>	<u>ADJUSTMENT</u>	<u>REVISED</u>
Donna Jackson	1,091	-14	1,077 No Change in Outcome
Kasin Muhammed	432	+5	437 No Change in Outcome
Luis Soto	547	-4	543 No Change in Outcome
Maryam Bey	1,033	+2	1,035 No Change in Outcome
Anthony R. Jackson	232	-6	226 No Change in Outcome
Eddie Osborne	127	-1	126 No Change in Outcome
Remy Maria Quinones	615	-1	614 No Change in Outcome
Isaac Jenkins	314	+5	319 No Change in Outcome
Joanne Miller	405	-3	402 No Change in Outcome

<u>GENERAL FUND</u>	<u>REPORTED</u>	<u>ADJUSTMENT</u>	<u>REVISED</u>
Yes	1,996	+2	1,998 No Change in Outcome
No	988	+8	996 No Change in Outcome

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts the findings and conclusions as his own.

Accordingly, the Commissioner finds and determines that, there being no changes in outcome upon recheck, the results of the annual school elections held in the Type II School Districts of Essex County remain as originally announced.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

HARRY A. STROH ASSOCIATES, :
 INC., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION
 TOWNSHIP OF HILLSBOROUGH, :
 SOMERSET COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner, prospective bidder, challenged bid specification requiring bidders to presently be providing maintenance, custodial and grounds management services for at least four New Jersey public schools.

ALJ concluded that the Board did have a reasonable basis for imposing the requirement -- to enable it to properly assess the ability of prospective bidders to serve what it views as legal and practical intricacies unique to New Jersey school districts. Motion for emergent relief was denied.

After reviewing ALJ's order on motion, Commissioner determined that the ALJ had addressed and made determinations with respect to petitioner's underlying claim and prayer for relief in this matter, obviating the need for further proceedings in this matter. Parties were notified Commissioner would be reviewing entire matter as an initial decision and parties were provided the usual exception and reply exception period. Commissioner adopted findings and determination in initial decision as his own, noting a board's reasonable exercise of its discretion is entitled to a presumption of validity absent the establishment by a challenger that such action was arbitrary, capricious or unreasonable. Palamar Construction Inc. Commissioner concurred with ALJ's denial of emergent relief and Petition of Appeal was dismissed.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING MOTION

FOR EMERGENT RELIEF

OAL DKT. NO. EDU 3653-95

AGENCY DKT. NO. 79-4/95

HARRY A. STROH ASSOCIATES, INC.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP
OF HILLSBOROUGH, SOMERSET COUNTY,**

Respondent.

William Welaj, Esq., for petitioner (Welaj, Miller & Robertson, attorneys)

Steven R. Fogarty, Esq., for respondent (Fogarty and Hara, attorneys)

Record Closed: April 12, 1995

Decided: April 13, 1995

BEFORE KATHRYN A. CLARK, ALJ:

This matter was opened by the petitioner, Harry A. Stroh Associates, Inc., on application for an Order granting emergent relief, pursuant to *N.J.A.C.* 1:1-12.6. The relief sought requests a stay in the opening of bids returnable Thursday, April 13, 1995 at 10:00 a.m. for the awarding of a contract for the maintenance, custodial and grounds management services by respondent, Hillsborough Township Board of Education, or, in the alternative, an order temporarily restraining respondent from awarding a contract for such services until a final order is entered by the Commissioner of the Department of Education.

PROCEDURAL HISTORY

Petitioner filed his appeal, including an application for emergent relief and stay of Board action, on April 10, 1995 with the Commissioner of the Department of Education. On the same day, the Department of Education transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

Oral argument on the motion for emergent relief was heard on April 12, 1995, at the Office of Administrative Law, Quakerbridge Road, Hamilton, New Jersey, and a brief oral decision was rendered at the close of oral argument. The Administrative Law Judge said that she would set forth her reasoning at length in writing, but did not wish to delay preparations for the opening of the bids, scheduled for the next morning.

STATEMENT OF THE CASE

The current maintenance, custodial and grounds management services contract for the Hillsborough Township Board of Education (Board), now held by Service Master, is due to expire on June 30, 1995. In anticipation of letting a new contract, the Board discussed the conditions it wanted to have met, and initially determined that bidders would be required to be current providers of such services to at least ten (10) New Jersey public school districts, and that at least three of those districts had to be of comparable size to the Hillsborough Township School District. In later discussions, the Board decided to reduce the number of New Jersey public school districts required to be served at the present time and to eliminate the size requirement, so as to attract a larger pool of bidders.

Ultimately, in January, 1995, the Board of Education advertised for bids, which required the bidders to be providing services at the present time to at least four (4) New Jersey public school districts. The Board determined this condition to be both material and non-waivable. Two bids were received one from ServiceMaster and one from petitioner. Both bidders were pre-qualified by the Division of Building Construction, Department of the Treasury (DBC). Both bids were opened on February 16, 1995. Petitioner's was the lower bid.

Upon initial review, the ServiceMaster bid was rejected as being too high, and petitioner's bid was rejected for failure to meet the requirement for the current provision of services to at least four New Jersey public school districts. The Board, at its meeting of March 13, 1995, decided to reject both bids, as it is allowed to do under the provisions of *N.J.S.A.* 18A:18A-5(d) and *N.J.S.A.* 18A:18A-22. The possibility of the District providing its own services, in-house, was considered, but the Board decided instead to advertise a second time. The previous bidders were advised of both the rejection of the first set of bids (although no reason was given for rejection) and of the re-advertisement. The second advertisement contained the same requirement as the first advertisement, that the prospective contractor be providing services at the present time to at least four (4) New Jersey public school districts. The same two entities, ServiceMaster and petitioner, are again the only bidders. The bids are due to be opened April 13, 1995.

Petitioner states that it provides services to some 500 school districts worldwide. Petitioner said that it is now providing services to two (2) New Jersey public school districts and that over the years, it has served 16 New Jersey school districts. Petitioner did not challenge the bid specifications prior to the opening of the first set of bids. Petitioner is now challenging the bid specifications prior to the opening of the second set of bids

DISCUSSION AND CONCLUSION

The fact that this contract has been re-advertised allows petitioner to raise a challenge, whereas petitioner did not do so before the opening of the first set of bids, and could not do so after the bids were opened.

Petitioner now argues that the bid specification of providing services to at least four (4) New Jersey public school districts is invalid, and that it will be irreparably harmed if the April bids are opened.

It is well-settled that a school district may add additional criteria to a bid advertisement. Michael T. Gavan, Inc., v. Board of Education of the Township of Lakewood, 94 N.J.A.R. 2d (EDU) 307 .

The granting of emergent relief is an extraordinary remedy which can only be awarded based upon a showing that irreparable harm will result if it is not granted, and a further showing that there is a likelihood of success on the merits. See, *N.J.A.C.* 1:1-12.6.

The criteria for determination of an application for emergent relief have been set forth in Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982). Four standards are articulated:

1. The relief should not be granted unless it is necessary to prevent irreparable harm. Harm is generally considered irreparable if it cannot be adequately redressed by monetary damages.
2. Such relief should not be granted when the legal rights underlying the claim are unsettled.
3. In order to prevail on an application for temporary relief, a party must make a preliminary showing of a reasonable probability of ultimate success on the merits.
4. The relative hardship of the parties in granting or denying the relief sought should be considered.

The question is whether the additional requirement is fair and reasonable? Was it established to exclude petitioner unjustly? Does the Board have a reasonable basis for the requirement? Bil Jim Construction Co., Inc. v. Manchester Bd. of Ed., 236 N.J. Super., 603, 607 (App. Div. 1989).

I **FIND** and **CONCLUDE** that the Board does have a reasonable basis for imposing such a requirement. The Board should be given enough information so as to assure itself that the eventual provider of the services is reputable, financially sound, and able to carry out the terms and conditions of the contract, and if the Board so chooses to elicit this information by checking with four school districts now served by the bidders, it is acting reasonably and is justified in doing so. Additionally, the Board's requirement that the four school districts be New Jersey school districts is valid and justifiable, as there are some provisions New Jersey school districts must meet that are unlike provisions in other states. Respondent, in his letter brief, mentions the "Right to Know" law as an example.

On the issue of irreparable harm, petitioner claims that respondent is not without a remedy if the bids cannot be opened tomorrow, because the respondent has the right to enter into a

contract on an emergency basis, under *N.J.S.A. 18A:18A-7*. Respondent rightly wonders who might be enticed to enter into such a contract, and this tribunal wonders what might be the circumstances and the costs under which another provider of such services would agree to be the “emergency” contractor. The greater hardship will be on the respondent, if it cannot sign a new contract before the expiration of the old one.

In *Gavan v. Lakewood* (*supra*), ALJ Campbell defined irreparable injury as “substantial injury to a material degree coupled with the inadequacy of money damages,” citing *Judice’s Sunshine Pontiac, Inc. v. General Motors, Inc.*, 418 F. Supp. 1212 (D. N.J. 1976) and *John Tully v. Mott Supermarkets, Inc.*, 337 418 F. Supp. 834 (D. N.J. 1972). This tribunal’s learned colleague concluded in that case which involved a challenge to an award of a contract because the school district required qualification statements in addition to the DBC qualification affidavits, that petitioner has shown that money damages are not available to it, but there had been no showing of “substantial injury to a material degree.” The petitioner in *Gavan*, and in this matter as well, will simply have lost out in an attempt to secure a contract, a risk that it presumably takes as a part of the routine functioning of its business. That does not fully satisfy the requirement of irreparable harm.

Additionally, petitioner states that the public interest is furthered by promoting unfettered competition. This is axiomatic, and, as petitioner said, is supported by case law. But also supported by case law is the notion that a school district should be able to request information sufficient to assure itself that the prospective contractor is capable and qualified.

Petitioner did not allege any collusion, corruption, fraud, undue influence or misfeasance between the Board and the only other bidder, ServiceMaster. Instead, the record is replete with indications that the Board is less than pleased with certain aspects of ServiceMaster’s past performance, and with the cost of Service Master’s bid for the new contract.

Petitioner has not suggested, much less offered any proof, that it has made expenditures on equipment, personnel or taken any other step in preparation for this contract.

Accordingly, petitioner cannot be said to have suffered any irreparable harm, outside of not receiving the economic benefits to be derived from the contract, for which he is not qualified according to the bid specifications. Kadell, Inc. t/a Reliable Roofing Corp. v. Pascack Valley Regional High School District, 1993 S.L.D. _____, slip op. at 5 (Comm. Ed. June 9, 1993).

Petitioner alleged that the added requirement placed an undue burden on small businesses, but then petitioner went on to describe the many types and kinds of facilities it serves, and the international scope of its operations. Petitioner cannot have it both ways - he either is or is not a small business, and it appears that he is not. The Board gave consideration to the possible impact on small businesses when it reduced the requirement from ten to four New Jersey school districts, and eliminated the size requirement. The Board is justified in expecting its eventual contractor to be of sufficient size and to have sufficient resources and financial stability to perform the maintenance, custodial and grounds management services it needs. If the Board feels that the experiences of four New Jersey school districts is enough to provide it with the desired assurances, this tribunal will not disturb that conclusion.

Petitioner has been afforded a reasonable opportunity to show that the added criteria created exclusivity and that there is not enough concomitant benefit to the Board to justify the imposition of the added criteria. Petitioner has not done so, and his **MOTION** is **DENIED**.

As a footnote, respondent, in oral argument, said that the decision of ALJ Samuels in Kadell v. Pascack Valley, as adopted by the Commissioner of the Department of Education, is binding on this tribunal, and, although he did not claim stare decisis standing for ALJ Campbell's decision in Gavan v. Lakewood, presumably respondent would make the same claim for that decision, too. Notwithstanding the high regard and deep respect this tribunal has for the inimitable and estimable ALJs Samuels and Campbell, I am compelled to point out that this forum is not controlled by precedent. See, 37 New Jersey Practice 336. Each case is heard and decided on its own merits, although reference can, and is, often made to earlier decisions which not only comport with this tribunal's decision but say it in words that cannot be improved upon, only reiterated.

A hearing date in this matter has been scheduled for June 26, 1995, commencing at 9 a.m. at the Office of Administrative Law, Bldg. 9, Quakerbridge Plaza, Quakerbridge Office, Trenton, New Jersey.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

April 13, 1995
DATE

Kathryn A. Clark
KATHRYN A. CLARK, ALJ

HARRY A. STROH ASSOCIATES, :
INC., :

 PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF HILLSBOROUGH,
SOMERSET COUNTY, :

 RESPONDENT. :

_____ :

Upon review of the record of this matter and the Order Denying Emergent Relief issued by the Office of Administrative Law, it appearing there were no remaining issues which would require further hearings, the parties were advised by letter dated April 13, 1995, from the Director of the Bureau of Controversies and Disputes, that the Commissioner would be reviewing the findings and conclusions of the Administrative Law Judge's order as an initial decision. Parties were, therefore, accorded 13 calendar days from their receipt of such April 13 letter (which was transmitted to them via fax and regular mail) to file exceptions to the ALJ's determinations and five additional business days for the filing of reply exceptions, and were further advised that at the expiration of this period the Commissioner would review all submissions and render his final determination in this matter. Exceptions and reply exceptions of both petitioner and the Board were timely filed in accordance with the established schedule.

Petitioner excepts to the ALJ's conclusion that the Board had a "reasonable" basis for imposing a requirement that any potential bidder must, at the time of the bid, be providing maintenance, custodial and grounds services to at least four other New Jersey public school districts. Petitioner rather contends that such requirement does not, as was asserted, provide the Board with an ability to assess a potential bidder's ability to perform, but only serves to preclude qualified and responsible companies who would be fully capable of performing such services from even bidding.

Petitioner presents a hypothetical example which, it posits, demonstrates the absurdity of such a pre-bidding requirement. It states that under this requirement company A, which it describes as one serving four small school districts and having no other clients, would be qualified to submit a bid, while company B, like petitioner, who has served 500 school districts worldwide, but which currently does not have four New Jersey school districts as clients, is precluded, despite its vast experience, from bidding at all.

Petitioner asserts that this arbitrary provision serves "no real purpose other than to artificially limit the pool of available bidders." (Petitioner's Exceptions at p. 2) As such, it submits that the specification discourages, rather than encourages, free and open competition, favors one bidder or group of bidders to the exclusion of other potential bidders and is, therefore, contrary to the provisions and intent of bidding laws and regulations.

Petitioner further asserts that reliance by the Board and the ALJ upon the necessity for a prospective bidder being intimately familiar with certain New Jersey legal requirements, such as the Right to Know Law, as justification for the requirement is misplaced. It proffers that New Jersey law is not so unique or difficult to comprehend as to justify imposition of such a limiting requirement.

Lastly, petitioner argues that as the Board has acknowledged that petitioner is a responsible contractor, in that there would be no need to conduct a responsibility hearing if it had met all specifications, the Board has, therefore, implicitly acknowledged petitioner's ability to perform the contract. As such, petitioner asserts that its rejection due to the absence of a specification specifically designed to assure a bidder's ability to perform the contract is paradoxical.¹

In response, the Board contends that the hypothetical example and arguments advanced by petitioner to illustrate petitioner's "vast experience" are irrelevant to the issue at hand herein. The Board maintains that the within dispute centers around whether petitioner can be required to comply with a particular bid specification requirement and petitioner's responsibility, or lack thereof, is not germane to this determination.

The Board asserts that contrary to petitioner's assertions, which it notes are unsubstantiated by any proof whatsoever, this specific bidding requirement provides the Board with a resource to assess a bidder's ability to perform the contract and further argues that this requirement is reasonably related to the purpose of the specification and the particular nature of the work to be performed in that:

The Board operates a large school district containing a total of eight schools, including a high school, middle schools and elementary schools. Its custodial, maintenance and groundkeeping operations are, therefore, extensive. The Board has responsibly determined that only a contractor who has already developed a history of dealing with New Jersey public schools, including the unique practical and legal difficulties they present, will be able to manage operations of the Board's magnitude effectively and

¹ Petitioner additionally excepted to the ALJ's determination with respect to irreparable injury and balancing of the hardships in denying the emergent aspect of this matter. In that the nature of this decision is one on the merits, i.e., whether bidding laws have been violated in this matter, the emergent element has been subsumed and need not be addressed herein.

economically. Specifically, the Board's specification requirement ensures that the bidder can provide comprehensive employee development training programs as required by state law, properly label and comply with "Right to Know" requirements and otherwise be able to research, review, apply and make recommendations concerning compliance with state statutes and ordinances. (Board's Reply Exceptions at p.3)

The Board further argues that case law has firmly established that decisions by public entities with respect to the necessity of particular bid specifications are entitled to a presumption of correctness unless these entities have acted arbitrarily, unreasonably or capriciously (Palamar Construction Inc. v. Pennsauken Tp., 196 N.J. Super. 241, 250 (App. Div. 1983)), and absent such a determination, the courts should not substitute their judgment for that of the governing body, (Ace-Manzo, Inc. v. Neptune Tp., 258 N.J. Super. 129, 142 (Law Div. 1992)), even if some doubt exists as to the ultimate wisdom of the action (Palamar, supra). (Board's Reply Exceptions at p. 4) It urges that as petitioner has presented no evidence that the Board's "current service" requirement is arbitrary, capricious or unreasonable, the Commissioner should not substitute his judgment for that of the Board.

In response to petitioner's contention that such requirement is inconsistent with the philosophy of the public bidding statutes, the Board proffers that this particular assertion was fully addressed and considered by the ALJ on page 5 of her decision where she stated:

Additionally, petitioner states that the public interest is furthered by promoting unfettered competition. This is axiomatic, and, as petitioner said, is supported by case law. But also supported by case law is the notion that a school district should be able to request information sufficient to assure itself that the prospective contractor is capable and qualified.

Petitioner did not allege any collusion, corruption, fraud, undue influence or misfeasance between the Board and the only other bidder, ServiceMaster. Instead the record is replete with

indications that the Board is less than pleased with certain aspects of ServiceMaster's past performance, and with the cost of ServiceMaster's bid for the new contract.

(Board's Reply Exceptions at p. 6)


Upon a careful and independent review of the record of this matter and full consideration of the exception and reply exception arguments advanced by the parties, the Commissioner concurs with the findings and conclusion of the ALJ that the Board did not act arbitrarily, unreasonably or in bad faith in imposing the particular bid requirement at issue herein.

As correctly noted by the Board in its exception arguments, a board's reasonable exercise of its discretion is entitled to a presumption of validity absent the establishment by a challenger that such action was arbitrary, capricious or unreasonable (see Palamar, supra.). The Commissioner finds and determines that the within petitioner has failed to make such a required showing. The Board asserted, and petitioner has advanced, no relevant proofs to the contrary, that the specification at issue in this matter was imposed to enable it to properly assess the ability of prospective bidders to serve what it views as legal and practical intricacies unique to school districts in New Jersey. Petitioner's disagreement with respect to the ultimate value of this specification vis-à-vis this stated purpose does not serve to render the Board's action illegal. As such, the Commissioner will not substitute his judgment for that of the Board. Further, the Commissioner was persuaded as to the Board's attempt to comply with the statutory intent of open, competitive bidding by its reduction of the number of such current service contracts required of an eligible bidder from the previously contemplated ten to the four actually required.²

² It was not necessary for the Commissioner to reach the ALJ's dicta discussion with respect to the precedential value of administrative decisions as such is not necessary or relevant to his decision herein.

Accordingly, the Commissioner adopts the findings and conclusions of the ALJ in her Order denying emergent relief in this matter and, as the Board's action in imposing the requirement at issue herein was not arbitrary, capricious or unreasonable, the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MAY 25, 1995
DATE OF MAILING MAY 25, 1995

175-95 R

RICHARD HARRIS AND KENTON P.
GARAY,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE
HUNTERDON CENTRAL REGIONAL
HIGH SCHOOL DISTRICT, HUNTERDON
COUNTY

RESPONDENT.

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COMMISSIONER OF EDUCATION

DECISION ON REMAND

MAY 25, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9624-94

AGENCY DKT. NO. 40-2/92 AND 35-2/92
(CONSOLIDATED)

(ON REMAND EDU 1945-92 AND EDU
2223-92 (CONSOLIDATED))

**RICHARD HARRIS AND
KENTON P. GARAY,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE
HUNTERDON CENTRAL REGIONAL
HIGH SCHOOL DISTRICT,**

Respondent.

David B. Friedman, Esq., for petitioner Harris (Balk, Oxfeld, Mandell & Cohen,
attorneys)

Stephen E. Klausner, Esq., for petitioner Garay (Klausner, Hunter & Seid,
attorneys)

James P. Granello, Esq., for respondent

Record Closed: April 3, 1995

Decided: April 6, 1995

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

Richard Harris and Kenton Garay, petitioners, are teaching staff members employed by the respondent Hunterdon Central Regional High School District Board of Education who sought an order vacating the head wrestling coach position, awarding the position to "a fully qualified permanent staff member who applied for the position," and full back pay and emoluments to that person.

The matter was opened on two separate petitions before the Commissioner of Education. They were transmitted to the Office of Administrative Law for determination pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13. The matters were heard and an initial decision issued on August 2, 1994.

The initial decision found that the district suspended three wrestling coaches in 1991 after a rules infraction was discovered; the district posted and advertised the positions of head wrestling coach and assistant wrestling coach on October 1, 1991; several applications were received and reviewed by the high school principal and the director of student administration; four persons were interviewed, Gibble, Garay, Harris and Holcombe; the interviewers reached a consensus and recommended Gibble to the Superintendent; the Superintendent accomplished the necessary application through the County Superintendent of Schools because Gibble, although he worked for the district, held only a county substitute certificate, and there was no procedural defect in the approval process. The decision concluded that Harris and Garay were not legitimately ruled out.

It was ordered that the petitioners be granted relief in the following way: the Board was to review the applications of both petitioners and, if necessary, interview both petitioners; the Board would then select one of the two petitioners based on its assessments of their backgrounds and abilities; that person would be paid the stipend lost, plus interest since the last day of the 1991-92 wrestling season. No other moneys were to be paid because the petitioners limited their petition to the 1991-92 season.

On September 16, 1994, the Commissioner agreed with the findings and conclusions, above, with the exception of limitation of remedy to the 1991-92 school year. The Commissioner remanded for determination of the question whether relief should necessarily be limited to the 1991-92 school year.

DETERMINATION

While this matter was pending on remand, the Appellate Division ruled in the case *Arthur Krupp v. Board of Education of the Union County Regional High School District No. 1*, 278 N.J. Super. 31 (App. Div. 1994). In *Krupp* the board of education sought review of a State Board of Education decision upholding a commissioner's decision that an intradistrict, certified teacher should have been appointed girls' basketball coach at the high school. The court held that employment of an intradistrict teacher was not mandated by regulation and the employment of an extra-district, certified teacher as a coach was authorized by the regulation.

The court examined the controlling regulation, N.J.A.C. 6:29-3.3, closely. The regulation provides, in pertinent part:

(a) Any person not certified as a teacher and not in the employ of a district board of education shall not be permitted to organize public school pupils during school time . . . [for] coaching or for conducting games, events, and contests in physical education or athletics.

(b) School districts shall be permitted to employ any holder of a New Jersey teaching certificate to work in the interscholastic athletic program provided the position has been advertised.

(c) In the event there is no qualified and certified applicant, the holder of a county substitute certificate is authorized to serve as an athletic coach in the district in which he or she is employed . . . provided that:

1. The district chief school superintendent demonstrates to the county superintendent that:

i. The vacant coaching position had been advertised;
and

- ii. There was no qualified applicant based on the written standards of the board of education.

The Appellate Division panel observed that many school law decisions have indicated that the germ of the regulation permits broad interscholastic athletic programs because it enables schools to hire extra-district teachers to coach sports beyond the experience of in-district teachers. At the same time, the regulation prohibits school districts from hiring professional athletes who are not also employed as certified teachers. The court discussed various Commissioner and State Board of Education rulings centered on the regulation. The court found that a plain reading of the regulation required the court to conclude that the Commissioner and Board had erred as a matter of law. The language of the regulation is not ambiguous. *N.J.A.C.* 6:29-3.3(a) and (b) clearly allow local school boards to hire intradistrict or extra-district qualified, certified teachers, provided the coaching position is first advertised. No preference for intradistrict employees appears anywhere in the regulations, and there is no basis for reading a preference into the regulation.

Until revised in November 1983, *N.J.A.C.* 6:29-3.3(b) provided:

Every person appointed subsequent to June 1, 1960, to coach, teach or train individual pupils or school teams for inter-school athletic competition shall be a certified member of a school faculty in that school district and shall be employed full-time during the regular day when classes are in session [15 N.J.R. 1152(b), 1153 (July 18, 1983)].

This language was deleted and replaced by "School districts shall be permitted to employ any holder of a New Jersey teaching certificate to work in the interscholastic athletic program provided the position has been advertised."

The deletion of a specific requirement and substitution of broader language is a clear indication of intent to eliminate what was removed. As amended, subsection (a) requires that athletic coaches be: (1) certified teachers and (2) employed by a school district in New Jersey. The subsection does not state that coaches must be certified teachers employed by the school district in which they are employed.

Subsection (a) must be read in context with subsection (b). Subsection (b) permits districts to “employ any holder of a New Jersey teaching certificate,” provided the local board has advertised the vacant position.

The court went on to state:

In summary, as contrasted with the pre-1983 version of the regulation, the regulation in effect during the applicable time frame here cannot properly be read to impose any intra-district hiring requirement or preference. It only requires a local board to advertise coaching positions before accepting any applications from certified teachers. See N.J.S.A. 6:29-3.3(b). In our view, the State Board’s interpretation of the regulation after the 1983 amendment relies upon a strained construction of the word “employment.” Perhaps this is due more to over-reliance on pre-1983 school board case decisions before the state agencies and the language therein without actually considering the impact of the 1983 amendment and the actual language of the amended regulation. Such a construction of the regulation as given by the State Board here would effectively reimpose terms the State Board eliminated in 1983 without following the requirements of the Administrative Procedure Act. See N.J.S.A. 52:14B-1 et seq.

Accordingly, we are constrained to reverse the decision of the Board and remand the matter to it for reconsideration in light of this decision. Because of their special expertise, however, it is for the Commissioner and the State Board, in the first instance, to consider the Board’s argument that the Board exercised sound educational judgment in denying Krupp the coaching appointment for the year at issue, and Krupp’s argument to the contrary.
[278 N.J. Super. at 42-43.]

The Appellate Division returned the matter to the State Board for a determination on the merits not inconsistent with the construction of the regulation set forth in the court’s opinion. So far as this judge knows, the State Board has not spoken.

Counsel were given the opportunity to be heard on *Krupp* and how it affects the present case, if at all. Petitioner Harris argues that *Krupp* is factually distinguishable in most aspects from the present case. Therefore, it is neither controlling nor persuasive. Subsection (c), above, still

controls the present case. Respondent Garay argues similarly. The Board, not unexpectedly, takes a different view.

The Board asserts that because *Krupp* involved the hire of extra-district qualified and certified teachers as opposed to an in-district teacher to coach basketball, an analogy can be drawn to the present case. The Appellate Division held that the plain reading of *N.J.A.C. 6:29-3.3* (a) and (b) regarding employment of coaches for interscholastic athletic programs clearly allows local school boards to hire intradistrict and extra-district qualified, certified teachers, provided the coaching position is first advertised. In footnotes to its opinion, the court addressed subsection (c). The court stated:

Only subsection (c), as amended, imposes a mandatory hiring preference for coaching personnel where no qualified and certified applicant is available. It permits local boards to hire county certified substitute teachers only if “no qualified and certified applicant” exists. [278 *N.J. Super.* at 40 n.3.]

And, the Appellate Division panel stated in its conclusion that the regulation here cannot properly be read to impose any intradistrict hiring requirement or preference. Prior Commissioner and State Board decisions have been distinguished or overruled.

This judge finds useful instruction in the court’s opinion at 42-43, cited above. The regulation now in effect cannot be read to impose any intradistrict hiring requirement or preference. It merely requires a board to advertise coaching positions before accepting any applications from certified teachers. When there is no qualified and certified applicant, the board may then hire the holder of a county substitute certificate, provided the chief school administrator demonstrates to the county superintendent that the vacant coaching position was advertised and there was no qualified applicant based on the written standards as a Board of Education (emphasis added).

It is undisputed in this matter that the Board specified in its announcement that it wanted prior head coaching experience. Because this standard was articulated and because the screening committee found the petitioners to lack head coach experience, the local superintendent certified

to the county superintendent that the vacant coaching position had been advertised and that there was no qualified applicant based on the Board's standards.

But, while *Krupp* has clearly modified interpretation of *N.J.A.C.* 6:29-3.3(a) and (b), it does not direct reinterpretation of (c). No reading of *Krupp* can gainsay this fact. Accordingly, the DETERMINATION here is the same as in the initial decision of August 2, 1994. I **FIND** and **CONCLUDE** that the Board's 1992-93 and 1993-94 head wrestling coach appointments continued to violate the petitioners' rights. A failure to amend pleadings in this situation is not a bar to the petitioners' ability to claim further relief. The question of further relief was clearly raised in the first hearing. Even if there were no formal amendment of the pleadings, a continuing violation has been found. Under these circumstances, basic fairness dictates there must be a remedy.

In consideration of the foregoing, it is **ORDERED** that the Board review, as it did for 1991-92, the applications of the petitioners and, if necessary, interview both petitioners. The Board must then select one of the two petitioners based on its assessments of their backgrounds and abilities. That person will then be paid the stipends lost for 1992-93 and 1993-94 plus interest from the last day of each season, respectively. The Commissioner of Education shall specify the date by which these actions shall be accomplished in the final agency decision. If no final agency decision is rendered and this initial decision becomes final by operation of law, the actions ordered herein shall be completed by July 1, 1995.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6 APRIL 1995
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

4/10/95
DATE

Hope R. Blackman
DEPARTMENT OF EDUCATION

APR 13 1995
DATE

Mailed to Parties
Jeff J. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cae

RICHARD HARRIS AND KENTON P. :
GARAY, :
 :
 PETITIONERS, :
 :
 V. :
 : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE :
 HUNTERDON CENTRAL REGIONAL : DECISION ON REMAND
 HIGH SCHOOL DISTRICT, HUNTERDON :
 COUNTY :
 :
 RESPONDENT. :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by the Board of Education, pursuant to N.J.A.C. 1.1-18.4.

The Commissioner initially states that inasmuch as this matter is before him on remand, the inquiry is herein limited to the scope of relief to be afforded.¹ Consequently, the

¹ Petitioners in this matter did not amend their pleadings to request relief beyond the 1991-92 school year. Although the ALJ, in his decision of August 2, 1994 found this fact sufficient to limit petitioners' relief to the 1991-92 school year, the Commissioner, in light of petitioners' assertion that they presented testimony with respect to two subsequent wrestling seasons, was not satisfied that relief should be so limited. The Commissioner ordered the matter remanded "****to the Office of Administrative Law for fact-finding necessary to determine whether the Board's 1992-93 and 1993-94 head wrestling coach appointment continued to violate petitioners' rights and for consideration of argument, and evidence as necessary, on the question of whether petitioner's failure to amend pleadings is a bar to their ability to claim further relief under the circumstances." (Commissioner's decision, September 16, 1994, p. 20)

Commissioner considers only the arguments on exception which address the relevant issue before him.²

The Board contends that the ALJ's decision on remand is not in accordance with the Commissioner's order in his decision of September 16, 1994 in that the ALJ, without the benefit of plenary hearing or gathering additional evidence, merely concludes that the Board's 1992-93 and 1993-94 head wrestling coach appointment continued to violate petitioners' rights, and therefore orders the payment of lost stipends to the selected candidate for those seasons. (Board's Exceptions at p. 2)

Upon careful and independent review, the Commissioner concurs with the ALJ's determination that the decision in Krupp, supra, does not alter the initial decision of August 2, 1994 with respect to petitioners' rights to the position in question. However, the Commissioner notes that while the parties were provided moment on remand to address the Krupp issue, contrary to the Commissioner's sole direction, the parties were not provided the opportunity to argue or present evidence as necessary on the question of relief, under the circumstances herein, beyond the 1991-92 school year. More troubling is the ALJ's finding and conclusion on remand, contrary to his prior determination,³ and in the absence of said additional argument or evidence, that, "[a] failure to amend pleadings in this situation is not a bar to the petitioners' ability to claim further relief." (Initial Decision at p. 7)

² The ALJ's decision of August 2, 1994 determined, and the Commissioner thereafter affirmed, that the Board failed to sufficiently articulate that petitioners were unqualified for the positions they sought, and the district did not articulate sufficient reason to employ an individual who held a county substitute certificate. (Initial Decision at p. 14) Several of the Board's exceptions effectively seek to relitigate this issue.


³ In his initial decision of August 2, 1994 limiting petitioners' relief, the ALJ states, "No other monies will be paid because the petitioners have limited their petition to the 1991-92 season." (Initial Decision at pp. 14 and 15).

Accordingly, the Commissioner is constrained to remand this matter to the Office of Administrative Law and direct once again:

***fact-finding necessary to determining whether the Board's 1992-93 and 1993-94 head wrestling coach appointment continued to violate petitioners' rights and *** consideration of argument, and evidence as necessary, on the question of whether petitioners' failure to amend the pleadings is a bar to their ability to claim further relief under the circumstances. (Commissioners' decision dated September 16, 1994, at p. 20)

Said argument should include, but need not be limited to, the certification status subsequent to the 1991-92 school year of Mr. Gible, the person initially awarded the position of wrestling coach, and the petitioners' continued efforts to apply for the wrestling coach position in the 1992-93 and 1993-94 school years.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

K.W., on behalf of her minor grandchild,
S.T., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE
TOWNSHIP OF SOUTH ORANGE-
MAPLEWOOD, ESSEX COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

AMENDED
INITIAL DECISION
SETTLEMENT

OAL DKT. NO. EDU 12073-94
AGENCY DKT. NO. 418-10/94

KATHALINE WING, on behalf of
her minor grandchild, S.T.,
Petitioner

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF SOUTH ORANGE
AND MAPLE, ESSEX COUNTY**

H. Kit Ellenbogen, Esq., attorney for petitioner

Joanne L. Butler, Esq., for respondent
(Young, Dimiero, Sayovitz, attorneys)

Record Closed: March 28, 1995

Decided: April 3, 1995

BEFORE IRENE JONES, ALJ:

This matter was transmitted to the Office of Administrative Law on December 15, 1994 for a hearing pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

A prehearing conference was held on January 18, 1995. Prior to date set for hearing the parties agreed to settle this matter and have prepared the attached agreement indicating the terms of settlement.

I have reviewed the record and the settlement terms and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

4/3/95
Date

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

4/26/95
Date

Hope R Blackman
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 01 1995
Date

Jeff S. Main
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

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RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

MAR 28 10 22 AM '95

YOUNG, DIMIERO & SAYOVITZ, P.A.
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(201) 736-5200
Attorneys for Respondent
South Orange-Maplewood Board of Education

KATHALINE WING, on behalf of
her minor grandchild, S.T.,

Petitioner,

v.

BOARD OF EDUCATION OF
THE TOWNSHIP OF SOUTH ORANGE
AND MAPLEWOOD, ESSEX COUNTY,

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL DKT NO.: EDUOS 12073-94N

**STIPULATION
OF SETTLEMENT**

BOARD OF EDUCATION OF THE
TOWNSHIP OF SOUTH ORANGE
AND MAPLEWOOD, ESSEX COUNTY,

Petitioner,

v.

KATHALINE WING, and KATHLEEN
V. EMERY,

Respondents.

THIS MATTER having come before the Court on Petition of
Kathaline Wing, on behalf of her grandson, S.T., seeking an
order that the pupil S.T. is entitled to a free and appropriate

public education in the Respondent South Orange and Maplewood Board of Education Schools, and the Respondent Board having filed an Answer and Counterclaim seeking judgment against Petitioner and Kathleen V. Emery, the mother of the pupil S.T., for tuition for that period of eligible attendance, and for good cause shown, the parties agree that it is in their best interests to resolve the within matter by Stipulation of Settlement;

IT IS on this 27 day of March, 1995,

Agreed and stipulated by and between the parties that:

1. Petitioner sought to have the pupil S.T. admitted to District Schools on or about September 1, 1994 pursuant to N.J.S.A. 18A:38-1, which application was rejected by the Board of Education on or about October 5, 1994.

2. Petitioner appealed this decision to the Commissioner of Education, and Petitioner was notified on or about October 26, 1994, that S.T. would be admitted to school during the pendency of the appeal.

3. S.T., commenced attendance at school on or about October 31, 1994.

4. Based upon documentation provided by Petitioner during the course of discovery, the Respondent Board has determined that the pupil S.T. is entitled to a free and appropriate public education in District Schools.

5. The parties will endeavor, in good faith, to resolve all issues relative to Petitioner's request for compensatory

education for the two months during which time S.T. was excluded from school.

6. Respondent Board also agrees, based upon documentation provided by Petitioner, that Melody Tolles, sister of S.T., is entitled to a free and appropriate public education in District Schools.

7. Except as set forth in paragraph 5, this Agreement contains the entire agreement and understanding between the parties and constitutes full and final settlement of any and all issues arising out of this action between the Petitioner Kathaline Wing, the Respondent Board, and Counterclaim Respondent Kathleen V. Emery, and all other claims are herein waived.

8. This Agreement shall be governed by the laws of the State of New Jersey.

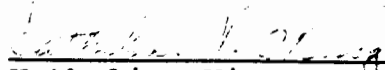
9. If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

10. The parties shall be bound by the terms and conditions of this Agreement, finding it to be fair and equitable under the circumstances surrounding this matter, and acknowledge that no term set forth herein shall constitute an admission of liability by either party for any purpose.

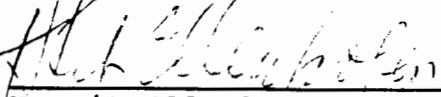
11. This Agreement may not be altered, amended or modified except in writing, signed, and duly authorized by all parties.

AGREED AND ACCEPTED:

S.T. by his grandmother
Kathaline Wing

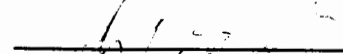


Kathaline Wing

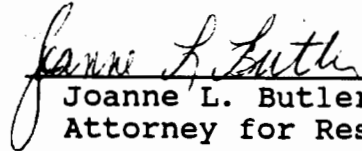


H. Kit Ellenbogen, Esq.
Attorney for Petitioner

BOARD OF EDUCATION OF THE
TOWNSHIPS OF SOUTH ORANGE AND
MAPLEWOOD



John Bradley, President



Joanne L. Butler, Esq.
Attorney for Respondent

K.W., on behalf of her minor grandchild,
S.T.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE
TOWNSHIP OF SOUTH ORANGE-
MAPLEWOOD, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

MAY 25, 1995
DATE OF MAILING MAY 25, 1995

IRA SWEET,	:	
	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF JACKSON,	:	
OCEAN COUNTY,	:	
	:	
RESPONDENT.	:	
<hr/>		

SYNOPSIS

Petitioner, retired school psychologist, sought payment of salary under N.J.S.A. 18A:30-2.1 for a period of absences caused by an injury determined to be work related by the Division of Workers' Compensation. The Board argued that petitioner's claim was untimely filed, and that petitioner was precluded from bringing the appeal by the terms of a 1991 settlement agreement.

ALJ found that petitioner's cause of action arose at the time he received his Workers' Compensation determination, so that an appeal filed upon receipt of a letter from the Board stating that it would not pay the requested benefit was untimely under N.J.A.C. 6:24-1.2. Notwithstanding that he found the appeal untimely, the ALJ did conclude that petitioner was not prevented from bringing the appeal under the terms of the settlement agreement at issue. Petition was dismissed.

Commissioner concurred that settlement did not preclude petitioner from bringing an action before the Commissioner. However, Commissioner reversed initial decision on the question of timeliness, finding that the cause of action in cases such as petitioner's is now to be reckoned in accordance with the State Board decision in Verneret, and that relaxation of the 90-day rule consistent with that decision was warranted under the circumstances herein. Matter was remanded for determination of petitioner's claim.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 10554-93

AGENCY REF. NO. 348-10/93

IRA SWEET,

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP
OF JACKSON, OCEAN COUNTY,**

Respondent.

Stephen B. Hunter, Esq., for petitioner, (Klausner, Hunter & Seid, attorneys)

Russell Weiss, Jr., Esq., for respondent, (Carroll & Weiss, attorneys)

Record Closed: December 30, 1994

Decided: April 7, 1995

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, a tenured school psychologist who has retired from the employ of the Board of Education of the Township of Jackson (Board) seeks payment of salary for periods of absences from his tenured position as a result of a personal injury caused by an accident arising out of and in the course of his employment under N.J.S.A. 18A:30-2.1.

The Board denies petitioner's claims asserting, among other things; that (1) petitioner's claim is untimely filed pursuant to N.J.A.C. 6:24-1.2(c) and, (2) that petitioner is barred from seeking such claims grounded upon a settlement between the parties entered into in January 1991.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A prehearing conference was conducted on June 17, 1994, at which, among other things, the issues to be determined by this tribunal were agreed upon.

Subsequently, the parties cross-moved for summary decision pursuant to N.J.A.C. 1:1-12.5. Extensions were requested and granted to execute this initial decision.

THE BOARD'S POSITION

STATEMENT OF FACTS

Petitioner was employed as a school psychologist by the respondent, Jackson Township Board of Education (Board), from September 1968 through June, 1992. In or about the years 1989 and 1990 there were several pending claims filed by petitioner against the Board, including claims before the Commissioner of Education, the Division on Civil Rights, the Division of Workers' Compensation, and the Superior Court. All of these claims, as well as all other potential claims, with the sole exception of the pending Workers' Compensation Claims, were settled by the parties in a settlement agreement, which was fully executed on January 3, 1991. (Exhibit A).¹ All matters except the Workers' Compensation claims were withdrawn and petitioner eventually retired from the Jackson School District effective June 30, 1992.

On December 29, 1993, a decision was rendered by the Honorable James J. O'Connell, Judge of Workers' Compensation in petitioner's claim for disability benefits. (Exhibit B) In that decision petitioner was awarded temporary compensation benefits, an award for partial permanent

¹ "Exhibit A" refers to the exhibit attached to the certification of Rosalie Gangemi, Business Administrator/Board Secretary, which accompanies this brief.

decision petitioner was awarded temporary compensation benefits, an award for partial permanent disability, medical expenses, legal fees and costs. In a letter from petitioner's attorney to the Board Secretary, dated April 22, 1993, petitioner sought reimbursement of salary for those periods of time corresponding to the Workers' Compensation award. (Exhibit C) This letter was received by the Board Secretary on April 26, 1993. On April 27, 1993, the Board Secretary sent a letter to petitioner's attorney informing him that the Board was referring the matter to the Board attorney and that further inquiries should be directed to him. (Exhibit D)

Petitioner sent two letters to the Board Secretary in May, 1993, requesting a response to his claim for salary reimbursement for back sick days related to his Workers' Compensation award. (Exhibits E and F). A third, follow-up letter was sent by petitioner on May 18, 1993. (Exhibit G) The Board Secretary responded to petitioner in a letter dated May 27, 1993, informing petitioner that his request had been forwarded to the Board attorney. (Exhibit H)

In a letter dated September 20, 1993, the Board attorney notified petitioner's attorney that all outstanding matters relating to petitioner's employment were resolved in the January 1991 settlement agreement and that petitioner was not entitled to additional compensation. (Exhibit I). The instant petition was filed with the Commissioner of Education on October 6, 1993.

LEGAL ARGUMENT

POINT I

PETITIONER'S CLAIM IS BARRED AS UNTIMELY SINCE IT WAS NOT FILED WITHIN 90 DAYS AS REQUIRED BY N.J.A.C. 6:24-1.2(c)

The regulations covering petitions before the Commissioner of Education establish a period of limitations within which all claims must be filed. Pursuant to N.J.A.C. 6:24-1.2(c) "the petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, or other action by the district board of education, individual party, or agency, which is the subject of the requested case hearing." The Commissioner has already applied the 90 day rule

Compensation award. The Commissioner concluded that the 90 day period would run from the date of the Order of Workers' Compensation Court. Verneret v. Board of Education of the City of Elizabeth, 1991 S.L.D. 1725, 1732 (October 11, 1991). Since the instant case makes an identical claim, Verneret controls the issue of timeliness. Here, the final order or action which is the subject of this petition is the opinion of the Workers' Compensation Judge awarding petitioner benefits for his disabilities. This order was issued by Judge O'Connell on December 29, 1992. (Exhibit B). It is reasonable to assume that petitioner's attorney received this order by January 4, 1993. The 90 day period started running from the time petitioner received the decision of the Workers' Compensation Judge. Since the petition was not filed until October 1993, the petition should be dismissed as untimely.

Decisions of the Commissioner and the State Board have recognized that "[i]t is clearly established that the 90 day rule is strictly applied and the time within which the petition must be filed is measured from the time when the cause of action accrued." Frinquello v. Bd. of Education of the Vocational Schools of the County of Bergen, 1986 S.L.D. 2485 (October 20, 1986). While relaxation of the 90 day limitations period has been applied in some cases, and is authorized by the regulations, the Appellate Division has "expressly cautioned that strict interpretation and sparing application is to be expected, and the Commissioner and the State Board have consistently followed that directive." Nealy v. Bd. of Education of the Borough of Roselle Park, 1987 S.L.D. 1598 (July 16, 1987). Relaxation of the rule "has been reserved for limited situations wherein a compelling reason can be demonstrated for expanding the limitations period." Pacio v. Board of Education of Lakeland Regional School District, 1989 S.L.D. 2060, 2062 (June 29, 1989). In Pacio the Commissioner noted that the reasons for expanding the 90 day period are:

Where a substantial constitutional issue is presented, where judicial review is sought of an informal administrative determination, and where a matter of significant public interest is involved. 1989 S.L.D. at 2063. quoting Miller v. Morris School District, 1989 S.L.D. _____, (February 25, 1980).

The instant matter does not involve a constitutional issue or judicial review of an informal administrative determination. Petitioner has not alleged that there is a significant public interest involved. The only interest involved is petitioner's own interest in additional compensation. Petitioner has not alleged any other factors which would justify a relaxation of the rule in cases

Petitioner has not alleged any other factors which would justify a relaxation of the rule in cases involving far more serious claims than those set forth in the instant matter. Ward v. Board of Education of the Bridgewater-Raritan School District, 93 N.J.A.R. (EDU) 435 (June 1, 1992) (Claim of sexual harassment in appointment process); LeMee v. Board of Education of the Village of Ridgewood, 1990 S.L.D. 663 (Claim of non-renewal due to age discrimination). The facts of the instant matter simply do not warrant a relaxation of the 90 day requirement.

Furthermore, it is inconsequential that petitioner wrote to the district (first through his attorney and then on his own) to make a claim for payment. Any such attempt to resolve the issue of entitlement, without the need for litigation, does not serve to toll the time to file a petition, as consistently held by the Commissioner, the State Board and the Courts. Perhaps the most definitive statement on this issue is the opinion of the Supreme Court in Kaprow v. Board of Educ. of Berkeley Tp. 131 N.J. 572 (1993). In that case, a claim asserting tenure rights following a RIF was held untimely since it had not been filed within 90 days of when Kaprow learned that another person had been selected to fill a vacancy to which Kaprow believed he was entitled. Furthermore, the Court specifically rejected petitioner's argument that the 90 day period was tolled while he awaited a reply to his letter claiming entitlement to a position. Kaprow had learned of the Board's failure to appoint him to a vacancy on February 23, 1988. He wrote to the Board on February 28, 1988, asserting a right to a position. Id. at 577. After receiving no reply, he wrote again on April 25, 1988. (Id.) The Board attorney eventually replied on June 14, 1988, and maintained that Kaprow was not entitled to a position. Id. at 578. The petition was filed on August 1, 1988. Id. Based on those facts, the Court ruled that the 90 day period began to run on February 23, 1988, and that subsequent events did not change that fact.

Kaprow's attempt to resolve his claim through negotiations with the Local Board is irrelevant. It does not negate the fact that he received adequate notice on February 23, nor does it toll the running of the limitation period. Id. at 588.

See also, Bd. of Educ. of Bernards Tp. v. Bernards Tp. Ed. Assn., 79 N.J. 311 327 n.4 (1979) and Riely v. Hunterdon Central Bd. of Ed., 173 N.J. Super. 109, 113 (App. Div. 1980) (proceeding to arbitration does not toll the 90 day period).

Based on Kaprow, therefore, petitioner's attempts to resolve the matter by writing to the Board are immaterial. Indeed, the facts of the instant matter favor a determination of untimeliness even more so than the facts in Kaprow. At least in Kaprow, the letter to the Board was sent out within the 90 day period. Here, even the initial letter to the Board from petitioner's attorney, Charles Mandell, which was dated April 22, 1993 and was received by the Board on April 26, 1993, was sent beyond 90 days from the date of the order in the Workers' Compensation matter, December 29, 1992. Even if time for mailing is allowed and the time begins to run on January 4, 1993, the 90 day period elapsed on April 5, 1993. Clearly, a claim which is already untimely, cannot be resurrected by writing a letter to the Board, awaiting a response and then claiming another 90 day period.

It is clear in the instant matter that petitioner's claim for reimbursement for salary arose on the date of the decision of the Workers' Compensation Judge. This was the "final order, ruling or other action by the ... agency, which is the subject of the requested contested case hearing." Verneret, supra. Petitioner did not need any decision by the Board before he could file his claim. Petitioner's appeal is not from the decision of the Board to deny his request for additional compensation for his salary loss during periods of disability. The subject of his petition is the failure of the Board to pay his salary at the time he was on disability leave. The date on which his cause of action accrued was the date on which a final determination was made that petitioner was entitled to temporary disability benefits for two separate periods during the 1987-88 and 1988-89 school years. While petitioner was free to attempt to resolve his claim for salary reimbursement with the Board, any such attempts at a resolution did not toll the 90 day period.

Finally, the instant matter is not one which would fall under the limited exception established in Lavin v. Hackensack Bd. of Ed., 90 day N.J. 146 (1982). In Lavin the Supreme Court addressed the claim of a teacher that she had been denied the military service credit when she had been hired by the school board some nine years earlier. The Court held that the military service credit was a statutory entitlement, rather than a term of the individual's employment and, therefore, was not subject to the limitations period for a claim based on an employment contract. Id. at 150. The court in Lavin indicated that the situation it was addressing was limited to those where "the benefit is not directly related to the employment service, but is being awarded for a totally unrelated reason". Id.

The decision in Lavin has been consistently distinguished in subsequent decisions addressing the issue of whether a benefit is purely statutory or related to the individual's employment. For example, in North Plainfield Educ. Ass'n v. Bd. of Educ., 96 N.J. 587 (1984) the Supreme Court held that a salary increment under N.J.S.A. 18A:29-8 was not a statutory entitlement, like the military service credit, but was a benefit based upon teaching performance. Therefore, the failure of the teachers to file a petition within 90 days of the date they had notice that they did not receive an increment barred their petition. Id. at 594.

And, in a case directly on point, Northey v. Board of Education of the City of Trenton, 1987 S.L.D. 2273 (December 7, 1987), the Commissioner addressed a claim brought by two teachers claiming that the Board had improperly deducted monies from their salaries for sick leave benefits in violation of N.J.S.A. 18A:30-2.1. The Commissioner dismissed the claim as untimely under the 90 day requirement, finding that the claim did not fall under the exception established in Lavin. It was held that "[t]he sick leave benefits provided by N.J.S.A. 18A:30-2.1 are directly related to teaching services and are not automatic or continuous." Id. at 2278. Based upon the holding in Northey it is clear that the claim at issue in the instant matter is subject to the 90 day limitation.

Since petitioner has failed to file his petition within the 90 day period expressly provided for in the regulations, N.J.A.C. 6:24-1.2(c), his petition should be dismissed as untimely.

POINT II

**THE PETITION IN THIS MATTER IS BARRED
BY A PRIOR SETTLEMENT AGREEMENT
REACHED BY THE PARTIES**

On December 7, 1990, petitioner signed an agreement of settlement with the Board releasing a number of claims against the Board in return for continuation of his employment, salary, the restoration of his increments and other compensation. (Exhibit A) In addition to releasing the Board from several specifically enumerated claims which petitioner had pending before the Commissioner of Education, the Division of Civil Rights and in Superior Court, the agreement also acts as a general release of all potential claims, with one specific exception, Workers' Compensation claims pending at the time of the settlement agreement. The last portion of paragraph 8 of the settlement agreement reads:

This agreement shall act as a release of liability of the Board for all matters or events occurring prior to the date of this agreement, with the exception of pending Workers' Compensation claims.

Paragraph 9 reads, in part:

Dr. Sweet agrees that after this agreement is signed he will not initiate or participate in initiating a petition, complaint, investigation or lawsuit of any kind arising out of or relating to matters or events which arose prior to the signing of this agreement.

By such agreement, petitioner expressly waived the instant claim, since it alleges entitlement to payment for periods of time prior to September 5, 1989.

The courts have held that "[t]he scope of a release is determined by the intention of the parties as expressed in the terms of the particular instrument, considered in light of all the facts and circumstances." Bilotti v. Accurate Forming Corp. 39 N.J. 184, 204 (1963). A release "not restricted by its terms to particular claims or demands, ordinarily covers all terms and demands due at the time of execution and within the party's contemplation." Herold v. Inman, 180 N.J. Super. 581, 586 (Law Div. 1981).

Any claim petitioner has regarding salary for the period he was on disability was cognizable at the time the release was entered. While a final resolution of such a claim may not have been reached until the Workers' Compensation matter was completed, the claim itself could have been brought prior to the time the Workers' Compensation matter was fully adjudicated. And, perhaps most critically for purposes of the instant matter, a claim for benefits under N.J.S.A. 18A:30-2.1 is a claim which could have been and should have been preserved by petitioner at the time the release was negotiated (as had been done with the pending Workers' Compensation claims), had that been his desire. While the impact on the settlement agreement is impossible to predict at this point, it is readily apparent that if petitioner had sought to keep alive a claim for sick benefits in the neighborhood of \$20,000, the amount the Board was willing to pay would have been significantly reduced.

It is also clear that the Board was and remains justified in believing that a claim such as this one is precluded by the following language from paragraph 8:

This agreement shall act as a release of liability of the Board for all matters or events occurring prior to the date of this agreement, with the exception of pending Workers' Compensation claims.

Indeed, there is nothing more the Board could have done to insulate itself from future litigation than to use the language of a general release, such as "a release ... for all matter or events occurring prior to the date of this agreement." After all, Dr. Sweet did not have a specific claim pending for benefits under N.J.S.A. 18A:30-2.1 at the time of the settlement, thus it was impossible to have him specifically withdraw it, as was specifically done with all other matters, except the Workers' Compensation claims. Clearly, the parties bargained for a settlement of all issues and a cessation of litigation (with only one exception). Petitioner is now renegeing in an attempt to obtain more money from the district. Such an attempt is contrary to the specific terms of the settlement agreement and contrary to the principles governing settlement of litigation.

New Jersey Courts have recognized that "[a] general release, duly executed and fairly obtained is a complete bar to further recovery" Reinhardt v. Wilbur, 30 N.J. Super. 502, 505 (App. Div. 1954). Courts have held that a settlement agreement reached by the parties to a

lawsuit is a contract and “will be honored ‘absent a demonstration of fraud or other compelling circumstances’ ” Nolan v. Lee Ho, 120 N.J. 465, 472 (1990). It has been noted that the “[s]ettlement of litigation ranks high in our public policy.” Jannarone v. W.T. Co., 65 N.J. Super. 472, 476 (1961). “Our courts strongly favor the policy that the settlement of litigation be attained and agreements thereby reached be honored.” Honeywell v. Bubb, 130 N.J. Super. 130, 136 (App. Div. 1974).

The release in this matter was duly executed and fairly obtained. Petitioner does not allege that he was subject to duress or that the agreement was fraudulently obtained. Therefore, the settlement agreement entered between the parties should be honored. Allowing petitioner to circumvent the settlement executed between the parties will not further the public policy of settling litigation. Instead, it will discourage the settlement of litigation by allowing a party to a settlement the opportunity to recover more than once on the same claim. There is simply no justification for disturbing the settlement agreement reached between the parties. The agreement should be upheld and the instant petition dismissed.

For the foregoing reasons, respondent, Board of Education of the Township of Jackson requests that summary decision be granted in its favor dismissing the petition in this matter.

PETITIONER’S POSITION

STATEMENT OF FACTS

Petitioner relies upon his Petition of Appeal before the Commissioner and his Affidavit in Support of his Cross-Motion for Summary Decision as the operative facts in this proceeding. Those documents, incorporated by reference, will not be repeated here.

LEGAL ARGUMENT

POINT I

THE PETITION OF APPEAL IS TIMELY FILED

The regulations covering Petitions of Appeal filed with the Commissioner of Education establish a period of limitations within which all claims must be filed. Pursuant to N.J.A.C. 6:24-1.2(c) “The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of final order, or other action by the district board of education, individual party, or agency, which is the subject of the requested case hearing.”

The lead decision to be analyzed in this area is the New Jersey Supreme Court’s decision in Kaprow v. Board of Education of Berkeley Township, 131 N.J. 572 (1993). The Board of Education in citing the Kaprow decision correctly states that Kaprow’s claim asserting his tenure rights following a reduction in force was held to have been untimely filed since Kaprow had not filed his Petition of Appeal within 90 days of when Kaprow had first learned that another person had been appointed by the Board to fill a vacancy to which Kaprow believed he was entitled. However, what the Jackson Board of Education does not recognize is that the Supreme Court’s analysis in Kaprow is unequivocally supportive of petitioner Dr. Ira Sweet’s contentions in the instant matter regarding the timeliness of the Petition of Appeal filed in this case.

More specifically, the Supreme Court in Kaprow held as follows:

We also find that the letter Kaprow received on February 23, 1988, from the secretary of the Local Board constituted adequate notice under N.J.A.C. 6:24-1.2(c). Although the limitations period governing RIF rights requires that the petitioner file a petition no later than the ninetieth day from the date of receipt of the notice of a final order, ruling, or other action by the District Board of Education, the regulation does not specify what constitutes adequate notice.

Adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a

duty to communicate. See Burns v. West Am. Corporation, 137 N.J. Super. 442, 446, 349 A.2d 142 (Dist. Ct. 1975). Moreover, adequate notice under the regulation must be sufficient to further the purpose of the ninety-day limitations period. See Apex Roofing Supply Company v. Howell, 50 N.J. Super. 462, 467, 158 A.2d 49 App. Div. (1960). A limitations period has two purposes. The first is to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims. Ochs v. Federal Insurance Company, 90 N.J. 108, 112, 447 A.2d 1963 (1982). The second purpose is “to penalize dilatoriness and serve as a measure of repose” by giving security and stability to human affairs. Ibid. (Quoting Farrell vs. Votator Div., 62 N.J. 111, 115, 299 A.2d 394 (1973).

When a plaintiff knows or has reason to know that he has a cause of action against an identifiable defendant and voluntarily sleeps on his rights so long as to permit the customary period of limitations to expire, the pertinent considerations of individual justice as well as the broader considerations of repose, coincide to bar his action. [Farrell supra., 62 N.J. at 115, 299 A.2d 394.]

Adequate notice under N.J.A.C. 6:24-1.2 should accommodate both purposes. **That is, the notice of requirement should effectuate concerns for individual justice by not triggering the limitations period until the tenured teachers have been alerted to the existence of facts that may equate in law with a post RIF cause of action.** See Burd vs. New Jersey Tel. Company, 76 N.J. 284, 291, 386 A.2d 1310 (1978). At the same time, it should further considerations of repose by establishing an objective event to trigger the limitations period in order “to enable the proper and efficient administration of the affairs of government.” Borough of Park Ridge vs. Salimone, 21 N.J. 28, 48, 120 A.2d 721 (1956).

The final order, ruling, or other action by the Local Board occurred when it appointed non-tenured persons to positions to which Kaprow claims tenure rights. The Local Board was clearly required to give Kaprow official notice of that action. **Kaprow, however, did not receive any notice of the Board’s action until February 23, 1988, when he learned from the secretary of the Local Board that it had created and filled two positions in which he claimed tenure rights. That notice, although it was unofficial and informal, was sufficient to trigger the ninety-day limitations period. It is clear that Kaprow learned that the Local Board had, in fact, taken final and formal action. Kaprow obviously believed that his tenured status entitled him to one or both of those positions under N.J.S.A. 18A:28-12 and the notice he had received was adequate to enable him to pursue his claim.** In the future, it would be better if such information and notice is officially authorized and communicated by the Local Board.

Nonetheless, Kaprow's February 28th letter to the secretary of the Local Board demonstrates that he had sufficient knowledge of the relevant facts to bring a RIF claim. He wrote:

I have recently become aware that the position of Assistant Superintendent, to which I retain tenure rights, was reinstated as late as September 1986, if not before. Additionally, the duties which I performed as Assistant Superintendent have been transferred to a new position entitled District Supervisor of Elementary Education. I am certain that those duties were consolidated under one individual prior to the appointment of the District Supervisor of Elementary Education.

Kaprow's attempt to resolve his claim through negotiations with the Local Board is irrelevant. It does not negate the fact that he received adequate notice on February 23, nor does it toll the running of the limitations period. See Riely vs. Hunterdon Central Board of Education, 173 N.J. Super. 109, 413 A.2d. 628 (App. Div. 1980).

Kaprow received adequate notice under N.J.A.C. 6:24-1.2(c) on February 23, 1988, to trigger the ninety-day limitations period. On that day, he learned from the Local Board the existence of that state of facts that would enable him to file a timely claim. To insist under these circumstances that there be additional or more specific notice will not further the objectives of the regulatory scheme, and would only defeat the considerations of repose and interfere with the efficient administration of the school laws. Because Kaprow received adequate notice on February 23, he was obligated to file his petition within the ninety-day period. Kaprow, however, did not file his petition until August 1, more than two months after the limitations period had expired. We therefore find that his claims are time-barred by N.J.A.C. 6:24-1.2(c). 131 N.J. at 587-589. (Emphasis added).

In sharp contrast to the facts in Kaprow, Dr. Sweet did not have any notice whatsoever of the Board of Education's intention not to comply with the prescriptions of N.J.S.A. 18A:30-2.1 in terms of properly compensating him until Russell Weiss, the Board of Education's attorney, advised Dr. Sweet's Workers' Compensation attorney, Charles Mandell, in a letter dated September 20, 1993, that the Board of Education had concluded that no additional compensation was owed to Dr. Sweet. The instant Petition of Appeal was filed within two weeks after Dr. Sweet, through one of his legal representatives, had first been apprised that he would not receive the compensation to which he was entitled. In the Kaprow matter the petitioner was specifically and unequivocally placed on notice as of February 23, 1988 that the position that he asserted an entitlement to had been filled by another individual. The Supreme Court appropriately determined

that the February 23, 1988 notification from the Board Secretary clearly put Kaprow on notice that he had a cause of action against the Board of Education at that time. In the instant matter, however, it would have been premature for Dr. Sweet to file a Petition of Appeal until after September 20, 1993, inasmuch as the correspondence received from Rosalie Gangemi, the Jackson Board of Education Secretary, (Exhibits "D" and "E" annexed to the Sweet Affidavit) certainly did not put anyone on notice that the Board of Education has rejected Sweet's claims pursuant to N.J.S.A. 18A:30-2.1. In fact, it was clear, in light of the communications between Ms. Gangemi and both Dr. Sweet and his Workers' Compensation attorney that this issue was simply being turned over to the Board attorney for his research and opinion.

In sum, it is "plain as a pike-staff" that the instant Petition of Appeal was timely filed.

The Board of Education in its brief also asserts, in part, that the Commissioner of Education decision in Veneret vs. Board of Education of the City of Elizabeth, 1991 S.L.D. 1725, supports a contention that the date of the issuance of a final compensation award triggers any filing obligation regarding compliance with N.J.S.A. 18A:30-2.1. It is submitted, however, that there is nothing in the record in the Veneret case that would indicate what the Elizabeth Board of Education's position was regarding compliance with the prescriptions of N.J.S.A. 18A:30-2.1 as of the date of the issuance of the Workers' Compensation Judge's Order or at any time prior to the filing of the Petition of Appeal in that case. Certainly for all we know about the Veneret case the Elizabeth Board of Education may have advised Verneret contemporaneously with the issuance of the Workers' Compensation Judge's Award that it was not responsible for any additional compensation payments to Verneret.

Of far greater significance regarding the Verneret decision is the fact that the Kaprow Supreme Court decision was decided subsequent to the Verneret Commissioner of Education decision. The Kaprow decision clearly established specific standards to be applied in the future regarding the timeliness of Petitions of Appeal filed with the Commissioner of Education.

In sum, the Supreme Court's decision in Kaprow fully controls the instant matter and mandates the conclusion that the Petition of Appeal filed by Dr. Ira Sweet is timely filed.

POINT II

THE PETITION OF APPEAL IN THIS MATTER IS NOT BARRED BY THE PRESCRIPTIONS OF THE PRIOR SETTLEMENT AGREEMENT CONCLUDED BY THE PARTIES

It is the position of petitioner that nothing contained within the Settlement Agreement, annexed to the Gangemi Affidavit filed on behalf of the Board of Education, bars the instant litigation.

The last portion of paragraph 8 of the Settlement Agreement reads:

This agreement shall act as a release of liability of the Board for all matters or events occurring **prior to the date of this agreement**, with the exception of pending Workers' Compensation claims. (Emphasis supplied).

Paragraph 9 reads in part:

Dr. Sweet agrees that after this agreement is signed he will not initiate or participate in initiating a petition, complaint, investigation or lawsuit of any kind arising out of or relating to matters or events which arose **prior** to the signing of this agreement. (Emphasis supplied).

For the reasons set forth in the first legal point of this brief it is submitted that the relevant event that is the subject of this Petition of Appeal was the September 20, 1993, letter from the Board attorney specifically rejecting Dr. Sweet's claims that N.J.S.A. 18A:30-2.1 required the Board of Education to pay Dr. Sweet additional salary payments during the operative time period. This Petition of Appeal clearly relates to events that arose **subsequent** to the signing of the Settlement Agreement, **not** prior to the date of the Agreement.

In the fourth legal point of this brief case support will be cited in support of petitioner's contention that the Workers' Compensation award affecting Dr. Sweet, issued after four years of litigation, is dispositive of all of the issues regarding the applicability of N.J.S.A. 18A:30-2.1, thus

mandating, as a matter of law, additional salary payments to Dr. Sweet. It was not until the receipt of the September 20, 1993, from the Board attorney that Dr. Sweet had any claim or cause of action against the Board of Education regarding the non-payment of compensation to him that was required pursuant to the prescriptions of N.J.S.A. 18A:30.2.1.

It is obvious that the reservation in the Settlement Agreement of Dr. Sweet's right to continue to pursue his Workers' Compensation claims did not bar him from seeking to enforce his right to additional compensation, pursuant to N.J.S.A. 18A:30-2.1, which arose only when Dr. Sweet had prevailed regarding his compensability claims that were litigated before a Workers' Compensation Judge.

Once Judge James O'Connell, Jr. determined that the absences at issues were a result of a personal injury "caused by an accident arising out of and in the course of Dr. Sweet's employment" the Jackson Board of Education first became liable for the additional salary payments mandated by N.J.S.A. 18A:30-2.1, approximately three years **after** the execution of the aforementioned Settlement Agreement.

If one was to credit the Board of Education's contentions Dr. Sweet, for example, would not have been able to sue the Board of Education if the Board of Education, subsequent to the execution of the Settlement Agreement defamed him and his professional reputation by, for example, misrepresenting his professional performance within the District. Moreover, if the Board's contentions were sustained, in a hypothetical situation in which the Jackson Board of Education was required to pay all certified employees in the District during the operative time period in which Dr. Sweet was employed additional compensation due to the resolution of some type of class action grievance or lawsuit the Board of Education would have been able to avoid paying Dr. Sweet because of reliance on the same prescriptions of the Settlement Agreement. Certainly Dr. Sweet would not have been barred from proceeding with defamation claims or contractual claims based upon the above hypothetical facts. Likewise, the prescriptions of paragraphs 8 and 9 of the Settlement Agreement certainly cannot bar Dr. Sweet from initiating breach of contract litigation against the Board of Education's noncompliance with paragraph 12 of the Agreement which required that Dr. Sweet receive a letter of recommendation signed by the Superintendent of Schools "upon separation from employment."

In sum, it is averred that Dr. Sweet had the absolute right to initiate litigation against the Board of Education regarding claims that first arose after the date of the Settlement Agreement which concerned the Jackson Board's refusal to comply with the prescriptions of N.J.S.A. 18A:30-2.1.

POINT III

THE BOARD OF EDUCATION CANNOT SEEK TO ENFORCE CERTAIN PROVISIONS WITHIN THE SETTLEMENT AGREEMENT WHEN THE BOARD ITSELF BREACHED THE AGREEMENT AT ISSUE IN A SUBSTANTIAL AND MATERIAL WAY

Assuming **arguendo** that there was any merit to the Board of Education's contentions that paragraphs 8 and 9 of the Settlement Agreement at issue barred the initiation of any post agreement litigation it is averred that it is uncontroverted in the instant matter that the Board of Education itself failed to comply with the Settlement Agreement when the Board refused to supply Dr. Sweet with a letter of recommendation signed by the Superintendent of Schools, Dr. Dominic Cotugno, which was required pursuant to the prescriptions of paragraph 12 of the Settlement Agreement.

Although he was not required to do so Dr. Sweet sent two separate letters to the Superintendent of Schools requesting the receipt of the letter of recommendation that should have been forwarded to his attention "upon separation from employment," only to have his requests denied by the administration. (See Exhibit "A" and "B" annexed to Dr. Sweet's affidavit).

It is beyond dispute that the failure to supply a requested letter of recommendation would undoubtedly have compromised Dr. Sweet's ability to secure any employment in the public or private sectors in any type of educational or professional capacity.

It is therefore averred that the Board of Education certainly lacks "clean hands" in the instant matter and in light of the Board of Education's substantial breach of the Settlement Agreement the Board of Education cannot therefore seek to enforce other prescriptions of the

Agreement, assuming **arguendo** again that those cited prescriptions (set forth in paragraphs 8 and 9) had any applicability to the issues presented in this matter.

POINT IV

**PETITIONER, DR. IRA SWEET, IS ENTITLED TO JUDGMENT
AS A MATTER OF LAW IN CONSIDERATION OF THE
PRESCRIPTIONS OF N.J.S.A. 18A:30-2.1**

N.J.S.A. 18A:30-2.1 states as follows:

Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in sections 18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any Workmen's Compensation award made for temporary disability. L. 1967, c. 271, § 18A:30-1, eff. January 11, 1968. (Emphasis supplied).

In the Appellate Division decision Forgash v. Lower Camden County School, 208 N.J. Super. 461 (1985), the Court determined that in a situation involving related Workers' Compensation claims and claims, pursuant to N.J.S.A. 18A:30-2.1, the Workers' Compensation Courts had exclusive original jurisdiction to decide the issue as to whether a particular injury was caused by an accident "arising out of and in the course of (one's) employment." The Forgash decision effectively mandated the conclusion that Workers' Compensation Judges' findings with regard to "compensability" pursuant to the principle of res judicata, established that a school

district employee prevailing in the Workers' Compensation forum was entitled, as matter of law, to additional salary payments pursuant to N.J.S.A. 18A:30-2.1.

In the Verneret case cited by the Board of Education the Commissioner of Education in reversing the Administrative Law Judge, determined that once an employee prevailed with regard to the Workers' Compensation component of a particular personnel dispute regarding entitlements to additional salary that employee was entitled to judgment, as a matter of law, pursuant to the prescriptions of N.J.S.A. 18A:30-2.1, regarding claims that the employee's "employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in Sections 18A:30-2 and 18A:30-3."

In consideration of the Appellate Division's decision in Forgash, as applied in the Verneret case, it is submitted that petitioner's cross-motion for summary decision should be granted in its entirety. The Board of Education should be ordered to strictly comply with the prescriptions of N.J.S.A. 18A:30-2.1 regarding additional salary payments owed to petitioner Dr. Ira Sweet.

DISCUSSION AND CONCLUSIONS

POINT I

WHETHER PETITIONER'S CLAIM WAS TIMELY FILED PURSUANT TO N.J.A.C. 6:24-1.2(c)

The controlling State Board of Education regulation is found at N.J.A.C. 6:24-1.2(c) which states, in part that:

The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. (Emphasis supplied)

The instant matter concerns an Order for Judgment and an Amended Order for Judgment issued by the Honorable James J. O'Connell, Jr., Judge of Workers' Compensation dated December 29, 1992 and February 17, 1993, respectively. Therein, Judge O'Connell awarded petitioner partial/permanent disability which entitled petitioner to 120 weeks payable at the rate of \$86.05 per week amounting to \$10,326. Petitioner was also awarded counsel fees in an amount of \$4,974.00 by the Board.

In the matter of Verneret, supra., cited by the Board, the Commissioner of Education held, among other things, that:

In this case, the Workers' Compensation determination upon which petitioner reasonably waited to file his claim was an absolute prerequisite to any ruling by the Commissioner; indeed, petitioner did not have a cause of action under N.J.S.A. 18A:30-2.1 until such time as the nexus between his injury and his employment was definitively established through compensation proceedings. Id. 1732 (citations omitted) (Emphasis supplied).

Thus, in Verneret, the Commissioner held that the Judgment of the Workers' Compensation Court triggered the 90 day rule under N.J.A.C. 6:24-1.2(c). Here, petitioner was advised by the Workers' Compensation Court of its final Amended Order, dated February 17, 1993. Under the Verneret holding, the 90 days within which petitioner was required to file his petition commenced upon his receipt of Judge O'Connell's Amended Order of Judgment, dated February 17, 1993. The herein record demonstrates that the petitioner's Petition of Appeal was received by the Commissioner on October 6, 1993.

The Verneret holding by the Commissioner is supported by opinion of our Supreme Court in Kaprow, supra. concerning the 90 day rule under N.J.A.C. 6:24-1.2(c). In John LeRose vs. Board of Education of the Township of Lacey, Ocean County, (OAL Dkt. No. EDU 10555-93, Decided March 25, 1994, remanded by the Commissioner of Education May 17, 1994) this court summarized the Kaprow case as follows:

Maurice Kaprow was a tenured assistant superintendent in the employ of the Berkeley Township Board of Education. Kaprow's employment was terminated effective June 31, 1981, as a consequence of a reduction in force (RIF) pursuant to N.J.S.A. 18A:28-9. The Berkeley Board

failed to maintain Kaprow's name on a preferred eligibility list for reemployment as required by N.J.S.A. 18A:28-12. Subsequent to Kaprow's termination, the Berkeley Board filled the position of assistant superintendent with someone other than Kaprow and without notice to him.

On February 23, 1988, Kaprow inquired of the Berkeley Board's secretary as to whether positions for which he retained tenure rights had been established by the Board subsequent to his termination. On February 23, 1988, the Board Secretary wrote Kaprow to advise him that on September 9, 1986, the Board appointed Robert Cilento to the position of Assistant Superintendent of Administrative Services. The Board Secretary also advised Kaprow that on July 1, 1987, the Board had appointed Sheila McGuckin as District Supervisor of Elementary Schools.

In or about February 28, 1988, Kaprow addressed a letter to the Berkeley Board making claim to both the Assistant Superintendent and District Supervisor positions. Kaprow requested the Board to reinstate him retroactively with full back pay and benefits, pursuant to N.J.S.A. 18A:28-12. The Berkeley Board did not reply to Kaprow's letter of February 28, 1988.

On April 25, 1988, Kaprow sent a second letter to the Berkeley Board asserting he wished to amicably resolve the matter and requested a reply by May 16, 1988. On June 14, 1988, the Berkeley Board's attorney responded to Kaprow's April 25, 1988, letter and acknowledged that two positions had been created and filled. The Board's attorney asserted, among other things, that the duties of the two positions were substantially different from those performed by Kaprow and, therefore, his RIF rights did not attach and there was no basis for his reinstatement.

On August 1, 1988, Kaprow filed a verified Petition of Appeal with the Commissioner of Education asserting his claim to the positions of Assistant Superintendent of Administrative Services and/or District Supervisor. Kaprow's case proceeded through the OAL, the Commissioner, the State Board of Education, the Appellate Division of Superior Court, to the New Jersey Supreme Court, which granted his petition for certification at 130 N.J. 16 (1992).

The Court in Kaprow found that the letter he received from the Berkeley Board's secretary on February 23, 1988, constituted adequate notice under N.J.A.C. 6:24-1.2(c). Justice Garibaldi, writing for the Court, made the following observation:

Adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate. See Burns v. West Am. Corp., 137 N.J. Super. 422, 446, 349, A 2d. 142 (Dist. Ct. 1975).

Moreover, adequate notice under the regulation must be sufficient to further the purpose of the ninety-day limitations period. See Apex Roofing Supply Co. v. Howell, 59 N.J. Super. 462, 158, A. 2d. 49 (App. Div. 1960). A limitations period has two purposes. The first is to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims. Ochs v. Federal Ins. Co., 90 N.J. 108, 112, 447, A. 2d. 163 (1982). The second purpose is “to penalize dilatoriness and serve as a measure of repose” by giving security and stability to human affairs. Ibid. (quoting Farrell v. Votator Div. 62 N.J. 111, 115, 299, A. 2d. 394 (1973)).

When a plaintiff knows or has reason to know that he has a cause of action against an identifiable defendant and voluntarily sleeps on his rights so long as to permit the customary period of limitations to expire, the pertinent considerations of individual justice as well as the broader consideration of repose, coincide to bar his action. [Farrell, supra. 62 N.J. at 115, 299, A. 2d. 394]

Adequate notice under N.J.A.C. 6:24-1.2 should accommodate both purposes. That is, the notice requirement should effectuate concerns for individual justice by not triggering the limitations period until the tenured teachers have been alerted to the existence of facts that may equate in law with a post-RIF cause of action. See Burd v. New Jersey Tel. Co., 76 N.J. 284, 291, 386, A. 2d. 1310 (1978). At the same time, it should further considerations of repose by establishing an objective event to trigger the limitations period in order “to enable the proper and efficient administration of the affairs of government.” Borough of Park Ridge v. Salimone, 21 N.J. 28, 48, 120 A. 2d. 721 (1956) Id. at 587.

The Court held that the notice to Kaprow on February 23, 1988, albeit unofficial and informal, was sufficient to trigger the ninety-day limitations period. Kaprow’s subsequent attempt to negotiate with the Board to resolve his claim was held to be irrelevant. The negotiations did not negate the fact that he received adequate notice February 23, 1988, nor did it toll the running of the ninety-day limitations period.

Here, petitioner was issued the Workers’ Compensation Court’s final order dated February 17, 1993. I **CONCLUDE** that the February 17, 1993 Amended Order for Judgment by

the Honorable James J. O'Connell, Jr., J.W.C. constitutes the commencement of the 90 day rule pursuant to N.J.A.C. 6:24-1.2(c). Petitioner knew or had reason to know that he had a cause of action against the Board at the time. Kaprow at 587.

I **CONCLUDE**, therefore, that petitioner's Petition of Appeal filed before the Commissioner on October 6, 1993, was untimely filed pursuant to N.J.A.C. 6:24-1.2(c) and the holding in Kaprow.

According, I **FIND and CONCLUDE** that the instant Petition of Appeal should be dismissed.

POINT II

WHETHER THE PETITION OF APPEAL IS BARRED BY THE SETTLEMENT ENTERED INTO THE PARTIES

The Agreement between petitioner and the Board, signed by petitioner on December 17, 1990, provides, in pertinent part, as follows:

8. Withdrawal of Litigation

Upon the signing of this agreement, Dr. Sweet shall take all necessary measures to withdraw all pending disputes between the parties, with the exception of pending workers' compensation claims

This agreement shall act as release of liability of the Board for all matters or events occurring prior to the date of this agreement, with the exception of pending workers' compensation claims.

Paragraph 9 of the Agreement provides for the cessation of litigation and states:

Dr. Sweet agrees that after this agreement is signed he will not initiate or participate in initiating a petition, complaint, investigation or lawsuit of any kind arising out of relating to matters or events which arose prior to the signing of this agreement. Dr. Sweet further agrees not to initiate or participate in initiating a petition, complaint, investigation or lawsuit of any kind arising out of or relating to matters or events which arise after the signing of this agreement; and that in lieu thereof he shall submit any

and all work-related problems to Edward Elms, Assistant Superintendent of Schools, as final arbiter of disputes between Dr. Sweet and anyone connected with the district. (Petitioner's Exhibit C, Board's Exhibit A)

The Agreement clearly saved and preserved petitioner's rights to continue to pursue his Workers' Compensation claims which were pending at the signing of the Agreement. Paragraph 9 of the Agreement merely provides that petitioner shall not "initiate" or "participate in initiating" in litigation of any kind arising out of or relating to matters or events which arose prior to the signing of the agreement.

The term "initiate" as defined by BLACK'S LAW DICTIONARY (5th ed. 1979) at 705, means to "commence: start; originate; introduce; inchoate." In MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1993) at 601, "initiate" is defined as "1: to cause or facilitate the beginning of: set going" Here, petitioner's Workers' Compensation claims were continuous, ongoing and protected by the Agreement entered into by him and the Board. Petitioner did not "initiate" any litigation in violation of the Agreement. Rather, the Board failed to comply with Judge O'Connell's Order of Judgment and Amended Order of Judgment.

It was due to the Board's failure to comply with Judge O'Connell's Orders that caused petitioner to petition the Commissioner for recourse to recover that which was due him. Petitioner's Petition of Appeal before the Commissioner was merely an extension of his Workers' Compensation claim against the Board which was preserved by the Agreement.

I **CONCLUDE**, that pursuant to the Agreement between petitioner and the Board, petitioner preserved his right to pursue his remedies as a consequence of the Worker's Compensation Court's holding in his favor.

I **CONCLUDE**, therefore, that petitioner had a right to petition the Commissioner pursuant to his claims under N.J.S.A. 18A:30-2.1.

Petitioner's argument of the Board's "unclean" hands was not raised as a issue by the prehearing order to be determined by this tribunal and, therefore, will not be dealt with here.

Petitioner's argument that he is entitled to payment under N.J.S.A. 18A:30-2.1 as a matter of law is similar, in many respects, to the arguments advanced by petitioner Kaprow.

Notwithstanding Kaprow's entitlement, the Court determined that he slept on his rights for failure to comply with the 90 day rule and I so **CONCLUDE** here.

ORDER

Accordingly, pursuant to N.J.A.C. 6:24-1.2(c) and the holding in Kaprow, supra, the herein Petition of Appeal is **DISMISSED** for failure to comply with the 90 day rule and **SUMMARY DECISION** is hereby **DENIED** to **PETITIONER** and **ENTERED** on **BEHALF** of the **JACKSON TOWNSHIP BOARD OF EDUCATION**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

7 April 1995
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

4/13/95
DATE

Receipt Acknowledged:

Hope R. Blackburn
DEPARTMENT OF EDUCATION

APR 20 1995
DATE

Mailed to Parties:
Jeff J. Mann
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

PETITIONER

NONE

RESPONDENT

NONE

EXHIBITS

PETITIONER

- A- LETTER, SEPTEMBER 21, 1992 TO DR. DOMINIC COTGNO FROM IRA SWEET
- B- LETTER, DECEMBER 15, 1992 TO DR. DOMINIC COTGNO FROM IRA SWEET
- C- LETTER, SEPTEMBER 20, 1993, TO CHARLES H. MANDELL, ESQ. FROM RUSSELL WEISS, JR., ESQ. W/AGREEMENT ATTACHED
- D- LETTER, APRIL 27, 1993, TO CHARLES H. MANDELL, ESQ. FROM ROSALIE GANGEMI, BOARD SECRETARY
- E- MEMO TO IRA SWEET FROM R. GANGEMI

RESPONDENT

- A- AGREEMENT
- B- ORDER FOR JUDGMENT AND AMENDED ORDER FOR JUDGMENT
- C- LETTER, APRIL 22, 1993 TO ROSALIE GANGEMI FROM CHARLES H. MANDELL, ESQ.
- D- LETTER, APRIL 27, 1993 TO CHARLES H. MANDELL, ESQ., FROM ROSALIE GANGEMI

- E- LETTER, MAY 1, 1993, TO MRS. GANGEMI FROM IRA SWEET
- F- LETTER, MAY 3, 1993, TO MRS. GANGEMI FROM IRA SWEET
- G- LETTER, MAY 18, 1993 TO ROSALIE GANGEMI FROM IRA SWEET
- H- MEMO, TO IRA SWEET MAY 27, 1993 FROM R. GANGEMI
- I- LETTER, SEPTEMBER 20, 1993, TO CHARLES H. MANDELL, ESQ. FROM
RUSSELL WEISS, JR., ESQ.

IRA SWEET, :
 :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 TOWNSHIP OF JACKSON, :
 OCEAN COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Pursuant to N.J.A.C. 1:1-18.4, timely exceptions were filed by both parties, and a reply to petitioner's exceptions was filed by the Board.

In his exceptions, petitioner concurs with the ALJ's conclusions regarding petitioner's ability to bring the within petition under the terms of his 1991 settlement agreement, but disputes the ALJ's findings with respect to the timeliness of that petition. Specifically, petitioner argues that the ALJ misinterpreted and misapplied the holding of the New Jersey Supreme Court in its Kaprow decision, supra, and that he further misunderstood the significance of the Commissioner decisions cited. Petitioner reiterates his Kaprow-based argument set forth at length in the initial decision at 11-14 above, as well as other legal arguments referenced in the initial decision regarding statutory entitlement and strict application of the 90-day rule in cases arising under N.J.S.A. 18A:30-2.1. Petitioner stresses that he received no substantive response from

the Board or any agent thereof regarding his claim for salary following adjudication of his workers' compensation claim until the Board attorney's letter of September 20, 1993, which placed him on notice for the first time that the Board would not be honoring his entitlement, thereby giving him the first action from which he could take appeal under the express language of N.J.A.C. 6:24-1.2(c).

In reply, the Board contends that petitioner's position, that the 90-day period does not begin to run until a person receives notification from the Board that his or her claim has been rejected, turns the holding of Kaprow on its head. Rather, the Board contends, that case clearly requires the 90-day rule to be reckoned from the date a person has knowledge that will give him/her a cause of action, specifically, notice that his/her rights may have been violated or that he/she may have an entitlement to some form of compensation. In fact, Kaprow specifically rejects the notion that the 90-day period is tolled while a person is awaiting a reply to his/her letter claiming such an entitlement, and in a prior decision, Verneret, supra, the Commissioner expressly held the cause of action in claims arising under N.J.S.A. 18A:30-2.1 to be the determination of the Workers' Compensation Court.

In its own exceptions, the Board endorses the ALJ's reasoning and conclusions with regard to the timeliness of petitioner's filing, but seeks, for purposes of precedent or possible appeal, a correction holding that petitioner's cause of

action arose upon issuance of the original Order of the Workers' Compensation Court dated December 29, 1992, not upon issuance of the Amended Order of February 17, 1993. It was the former, the Board argues, that established the fact of work-related injury and gave rise to any purported claim under N.J.S.A. 18A:30-2.1, while the latter's express purpose was solely to correct an inadvertent error in the original Order regarding calculation of petitioner's rate of compensation.

The Board further disputes the ALJ's conclusion regarding the effect of the 1991 settlement agreement on petitioner's ability to bring the instant appeal, reiterating the arguments reproduced at length at pages 8-10 above.

Upon review and consideration of this matter, for the reasons set forth below, the Commissioner reverses the initial decision with respect to its finding on the timeliness of petitioner's appeal, while affirming the ALJ's ruling with respect to petitioner's ability to bring an appeal before the Commissioner under the terms of the 1991 settlement agreement.

Initially, the Commissioner does not agree that Kaprow, supra, and the Commissioner's decision in Verneret, supra, compel a conclusion that petitioner's cause of action arose upon the date of his Workers' Compensation determination. In Kaprow, while petitioner's entitlement to a subsequent opening arose upon elimination of his own position, his cause of action did not arise until: 1) the Board affirmatively moved to place someone else in that opening, and 2) he had specific knowledge of the

Board's action, so as to have been placed on notice that his rights may have been violated. It is, therefore, inconsistent to conclude herein that, based upon Kaprow, petitioner's cause of action arose upon creation of his entitlement, rather than upon the actions or events that would or should have reasonably led him to recognize that the Board did not intend to honor that entitlement, thereby violating his statutory rights.

Neither can the Commissioner's ruling in Verneret be construed, as the Board herein would have it, as express support of its position. In Verneret, the matter at hand was not whether petitioner's cause of action arose on issuance of a Worker's Compensation ruling as opposed to subsequent notice that a board would not pay additional benefits under N.J.S.A. 18A:30-2.1, as is the case herein. Rather, the debate centered on whether it was necessary for petitioner to have filed before the Commissioner at the time benefits were initially refused by the Board, as opposed to waiting for a Workers' Compensation determination; indeed, the central issue of the present matter did not even arise, in that petitioner filed within 90 days of his Workers' Compensation determination.

Finally, neither the parties nor the ALJ take into account the State Board of Education's January 4, 1995 appeal decision on Verneret. Prior to that ruling, the Commissioner had routinely held, as he did in the matter on appeal, that petitioners had no cause of action under N.J.S.A. 18A:30-2.1 until such time as the Division of Workers' Compensation ruled

that a specific disability was work-related. The State Board, however, declared this long-standing practice to be in error and held instead that

The fact that the Commissioner has the discretion to defer exercising his jurisdiction in certain instances in order to permit the Division of Workers' Compensation to determine whether an injury was work-related does not, however, excuse a petitioner's failure to comply with the filing requirements of N.J.A.C. 6:24-1.2 when seeking benefits under the education law. Therefore, we can not accept the Commissioner's legal conclusion that a cause of action under N.J.S.A. 18A:30-2.1 does not arise until such time as Workers' Compensation renders such a determination.

We reiterate that it is the Commissioner who must determine whether or not the particular facts underlying a claim filed with him for benefits pursuant to N.J.S.A. 18A:30-2.1 are such that he should refrain from considering the matter until a determination has been made by the Division of Workers' Compensation. Hackensack v. Winner, supra. In contrast, N.J.A.C. 6:24-1.2 establishes filing requirements that petitioners must meet in filing petitions under the education laws.***

We also hold that any petitioner claiming benefits under N.J.S.A. 18A:30-2.1 must file a petition with the Commissioner of Education within 90 days of the district board's action which has the effect of denying such benefits to petitioner.*** (Slip Opinion at pp. 4-6, emphasis in final paragraph supplied)

Thus, it is now clearly established how a cause of action under N.J.S.A. 18A:30-2.1 is to be reckoned. However, the State Board, in recognition that its ruling significantly altered the prevalent understanding of when claims under N.J.S.A. 18A:30-2.1 were to be filed with the Commissioner, went on to apply its holding prospectively and relax the 90-day filing rule so as to permit petitioner to pursue his claim.

Therefore, under the facts and circumstances herein, which arose under the legal construction and practice in effect

prior to the State Board's ruling in Verneret, the Commissioner deems it appropriate to relax the 90-day filing rule so as to permit consideration of petitioner's claim. In so holding, the Commissioner notes that petitioner promptly pursued his claim with the Board upon issuance of a determination from Workers' Compensation and promptly filed before the Commissioner upon first notice by the Board, or any representative thereof, that it would not pay the anticipated benefit.

On the question of whether the within appeal is barred by the terms of the 1991 settlement agreement between the parties, the Commissioner concurs with the ALJ that petitioner's entitlement under N.J.S.A. 18A:30-2.1 is an extension of the Workers' Compensation claims expressly preserved in the settlement agreement. As that agreement did not insulate the Board from the consequent obligation which arose once those claims were successful, petitioner is not prevented by the terms of the agreement from appealing the Board's refusal to fulfill that obligation.

Accordingly, for the reasons set forth above, the Commissioner finds that petitioner is entitled to a hearing on the merits of his claim. The Commissioner, therefore, remands this matter to the Office of Administrative Law for findings and recommendations as to the extent of petitioner's entitlement under N.J.S.A. 18A:30-2.1.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

EDU #10554-93
C # 177-95
SB # 76-95

IRA SWEET,	:	
	:	
PETITIONER-RESPONDENT,	:	
	:	
V.	:	STATE BOARD OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF JACKSON,	:	
OCEAN COUNTY,	:	
	:	
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, May 26, 1995

For the Petitioner-Respondent, Klausner, Hunter & Cige (Stephen B. Hunter, Esq., of Counsel)

For the Respondent-Appellant, Carroll & Weiss (Russell Weiss, Jr., Esq., of Counsel)

The basic facts herein are not in dispute. On December 29, 1992 and, as subsequently modified on February 17, 1993, the Division of Workers' Compensation rendered a determination that Ira Sweet (hereinafter "petitioner"), a retired school psychologist, had suffered an injury which arose out of and in the course of his employment with the Board of Education of the Township of Jackson (hereinafter "Board") and that he was entitled to partial/permanent disability benefits. Petitioner thereafter sought payment from the Board, pursuant to N.J.S.A. 18A:30-2.1, of his

Nov. 1, 1995

salary for periods of absence from his tenured employment as a result of such injury.¹ By letter dated September 20, 1993, the Board indicated that it was denying petitioner's claim on the basis of a settlement agreement entered into by the parties in January 1991. On October 6, 1993, petitioner filed a petition with the Commissioner of Education challenging the Board's refusal to provide him with such benefits.

An Administrative Law Judge ("ALJ") recommended dismissing the petition as untimely under N.J.A.C. 6:24-1.2(c), reasoning that petitioner was required to file that petition within 90 days after Workers' Compensation determined that he had suffered an injury which arose out of and in the course of his employment. The Commissioner rejected that conclusion, finding that relaxation of the filing requirement was appropriate in this instance. Accordingly, he remanded this matter to the Office of Administrative Law ("OAL") for further proceedings on the merits of the petition. The Board filed the instant appeal to the State Board of Education.

Although we affirm the ultimate determination of the Commissioner to remand this matter to OAL, we modify the Commissioner's analysis.

¹ N.J.S.A. 18A:30-2.1, "Payment of sick leave for service connected disability," provides, in pertinent part:

Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in sections 18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmen's compensation award made for temporary disability.

N.J.A.C. 6:24-1.2(c) provides that:

The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

Petitioner herein, in express compliance with N.J.A.C. 6:24-1.2, filed the instant petition with the Commissioner of Education within 90 days after he received the September 20, 1993 letter from the Board notifying him that it was denying his claim for benefits under N.J.S.A. 18A:30-2.1. Petitioner's compliance with the 90-day rule is not impacted by decisions rendered by the Commissioner during this period which indicated that a petition claiming benefits under N.J.S.A. 18A:30-2.1 was required to be filed within 90 days after the Division of Workers' Compensation determined that a claimant had suffered an injury which arose out of and in the course of his employment. See Verneret v. Board of Education of the City of Elizabeth, decided by the Commissioner, October 11, 1991, aff'd with modification by the State Board, January 4, 1995.² Unlike the matter now before us, those cases involved circumstances in which the employee's claim for benefits had been denied by the district board prior to a determination by Workers' Compensation. In such instances, it had been held by the

² The State Board in Verneret acknowledged the confusion which existed regarding the filing requirements for petitions claiming benefits under N.J.S.A. 18A:30-2.1 and clarified the law in this regard. The State Board rejected the Commissioner's legal conclusion that a cause of action under that statute did not arise until such time as Workers' Compensation rendered a determination that the injury was work-related and held that petitions for benefits thereunder were required to be filed with the Commissioner of Education within 90 days of the district board's action which had the effect of denying such benefits to the petitioner. Given the confusion that existed in this area, the State Board applied its holding prospectively.

Commissioner that a petition for benefits under N.J.S.A. 18A:30-2.1 need not have been filed until after Workers' Compensation rendered its decision.

As duly noted by the Commissioner, however, this case involves a situation in which the petitioner's claim for benefits under N.J.S.A. 18A:30-2.1 was denied by the Board subsequent to the determination by the Division of Workers' Compensation that he had suffered an injury arising out of his employment. We find no justification for applying circular reasoning to these circumstances so as to circumvent the express language of N.J.A.C. 6:24-1.2(c) and require petitioner to have filed his petition subsequent to the Worker's Compensation determination, yet prior to the Board's denial of his claim. Inasmuch as petitioner filed his petition with the Commissioner of Education within 90 days after the Board provided him with notice that it was denying his claim for benefits under N.J.S.A. 18A:30-2.1, we find that he fully complied with the 90-day requirement of N.J.A.C. 6:24-1.2(c). Consequently, we reject the Commissioner's assertion that it was necessary to relax that requirement in this instance.

In addition, although we agree with the Commissioner that petitioner was not prevented from claiming benefits under N.J.S.A. 18A:30-2.1 as a result of the January 1991 settlement agreement with the Board, we also modify the Commissioner's analysis in that regard. Given the facts herein and the state of the law at the time of the controverted agreement, see, supra, we cannot conclude that petitioner knowingly relinquished his right to a statutory benefit. Indeed, the Commissioner had held, in a determination subsequently rejected by the State Board, that a cause of action for

benefits under N.J.S.A. 18A:30-2.1 did not even arise until such time as Workers' Compensation rendered a determination that the injury arose out of and in the course of the claimant's employment. Verneret, supra.³ in view of the fact that petitioner expressly excluded "pending workers' compensation claims" from the settlement agreement, we are unable to conclude under these particular facts that petitioner knowingly waived any entitlement to benefits under N.J.S.A. 18A:30-2.1.

Accordingly, for the reasons expressed herein, we affirm the ultimate determination of the Commissioner rejecting the ALJ's dismissal of the petition and remanding this matter to the Office of Administrative Law for further proceedings on the merits of the petition.

November 1, 1995

Date of mailing NOV 03 1995

³ Our January 1995 decision in Verneret, subsequent to the relevant events herein, settled that a cause of action for benefits under N.J.S.A. 18A:30-2.1 is entirely distinct from a claim for workers' compensation benefits, notwithstanding that the employee's entitlement to benefits under that statute may be contingent upon a subsequent determination by the Division of Workers' Compensation that the injury was work-related.

178-95

MARGARET BERARDI, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION

SCHOOL DISTRICT OF SOUTH ORANGE- :
MAPLEWOOD, ESSEX COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner, full-time clerical aide, contended Board's action terminating her employment violated her tenure rights pursuant to N.J.S.A. 18A:17-2.

Citing Barnes Appellate Division decision, ALJ found that petitioner's job as clerical aide was a "clerical position" within the meaning of N.J.S.A. 18A:17-2 and she could not be removed from it without the filing and proving of tenure charges against her in accord with N.J.S.A. 18A:6-10 to -29. ALJ ordered petitioner be immediately restored to her position as clerical aide with back pay and compensation for benefits lost from the date of her termination.

Commissioner adopted findings and determination in initial decision and ordered reinstatement with compensation.

MAY 30, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7531-94

AGENCY DKT. NO. 290-7/94

MARGARET BERARDI,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
SCHOOL DISTRICT OF SOUTH
ORANGE AND MAPLEWOOD,**

Respondent.

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

Joanne L. Butler, Esq., for respondent (Young, Dimiero & Sayovitz, attorneys)

Record Closed: March 6, 1995

Decided: April 11, 1995

BEFORE EDITH KLINGER, ALJ:

On July 15, 1994, petitioner, Margaret Berardi, filed a verified petition alleging that she was terminated from her position as a full-time clerical aide in violation of her tenure rights acquired pursuant to *N.J.S.A. 18A:17-2*. On August 1, 1994, the respondent filed its answer denying that Berardi had tenure rights. On August 5, 1994, the Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

At a telephone prehearing conference, held with the parties on October 18, 1994, it was determined that the following were the issues to be resolved at hearing:

1. Was petitioner tenured in her clerical position pursuant to *N.J.S.A. 18A:17-2*?
2. Was the Board required to file tenure charges against her in order to remove her for cause?
3. To what relief, if any, is petitioner entitled?

It was further determined that there was no dispute as to the facts in this matter. Therefore, the parties agreed to file a joint Stipulation of Facts with the undersigned and submit the matter for hearing on the papers. The record closed on March 3, 1994 after the last submission was received from the parties.

STIPULATION OF FACTS

The parties stipulated that the facts in this matter are as follows:

1. On August 25, 1986, the respondent, Board of Education of the School District of South Orange and Maplewood (Board), appointed the petitioner, Margaret Berardi, to serve as a full-time clerical aide at Columbia High School from September 1, 1986 to June 30, 1987. Berardi was notified of this action by letter dated August 26, 1986.
2. Berardi's salary for the 1986-87 school year was \$9,165, as set forth in a memorandum dated October 1, 1986.
3. Berardi was reemployed as a full time clerical aide for the 1987-88 school year. Her salary for that year was \$10,140, as set forth in a contract signed by Berardi on June 4, 1987.
4. Berardi was reemployed as a full time clerical aide for the 1988-89 school year. Her salary for that year was \$11,460, as set forth in a contract signed by Berardi on January 3, 1989.

5. Berardi was reemployed as a full time clerical aide for the 1989-90 school year. Her salary for that year was \$12,684 as set forth in a contract signed by Berardi on June 23, 1989.
6. Berardi was reemployed as a full time clerical aide for the 1990-91 school year. Her salary for that school year was initially set at \$13,234, pending the outcome of negotiations as set forth in a letter, dated May 22, 1990, and acceptance of employment, dated May 29, 1990.
7. Berardi was reemployed as a full time clerical aide for the 1991-92 school year. Her salary for that year was \$14,836, as set forth in a contract signed by Berardi on June 24, 1991.
8. Berardi was reemployed as a full time clerical aide for the 1992-93 school year. Her salary for that school year was initially set at \$15,508, pending the outcome of collective negotiations as set forth in a document, dated June 2, 1992. Pursuant to collective negotiations, her salary was increased to \$15,670.
9. Berardi was reemployed as a full time clerical aide for the 1993-94 school year. Her salary for that year was \$16,532, as established by the applicable salary guide.
10. On May 2, 1994, the Board terminated Berardi's employment effective July 1, 1994. Berardi was notified by letter of May 5, 1994, that her employment was terminated "due to performance reasons."
11. At no time has the Board initiated tenure charges against the petitioner, pursuant to N.J.S.A. 18A:6-10 to -29.
12. If Berardi had been reemployed by the Board as a full time clerical aide for the 1994-95 school year, her salary would have been \$17,701.
13. In October 1986, the Board requested approval from the County Superintendent of Schools for the position of clerical aide. The County Superintendent gave her approval on December 16, 1986.

14. The job description for clerical aides employed by the Board, which was attached to the request for County Superintendent approval for the position, contains the following responsibilities:
 - a) Check student attendance daily (control of cutting, early dismissals, absences, etc.);
 - b) Calls to parents concerning absences;
 - c) Refer problems to guidance counselors and/or appropriate administrators;
 - d) Receive telephone calls for teachers and leave messages as needed;
 - e) Sort incoming and outgoing mail;
 - f) Assist secretarial staff (filing, Xeroxing, etc.);
 - g) Maintain appropriate relationships with student, parents, and staff.
15. The job description also contained this paragraph: "It is not the intent of this description to cover all of the duties and responsibilities of the position. It lists some of the important areas and is intended to convey a general understanding of the assignment."
16. On or about October 24, 1986, the Board forwarded to the County Superintendent the 1986-87 Annual Report of Persons Employed in School Aide Positions reporting petitioner as a clerical aide. The annual report was approved by the County Superintendent on or about December 16, 1986.
17. On or about October 28, 1987, the Board forwarded to the County Superintendent the 1987-88 Annual Report of Persons Employed in School Aide Positions reporting petitioner as a clerical aide. The annual report was approved by the County Superintendent on or about November 17, 1987.
18. On or about October 10, 1988, the Board forwarded to the County Superintendent the 1988-89 Annual Report of Persons Employed in School Aide Positions reporting petitioner as a clerical aide. The annual report was approved by the County Superintendent on or about November 16, 1988.
19. On or about October 12, 1989, the Board forwarded to the County Superintendent the 1989-90 Annual Report of Persons Employed in School Aide

- Positions reporting petitioner as a clerical aide. The annual report was approved by the County Superintendent on or about November 29, 1989.
20. On or about October 15, 1990, the Board forwarded to the County Superintendent the 1990-91 Annual Report of Persons Employed in School Aide Positions reporting petitioner as a clerical aide. The annual report was approved by the County Superintendent on or about December 21, 1990.
 21. On or about October 22, 1991, the Board forwarded to the County Superintendent the 1991-92 Annual Report of Persons Employed in School Aide Positions reporting petitioner as a clerical aide. The annual report was approved by the County Superintendent on or about October 31, 1991.
 22. On or about October 26, 1992, the Board forwarded to the County Superintendent the 1992-93 Annual Report of Persons Employed in School Aide Positions reporting petitioner as a clerical aide. The annual report was approved by the County Superintendent on or about November 20, 1992.
 23. On or about October 27, 1993, the Board forwarded to the County Superintendent the 1993-94 Annual Report of Persons Employed in School Aide Positions reporting petitioner as a clerical aide. The annual report was approved by the County Superintendent on or about November 17, 1993.
 24. Berardi carried out the responsibilities set forth in the job description for clerical aides. In addition, her employment duties included the following:
 - a) Received emergency cards from students in two grades, put them in order and gave a copy to counselors.
 - b) Results of discipline referral forms were mailed to parents to inform them of their child's detention.
 - c) Wrote out detention slips for home room tardiness.
 - d) Provided computer center and guidance center with requested information.
 - e) Provided pupil information to teachers when required.
 25. The board employs office support personnel in the positions of "secretary," with level designations of S-1 through S-5, and "clerical aide" only. No positions titled "clerical" exist.

THE RELEVANT STATUTE

N.J.S.A. 18A:17-2 provides, in relevant part:

b. Any person holding any secretarial or clerical position or employment under a board of education of any school district or under any officer thereof, after

1. The expiration of a period of employment of three consecutive calendar years in the district or such shorter period as may be fixed by the board or officer employing him, or

2. Employment for three consecutive academic years, together with employment at the beginning of the next succeeding academic year, an academic year being the period between the time when school opens in the district after the general summer vacation and the beginning of the next succeeding summer vacation, and

c. Any person, who has acquired, or shall hereafter acquire, tenure in any secretarial or clerical office, position or employment under the board of education or a school district and has been appointed district clerk or secretary, or shall hereafter be appointed secretary of said district, as such secretary, shall hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except for neglect, misbehavior or other offense and only in the manner prescribed by [*N.J.S.A.* 18A:6-9 through -29].

DISCUSSION OF LAW

The applicable statute makes it clear that anyone employed by a school district in a clerical position for three consecutive calendar years or three consecutive academic years acquires tenure in the position. Therefore, in the present case, if Berardi's job as a clerical aide is a "clerical position" within the meaning of *N.J.S.A.* 18A:17-2, she cannot be removed from it without filing and proving tenure charges against her in accord with *N.J.S.A.* 18A:6-10 to -29.

The statutes contain no blanket denial of tenure to individuals employed as "aides," however, the applicable sections of the administrative code and case law have recognized that certain employees characterized as aides are not entitled to tenure.

Consequently, if Berardi is not employed in a clerical position, the Board may terminate her as it would any other nontenured employee.

In *Barnes v. Bd. of Ed. Of Jersey City*, 85 N.J. Super. 42 (App. Div. 1964), the school board argued that the words "clerical" and "secretarial" were synonymous and that "a clerk is one who under direction, performs routine, repetitive, non-complex clerical work of a varied nature as a beginner at the entrance level of employment." 85 N.J. Super. at 44, 45. The court considered the legislative history of N.J.S.A. 18A:17-2, and rejected the Board's restrictive definition, stating:

[T]he phrase "clerical position" was intended to extend the statutory protection coverage beyond secretarial employment. Moreover, since tenure statutes are intended to secure efficient public service by protecting the public employees in their employment, "the widest range should be given to the applicability of the law." (Citation omitted.)

[85 N.J. Super. at 45.]

The fact that additional, non-clerical duties, are performed does not control. In *Barnes v. Bd. Of Ed. Of Jersey City*, 1963 S.L.D. 240, 245-47, the State Board determined, and the Appellate Division affirmed, 85 N.J. Super. at 45, that the following employees held 'clerical positions' within the meaning of the statute, although some served under job titles that did not mention the words 'clerk' or 'clerical.'

1. Raymond G. Davis was appointed as a porter and later served as an inspector in the maintenance department. Among his duties were making up mechanic's payrolls, collecting time cards, keeping time records, and keeping lists of where mechanics were working and what they were doing. He also checked to see if the men were performing their work and did occasional inspections but 'the bulk of his time was spent on clerical assignments.'
2. Frank Casey held the position of storekeeper. He administered the storeroom. He also "kept time sheets, recorded absences, scheduled and recorded vacations, noted accidents and reported on them, kept delivery and pick-up records, recorded purchase orders, typed requisitions, took inventories,

supervised the card index for storeroom records, received and counted supplies, etc.”

3. Albert Herberman was a stock clerk. He typed “records of what was received, and what was requisitioned and of inventory remaining.”
4. William R. Flanagan was a receiving stock clerk. He received goods sent in, checked them and signed receipts.
5. John Colleran was an assistant storekeeper. His duties consisted of “assigning requisitions for execution, listing purchase orders, checking loading of trucks, preparing inventories, maintaining neatness and order in storeroom, typing notices, handling inventory, etc.”
6. Ettore Vignone was a timekeeper. Ninety percent of his duties were clerical and for the rest of the time he was in charge of all maintenance emergencies occurring outside of regular school hours.

However, the mere fact that an employee performs clerical duties is not controlling. In *Rossi v. Bd. of Ed. of the Tp. of Willingboro*, Agency Docket No. 294-8/78 (decided Sept. 24, 1980), *aff'd*, Comm’r of Ed. (Nov. 7, 1980) (unreported), *aff'd*, State Bd. (August 5, 1981), the petitioner was employed as a learning resource center aide and claimed tenure pursuant to *N.J.S.A. 18A:17-2b*. The district argued that her title as ‘aide’ precluded her from eligibility for tenure pursuant to *N.J.A.C. 6:11-4.9*. The administrative law judge stated that her job duties included clerical duties but found that the position was a paraprofessional, not a clerical, one. A paraprofessional is defined at *N.J.A.C. 6:11-4.6(a)* as a school or classroom aide “assisting in the supervision of pupil activities under the direction of a principal, teacher or other designated certified professional personnel.” He distinguished *Barnes, supra*, on the grounds that it dealt with nonprofessional, rather than paraprofessional employees.

In both *Jacobsen v. Bd. of Ed. of Union City*, Comm’r of Ed. (Sept. 16, 1983), *aff'd*, St. Bd. (Feb. 1, 1984), and *Beaute v. Bd. of Ed. of North Arlington*, OAL DKT. EDU 295-80 (July 28, 1981), adopted, Comm’r of Ed. (Sept. 14, 1981, *aff'd*, State Bd. of

Ed. (Feb. 3, 1982), the use of the word "clerk" in the petitioners' job titles was held to create reasonable expectations of tenure. There is no evidence in the record in the present case that would allow a finding as to Berardi's employment expectations as they related to tenure.

The *Random House College Dictionary*, 251 (Rev. Ed. 1984) defines a clerk as "a person employed, as in an office, to keep records, accounts, files, handle correspondence, or the like." The *American Heritage Desk Dictionary*, 194 (1981 ed.) defines a clerk as "a person who works in an office performing such tasks as keeping records and files." "Clerical" pertains to, is appropriate for, or is assigned to a clerk. The last definition is a composite of the definitions given by the two cited dictionaries.

Based upon these definitions, I **FIND** that Berardi's position is clerical. I also **FIND** that, whatever her job title, she holds a "clerical position" within the meaning of *N.J.S.A. 18A:17-2*, because her duties are "clerical" within the meaning of *Barnes, supra*. Most of her job duties are the same or very similar to those of the employees in that matter who were found to hold "clerical positions".

I **FIND** that she is not employed as a paraprofessional aide, as defined by *N.J.A.C. 6:11-4.6(a)*, and, therefore, I **CONCLUDE** that she is not precluded from eligibility for tenure pursuant to *N.J.A.C. 6:11-4.9. Rossi, supra*. The use of the word "aide" in her job title does not control her tenure status.

Consequently, I **CONCLUDE** that, pursuant to *Barnes v. Bd. of Ed. of Jersey City, 85 N.J. Super., supra*, she is entitled to the statutory protection coverage of *N.J.S.A. 18A:17-2*. Accordingly, I **CONCLUDE** that she may not be removed from her position except in accord with the provisions of *N.J.S.A. 18A:6-10 to -29*. For this reason, I **CONCLUDE** that respondent's actions were in violation of petitioner's tenure rights.

ORDER

It is hereby **ORDERED** that Margaret Berardi be immediately restored to her position as clerical aide with back pay and compensation for benefits lost from the date of her termination..

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 11, 1995
DATE

Edith Klinger
EDITH KLINGER, ALJ

4/13/95
DATE

Receipt Acknowledged:
Hope R. Blackburn
DEPARTMENT OF EDUCATION

APR 17 1995
DATE
md/e

Mailed to Parties:
[Signature]
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Exhibits:

- J-1 Letter of Appointment, dated August 26, 1986
- J-2 Notification of Salary Rate, dated October 1, 1986
- J-3 Offer and Acceptance of Employment for 1987-88 School Year
- J-4 Offer and Acceptance of Employment for 1988-89 School Year
- J-5 Offer and Acceptance of Employment for 1989-90 School Year
- J-6 Letter Concerning Reappointment for 1990-91 School Year
- J-7 Offer and Acceptance of Employment for 1990-91 School Year
- J-8 Offer and Acceptance of Employment for 1991-92 School Year
- J-9 Offer and Acceptance of Employment for 1992-93 School Year
- J-10 Salary Guide for the 1994-95 School Year
- J-11 Letter of Termination, dated May 5, 1994
- J-12 Application for Approval of School Aide Position, with Attached Job Description
- J-13 1986-87 Annual Report of Persons Employed in School Aide Positions
- J-14 1987-88 Annual Report of Persons Employed in School Aide Positions
- J-15 1988-89 Annual Report of Persons Employed in School Aide Positions
- J-16 1989-90 Annual Report of Persons Employed in School Aide Positions
- J-17 1990-91 Annual Report of Persons Employed in School Aide Positions
- J-18 1991-92 Annual Report of Persons Employed in School Aide Positions
- J-19 1992-93 Annual Report of Persons Employed in School Aide Positions
- J-20 1993-94 Annual Report of Persons Employed in School Aide Positions

MARGARET BERARDI, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
SCHOOL DISTRICT OF SOUTH ORANGE-
MAPLEWOOD, ESSEX COUNTY, :
RESPONDENT. :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Respondent's exceptions and petitioner's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.


Respondent's exceptions essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ), again contending, inter alia, that petitioner's service as a clerical aide for the respondent Board is not a tenured position under N.J.S.A. 18A:17-2, and thus, petitioner's employment may be terminated without respondent's filing and proving tenure charges against her in accord with N.J.S.A. 18A:6-10 to 29.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that pursuant to the Appellate Division decision, Barnes v. Board of Ed. of Jersey City, 85 N.J. Super. 42 (App. Div. 1964), petitioner holds a clerical position within the meaning of the statute based on the nature of her job duties and on the broad range of definition afforded in applying this statute.

The Commissioner further concurs with the ALJ that petitioner is entitled to the statutory protection coverage of N.J.S.A. 18A:17-2 and may not be removed from her position except in accord with the provisions of N.J.S.A. 18A:6-10 to 29.

Accordingly, for the reasons well-expressed therein, the Commissioner affirms the initial decision of the Office of Administrative Law and orders that Petitioner Margaret Berardi be immediately restored to her position as clerical aide with back pay and compensation for benefits lost from the date of her termination.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MAY 30, 1995

DATE OF MAILING MAY 30, 1995

179-95

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE :
 SCHOOL DISTRICT OF THE : COMMISSIONER OF EDUCATION
 TOWNSHIP OF MOUNT LAUREL, : DECISION
 BURLINGTON COUNTY. :
 _____ :

MAY 31, 1995

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE :
 SCHOOL DISTRICT OF THE : COMMISSIONER OF EDUCATION
 TOWNSHIP OF MOUNT LAUREL, : DECISION
 BURLINGTON COUNTY. :
 _____ :

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held on April 18, 1995 in the School District of the Township of Mount Laurel, Burlington County, were as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Cathy Ladd	2,170	164	2,334
Dennis Riley	1,733	171	1,904
Miriam (Bobbie) Espy	1,570	132	1,702
Robert M. Sacks	1,580	107	1,687

Pursuant to a letter request from Robert M. Sacks, filed on April 25, 1995, an authorized representative of the Commissioner of Education from the Office of the Burlington County Superintendent of Schools was directed to conduct a recount of machine ballots cast at two specific polling places, namely the Countryside Elementary School and the Parkway Elementary School. Mr. Robert Sacks also requested a recount of the absentee ballots, pursuant to N.J.S.A. 19:15-24. The recount was conducted on May 5, 1995 at the Burlington County

Superintendent of Elections Office, Eayrestown Road, Mount Holly, and the Board of Elections Office, 49 Rancocas Road, Mount Holly.

At the conclusion of the recount, the tally stood as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Cathy Ladd	2,170	159	2,329
Dennis Riley	1,733	166	1,899
Miriam (Bobbie) Espy	1,570	132	1,702
Robert M. Sacks	1,580	107	1,687

While the recount of absentee votes resulted in a slight change in tallies for two candidates, the outcome of the election is unaffected by the change.


This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions set forth therein.

Accordingly, the Commissioner determines that, as originally announced, Miriam (Bobbie) Espy, Cathy Ladd and Dennis Riley were elected to full terms of three years each on the Board of Education of the School District of the Township of Mount Laurel.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MAY 31, 1995

DATE OF MAILING JUNE 1, 1995

180-95

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE :
 SCHOOL DISTRICT OF THE BOROUGH : COMMISSIONER OF EDUCATION
 OF LITTLE FERRY, BERGEN COUNTY. :
 _____ :
 :

DECISION

MAY 31, 1995

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE :
 SCHOOL DISTRICT OF THE BOROUGH : COMMISSIONER OF EDUCATION
 OF LITTLE FERRY, BERGEN COUNTY. :
 _____ : DECISION

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held on April 18, 1995, in the School District of the Borough of Little Ferry were as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Joseph J. La Rosa	415	62	477
Michael P. Castelli	366	48	414
Linda C. Reinert	366	40	406
Janet Castellano	344	47	391
Salvatore Badalamenti	297	49	346
Peter F. Iurato	273	44	317

Pursuant to a letter request from Janet Castellano, dated April 20, 1995 and filed on April 21, 1995, an authorized representative of the Commissioner from the Office of the Bergen County Superintendent of Schools was directed to conduct a recount of machine ballots cast for members of the Board pursuant to N.J.S.A. 14-63.2. The recount was conducted on May 4, 1995 at the Bergen County Voting Machine Warehouse in Carlstadt.

At the conclusion of the recount, the totals were as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Joseph J. La Rosa	415	62	477
Linda C. Reinert	364	40	404
Janet Castellano	354	47	401
Salvatore Badalamenti	297	49	346
Michael P. Castelli	294	48	342
Peter F. Iurato	273	44	317

There was a change in tally based on the number of votes at the polls for candidates on the ballots.* Such change, 72 fewer votes for Michael P. Castelli, 2 fewer votes for Linda Reinert and 10 additional votes for Janet Castellano, was attributable to a clerical error on the Official Tabulation of the original election results, and resulted in a change in the announced results of the election, with Janet Castellano rather than Michael P. Castelli being a successful candidate. As such, the Commissioner's representative recommends that Joseph J. La Rosa, Linda C. Reinert, and Janet Castellano are the successful candidates for three-year terms on the Little Ferry Board of Education.

This concludes the report of the Commissioner's representative.


* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts it as his own.

* Absentee tallies on recount are as reported by the County Board of Elections. No application for a recount of absentee ballots had been made to Superior Court as of the date of the Commissioner's recheck of the voting machines.

Accordingly, the Commissioner finds and determines that Joseph J. La Rosa, Linda C. Reinert, and Janet Castellano were elected to full terms of three years each on the Board of Education of the School District of the Borough of Little Ferry.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MAY 31, 1995

DATE OF MAILING JUNE 1, 1995

181-95

IN THE MATTER OF THE ANNUAL SCHOOL :
ELECTION HELD IN THE SCHOOL DISTRICT : COMMISSIONER OF EDUCATION
OF THE BOROUGH OF CARTERET, : DECISION
MIDDLESEX COUNTY. :
_____ :

MAY 31, 1995

IN THE MATTER OF THE ANNUAL SCHOOL :
 ELECTION HELD IN THE SCHOOL DISTRICT : COMMISSIONER OF EDUCATION
 OF THE BOROUGH OF CARTERET, : DECISION
 MIDDLESEX COUNTY. :
 _____ :

The announced results of the balloting for three (3) members of the Board of Education for full terms of three (3) years each at the annual school election held on April 18, 1995 in the School District of the Borough of Carteret were as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Pat Crilley	835	43	878
Dennis Cherepski	793	50	843
Sally Bonventure	725	49	774
Louis G. Mangieri	754	13	767
William J. Kolibas, Jr.	612	38	650
Sophie F. Cherepon	587	13	600
Albert Walsh	491	36	527
Michelle M. Grandell	485	33	518

Pursuant to a letter request from Louis G. Mangieri, dated April 25, 1995, the Commissioner directed his representative from the Office of the Middlesex County Superintendent of Schools to conduct a recount of machine ballots cast for members of the Board pursuant to N.J.S.A. 18A:14-63.2. The machine recount was conducted on May 2, 1995 at the Middlesex County Voting Machine Warehouse in Edison. There were no changes in the at-poll tallies as a result of the recount.

A recount of absentee ballots had been requested pursuant to N.J.S.A. 19:57-24, and upon such recount, on May 3, 1995, the Board of Elections rejected several ballots printed in blue ink, with the result that the outcome of the election appeared to be altered. However, appeal of that determination was taken to Superior Court, and on May 12, 1995, the Court pronounced the May 3, 1995 certification null and void and reinstated the original count.

Thus, on recount, the results of the election were unchanged and remained as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Pat Crilley	835	43	878
Dennis Cherepski	793	50	843
Sally Bonventure	725	49	774
Louis G. Mangieri	754	13	767
William J. Kolibas, Jr.	612	38	650
Sophie F. Cherepon	587	13	600
Albert Walsh	491	36	527
Michelle M. Grandell	485	33	518

On recount, a two-vote discrepancy was noted between the numbers on the public counters and the poll list, but this discrepancy was insufficient to have affected the outcome of the election.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions therein.

Accordingly, the Commissioner finds and determines that Pat Crilley, Dennis Cherepski and Sally Bonventure were elected to full terms of three years each on the Board of Education of the Borough of Carteret.

The Commissioner further directs that a copy of this decision be forwarded to the Office of Administrative Law for inclusion in the record of the inquiry presently pending into the conduct of the above-captioned election.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MAY 31, 1995

DATE OF MAILING JUNE 1, 1995

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE :
 SCHOOL DISTRICT OF THE TOWN- :
 SHIP OF PISCATAWAY, MIDDLESEX :
 COUNTY. :

COMMISSIONER OF EDUCATION
 DECISION

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE :
 SCHOOL DISTRICT OF THE TOWN- : COMMISSIONER OF EDUCATION
 SHIP OF PISCATAWAY, MIDDLESEX : DECISION
 COUNTY. :
 _____ :

The announced results of the balloting for the General Fund question of the Board of Education at the annual school election held on April 18, 1995, in the Piscataway Township School District were as follows:

<u>POLLING DISTRICT</u>	<u>FOR</u>	<u>AGAINST</u>
Voting District #1	731	784
Absentee Votes	62	19
TOTAL	793	803

Pursuant to separate letter requests from David B. Rubin, Esquire, on behalf of ten qualified voters, filed on April 28, 1995, and from Ms. Giovanna J. Musto, on behalf of ten qualified voters, filed on April 27, 1995, an authorized representative of the Commissioner of Education from the Office of the Middlesex County Superintendent of Schools was directed to conduct a recount of machine ballots cast for the General Fund question pursuant to N.J.S.A. 18A:14-63.3. The recount was conducted on May 2, 1995 at Middlesex County Board of

Elections Voting Machine Warehouse, Edison. A recount of the absentee ballots was conducted by the Middlesex County Board of Elections pursuant to N.J.S.A. 19:15-24.

At the conclusion of the recount, the tally for the General Fund question stood as follows:

<u>POLLING DISTRICT</u>	<u>FOR</u>	<u>AGAINST</u>
Voting District #1	731	784
Absentee Votes	46	16
TOTAL	777	800

While the recount of absentee votes resulted in a change in tally, the outcome of the election is unaffected by the change.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions set forth therein.

Accordingly, the Commissioner determines that, as originally announced, the General Fund question of the Board of Education of Piscataway Township was defeated by the voters pursuant to N.J.S.A. 18A:14-58.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MAY 31, 1995

DATE OF MAILING JUNE 1, 1995

183-95

JACQUELINE HOLMES-WILLIAMS, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

NEW JERSEY STATE DEPARTMENT :
OF HUMAN SERVICES, :

DECISION

RESPONDENT. :

_____ :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7288-94

AGENCY DKT. NO. 174-6/94

**JACQUELINE HOLMES-
WILLIAMS,**

Petitioner,

v.

**DEPARTMENT OF HUMAN
SERVICES,**

Respondent.

Lisa Morowitz, Esq., for petitioner (Weissman & Mintz, attorneys)

Jayroe Wurst, Deputy Attorney General, for respondent (Deborah T. Poritz, Attorney General of New Jersey, attorney)

Record Closed: April 12, 1995

Decided: April 17, 1995

BEFORE M. KATHLEEN DUNCAN, ALJ:

On July 28, 1994, this matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -13. Cross-motions for summary decision were granted in part and denied in part by order entered January 31, 1995 (copy attached) and a hearing was scheduled for March 21, 1995. Prior to the scheduled hearing date, the parties advised that they had agreed to a settlement, resolving this matter without the

necessity for a hearing. A signed Settlement Agreement, which is attached hereto and made a part hereof as if set forth herein at length, was received on April 12, 1995.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this Agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the Settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

April 17, 1995
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

April 20, 1995
DATE

Norm R Black
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 26 1995
DATE

Jeff S. Marin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

re: [unclear]
to: [unclear]
[unclear]



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakberbridge Plaza
CN 049
Trenton, New Jersey 08625
(609) 588-6633

M. Kathleen Duncan
Administrative Law Judge

January 30, 1995

Lisa Morowitz, Esquire
Weissman & Mintz
One Executive Drive - Suite 200
Somerset, New Jersey 08873

LETTER ORDER

Jayroe Wurst
Deputy Attorney General
Division of Law
Hughes Justice Complex
CN 112
Trenton, New Jersey 08625

RE: Jacqueline Holmes-Williams v. New Jersey
State Department of Human Services
OAL DKT. NO. EDU 7288-94
AGENCY DKT. NO. 174-6/94

Dear Counsel:

I have considered your cross-motions for summary decision, the responses filed by each of you, and the oral arguments I heard by telephone conference call on December 15, 1994. For the following reasons, petitioner's motion is granted in part and denied in part; respondent's motion is likewise granted in part and denied in part.

With respect to the time period from May 14, 1994, the date respondent acknowledges an alleged leave of absence without pay terminated, to June 13, 1994, the date the Commissioner of Education issued his decision in EDU 6849-92 terminating petitioner's tenure rights, the facts and the law are clear; respondent's May 10, 1994 directive that petitioner return to her teaching duties

January 30, 1995

This order may be reviewed by the **COMMISSIONER OF EDUCATION** either upon interlocutory review, pursuant to N.J.A.C. 1:1-14.10, or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

Very truly yours,



M. KATHLEEN DUNCAN
Administrative Law Judge

MKD:cc

RECEIVED
STATE OF N.J.
OFFICE OF ADM. LAW
APR 12 11 54 AM '95

DEBORAH T. PORITZ
Attorney General of New Jersey
Attorney for Respondent New Jersey Department
of Human Services
R.J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625

By: Jayroe Wurst
Deputy Attorney General
(609) 292-8552

BEFORE THE NEW JERSEY
COMMISSIONER OF EDUCATION
Agency Dkt. No. 174-6/94
OAL Dkt. No. EDU 7288-94

JACQUELINE HOLMES-WILLIAMS,)
Petitioner,) Civil Action
v.) SETTLEMENT
NEW JERSEY DEPARTMENT OF)
HUMAN SERVICES,)
Respondent.)

Petitioner, Jacqueline Holmes-Williams, and Respondent,
New Jersey Department of Human Services ("DHS"), desire to enter
into the following agreement in the public interest:

1. WHEREAS, Petitioner was employed as a Teacher at
Riverfront State Prison Department of Corrections ("DOC") beginning
July 1985; and
2. WHEREAS, on or about August 13, 1992, DOC certified
tenure charges against the Petitioner to the Commissioner of
Education; and

3. WHEREAS, on or about August 24, 1992, Petitioner was suspended without pay; and

4. WHEREAS, on or about October 6, 1992, Petitioner's position was reassigned -- as a result of a reduction in work force -- from Riverfront State Prison to the Division of Juvenile Services at the Mercer Wee Care Program; and

5. WHEREAS, on or about December 2, 1992, while on a suspension without pay, Petitioner obtained substitute employment as a full time staff representative for Local 1040 of the Communications Workers of America ("CWA"), AFL-CIO; and

6. WHEREAS, on January 3, 1993, Petitioner's 120 day suspension without pay expired; and

7. WHEREAS, in July 1993, as a result of a transfer of the Division of Juvenile Services from DOC to the DHS, the position held by Petitioner at the Mercer Wee Care Program fell under the auspices of DHS; and

8. WHEREAS, as of July 1993, DHS began making salary payments to Petitioner subject to mitigation of earnings from her then-employer, Local 1040; and

9. WHEREAS, in the Fall of 1993, CWA submitted to the Governor's Office of Employee Relations ("OER") a list of full-time employees Local 1040 requested be placed on union leave without pay from the State; and

10. WHEREAS, CWA inadvertently placed Petitioner -- who was awaiting an initial decision from the ALJ in her appeal of the

tenure charges - on the list requesting union leave without pay;
and

11. WHEREAS, the collective negotiations agreement between the State of New Jersey and CWA provides for leaves of absence without pay for employees elected or appointed to full-time positions with CWA; and

12. WHEREAS, the OER, by letter dated December 21, 1993, informed CWA, Petitioner's exclusive representative for negotiating petitioner's terms and conditions of employment with the State, that a one-year leave of absence for union activity had been approved for Petitioner; and

13. WHEREAS, as of January 7, 1994, DHS ceased all salary payments to Petitioner; and

14. WHEREAS, on January 5, 1994, an Administrative Law Judge issued an initial decision finding Petitioner guilty of conduct unbecoming a public employee and exceptions were filed (OAL Dkt. No. EDU 6849-92, Agency Dkt. No. 388-8/92); and

15. WHEREAS, on March 5, 1994, Local 1040 discontinued Petitioner's services as a paid staff representative; and

16. WHEREAS, Petitioner applied for and received unemployment benefits for the time period at issue in this matter;
and

17. WHEREAS Petitioner began seeking substitute employment, and by letter dated March 15, 1994, informed DHS that as of March 5, 1994, she was no longer in the employ of Local 1040,

30. WHEREAS, on September 29, 1994, Respondent filed papers in opposition to Petitioner's summary judgment motion and cross-moved for summary judgment; and

31. WHEREAS, the Honorable M. Kathleen Duncan, ALJ after oral argument on December 15, 1994, issued a decision ordering Respondent to compensate Petitioner for her full salary less any mitigation for the period May 14, 1994 through June 12, 1994, and scheduling a plenary hearing on March 8, 1994 to decide the remaining issues raised by the petition and motions.

IT IS THEREFORE AGREED that Williams will withdraw the petition against DHS subject to the approval of this settlement by the Commissioner of Education; and

IT IS FURTHER AGREED that DHS will pay the Petitioner a lump sum of \$3,000 subject to the approval of this settlement by the Commissioner of Education; and

IT IS FURTHER AGREED that DHS will not deduct funds from the \$3,000 lump sum and makes no representation concerning what Federal or State taxes, if any, said lump sum may be subject to; and

IT IS FURTHER AGREED that both parties waive any right they may have to pursue any claim for relief for attorney's fees arising from the facts underlying this matter; and

IT IS FURTHER AGREED that both parties waive the right to file exceptions and cross-exceptions;

HOWEVER, should the Commissioner of Education or the State Board of Education refuse to approve any terms of this

settlement, such refusal shall not interfere with the right of either party to pursue the matter further nor shall the terms of this settlement or the reasons therefor be offered or admitted as evidence in future proceedings;

THE REASONS FOR ENTERING INTO THIS AGREEMENT ARE AS FOLLOWS:

(a) The costs of continuing to prosecute and defend this matter are expected to be substantial; and

(b) The allegations contained in this petition concern only issues of back pay and do not involve allegations of moral turpitude; and

(c) The Administrative Law Judge has already recommended that the State be held liable for a portion of the monies claimed by Petitioner; and

(d) Petitioner is waiving her right to receive full back salary other than the \$3,000 lump sum; and

(e) Both parties after consultation with counsel, fully endorse the agreement and wish to implement said terms.

Jacqueline Holmes-Williams
Jacqueline Holmes-Williams
Petitioner

Dated: April 11, 1995

Lisa Morowitz
Lisa Morowitz
Attorney for Petitioner

Dated: April 11, 1995

DEBORAH T. PORITZ
ATTORNEY GENERAL OF NEW JERSEY

Jayroe Wurst
By: Jayroe Wurst
Deputy Attorney General
Attorney For Respondent

Dated: April 11, 1995

OAL DKT. NO. EDU 7288-94

JACQUELINE HOLMES-WILLIAMS, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT : DECISION
OF HUMAN SERVICES, :
RESPONDENT. :
_____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

JUNE 1, 1995

DATE OF MAILING JUNE 1, 1995

184-95

K.S., on behalf of her minor child, G.S., :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE : DECISION
 BOROUGH OF GLASSBORO,
 GLOUCESTER COUNTY, :
 RESPONDENT. :
 _____ :

SYNOPSIS

Petitioner, mother of high school student G.S., sought order directing the Board to reassess G.S.'s grade for the second marking period and part of the third marking period (1993-94 school year) in the Foods II class. Petitioner challenged use of a grading system which allegedly did not comply with district policy.

ALJ found that the superintendent acted pursuant to the Board's mandate to assure that the grading system was indeed in compliance with the district's policy. That petitioner did not agree with the superintendent's decision not to utilize her grading formula retroactively did not make his conduct nor the Board's affirmance of that conduct arbitrary or capricious. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10633-94

AGENCY DKT. NO. 362-9/94

**K.S. ON BEHALF OF HER
MINOR CHILD, G.S.,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE
BOROUGH OF GLASSBORO,
GLOUCESTER COUNTY,**

Respondent.

Timothy D. Scaffidi, Esq., for petitioner

Louis Petroni, Esq., for respondent (Montgomery, McCracken, Walker
and Rhoads, attorneys)

Record Closed: March 2, 1995

Decided: April 10, 1995

BEFORE CAROL LASKIN, ALJ t/a:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

K.S., mother of G.S., filed a petition of appeal with the Commissioner of the Department of Education on September 1, 1994, seeking an order directing the respondent Glassboro Board of Education (Board) to reassess G.S.'s grade for the second and part of the third marking period (1993-94 school year) in the Foods II class at Glassboro High School.

The matter was transferred to the Office of Administrative Law (OAL) for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13. During the January 24, 1995 telephonic prehearing conference, counsel for respondent declared that he would not be representing the Board at hearing. Rather, the Board desired to appear *pro se*. The undersigned advised during said conference and by letter dated January 31, 1995, that *N.J.A.C.* 1:1-5.4 does not authorize a school district, a body politic, to be represented at a contested hearing by a non-lawyer. Thus, the letter informed, "the superintendent or other non-attorney representative may not present witnesses nor cross-examine petitioner's witnesses at the hearing scheduled for March 2, 1995."

The hearing was indeed held on that date at the OAL, Trenton, New Jersey. While petitioner appeared with counsel, only Superintendent Nicholas Mitcho, fully aware of *N.J.A.C.* 1:1-5.4 and the above outlined communications, was present for respondent. Thus, respondent presented no case in support of its position that it had acted in good faith in accordance with its policies.

Nevertheless, at all times, it remained the petitioner's burden of persuasion and production to establish by a preponderance of the credible evidence that the Board acted arbitrarily, capriciously, discriminatory, or in bad faith in its application of its grading system to petitioner in the Foods II course during the 1993-94 school year. See *J.B. on behalf of W.B. v. Bd. of Ed., Twp. of Pequannock, Piscataway*, 93 *N.J.A.R.* 2d. (EDU) 664; *Talarski v. Edison Twp. Bd. of Ed.*, 1977 *S.L.D.* 862.

To meet this burden, only petitioner, K.S., presented testimony. Fourteen exhibits were admitted into evidence: those exhibits purporting to be Board policies were acknowledged by the Superintendent to be accurate representations of those policies existing during the school year 1993-94. At the close of the hearing on March 2, 1995, the record was closed.

EVIDENCE PRESENTED

At hearing, K.S.'s testimony and the exhibits presented revealed the following: G.S., the son of K.S., a sophomore during the 1993-94 school year, matriculated in the Foods II course at Glassboro High School. The grade for the course was and is comprised 50 percent on tests and 50 percent from participation on food preparation days. It is the preparation grade given to G.S. during the second and part of the third marking periods which is the subject of the instant petition. Participation includes *inter alia* cooperation during food preparation as well as clean-up.

K.S. asserts that the failing grade given to her son for participation on food preparation days failed to conform with Glassboro Board of Education Policy 5121, P-9, and was inconsistent with the "definition of grades" contained in the student handbook, "The Margol" (P-3a). Petitioner stipulated that she makes no claim that the Board acted discriminatorily towards her son or in bad faith when it determined that on June 1, 1994, after the matter was presented to the full Board, not to recalculate G.S.'s participation grade. Rather, K.S. argues that the Board acted arbitrarily and capriciously in that decision.

Glassboro Board of Education Policy 5121, in *pertinent part*, provides:

The superintendent, in consultation with the teaching staff, shall develop a marking system to be used uniformly throughout the district. The system should be clear, easily understood by parents/guardians and pupils, and able to be applied with consistency of interpretation. The evaluation and the grading symbols shall be intended to appraise the pupil's progress toward established goals and shall be a factor in promotion/graduation decisions.

The parents/guardians must be made aware of the progress of their child, his/her own growth patterns and the child's progress in relation to recognized standards.

The board of education reserves the right to review and alter any grade or evaluation assigned to a pupil by the professional staff. As a matter of policy it delegates this authority to the superintendent, who shall develop and implement an administrative regulation that establishes a process for the review of any grade or evaluation in question. The regulations shall protect the integrity of the grading and evaluation system and guarantee a fair hearing to all individuals party to a dispute concerning a grade or evaluation.

The definition of grade section of "The Margol" states *inter alia*:

Note: The guidance department furnishes the following information to colleges and universities relative to grade interpretation.

- A -- 90 - 100 %
- B -- 80 - 89%
- C -- 70 - 79%
- D -- 60 - 69%
- NC -- Below 60%
- NCA -- 50 - 0% Failure due to excessive absences
- NCE -- 0% Failure due to not taking final exam

Teachers use the above stated information as a guideline in determining report period grades.

For the past twelve years, prior to the 1993-94 school year, the foods courses were taught by Mrs. Lynn Bullock. She utilized a daily food preparation grade system of 0, 1, 2, and 3. At some point, Mrs. Bullock took a medical leave of absence and was replaced first by Mrs. Dilba, and during the second marking period of the 1993-94 school year, by long term substitute, Patricia LaBouff.

In early February 1994, G.S. received his failing grade in Foods II, P-10. K.S., never disputing her son's less-than-admirable behavior and failing mid-term grade, requested a meeting with Mrs. LaBouff and the guidance counselor, Mr. John LaPalomente. Such meetings were conducted on February 25 and 28, 1994, to discuss the computation of the grade. K.S. asserts that at said meetings, she was informed that the 0, 1, 2, and 3 in participation corresponded to an equivalency of 1 equals 33, 2 equals 66, and 3 equals 100. This, K.S. argues, is inconsistent with Policy 5121, P-9 (outlined above) and the student handbook grade section, P-3 (outlined above), in that the grading system is unclear, not easily understood, and has the propensity to be applied inconsistently. K.S. has sought to have her son's grade changed in conformance with her formula, P-14, an equivalency of 3 equals 100, 2 equals 85, 1 equals 70. Utilizing this formula, K.S. tabulates that her son should have received a "60" in participation rather than "50" during the second marking period and an "86" rather than an "82" on the third marking period. See P-11 through P-13.

Receiving no satisfaction from the teacher or guidance counselor, K.S. appealed first to Principal Harry J. Alexandrowicz and then to Superintendent Nicholas A. Mitcho. K.S. testified that Superintendent Mitcho misinformed her that she had no recourse beyond him, and that he claimed he had no authority to change the grade, *see* P-1. Likewise, she complained he did not inform her of the right to challenge a student's grade pursuant to Board Policy 5125, P-7, and Board Policy 5145.6, Pupil Grievance Procedure, P-8. Nevertheless, K.S. acknowledged that her request for meetings, *see* P-2 and P-6, were addressed by the superintendent and the Board.

On April 4, 1994, another meeting to discuss the grading issue was held between K.S. with her son G.S. and the superintendent, principal, teacher LaBouf, guidance counselor, and department chairperson Pat Stewart. Therein, the superintendent discussed and presented an amended system for the participation grade, P-4. This new grading system contained a numerical equivalency of 1 through 5 unlike the previous system of 0 through 3. Superintendent Mitcho offered to recalculate the second period grading system utilizing an equivalency of 1 equals 50, 2 equals 69 and 3 equals 100. K.S. refused this calculation, claiming that her formula, identified above, should be utilized.

On or about April 14, 1994, P-4 (presented at the April 4, 1994 meeting) was provided to all students in the home economics foods courses to clarify the grading system for participation during food preparation days. No retroactive changes of grades were made.

K.S. appealed this decision to the Glassboro Board of Education pursuant to Board Policy 5125, P-7, through counsel. Providing the Board with the entire document package of P-1 through P-9, petitioner and counsel had full opportunity to present their arguments to the full Board. The Board recessed into a closed session to deliberate for over two hours where upon petitioner was informed that, based upon a tie vote, the Board had been unable to reach the resolution she sought. Thus, the Board refused to recalculate petitioner's son's participation grade for the second and part of the third 1993-94 marking period. Thereafter, in accordance with the Board's policies and applicable code provisions, petitioner filed the instant appeal.

LEGAL DISCUSSION AND CONCLUSION

It is axiomatic that the Board's policies and acts are entitled to a presumption of correctness. Consequently, the reviewing authority may not over-ride or substitute its judgment for that of the Board unless there is a clear showing of arbitrariness. See *Kopera v. West Orange Bd. of Ed.*, 60 N.J. Super. 288 (App. Div., 1960); *K.L.L. v. Livingston Twp. Bd. of Ed.*, 92 N.J.A.R. 2d. (EDU) 648. It is not enough for the petitioner to prove merely that her formulation of a grading system is more reasonable and enlightened than that chosen by the Board, through its superintendent, its administrator. Superintendent Mitcho's determination to clarify the grading for participation in foods classes, P-4, in response to the concerns raised by the petitioner and his decision not to retroactively recalculate participation grades which, he believed, were consistent with P-4, was not arbitrary. Superintendent Mitcho, in good faith, believed that the participation grading system contained in the new "grading for foods classes," P-4, was consistent with the system enforced by Mrs. Bullock and Mrs. LaBouff for twelve years previous to the third marking period of the 1993-94 school year. In both grading systems, a No. 2 grade represented "minimal participation," P-4.

I **FIND** that Superintendent Mitcho, in devising P-4, with the input of the petitioner, department chairperson, teachers, principal, and guidance counselor, was acting pursuant to the mandate of the Board to assure that the food participation grading system was indeed in compliance with Glassboro Board of Education Policy 5121, P-9. That petitioner does not agree with the superintendent's decision not to utilize her formula retroactively does not make the superintendent's conduct nor the Board's affirmance of that conduct arbitrary or capricious.

Moreover, while I **FIND** that petitioner may have initially not understood nor have been informed of her appeal rights, I **FIND** that once cognitive of these rights, she was provided with all due process to appeal and was given a "full and fair opportunity to present evidence relevant to

the issue,” pursuant to Board’s Policy 5125, P-7. Petitioner’s failure to present the testimony of her son, G.S., the superintendent, or any other relevant staff member of the Board attributed to her failure to meet her burden of establishing that the Board’s actions were arbitrary, capricious, or a bad faith exercise of the discretion in the performance of duties imposed upon them. *See Talariski v. Edison Twp. Bd. of Ed., supra.*

Based upon the foregoing, I **CONCLUDE** that the petitioner has not met her burden and that the petitioner’s appeal must then be **DISMISSED**. It is **SO ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE**

DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 10, 1995
DATE

Carol J. Laskin
CAROL LASKIN, ALJ t/a

7/24/95
DATE

Receipt Acknowledged:

Hope R. Blackburn
DEPARTMENT OF EDUCATION

APR 28 1995
DATE

Mailed to Parties:
Jeff S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

njf

APPENDIX

Witnesses:

For Petitioner:

K.S., petitioner

For Respondent:

None

Exhibits:

For Petitioner:

- P-1 Summary of Events
- P-2 Attachment No. 1, letter of March 28, 1994
- P-3 Attachment No. 2, Flight to the Stars, "The Marigol"
- P-3a Entire student handbook, "The Marigol"
- P-4 Attachment No. 3, grading for food classes
- P-5 Third marking period grade
- P-6 Letter dated March 24, 1994
- P-7 Board policy No. 5125
- P-8 Board policy No. 5145.6 (Pupil Grievance Procedure 1993-94)
- P-9 Board policy No. 5121 (Examination/grading/rating/1993-94)
- P-10 The grade of G.S. as of February 4, 1994 (didactic)
- P-11 The grade for G.S. for the entire 10th grade, dated June 18, 1993
- P-12 Copy of the teacher's grading book
- P-13 The petitioner's calculation of the second marking period grade presented to teacher
- P-14 Petitioner's calculation of desired grade for son, G.

For Respondent:

None


K.S., on behalf of her minor child, G.S., :
 PETITIONER, :
V. :
BOARD OF EDUCATION OF THE :
BOROUGH OF GLASSBORO, :
GLOUCESTER COUNTY, :
 RESPONDENT. :
_____:

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record in this matter, the Commissioner concurs with and adopts as his own the ALJ's conclusion that petitioner has not met her burden of establishing that the Board's action in formulating, adopting and applying prospectively a new grading system for the Foods Classes, in response to petitioner's concerns about the former grading system, was arbitrary and capricious merely because it was inconsistent with the grading method devised by petitioner. As aptly noted by the ALJ, "That petitioner does not agree with the superintendent's decision not to utilize her formula retroactively does not make the superintendent's conduct nor the Board's affirmance of that conduct arbitrary or capricious." (Initial decision at p. 6)

Accordingly, the initial decision of the Office of Administrative Law dismissing the petition in this matter is adopted for the reasons expressed therein.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

JUNE 1, 1995

DATE OF MAILING JUNE 1, 1995

185-95

SOMERSET COUNTY AUDIO VISUAL
AIDS COMMISSION,

PETITIONER,

V.

BOARD OF EDUCATION OF THE
BOROUGH OF BERNARDSVILLE,
SOMERSET COUNTY,

RESPONDENT.

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COMMISSIONER OF EDUCATION

DECISION

JUNE 1, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10632-94

AGENCY DKT. NO. 395-9/94

**SOMERSET COUNTY AUDIO VISUAL
AIDS COMMISSION,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE
BOROUGH OF BERNARDSVILLE,
SOMERSET COUNTY,**

Respondent.

Richard Dieterly, Esq., on behalf of petitioner (Gebhardt & Kiefer, attorneys)

Joseph R. Morano, Esq., on behalf of respondent (Schwartz, Simon, Edelstein,
Celso & Kessler, attorneys)

Record Closed: April 18, 1995

Decided: April 24, 1995

BEFORE SOLOMON A. METZGER, ALJ:

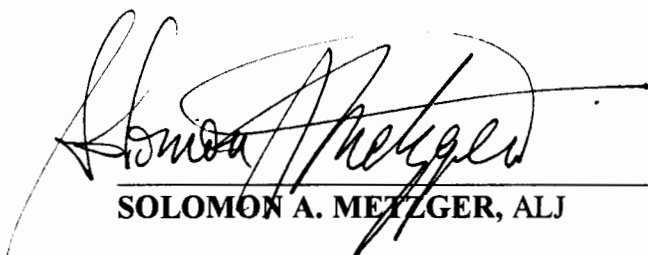
This matter arises out of a petition before the Commissioner of Education pursuant to *N.J.S.A.* 18A:51-12, and regulations promulgated thereunder. The matter was transmitted to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13. The parties have now submitted a settlement agreement in the matter which is annexed. Having reviewed the terms of the settlement and it appearing that it was entered into voluntarily and fully disposes of all issues in controversy, I **CONCLUDE** that this matter is no longer a contested case

before the Office of Administrative Law. It is **ORDERED** that the parties comply with the terms of settlement and that these proceedings be and hereby are concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

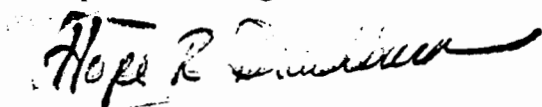
This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

4/24/95
DATE


SOLOMON A. METZGER, ALJ

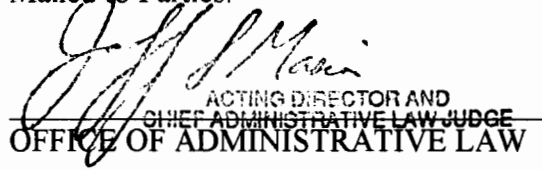
Receipt Acknowledged:

4/24/95
DATE


DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 02 1995
DATE


ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cae

**SETTLEMENT AGREEMENT AND RELEASE BETWEEN THE
BERNARDSVILLE BOARD OF EDUCATION AND THE
SOMERSET COUNTY AUDIO VISUAL AIDS COMMISSION**

RECEIVED
STATE OF N.J.
DEPARTMENT OF LAW
APR 10 10 53 AM '95

This Agreement is made and entered into as of this 27 day of February, 1995, by and between the Bernardsville Board of Education (hereinafter referred to as "the Board"), and the Somerset County Audio/Visual Aids Commission (hereinafter referred to as "the Commission").

WHEREAS,

A. The Board has expressed its intent to withdraw as a participating member of the Commission for the 1994-95 school year pursuant to N.J.S.A. 18A 51-12; and

B. The parties acknowledge that there has been a long term ongoing dispute regarding the effective date of the Board's withdrawal from the Commission, as well as any financial obligations related thereto; and

C. The parties have engaged in extended negotiations concerning the Board's withdrawal as a participating member of the Commission; and

D. Both the Board and the Commission desire to enter into an agreement stipulating the Board's withdrawal as a participating member of the Commission, together with a release of any claims that the Commission may have against the Board, related to said withdrawal;

NOW THEREFORE, in consideration of the mutual covenants contained herein, the parties agree as follows:

1. The Board shall pay to the Commission the amount of \$3,600, which shall constitute the Board's full and final financial membership obligation to the Commission for the 1994-95 school year.

2. In return for the above payment, the Commission, solely for the purposes of resolving this litigation, recognizes the Board's intention to withdraw as participating member of the Commission in accordance with a duly adopted Board motion to withdraw dated June 27, 1994, and agrees that the Board shall be deemed to have been immediately withdrawn from membership in the Commission in accordance with N.J.S.A. 18A:51-12 as of the date set forth in this agreement.

3. The Commission shall also withdraw the matter presently before the Commissioner of Education, entitled Somerset County Audio/Visual Aids Commission v. Bernardsville Board of Education, OAL Docket No. EDU 10632-94.

4. The Commission, in consideration of this Agreement, releases and forever discharges the Board and the Board's members, directors, trustees, officers, employees, agents, attorneys, successors, heirs, executors and assigns (the Board and the foregoing persons and entities are hereinafter collectively referred to as the "Releasees") from:

(a) Any and all claims asserted or which could have been asserted;

(b) Any and all claims, charges, or complaints asserted, or which could have been asserted

concerning any aspect of the Board's membership or withdrawal of membership in the Commission, any agreement concerning the termination of such membership, including, but not limited to, any and all claims of wrongful discharge or breach of contract, any and all claims for equitable estoppel.

5. The Board, in consideration of this Agreement, releases and forever discharges the Commission, and its members, directors, trustees, officers, employees, agents, attorneys, successors, and assigns from any claims which could have been asserted by the Board against the Commission.

6. This Agreement shall be interpreted, construed and enforced pursuant to the laws of the State of New Jersey.

7. This Agreement sets forth the entire agreement between the parties hereto.

8. This Agreement shall not in any way be construed as an admission by the Board of any liability, nor by the Commission of any lack of liability of the Board. This Agreement is entered as the resolution of a disputed matter between the parties.

9. The Commission and Board both expressly acknowledge, represent and warrant that the terms and provisions of this Agreement are the only consideration for signing this Agreement; that no other promise or agreement of any kind has been made to or with any person or entity whatsoever to cause the signing of this Agreement; and that in executing this Agreement, neither the

Commission nor the Board relies and has not relied upon any representation or statement made by the others, agents, representatives or attorneys with regard to the subject matter, basis or effect of this Agreement or otherwise.

10. All of the terms of this Agreement are deemed material. This Agreement is the entire Agreement between the parties and incorporates the complete financial obligation of the Board to the Commission.

IN WITNESS WHEREOF, the parties do set forth their hands and seal as of the date first above written.

BERNARDSVILLE BOARD OF EDUCATION

By: *Kevin W. Kline*

Attest: *Phyllis Kopp*

Date: *2-27-95*

SOMERSET COUNTY AUDIO/VISUAL AIDS
COMMISSION

By: *C. J. Horemba*


Attest: *J. M. Heller*

Date: *3/23/95*

SOMERSET COUNTY AUDIO VISUAL :
AIDS COMMISSION, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 BOROUGH OF BERNARDSVILLE, :
 SOMERSET COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

JUNE 1, 1995

DATE OF MAILING JUNE 1, 1995

186-95

M.L.B./Y., as guardian ad litem for A.L.B.
and T.L.B., :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN-
SHIP OF HOLMDEL ET AL., MONMOUTH
COUNTY, :

DECISION

RESPONDENTS. :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4180-94

AGENCY DKT. NO. 61-4/94

**M. L./Y.,
A GUARDIAN AD LITEM FOR
A.L. AND T.L.,**

Petitioners,

v.

**HOLMDEL TOWNSHIP BOARD OF
EDUCATION AND DR. SUSAN S. LEGLISE,**

Respondent.

Gary M. Weiss, Esq., for petitioner

Martin M. Barger, Esq., for respondent (Reussille, Mausner, Carotenuto, Bruno and Barger, attorneys)

Record Closed: April 21, 1995

Decided: April 26, 1995

BEFORE STEVEN C. REBACK, ALJ:

This matter was transmitted to the Office of Administrative Law on May 2, 1994, for determination as a contested case, pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The parties have agreed to a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:


1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

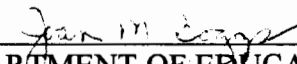
This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

4/28/95
DATE


STEVEN C. REBACK, ALJ

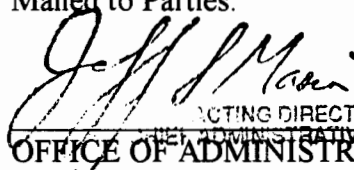
Receipt Acknowledged:

4/28/95
DATE


DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 04 1995
DATE


ACTING DIRECTOR AND
DEPT. ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

slf

RECEIVED
STATE OF N.J.
OFFICE OF ATTORNEY GENERAL

APR 21 3 53 AM '95

REUSSILLE, MAUSNER, CAROTENUTO, BRUNO & BARGER
365 Broad Street
P. O. Box 580
Red Bank, New Jersey 07701-0580
(908) 741-1800
Attorneys for Respondents

STATE OF NEW JERSEY
BEFORE THE COMMISSIONER
OF EDUCATION,
OAL DOCKET NO. EDU 04180-94 S
AGENCY REF. NO. 61-4/94

MARY LOBELLO/YANUZZI, a)
Guardian Ad Litem for)
ANTHONY LOBELLO and TAYLOR)
LYNN LOBELLO,)

Petitioners,)

vs.)

HOLMDEL TOWNSHIP BOARD OF)
EDUCATION and DR. SUSAN S.)
LeGLISE,)

Respondents.)

STIPULATION OF SETTLEMENT

This matter being opened to the Court by Reussille, Mausner,
Carotenuto, Bruno & Barger, Esqs., (MARTIN M. BARGER, ESQ.),
Attorneys for Respondents, and GARY M. WEISS, ESQ., Attorney for
Petitioners, and the parties having settled all outstanding
issues with the assistance of the Court, and the parties wishing
to put the terms of the settlement on the record, and the Court
having approved the settlement which will be incorporated in an

EXHIBIT "A"

REUSSILLE, MAUSNER, CAROTENUTO, BRUNO & BARGER
COUNSELLORS-AT-LAW
34 BROAD STREET, RED BANK, NEW JERSEY 07701
718-A BUCKINGHAM DRIVE, LAKEWOOD, NEW JERSEY 08701
38 B WHITING SHOPPING CENTER, WHITING, NEW JERSEY 08759

2.

Initial Decision to be submitted to the Commissioner of Education for final approval, and for good cause shown,

IT IS, on this day of , 1995

ORDERED that the following Stipulation of Settlement be incorporated into an Initial Decision of this Court and submitted to the New Jersey Commissioner of Education for final approval:

1. Mary LoBello/Yanuzzi and Anthony LoBello shall be liable to Holmdel Township Board of Education, jointly and severally, for the sum of \$9,500.00, representing full settlement of all claims for tuition from 1990 to date.

2. There shall be a six (6) month delay in payments to Holmdel Township Board of Education.

3. Commencing on April 1, 1995, Mary LoBello/Yanuzzi and/or Anthony LoBello shall make ten (10) payments, of \$950.00 each, to Holmdel Township Board of Education, said payments being due and payable on the following dates:

- April 1, 1995
- October 1, 1995
- April 1, 1996
- October 1, 1996
- April 1, 1997
- October 1, 1997
- April 1, 1998
- October 1, 1998
- April 1, 1999
- October 1, 1999

4. If said payments are not submitted as set forth above, Holmdel Township Board of Education may pursue all procedures and rights that it shall be entitled to by law.


REUSSILLE, MAUSNER, CAROTENUTO, BRUNO & BARGER
COUNSELLORS-AT-LAW
34 BROAD STREET, RED BANK, NEW JERSEY 07701
718-A BUCKINGHAM DRIVE, LAKEWOOD, NEW JERSEY 08701
38 S WHITING SHOPPING CENTER, WHITING, NEW JERSEY 08758


STEVEN REBACK, A.L.J.

3.

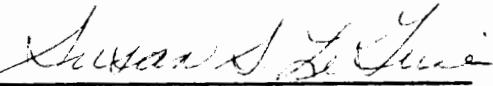
We hereby consent to the form and entry of this Stipulation of Settlement.

REUSSILLE, MAUSNER, CAROTENUTO,
BRUNO & BARGER
Attorneys for Respondents


BY:  4/5/95
MARTIN M. BARGER
Member of the Firm

 G.M.W.
4/5/95
GARY M. WEISS
Attorney for Petitioners

HOLMDEL TOWNSHIP BOARD OF
EDUCATION

BY: 
DR. SUSAN S. LeGLISE
Superintendent

 MLY
4/5/95
MARY LOBELLO YANUZZI

 4/5/95
ANTHONY LOBELLO

REUSSILLE, MAUSNER, CAROTENUTO, BRUNO & BARGER
COUNSELLORS-AT-LAW
34 BROAD STREET, RED BANK, NEW JERSEY 07701
719-A BUCKINGHAM DRIVE, LAKEWOOD, NEW JERSEY 08701
38 B WHITING SHOPPING CENTER, WHITING, NEW JERSEY 08759

M.L.B./Y., as guardian ad litem for A.L.B.
and T.L.B.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWN-
SHIP OF HOLMDEL ET AL., MONMOUTH
COUNTY,

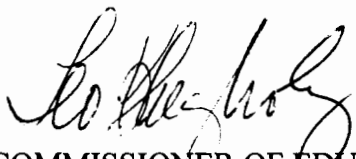
RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

JUNE 1, 1995

DATE OF MAILING JUNE 1, 1995

187-95

IN THE MATTER OF THE TENURE :
 HEARING OF JOHN PATTEN, STATE- :
 OPERATED SCHOOL DISTRICT OF THE : COMMISSIONER OF EDUCATION
 CITY OF PATERSON, PASSAIC, COUNTY. :
 _____ :
 :

DECISION



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7873-94
AGENCY REF. NO. 180-6//94

**STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF PATERSON,**

Petitioner,

v.

JOHN PATER,

Respondent.

Gregory G. Johnson, Esq., represented petitioner

John J. Segreto, Esq., represented respondent
(Segreto and Segreto, attorneys)

Record Closed: April 6, 1995

Decided: April 21, 1995

BEFORE: THOMAS E. CLANCY, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on August 16, 1994 for a hearing pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Settlement Agreement and Action Form.

Having reviewed the contents of the attached Settlement Agreement and Action Form, I **FIND** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached Settlement Agreement and Action Form meet the requirements of *N.J.S.A. 1:1-19.1.1* and I **HEREBY** approve same. In conjunction therewith, I **ORDER** that the parties comply with their contents and that these proceedings be (and are hereby) **TERMINATED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, 225 East State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

4/21/95
DATE

4/24/95
DATE

MAY 01 1995
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALJ

Receipt Acknowledged:
Hope R. Blackburn
DEPARTMENT OF EDUCATION

[Signature]
Mailed to Parties.
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE.
OFFICE OF ADMINISTRATIVE LAW

PATERSON PUBLIC SCHOOLS
ACTION FORM

15-15210

1. Curricular recommendations must include school, student initials, tuition rate and/or other appropriate information.
2. Fiscal recommendations must include all appropriate fiscal information.
3. Personnel recommendations must include name, location from/to, salary from/to, degree & step, effective date, reason.
4. Others as specifically defined below.

Background Data:

The State District Superintendent certified tenure charges against John Patter, Custodian, for excessive absenteeism, theft of property, neglect of duty, and use of profanity/provocation of fights. Mr. Patter denied the charges. A plenary hearing before an administrative law judge was scheduled for April 6, 1995. As part of a proposed settlement, Mr. Patter would resign from the District effective April 14, 1995.

Recommendation:

Approve the attached Settlement Agreement signed by Special Counsel, Mr. Patter and his counsel. The settlement of this matter will save significant legal expenses and costs, as well as time expended by administrators and witnesses.

APPROVALS REQUIRED

1. Submitted by Gregory G. Johnson, Special Counsel April 6, 1995
(Name, Title) Date

2. Account No. _____

Certification of Funds _____
Signature/Date

Funds Available

Non-Budget Item

Funds Not Available

Funds Not Needed

3. Approved by _____
State Superintendent or Ass't Superintendent or Business Administrator Date

4. Verification by: Personnel (all personnel actions) _____
Name Date

5. Verification by Legal Department if required _____
Name Date

6. Approval — State District Superintendent [Signature] _____
Date

COPIES AS FOLLOWS:

WHITE - OFFICIAL RECORD
PINK - TO #1

GREEN - TO #6

YELLOW - TO BUSINESS ADMINISTRATOR
GOLD - TO DIRECTOR OF FINANCIAL OPERATIONS

In the Tenure Hearing of APR 6 10 37 AM '95

John Patter

OAL Dkt. EDU 7873

Agg Dkt No. 180-6/94

State-Operated School District
of the City of Paterson

SETTLEMENT Agreement

The parties to this matter, petitioner Paterson Public Schools, and the respondent John Patter, agree to resolve this matter in accordance with the following terms:

1. The respondent shall resign from his current custodian position effective April 14, 1995
2. The petitioner hereby withdraws the tenure charges against the respondent with prejudice. The said ~~se~~ charges shall be removed from the respondent's personnel file.
3. The petitioner will provide all proper documentation to the pension service for the respondent's retirement. Such retirement shall be considered in good standing.
4. This agreement is subject to the review and approval of the State District Superintendent of Paterson and the Commission of Education.

APR 6 10 34 AM '95

5. If the settlement Agreement is approved, then the charges shall be reinstated and the ^{respondent} ~~petitioner~~ will be restored to the payroll retroactive to April 14, 1995.

6. The parties have reviewed this Agreement and agree to the terms by affixing their signatures below:

Parkerson Public Schools

Gregory G. Johnson
Gregory G. Johnson
Attorney for Petitioner

Respondent John Patten

John Patten
John Patten

John J. Segreto, Esq.
John J. Segreto, Esq.
Attorney for the Respondent


Dated: April 6, 1995

IN THE MATTER OF THE TENURE :
HEARING OF JOHN PATTER, STATE- :
OPERATED SCHOOL DISTRICT OF THE : COMMISSIONER OF EDUCATION
CITY OF PATERSON, PASSAIC, COUNTY. :
_____ :

DECISION

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

JUNE 1, 1995

DATE OF MAILING JUNE 1, 1995

188-95

ROSE M. McATEE,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
BOROUGH OF SOUTH RIVER,	:	
MIDDLESEX COUNTY,	:	
	:	
RESPONDENT.	:	



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1668-94

AGENCY DKT. 421-12/93

ROSE M. McATEE,

Petitioner,

v.

**BOARD OF EDUCATION OF THE BOROUGH
OF SOUTH RIVER, MIDDLESEX COUNTY,**

Respondent.

Arnold M. Mellk, Esq. for petitioner, (Wills, O'Neill & Mellk, attorneys)

Robert A. Blanda, Esq., for respondent

Record Closed: April 25, 1995

Decided: April 28, 1995

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

This matter was transmitted to the Office of Administrative Law on February 23, 1994, for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14-F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of the settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does

not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

28 April 1995
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

5/1/95
DATE

Heidi R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

lmh

APR 25 1995

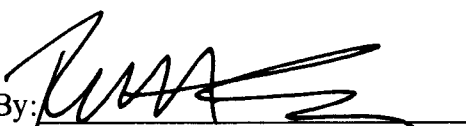
Arnold M. Mellk, Esq.
WILLS, O'NEILL & MELLK
10 Nassau Street, P.O. Box 614
Princeton, NJ 08542
609-924-0700
Attorneys for Petitioner

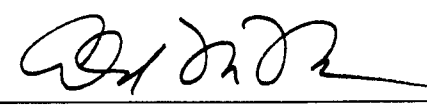
ROSE M. McATEE,	:	NEW JERSEY OFFICE OF
	:	ADMINISTRATIVE LAW
Petitioner,	:	
	:	BEFORE THE COMMISSIONER
	:	OF EDUCATION
v.	:	Agency No. 421-12/93
	:	
SOUTH RIVER BOARD OF	:	OAL Docket No.EDU 01668-94 S
EDUCATION,	:	
	:	STIPULATION OF SETTLEMENT
Respondent.	:	WITH PREJUDICE

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed with prejudice and without costs against either party, on the following terms:.

1. The South River Board of Education shall pay to Rose McAtee the sum of \$36,870;
2. The South River Board of Education will make the appropriate pension contributions for the 1991-1992 and 1992-1993 school years;
3. The South River Board of Education will grant to Rose McAtee seniority for that same period; and
4. The South River Board of Education will restore to Rose McAtee all sick days for that same time period.

WILLS, O'NEILL
& MELLK
ATTORNEYS AT LAW
10 NASSAU STREET
P.O. BOX 614
PRINCETON NJ 08542

By: 
Robert A. Blanda
Attorney(s) for Respondent


WILLS, O'NEILL & MELLK
By: 
Arnold M. Mellk
Attorney(s) for Petitioner

Date: 4-24-95

ROSE M. McATEE, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 BOROUGH OF SOUTH RIVER, :
 MIDDLESEX COUNTY, :
 :
 RESPONDENT. :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

189-95

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE :
 SCHOOL DISTRICT OF THE TOWNSHIP :
 OF TEANECK, BERGEN COUNTY. :

COMMISSIONER OF EDUCATION
 DECISION

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE :
SCHOOL DISTRICT OF THE TOWNSHIP : COMMISSIONER OF EDUCATION
OF TEANECK, BERGEN COUNTY. :
_____ : DECISION

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held on April 18, 1995, in the School District of the Township of Teaneck were as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Barbara Ostroth	2,469	50	2,519
Tasha Morton	1,915	46	1,961
Lloyd Houston	1,851	47	1,898
Beverly Lefkowitz	1,803	32	1,835
Marvin Markman	1,633	37	1,670
Leon Wilburn	575	15	590

Pursuant to a letter request from Beverly Lefkowitz, dated April 24, 1995, and filed April 25, 1995, an authorized representative of the Commissioner from the Office of the Bergen County Superintendent of Schools was directed to conduct a recount of machine ballots cast for members of the Board pursuant to N.J.S.A. 18A:14-63.2. The recount was conducted on May 8, 1995, at the Bergen County Voting Machine Warehouse in Carlstadt.

At the conclusion of the recount, the tally stood unchanged, remaining as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Barbara Ostroth	2,469	50	2,519
Tasha Morton	1,915	46	1,961
Lloyd Houston	1,851	47	1,898
Beverly Lefkowitz	1,803	32	1,835
Marvin Markman	1,633	37	1,670
Leon Wilburn	575	15	590

Absentee tallies on recount are as reported by the Bergen County Board of Elections. No application for a recount of absentee ballots had been made to Superior Court as of the date of the Commissioner's recheck of the voting machines.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions set forth therein.

Accordingly, the Commissioner finds and determines that, as originally announced at the conclusion of the election, Barbara Ostroth, Tasha Morton and Lloyd Houston were elected to full terms of three years each on the Board of Education of the Township of Teaneck.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

JUNE 2, 1995
DATE OF MAILING JUNE 2, 1995

190-95

IN THE MATTER OF THE ANNUAL SCHOOL :
 ELECTION HELD IN THE SCOTCH PLAINS- : COMMISSIONER OF EDUCATION
 FANWOOD SCHOOL DISTRICT, : DECISION
 UNION COUNTY. :
 _____ :

JUNE 2, 1995

IN THE MATTER OF THE ANNUAL SCHOOL :
 ELECTION HELD IN THE SCOTCH PLAINS- : COMMISSIONER OF EDUCATION
 FANWOOD SCHOOL DISTRICT, : DECISION
 UNION COUNTY. :
 _____ :

The announced results of the balloting for two (2) members of the Board of Education from the Township of Scotch Plains for full terms of three (3) years each at the annual school election held on April 18, 1995, in the Scotch Plains-Fanwood School District were as follows:

<u>SCOTCH PLAINS</u> <u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Albert J. Syvertsen	1503	34	1537
Donald E. Sheldon	1194	29	1223
Edward J. Saridaki, Jr.	1100	24	1124
Richard R. Meade (Write-in)	0	2	2
Mary Cappio (Write-in)	0	1	1

The announced results of the balloting for one (1) member of the Board of Education from the Borough of Fanwood for a full term of three (3) years at the annual school election held on April 18, 1995, in the Scotch Plains-Fanwood School District were as follows:

<u>FANWOOD</u> <u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Richard R. Meade	506	8	514
Victoria C. Manduca	370	4	374

Pursuant to letter requests from Edward J. Saridaki, Jr., dated April 24, 1995, and Victoria C. Manduca, dated April 26, 1995, the Commissioner directed his representative from the Office of the Union County Superintendent of Schools to conduct a recount of machine ballots cast for members of the Board pursuant to N.J.S.A. 18A:14-63.2. The machine recount was conducted on May 9, 1995 at the Union County Voting Machine Warehouse at 2345 South Avenue, Scotch Plains. Absentee ballots for the Scotch Plains seats were recounted by the

County Board of Elections pursuant to N.J.S.A. 19:57-24. No request for a recount of absentee ballots was made for the Fanwood seat, so that absentee totals on recount are as originally certified by the County Board of Elections.

At the conclusion of the recount, the results were unchanged as follows:

SCOTCH PLAINS

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Albert J. Syvertsen	1503	34	1537
Donald E. Sheldon	1194	29	1223
Edward J. Saridaki, Jr.	1100	24	1124
Richard R. Meade (Write-in)	0	2	2
Mary Cappio (Write-in)	0	1	1

FANWOOD

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Richard R. Meade	506	8	514
Victoria C. Manduca	370	4	374

This concludes the report of the Commissioner's representative.


* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions therein.

Accordingly, the Commissioner finds and determines that, as originally announced, Albert J. Syvertsen and Donald E. Sheldon were elected to full terms of three years each, representing the Township of Scotch Plains, and Richard R. Meade was elected to a full term of three years, representing the Borough of Fanwood, on the Scotch Plains-Fanwood Board of Education.

The Commissioner further directs that a copy of this decision be forwarded to the Office of Administrative Law for inclusion in the record of the inquiry presently pending into the conduct of the above-captioned election.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

191-95

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE :
 SCHOOL DISTRICT OF THE :
 TOWNSHIP OF WILLINGBORO , :
 BURLINGTON COUNTY. :

COMMISSIONER OF EDUCATION
 DECISION

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE :
 SCHOOL DISTRICT OF THE : COMMISSIONER OF EDUCATION
 TOWNSHIP OF WILLINGBORO , : DECISION
 BURLINGTON COUNTY. :
 _____:

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held on April 18, 1995 in the School District of the Township of Willingboro, Burlington County, were as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Lloyd Davis	1,191	16	1,207
Tony John	1,000	16	1,016
Edith Wright	983	19	1,002
Linda Taylor	922	25	947
Victor Smith	758	25	783
Houston A. Johnson	706	25	731
Charlene J. Edwards	597	6	603
Hosey Best	533	7	540
Maria Albanesi	371	7	378
Lawrence Weber	262	2	264

Pursuant to a letter request from Linda Taylor, an authorized representative of the Commissioner of Education from the Office of the Burlington County Superintendent of Schools was directed to conduct a recount of machine ballots cast. A recount of absentee ballots was also requested, pursuant to N.J.S.A. 19:15-24. The recount was conducted on May 5, 1995, at the

Burlington County Superintendent of Elections Office, Eayrestown Road, Mount Holly and the Board of Elections Office, 49 Rancocas Road, Mount Holly.

At the conclusion of the recount, the tally stood as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Lloyd Davis	1,191	16	1,207
Tony John	1,000	16	1,016
Edith Wright	983	19	1,002
Linda Taylor	922	25	947
Victor Smith	758	25	783
Houston A. Johnson	706	25	731
Charlene J. Edwards	597	6	603
Hosey Best	533	7	540
Maria Albanesi	371	6	377
Lawrence Weber	262	2	264

While the recount of absentee votes resulted in a slight change in tally for one candidate, the outcome of the election is unaffected by the change.


This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions set forth therein.

Accordingly, the Commissioner determines that, as originally announced, Lloyd Davis, Tony John and Edith Wright were elected to full terms of three years each on the Board of Education of the School District of the Township of Willingboro.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

JUNE 2, 1995
DATE OF MAILING JUNE 2, 1995

192-95

BEVERLY MITCHELL,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF TRENTON, MERCER COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3043-94

AGENCY DKT. NO. 388-11/93

BEVERLY MITCHELL,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
CITY OF TRENTON, MERCER
COUNTY,**

Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzali, Fagella and Nowak, attorneys)

Thomas W. Sumners, Jr., Esq., for respondent (Sumners Council George and Dortch, attorneys)

Record Closed: April 18, 1995

Decided: April 26, 1995

BEFORE STEVEN C. REBACK, ALJ:

This matter was transmitted to the Office of Administrative Law on March 20, 1994, for determination as a contested case, pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The parties have agreed to a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

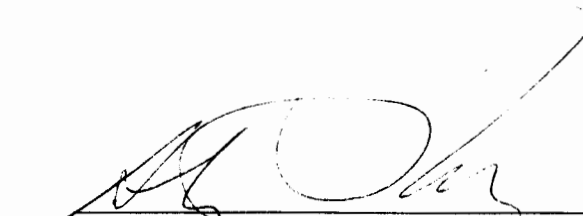
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.


This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

4/26/95
DATE


STEVEN C. REBACK, ALJ

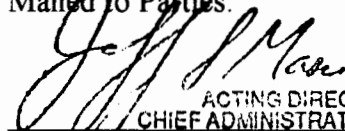
5/11/95
DATE

Receipt Acknowledged:


DEPARTMENT OF EDUCATION

MAY 05 1995
DATE

Mailed to Parties:


ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

slf

SUMNERS COUNCIL GEORGE & DORTCH

A Professional Corporation
120 Sanhican Drive
P.O. Box 7824
Trenton, New Jersey 08618
(609) 393-6604
Attorneys for Respondent

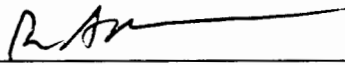
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STATE OF N.J.
OFFICE OF THE ATTORNEY GENERAL

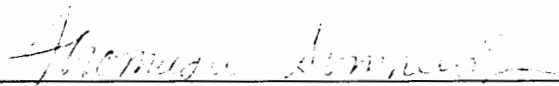
APR 13 11 16 AM '95

BEVERLY MITCHELL,	:	BEFORE THE COMMISSIONER
	:	OF EDUCATION
PETITIONER,	:	
	:	OAL DOCKET NO. EDUOA 03043-94S
vs.	:	AGENCY REF. NO. 388-11/93
	:	
BOARD OF EDUCATION OF THE CITY	:	CIVIL ACTION
OF TRENTON, MERCER COUNTY,	:	
	:	STIPULATION OF SETTLEMENT
RESPONDENT.	:	

It is hereby agreed upon and stipulated by the Petitioner, Beverly Mitchell, and Respondent, Board of Education of the City of Trenton, Mercer County, as follows:

1. The Board has paid Beverly Mitchell two (2) days pay and purged her file of all reprimands/documents pertaining to an alleged altercation with Patricia Nagy.
2. Petitioner dismisses the Petition of Appeal with prejudice.
3. This agreement is reached voluntarily and without duress.


 Richard A. Friedman, Esq.
 Zazzali, Zazzali, Fagella & Nowak, P.C.
 Attorney for Petitioner


 Thomas W. Sumners, Jr., Esq.
 Sumners Council George & Dortch, P.C.
 Attorney for Respondent

Dated: 4/7/95

BEVERLY MITCHELL, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE CITY : DECISION
 OF TRENTON, MERCER COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

JUNE 2, 1995
DATE OF MAILING JUNE 2, 1995

WILLIAM BABIK :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF WEST :
MORRIS REGIONAL SCHOOL :
DISTRICT, MORRIS COUNTY, :

DECISION

RESPONDENT. :

_____ :

OAL DKT. NO. EDU 9223-90

WILLIAM BABIK :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF WEST : DECISION
MORRIS REGIONAL SCHOOL :
DISTRICT, MORRIS COUNTY, :
RESPONDENT. :
_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

:
COMMISSIONER OF EDUCATION

JUNE 2, 1995
DATE OF MAILING

194-95

LOUIS PERNA, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

STATE-OPERATED SCHOOL DISTRICT :
OF THE CITY OF PATERSON,
PASSAIC COUNTY, :

DECISION

RESPONDENT. :

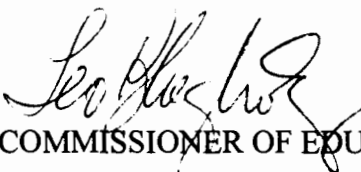
_____ :

OAL DKT. NO. EDU 9747-94

LOUIS PERNA, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 STATE-OPERATED SCHOOL DISTRICT : DECISION
 OF THE CITY OF PATERSON, :
 PASSAIC COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

JUNE 2, 1995
DATE OF MAILING JUNE 2, 1995

195-95

GORDON R. LEMATTY,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF UNION, UNION	:	
COUNTY,	:	
	:	
RESPONDENT.	:	
	:	
_____	:	

JUNE 2, 1995

OAL DKT. NO. EDU 10635-90

GORDON R. LEMATTY, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 TOWNSHIP OF UNION, UNION :
 COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

JUNE 2, 1995
DATE OF MAILING JUNE 2, 1995

196-95

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE :
SCHOOL DISTRICT OF THE TOWN- :
SHIP OF EWING, MERCER COUNTY. :
_____ :

COMMISSIONER OF EDUCATION
DECISION

JUNE 7, 1995

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE :
 SCHOOL DISTRICT OF THE TOWN- : COMMISSIONER OF EDUCATION
 SHIP OF EWING, MERCER COUNTY. : DECISION
 _____ :

The announced results of the balloting for three members for full terms of three years each on the Board of Education of the Township of Ewing at the annual school election held on April 18, 1995, were as follows:

THREE-YEAR TERM

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Vince Ordini	1,130	33	1,163
Bruce J. White	1,045	30	1,075
Elizabeth K. Forbes	1,014	36	1,050
Jeanette C. Watson	998	20	1,018
Lenora M. Green	909	22	931
Edward H. Vickner, Jr.	742	21	763

Pursuant to a letter application from Jeanette C. Watson, a defeated candidate, filed on April 24, 1995, the Commissioner of Education directed his representative from the Office of the Mercer County Superintendent of Schools to conduct a recheck of the votes cast on the voting machines pursuant to N.J.S.A. 14-63.2. This recheck was conducted on April 27, 1995, at the Mercer County Voting Machine Warehouse in Trenton. At the conclusion of the

recheck of the votes cast on the voting machines, the tally stood unchanged, remaining as follows:

THREE-YEAR TERM

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Vince Ordini	1,130	33	1,163
Bruce J. White	1,045	30	1,075
Elizabeth K. Forbes	1,014	36	1,050
Jeanette C. Watson	998	20	1,018
Lenora M. Green	909	22	931
Edward H. Vickner, Jr.	742	21	763

Absentee tallies on recount are as reported by the Mercer County Board of Elections. No application for a recount of absentee ballots had been made to Superior Court as of the date of the Commissioner's recheck of the voting machines.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions set forth therein.

Accordingly, the Commissioner determines that, as originally announced, Vince Ordini, Bruce J. White and Elizabeth K. Forbes were elected to full terms of three years each on the Ewing Township Board of Education.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

JUNE 7, 1995

DATE OF MAILING JUNE 7, 1995

197-95

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE :
SCHOOL DISTRICT OF THE TOWNSHIP :
OF SADDLE BROOK, BERGEN COUNTY. :
_____ :

COMMISSIONER OF EDUCATION
DECISION

JUNE 7, 1995

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE :
SCHOOL DISTRICT OF THE TOWNSHIP : COMMISSIONER OF EDUCATION
OF SADDLE BROOK, BERGEN COUNTY. :
_____ : DECISION

The announced results of the balloting for three members of the Board of Education for full terms of three years each and one member for an unexpired term of one year at the annual school election held on April 18, 1995, in the School District of the Township of Saddle Brook were as follows:

THREE-YEAR TERM

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Sebastian (Sam) Salierno	925	6	931
Dorothy Sullivan	825	6	831
Florence Ficker	751	7	758
Leo Czekalski	730	6	736

ONE-YEAR TERM

Adeline Goldsholl	776	5	781
Patrick Carberry	641	6	647

Pursuant to a letter application from Leo Czekalski, a defeated candidate, filed on April 21, 1995, the Commissioner of Education directed his representative from the Office of the Bergen County Superintendent of Schools to conduct a recheck of the votes cast on the voting

voting machines pursuant to N.J.S.A. 14-63.2. This recheck was conducted on May 4, 1995, at the Bergen County Voting Machine Warehouse in Carlstadt.

At the conclusion of the recheck of the votes cast on the voting machines, the tally stood unchanged, remaining as follows:

THREE-YEAR TERM

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Sebastian (Sam) Salierno	925	6	931
Dorothy Sullivan	825	6	831
Florence Ficker	751	7	758
Leo Czekalski	730	6	736

ONE-YEAR TERM

Adeline Goldsholl	776	5	781
Patrick Carberry	641	6	647

No application for a recount of absentee ballots had been made to Superior Court as of the date of the Commissioner's recheck of the voting machines.

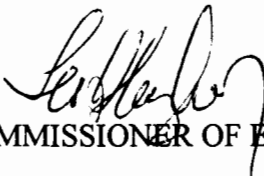
This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions set forth therein.

Accordingly, the Commissioner determines that, as originally announced, Sebastian (Sam) Salierno, Dorothy Sullivan and Florence Ficker were elected to full terms of three years each on the Saddle Brook Board of Education and Adeline Goldsholl was elected to fill the one-year unexpired term on the Saddle Brook Board of Education.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

JUNE 7, 1995

DATE OF MAILING JUNE 7, 1995

198-95

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE :
 SCHOOL DISTRICT OF THE TOWN- : COMMISSIONER OF EDUCATION
 SHIP OF OLD BRIDGE, MIDDLESEX : DECISION
 COUNTY. :
 _____ :

JUNE 7, 1995

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE :
SCHOOL DISTRICT OF THE TOWN- : COMMISSIONER OF EDUCATION
SHIP OF OLD BRIDGE, MIDDLESEX : DECISION
COUNTY. :
_____ :

The announced results of the balloting for three members of the Old Bridge Board of Education for full terms of three years each and for one member for an unexpired term of two years at the annual school election held on April 18, 1995, were as follows:

THREE-YEAR TERM

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Joan Bonk	1,352	36	1,388
Margaret George	1,234	31	1,265
Michael Hegarty	1,041	29	1,070
George Kevin Calogera	993	23	1,016
Mitchell P. Geier	865	18	883
Barry K. Hopman	32	17	849

TWO-YEAR TERM

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Susan P. Kaplan	1,473	43	1,516

Pursuant to a letter request from Mr. George Kevin Calogera, a defeated candidate for a Township of Old Bridge School Board seat, filed on April 24, 1995, the Commissioner of Education directed his representative from the Office of the Middlesex County Superintendent of Schools to conduct a recheck of the machine ballots cast. The recount was conducted on May 2, 1995 at the twelve polling districts used during the election.

Absentee tallies on recount are as reported by the Middlesex County Board of Elections. No application for a recount of absentee ballots had been made to Superior Court as of the date of the Commissioner's recheck of the voting machines, pursuant to N.J.S.A. 19:57-24.

At the conclusion of the recounts, the tally stood unchanged, remaining as follows:

THREE-YEAR TERM

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Joan Bonk	1,352	36	1,388
Margaret George	1,234	31	1,265
Michael Hegarty	1,041	29	1,070
George Kevin Calogera	993	23	1,016
Mitchell P. Geier	865	18	883
Barry K. Hopman	32	17	849

TWO-YEAR TERM

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Susan P. Kaplan	1,473	43	1,516

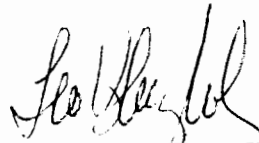
This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions set forth therein.

Accordingly, the Commissioner determines that, as originally announced, Margaret George, Michael Hegarty and Joan Bonk were elected to full terms of three years each on the Old Bridge Board of Education, and Susan P. Kaplan was elected to fill the two-year unexpired term.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

JUNE 7, 1995

DATE OF MAILING JUNE 7, 1995

199-95

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF ROSELLE : DECISION
PARK, UNION COUNTY. :

JUNE 7, 1995

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
 SCHOOL DISTRICT OF ROSELLE : DECISION
 PARK, UNION COUNTY. :

The announced results of the balloting for the General Fund question of the Board of Education at the annual school election held on April 18, 1995 in the Roselle Park School District were as follows:

	<u>FOR</u>	<u>AGAINST</u>
At Polls	835	884
Absentee	<u>43</u>	<u>32</u>
TOTAL	878	916

Pursuant to a letter request from the Roselle Park Board of Education, dated April 26, 1995, an authorized representative of the Commissioner from the Office of the Union County Superintendent of Schools was directed to conduct a recount of machine ballots cast for the General Fund question pursuant to N.J.S.A. 18A:14-63.3. The recount was conducted on May 4, 1995, at the Union County Voting Machine Warehouse, 300 North Avenue, East Westfield.

At the conclusion of the recount, the tally for the General Fund question stood unchanged, remaining as follows:

	<u>FOR</u>	<u>AGAINST</u>
At Polls	835	884
Absentee	<u>43</u>	<u>32</u>
TOTAL	878	916

Absentee tallies on recount are as reported by the Union County Board of Elections. No application for a recount of absentee ballots had been made to Superior Court as of the date of the Commissioner's recheck of the voting machines.


This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions set forth therein.

Accordingly, the Commissioner determines that, as originally announced, the General Fund question of the Board of Education of Roselle Park was defeated by the voters pursuant to N.J.S.A. 18A:14-58.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

JUNE 7, 1995

DATE OF MAILING JUNE 7, 1995

200-95E

SOUTH RIVER EDUCATION ASSOCIATION, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE BOROUGH :
OF SOUTH RIVER, MIDDLESEX COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION ON MOTION

JUNE 7, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING MOTION
FOR EMERGENT RELIEF

OAL DKT. NO. EDU 3865-95

AGENCY DKT. NO. 63-3/95

**SOUTH RIVER EDUCATION
ASSOCIATION,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE
BOROUGH OF SOUTH RIVER,
MIDDLESEX COUNTY,**

Respondent.

Sanford R. Oxfeld, Esq., for petitioner (Balk, Oxfeld, Mandell & Cohen, attorneys)

Robert A. Blanda, Esq., for respondent

BEFORE ROBERT W. SCOTT, ALJ:

This matter was opened by the petitioner, South River Education Association, on an application for an Order granting emergent relief, pursuant to N.J.A.C. 1:1-12.6. The petitioner seeks to restrain the respondent from using approximately \$406,000 restored to the respondent's 1994-95 school budget by the Commissioner of Education on January 26, 1995.

PROCEDURAL HISTORY

The petitioner filed its appeal, including an application for interim relief with the Commissioner of the Department of Education on March 28, 1995. On April 5, 1995, the petitioner filed proof of service of its appeal on the respondent. On April 17, 1995, the Department of Education transmitted the matter to the Office of Administrative Law for determination as a contested case. Oral argument on the motion was heard on May 10, 1995, at the Office of Administrative Law, 9 Quakerbridge Plaza, Mercerville, New Jersey.

CASE STATEMENT

The petitioner is the employee representative for employees of the respondent. In the Spring 1994, the parties entered into negotiations for a new collective bargaining agreement because their current contract was due to expire on June 30, 1994. On April 19, 1994, the voters of the Borough of South River rejected the proposed school budget for the 1994-95 school year. On May 11, 1994, the mayor and council of the Borough of South River, after reducing the budget approximately \$967,000 approved said budget. On June 15, 1994, the respondent appealed to the Commissioner of Education seeking to restore to the 1994-95 school budget the monetary sums reduced by the mayor and council of South River. As indicated above, on January 26, 1995, the Commissioner restored certain items to the budget including approximately \$406,000 for salary accounts. During negotiations between the parties from the Spring 1994 until the present, the respondent has taken a constant position concerning its offer for increasing salaries during the proposed time of the agreement under negotiation. Even after the \$406,000 was restored to the budget by the Commissioner in January 1995, the respondent maintained its previous position as to salary increases and in March 1995, purchased computers, textbooks, desks, chairs, flash cards, posters, globes, and other supplies. Normally, these items are purchased at the beginning of the school year in July and August.

PETITIONER'S POSITION

The petitioner argues that the facts above demonstrate that the respondent is using the monies restored to the budget by the Commissioner to purchase equipment and supplies and not for salaries. The petitioner argues that the Commissioner's decision specifically restored the \$406,000 to the budget for salaries and that these funds can only be used for that purpose.

RESPONDENT'S POSITION

The respondent represented that even though the Commissioner's decision restored \$406,000 to the 1994-95 school budget the respondent has not received these funds because of on-going litigation with the Borough of South River. Further, the respondent disputed the petitioner's claim that the Commissioner had ordered that the restored funds were to be used only for salaries. The respondent had other arguments including that a similar application for relief such as this one had been filed by the petitioner with the Public Employment Relations Commission and the petitioner had been unsuccessful in that forum. Lastly, the respondent argued that the \$406,000 in question had nothing to do with the on-going negotiations between the parties concerning the collective bargaining agreement and that there was no legal authority to allow the petitioner to interfere with how the respondent spent its funds. The respondent also argued that any money spent recently on supplies and equipment came from other accounts and was within the budget for the current school year.

APPLICABLE LAW

The criteria for determining an application for emergent relief has been set forth in case law. Crowe v. DeGiora, 90 N.J. 126 (1982). Emergent relief should not be granted unless it is necessary to prevent irreparable harm. Relief also should not be granted when the legal rights underlying the claim are unsettled. Further, the party seeking the relief must show a reasonable probability of ultimate success on the merits of the dispute between the parties.

The provisions of *N.J.A.C.* 1:1-12.6 clearly state that the granting of emergent relief is an extraordinary remedy which can only be awarded upon a showing that irreparable harm will result and that there is a likelihood of success on the merits by the party seeking such relief.

DISCUSSION

It appears to the undersigned that the real dispute between the parties in this matter is not the 1994-95 school budget or the sums restored to that budget by the Commissioner of Education. The on-going dispute between the parties is the negotiations concerning the future collective bargaining agreement between them. The petitioner, or its members, are obviously upset that they do not have a new contract and that the respondent has refused to raise its offer concerning salary increases. Though the petitioner may be concerned that the respondent is spending monies which could be used for other things including salaries, this does not in any way prevent the petitioner from seeking the best contract it can obtain from the respondent and pursuing applicable remedies if the parties fail to agree on a contract. If and when the parties reach an agreement, or some agreement is reach for them through other processes, the petitioner will have avenues to see that its members received their entitlements including salaries.

FINDINGS AND CONCLUSIONS

I **FIND** and **CONCLUDE** that the petitioner has failed to show that irreputable harm will occur if the respondent is not restrained from spending the \$406,000 in question. Further, the petitioner has not shown that there is a reasonable probability that the petitioner will be successful on the merits of its claim. The nature of the dispute between the parties is not a claim, but a collective bargaining agreement. Hopefully, in the end, both parties will be satisfied when a contract is reached or some other disposition occurs. One side or the other may feel that they were more successful in the process but, this does not mean ultimate success on the merits for the purposes of meeting the requirements for granting this motion. I, therefore, **DENY** the petitioner's application for emergent relief.

This Order on an application for emergent relief may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief accordance with *N.J.S.A. 52:14B-10*.

May 11, 1995
DATE

Robert W. Scott
ROBERT W. SCOTT, ALJ

SOUTH RIVER EDUCATION ASSOCIATION, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH : DECISION ON MOTION

OF SOUTH RIVER, MIDDLESEX COUNTY, :

RESPONDENT. :

The record of this matter and the Order Denying Emergent Relief issued by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

After a full and independent review of the record in this matter, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge (ALJ), that as petitioner has failed to establish the required elements necessary for the granting of emergent relief under Crowe, supra, such relief must be denied. The Commissioner further concurs with the ALJ that “[t]he nature of the [within] dispute between the parties [herein] is not a claim, but a collective bargaining agreement.” (ALJ’s Order, at p. 5)

Accordingly, petitioner’s application for emergent relief is denied and this matter is being returned to OAL for such further proceedings as are deemed necessary to bring it to conclusion.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

JUNE 7, 1995

DATE OF MAILING JUNE 7, 1995

201-95

IN THE MATTER OF THE ANNUAL SCHOOL :
ELECTION HELD IN THE RAMAPO-INDIAN : COMMISSIONER OF EDUCATION
HILLS REGIONAL HIGH SCHOOL DISTRICT, : DECISION
CONSTITUENT DISTRICT OF FRANKLIN :
LAKES BOROUGH, BERGEN COUNTY. :
_____ :

JUNE 7, 1995

IN THE MATTER OF THE ANNUAL SCHOOL :
 ELECTION HELD IN THE RAMAPO-INDIAN : COMMISSIONER OF EDUCATION
 HILLS REGIONAL HIGH SCHOOL DISTRICT, : DECISION
 CONSTITUENT DISTRICT OF FRANKLIN :
 LAKES BOROUGH, BERGEN COUNTY. :
 _____ :

The announced results of the balloting for one (1) member of the Board of Education from the constituent district of the Borough of Franklin Lakes for a full term of three (3) years at the annual school election held on April 18, 1995 in the Ramapo-Indian Hills Regional High School District were as follows:

<u>FRANKLIN LAKES</u> <u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Steven B. Crystal	732	32	764
Joseph A. Medici	694	32	726

Pursuant to a letter request from Joseph A. Medici, dated April 19, 1995, the Commissioner directed his representative from the Office of the Bergen County Superintendent of Schools to conduct a recount of machine ballots cast for the Franklin Lakes member of the regional Board pursuant to N.J.S.A. 18A:14-63.2. The machine recount was conducted on May 3, 1995 at the Bergen County Voting Machine Warehouse in Carlstadt. There was no change in the machine tallies as a result of the recount. There had been some indication that a recount of absentee ballots would be requested pursuant to N.J.S.A. 19:57-24, but no such request was ultimately made. Thus, absentee tallies on recount are as certified by the County Board of Elections at the conclusion of the balloting on April 18, 1995.

Therefore, on recount, the results of the election were unchanged and remained as follows:

FRANKLIN LAKES

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Steven B. Crystal	732	32	764
Joseph A. Medici	694	32	726

This concludes the report of the Commissioner's representative.


* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions therein.

Accordingly, the Commissioner finds and determines that Steven B. Crystal was elected to a full term of three years on the Board of Education of the Ramapo-Indian Hills Regional High School District, representing the constituent district of the Borough of Franklin Lakes.

The Commissioner further directs that a copy of this decision be forwarded to the Office of Administrative Law for inclusion in the record of the inquiry presently pending into the conduct of the above-captioned election.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

JUNE 7, 1995

DATE OF MAILING JUNE 7, 1995

IN THE MATTER OF THE TENURE :
 HEARING OF SONDRA YANNIELLO, :
 BOARD OF EDUCATION OF THE CITY : COMMISSIONER OF EDUCATION
 OF MILLVILLE, CUMBERLAND COUNTY. :
 _____ : DECISION

SYNOPSIS

Board certified charges of unbecoming conduct against respondent, Spanish Teacher/Substance Awareness Counselor, due to her alleged use of illegal drugs on or about May 20, 1994. Respondent had completed a treatment program for drugs in 1989 and at that time had signed a Health Improvement Program Contract requiring her to remain drug free.

ALJ found that respondent's use of illegal amphetamines while attending a conference sponsored by the district constituted a breach of contract. ALJ found that based upon the definition of "handicapped" set forth in the New Jersey Law Against Discrimination (LAD) at N.J.S.A. 10:5-5a, as well as applicable New Jersey case law, respondent's addiction to drugs was afforded handicapped protection status. Thus, ALJ found that "reasonable accommodation" had to be made for respondent's handicap. Moreover, ALJ found that a teacher should not be held to the same standard as that of a policeman or fireman in that upon one "slip" there exists just cause for termination. Therefore, ALJ found that termination was not the appropriate penalty. Respondent was ordered reinstated with penalty and restrictions as noted.

Examining this as a tenure matter, Commissioner found respondent's actions constituted unbecoming conduct. Commissioner further determined that, in light of the particular circumstances herein, and in consideration of the key role districts play in preventing substance use among students, the Board reasonably accommodated respondent's handicap. The Commissioner explicitly rejected the significance placed by the ALJ on the fact that students were not exposed to respondent's addictive behavior and that she voluntarily reported her actions, noting such rationale would permit repeated use of illegal substances. Commissioner ordered respondent dismissed as of the date of this decision and the matter forwarded to the State Board of Examiners for further appropriate action.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8800-94

AGENCY DKT. NO. 265-6/94

**IN THE MATTER OF
THE TENURE HEARING OF
SONDRA YANNIELLO, BOARD
OF EDUCATION OF THE CITY
OF MILLVILLE, CUMBERLAND COUNTY,**

Russell E. Paul, Esquire, for petitioner

Steven R. Cohen, Esquire, for respondent (Selikoff & Cohen, attorneys)

Record Closed: March 24, 1995

Decided: April 20, 1995

BEFORE **JOSEPH E. KANE**, ALJ:

**STATEMENT OF THE CASE
AND PROCEDURAL HISTORY**

On June 2, 1994, Specification of Charges pursuant to N.J.S.A. 18A:6-10 was provided to the respondent. The charges alleged unbecoming conduct as a result of respondent's use of illegal drugs on or about May 20, 1994. On June 21, 1994, a hearing was conducted before the Board of Education of the City of Millville wherein the Board found probable cause exists that the charges if credited were sufficient to warrant dismissal and thus forwarded their findings and the written charges to the Commissioner of Education for a hearing pursuant to N.J.S.A. 18A:6-16. The

Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

A hearing was conducted at the Atlantic City OAL, 1201 Bacharach Boulevard, Atlantic City, New Jersey on February 8, 1995 and February 24, 1995. The record was held open until March 24, 1995, in order to permit the filing of post hearing briefs. A decision was rendered on April 12, 1995.

ISSUES

WHETHER RESPONDENT'S ADDICTION FALLS WITHIN THE DEFINITION OF HANDICAPPED UNDER THE NEW JERSEY LAW AGAINST DISCRIMINATION AND/OR THE FEDERAL AMERICANS WITH DISABILITIES ACT, AND IF SO, HOW MANY OPPORTUNITIES FOR REHABILITATION (REASONABLE ACCOMMODATION) SHOULD BE PROVIDED TO A TEACHER.

INTRODUCTION

Respondent has worked as a teacher for the Millville school system since 1986. In 1988, she revealed to her principal that she had a problem with drugs and requested assistance to enter a rehabilitation program. She successfully completed a 28 day in-patient treatment program and returned to work in January 1989. At that time she signed a Health Improvement Program Contract which in sum, required that she would remain drug free. Respondent continued to teach Spanish until the 1993/94 school year when she assumed the position of a Substance Awareness Counselor.

Respondent remained drug free until May 20, 1994, when while at a school sponsored conference she ingested amphetamines. She immediately reported her "slip" to school authorities who, on May 23, 1994, requested a drug screening. The results proved positive for the use of a controlled dangerous substance, amphetamines.

There is no dispute that respondent had an excellent reputation as both a classroom Spanish teacher and a Substance Awareness Counselor. Petitioner argues that despite respondent's good teaching record, the school system cannot sanction employment of a teacher who uses illegal drugs. Petitioner argues that it gave respondent an opportunity to redeem herself in 1989 and that the subsequent "slip" which occurred on May 20, 1994, constitutes a violation of the Health Improvement Program Contract with such breach warranting termination.

Respondent contends that her addiction falls within the definition of "handicapped" within New Jersey's Law Against Discrimination, N.J.S.A. 10:5-12 and the Americans With Disabilities Act, (ADA) 42 U.S.C.A. § 12101 to 12213, and accordingly, she is entitled to maintain her employment and to seek drug rehabilitation counseling as a "reasonable accommodation".

FINDINGS OF FACT

Respondent has been a teacher in the Millville school system since 1986. She started as a part-time language teacher and then began teaching Spanish full-time in the fall of 1987. Her duties included teaching Spanish I and II in the Millville Senior High School as well as an alternative program known as the Holly Heights School, where she taught an exploratory language program, French, Spanish and Latin. From the date of her initial employment until her termination in May of 1994, respondent gained an ever increasing good reputation as a teacher who had excellent rapport with her students. She got along well with and was respected by her fellow teachers, as well as those in the school administration and guidance program.

In December of 1988, respondent revealed to her Principal, Mr. Warren Elliott, that she had a problem with the use of illegal drugs. This meeting took place off the school premises. At that time respondent advised Mr. Elliott that her drug problem seemed to have begun after the death of her first husband.

Respondent was married at the age of 19 and described herself as a battered woman. At the age of 23 she and her husband separated and were considering a divorce. In an effort to reconcile her husband took her on a short vacation after which they returned to his residence.

When she advised him that she was not sure if she wanted to remain, he put a loaded gun to her head. Respondent testified that she did not move and that he continued to beg her to stay. He then took the gun away, began to sob and went into the bedroom. Respondent thought that if she attempted to leave that she would be shot. After a period of approximately one half hour, she went into the bedroom and found that her husband had hung himself in the closet. She ran to the kitchen, got a knife, cut him down and called the local police and hospital. Her in-laws arrived shortly thereafter and blamed her for the death of her husband and threatened to kill her.

Respondent stated that she was immediately placed under the care of a psychiatrist and was heavily sedated. She indicated that until this event in her life occurred in 1986, she had not been a user of illegal drugs.

Mr. Elliott testified that he fully supported and recommended to the school administration that respondent be admitted into an in-patient treatment facility. Respondent went directly from her meeting with Mr. Elliott to Seabrook House where she remained for a 28 day in-patient treatment program which she successfully completed.

Mr. Elliott testified that he had been supportive of respondent beginning in early 1988. At that time, it came to his attention that respondent had been found guilty of shoplifting. Mr. Elliott testified that respondent's in-school behavior was not inappropriate, but he opined that the nature of the offense could indicate an involvement with illegal drugs. No discipline was recommended by Mr. Elliott, instead, he advised his superintendent that he thought it was aberrant behavior and that he would monitor the situation closely. It was not until the meeting which took place between with Mr. Elliott and the respondent in December of 1988, that he was fully aware of the extent of respondent's drug problem.

When respondent returned to the school system in January 1989, she entered into a Health Improvement Program Contract. It was Mr. Elliott's recommendation that respondent be permitted to return and be given a second chance provided that she abided by the terms of the Health Improvement Program Contract. Mr. Elliott recalled advising the respondent that although the contract did not specify that termination would occur should she again use illegal drugs, he did indicate to her that termination would most likely take place. It was Mr. Elliott's

opinion as well as that of the school administration that respondent was a good teacher who was worth saving and together with a representative of the teacher's union, respondent entered into the Health Improvement Program Contract.

The Health Improvement Program Contract permits the school system to call for random drug testing and further indicates that should a violation occur, disciplinary action would follow. The contract reads in pertinent part:

Should evidence or suspicion of a renewed problem occur in any other subsequent year of employment, Ms. Dublinsky¹ will agree to random testing.

Should testing at any time be clearly positive, Ms. Dublinsky understands that disciplinary action by the Millville Board of Education shall be warranted.

From the time respondent entered into the Health Improvement Program Contract until May 23, 1994, Mr. Elliott did not recommend random drug testing nor did he observe any evidence of drug usage. On the contrary, Mr. Elliott testified that he has never observed any misbehavior on the part of respondent and that she was a good teacher who had an excellent rapport with her students.

Mr. Elliott's testimony concerning respondent's abilities as a teacher is a common theme which was echoed by witnesses both for the respondent and the petitioner. This good reputation continued into the fall of 1993, when respondent assumed the position of a Substance Abuse Counselor (SAC). A SAC works with students and their parents to understand and deal with substance abuse issues of both alcohol and drugs. In the fall of 1993, respondent possessed the requisite certifications to be a SAC and currently expects to complete a master's program in student guidance in May of 1995.

Franklin MacDonald was respondent's supervisor within the Millville Senior High School Guidance Department when she was a SAC during the 1993/94 school year.

¹ Respondent's name in 1989 was Sondra Dublinsky

Mr. MacDonald was aware of the Health Improvement Program Contract and respondent's previous involvement with drugs. Knowing her past, Mr. MacDonald testified that he did not have a problem with respondent holding the position of a SAC. He indicated that it is not unusual for counselors in the field of substance abuse to also be recovering addicts. Mr. MacDonald opined that it was perhaps her former involvement with drugs and her subsequent recovery which enabled her to have a good empathetic relationship with students involved in alcohol and drugs.

Respondent was a member of the core team which hears and makes recommendations concerning students who are involved with alcohol or drugs. The team consists of a school administrator, school nurse, teachers, guidance counselor and the SAC. Respondent participated in the core team both at the senior high school as well as in the alternative school program. The alternative school is, as the name indicates, an alternative way for students who are not faring well in the regular high school to get an education. These would generally be students with discipline, attendance or substance abuse problems.

As late as April 29, 1994, Mr. MacDonald evaluated respondent's performance as a SAC and indicated that she had an excellent rapport with students and was performing well in the job. He observed that she worked very hard as a SAC and enjoyed the responsibilities. He found that she often would devote more time to the job than what was required and as a result, he was of the opinion that the school's success rate in reaching students with alcohol and drug problems had increased. Mr. MacDonald was in agreement with Mr. Elliott that he never observed any evidence of substance abuse, nor did he have any suspicion that respondent was using illegal substances until he received a call on the morning of May 20, 1994.

Frederick Setser was on the core team with the respondent for the alternative school. Mr. Setser testified that respondent did an outstanding job as the SAC on the core team. Mr. Setser stated that respondent had a unique ability to relate to the students and was able to get an enormous amount of students involved in the program within the short period of time that she was the SAC. Mr. Setser observed that the SAC position was very important to the respondent and that if he had any one criticism of her it was that she spent too much time involved with the job.

Jean Corson is a special education teacher who had three of her students working directly with the respondent. She noted that the respondent had a good working relationship with the parents of students involved in alcohol and drugs. She related one instance when one of her students had resisted going into rehabilitation and that respondent accompanied the student and his parents into the rehabilitation facility. The student later told Mrs. Corson that without respondent's direct intervention and assistance, he would not have followed through with getting help.

Mrs. Corson attended several week-end school sponsored trips with the respondent. Both during these trips and during the regular school day, Mrs. Corson never observed that the respondent engaged in any behavior which would be indicative of substance abuse.

Jeannie Setser is a science teacher at the senior high school. She has observed the respondent since she first began employment in 1986 and related that the respondent had taught her son Spanish. Mrs. Setser was aware of respondent's past involvement with drugs but testified she never saw any evidence of drug usage. She stated that she would not have any objection to the respondent being around or teaching her son.

Theodore Tardiff is employed by the New Jersey State Department of Labor Wage and Hour Compliance. He describes himself as a friend of the respondent and a recovering alcoholic. He attends either AA or NA meetings with the respondent at least once a week. He attributes his recovery and continued sobriety to the counseling and friendship she has shown to him over the years. He testified that he is able to call her at any time of the day or night for counseling should he feel that he is going to slip. He has never observed the respondent engage in any form of substance abuse.

Charles Maul is President of the Millville Teacher's Association. His classroom is directly opposite the respondent's. He described the respondent as one who is well loved both by her students and the faculty members. His testimony echoed that of the witnesses set forth above in that he has never observed any instances of substance abuse.

Finally, Charles Brett is the Principal of the alternative high school and one of respondent's supervisors. He is a member of the Board of Education of the Cumberland County Vocational Technical School and President of the Cumberland County School Board's Association. Mr. Brett, who was aware of respondent's past drug usage, testified that she had a unique way of reaching students. He further indicated that she did an excellent job as the SAC counselor for the alternative school core team. He was of the opinion that her past problems with drugs and her recovery helped her to empathize with students who have experienced the same substance abuse difficulties.

Based upon the record set forth above, I herein **FIND** that respondent successfully completed a 28 day rehabilitation program at Seabrook House in December, 1988/January, 1989 and thereafter signed a Health Improvement Program Contract in January 1989 which allowed her to return to work as a Spanish teacher. The record is abundantly clear that respondent enjoyed a good reputation as a teacher and as a SAC earning the respect of both students and faculty alike. I **DO NOT FIND** that respondent was a substance abuser while on school property or on school time from the conclusion of the Seabrook House rehabilitation program in January 1989 until May 20, 1994.

The incident which triggered what the petitioner characterizes as a breach of the Health Improvement Program Contract occurred on May 20, 1994. This is the event which ultimately led to respondent's termination.

Respondent assumed the title of SAC for the 1993/94 school year. She described this position as being very meaningful to her in her life since, as a recovering addict, this presented her with an opportunity to give back to students what she had learned about her addiction. She found this position to be eminently more meaningful than that of a classroom Spanish teacher. When assuming the position in the fall of 1993, the respondent was aware that the teacher who had vacated the SAC title was applying to be a guidance counselor and that she was reserving her bumping rights to move back into the SAC position. In late April 1994, it became abundantly clear to the respondent that these bumping rights were going to be exercised and that she would return to the classroom as a Spanish teacher for the 1994/95 school year.

May 20, 1994, was a Friday. For the four days prior to May 20th, respondent had been sponsored by the Millville Senior High School to attend a conference in Toms River, New Jersey on drugs in sports. The conference was being attended by school coaches, teachers, SAC's and at times students. By this time the thought of not retaining the SAC position became overwhelming. On the evening of May 19, 1994, she drove to Mays Landing, New Jersey and obtained two "diet pills" (amphetamines) from a friend. She drove back to the hotel where she was staying and ingested the amphetamines.

Mr. MacDonald recalled receiving at least three calls from the respondent beginning at approximately 7:30 a.m. the morning of May 20, 1994. He described the respondent as not making sense and being overly obsessed about retaining the SAC position. He stated that she wanted to return immediately to the school and meet with Mr. Elliott and other members of the administration to talk about the SAC position.

Mr. MacDonald testified that after the second call, it became apparent to him that the respondent was under the influence of either drugs or alcohol and he advised her to remain in the hotel room and not to drive and that he would make arrangements for her husband to pick her up. Mr. MacDonald then recalled receiving another call around 11:30 a.m. only this time respondent was calling from the conference. She explained to Mr. MacDonald that she felt that she had to go to the conference because the Board had sponsored her. Mr. MacDonald testified that during this call her speech was more normal.

Mr. MacDonald testified that in addition to respondent's concern over losing the SAC position, she was very apologetic stating that she had taken a drink the night before and that by doing so she had let the school down.

Mr. MacDonald's final telephone call came from the respondent at approximately 4:30 p.m. on May 20, 1994. Respondent advised him that she was in the Lighthouse in Mays Landing, New Jersey. The Lighthouse is a drug and alcohol rehabilitation center. Mr. MacDonald recalled that she had voluntarily admitted herself into the Lighthouse seeking assistance for her "slip". Mr.

MacDonald again advised respondent that they would meet on Monday morning to discuss the SAC position.

Mr. MacDonald recalled that on Monday morning, May 23, 1994, respondent arrived in his office early in the morning. She was extremely apologetic, explaining that she had let everybody down. Respondent, at that time, denied that she had used illegal drugs claiming instead that she had ingested alcohol. Mr. MacDonald advised her that the school administration would now require a drug and alcohol screening. Mr. MacDonald described respondent's attitude as cooperative and indicated that she readily consented to the test. The test was administered on the morning of May 23, 1994, and the results were returned as positive for the use of amphetamines on May 27, 1994.

On the morning of May 23, 1994, and for the remainder of that week, Mr. MacDonald did not observe any evidence of drug use on the part of the respondent.

Respondent later admitted that she had lied about her use of illegal drugs and instead claimed that she had ingested alcohol because, as a counselor in the field of alcohol and drug rehabilitation, she knew that society more readily accepted alcohol rather than drug abuse. Respondent testified that after she took the two diet pills she felt out of sorts, embarrassed and depressed. She had returned to a mode of behavior which she had not experienced for five years.

On May 20, 1994, and to the present, the Millville School System did not have an Employee Assistance Program (EAP). An EAP is a confidential intervention program which provides assistance in a variety of areas, but in particular alcohol and drug abuse.

Respondent testified that she knew that she had disappointed the school system, as well as herself when she took the amphetamines. On the morning of May 20, 1994, she contacted another SAC who indicated she could not help her and that she should immediately call Mr. MacDonald. When respondent arrived at the Lighthouse on the afternoon of May 20, 1994, she testified that she was not high but very aware that she had reverted to an old way of behaving and that she needed immediate help to stop what she knew was wrong.

Based upon respondent's admission of drug usage on May 20, 1994, as well as the positive test results returned on May 27, 1994, I **FIND** that respondent's use of illegal amphetamines while attending a conference sponsored by the Millville school system constitutes a breach of the contract. Paragraph 6 of this contract admonishes that disciplinary action may be instituted for a breach of the contract. The question which must now be addressed is whether under the **FACTS** of the within matter, as well as the below cited statutory and case law, termination of respondent's employment was proper.

Dr. Fred Ryan Chase, is a psychologist who has been treating the respondent for two years. Dr. Chase was accepted by this tribunal as an expert in the treatment of addiction.

Dr. Chase testified that drug addiction is recognized as a disease by the American Psychiatric Association. In his opinion the disease of addiction fits within the definition of "handicapped" set forth at N.J.S.A. 10:5-5q.

"Handicapped" means suffering from physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or from any mental, psychological or developmental disability resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. Handicapped shall also mean suffering from AIDS or HIV infection.

Respondent began treating with Dr. Chase in October 1992. Dr. Chase described the goal of the treatment was to attempt to confront and deal with any and all obstacles to respondent's continued recovery from her addiction.

Based upon Dr. Chase's in-patient treatment of addicts over 20 years, he has found that one of the clinical wisdoms was that patients recover at a 30, 30 and 30 rate. That means that the first 30 percent can be expected to recover in a reasonably straight manner without experiencing "slips". The other 60 percent will absolutely experience "slips" and of that 60, 30 percent will at some point be able to embrace sober living. Finally, at some other point the remaining 30 percent may or may not succeed.

Dr. Chase testified that in his experience with treating employees in various industries, he has found that the general rule is that an employee is given three attempts at rehabilitation before being terminated. In keeping with the standard Dr. Chase concluded that although he cannot condone a "slip" it is something which for most addicts is likely to occur. More importantly, he looks at why the slip occurred and what response the addict had to continued recovery after the slip. Based upon this analysis together with a three step approach to recovery, that of continuing psychotherapy, participation in a 12 step program and administering medication, he was of the opinion that respondent would not be a threat to either her students or the administration should she be permitted to return to work.

Dr. Chase understood the May 20, 1994, slip as a response to the real sense of devastation over the loss of the SAC position and how the respondent was defining herself. Dr. Chase found that respondent in the SAC position was able to give back to her students some of the progress she has made as a recovering addict.

Not condoning a slip of this nature Dr. Chase, nevertheless, felt that her prognosis for recovery was excellent. His opinion is based upon the fact that the slip was of a very short duration which was marked by extreme remorse, shame and depression and a quick cessation of the addictive behavior within 24 hours. The interruption of the addictive behavior and her willingness to engage in immediate treatment points towards high motivation and an intent to recover.

Since the slip in 1994, Dr. Chase has altered his mode of treatment to include the medication Zoloft. This is an anti-depressant medication which diminishes intense feelings and

emotions without reducing the person into a “zombie”. In his opinion this medication in no way would affect her ability to be a classroom teacher.

Zoloft is an aid to the respondent in managing her feeling of depression which has the effect of containing extremes in emotions.

Based upon this three pronged strategy: continued psychotherapy, participation in a 12 step program and continuance on Zoloft, his opinion was that she had an excellent prognosis for recovery. On cross examination Dr. Chase admitted that although there is no 100 percent guarantee that any addict will recover or not slip, he would feel that her chance of success at this point is at least 95 percent.

Should respondent be returned to employment with the Millville school system, Dr. Chase had some recommendations which should be conditions of return. First, he testified that the disease of addiction is often accompanied by a feeling of alienation and isolation. He would recommend a contact person at the job site so that respondent, as a recovering addict, will know that there is an ally available to talk to. In Dr. Chase’s experience he has found that the more an addict can perceive that he or she has allies, the less likely it is that feelings of isolation can become dangerous emotions. Secondly, he would require random drug screenings. He testified that respondent has to know that there are expectations made of her. Finally, he recommended that she continue with the three prong approach.

Given this strategy Dr. Chase concluded that there is a reasonable medical certainty that she will not have another slip. Dr. Chase candidly admitted that he cannot give a 100 percent guarantee that a slip will not occur, but he was of the opinion that there is a 95 percent certainty that respondent will not regress.

Dr. Chase was then asked the question, “What would be the perceived harm to either students or to faculty should a slip occur on school property?” Dr. Chase provided a two part answer to this question. He indicated that the job as a SAC is one of education and information. In that vein, it is hoped, people come to understand that this is not a morally bad thing, it is a struggle and a challenge which needs to be dealt with. Dr. Chase concluded that on one hand it

would have impact and would admittedly disturb some students. On the other hand, he concluded from an educational point of view that if the public has an understanding of the progression of the disease of addiction, the problem is not to be minimized but there must be understanding that struggles and slips may occur during recovery. Dr. Chase hoped that students, although being disturbed over a slip, would understand what is occurring within the context of the recovery from addiction.

After working with Dr. Chase, respondent has concluded that it was wrong to attach intense feelings to the loss of the SAC position, that "a job is just a job". She feels that now her continued sobriety and her health is much more important than a position and that because of this realization, she feels that slips will not occur in the future.

There is a two-fold issue presented in this matter. The first is whether respondent's addiction is a "handicap" under the New Jersey Law Against Discrimination (LAD) or the federal Americans With Disabilities Act (ADA) and if so, how many opportunities for rehabilitation (reasonable accommodation) should be provided to the respondent.

The petitioner contends that it provided respondent with a reasonable accommodation in 1989, when it allowed her to enter Seabrook House and thereafter regain her employment subject to the terms of the Health Improvement Program Contract. Once the Health Improvement Program Contract was breached, petitioner argues that it is no longer under an obligation to continually provide respondent with repeated opportunities to gain sobriety. Petitioner contends that respondent as a teacher should be held to a high standard of conduct which must be maintained at all times when dealing with vulnerable high school students.

Respondent submits that she is a qualified person with a handicap, the disease of addiction, who is entitled to reasonable accommodation of her handicap rather than dismissal from her tenured employment as a teacher. She contends further that it is not unusual in the treatment of the disease of addiction to have at least one "slip" during the course of recovery and that given her position as a teacher and the facts as set forth above, this one regression should not serve as a basis for elimination of her career as a teacher.

The threshold issue to be considered is whether respondent's drug addiction falls within the purview of the LAD. I **FIND** that based upon the definition of "handicapped" set forth in the LAD at N.J.S.A. 10:5-5(a) as well as applicable New Jersey case law, respondent's addiction to drugs is afforded handicapped protection status. See Matter of Cahill, 245 N.J. Super 397, 400 (App. Div. 1991) and Clowes v. Terminex Intern, Inc., 109 N.J. 575, 590-595 (1988).

Given that respondent is entitled to protection under the LAD, the next issue to be considered is what type and form of rehabilitation should be afforded to respondent if at all. There are two bodies of law which come into play to address this issue. The first is the case law interpreting the LAD. The second is the Federal Rehabilitation Act of 1973, 29 U.S.C.A. 701 et seq., (Act).

The New Jersey LAD, N.J.S.A. 10:5 et seq. was enacted in part to combat discrimination against handicapped individuals. Its regulations were patterned after those promulgated under the Federal Rehabilitation Act of 1973. Ensslin v. Twp. of North Bergen A-959-9272, page 12, decided July 15, 1994; see 22 N.J.R. 1936. Many of the provision of the LAD are similar to those of the federal Act. The LAD provides:

unless it can be clearly shown that a person's handicap. . . would prevent such person from performing a particular job it is an unlawful employment practice to deny an otherwise qualified handicapped. . . person the opportunity to. . . maintain employment . . . solely because such person is handicapped. N.J.S.A. 10:5-29.1.

This "opportunity" means that an employer

must make a reasonable accommodation to the limitations of the handicapped employee. . . unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business. N.J.A.C. 12:13-2.5(b).

Thus, in making such a reasonable accommodation, an employer should take into consideration the interests of the employee and the public. Jamsen v. Food Circus Supermarkets, Inc. 110 N.J. 363, 374 (1988). To this point, the LAD operates similarly to the federal Act in

seeking to protect the right of a handicapped individual to maintain gainful employment. However, New Jersey law does not solely seek to protect the handicapped's right; it also seeks to balance these rights against the employer's interests. New Jersey law provides that:

an employer who rejects a job applicant not because of his handicap per se but because of an opinion, reasonably arrived at, that the handicap precludes job performance, . . . cannot and should not be found in violation of the Law Against Discrimination." Anderson v. Exxon Co., U.S.A. 89 N.J. 483, 496 (1982).

In applying the above law to civil service employees who have substance abuse problems, two lines of cases have evolved. The first involves employees who work in positions involving public safety, such as police officers, firefighters, corrections officers, etc. Such employees have been afforded only one chance at rehabilitation before being terminated. For example, in Matter of Cahill, 245 N.J. Super. 397 (App. Div. 1991), a Newark firefighter was terminated upon discovery that he was a substance abuser. Prior to this discovery and unknown to the Newark Fire Department, the firefighter had voluntarily (at the advice of his union) undergone rehabilitative treatment at a substance abuse center. Subsequent to this discovery of drug abuse, the Department gave the firefighter leave of absence in order to join a treatment program. After he completed the rehabilitation program, the Department reinstated the firefighter upon condition that he submit to random drug testing. Thereafter, the firefighter failed such a test, and was terminated. The court held that the Department had reasonably accommodated the firefighter's handicap by offering him a chance at rehabilitation. Respondent argues that the Cahill court stated that Cahill had his chances at rehabilitation before being terminated, and that this means that respondent must be given more than one chance at treatment here. However, in Cahill, the employer gave the firefighter only one chance at rehabilitation. The Cahill court held that the Department had reasonably accommodated the firefighter's handicap by giving him leave to complete a treatment program, and then reinstating him upon condition that he submit to random drug testing. Thus, there was only one officially sanctioned allowance for rehabilitation. The court thus upheld the firefighter's dismissal. Cahill, 245 N.J. Super at 401.

Other cases have held similarly. See Tanner v. New Jersey Training School, Jamesburg, Department of Corrections, 94 N.J.A.R.2d (CSV) 642 (corrections officer removed after testing

positive for illegal substance after his return from a rehabilitation program); Ayers v. New Jersey Training School, 94 N.J.A.R.2d (CSV) 497 (firefighter given one chance to rehabilitate his drug addiction, then terminated after testing positive again).

The other line of cases involves civil service employees who are not in positions that involve public safety or trust, such as clerical workers, secretaries, etc. In those cases, the employee is afforded several chances at rehabilitation. Termination is usually invoked if, after the rehabilitation, the employee's performance is substandard. For example, in LuSane v. Union County Board of Social Services, 94 N.J.A.R.2d (CSV) 637, the employee, an income maintenance technician, was terminated for incompetence, inefficiency, and failure to perform duties. The employee contested her removal on grounds that she had a substance abuse addiction. Both the ALJ and the Merit System Board upheld the termination, citing that she had already been given numerous chances at rehabilitation. Similarly, in Fisher v. Union County Division of Social Services, 94 N.J.A.R.2d (CSV) 125, an employee was terminated for incompetency, inefficiency and failure to perform her duties. The Board, upon learning of her drug addiction, first counseled her and then ultimately fired her. The employee argued that her drug addiction caused her problems, that this addiction was a handicap, and that thus she should not be terminated. The ALJ held that her removal should be modified to a six month leave of absence without pay because she was entitled to several chances to complete a drug rehabilitation program.

Since the New Jersey statutes are silent as to a limit to the number of chances at rehabilitation that must be afforded to a substance-abusing civil service employee, and since there are two divergent lines of case law on this point, one may look to the federal standards for guidance.

The Federal Rehabilitation Act was enacted to protect the handicapped from discrimination, and in particular, to maximize the employment of individuals with disabilities. 29 U.S.C.A. § 701(b). The Act has numerous provisions, whose enforcement is designed to "achieve equality of opportunity, full inclusion and integration in society" for such individuals. Id. Two of these provisions are pertinent to the instant matter. First, Section 706(7) of the Act specifically defines a "handicapped individual to include a drug abuser or alcohol abuser". Second, while the

Act is a federal program, it applies to the States to the extent that it “prohibits a federally funded State program from discriminating against an otherwise qualified individual solely by reason of his or her disability.” Ensslin v. Twp. of North Bergen, A-959-9272, decided July 15, 1994, citing 29 U.S.C.A. § 794. Thus, the Act provides protection for individuals who are handicapped by drug or alcohol dependency, so long as they are paid through federal funds.

One particular protection that the Act provides for such individuals is a chance at rehabilitation. The Act requires the federal employers make “reasonable accommodation to the known physical or mental limitations of a . . . handicapped [employee] unless the agency can demonstrate that the accommodation would impose undue hardship on the operation of its program.” 29 U.S.C. § 794A(a)(i); 29 CFR § 1613.704 (1984). With respect to a handicap constituting alcohol or drug abuse, federal courts have interpreted the Act’s mandate of reasonable accommodations to mean that an employee must be given a full chance to rehabilitate him or herself, which would include offering counseling and leave time (without pay) for rehabilitation at a treatment program. See Whitlock v. Donovan, 598 F. Supp 126 (D.D.C. 1988). When granting such leave of absence, the employer should take into account the potential for relapses. Whitlock, 598 F. Supp at 134. This means that the federal employer must give the employee more than one chance at attending rehabilitation or treatment programs. Id. at 134; Callicotte, 698 F. Supp. at 949-950. Termination of employment can only be utilized as a last resort, if it becomes apparent that the employee cannot be rehabilitated or refuses to enter a treatment program, or if allowance for rehabilitation imposes an undue burden on the employer. Id.

The federal Act applies directly to federal employers and federal employees. Furthermore, the Act applies to state employees only to the extent that they are paid through federally funded programs.

Respondent was a teacher working for the Board of Education of the City of Millville. Although the record does not reflect, it can be reasonably assumed that she was paid from local and not federal funds. Therefore, the Act and corresponding federal case law does not expressly apply to her, unless New Jersey has adopted the Act. As seen above, New Jersey has enacted its

own statute (the LAD) to assist handicapped or disabled individuals, and this law does not incorporate or expressly adopt all of the provisions of the federal Act. However, insofar as the New Jersey LAD follows the legislative intent of the federal Act, one may look to the Act whenever the LAD is silent. As seen above, the LAD does not expressly provide for a limit to the number of times that a civil service employee with a substance abuse handicap can be rehabilitated before her employment is terminated. Therefore, since New Jersey law on this point is silent, one may utilize the Act's provisions as guidance in this matter.

This conclusion is supported by the Americans with Disabilities Act of 1990, 42 U.S.C.A. § 12101 to 12213 (ADA), which closely parallels New Jersey's LAD. The ADA makes it unlawful for an employer to discriminate against an employee who suffers a disability. The ADA further requires that an employer "make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability . . ." 42 U.S.C.A. § 12112(b)(5)(A). The ADA includes substance abuse in its definition of a disability, so long as there is no current, on-going use and the disabled person is undergoing (or has completed) treatment. 42 U.S.C.A. § 12114(b). The ADA defines reasonable accommodation to include any facilitations that would enable the employee to continue his or her employment at an acceptable level, so long as the accommodations do not entail a changing of the "essential functions" of the position. 42 U.S.C.A. § 12111.

To this point, the ADA closely tracks the LAD. However, the ADA is silent as to what specifically constitutes "reasonable accommodation" of a substance abuse handicap. Since the LAD is on point, and since the LAD is not contrary to the ADA, one must defer to its language. Therefore, the provisions in the LAD for allowing for rehabilitation chances must be followed. However, as stated above, since the LAD is silent as to the number of chances at rehabilitation that must be afforded, one may use the standards espoused in the Federal Rehabilitation Act, which allows for multiple chances at rehabilitation.

In this matter respondent was a SAC and if returned to employment, would be a Spanish teacher. This position is not akin to the position of policeman, firefighter or corrections officer in the sense that there is less concern about public safety and threat to life. Nor is the position

analogous to that of a clerk or income maintenance technician as set forth in Fisher and LuSane. A teacher in general, unlike a policeman or firefighter will not threaten the health or safety of students if the teacher's sobriety is compromised. Instead, what is lost is the quality of the teacher's job performance and the diminution of the teacher as a role model in the eyes of the students. These factors, albeit intangible, have the very real potential to harm the growth and development of students during the formative high school years.

Accordingly, I **DO NOT FIND** that a teacher should be held to the same standard as that of a policeman or fireman, in that upon one "slip" there exists just cause for termination. Nor do I **FIND**, however, that the chances for rehabilitation should be endless. To this end, I **FIND** Dr. Chase's testimony to be credible that in general most industries follow a three strikes and you're out rule. I herein **FIND** that this is the standard which should be applied in the instant matter, however, incorporated into that standard should be an inquiry as to what impact returning a teacher to the classroom would have upon students.

In the instant matter respondent's "slip" did not occur on school property or in the presence of students. The testimony of the witnesses who observed respondent on the morning of May 23, 1994, was that she did not appear to be under the influence of drugs. On the contrary, respondent continued with her regular duties during the course of the week.

Mitigating in respondent's favor is the fact that she immediately reported her slip to her supervisors and checked in to the Lighthouse rehabilitation facility. Respondent recognized that the behavior could not continue and took steps to avoid further involvement with drugs. These actions I **FIND** were consistent with her intent to continue recovery. A first or even second "slip" cannot be countenanced if students are exposed to non-sober behavior on the part of a teacher or if the teacher continues to reject assistance or to otherwise seek recovery. The concept of an employer providing reasonable accommodation to a teacher does not include returning a teacher to the classroom who is otherwise not in recovery and who has not voluntarily sought assistance to deal with the addiction.

Dr. Chase's testimony which was unrefuted would indicate that it is likely that a recovering addict will experience at least one slip. This standard is recognized in the Federal Act. See Whitlock, supra. However, I **DO NOT FIND** that a school system should provide reasonable accommodations to an addict who has incurred a slip when students would otherwise be adversely effected. In the instant matter respondent's slip was not discovered through involuntary means, that is, through a random drug test. She voluntarily provided this information to the school district and most importantly immediately sought assistance to stop behavior which could not be countenanced by herself or the school district.

The concept of reasonable accommodation as it pertains to a teacher does not include the concept of unlimited opportunities to seek recovery. The teacher's interest in obtaining recovery must be balanced against the school district's interest in providing a drug free environment for students. If, for example, respondent had not voluntarily admitted her slip and sought recovery or if she had ingested drugs on school property or the effects of drugs were manifest while she was teaching in the school, termination would be the appropriate penalty upon a second slip. In this instance, the only reasonable accommodation which must be provided by the employer is monitoring of continued compliance with the Health Improvement Program Contract.

Accordingly, I herein **FIND** that termination is not the appropriate penalty in this matter. A return to employment, however, is not without restrictions which I **FIND** were aptly set forth by Dr. Chase. Based upon Dr. Chase's testimony, I herein **FIND** that:

1. Respondent shall have a contact person which can be either in the form of the Employee Assistance Program or a person designated by the School Board.
2. The Board shall have, without probable cause, at any time the right to require respondent to submit to drug and/or alcohol testing.
3. Respondent shall continue attendance at NA and/or AA meetings or respondent shall continue a course of treatment the nature of which is to be prescribed by Dr. Fred Chase.

I further **FIND** that in accordance with Dr. Chase's testimony, that expectations are to be made of a recovering addict, that if those expectations are breached punitive measures may be in order. Accordingly, I **DO NOT FIND** that back pay shall be ordered for the 120 day period immediately following dismissal.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

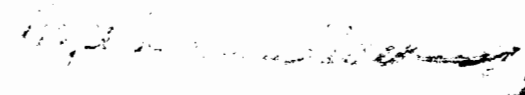
This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

APR 26 1995
DATE


JOSEPH E. KANE, ALJ

Receipt Acknowledged:


DEPARTMENT OF EDUCATION

4/27/95
DATE

Mailed to Parties:


ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

MAY 03 1995
DATE
psa

DOCUMENTS IN EVIDENCE

FOR PETITIONER:

NONE

FOR RESPONDENT:

R-1 TEACHING APPLICATION

JOINT EXHIBITS:

J-1 SPECIFICATION OF CHARGES
J-2 HEALTH IMPROVEMENT PROGRAM CONTRACT
J-3 MEMO FROM FRANK MacDONALD TO SONDRY YANNIELLO
J-4 GUIDANCE COUNSELOR OBSERVATION REPORT
J-5 DRUG TEST RESULTS
J-6 TRANSCRIPT OF JUDY BRETT TESTIMONY
J-7 RESUME OF FRED CHASE
J-8 DRUG TEST RESULTS

WITNESSES

FOR PETITIONER:

WARREN EDWARD ELLIOTT
GARY L. STANKER
WARREN McDONALD
PATRICIA CORNELL
ROBERT BRUCE CAMPBELL

FOR RESPONDENT:

SONDRY YANNIELLO
CHARLES BRETT
JEAN CORSON
THEODORE E. TARDIFF
CHARLES MAUL
DR. FRED RYAN CHASE

IN THE MATTER OF THE TENURE :
HEARING OF SONDRY YANNIELLO, :
BOARD OF EDUCATION OF THE CITY : COMMISSIONER OF EDUCATION
OF MILLVILLE, CUMBERLAND COUNTY. :
_____ :
: DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The Board's exceptions and respondent's reply thereto were timely filed in accordance with N.J.A.C. 1.1-18.4.

The Board initially objects to the ALJ's statement of the issues in this matter. The ALJ frames the issues as whether respondent's addiction falls within the definition of "handicapped" under New Jersey's Law Against Discrimination (LAD) and/or the Federal Americans with Disabilities Act (ADA), and if so, how many opportunities for rehabilitation should be provided? However, the Board asserts that, inasmuch as this is a tenure matter, the primary question is whether the respondent, under the circumstances herein, was guilty of unbecoming conduct under N.J.S.A. 18A:6-10, and assuming the respondent is, by her addiction, considered handicapped under the LAD, is she, as a teacher, entitled to more than one opportunity for rehabilitation? (Board's Exceptions at p. 1)

The Board contends that the initial decision omits vital information from its introduction. In this regard, the Board notes that the ALJ fails to indicate that respondent did not

tell the Board that she had a problem with drugs when she worked at the Egg Harbor Township School District prior to her employment with the Board of Education of the City of Millville. (Id. at p. 2) Rather, respondent only acknowledged this information under cross-examination. Further, the Board asserts that the ALJ excludes from the introduction data with regard to respondent's 1989 conviction for possession of cocaine and her second conviction for shoplifting, both incidents unknown to the Board at the time. Finally, the Board avers that the ALJ fails to state that respondent initially told her administration she had ingested alcohol when she left the conference on May 19, 1994; on direct examination, the respondent stated that she had taken "diet pills," but only when questioned by the ALJ did respondent acknowledge that she left the conference, drove to Mays Landing and obtained amphetamines. (Id. at pp. 2, 4)

Further, the Board strongly objects to the ALJ's characterization of the events which gave rise to this matter as a "slip" on respondent's part. Instead, the Board suggests that respondent's actions "***allegedly violated the criminal statutes in that it was possession and use of a controlled dangerous substance *** [and] violated the Health Improvement Program Contract, and *** was clearly unbecoming conduct under N.J.S.A. 18A:6-10(b)." (Id. at p. 3) Moreover, the Board contends that respondent did not voluntarily report her actions, "***but rather [her actions] were the involuntary result of her ingestion of amphetamines, a controlled dangerous substance." (Id.) The Board also objects to the characterization of respondent's discourse with Mr. MacDonald on May 20, 1994 concerning this incident in that the ALJ states, "Mr. MacDonald recalled that she had voluntarily admitted herself into the Lighthouse seeking assistance for her 'slip'." (Initial Decision at pp. 9, 10) The Board insists that no place in Joint Exhibit 3, the memorialization of that conversation, does Mr. MacDonald indicate that he considered respondent's actions a "slip." (Board's Exceptions at pp. 4, 5)

Respondent asserts that the ALJ correctly represents respondent's behavior on May 19, 1994 as a "slip," and the expert testimony of Dr. Chase supports that characterization. (Respondent's Reply at p. 6) Moreover, respondent argues the Board makes a "preposterous assertion" when it contends that respondent did not act voluntarily when she contacted her supervisor, because she was under the influence of a substance and not aware of what she was doing. (Id. at p. 5) Respondent avers that, to the contrary, Mr. MacDonald's testimony regarding his conversations with respondent on May 20, 1994 suggests she clearly conveyed to him her concerns about staying in the position as substance awareness coordinator and, on the following Monday morning, May 23, 1994, respondent reported immediately to MacDonald's office to apologize for her behavior. (Id. at p. 6)

While acknowledging that respondent's drug addiction constitutes a handicap under New Jersey's Law Against Discrimination (Board's Exceptions at p. 5), the Board nevertheless contends that, by accommodating respondent's treatment in January of 1989 and permitting her return to the district thereafter, she has been given full opportunity for rehabilitation. "In addition, the Respondent had entered into a Health Improvement Program Contract and was aware that violation of same could result in her termination." (Id. at p. 9)

Respondent, however, concurs with the ALJ's determination that she should continue to be afforded reasonable accommodation for her handicap. (Respondent's Reply at p. 4) Concerning the Board's position that she be afforded only one chance at rehabilitation, respondent argues, "The Board presented no lay or expert testimony in support of this proposition, nor has it cited any authority to the ALJ or to the Commissioner for this proposition." (Id.) Instead, respondent counters, the expert testimony of Dr. Chase, belies the Board's position inasmuch as Dr. Chase testified that "****an addict will experience 'slips,' but

what is of the utmost importance in determining whether the addict is truly on the road to recovery is the response to the slip.” (Id.) Respondent claims that her slip was short in duration, was marked by extreme remorse, shame and depression and there was a quick cessation of addictive behavior within 24 hours. (Id.) Thus, she disputes that she is seeking a “second chance.”

The Board further rejects the portion of the ALJ’s analysis which considers federal standards when determining the number of chances at rehabilitation an employer must provide a substance-abusing civil servant, since the LAD is silent on the issue. The Board contends that the ADA does not apply to individuals currently engaged in the unlawful use of drugs and, inasmuch as the ALJ has instructed that the Federal Rehabilitation Act applies to federal employers and federal employees, as well as persons funded under federal programs, “***there is no need to force the imposition of a federal statute in this case.” (emphasis in text) (Board’s Exceptions at p. 7)

Respondent reasons that the ALJ properly considered federal standards, citing Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 97 (1990) for the proposition “***that in a variety of contexts involving allegations of unlawful discrimination, the New Jersey Supreme Court has looked to federal law as a key source of interpretive authority; standards developed under the LAD ‘have been markedly influenced by the federal experience.’” (Respondent’s Reply at p. 3)

The Board submits there is clear case law in New Jersey furnishing guidance with respect to an employer’s duty to provide a handicapped employee with “reasonable accommodation,” N.J.A.C. 13:13-2.5(b). As to the two divergent lines of case law on this point,

substance awareness activities working in a position involving public safety and dealing with vulnerable children, to the role of a police officer, firefighter, or corrections officer, rather than to a clerical worker or secretary. (Board's Exceptions at p. 6) The Board asserts that the ALJ inconsistently finds the role of a Spanish teacher "****is not akin to the position of policeman, firefighter or corrections officer in the sense that there is less concern about public safety and threat to life," yet acknowledges the prospect of "intangible" harm to students. (Initial Decision at pp. 19, 20)

Respondent asserts that the ALJ properly determined that she should not be held to the standard applied in Cahill, supra, and Tanner, supra, in that her position is not akin to that of a policeman, firefighter or corrections officer. (Respondent's Reply at p. 5) Rather, respondent continues, the ALJ properly adopted the "Three Strikes-You're Out" standard used in private industry (Id.) which permits respondent to remain in her position, subject to her participation in a plan proposed by Dr. Chase. Moreover, respondent contends that the Board has failed to meet its burden under Jansen, supra, of proving that her handicap precludes her from performing her job as a teacher or substance awareness coordinator. Respondent maintains that the Jansen standard requires the Board to show, with a reasonable degree of certainty, that respondent's employment poses a serious threat of injury to the health and safety of herself or others. (Id. at p. 7) In that there has been no showing that the Board cannot accommodate respondent, or that such accommodation would pose a threat of serious injury to the safety of herself or others, respondent maintains that the ALJ properly ordered respondent's reinstatement, and the initial decision should be affirmed.

Upon careful and independent review of this matter, the Commissioner initially finds that, based on the ALJ's determination that respondent used illegal amphetamines while

attending a conference in May 1994, and said use of the substance was a breach of the Health Improvement Program Contract which she signed with the Board in January of 1989 following her completion of a drug rehabilitation program (Initial decision at p. 11), respondent's actions constitute unbecoming conduct, pursuant to N.J.S.A. 18A: 6-10. Analysis must next consider the consequence of respondent's conduct, in view of her status as a handicapped person under the LAD. (Initial Decision at p. 15)¹

New Jersey's LAD establishes that it is unlawful to discriminate against any person because such person is or has been at any time handicapped, and further prohibits any unlawful employment practice against such person, unless the nature and extent of the handicap reasonably precludes the performance of a particular employment. N.J.S.A. 10:5-4.1.

Additionally, State Administrative Code provides:

An employer must make a reasonable accommodation to the limitations of a handicapped employee or applicant, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business.*** N.J.A.C. 13:13-2.5(b).

Thus, merged with the analysis of appropriate consequence for respondent's conduct must be an examination of the Board's action to determine whether it has reasonably accommodated respondent's handicap.

The Commissioner has long recognized that teachers hold a position demanding public trust, In the Matter of the Tenure Hearing of Jeffrey Wolfe, School District of the Township of Randolph, Morris County, 1980 S.L.D. 721, 724, citing In the Matter of the Tenure

¹ Here, the Commissioner notes that the Board does not challenge the ALJ's finding that respondent is afforded handicapped status under New Jersey's LAD, N.J.S.A. 10:5-5q (Board's Exceptions at p. 5).

Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County, 1974

S.L.D. 97, 98. Consequently, teachers are held to a higher standard of conduct:

This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the childrenthe teacher is an enormous force for improving the public weal. Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling.”
In re Sammons, 1972 S.L.D. at 302.

As such, the Commissioner cannot concur with the ALJ’s finding that the “three strikes” standard followed in private industry should be applied to the matter herein. (Initial Decision at p. 20) Instead, the Commissioner recognizes that a determination of fitness for a particular position in a school system requires a balancing of interests, In the Matter of the Tenure Hearing of Arlene Dusel, 1978 S.L.D. 526, 531. Under the particular circumstances existing in this matter, and mindful of the paramount role which local districts are assigned in the struggle to prevent substance use among students,² the Commissioner finds that the Board has reasonably accommodated respondent’s handicap by supporting her effort to obtain treatment for her chemical addiction in 1989 so as to permit her return to the district thereafter. Moreover, the Commissioner notes that respondent understood, or should have understood, upon signing the Health Improvement Program Contract that disciplinary action such as this could ensue upon her use of an illegal substance.³ Consequently, the Commissioner finds that the balancing of interests herein, Dusel, supra, compels that respondent be terminated from her position.


² See N.J.S.A. 18A:40A-1 et seq. and N.J.A.C. 6:29-6.

³ Paragraph six of the Health Improvement Program Contract states, “Should testing at any time be clearly positive, Ms. Dublinsky [Yanniello] understands that disciplinary action by the Millville Board of Education shall be warranted.”

Further, the Commissioner explicitly rejects the significance placed by the ALJ on the fact that students were not exposed to respondent's addictive behavior, and that respondent voluntarily reported her actions to the district while also seeking assistance from a treatment facility. Such rationale would permit repeated use of an illegal substance, provided the employee did not allow students to be exposed to such use, and provided, following every "slip," the employee voluntarily reported the action and sought assistance.

Accordingly, respondent is hereby dismissed from her tenured position with the Board as of the date of this decision, and this matter will be forwarded to the State Board of Examiners for action as it deems appropriate pursuant to N.J.A.C. 6:11-3.6.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

JUNE 12, 1995

DATE OF MAILING JUNE 13, 1995

EDU #8800-94
C # 203-95
SB # 78-95

IN THE MATTER OF THE TENURE :
HEARING OF SONDRA YANNIELLO, : STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY : DECISION
OF MILLVILLE, CUMBERLAND COUNTY. :

Decided by the Commissioner of Education, June 12, 1995

For the Petitioner-Respondent, Russell E. Paul, Esq.

For the Respondent-Appellant, Selikoff & Cohen (Stephen R. Cohen, Esq.,
of Counsel)

Sondra Yanniello (hereinafter "respondent") commenced her employment with the Board of Education of the City of Millville (hereinafter "Board") as a language teacher in January 1986. In December 1988, after respondent revealed to her principal that she had a drug problem, she entered into a 28-day inpatient treatment program, which she successfully completed. When respondent returned to the district in January 1989, she signed a Health Improvement Program Contract as a condition of her continued employment in which she agreed to submit to random drug testing during the 1988-89 school year and testing in subsequent years if there were ever evidence or suspicion of a renewed problem. Respondent acknowledged her understanding therein that if such testing proved to be positive, she would be subject to disciplinary action. In

1/8/95

1993, the Board appointed respondent to a position as a substance awareness counselor.

There was no further evidence of drug use until May 20, 1994. At that time, respondent had been sponsored by Millville Senior High School to attend a workshop in Toms River on drugs in sports when she took "two diet pills" containing amphetamine, a controlled dangerous substance, which she indicated she had obtained from a friend. Respondent's supervisor, Franklin MacDonald, testified that he had received four phone calls from respondent beginning at approximately 7:40 a.m. on the morning of Friday, May 20. As he related in a memorandum to respondent dated May 23, 1994: "Your disoriented state during the first and second phone calls prompted my concern....You appeared out of control in the morning at your hotel, your conversation rambled, seemed disjointed and, at times, you made little sense." Exhibit J-3, in evidence. Respondent told MacDonald that she had taken a drink the night before. Fearing for respondent's safety, MacDonald advised her not to drive to the workshop and told her that he would arrange for someone to pick her up. Tr. 2/8/95, at 64. Later that day, respondent called MacDonald from a drug and alcohol rehabilitation center. During the course of the day, MacDonald spoke to the acting principal and expressed concern regarding a possible relapse of respondent's drug abuse. MacDonald related in his memorandum that at their meeting held that morning, respondent had expressed "embarrassment and sorrow for your actions on Friday and your guilt for drinking Thursday evening, May 19, 1994 (Note - you denied the use of drugs)." Exhibit J-3, in evidence.

Pursuant to the terms of her Health Improvement Program Contract, respondent consented to a drug test, which revealed the presence of amphetamines. She subsequently acknowledged that she had lied about her use of illegal drugs, stating that she was afraid and embarrassed to admit to the drug use and contending that society more readily accepted social drinking. Tr. 2/8/95, at 178.

On June 21, 1994, the Board certified the instant tenure charges against respondent for unbecoming conduct as the result of that incident.

On April 20, 1995, an Administrative Law Judge ("ALJ"), finding that respondent's addiction to drugs was afforded handicapped status under the New Jersey Law Against Discrimination, concluded that one "slip" did not provide just cause for a teacher's termination. Nor, however, did he find that the chances for rehabilitation should be endless:

The concept of reasonable accommodation as it pertains to a teacher does not include the concept of unlimited opportunities to seek recovery. The teacher's interest in obtaining recovery must be balanced against the school district's interest in providing a drug free environment for students. If, for example, respondent had not voluntarily admitted her slip and sought recovery or if she had ingested drugs on school property or the effects of drugs were manifest while she was teaching in the school, termination would be the appropriate penalty upon a second slip.

Initial Decision, slip op. at 21.

The ALJ recommended that respondent forfeit the 120 days' salary which had been withheld following certification of the tenure charges.

On June 12, 1995, the Commissioner adopted the ALJ's finding that respondent was guilty of unbecoming conduct, but rejected the ALJ's recommended penalty. The

Commissioner disagreed with the ALJ's finding that a "three strikes" standard should be applied to this case, and rejected the significance placed by the ALJ on the fact that students were not exposed to respondent's addictive behavior and that she had voluntarily reported her actions to the district while also seeking assistance from a treatment facility. The Commissioner noted that such rationale would permit repeated use of an illegal substance provided the employee did not allow students to be exposed to such use and that the employee voluntarily reported each "slip" and sought assistance. He also found that the Board had reasonably accommodated respondent's handicap by supporting her effort to obtain treatment for her addiction in 1989 so as to permit her to return to work in the district. Under the circumstances, the Commissioner determined that dismissal of respondent from her tenured employment was the appropriate penalty for her unbecoming conduct.

Respondent filed the instant appeal to the State Board.

After a thorough review of the record, we affirm the determination of the Commissioner to dismiss respondent from her tenured employment, as modified herein.

As acknowledged by the ALJ and Commissioner, drug addiction is a handicap within the protection of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. Matter of Cahill, 245 N.J. Super. 397, 400 (App. Div. 1991). "[W]here feasible, an employer should afford an opportunity for rehabilitation to an employee handicapped by substance abuse." Id. at 401. However, "[t]he employer is not required to assume—or hope—that the employee will limit alcohol and other drug consumption to off-duty hours, or that the effects of drugs will be dissipated by the time the work day begins." Id.

In State-Operated School District of Jersey City v. Dorothy Howard, 95 N.J.A.R. 2d (EDU) 301 (App. Div. 1995), the district board filed tenure charges of chronic and excessive absenteeism against a tenured staff member following her successful completion of a residential alcohol abuse program. The Appellate Division affirmed the State Board's determination that dismissal of the staff member was not appropriate under those circumstances. The State Board observed that the record in that case demonstrated that the staff member was successfully addressing the underlying cause of her past absenteeism and was able to return to work. The State Board found nothing in the record of that case to warrant a conclusion that she would abandon her program of recovery thereafter or that she was not capable of satisfactorily fulfilling her job responsibilities. The Appellate Division stressed, however, that "nothing in the State Board's decision or in this opinion would prevent the district from refiling tenure charges in the event of a failure of Howard's rehabilitation in the future." Id. at 302.

Under the particular facts in the record before us, we agree that the Board has demonstrated respondent's unbecoming conduct and that dismissal of respondent from her tenured employment is the appropriate penalty.

As noted by the Commissioner, the Board reasonably accommodated respondent's handicap. The Board supported respondent's efforts in undergoing a 28-day inpatient drug rehabilitation program and subsequently reinstated her on the condition that she submit to drug testing if there were ever further suspicion of illegal drug use. When such a suspicion arose in May 1994, respondent tested positive for amphetamines.

We emphasize, moreover, that at the time of her positive drug test, respondent was employed in the district as a substance awareness counselor, a position in which she was responsible for counseling students on drug use and assisting students with drug related problems. The significance of respondent's responsibilities was underscored by MacDonald, who testified that "[t]he fact that she is acting in the capacity of a substance awareness coordinator forbids her from using any kind of illegal drug or alcohol, for that matter." Tr. 2/8/95, at 90.

Finally, we reject the ALJ's finding, apparently adopted by the Commissioner, that respondent voluntarily reported her "slip" to school administrators. It is undisputed that respondent expressly denied using drugs, the basis for her addiction, until after the drug test came back positive, claiming instead that she had consumed alcohol. Notwithstanding the fact that respondent may have been afraid and embarrassed to acknowledge her relapse, tr. 2/8/95, at 178, we find that she demonstrated a lack of candor in explaining her "disoriented state" to her supervisor.¹

Accordingly, under the particular facts in the record before us, we affirm the determination of the Commissioner to dismiss respondent from her tenured

¹ We note, in response to respondent's exceptions, that the record does not support her contention that she had called her supervisor on May 20, 1994 to report her "slip" and to seek his help. Rather, the evidence indicates that respondent had called to express an urgent need to meet with school administrators regarding the impending loss of her substance awareness position as the result of another staff member exercising bumping rights thereto. As previously noted, respondent's supervisor indicated that respondent's disoriented state during her first and second phone calls had prompted his concern. He stated that respondent had appeared out of control and that her conversation had rambled, seemed disjointed and made little sense.

Nor does the record support respondent's contention that the Board failed to provide her with promised accommodations and, in so doing, may have contributed to her "slip." Contrary to respondent's assertion in her exceptions, the Board did not agree in the Health Improvement Program Contract to provide respondent with "an employee assistance program, counselling [sic] and support for her in the event she suffered another slip." Respondent's Exceptions, at 4. Rather, that agreement allowed respondent to complete a drug treatment program and acknowledged respondent's understanding that she would be subject to disciplinary action in the event she ever tested positive for drugs in the future.

employment, as modified herein. Respondent's request for oral argument is denied as not necessary for a fair determination of this matter.

Attorney exceptions are noted.

Jean D. Alexander abstained.

January 8, 1997

Date of mailing JAN 10 1997

204-95

EDNA THOMPSON,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF PLEASANTVILLE, ATLANTIC	:	
COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner, former Assistant Business Administrator, alleged Board abolished her position in an arbitrary, capricious and unreasonable manner in violation of N.J.S.A. 18A:28-9.

ALJ concluded petitioner failed to prove that the Board's action to abolish her position was done for reasons other than to reorganize the Business Office. Moreover, ALJ found that there were no violations of the Open Public Meetings Act. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

JUNE 14, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1664-94

AGENCY REF. NO. 13-1/94

EDNA THOMPSON,

Petitioner,

v.

BOARD OF EDUCATION OF THE

CITY OF PLEASANTVILLE,

ATLANTIC COUNTY,

Respondent.

Harry Furman, Esq., for petitioner, (Eisenstat, Gabage, Berman & Furman, attorneys)

James L. Jackson, Esq., for respondent,

Record Closed: March 16, 1995

Decided: April 28, 1995

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Edna Thompson, alleges that the action by the Board of Education of the City of Pleasantville (Board) to abolish the position of Assistant School Business Administrator, thus reducing her annual salary, was arbitrary, capricious and lacked good faith. The Board denies

petitioner's allegation and asserts that its actions to abolish the position was in accordance with the statutes and in good faith.

The Commissioner of Education (Commissioner) was in receipt of petitioner's Petition of Appeal on January 24, 1994. On February 23, 1994, the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A prehearing conference was held on August 10, 1994, where, among other things, the issues to be determined were set forth and the hearing dates established.

The hearing was held on January 12 and 13, 1995, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey. The parties requested, and were granted leave, to submit post hearing briefs of law. The hearing record closed with the receipt of the last submission on March 16, 1995.

ISSUES

The issues to be determined by this tribunal, as agreed upon by the parties, are these:

1. Whether the Board's action to abolish the position of Assistant Business Administrator was arbitrary, capricious and lacking good faith, in violation of N.J.S.A. 18A:28-9?
2. If, in fact, the abolition of the position of Assistant Business Administrator was justifiable, what legal rights did petitioner maintain with respect to her employment with the Board?

FINDINGS OF FACT

Based upon the testimony and other evidence adduced at the hearing, and having given fair weight thereto, I **FIND** the following **FACTS** in this matter:

Petitioner commenced her employment with the Board in 1987 in its Business Office in the position of bookkeeper. In or about 1980, she was transferred to the Office of the Superintendent of Schools with the title of Administrative Assistant to the Superintendent. While petitioner served in the Office of the Superintendent, the Board created the unrecognized title of Assistant Business Administrator in its Business Office. Petitioner was appointed to the position on or about October 6, 1992.

In or about 1987, petitioner began taking course work which would lead to her obtaining Certification as a School Business Administrator. Petitioner completed the required course work for the certificate in 1991. On September 9, 1991, the Board's Secretary School Business Administrator wrote a letter to the Atlantic County Superintendent of Schools outlining petitioner's career with the Board and her duties and responsibilities under the title of Assistant Business Administrator (P-2).

On November 13, 1991, Janice M. Howe, Certification Analyst, Office of Atlantic County Superintendent of Schools, wrote petitioner concerning petitioner's status with regard to a School Business Administrator Certificate. Ms. Howe stated the following:

A review of your transcripts and experience has been completed in regards to the above certification.

Our Trenton Office has notified us that before a Certification of Eligibility can be issued, a candidate must present evidence of five (5) years of School Board Secretary experience.

Enclosed is a copy of the current requirements.

If there are any questions/concerns, please do not hesitate to contact our office. (P-4)

The Board adopted a Job Description for the position of Assistant Business Administrator which provided, among other things, that the individual so appointed hold a School Business Administrator Certificate (the Board's existing staff member was required to obtain the certification by January 1993). (R-1)

In or about September 13, 1993, Judith Wilcox commenced service as the Board's Superintendent of Schools. On September 14, 1993, petitioner executed and signed a salary status with the Board in the amount of \$42,852 for the 1993-94 school year in the position of Assistant Business Administrator (P-3).

On or about October 12, 1993, petitioner was called to Superintendent Wilcox's office concerning petitioner's employment position as Assistant Business Administrator. Petitioner understood that Superintendent Wilcox was concerned about petitioner's lack of certification for the position. Superintendent Wilcox intended to recommend to the Board that the position be abolished. Superintendent Wilcox did not advise petitioner of the Superintendent's intention to recommend to the Board the abolition of the position of Assistant Business Administrator.

On October 15, 1993, Superintendent Wilcox sent petitioner a letter which stated, in pertinent part, as follows:

This letter is to inform you that the Board of Education, on Tuesday, October 26, 1993, at 5:30 p.m. in close session, intends to discuss matters which are related to your employment.

If you wish these matters to be discussed in open session, please contact me on or before Thursday, October 21, 1993. Thank you. (P-9)

Two other Board employees received similar letters, *i.e.*, Kemry McFadden, Administrative Assistant to the Superintendent, and Effie Jenkins Smith, Community Education Coordinator.

Subsequent to receipt of Superintendent Wilcox's letter dated October 15, 1993, petitioner spoke with the Superintendent's secretary on October 21, 1993. Petitioner testified she advised the secretary that petitioner wished to speak with the Board concerning the Superintendent's letter. Petitioner testified that the Superintendent's secretary stated there was no need for petitioner's to speak with the Board because a number of individuals had received such letters and the Board just intended to change job titles. Petitioner presented no

corroborating testimony or other evidence to support this assertion. Nor did petitioner state she wished that her job status be discussed in open or closed session by the Board.

Following her conversation with the Superintendent's secretary on October 21, 1993, petitioner contacted the Atlantic County Superintendent of Schools Office and requested to be put in touch with Jack Epstein, a certification examiner with the New Jersey Department of Education (DOE), State Board of Examiners. Subsequently, the DOE Board of Examiners issued petitioner a Certificate of Eligibility for the School Business Administrator Certificate, dated October 1993. (P-6) The Certificate of Eligibility reads, in part, as follows:

[This is to certify that EDNA M. THOMPSON]

Has completed certain requirements for certification and is eligible to seek employment in positions requiring the Provisional Certificate in the area(s) Listed below. The Provisional Certificate will be issued contingent upon evidence of employment in a district that agrees to provide an approved induction program, including required job support, performance evaluation and professional coursework.

SCHOOL BUSINESS ADMINISTRATOR (P-6)

On October 22, 25 and 26, 1993, petitioner had conversations with Superintendent Wilcox concerning her certification for the position as Assistant Business Administrator. Petitioner testified that on October 22, 1993, Superintendent Wilcox advised petitioner that because petitioner did not have the appropriate certification, the Superintendent would recommend to the Board that it abolish the position of Assistant Business Administrator. Superintendent Wilcox denies she advised petitioner of her intention to recommend the abolition of the position.

On October 25 and 26, 1993, petitioner advised Superintendent Wilcox that petitioner's Certification of Eligibility for School Business Administrator was forthcoming. On October 26, 1993, the Board followed Superintendent Wilcox's recommendation and, among other things, abolished the position of Assistant Business Administrator.

Superintendent Wilcox testified that her recommendation to the Board to abolish the Assistant Business Administrator's position was based upon a total package of proposals to

achieve instructional services, improve student achievement, student attendance and physical facilities. The Superintendent looked at the various positions in the school district and determined that the position of Assistant School Business Administrator was not necessary nor needed in the delivery of services to the children of the district. The Superintendent determined that the job duties of the Assistant Business Administrator could be performed by others in the Business Office.

Superintendent Wilcox testified about other areas within the school district which were in need of reorganization and were included in her recommendations to the Board. In addition to the abolition of the Assistant School Business Administrator position, the Superintendent recommended the reorganization of the bookkeeper positions in the Business Office; separate the position of Maintenance Supervisor into two positions; *i.e.*, Facilities Supervisor and Maintenance Supervisor; separate the Board's Affirmative Action Officer from the Board's Personnel Office, among others. Superintendent Wilcox asserted that it was necessary to make the organizational changes in October 1993, rather than wait until the end of the 1993-94 school year.

There were no vacancies in bookkeeping within the Board's Business Office. There was however, a vacancy in a position of secretary for the Board's Good Start Program. The Board, therefore, transferred petitioner to this position, effective November 1, 1993, at an annual salary of \$25,893. (P-5). Petitioner refused to sign the Board's salary notice for the position at the salary of \$25,893 per year (P-5).

On November 19, 1993, petitioner wrote a letter to the Board's President and stated the following:

On yesterday, November 18, 1993 I received official notification that The Board of Education took action at its October 26th meeting to abolish the position of Assistant Business Administrator effective November 1, 1993. It is my understanding that the reason for this action was the lack of certification by the person in the position.

Perhaps seeing this in writing for the first time had its impact. It made me realize that I would be remiss if I failed to report to the Board circumstances surrounding my certification.

I initially applied for certification in September 1991, but was denied because I was not in the position of Business Administrator at that time. (See enclosed letters)

I called several times to see if they would reverse the decision and they would not, until October of 1993. I called my examiner, Jack Eckstein at the State Department and he informed me that I would receive a Certificate of Eligibility. (See enclosed)

The Certificate, dated October 1993 was issued, and would allow me to work in any position where certification is required.

The point that I am trying to make is that I did have certification before the effective date of the Boards' (sic) action.

Should you have any questions, please feel free to call me. (P-7)

Petitioner was offered the opportunity to appear before the Board. She met with the Board on December 27, 1993, where it reaffirmed its determination of October 26, 1993, to abolish the position of Assistant School Business Administration.

DISCUSSION AND CONCLUSIONS

The statutory basis upon which the Board abolished the position of Assistant School Business Administrator is found at N.J.S.A. 18A:28-9, and reads as follows:

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

Petitioner argues, among other things, that the Board violated the spirit and purpose of the Open Public Meetings Act (OPMA). Petitioner asserts that the general letter she received, dated October 15, 1993 (P-9) from Superintendent Wilcox was inadequate notice because it failed to communicate to petitioner the Superintendent's intention to recommend the abolition of the Assistant School Business Administrator position. Petitioner also contends that she was misled by the Superintendent's secretary who advised petitioner there was nothing to worry about when

petitioner sought to meet with the Board concerning the letter dated October 15, 1993. Petitioner further argues that in the conversations she had with Superintendent Wilcox between October 12 and 26, 1993, petitioner was not advised that the Superintendent intended to recommend the abolition of her employment position but, rather, was lead to believe that the Superintendent was concerned about petitioner's lack of certification for the position of Assistant School Business Administrator. In re Bd. of Ed. of the City of Englewood, 150 N.J. Super. 265 (App. Div. 1977); Rice v. Union Cty. Reg. High School Bd. of Ed., 155 N.J. Super. 64 (App. Div. 1977).

The Board counters that there is no contention that petitioner received the Superintendent's letter, dated October 15, 1993, (P-9) in an untimely fashion. It asserts that the letter is clear that the Board intended to discuss matters related to petitioner's employment. The Board argues that the notice to petitioner is sufficient and adequate to meet its obligation under N.J.S.A. 10:4-1 to -21, and decisional and case law. Burrows v. Ramapo Indian Hills Regional High School District, 93 N.J.A.R. 2d. (EDU) 605 at 609; Jamison v. Morris School District Board of Education, 198 N.J. Super. 411 (App. Div. 1985) at 416.

Petitioner further argues that the Board's motivation for the abolition of the position of Assistant School Business Administrator was in contravention of N.J.S.A. 18A:28-9 and represented an action which was arbitrary and capricious in nature. Petitioner contends there is an issue of credibility of the witnesses which is critical to this tribunal's determination. She asserts that all of her discussions with the Superintendent centered on the issue of petitioner's alleged defective certification to hold the position of Assistant School Business Administrator and the Superintendent's intention to recommend the abolition of the position. Petitioner avers there was no discussion of reorganization, economy or any other motivating factor for the abolition of the position. The only issue, she asserts, was her certification which, she contends, she satisfied prior to the Board's action on October 26, 1993. Superintendent Wilcox admitted on this hearing record that petitioner's certification was discussed and that reorganization of the Business Office was not discussed with petitioner. Moreover, petitioner asserts, the Superintendent provided no written documentation by way of memorandum or report to the Board of her intention, with an explanation of reasons, that a reorganization was contemplated. Moresh v. Bayonne Board of Education, 52 N.J. Super. 105 (App. Div. 1958); Klinger v. Cranbury Tp. Bd. of Ed., 190 N.J. Super. 354 (App. Div. 1984); Viemeister v. Bd. of Ed. of Prospect Park, 5 N.J. Super., 215

(App. Div. 1949). Therefore, petitioner contends, her testimony is more credible than Superintendent Wilcox that the Superintendent intended to abolish petitioner's position as Assistant School Business Administrator on the basis of petitioner's certification, not on the basis of any reorganization.

Petitioner argues there is nothing in N.J.S.A. 18A:28-9 which permits the Board to abolish a position on the basis of petitioner's alleged certification difficulties. She contends there is no managerial prerogative to abolish the position of Assistant School Business Administrator under the statute to deal with a problem Superintendent Wilcox perceived she had inherited; *i.e.*, petitioner's lack of certification.

Petitioner maintains that the element of good faith is essential in matters of position abolishment and reorganization. Lauten v. Board of Education of Jersey City, 1963 S.L.D. 119; Page v. Board of Education of City of Trenton and Maffei, 1975 S.L.D. 644. Good faith should be evident in all such instances of reorganization. Boeshore v. Board of Education of the Township of North Bergen, 1974 S.L.D. 805.

Petitioner contends that neither economy nor reorganization was the basis for the Board's action to abolish the position of Assistant School Business Administrator. She asserts that reorganization became convenient after-the-fact criterion to justify an arbitrary and capricious action by the Board. Petitioner argues that the Board's action should be voided as a matter of law and that she should be immediately restored to the position of Assistant School Business Administrator.

The Board argues that petitioner has failed to sustain her burden of proof that the Board violated N.J.S.A. 18A:28-9. It asserts that the authority of a board of education to abolish a position of employment, and thereby affect a reduction in force, is contained in N.J.S.A. 18A:28-9. Nothing in N.J.S.A. 18A:28-9, or case law interpreting that statute, requires that a superintendent of schools or a board of education must generate memoranda, reports or other written documents delineating a plan of reorganization within a school district. When a board of education votes publicly on personnel matters that it has discussed in closed session, it need not publicly reveal the reason for its action. Rice v. Union County Regional School Board of

Education, 155 N.J. Super. at pg. 72. A board need only return to public session, after having discussed personnel matters in closed session, and on the public record state any resolution pertaining to the closed session deliberations. Gayeski v. Hackensack Board of Education, 1989 S.L.D. at pg. 1264. The petitioner does not allege the Board took action to adopt the resolution which abolished the position in other than an open, properly advertised, public meeting.

The authority given to school boards to abolish positions or job titles within their school districts is discretionary. Action of the local board which lies within its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives. Kopera v. Board of Education of Town of West Orange, 60 N.J. Super. 288 (1960) at pg. 294. The Board, in the case at bar, contends that its action were neither arbitrary, capricious, without rational basis nor induced by improper motive.

The Board cites reorganization actions the Board adopted for the 1993-94 school year in addition to the abolition of the position of Assistant School Business Administrator. Superintendent Wilcox testified, without contradiction, that the Board approved the following:

- Effie Jenkins Smith was appointed Affirmative Action Officer for the District
- The job title Administrative Assistant to the Superintendent was changed to Administrative Assistant - Personnel
- The job description of the Director of Computer Services was changed to include responsibility for student transportation
- The three tier system of bookkeeper titles: Bookkeeper I, Bookkeeper II and Bookkeeper III was changed to one district title called Bookkeeper
- The district-wide position of Facilities Manager was created and filled
- All four supervisor positions in the district were abolished
- The position Director of Health, Physical Education and Athletics was created and filled
- The position of Elementary Guidance Counselor was created and filled for each of the elementary schools
- An additional Assistant Principal was hired for Leeds Avenue School, the largest elementary school in the district, giving that school two Assistant Principals instead of one
- Near the end of the school year an Assistant Superintendent was hired to aid the Superintendent in the area of curriculum and instruction.

The Board maintains that Superintendent Wilcox did not recommend the abolition of the Assistant School Business Administrator because of petitioner's problems with certification but rather, because in Wilcox's professional opinion the position was not needed. Actions of a Board of Education are entitled to a presumption of correctness, as well as a presumption that such actions will be upheld by the Commissioner of Education, absent a showing of bad faith, illegal motive or a lack of rational basis. Kopera v. West Orange Board of Education 60 N.J. Super. 288, Mackey v. Board of Education of the Borough of Ridgefield 83 S.L.D. 96, at pg. 100. Bad faith means improper or evil purpose or motive. Fegen v. Board of Education of Fair Lawn 1966 S.L.A. 167, at pg. 170.

The Board argues that presuming, arguendo, that it abolished the position of Assistant Business School Administrator because the petitioner lacks the certification as a school business administrator required by Exhibit R-1, the evidence presented does not show that such action by the Board would be arbitrary, capricious or without rational basis. Mackey v. Board of Education of the Borough of Ridgefield 83 S.L.D. at pg. 100; Page v. Board of Education of City of Trenton 75 S.L.D. 116. Nor could such action, if taken by the Board for that reason, be considered to have been taken in bad faith or for an improper, evil or illegal purpose under the circumstances that existed. Fegen v. Board of Education of Fair Lawn 1966 S.L.D. at pg. 170; Marotta v. Board of Education of the Borough of Sayreville 76 S.L.D. 676; Perry v. Board of Education of the Borough of Glen Rock 80 S.L.D. 655; Tinker v. Des Moines County School District 399 U.S. 503 (1969). Actions of a local board which lie within its discretionary powers may not be upset unless patently arbitrary without rational basis, or induced by improper motives Kopera v. Board of Education of the Town of West Orange 60 N.J. Super. 288 (App. Div. 1960) at pg. 294.

Having reviewed and considered the entire record in this matter, I **CONCLUDE** that petitioner has failed to carry her burden of proof, by a preponderance of the reliable and credible evidence, that the Board's action to abolish the position of Assistant School Business Administrator was done for reasons other than to reorganize its Business Office.

I **CONCLUDE** that petitioner failed to demonstrate that the Board's action to abolish the position of Assistant School Business Administrator was arbitrary, capricious, and lacking in good faith, or in violation of N.J.S.A. 18A:28-9.

While this tribunal may disagree with Superintendent Wilcox with respect to her conduct toward petitioner in their discussions concerning the abolition of the position then occupied by petitioner, there is no showing that the Board's action was in any manner violative of N.J.S.A. 18A:28-9. I **CONCLUDE** that the Superintendent's testimony was credible concerning her recommendations to the Board for the reorganization of the Board's Business Office. In re Perrone, 5 N.J. 514, 522 (1950).

I **CONCLUDE** there were no violations of the OPMA by the Board, N.J.S.A. 10:4-1 to -21. It provided petitioner proper notice of its pending actions concerning her employment position under N.J.S.A. 10:4-8 and as required by the Court's holding in Rice, supra.

I **CONCLUDE** that the Board has properly placed petitioner in an employment position which comports with her tenure status.

ORDER

Accordingly, it is **ORDERED** that the Petition of Appeal by Edna M. Thompson be and is hereby **DISMISSED** for the reasons set forth above.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 28, 1995
DATE

LILLARD E. LAW *by [Signature]*
LILLARD E. LAW, ALJ

5/1/95
DATE

Receipt Acknowledged:

[Signature]
DEPARTMENT OF EDUCATION

MAY 08 1995
DATE

Mailed to Parties:

[Signature]
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

PETITIONER

EDNA THOMPSON

JUDITH WILCOX

RESPONDENT

SKENDER ARRAMI

DOCUMENTS IN EVIDENCE

PETITIONER

- P-1 GENERAL APPLICATION FOR EMPLOYMENT
- P-2 LETTER, 9/9/91, TO COUNTY SUPERINTENDENT FROM BYRD
- P-3 NOTICE OF SALARY, SIGNED 9/14/93 FOR 1993-94
- P-5 LETTER, 11/13/91 TO THOMPSON FROM JANICE HOWE
- P-6 CERTIFICATION OF ELIGIBILITY, SCHOOL BUSINESS ADMINISTRATOR
ISSUED 10/93
- P-7 LETTER TO DOROTHY JOHNSON, PRESIDENT BOE FROM THOMPSON,
DATED 11/19/93
- P-8 N.J. DOE, OFFICE OF TEACHER CERTIFICATION AND ACADEMIC
CREDENTIALS, SCHOOL BUSINESS ADMINISTRATION, 10/26/93
- P-9 LETTER, 10/15/93 TO EDNA THOMPSON FROM JUDITH WILCOX

RESPONDENT

- R-1 JOB DESCRIPTION, ASSISTANT BUSINESS ADMINISTRATOR 12/89
- R-2 DATE OF HIRE BOOKKEEPER IN THE DISTRICT

EDNA THOMPSON, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE CITY : DECISION
 OF PLEASANTVILLE, ATLANTIC :
 COUNTY, :
 :
 RESPONDENT. :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner agrees with the findings and conclusions of the ALJ as articulated in the initial decision. The ALJ concluded, and the Commissioner concurs, that petitioner failed to demonstrate by a preponderance of the evidence that abolition of her position was arbitrary, capricious, improper or taken in bad faith. The Commissioner further concurs that the Board has the authority to reorganize personnel and thereby affect a reduction in force under N.J.S.A. 18A:28-9.

Accordingly, for the reasons well-expressed therein, the Commissioner affirms the initial decision of the Office of Administrative Law dismissing the within Petition of Appeal.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

JUNE 14, 1995

DATE OF MAILING JUNE 15, 1995

205-95

K.O.H., on behalf of his daughter, R.H., :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE TOWN- : DECISION
 SHIP OF EDISON, MIDDLESEX COUNTY, :
 RESPONDENT. :
 _____ :

SYNOPSIS

Petitioning parent challenged Board's expulsion of his daughter, R.H., for allegedly assaulting a teacher.

Having considered the transcripts of the testimony of witnesses presented at the hearings conducted by the Board of Education, the ALJ concluded that the Board gave petitioner full and fair opportunity to present R.H.'s case, including all mitigating circumstances and that the Board's decision to expel was justified especially in light of R.H.'s long record of disciplinary problems.

Commissioner adopted findings and determination in initial decision as his own, noting he had no reason to challenge the credibility assessments made by the ALJ. Petition was dismissed.

JUNE 14, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7179-94

AGENCY DKT. NO. #154-5/94

**K.O.H., ON BEHALF
OF HIS DAUGHTER, R.H.,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF EDISON,
MIDDLESEX COUNTY,**

Respondent.

Mark W. Fox, Esq., for the petitioner

Viola S. Lordi, Esq., for the respondent (Wilentz, Goldman and Spitzer, attorneys)

Record Closed: April 26, 1995

Decided: April 28, 1995

BEFORE ROBERT S. MILLER, ALJ:

STATEMENT OF THE CASE
AND PROCEDURAL HISTORY

K.O.H. ("petitioner"), on behalf of his daughter R.H. (a minor), appeals from a decision of the Board of Education of the Township of Edison ("respondent" or "the Board") expelling R.H. from the J.P. Stevens High School as a result of an altercation that occurred there on October 15, 1993 between R.H. and Richard Krychowecky, a teacher at the high school.

Specifically, petitioner seeks a determination from the Commissioner of Education that the expulsion decision of the Board of Education was arbitrary, capricious and unreasonable and therefore should be declared null and void. On May 13, 1994, petitioner filed a petition of appeal in the Office of the Commissioner of Education. Thereafter, a timely answer was submitted by the respondent. On July 27, 1994 this matter was filed in the Office of Administrative Law for determination as a contested case pursuant to the New Jersey Administrative Procedure Act.

A prehearing conference was held on October 26, 1994. Subsequently, respondent moved to have the case heard and decided on the basis of the record below. This motion was granted and, on January 3, 1995, I entered an order to that effect and further ordered that no additional testimony would be taken except on the question of "whether the Board's decision was arbitrary, capricious or tainted by bias."

Subsequently, counsel decided that no testimony whatever would be presented at the hearing. Rather, counsel appeared before me on March 14, 1995 and submitted oral argument. The record closed upon the filing of reply briefs.

The essential background facts in this case are not in dispute, having been established by the pleadings, by stipulations made by counsel at the outset of the hearing, and by the submission of documentary evidence and of the transcripts of the hearings conducted by the Board of Education.

FINDINGS OF FACT

On October 15, 1993 the principal of the J.P. Stevens High School suspended R.H. for five days based upon an alleged assault by her on a teacher (Mr. Krychowecy) on that date.

On October 25, 1993, following further investigation, the superintendent of the Edison Township public schools extended the suspension of R.H. for an additional fifteen days. R.H. was then formally charged with (1) insubordination and (2) physically assaulting a teacher, and the superintendent referred the matter to the Board.

A hearing before the Board on the subject of the aforesaid charges against R.H. was scheduled for November 4, 1993. The Board, however, granted the request of counsel for R.H. to adjourn the proceedings so as to allow him to investigate the matter and further prepare R.H.'s defense. On November 15, 1993 the Board indefinitely extended the suspension of R.H., pending its determination at the expulsion hearing. R.H. was placed on home instruction in the interim.

Upon the motion of the Board, Administrative Law Judge Bruce R. Campbell entered an order on December 6, 1993 directing that a child study team evaluation be conducted respecting R.H. The Board's motion was made in response to the refusal of R.H.'s parents to consent to the child study team evaluation, required by N.J.A.C. 6:28-2.8(g) to be completed prior to consideration of a pupil for expulsion.

The expulsion hearing was conducted by the Board on a series of dates from December 1993 through March 1994. On March 4, 1994 the Board found by a preponderance of the credible evidence that on October 15, 1993 R.H. was insubordinate and did commit an assault upon a teaching staff member in the employ of the Board.

On March 15, 1994 the Board continued the hearing for the purpose of receiving testimony and argument of counsel on the subject of factors in aggravation and mitigation of R.H.'s conduct. R.H. was also represented by counsel at the March 15 hearing, on which date the Board expelled R.H. from the Edison Township school system. The Board determined, however,

that she would not be prevented from participating in the G.E.D. Program through the Edison Township Adult School.

The hearing before me was conducted on March 14, 1995, by which time R.H.'s class had graduated and R.H. had received a general equivalency diploma.

ISSUE AND ANALYSIS

There are two statutory provisions directly applicable to this case.

N.J.S.A. 18A:37-2 provides that any "pupil who is guilty of . . . open defiance of the authority of any teacher or person having authority over him . . . shall be liable to punishment and to suspension or expulsion from school."

Pursuant to N.J.S.A. 18A:37-2.1, any pupil who commits an assault upon a teacher "shall be immediately suspended from school consistent with procedural due process pending expulsion proceedings before the local board of education."

As noted by the United States Supreme Court twenty years ago, local boards of education have been expressly charged by the Legislature with the orderly conduct of public schools and, as a corollary, have been vested with broad discretion in matters of pupil discipline. See Goss v. Lopez, 419 U.S. 565, 573, 95 S. Ct. 729, 736, 42 L. Ed. 2d 725, 734 (1975) ("The authority possessed by the State to prescribe and enforce standards of conduct in its schools . . . [is] concededly very broad. . .").

In assessing the propriety of the instant expulsion, the scope of review of the Commissioner of Education is circumscribed. As noted by Administrative Law Judge Metzger in M.G. v. Monmouth Regional High School Bd. of Educ., 91 N.J.A.R.2d (Vol. 4) 38, 40 (Education), adopted in part, rejected in part, State Bd. of Educ., 92 N.J.A.R.2d (Vol. 4) 364 (Education): "[Board] decisions in this matter carry a presumption of validity and [it is the] petitioners who must show that the actions taken were arbitrary and unreasonable, if they are to be disturbed." In adopting the administrative law judge's decision, the Commissioner of

Education likewise noted the limited scope of review: “*** it is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards.” 91 N.J.A.R.2d (Vol. 4) at 42, quoting Boult v. Board of Education of the City of Passaic, 1939-49 S.L.D. 7 (1946), aff’d, State Board of Education 15, 135 N.J.L. 329 (Sup. Ct. 1947), aff’d, 136 N.J.L. 521 (E. & A. 1948).

Among the many judicial decisions expressing the same concepts are: Quinlan v. Board of Education of North Bergen Township, 73 N.J. Super. 40, 46-7 (App. Div. 1962); Kopera v. West Orange Board of Education, 60 N.J. Super. 288, 294 (App. Div. 1960); Thomas v. Morris Township Board of Education, 89 N.J. Super. 327, 332 (App. Div. 1965), aff’d, 46 N.J. 581 (1966); and Boyle v. Riti, 175 N.J. Super. 158, 166 (App. Div. 1980). In Boyle, the court declared:

It is well established that a presumption of reasonableness attaches to the action of an administrative agency and the party who challenges the validity of that action has the burden of showing that it was arbitrary, unreasonable or capricious. . . . Also, where the administrative record discloses a reasonable basis for findings and accordant administrative action, . . . [the reviewing court’s] duty is ordinarily to uphold such action.

[175 N.J. Super. at 166 (citations omitted).]

There are, of course, numerous administrative law cases to the same effect. These include Boult, supra; M.G. v. Board of Education of West Deptford, 83 S.L.D. 339, 354 (Commissioner of Education cannot substitute his judgment for that of the local board of education and can only determine whether it had a reasonable basis for its conclusion); and K.L. v. Board of Education of Matawan/Aberdeen High School District, 91 N.J.A.R.2d (Vol. 4) 74, 76 (Education) (discretionary action of local school board may not be upset, unless patently arbitrary, without rational basis, or induced by improper motives).

The judicial rationale for this deference to local boards of education appears to be twofold: (1) the ability of the local board of education as the fact-finder in the first instance to see and hear the witnesses and to determine credibility, and (2) the expertise of the local board with respect to its knowledge of local conditions and circumstances.

Turning to the instant case, the issue presented may be phrased as follows: Does a fair reading of the record established below lead to the conclusion that the decision of respondent was arbitrary, unreasonable, capricious, or tainted by bias? For the reasons expressed hereafter, I am of the opinion that this question should be answered in the negative.

There were two quite different versions of what occurred in the cafeteria at the J.P. Stevens High School around noon on October 15, 1993. The version of Mr. Krychowecky was as follows: While he was on cafeteria duty, he observed R.H. "cut the line." He approached R.H. and asked her several times to go to the end of the line. R.H. ignored him each time. He then took the container of milk out of her hand. Without warning, R.H. then punched him in the head. He was stunned. R.H. continued to throw punches. With some difficulty but without using excessive force, Mr. Krychowecky managed to subdue her, bring her under control, escort her out of the cafeteria, and turn her over to the security guard.

The version of R.H. was essentially as follows: She did not "cut the line." Mr. Krychowecky was mistaken in his belief and started to "hassle" her. Mr. Krychowecky approached her and when she ignored him he pushed her. R.H. reacted instinctively by hitting Mr. Krychowecky, and at that point he overreacted, forced her onto the ground and pushed her arm behind her back, causing her severe pain, and generally using excessive force.

There were witnesses supporting each version. Among those corroborating R.H.'s story were D.W., S.J., P.L., and J.Y. (all students). Confirming the version of Mr. Krychowecky were, among others, A.W., P.L.H., S.S., and A.D. (students) and Pamela Brown and Dorinda Tooker (teachers).

I have read the transcripts of the testimony of the witnesses called by both sides. In my opinion, neither the quantity of the witnesses nor the quality of their testimony preponderated in

favor of petitioner. Indeed, it was my impression that the quality of the testimony supporting Mr. Krychowecky's version was superior to the quality of the testimony supporting R.H.'s version. For example, according to Mr. Ventola (graphic arts teacher), one of R.H.'s principal witnesses (P.L.) was in his classroom when the altercation occurred. Another witness for petitioner (S.J.) declared: "She ran towards him and she hit him and at that time Mr. Krychowecky was real upset . . . so he grabbed her by the neck and he started pushing her backwards and she started stumbling." R.H. herself admitted that she ignored Mr. Krychowecky and that she hit him with her closed fists (although she claimed that she did so only after he first pushed her).

Typical of the student eyewitnesses supporting Mr. Krychowecky was A.W., who confirmed that R.H. had "cut the line," that she ignored Mr. Krychowecky, and that she precipitated the incident and initiated the violence; A.W. was of the opinion that R.H.'s striking of Mr. Krychowecky was not warranted because she was in no way threatened or abused. Another witness (P.L.H.) stated that she saw Mr. Krychowecky speaking to R.H. and that the latter ignored him; he then took the milk out of R.H.'s hand and "she stepped forward and slapped him across the face." P.L.H. added that "she was going for him again," and that "he was trying to restrain her."

In short, I am of the opinion that petitioner has been unable to overcome the presumption of correctness and reasonableness which attaches to the decision of respondent with respect to the culpability of R.H. for the altercation and, in particular, the determination that R.H. physically assaulted Mr. Krychowecky during school hours on October 15, 1993.

With respect to the decision of the Board of Education to expel R.H., rather than to impose a lesser penalty, it should be noted that R.H. had a long record (going back to at least sixth grade) of insubordination, tardiness, disrespect for authority, and initiating violent behavior; on one occasion she pushed another teacher in the chest. This prior record was amply supported by the evidence presented at the hearing and was not effectively disputed by petitioner.

In my opinion, the Board of Education gave full and fair opportunity for petitioner to present her case, including all mitigating circumstances, and its decision to expel, under the

circumstances here (including the need to protect its teachers from assault and students from violence), was justified.

CONCLUSION AND ORDER

For the reasons expressed above, I **CONCLUDE** that petitioner's application to have the Commissioner of Education declare null and void the decision of the Edison Township Board of Education expelling R.H. from the Edison Township school system be denied. It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 28, 1995
DATE

Robert S. Miller
ROBERT S. MILLER, ALJ

Receipt Acknowledged:

4/28/95
DATE

[Signature]
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 05 1995
DATE

Jeff S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE

For the Petitioner:

P-11 Diagram of J.P. Stevens High School cafeteria

For the Respondent:

None

WITNESSES

For the Petitioner:

None

For the Respondent:

None

K.O.H., on behalf of his daughter, R.H., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN- : DECISION
SHIP OF EDISON, MIDDLESEX COUNTY, :
RESPONDENT. :
_____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties. It is, however, noted that on May 18, 1995, petitioner attempted to submit pro se "Exceptions by Petitioner" in this matter. Such submission was apparently without the knowledge or consent of his attorney of record, nor was there any indication that it had been served on opposing counsel. By letter dated May 19, 1995, petitioner's submission was returned to him and he was advised by the Director of the Bureau of Controversies and Disputes that, pursuant to N.J.A.C. 1:1-5.1, a party to administrative proceedings may choose one of several options with respect to his representation and that, because petitioner elected throughout the course of the instant proceedings to be represented by counsel with all submissions in this matter being accomplished by and through such legal counsel, absent notification to the Bureau of Controversies and Disputes that he is no longer represented by an attorney, petitioner is unable to make submissions of any kind on his own behalf to the record of this matter.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that petitioner has not met the burden of establishing that the Board's action in expelling R.H. was arbitrary, capricious, or unreasonable. He further finds that the record before him does not provide any cause to challenge the credibility assessments made by the ALJ. As such, the Board's action in this matter will not be overturned by the Commissioner.

Accordingly, the initial decision of the Office of Administrative Law is adopted as the final decision in this matter for the reasons clearly articulated therein, and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

JUNE 14, 1995

DATE OF MAILING JUNE 15, 1995

EDU #7179-94
C # 205-95
SB # 77-95

K.O.H., on behalf of his daughter, R.H., :
 PETITIONER-APPELLANT, :
 V. : STATE BOARD OF EDUCATION
 BOARD OF EDUCATION OF THE : DECISION
 TOWNSHIP OF EDISON, MIDDLESEX :
 COUNTY, :
 RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, June 14, 1995

For the Petitioner-Appellant, Karriem O. Hassan, pro se

For the Respondent-Respondent, Wilentz, Goldman & Spitzer (Viola S. Lordi, Esq., of Counsel)

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

Donald C. Addison, Jr., Wendel E. Daniels and Thomas P. McGough abstained.

February 7, 1996

Date of mailing FEB 09 1996

206-95

IN THE MATTER OF THE ANNUAL SCHOOL :
ELECTION HELD IN THE SCHOOL DISTRICT : COMMISSIONER OF EDUCATION
OF THE TOWNSHIP OF STAFFORD, : DECISION
OCEAN COUNTY. :
_____ :

JUNE 14, 1995

IN THE MATTER OF THE ANNUAL SCHOOL :
 ELECTION HELD IN THE SCHOOL DISTRICT : COMMISSIONER OF EDUCATION
 OF THE TOWNSHIP OF STAFFORD, : DECISION
 OCEAN COUNTY. :
 _____ :

The announced results of the balloting for three (3) members of the Board of Education for full terms of three (3) years each at the annual school election held on April 18, 1995 in the School District of the Township of Stafford were as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Carol G. Williams	832	82	914
Richard Czajkowski	629	49	678
Joseph Suizzo	534	40	574
Dom Ross	500	63	563
John L. Steele	463	81	544
Ray Fix	452	77	529
Brian Delaney	408	51	459
Andrew Sivil	391	52	443

Pursuant to a letter request from Dom Ross, dated April 24, 1995, the Commissioner directed his representative from the Office of the Ocean County Superintendent of Schools to conduct a recount of machine ballots cast for members of the Board pursuant to N.J.S.A. 18A:14-63.2. The machine recount was conducted on May 9, 1995 at the Ocean County Voting Machine Warehouse in Dover Township. Absentee ballots were recounted by the Board of Elections pursuant to N.J.S.A. 19:57-24.

On recount, the results of the election were as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Carol G. Williams	832	82	914
Richard Czajkowski	629	49	678
Joseph Suizzo	534	40	574
Dom Ross	500	63	563
John L. Steele	463	81	544
Ray Fix	452	77	529
Brian Delaney	408	52	460
Andrew Sivil	391	51	442

On recount, there were two minor changes in absentee ballot tallies (one vote more for Delaney and one vote less for Sivil), while machine counts remained the same as announced at the conclusion of the election. However, this difference did not affect the outcome of the election.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions therein.

Accordingly, the Commissioner finds and determines that Carol G. Williams, Richard Czajkowski and Joseph Suizzo were elected to full terms of three years each on the Board of Education of Stafford Township.

IT IS SO ORDERED.


ACTING COMMISSIONER

JUNE 14, 1995

DATE OF MAILING JUNE 15, 1995

207-95

IN THE MATTER OF THE ANNUAL SCHOOL :
ELECTION HELD IN THE SCHOOL DISTRICT : COMMISSIONER OF EDUCATION
OF THE TOWNSHIP OF LYNDHURST, : DECISION
BERGEN COUNTY. :
_____ :

JUNE 14, 1995

IN THE MATTER OF THE ANNUAL SCHOOL :
 ELECTION HELD IN THE SCHOOL DISTRICT : COMMISSIONER OF EDUCATION
 OF THE TOWNSHIP OF LYNDHURST, : DECISION
 BERGEN COUNTY. :
 _____ :

The announced results of the balloting for three (3) members of the Board of Education for full terms of three (3) years each at the annual school election held on April 18, 1995 in the School District of the Township of Lyndhurst were as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Richard Ingraffia, Jr.	944	13	957
Michael A. Guarino	901	20	921
Edward Boze	811	20	831
Vincent Auteri, Jr.	816	9	825
Gerald Coppola	766	22	788
Joseph T. Callahan	635	18	653
Jerome E. Onnembo, Jr.	638	13	651
Michael R. Schilare	616	21	637

Pursuant to a letter request from Vincent Auteri, Jr., dated April 24, 1995, the Commissioner directed his representative from the Office of the Bergen County Superintendent of Schools to conduct a recount of machine ballots cast for members of the Board pursuant to N.J.S.A. 18A:14-63.2. The machine recount was conducted on May 3, 1995 at the Bergen County Voting Machine Warehouse in Carlstadt. Absentee ballots were recounted on May 19, 1995, by the Bergen County Board of Elections pursuant to N.J.S.A. 19:57-24.

On recount, the results of the election stood as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Richard Ingraffia, Jr.	944	13	957
Michael A. Guarino	901	20	921
Edward Boze	811	20	831
Vincent Auteri, Jr.	816	9	825
Gerald Coppola	766	22	788
Joseph T. Callahan	635	18	653
Jerome E. Onnembo, Jr.	638	13	651
Michael R. Schilare	622	21	643

The only change in machine tally on recount was six additional votes for candidate Schilare, while there were no changes at all in absentee tallies. Thus, the results of the election were not altered.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions therein.

Accordingly, the Commissioner finds and determines that Richard Ingraffia, Jr., Michael A. Guarino and Edward Boze were elected to full terms of three years each on the Board of Education of the Township of Lyndhurst.

IT IS SO ORDERED.


ACTING COMMISSIONER

JUNE 14, 1995

DATE OF MAILING JUNE 15, 1995

208-95

IN THE MATTER OF THE ANNUAL SCHOOL :
ELECTION HELD IN THE SCHOOL DISTRICT : COMMISSIONER OF EDUCATION
OF THE CITY OF GARFIELD, : DECISION
BERGEN COUNTY. :
_____ :

JUNE 14, 1995

IN THE MATTER OF THE ANNUAL SCHOOL :
 ELECTION HELD IN THE SCHOOL DISTRICT : COMMISSIONER OF EDUCATION
 OF THE CITY OF GARFIELD, BERGEN : DECISION
 COUNTY. :
 _____ :

The announced results of the balloting for three (3) members of the Board of Education for full terms of three (3) years each at the annual school election held on April 18, 1995 in the School District of the City of Garfield were as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
John Pinto	1389	45	1434
Maria Capezzuto Scannella	1178	62	1240
Vincent Zangara	1193	32	1225
Kenneth S. Conte	1080	130	1210
Edward Puzio	1042	23	1065
Carol Scudillo	997	45	1042

Pursuant to a letter request from Dennis J. Oury, Esq., on behalf of Kenneth S. Conte, dated April 21, 1995, the Commissioner directed his representative from the Office of the Bergen County Superintendent of Schools to conduct a recount of machine ballots cast for members of the Board for three-year terms pursuant to N.J.S.A. 18A:14-63.2. The machine recount was conducted on May 3, 1995 at the Bergen County Voting Machine Warehouse in Carlstadt. Absentee ballots were recounted by the Bergen County Board of Elections on May 19, 1995, pursuant to N.J.S.A. 19:57-24.

At the conclusion of the recount, the tally stood as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
John Pinto	1389	44	1433
Maria Capezzuto Scannella	1178	63	1241
Vincent Zangara	1193	32	1225
Kenneth S. Conte	1080	130	1210
Edward Puzio	1042	23	1065
Carol Scudillo	997	46	1043

Machine tallies on recount remained the same, while there were minor changes in absentee tallies for candidates Scudillo, Pinto and Scannella. However, these were insufficient to alter the outcome of the election.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions therein.

Accordingly, the Commissioner finds and determines that John Pinto, Maria Capezzuto Scannella and Vincent Zangara were elected to full terms of three years each on the Board of Education of the City of Garfield.

The Commissioner further directs that a copy of this decision be forwarded to the Office of Administrative Law for inclusion in the record of the inquiry presently pending into the conduct of the above-captioned election.

IT IS SO ORDERED.


ACTING COMMISSIONER

JUNE 14, 1995

DATE OF MAILING JUNE 15, 1995

209-95

IN THE MATTER OF THE ANNUAL SCHOOL :
ELECTION HELD IN THE SCHOOL DISTRICT : COMMISSIONER OF EDUCATION
OF THE CITY OF ASBURY PARK, : DECISION
MONMOUTH COUNTY. :
_____ :

IN THE MATTER OF THE ANNUAL SCHOOL :
 ELECTION HELD IN THE SCHOOL DISTRICT : COMMISSIONER OF EDUCATION
 OF THE CITY OF ASBURY PARK, : DECISION
 MONMOUTH COUNTY. :
 _____ :

The announced results of the balloting for three (3) members of the Board of Education for full terms of three (3) years each, and for one (1) member for an unexpired term of one (1) year, at the annual school election held on April 18, 1995 in the School District of the City of Asbury Park were as follows:

Three-year Term

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Sheila C. Solomon	433	57	490
Joyce S. Cooke	336	32	368
Anthony G. Salerno, Jr.	257	52	309
Rodney Bond	237	31	268

One-Year Term

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
John T. Huber, Jr.	224	52	276
James T. Famularo	242	26	268

Pursuant to a joint letter request from Rodney Bond and James Famularo, dated April 24, 1995, the Commissioner directed his representative from the Office of the Monmouth County Superintendent of Schools to conduct a recount of machine ballots cast for members of the Board pursuant to N.J.S.A. 18A:14-63.2. The machine recount was conducted on May 15,

1995 at the County Voting Machine Warehouse in Freehold. No request for a recount of absentee ballots was made pursuant to N.J.S.A. 19:57-24.

Thus, on recount, the results of the election were unchanged and remained as follows:

Three-year Term

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Sheila C. Solomon	433	57	490
Joyce S. Cooke	336	32	368
Anthony G. Salerno, Jr.	257	52	309
Rodney Bond	237	31	268

One-Year Term

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
John T. Huber, Jr.	224	52	276
James T. Famularo	242	26	268

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions therein.

Accordingly, the Commissioner finds and determines that Sheila C. Solomon, Joyce S. Cooke and Anthony G. Salerno, Jr. were elected to full terms of three years each, and John T. Huber, Jr. to an unexpired term of one year, on the Board of Education of the City of Asbury Park.

The Commissioner further directs that a copy of this decision be forwarded to the Office of Administrative Law for inclusion in the record of the inquiry presently pending into the conduct of the above-captioned election.

IT IS SO ORDERED.


ACTING COMMISSIONER

JUNE 14, 1995

DATE OF MAILING JUNE 15, 1995

210-95

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE :
 SCHOOL DISTRICT OF PRINCETON :
 REGIONAL, CONSTITUENT DISTRICT :
 OF PRINCETON TOWNSHIP, MERCER :
 COUNTY. :

COMMISSIONER OF EDUCATION
 DECISION

JUNE 14, 1995

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE :
 SCHOOL DISTRICT OF PRINCETON :
 REGIONAL, CONSTITUENT DISTRICT :
 OF PRINCETON TOWNSHIP, MERCER :
 COUNTY. :

COMMISSIONER OF EDUCATION
 DECISION

The announced results of the balloting for two members of the Board of Education for full terms of three years each at the annual school election held on April 18, 1995 in the school district of Princeton Regional, Constituent District of Princeton Township, Mercer County, were as follows:

THREE-YEAR TERM

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Todd Tieger	808	113	921
David Robbins	659	51	710
Regina M. Simpson	599	98	697
Richard Barros	510	47	557
Gretchen Godwin (write-in)	1	0	1

Pursuant to a letter application from Regina M. Simpson, a defeated candidate, filed on April 28, 1995, the Commissioner of Education directed his representative from the office of the Mercer County Superintendent of Schools to conduct a recheck of the votes cast on the voting machines pursuant to N.J.S.A. 18A:14-63.2. This recheck was conducted on May 16,

1995 at the Mercer County Voting Machine Warehouse in Trenton. At the conclusion of the recheck of the votes cast on the voting machines, the tally stood as follows:

THREE-YEAR TERM

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Todd Tieger	814	113	927
David Robbins	659	51	710
Regina M. Simpson	599	98	697
Richard Barros	510	47	557
Gretchen Godwin (write-in)	1	0	1

As indicated, Todd Tieger received six additional votes, but the outcome of the election was not altered on recount.

Absentee tallies on recount are as reported by the Mercer County Board of Elections. No application for a recount of absentee ballots had been made to Superior Court as of the date of the Commissioner's recheck of the voting machines.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions set forth therein.

Accordingly, the Commissioner determines that, as originally announced, Todd Tieger and David Robbins were elected to full terms of three years each on the Princeton Regional Board of Education.

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

JUNE 14, 1995

DATE OF MAILING JUNE 15, 1995

211-95

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF UNION TOWN- : DECISION
SHIP, UNION COUNTY. :

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF UNION TOWN- : DECISION
SHIP, UNION COUNTY. :

The announced results of the balloting for three (3) members of the Board of Education for full terms of three years each at the annual election held April 18, 1995 in the School District of Union Township, Union County, were as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Francis R. Perkins	1,954	90	2,044
Philip Maraviglia, Jr.	1,712	75	1,787
Kathleen A. Reiss	1,589	89	1,678
Peter Russo	1,588	86	1,674
Leslie N.A. Cole, Sr.	1,154	78	1,232
Walter A. Buerkle	996	64	1,060
Shawn P. Gianella	557	27	584
Edward W. Galuska	295	20	315
Patricia Pastore (write-in)	1	0	1
Joe Grauman (write-in)	1	0	1
Bob Quasius (write-in)	1	0	1

Pursuant to a letter application from Peter Russo, a defeated candidate, filed on April 20, 1995, the Commissioner of Education directed his representative from the Office of the Union County Superintendent of schools to conduct a recheck of the votes cast on the voting machines pursuant to N.J.S.A. 18A:14-63.2. This recheck was conducted on May 4, 1995 at the Union County Voting Machine Warehouse at 300 North Avenue, East, Westfield, New Jersey.

Absentee tallies on recount are as reported by the Union County Board of Elections. No application for a recount of absentee ballots had been made to Superior Court as of the date of the Commissioner's recheck of the voting machines.

At the conclusion of the recount, the tally was slightly altered although the results were unchanged and stood as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Francis R. Perkins	1,954	90	2,044
Philip Maraviglia, Jr.	1,712	75	1,787
Kathleen A. Reiss	1,589	89	1,678
Peter Russo	1,588	86	1,674
Leslie N.A. Cole, Sr.	1,154	79	1,233
Walter A. Buerkle	996	63	1,059
Shawn P. Gianella	557	27	584
Edward W. Galuska	295	20	315
Patricia Pastore (write-in)	1	0	1
Joe Grauman (write-in)	1	0	1
Bob Quasius (write-in)	1	0	1

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions set forth therein.

Accordingly, the Commissioner determines that , as originally announced, Francis R. Perkins, Philip Maraviglia, Jr. and Kathleen A. Reiss were elected to full terms of three years each on the Union Township Board of Education.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

JUNE 14, 1995

DATE OF MAILING JUNE 15, 1995

212-95E

B.M. AND B.M., on behalf of their minor child, :
J.M.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWN-
SHIP OF DEPTFORD, GLOUCESTER
COUNTY,

RESPONDENT.

:
:
:
:
:
:
:

COMMISSIONER OF EDUCATION
DECISION ON MOTION

B.M. AND B.M., on behalf of their minor child, :
J.M., :

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF DEPTFORD, GLOUCESTER :
COUNTY, :

DECISION ON MOTION

RESPONDENT. :
_____ :

For Petitioners, B.M. and B.M., pro se

For Respondent, Donna Platt, Esq.

This matter was opened before the Commissioner of Education on June 7, 1995, by way of a Petition of Appeal and Motion for Emergent Relief filed by B.M. and B.M., on behalf of their son, J.M., seeking an order permitting J.M. to participate in graduation ceremonies from Deptford High School on June 14, 1995. On June 1, 1995, the Board of Education of the Township of Deptford denied petitioners' appeal of the principal's decision that J.M. had violated the Board's attendance policy by having excessive absences as defined by the policy and, therefore, had insufficient course credit to graduate or to participate in graduation ceremonies. Petitioners are challenging only the Board's decision to deny J.M.'s participation in graduation and not the decision that J.M. had insufficient credits to graduate.

This matter was filed with the Commissioner after the Board denied petitioners' appeal to it under the provisions of the Deptford Township Board of Education Rules and Regulations for Administering the Attendance Policy Grades 7 through 12 (hereinafter referred to as "Attendance Policy").

On June 12, 1995, oral argument was heard by telephone conference call by Gary Reece, Assistant Commissioner for the Office of Standards and Assessment, who was designated to hear and decide this matter, pursuant to the Commissioner's authority under N.J.S.A. 18A:4-34. Upon consideration of arguments, the Assistant Commissioner found that petitioners had not met the standards for granting injunctive relief set forth in Crowe v. DeGoia, 90 N.J. 126 (1982). Petitioners were advised of the decision telephonically on June 13, 1995. The Crowe standards required petitioners to show that J.M. would be irreparably harmed if not permitted to attend the graduation ceremony, that J.M. has a substantial likelihood of prevailing on the merits of the claim and that in balancing the interests of the parties, the harm to J.M. would be greater than that to the Board should the requested relief not be granted.

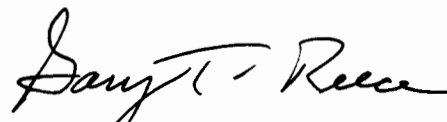
Petitioners assert that the Board's action denying their appeal at the local level was arbitrary, capricious and an abuse of discretion because the Board did grant the appeals of other students with more accumulated absences than J.M. and is permitting those other students to graduate and participate in graduation ceremonies. During arguments, however, petitioners raised no issue that the Board improperly applied the elements of its appeals procedure. The procedure permits the Board to excuse absences only for "reasons of sickness, hardship, or other extenuating circumstances ***." The policy requires the Board in making its determination to "consider the student's total attendance record, academic standing and course performance ***."

(Attendance Policy at p. 6) The Board asserts that it has properly applied its policy, that K.C. has been excessively absent, and that his parents were notified that he was in non-credit status by certified mail. It asserts that the consequences of violating the attendance policy are contained in the letter, as well as the district's student handbook which was provided to petitioners prior to the commencement of the school year. Moreover, the Board asserts that petitioners signed a letter acknowledging that they read the handbook and agreed to be bound by its requirements. Strict enforcement of its attendance policy, it asserts, has resulted in the Board being able to maintain an approximately 95% attendance rate.

Although the Assistant Commissioner is mindful of petitioners' argument that the family will be emotionally and irreparably harmed if J.M. is unable to participate in graduation, this is not legally sufficient to permit him to grant emergent relief. A weighing of the arguments of the parties leads the Assistant Commissioner to conclude that petitioners have not demonstrated entitlement to injunctive relief.

In so concluding, the Assistant Commissioner notes that petitioners do not contest the requirement that J.M. attend summer school based on J.M.'s excessive absences (inclusive of cuts and tardiness) which were calculated pursuant to policy.

Accordingly, the Motion for Emergent Relief is denied and the matter is ordered transmitted to the Office of Administrative Law for further proceedings.



ASSISTANT COMMISSIONER OF EDUCATION

JUNE 19, 1995

DATE OF MAILING JUNE 19, 1995

213-95E

B.B. AND L.B., on behalf of their minor child, :
T.B., :

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF DEPTFORD, GLOUCESTER :
COUNTY, :

DECISION ON MOTION

RESPONDENT. :
_____ :

B.B. AND L.B., on behalf of their minor child, :
T.B., :

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF DEPTFORD, GLOUCESTER :
COUNTY, :

DECISION ON MOTION

RESPONDENT. :
_____ :

For Petitioners, B.B. and L.B., pro se

For Respondent, Donna Platt, Esq.

This matter was opened before the Commissioner of Education on June 12, 1995, by way of a Petition of Appeal and Motion for Emergent Relief filed by B.B. and L.B., on behalf of their son, T.B., seeking an order permitting T.B. to participate in graduation ceremonies from Deptford High School on June 14, 1995. On June 1, 1995, the Board of Education of the Township of Deptford denied petitioners' appeal of the principal's decision that T.B. had violated the Board's attendance policy by having excessive absences as defined by the policy and, therefore, had insufficient course credit to graduate or to participate in graduation ceremonies. Petitioners are challenging only the Board's decision to deny T.B.'s participation in graduation ceremonies. This matter was filed with the Commissioner after the Board denied

petitioners' appeal to it under the provisions of the Deptford Township Board of Education Rules and Regulations for Administering the Attendance Policy Grades 7 through 12 (hereinafter referred to as "Attendance Policy").

On June 13, 1995, oral argument was heard by telephone conference call by Peter Contini, Assistant Commissioner for the Division of Field Services, who was designated to hear and decide this matter pursuant to the Commissioner's authority under N.J.S.A. 18A:4-34. Upon consideration of argument, the Assistant Commissioner finds that petitioners have not met the standards for granting injunctive relief set forth in Crowe v. DeGoja, 90 N.J. 126 (1982). Those standards required petitioners to show that T.B. would be irreparably harmed if not permitted to attend the graduation ceremony, that T.B. has a substantial likelihood of prevailing on the merits of the claim and that in balancing the interests of the parties, the harm to T.B. would be greater than that to the Board should the requested relief not be granted.

Petitioners assert that the Board's action denying their appeal at the local level was arbitrary, capricious and an abuse of discretion. This is because the Board granted the appeal of other students with more accumulated absences than T.B. and is permitting those other students to graduate and to participate in graduation ceremonies. During argument, however, petitioners raised no issue that the Board improperly applied the elements of its appeals procedure. The procedure, which was provided to the Assistant Commissioner, permits the Board to excuse absences only for "reasons of sickness, hardship, or other extenuating circumstances ***." The policy requires the Board in making its determination to "consider the student's total attendance record, academic standing and course performance ***." (Attendance Policy at p. 6)

Petitioners argued that T.B. will suffer irreparable harm if he is denied the opportunity to participate in graduation ceremonies because he will suffer emotional distress and his resentment may affect him in future years. Although in the petition it is asserted that T.B. suffers from asthma, during oral argument petitioners expressly denied that any of the absences were related to his illness.

A weighing of the arguments of the parties leads the Assistant Commissioner to conclude that petitioners have not demonstrated entitlement to injunctive relief. Even if the Assistant Commissioner considers the doctor's notes which petitioners acknowledged were not provided to the Board, T.B.'s absences still exceed the number of permissible absences to receive course credit. Additionally, the school has demonstrated that it has a legitimate reason to deny graduation to students as part of its enforcement of its attendance policy, and its record of student attendance.

The Board asserts that it has properly applied its policy, that T.B. has been excessively absent, that his parents were notified that he was in non-credit status by certified mail on March 16, 1995, and that prior to the certified letter, the Board had sent six letters indicating that T.B. was having attendance problems. It asserts that the consequences of a student violating the policy are contained in the letters, as well as in the student handbook which was provided to petitioners prior to the commencement of the school year. Moreover, the Board asserts that petitioners signed a letter acknowledging that they had read the handbook and agreed to be bound by its requirements. Strict enforcement of its attendance policy, it asserts, has resulted in the Board being able to maintain an approximate 95% attendance rate.

Accordingly, the Motion for Emergent Relief is denied and the matter is ordered transmitted to the Office of Administrative Law for further proceedings.

Peter B. Cortine

ASSISTANT COMMISSIONER OF EDUCATION

JUNE 19, 1995

DATE OF MAILING JUNE 19, 1995 4

214-95E

P.C. AND R.C., on behalf of their minor child, :
K.C., :

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF DEPTFORD, GLOUCESTER :
COUNTY, :

DECISION ON MOTION

RESPONDENT. :
_____ :

P.C. AND R.C., on behalf of their minor child, :
K.C., :

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF DEPTFORD, GLOUCESTER :
COUNTY, :

DECISION ON MOTION

RESPONDENT. :
_____ :

For Petitioners, P.C. and R.C., pro se

For Respondent, Donna Platt, Esq.

This matter was opened before the Commissioner of Education on June 7, 1995, by way of a Petition of Appeal and Motion for Emergent Relief filed by P.C. and R.C., on behalf of their son, K.C., seeking an order permitting K.C. to participate in graduation ceremonies from Deptford High School on June 14, 1995. On June 1, 1995, the Board of Education of the Township of Deptford denied petitioners' appeal of the principal's decision that K.C. had violated the Board's attendance policy by having excessive absences as defined by the policy and, therefore, had insufficient course credit to graduate or to participate in graduation ceremonies. Petitioners are challenging only the Board's decision to deny K.C.'s participation in graduation and not the decision that K.C. had insufficient credits to graduate. This matter was

filed with the Commissioner after the Board denied petitioners' appeal to it under the provisions of the Deptford Township Board of Education Rules and Regulations for Administering the Attendance Policy Grades 7 through 12 (hereinafter referred to as "Attendance Policy").

On June 12, 1995, oral argument was heard by telephone conference call by Gary Reece, Assistant Commissioner for the Office of Standards and Assessment, who was designated to hear and decide this matter, pursuant to the Commissioner's authority under N.J.S.A. 18A:4-34. Upon consideration of arguments, the Assistant Commissioner found that petitioners had not met the standards for granting injunctive relief set forth in Crowe v. DeGoia, 90 N.J. 126 (1982). Petitioners were advised of the decision telephonically on June 13, 1995. The Crowe standards required petitioners to show that K.C. would be irreparably harmed if not permitted to attend the graduation ceremony, that K.C. has a substantial likelihood of prevailing on the merits of the claim and that in balancing the interests of the parties, the harm to K.C. would be greater than that to the Board should the requested relief not be granted.

Petitioners assert that the Board's action denying their appeal at the local level was arbitrary, capricious and an abuse of discretion because the Board did grant the appeals of other students with more accumulated absences than K.C. and is permitting those other students to graduate and to participate in graduation ceremonies. During argument, however, petitioners raised no issue that the Board improperly applied the elements of its appeals procedure. The procedure permits the Board to excuse absences only for "reasons of sickness, hardship, or other extenuating circumstances ***." The policy requires the Board in making its determination to "consider the student's total attendance record, academic standing and course performance ***." (Attendance Policy at p. 6) Although during oral argument petitioners stated that K.C. is a

special education student, petitioners specifically denied that the absences were related to his classification.

The Board asserts that it has properly applied its policy, that K.C. has been excessively absent, and that his parents were notified that he was in non-credit status by certified mail. It asserts that the consequences of violating the attendance policy are contained in the letter, as well as the district's student handbook which was provided to petitioners prior to the commencement of the school year. Moreover, the Board asserts that petitioners signed a letter acknowledging that they read the handbook and agreed to be bound by its requirements. Strict enforcement of its attendance policy, it asserts, has resulted in the Board being able to maintain an approximately 95% attendance rate.

A weighing of the arguments of the parties leads the Assistant Commissioner to conclude that petitioners have not demonstrated entitlement to injunctive relief.

In so concluding, the Assistant Commissioner notes that petitioners do not contest the requirement that K.C. attend summer school based on his excessive absences (inclusive of cuts and tardiness) which were calculated pursuant to policy.

Accordingly, the Motion for Emergent Relief is denied and the matter is ordered transmitted to the Office of Administrative Law for further proceedings.


ASSISTANT COMMISSIONER OF EDUCATION

JUNE 19, 1995

DATE OF MAILING JUNE 19, 1995

215-95

BOARD OF EDUCATION OF THE CITY OF :
 PLEASANTVILLE, ATLANTIC COUNTY, :
 PETITIONER, :
 : COMMISSIONER OF EDUCATION
 V. :
 : DECISION
 RICHARD CHAMBERS, :
 :
 RESPONDENT. :
 _____ :

SYNOPSIS

Petitioning Board sought to compel respondent, tenured music teacher, to undergo a physical and psychiatric examination by a physician of the Board's choosing. Board also sought order to suspend respondent's pay until completion of such examination.

ALJ concluded that there was no authority granted to the Board to suspend respondent's pay pending a physical and psychiatric examination unless the Board certified tenure charges in accordance with N.J.S.A. 18A: 6-10. Therefore, the Board's application to suspend respondent's pay pending examination was dismissed. ALJ concluded Board has the statutory right and obligation to require respondent to undergo examination pursuant to N.J.S.A. 18A:16-2 to determine fitness. (Gish Appellate Division decision) ALJ ordered respondent to submit to an examination and evaluation by the Board's authorized psychiatrist at a time and place scheduled by the Board.

Commissioner adopted findings and determination in initial decision as his own and directed respondent submit to an examination in accordance with ALJ's instructions. Commissioner dismissed Board's application to suspend respondent's pay pending the physical and psychiatric examination.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 7283-94

AGENCY DKT. NO. 274-7/94

**BOARD OF EDUCATION OF THE CITY
OF PLEASANTVILLE, ATLANTIC COUNTY,**

Petitioner,

v.

RICHARD CHAMBERS,

Respondent.

James L. Jackson, Esquire, for petitioner,

Ned P. Rogovoy, Esquire, for respondent (Girard and Rogovoy, attorneys)

Record Closed: March 21, 1995

Decided: May 5, 1995

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE

The Board of Education of the City of Pleasantville (Board or Petitioner) seeks an Order from the Commissioner of Education (Commissioner) to compel respondent, Richard Chambers, a

tenured teaching staff member in the Board's employ, to undergo a physical and psychiatric examination by a physician of the Board's choosing. The Board also seeks an Order from the Commissioner to suspend respondent's pay until such examination is completed.

This matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. Prehearing conferences were held on November 9 and 17, 1994, at which, among other things, the issues to be determined by this tribunal were settled. The parties agreed that the matter should be determined by way of stated facts and written legal arguments. Therefore, no hearing was required. The record was closed on December 22, 1994, with the last submission. Extensions were requested and granted in order to execute this initial decision.

LEGAL ARGUMENTS OF THE PARTIES

The Board's Position:

FACTS

The Board relies upon the facts, allegations and statement set forth in the Petition filed in this matter.

1. Respondent is a tenured music teacher in Petitioner's school district.
2. At a meeting held on February 22, 1994, based upon the evidence presented to it and a finding that Respondent's behavior evidences a significant possibility of harmful, significant deviation from normal mental and/or physical health, affecting his ability to teach, discipline and associate with school district students, the Petitioner passed a resolution requiring the Respondent to undergo a psychiatric examination to be performed by Dr. Stuart Zuckerman, D.O. and a physical examination to be performed by a physician approved by the Petitioner, pursuant to N.J.S.A. 18A:16-2. The said resolution also set March 8, 1994 as the date on which the Respondent would be afforded an opportunity to be heard by the Petitioner regarding its requirement that the Respondent be so examined.

3. By separate resolution passed also on February 22, 1994, Petitioner suspended the Respondent from his teaching duties, with pay, pending the completion of the said examinations.

4. By letter from Petitioner's Personnel Administrator dated February 23, 1994, Respondent was advised of the Petitioner's decisions of February 22, 1994, his rights pursuant to N.J.S.A. 18A:16-3 and, that March 8, 1994 at 6:00 P.M. had been set as the date and time for him to be heard by the Petitioner regarding its decision to have him examined. Said letter was hand delivered to Respondent on February 23, 1994.

5. By letter dated February 24, 1994, from Petitioner's Personnel Administrator, Respondent was provided with a Statement of Reasons for the Petitioner's decision, a copy of the resolutions passed by Petitioner on February 22, 1994, and written documents and statements relied upon by the Petitioner in arriving at its decision to have the Respondent examined.

6. At the request of the Respondent, the hearing scheduled before the Petitioner on March 8, 1994 was rescheduled to March 29, 1994 at 6:00 P.M., on which date the Respondent appeared before the Petitioner with his legal counsel, Ned P. Rogovoy, Esquire, and Respondent made a presentation to the Petitioner. Following Respondent's presentation to the Petitioner, the Petitioner voted to affirm its prior decision to require the Respondent to be examined, which affirmation Respondent was informed of by letter dated April 6, 1994, to Respondent's attorney. Also in the said letter of April 6, 1994, Respondent was advised that he would receive a written notice of the date, time and place for the examination by written correspondence.

7. Dr. Stuart Zuckerman, the psychiatrist chosen by the Petitioner to perform a fair and thorough psychiatric examination of the Respondent, said he would need to review certain records pertaining to the Respondent, including records of Respondent's prior medical and psychiatric treatment, hospital records or reports, credit records, personnel files and military discharge records, if Respondent has been in the military service. Dr. Zuckerman also advised that he would require that Respondent execute an informed consent prior to the examination.

8. In a telephone conversation on April 21, 1994, Petitioner's Solicitor advised Respondent's Attorney, Ned P. Rogovoy, regarding the information Dr. Zuckerman required in order to perform a fair and meaningful examination. Respondent's counsel was also informed that an authorization to acquire the necessary records and an informed consent form would be prepared for the Respondent to execute and return to Petitioner's Solicitor. Petitioner's Solicitor would then obtain the records which would be forwarded directly to Dr. Zuckerman. Thereafter, an appointment for the examination with Dr. Zuckerman would be scheduled. Mr. Rogovoy advised the Petitioner's Solicitor to forward the authorization to obtain the records and the informed consent form to him and he would discuss the same with the Respondent. Said authorization and informed consent were forwarded to Mr. Rogovoy by certified mail under cover letter dated April 26, 1994 and was received by Mr. Rogovoy on April 29, 1994.

9. Not hearing from Mr. Rogovoy for several days after his receipt of the authorization and informed consent, Petitioner's Solicitor contacted Mr. Rogovoy by telephone on May 9, 1994 at which time Mr. Rogovoy advised Petitioner's Solicitor that he had spoken to his client, the Respondent, and the Respondent told him that he would not sign the authorization or informed consent form forwarded under cover letter of April 26, 1994.

10. At a regularly scheduled meeting of the Petitioner held on May 17, 1994, Petitioner directed its counsel to file the appropriate petition before the Commissioner of Education to obtain an order to compel the Respondent to execute the said necessary authorization and informed consent and otherwise cooperate so that the required examination may be performed by Dr. Zuckerman.

11. During the more than three (3) month period between February 23, 1994, when Respondent was advised that Dr. Stuart Zuckerman had been chosen by Petitioner to perform the psychiatric examination and May 18, 1994, the Respondent did not express a preference for another psychiatrist to perform the required examination.

12. By letter from Respondent's counsel dated May 18, 1994, faxed on May 18, 1994, Petitioner's Solicitor was advised that Respondent had directed his attorney to advise Petitioner's Solicitor that Respondent chose Dr. Janet Thornton, a staff psychiatrist at Atlantic Mental Health,

Inc. to perform the examination. Respondent cited the fact that Respondent has previously been evaluated by Dr. Thornton on or about February 8, 1993, at the request of the Petitioner, before the Respondent was allowed to return to work after a six (6) month absence during which he was under psychiatric treatment at South Amboy Memorial Hospital in South Amboy, New Jersey and Middlesex County Mental Health Clinic in Old Bridge, New Jersey.

13. At a regularly scheduled meeting of the Petitioner held on June 7, 1994, Petitioner was advised of Respondent's request that the examination be performed by Dr. Janet Thornton and, after discussion, Petitioner voted not to approve Respondent's request to have the required psychiatric examination performed by Dr. Thornton. By letter dated June 9, 1994, faxed to Respondent's counsel on June 9, 1994, Respondent's counsel was advised of the Petitioner's decision at its meeting on June 7, 1994, citing the Petitioner's position that it wants the examination of the Respondent performed by a professional that has had no previous contact with the Respondent and that the Petitioner is seeking a completely objective evaluation.

14. Respondent has failed and refused to cooperate with Petitioner to accomplish the examination of the Respondent required by the Petitioner pursuant to N.J.S.A. 18A:16-2.

THE BOARD'S LEGAL ARGUMENT

A Board of Education may suspend a tenured teaching staff member, with pay, pending a physical or psychiatric examination. John W. Griggs vs. Board of Education of the Borough of Somerville, Somerset County, 80 S.L.D. 1492 (St. Bd.); N.J.S.A. 18A:25-6; N.J.S.A. 18A:16-2. However, unless it certifies tenure dismissal charges to the Commissioner, a board of education lacks the authority to suspend a tenured teaching staff member without pay or to otherwise reduce such person's compensation. N.J.S.A. 18A:6-10.

The Respondent was suspended, with pay, by the Petitioner commencing February 23, 1994 pending the receipt and review of the results of a psychiatric and physical examination of the Respondent. Petitioner's actions were based upon a finding that Respondent's behavior "evidences a significant possibility of harmful, significant deviation from normal mental and/or physical health affecting his ability to teach, discipline and associate with school district students"

(See a copy of Petitioner's Resolution attached as Exhibit "A"). Respondent did not challenge Petitioner's findings. Since February 23, 1994, Petitioner has gone through the procedural steps necessary including requests for Respondent's cooperation. Respondent's response has been a belated request, more than three months after the initial notice to Respondent, that the examination be performed by someone other than Dr. Zuckerman, the physician designated by the Petitioner in every notice or correspondence sent to the Respondent starting February 23, 1994. The Petitioner has disapproved each of the physicians suggested by the Respondent for the appropriate reasons stated in letters to Respondent's attorney dated June 9, 1994 and July 13, 1994 (mistakenly dated June 13, 1994), hereto attached as Exhibits "B" and "C", respectively.

The irreparable harm to the Petitioner, and through it to the taxpayers of Pleasantville, is the continued payment of public funds to the Respondent, as salary, for which he is not working. Respondent's actions also undermine the authority of the Petitioner. Respondent has thus far been paid for more than four (4) months salary in this matter. Though Petitioner has filed a Petition seeking an Order of the Commissioner requiring the Respondent to undergo the requested examinations, that Petition is not likely to be decided for several months. Petitioner will again be required to pay salary to Respondent, beginning in September, for the 1994-1995 school year, without recompense. Once the salary is paid, the Petitioner has no legal basis or adequate remedy at law for recouping the funds paid to the Respondent, no matter what the outcome of the examinations or the Petition filed in this matter. Crowe vs. DeGioia, 90 N.J. 132-133; Morris County Transfer Station, Inc. vs. Frank's Sanitation, 260 N.J. 570 (App. Div. 1992) at pg. 575. Respondent should not be allowed to continue to benefit from his failure to cooperate with the Petitioner. Equity will never suffer a wrong without a remedy. Orland Properties, Inc. vs. Broderick, 94 N.J. Super 307 (Ch. Div. 1967) at pg. 313-314.

The second prong of the Crowe test requires that temporary relief be withheld when the legal rights of the parties are unsettled. This prong is satisfied in the case at bar. The authority of a board of education to have a teaching staff member examined is well settled. N.J.S.A. 18A:16-2; Kochman vs. Keansburg Board of Education, 124 N.J. Super 203 (App. Div. 1973)); Gish vs. Board of education of Borough of Paramus, Bergen County 145 N.J. Super 96 (App. Div. 1976); 74 S.L.D. 1150. The Petitioner's authority has been upheld as a reflection or extension of the

board's duty to protect students from significant danger or harm, whether physical or otherwise. Gish at pg. 104-105.

In his answer the Respondent cites the fact that he has offered the names of two psychiatrists he chooses to have perform the required psychiatric examination. One of the psychiatrists chosen by the Respondent previously examined him on or about February 8, 1993, at the request of the Petitioner, and thereafter advised the Petitioner that the Respondent was fit to return to work. The behavior which has caused the Petitioner to require that the Respondent undergo the pending psychiatric examination was first documented on December 7, 1993, ten (10) calendar months or seven (7) school months after that psychiatrist had declared him fit. The second psychiatrist suggested by the Respondent is associated with the same office or association as is the first. The psychiatrist who examined the Respondent on February 8, 1993 did so at the Petitioner's direction prior to Respondent's return to work after Respondent's self-imposed six month absence from his duties due to a mental disorder. However, there is no legal or other requirement that Petitioner approve the Respondent's return to that same psychiatrist or her associate for the pending examination. Pursuant to its obligation to protect school district students, the Petitioner has legitimately taken the position that it wants an objective psychiatric examination performed by a psychiatrist not previously associated with Respondent or Petitioner in any way. The Petitioner has exercised its legitimate right not to approve the psychiatrists suggested by the Respondent. The Respondent continues to refuse to cooperate and he draws a salary while doing so.

The third prong of the Crowe test requires that interim relief not be granted when material facts are controverted. A review of the Petition and Answer filed in this matter show that no material facts are controverted. The third prong of Crowe is satisfied.

The final prong of the Crowe test requires an examination of the relative hardship the requested interim relief will impose upon the parties. When applying this prong of the test, the principles of justice, equity and morality must always be considered. Zoning Board of Adjustment vs. Service Electric Cable T.V., 198 N.J. Super 370 (App Div. 1985) at pg. 379. Applying those principles, the Respondent should not be allowed to continue to collect a salary of public funds, without recompense, while failing to cooperate with the Petitioner in carrying out its legitimate

authority. This prong of the test should not be decided in a way that renders the Petitioner's authority vain and useless. Pfaus vs. Palermo, 97 N.J. Super at page 8 (App. Div. 1967); Poff vs. Caro, 228 N.J. Super 370. Applications for interim relief should not be viewed with a narrow and grudging approach; but rather in a manner which seeks equity and justice.

It is within the Respondent's power to resolve this matter by providing the cooperation sought by the Petitioner in order to carry out the Petitioner's legitimate authority and function. In that regard, should the commissioner grant the Petitioner's request that Respondent's current suspension be without pay, any hardship which may be visited upon the Respondent thereby has been brought about by the Respondent. The Petitioner does not have the independent power to cease paying salary to the Respondent until the required examination has been done.

Respondent's Position

FACTS

Petitioner School Board, by resolution adopted February 22, 1994, alleged that Respondent's conduct was a deviation from normal mental or physical health and, therefore, effected his ability to teach. The resolution further requested that the Respondent undergo a psychiatric and physical examination pursuant to N.J.S.A. 18A:16-2 and 18A:16-3. The resolution further directed that the examination be performed by a Dr. Stuart Zuckerman, and further a March 8, 1994 date was set for a hearing should the Respondent request same. In fact, the Petitioner School Board then rescheduled the hearing for Tuesday, March 29th. It was agreed by and between counsel for the respective parties that the hearing would be of the type delineated in Gish v. Bd. of Educ. of the Borough of Paramus 145 N.J. Super 96. Subsequent to the Gish hearing held on March 29th, the Board, by letter on April 6, 1994, affirmed its prior decision to require that Respondent undergo a psychiatric and physical examination, pursuant to N.J.S.A. 18A:16-2, with the proviso that Respondent would receive a subsequent notice of date time and place for the examination. Prior to receiving a date, time and place, there was communication between counsel for the respective parties whereby Petitioner was requesting authorizations to obtain medical records and reports, psychiatric and/or psychological records and reports, hospital records and reports, credit records, personnel files and military records. Ultimately, in the give

and take of the propriety of Petitioner's request for Respondent's authorizations, and specifically on May 18, 1994, Respondent, through his attorney, caused a letter to be sent to solicitor for Petitioner, wherein pursuant to N.J.S.A. 18A:16-3 the Respondent designated a different psychiatrist which the Board had designated in a prior evaluation of Respondent back in February of 1993. There was then an exchange whereby the Board would not accept their prior designee psychiatrist, the Respondent chose another which prompted the Petitioner School Board, by and through their attorney, to file an action with the Commissioner related to the interpretation of N.J.S.A. 18A:16-2 and 18A:16-3, which is the subject of the underlying action herein.

Now, Petitioner brings another emergent application requesting that Petitioner School Board be able to discontinue Respondent's pay. Respondent opposes any emergent relief for reasons which are inhereinafter cited.

RESPONDENT'S
LEGAL ARGUMENT

In Slater v. Board of Educ., 237 N.J. Super. 424 (App. Div. 1989) at 426, it is specifically stated:

Thus, a tenured employee may be suspended without pay only if indicted or if tenure charges have been preferred and certified to the Commissioner of Education. In all other circumstances, a suspension must be with pay.

Further, at page 426 in Slater, supra., it is stated:

If a tenure charge is preferred and filed with the school board, the board reviews it and the accompanying statement of supporting evidence, and any written statement submitted by the employee. The board then determines if there is probable cause for the charge. If there is, the board's certification to that effect is forwarded to the Commissioner of Education. N.J.S.A. 18A:6-11.

After certification of the charge, the board may suspend the employee with or without pay.

In the instant case, obviously there is no indictment and further no tenure charge has been preferred filed and certified. The Board properly requested that the Respondent submit to a psychological and physical examination, pursuant to N.J.S.A. 18A:16-2, and Respondent exercised his options to a hearing and then to another psychiatrist previously designated by the School Board under 18A:16-3. Respondent never refused to be examined, but then again, all of that is the subject of the underlying suit. After examination, which certainly will be insightful as to Respondent's ability to teach, the School Board may then exercise different options, including the certification or the attempted certification of tenure charges. At this point there certainly are no tenure charges which have been certified by Petitioner School Board, nor has that certification been sent to the Commissioner, pursuant to N.J.S.A. 18A:16-11, but rather there is a request for an examination of Respondent which is a preliminary action and an investigatory action, but certainly is not a tenure charge in and of itself. Also citing Romanowski v. Bd. of Ed. of Jersey City, 89 N.J. Super. 38.

N.J.S.A. 18A:6-10 specifically provides that a board of education lacks the authority to suspend without pay unless it certifies tenure dismissal charges to the Commissioner.

Crowe v. DeGioia, 90 N.J. 132 is relied upon by Petitioner for relief herein. Crowe deals with whether temporary relief can be awarded in a suit to enforce an agreement between unmarried co-habitants. Crowe, a female, lived with DeGioia from 1960 until 1967 and from 1967 to 1980 lived in DeGioia's house and claims DeGioia made certain representations that he would take care of her for the rest of her life. Crowe then asked the court to enforce her alleged agreement and there was certainly some factual dispute as to the promise to support, but the Chancery Division denied a motion for transfer to the Law Division and they awarded Crowe minimal immediate temporary support. DeGioia appealed and the Appellate Division reversed on the basis that there was no authority for awarding "alimony" and that preliminary relief in any event was not available, thus the Appellate Division vacated the order granting support.

The Supreme Court went on to say that under a "relevant" statute alimony may be ordered on an interim basis only in a matrimonial action, specifically N.J.S.A. 2:34-23, which statutory action does not embrace an action on a contract between unmarried co-habitants. The court goes on to mention that there are times when the courts will recognize preliminary relief but only in the

most sensitive exercising of judicial discretion. The court further says that in order for any temporary relief to be granted, the underlying claim cannot be unsettled.

In the case at bar, which psychiatrist should examine the Respondent and the outcome of that psychiatrist's analysis is and has not been accomplished and, therefore, the outcome of who should examine Respondent and what the examiner will say is unsettled. Specifically what is unsettled is a professional opinion as to Respondent's ability to perform his job as a teacher, the Board wants a psychiatric examination prior to making that determination, therefore, the underlying claim is unsettled.

The Crowe case further states that no preliminary injunctions should issue "where all material facts are controverted", page 133. "Thus, to prevail on an application for temporary relief, a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits." After the Gish hearing and Respondent's presentation the Petitioner still requested that Respondent submit to a psychiatric examination. NO DETERMINATION WAS MADE AS TO RESPONDENT'S ABILITY TO TEACH NOR HIS FITNESS TO TEACH, therefore, the material facts are controverted and even if the Crowe case were the standard, the material facts being in dispute would not permit a court to issue preliminary injunctive relief as is requested by Petitioner herein.

The statutes are clear and so is the Slater case, supra, no suspension of pay is justified and/or appropriate by the statutes or the case law at this point in time and suspension of pay on this emergent application should be denied.

DISCUSSION AND CONCLUSIONS

The Board is authorized to suspend an employee under the statutory provisions found in Title 18A Education Law. As the court observed and stated in Slater, supra at 426, a board of education may suspend a tenured employee without pay only if that employee is under indictment (N.J.S.A. 18A:6-8.3) or the board has preferred and certified tenure charges against the employee to the Commissioner (N.J.S.A. 18A:6-16). Neither of those elements are extant here. Respondent is not under indictment nor has the Board preferred and certified tenure charges

against respondent to the Commissioner. The Board's arguments in equity are inappropriate and may not be considered in making a determination concerning the law which dictates the operation of our State's public schools.

Accordingly, I **CONCLUDE** that under the facts and circumstances of this matter, there is no authority granted to the Board to suspend Respondent's pay pending a physical and psychiatric examination. Therefore, the Board's application to suspend Respondent's pay pending the physical and psychiatric evaluation is hereby **DISMISSED**.

The Board, however, has the statutory right and obligation to require Respondent to undergo a physical and psychiatric examination, pursuant to N.J.S.A. 18A:16-2 when, "... in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health." The Court, in Gish, *supra*, said at 105 that:

A teacher's fitness may not be measured "solely by his or her ability to perform the teaching function and ignore the fact that the teacher's presence in the classroom might, nevertheless, pose a danger of harm to the students for a reason not related to academic proficiency." In re Tenure Hearing of Grossman, 127 N.J. Super 13, 32 (App. Div. 1974), certif. den. 65 N.J. 292 (1974), and authorities cited therein.

The Gish Court stated at 104 that the obligation of the board of education to determine the fitness of its teachers is a reflection of the board's duty to protect the students under its charge from significant damages of harm, whether it be physical or otherwise.

Respondent, on the other hand, relies upon N.J.S.A. 18A:16-3 to support his position that he has the option to choose the physician and/or psychiatrist to perform the examinations and evaluations. N.J.S.A. 18A:16-3 reads as follows:

Any such examination may be made by a physician or institution designated by the board, in which case the cost thereof and all laboratory tests and fluoroscopic or X-ray procedures shall be borne by the board or, at the option of the employee, they may be made by a physician or institution of his own choosing, approved by

the board, in which case said examination shall be made at the employee's expense.

Respondent seeks to use the services of a psychiatrist who had previously evaluated Respondent, at the Board's expense. The Board has rejected Respondent's choice of psychiatrists which, under N.J.S.A. 18A:16-3 it is authorized to do. The law does not bestow upon Respondent the right to unilaterally select the psychiatrist of his choosing. Rather, the statute is explicit in granting the Board the right to approve, or disapprove, Respondent's selection. The Board has done so and rejected Respondent's choice in favor of an independent examination and evaluation. Absent the Board's express imprimatur for Respondent's selection, it may invoke the provisions of N.J.S.A. 18A:16-2 and require Respondent to undergo an examination by a psychiatrist of its choosing.

It is therefore **ORDERED** that Respondent submit to an examination and evaluation by the Board's authorized psychiatrist at a time and place scheduled by the Board.

In order for the conduct of a fair and impartial evaluation of Respondent, it is necessary for the examining physician/psychiatrist to have for his/her review all pertinent data and information concerning Respondent's prior medical and psychiatric treatment, hospital record or reports, together with personnel files under the control of the Board.

Accordingly, it is **ORDERED** that Respondent execute the necessary releases and authorizations for such records or reports for the use of the psychiatrist selected by the Board to perform the examination and evaluation of Respondent.

Summary decision is hereby entered on behalf of Respondent denying the Board's application to withhold or suspend Respondent's salary pending Respondent's examination under N.J.S.A. 18A:16-2.

Summary decision is hereby entered on behalf of the Board with regard to its right and obligation to cause Respondent to submit to a physical and psychiatric evaluation pursuant to N.J.S.A. 18A:16-2.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

MAY 5, 1995
DATE

5/5/95
DATE

MAY 12 1995
DATE
psa

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

Hope R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

Jeff S. Marin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

BOARD OF EDUCATION OF THE CITY OF :
PLEASANTVILLE, ATLANTIC COUNTY, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
RICHARD CHAMBERS, : DECISION
RESPONDENT. :
_____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

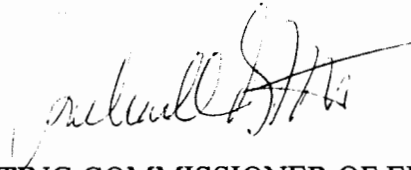
Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ) that the Board may require respondent to undergo a physical and mental examination in accordance with Gish, supra. Additionally, the Commissioner concurs that the Board has a right to approve of respondent's choice of physician since respondent does not wish the examination to be conducted at his own expense pursuant to N.J.S.A. 18A:16-2 and 16-3.

Finally, the Commissioner concurs with the ALJ that in accordance with N.J.S.A. 18A:6-10 and 6-11 unless the Board certifies dismissal charges, the Board lacks the authority to suspend a tenured staff member without pay.

Accordingly, for the reasons well-expressed therein, the Commissioner affirms the initial decision of the Office of Administrative Law ordering that respondent submit to an

examination in accordance with the ALJ's instructions and dismissing the Board's application to suspend respondent's pay pending the physical and psychiatric evaluation.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

JUNE 19, 1995

DATE OF MAILING JUNE 19, 1995

EDU #7283-94
C # 215-95
SB # 80-95

BOARD OF EDUCATION OF THE CITY :
 OF PLEASANTVILLE, ATLANTIC :
 COUNTY, :

PETITIONER-RESPONDENT, : STATE BOARD OF EDUCATION

V. : DECISION

RICHARD CHAMBERS, :

RESPONDENT-APPELLANT. :

Decided by the Commissioner of Education, June 19, 1995

For the Petitioner-Respondent, James L. Jackson, Esq.

For the Respondent-Appellant, Girard & Rogovoy (Ned P. Rogovoy, Esq.,
of Counsel)

On February 22, 1994, the Board of Education of the City of Pleasantville (hereinafter "Board") adopted a resolution pursuant to N.J.S.A. 18A:16-2 and 18A:16-3 directing Richard Chambers (hereinafter "respondent"), a tenured teaching staff member, to undergo a psychiatric examination to be performed by Dr. Stuart Zuckerman, D.O. and a physical exam to be performed by a physician to be approved by the Board. On May 18, 1994, respondent, acting pursuant to N.J.S.A. 18A:16-3, provided the Board with the name of a psychiatrist he wanted to perform the examination. On June 7, the Board rejected respondent's choice, advising him in a letter dated June 9 that the Board wanted a completely objective evaluation

2/7/96

performed by a physician who had not had any previous contact with respondent.¹ On June 20, respondent provided the Board with the name of another psychiatrist who had not had any previous contact with him but who was associated with the same medical center as his first choice.

On June 30, 1994, the Board submitted the instant petition to the Commissioner of Education, seeking to compel respondent to submit to a psychiatric examination conducted by Dr. Zuckerman. At its meeting of July 5, 1994, the Board rejected respondent's second choice "for substantially the same reasons" it had given for rejecting his first choice.

On May 5, 1995, an Administrative Law Judge ("ALJ") recommended that respondent be directed to submit to an examination by Dr. Zuckerman. Observing that the law did not bestow upon respondent the right to unilaterally select the physician of his choosing, the ALJ concluded that the law was explicit in granting the Board the right to approve or disapprove of respondent's selection and that the Board had rejected respondent's choice in favor of an independent examination and evaluation. The ALJ concluded that absent the Board's express approval of respondent's selection, it could invoke the provisions of N.J.S.A. 18A:16-2 and require respondent to undergo an examination by a psychiatrist of its choosing.

On June 19, 1995, the Commissioner adopted the ALJ's findings and conclusions and directed respondent to submit to an examination by the Board's psychiatrist in accordance with the ALJ's instructions. The Commissioner added that

¹ The psychiatrist initially selected by respondent had previously examined him in 1993 at the Board's request.

he "concur[red]" that "the Board has a right to approve of respondent's choice of physician since respondent does not wish the examination to be conducted at his own expense pursuant to N.J.S.A. 18A:16-2 and 16-3." Commissioner's Decision, slip op. at 15.

Respondent filed the instant appeal to the State Board. Respondent does not dispute the Board's authority to compel him to submit to a psychiatric examination or its action in directing him to submit to such an evaluation. Rather, he argues that the statutory scheme provides him with the option of selecting the psychiatrist, subject to the Board's approval.

After a thorough review of the record, we reverse the decision of the Commissioner.

While there is no dispute that a district board may require psychiatric or physical examinations of any employee "whenever, in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health," N.J.S.A. 18A:16-2, such an examination:

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

N.J.S.A. 18A:16-3 (emphasis added).

We reject the Commissioner's adoption of the ALJ's conclusion that the Board, upon rejection of respondent's selected physician, could automatically invoke the provisions of N.J.S.A. 18A:16-2 so as to require respondent to submit to an

evaluation by a physician of its choosing. We find nothing in the statutory scheme that would support such a construction. N.J.S.A. 18A:16-3 expressly provides the employee with the option of selecting a physician to conduct the examination. While that option is not unlimited, and the employee's selections are subject to the district board's approval, N.J.S.A. 18A:16-3 does not, as the Initial Decision would allow, provide a district board with the authority to mechanically nullify that option simply by rejecting the employee's initial choice and then, at that point, forcing the employee to accept the doctor it selected.

Moreover, in "concurring" that the statute provides the Board with the "right to approve of respondent's choice of physician since respondent does not wish the examination to be conducted at his own expense," the Commissioner misconstrued both the statute and the record. The Initial Decision does not offer such a conclusion, and respondent does not dispute his statutory obligation to pay for the examination if performed by a physician of his choosing. Nor is the Board's right to approve respondent's selection conditioned upon that payment obligation. Rather, the statute is clear in providing that an examination conducted by a physician of the employee's choosing must be at the employee's expense and that the district board has the right to approve of the employee's selection.

Both district boards and their employees must act in a reasonable manner in proceeding under N.J.S.A. 18A:16-2 and 18A:16-3. Given the particular facts in the record of this matter, the Board herein has not demonstrated that respondent's conduct has been such as to entitle it to compel him to submit to an examination by

Dr. Zuckerman at this time. Respondent provided the Board with the names of two psychiatrists, both of whom were rejected by the Board as indicated above.² The record does not indicate that respondent's actions or particular selections were designed as a subterfuge to frustrate or impede the Board's statutory authority to compel him to submit to an examination.³ Indeed, when informed of the Board's reason for rejecting his first choice, respondent promptly submitted the name of another psychiatrist with whom he had no previous contact. The Board, however, also rejected that choice, apparently on the grounds that the second physician was associated with the same medical center where respondent's previous examination had been conducted.

Consequently, for the reasons stated herein, we reverse the decision of the Commissioner directing respondent to submit to a psychological evaluation by Dr. Zuckerman. However, given the time which has already elapsed in this matter as the result of these proceedings, we direct respondent to provide the Board with the name of another psychiatrist within two weeks from the date of our decision herein. Inasmuch as we reject respondent's contention that the Board acted unreasonably in requiring him to submit to an independent objective evaluation, we direct that the

² We note that the Board submitted its instant petition to the Commissioner prior to rejecting respondent's second choice.

³ While the Board argues that respondent waited nearly three months after its selection of Dr. Zuckerman on February 22, 1994 to submit his own choice on May 18, we note that a hearing on its directive was held by the Board on March 29, at which time it reaffirmed its action. See Gish v. Bd. of Education of Paramus, 145 N.J. Super. 96 (App. Div. 1976), certif. den., 74 N.J. 251 (1977), cert. den., 434 U.S. 879 ["Before a teacher is ordered to submit to a psychiatric examination, he is entitled to...a hearing, if requested." 145 N.J. Super. at 100, quoting Kochman v. Keansburg Bd. of Ed., 124 N.J. Super. 203, 213 (Ch. Div. 1973)]. Notice to respondent of such action was dated April 6, 1994.

respondent select a physician who is not associated with the medical center which performed his previous evaluation and who has not had any previous contact with him. In acting upon such selection, the Board may not unreasonably withhold its approval.⁴

Donald C. Addison, Jr., Wendel E. Daniels and Thomas P. McGough abstained.

February 7, 1996

Date of mailing FEB 09 1996

⁴ We stress that once the parties have agreed on a physician to perform the examination, the Board is required to respect the ensuing physician-patient relationship. Accordingly, respondent cannot be compelled by the Board to authorize release to the Board's counsel of any records requested by the physician as part of his or her evaluation. See Petition of Appeal, at 6.

HERBERT DRUKER, CHARLES BOLDEN, :
 LEONA ROBERTS, MELVIN THOMAS, :
 EDWARD NOVAK, JOHN GRINNAGE, :
 JOHN WASINDA, ANTOINETTE HAMPTON, :
 JOYCE BROWN, HARRY ROCCO, ROBERT :
 TRAMA, JANET SHELTON, ED KERNS, :
 ELIZABETH KELLY, ALMA SINGLETON :
 AND THE WILLINGBORO EDUCATIONAL :
 ADMINISTRATORS' ASSOCIATION, : COMMISSIONER OF EDUCATION

PETITIONERS, : DECISION

V. :

BOARD OF EDUCATION OF THE TOWN- :
 SHIP OF WILLINGBORO, BURLINGTON :
 COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioners, building-level administrators who were members of the collective bargaining unit of Willingboro Educational Administrators' Association, challenged Board's requirement that its administrators and supervisors obtain a black seal license as a condition of employment.

While the ALJ found that petitioners failed to meet their burden of proof that the requirement to obtain a black seal license was arbitrary, unreasonable or capricious in that the principal needs to have a working knowledge of potentially dangerous equipment within the school building, the ALJ also determined that the requirement was a negotiated term of employment within petitioners' bargaining agreement since 1982. Accordingly, since disputes that are properly the subject of mandatory negotiation are not cognizable by the Commissioner as controversies arising under school laws, this matter should not fall within the decisional purview of the Commissioner. Petitioners' application for a determination of invalidity of the black seal license requirement was denied.

Commissioner adopted findings and determination in initial decision as his own.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3664-94

AGENCY DKT. NO. 45-3/94

**HERBERT DRUKER, CHARLES BOLDEN,
LEONA ROBERTS, MELVIN THOMAS,
EDWARD NOVAK, JOHN GRINNAGE,
JOHN WASINDA, ANTOINETTE HAMPTON,
JOYCE BROWN, HARRY ROCCO, ROBERT
TRAMA, JANET SHELTON, ED KERNS,
ELIZABETH KELLY, ALMA SINGLETON
AND THE WILLINGBORO EDUCATIONAL
ADMINISTRATORS' ASSOCIATION,**

Petitioners,

v.

**BOARD OF EDUCATION OF
THE TOWNSHIP OF WILLINGBORO,
BURLINGTON COUNTY,**

Respondent.

Robert M. Schwartz, Esq., for petitioners (Lake and Schwartz, attorneys)

Lisa James-Beavers, for respondent (Hill Wallack, attorneys)

Record Closed: April 10, 1995

Decided: May 3, 1995

BEFORE ROBERT S. MILLER, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On March 10, 1994, Herbert Druker filed a petition with the Commissioner of Education for a declaratory determination that the respondent Willingboro Township Board of Education ("Board") has no authority to require its administrators and supervisors to obtain a black seal license as a condition of employment.

An answer was filed on April 4, 1994. On November 10, 1994, without objection, an amended petition, adding a number of other individuals and the Willingboro Educational Administrators' Association, was filed.

Subsequently, counsel agreed upon a stipulation of facts and made cross-motions for summary decision. Briefs and reply briefs were filed in due course. Oral argument was held on April 10, 1995, at which time counsel also submitted (by way of a joint exhibit) a copy of a collective bargaining agreement between the Willingboro Township Board of Education and the Willingboro Educational Administrators' Association for July 1, 1991 to June 30, 1994.

As stated above, the essential facts in this matter are not in dispute. They are as follows:

FINDINGS OF FACT

1. Petitioners are building-level administrators employed by the Willingboro Board of Education.
2. Petitioners are members of the collective bargaining unit identified as the Willingboro Educational Administrators' Association.
3. A current collective bargaining agreement between the Willingboro Board of Education and the Willingboro Educational Administrators' Association provides in Article 15 that each unit member of the Association shall obtain a black seal license within three (3) years.
4. The administrators were first required to obtain their black seal licenses as a result of the renewal of the collective bargaining agreement that became effective on July 1, 1982 and was to remain effective through June 30, 1984.

5. This collective bargaining agreement was signed by the president of the Willingboro Educational Administrators' Association on behalf of the membership.
6. The black seal license has remained a requirement for administrators since the 1982 collective bargaining agreement made it so.
7. Dr. Herbert Druker was employed by the Willingboro Board of Education from December 1, 1968 to his retirement on December 1, 1994.
8. The black seal license signifies that the holder thereof has taken a course and passed a test concerning the safe and proper operation of steam generators (boilers) and steam generator equipment.

ISSUE AND ANALYSIS

In pertinent part, N.J.S.A. 18A:27-4 provides as follows:

Each board of education may make rules, not inconsistent with the provisions of this title, governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members

N.J.S.A. 34:7-1 states that no unlicensed person shall operate a steam generator and that no owner or person having charge of a building in which such equipment is located shall allow the use of such equipment unless the same is in charge of a properly licensed person.

N.J.A.C. 6:11-9.5 sets forth the requirements necessary to hold a principal's endorsement to an administrative certification. These requirements include: (1) a master's degree in one of the recognized fields of leadership or management; (2) passing a State administered examination; (3) a performance assessment conducted by State-approved assessors; and (4) completion of a State-approved residency program under the direction of a State-approved mentor and sponsorship of a public or non-public school.

The question in this case thus becomes whether the black seal license requirement in the collective bargaining agreement is "inconsistent with" the certification requirements for

administrators and principals found in N.J.A.C. 6:11-9.1 et seq. For the reasons to be expressed hereafter, I believe this question should be answered in the negative.

The argument of petitioners, as set forth in their brief of March 10, 1995, is essentially as follows:

“Nowhere in the certification rules is there a requirement that a principal also must know how to operate a steam powered generator to hold the title of principal. Petitioners contend that a local district board may not make or impose local requirements which are materially different from and which materially alter the State certification requirements. Petitioners submit that assuming a local district board of education has the authority to impose local requirements in addition to the State certification requirements to hold a given position, there must be some reasonable relationship between the locally mandated requirements and the position for which they are intended to apply.”

Petitioners, however, have the burden of proof in this matter and they have been unable to cite any authority directly in support of their position. The closest they have come are the cases of South River Educational Association v. South River Board of Education, 1987 S.L.D. 2724, and Van Os v. Board of Education of Township of Cinnaminson, 1977 S.L.D. 1040. The former decision invalidated certain requirements imposed by the South River Board of Education which had the effect of defeating the established seniority rights of teachers in the school system. Clearly, that is not the situation in the instant case. The Van Os decision upheld the right of the Cinnaminson Board of Education to impose requirements greater than those for a regular teaching certificate, but warned that a board can not be “wholly arbitrary in its quest for teachers with multiple certification” (1977 S.L.D. at 1043).

Furthermore, petitioners concede that one of the responsibilities of a principal is the safety of the students, teachers, and other people who attend, visit, or work in the school building (or buildings) where, so to speak, he presides. Again, petitioners have been unable to demonstrate anything arbitrary, unreasonable or capricious in a requirement that the principal have working knowledge of potentially dangerous equipment within the school building and of the precautions and measures that should be taken to minimize the risks thereof.

Third, the requirement of a black seal license has not been unilaterally imposed by respondent on petitioners. It was agreed upon by both parties and has been in effect and incorporated into collective bargaining agreements since 1982. As respondent's counsel points out, the collective bargaining agreement under which the parties have been operating is the result of a negotiating process, involving quid pro quos by both sides. It is quite likely that the administrators agreed to the black seal license requirement in return for a concession or concessions made by the Board of Education. Without pursuing the matter further, I should note that petitioners' claim of invalidity at this time (twelve years after having agreed to the requirement) implicates the equitable doctrines of laches and estoppel, both of which may be invoked as a defense by respondent.

Finally, although N.J.S.A. 18A:6-9 gives the Commissioner subject matter jurisdiction to hear and determine "all controversies and disputes arising under the school laws," that phrase has been interpreted to mean that the dispute arises under Title 18A. Fair Lawn Board of Educ. v. Mayor of Fair Lawn, 143 N.J. Super. 259, 266 n.3 (Law Div. 1976). If the controversy does not arise under the school laws, it is outside the Commissioner's jurisdiction, even though it may pertain to school personnel. East Brunswick Bd. of Educ. v. Township Counsel of East Brunswick, 48 N.J. 94, 102 (1966). The Commissioner's main responsibility is to see that the policies of the school laws are being faithfully effected. Laba v. Newark Bd. of Educ., 23 N.J. 364 (1957).

Disputes that are properly the subject of mandatory negotiation are not cognizable by the Commissioner as controversies arising under the school laws. See Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 22 (1973); Red Bank Bd. of Educ. v. Warrington, 138 N.J. Super. 564, 571 (App. Div. 1976). The Public Employment Relations Commission has primary jurisdiction to determine whether the subject matter of a dispute is within the scope of collective negotiations. Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 154 (1978). Terms and conditions of employment are subjects that are negotiable pursuant to the Employer-Employee Relations Act, N.J.S.A. 34:13A-1 to -21. The requirement that principals obtain a black seal license, having been negotiated and set forth in the collective bargaining

agreement, is clearly a term and condition of employment. If it involves educational policy at all, it does so only indirectly, and should not fall within the decisional purview of the Commissioner.

CONCLUSION AND ORDER

For the reasons expressed above, **I CONCLUDE** that the petitioners' application for a determination of invalidity of the black license seal requirement should be **DENIED**. It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 3, 1995
DATE

Robert S. Miller
ROBERT S. MILLER, ALJ

5/5/95
DATE

Receipt Acknowledged:

Hope R. Blackman
DEPARTMENT OF EDUCATION

MAY 11 1995
DATE

Mailed to Parties:
Jeff S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

tmp

EXHIBITS

Joint:

- J-1 Agreement between Willingboro Township Board of Education and Willingboro Educational Administrators' Association for July 1, 1991 to June 30, 1994

HERBERT DRUKER, CHARLES BOLDEN, :
LEONA ROBERTS, MELVIN THOMAS, :
EDWARD NOVAK, JOHN GRINNAGE, :
JOHN WASINDA, ANTOINETTE HAMPTON, :
JOYCE BROWN, HARRY ROCCO, ROBERT :
TRAMA, JANET SHELTON, ED KERNS, :
ELIZABETH KELLY, ALMA SINGLETON :
AND THE WILLINGBORO EDUCATIONAL :
ADMINISTRATORS' ASSOCIATION, : COMMISSIONER OF EDUCATION

PETITIONERS, : DECISION

V. :

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF WILLINGBORO, BURLINGTON :
COUNTY, :

RESPONDENT. :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioners' exceptions and the reply thereto were timely filed pursuant to N.J.A.C. 1:1-18.4.

Petitioners essentially renew their arguments previously advanced before the Administrative Law Judge (ALJ) and further argue that the ALJ's erroneous reasoning and conclusion that the Board did not act arbitrarily in requiring its building level administrators to obtain a black seal license could lead to an endless list of requirements being imposed at the local level. (Exceptions at p. 3) Additionally, petitioners assert that this matter is properly within the jurisdiction of the Commissioner in that "[t]he Commissioner has an interest in determining

whether the qualifications of any teaching staff member can be controlled by something other than what is set forth by the State Board of Examiners in the New Jersey Administrative Code” (Id. at p. 4)

The Board supports the ALJ’s findings that petitioners have failed to meet their burden of proof, that the black seal requirement was a negotiated term within petitioners’ bargaining agreement, and that this matter is not within the jurisdiction of the Commissioner. (Board’s Reply at pp. 1, 2)

Upon careful and independent review, the Commissioner finds petitioners’ exceptions to be without merit and concurs with the ALJ’s conclusion that petitioners’ request for a determination of invalidity of their contractual requirement to obtain a black seal license should be denied. In that the requirement to obtain a black seal license has been part of petitioners’ collective bargaining agreement since 1982, and is a term and condition of employment, the Commissioner agrees with the ALJ that petitioners’ request “[i]f it involves educational policy at all *** does so only indirectly, and should not fall within the decisional purview of the Commissioner.” (Initial Decision at p. 6)

Accordingly, the Commissioner adopts the initial decision of the ALJ for the reasons expressed therein.

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

JUNE 19, 1995

DATE OF MAILING JUNE 19, 1995

IN THE MATTER OF THE TENURE :
 HEARING OF SHARON JONES, SCHOOL :
 DISTRICT OF THE CITY OF ATLANTIC : COMMISSIONER OF EDUCATION
 CITY, ATLANTIC COUNTY. :
 _____ :
 :

DECISION

SYNOPSIS

Board certified tenure charges against respondent secretary for alleged excessive and chronic absenteeism beginning in the first year of her employment (school year 1987-88) and documented through school year 1993-94.

ALJ concluded that the Board properly served respondent with tenure charges and established by a preponderance of credible evidence that her unauthorized absences were excessive and imposed undue hardship on the operation of the Board's Accounting Department. Pursuant to N.J.A.C. 13:13-2.5(b), the Board made reasonable accommodations for her handicap (drug use) as it existed in 1988-89; moreover, ALJ determined, based on respondent's testimony, that her excessive absences were not due to her drug use. Board also complied with Open Public Meetings Act (OPMA); respondent's refusal to accept the properly served notice did not give rise to a violation of the OPMA. ALJ ordered the Board's action terminating the respondent's tenured secretary position sustained.

In light of the record of absences which fully supported sufficient cause to terminate respondent from her tenured position, Commissioner adopted the initial decision as his own and directed dismissal from her position as of the date of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6578-94

AGENCY REF. NO. 142-5/94

**IN THE MATTER OF THE TENURE HEARING
OF SHARON JONES, SCHOOL DISTRICT OF
THE CITY OF ATLANTIC CITY, ATLANTIC
COUNTY**

Joan Langer, Esq., for the complainant Board of Education
(Joseph M. Jacobs, attorney)

Allen S. Zeller, Esq., for respondent, (Freeman, Zeller & Bryant, attorneys)

Record Closed: March 22, 1995

Decided: May 3, 1995

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Board of Education of the City of Atlantic City (Board) certified charges against respondent, Sharon Jones, a tenured secretary, before the Commissioner of Education (Commissioner) alleging excessive absenteeism and seeks her removal from her tenured position.

The matter was transmitted to the Office of Administrative Law (OAL) on July 11, 1994, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A prehearing conference was held on October 21, 1994, at which, among other things,

the issues to be determined by this tribunal were set forth and the hearing dates of March 21, 22 and 23, 1995, were established.

The hearing was conducted on March 21 and 22, 1995, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey. The hearing record closed on March 22, 1995.

ISSUES

The issues to be determined, as agreed upon by the parties, are as follows:

1. Whether the tenure charges of excessive absenteeism are true, in fact?
2. Whether the Board failed to conform to the provisions of New Jersey Statutes in certifying tenure charges against respondent, and has thus deprived respondent of due process of law?
3. Whether the Board violated the provisions of the Open Public Meetings Act with regard to the action taken against respondent?
4. Whether the Board is barred by the doctrines of equitable estoppel and laches?
5. Whether the Board is barred by the statute of limitations?
6. Whether the Board is barred in that it fails to state a cause of action upon which relief can be granted?
7. Whether the Board has violated respondent's rights by its refusal and/or neglect in providing respondent with an accommodation of her disabilities in violation of the laws of the United States and the State of New Jersey including, but not limited to, the Americans with Disabilities Act?

BURDEN OF PROOF

The Board has the burden of proof for Issue No. 1 and must carry it by a preponderance of the credible evidence. Respondent has the burden of proof with respect to Issue No. 2 through No. 7, by the same standard.

STIPULATIONS

The parties stipulated to the documents contained in Exhibit P-1. Respondent did not, however, stipulate that the Board's Notice to her was either sent or received. The Disciplinary Charges which give rise to the tenure charges against respondent and allege chronic absenteeism are as follows:

1. During the period from 1987 to the present date, the respondent, Sharon Jones, has been chronically absent from her duties as a secretary of the Atlantic City Board of Education.
2. Pursuant to the respondent's contract of employment with the Atlantic City Board of Education, a secretary is permitted a total of twelve (12) sick days per year, three (3) personal days per year, and ten (10) vacation days per year during the first six (6) years of employment.
3. The respondent's contract of employment commenced in the school year of 1987. In her first year of employment the respondent accumulated nine (9) sick days and two (2) personal days. Additionally, the respondent was docked for three (3) days during the days of June 15, June 16 and June 17, 1988. "Docked" days are defined as unauthorized absences. During school year 1988-89, the respondent consumed all of her allocated twelve (12) sick days, three (3) personal days, and then (10) vacation days. The respondent was granted twenty five (25) days approved medical leave during school year 1988-89.
4. Additionally, in school year 1988-89 the respondent was docked for twenty five (25) unauthorized absences, as follows:

1988

July 22, 1988
August 18, 1988
September 5, 12, 13 and 20, 1988
October 18, 1988
November 2, 3 and 15, 1988

1989

January 25, 1989
February 1, 6, 7, 8, 13, and 14, 1989
April 18, 1989
May 2, 3, 6, 7, 8, 9, and 10, 1989

vacation time for a total of fifteen (15) days vacation. During the said school year, the respondent was docked a total of twenty six (26) days for unauthorized absences, as follows:

1993

November 19 and 30, 1993

December 1, 2, 3, 6, 9, 15, 16, 17, 20 and 21, 1993

1994

January 7, 10, 11, 12, 13, 14, 21, 24, 25, 27 and 31, 1994

February 1 and 2, 1994

10. The respondent's continued absences have caused repeated interruptions in the the efficient management of the Administrative offices due to requirements for substitution of secretaries and shifting of assigned secretarial tasks. Additionally, the respondent's absences have imposed an undue hardship upon the administrative process of the school system.
11. The respondent's portfolio of accrued absences has continually escalated in each academic year of her employment.
12. The respondent's absences constitute excessive and chronic absenteeism by a secretary and require disciplinary action by the Board of Education. (P-1).

TESTIMONIAL AND DOCUMENTARY EVIDENCE

Charles B. Hawn, Jr., the Board's Assistant Superintendent and Board Secretary, testified, among other things, about the composition of the Board's Business Office. He asserted there were five employees and one supervisor in the Accounting Department, three of which were assigned to payroll.

Mr. Hawn testified that respondent was assigned to post purchase orders and record their payments. She was subject to deadlines and was required to have reports ready and available prior to the Board's monthly meetings. The Board Secretary asserted that he was satisfied with respondent's work when she appeared for duty.

Mr. Hawn testified that respondent was awarded twelve sick leave days per year or one per month for a twelve month employee. Sick leave time may be accumulated and carried over from year to year. She was also allowed three administrative days per year which, if not used, are

converted to sick leave days at the end of the year. Respondent was allowed ten vacation days per year up to her sixth year of employment. Thereafter, she was allowed five additional vacation days or, fifteen days per year. Vacation days are not allowed to be accumulated or carried over to the subsequent year.

Board Secretary Hawn testified that he has had numerous discussions with respondent about her absenteeism, arriving late for duty and leaving her duty post early. Mr. Hawn testified that in every year of respondent's employment while he served as the Board's Secretary, respondent would be docked for unauthorized absence beginning in or about April of each year. Unauthorized absences is an absence from duty where the employee has exhausted his/her sick leave time and other leave time used for absences. A note from a physician does not excuse an unauthorized absence.

Mr. Hawn testified that he had discussions with respondent about her absenteeism on at least five occasions during the past three years. Although the Board Secretary would give respondent the benefit of doubt and attempt to work with her to improve her attendance, it did not improve even after respondent asserted that it would not happen again.

Board Secretary Hawn testified that he had personally discussed the Board's Policy concerning absenteeism and specifically Article XV, Section 7 which provide that an employee who is absent for more than two days without the knowledge and consent of the Superintendent of Schools shall be considered to have broken her contract with the Board (P-5). He also discussed the implication of Title 18A, Education Law, with respect to her continued employment with the Board.

Mr. Hawn testified that respondent was granted an authorized leave of absence during the 1989-90 school year. Hawn was told that the leave was granted for medical reasons; *i.e.*, a drug problem. He did not discuss this leave with respondent at anytime.

In 1992, Hawn recommended to the Board, which it accepted, to permanently withhold respondent's salary increment for chronic absenteeism.

In March 1994, Board Secretary Hawn advised respondent, orally, that the Board would discuss her employment status concerning her absenteeism. The discussion took place in Mr. Hawn's office with Ilenna Pitts, respondent's union representative, present. Respondent had arrived for duty late on that day. Mr. Hawn advised respondent and Ms. Pitts that respondent's absence jeopardized the Board's Business Office operation. He also advised both respondent and Pitts that respondent would receive official notice from the Board.

On or about March 3, 1994, the Board's Superintendent of Schools brought disciplinary charges against respondent to the Board. The Board executed a Notice of Disciplinary Charges against respondent, dated March 1, 1994. On March 4, 1994, the Board's solicitor mailed respondent two notices at the addresses she had supplied to the Board. One notice was sent to P.O. Box 5254, Atlantic City, NJ 08404. The other notice was sent to respondent at 1734 Grant Avenue, Atlantic City, NJ 08401. Both notices were unclaimed by respondent and returned to the Board.

On April 26, 1994, the Board, by a majority vote, certified disciplinary charges against respondent and suspended her without pay, effective April 27, 1994. On April 29, 1994, the Board's Solicitor sent its Notice, Certification of Determination, Notice of Disciplinary Charges, Disciplinary Charges and Proof of Mailing to respondent at the above addresses. (P-1). The same documents sent to respondent dated April 29, 1994, were returned to the Board's Solicitor unclaimed.

Susan G. Maggio, Accounting Department Office Manager, testified on behalf of the Board asserting, among other things, that she was respondent's director supervisor. Ms. Maggio, who is responsible to Mr. Hawn, asserted that respondent was a good worker when she was present. Ms. Maggio did not have any personal problems with respondent. The major problem she had was with respondent's absenteeism.

Ms. Maggio testified that the Board's Accounting Department processed more than 4,000 purchase orders each year. This required the posting of the purchase orders and confirming the orders. She asserted it got to the point where respondent's duties were divided between two

other employees in the Accounting Department because of respondent's excessive absenteeism. As a consequence, the other two employees fell behind in their assigned work.

Respondent was required to generate a report for the Board's monthly meeting. Ms. Maggio asserted that respondent would always be absent just prior to the deadline for the Board report thus, placing an additional burden upon the other employees in the Accounting Department to complete respondent's assigned duties.

The record demonstrates that between May 3, 1989 and April 20, 1994, Ms. Maggio generated nine memoranda concerning respondent's conduct. The memoranda to respondent included: observations of sleeping at her desk (January 14 and 15, 1992, June 5, 1992, August 12, 1992, May 28, 1993); taking her lunch break and not returning to duty (September 21, 1993); reporting that she had overslept, was seeing a doctor and would report to work late but did not (May 3, 1989, November 30, 1993, December 1, 1993, December 3, 1993); no call and no show (December 2, 1993). These observations were in addition to respondent's unauthorized absences. On April 20, 1994, Ms. Maggio addressed the following memorandum to Mr. Hawn:

Attendance is a crucial part of efficient office management. Sharon's attendance since Easter break is averaging 2 1/2 days per week. She has been late, she is taking an extended lunch, nodding at her desk, or she is either coming in a half day or not at all. I cannot run an office and expect accuracy if she is not here to complete her job. For the past four months Jacque and Dottie have not only to had to complete their share of the work, but also Sharon's work. Dottie's job is to complete all federal program paper work, be it purchase orders, vouchers, or reports. She also is responsible for completing the check registers each month, which includes listing all voided and canceled checks.

Consequently, she has fallen behind. I do not feel this is fair to the other ladies in the office, or for that matter, me. I am requesting you speak to her and reinforce the importance of her attendance and accuracy in completing her job. On Tuesday, April 19, Sharon left for lunch at 11:10 a.m., and never returned. She called at 3:35 p.m. to say she had fallen asleep. She called this morning and told Jacque she was running late and would be in by 9:30. It is now 2:00 p.m., and she has not arrived or even called to let me know what her intentions are. My position includes the responsibilities of all work that is required to be done on a monthly basis. I cannot accept responsibility if I do not have a full staff to complete their respective jobs. Her absenteeism is putting a great strain on our monthly

deadlines and extreme stress in our office. I am available to discuss any suggestions you may have. (R-2)

Ms. Maggio testified that one full-time employee had been absent from the Accounting Department for more than one year on an approved medical leave of absence. She conceded that the absent employee's work was divided among the other employees with the bulk of the work assigned to respondent. Ms. Maggio asserted that long-term absence was easier to accommodate than the unauthorized excessive absenteeism of respondent. The Accounting Department was in the position to plan the work of the long-term employee where the absence of respondent interrupted the flow of work.

Ms. Maggio testified that she was not aware that the Board intended to bring charges against respondent for the termination of her tenured position until Mr. Hawn advised the whole Accounting Department that respondent had been suspended, effective April 27, 1994. Although Ms. Maggio was respondent's supervisor, she did not evaluate respondent.

Dorothy Maxwell-Guzman, Accounting Clerk, testified on behalf of the Board. She has been employed by the Board for nine years and is responsible for accounting for all federal and state grants in aid. She has been placed in the position to help her co-workers when they are in need of help and assistance.

Ms. Maxwell-Guzman testified that she was friendly with respondent and that respondent was an excellent worker when she appeared for work. However, respondent was in the habit of coming to work late and leaving work early. Respondent also slept on the job and failed to call in to report her absence or just failed to appear for work after she called to report that would be late.

Ms. Maxwell-Guzman attempted to help respondent with respondent's personal problems. Respondent would confide in Maxwell-Guzman and told her about respondent's medical leave of absence for drug detox and rehabilitation. Ms. Maxwell-Guzman was aware that respondent was involved in an automobile accident which caused respondent to be absent from duty. Ms. Maxwell-Guzman was also aware that respondent missed work when she had contracted pneumonia. Ms. Maxwell-Guzman testified that during the 1990-91 school year, respondent was

involved in a bitter custody action with her former husband. She asserted that respondent missed work because of court appearances.

Respondent confided in Maxwell-Guzman when the Board filed charges against her and she was suspended without pay. Respondent told Maxwell-Guzman that respondent felt Ms. Maggio treated her differently and ridiculed respondent. Respondent felt that Ms. Maggio picked on respondent.

Ms. Maxwell-Guzman asserted that the problem in the Accounting Department's office was respondent's absence.

Respondent testified on her own behalf asserting, among other things, that her current address is 1734 Grant Avenue, Atlantic City, New Jersey, and has been so for the past three years. She admitted she also maintained a post office rental box with her sister at P.O. Box 5254, Atlantic City, New Jersey. It is the post office box number which is listed as her present address on the employment application respondent signed and executed on September 30, 1987.

Respondent corroborated Board Secretary Hawn's testimony that she met with him in March 1994, where Mr. Hawn advised respondent that her absenteeism would be discussed by the Board. Respondent testified that "we met a lot" about her absenteeism and arriving late for duty.

Respondent asserted that she was made aware that her suspension from duty was to be considered by the Board and that Board Secretary Hawn would recommend that tenure charges against her be certified to the Commissioner. She testified that she became aware of her pending suspension on April 18 or 19, 1994. Respondent asserted that she was in receipt of the charge against her either April 28 or 29, 1994, subsequent to the Board's action on April 26, 1994. (P-1)

Respondent testified with regard to Charge No. 4, of the Superintendent's Disciplinary Charges to the Commissioner concerning the 1988-89 school year. She admitted that she had 25 days of unauthorized absence prior to her entry into a drug rehabilitation program. She contended that she was having difficulty with a thyroid problem in addition to problems with her husband in a child custody dispute. Respondent was admitted and completed a 31 day drug

rehabilitation program at Seabrook House during the 1988-89 school year. This involved three days of detoxification followed by 28 days of rehabilitation. This was an approved leave of absence by the Board after which, respondent returned to duty in the Board's Accounting Department.

Respondent admitted she continued to take unauthorized absences after the exhausting of her sick leave, personal and vacation days. In 1989-90, it was five unauthorized absences beyond her earned and allowed leave days. In 1990-91, it totaled eight unauthorized days; 1991-92, it was four days; 1992-93, 21 days; 1993-94, 26 days, with five vacation days added to her approved absences for longevity.

Respondent asserted that she would oversleep on occasion and call her office after it had opened for the day to report her absence. She contended she was not always successful in making contact with the Accounting Department to report she would be appearing late for work.

With regard to the child custody problems with her husband, respondent testified she had to get a second job in order to pay child support and pay for the litigation. She asserted that the custody process lasted two years, which caused her to be in court at least twice per month. She asserted she also had medical problems during this period which required surgery and caused her to be absent from work approximately one week. During this period, respondent was involved in an automobile accident where she suffered a dislocated shoulder and a herniated disc.

During the 1993-94 school year, respondent asserted she contracted pneumonia which caused her to be absent from work for one month. She also asserted she suffered a nervous breakdown and entered into counseling at the Atlantic City Mental Health Clinic.

Respondent testified that she confided in Ms. Maggio about her drug problem and that Ms. Maggio sought help for respondent. She admitted that from 1988 until 1994 she was advised, annually, that her continued absence would result in the loss of her employment position. Respondent further admits that due to her continued absence, her salary increment was withheld at the end of the 1992 school year. Respondent complained that she felt that Ms. Maggio ridiculed her when respondent was late for duty by asking respondent if she was doing drugs.

Respondent asserted that everyone in the Accounting Department helped her to get to work and in a timely manner. Some employees would call respondent at her home when respondent overslept and one employee would pick respondent up at her home and transport her to work. Respondent testified that all of the employees in the Accounting Department tried to be "my mom."

DISCUSSIONS AND CONCLUSIONS

Respondent admits she had been addicted to drugs and now claims protection as a handicapped person under New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-5(q), as

. . . suffering from . . . any mental, psychological or developmental disability resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. . .

In the matter of Clowes v. Terminix Intern, Inc., 109 N.J. 575, 593-594 (1988) our New Jersey Supreme Court held that alcoholism is a handicap under LAD. Drug addiction as a handicap was included in the Matter of Cahill, 245 N.J. Super. 397 (App. Div. 1991). As the Court said in Cahill, "Alcohol is a drug." Id. at 400. Se also Clowes at 592. The Cahill Court continued to say:

Addiction, habituation or dependency which results from use of one drug or another, or as in this case, a combination of drugs, renders a person handicapped. Id. 400

The Administrative Code, at N.J.A.C. 13:13-2.5(b) provides that:

An employer must make a reasonable accommodation to the limitations of a handicapped employee or applicant, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business. The determination as to whether an employer has failed to make reasonable accommodation will be made on a case-by-case basis.

Respondent claims that the Board has failed to make the necessary accommodation for her handicap. She also relies upon the testimony of the Board's witnesses who asserted that her work was satisfactory when she was in attendance at her duty station.

Respondent admits to drug addiction which caused her to enter a drug detoxification and rehabilitation program during the 1988-89 school year. Respondent does not, however, admit to drug use thereafter. Rather, respondent blames her unauthorized absence on a protracted child custody case over a two year period which required respondent to appear in court. Respondent also asserts she had to take a second job to pay the expenses for the child custody case which caused her to report to work late. Respondent also states that her unauthorized absenteeism was the result of an automobile accident, pneumonia, death in the family, a medical problem which necessitated surgery and a nervous breakdown. At no time during the hearing did respondent admit that she had returned to the use of drugs subsequent to rehabilitation during the 1988-89 school year. In fact she took offense when Ms. Maggio asked her if her tardiness or absenteeism was due to drug use.

The facts in this matter clearly demonstrate that the Board afforded respondent a reasonable accommodation of her drug abuse handicap by granting her an unpaid leave of absence during the 1988-89 school year to provide her the opportunity to attend a drug detoxification and rehabilitation program. The record shows that her attendance improved, however, she was still charged five unauthorized absence during the 1989-90 school year. These unauthorized absences were charged against respondent after she had exhausted her 12 sick leave days, three personal days and 10 vacation days. The unauthorized absences continued up until at least February 1994 (P-1). During these periods of unauthorized absences, the employees of the Board's Accounting Department completed respondent's work assignments, to the detriment of their own work assignments. Respondent's conduct contributed to a stressful condition in the Accounting Department. It was not known when respondent would appear for duty or, even if she did appear, it was not known whether she would remain on the job. Respondent has the reputation of arriving to work late, falling asleep at her desk and taking an early lunch and not returning to her work station. Respondent admits that Ms. Maggio and others in her office attempted to help her in a variety of ways to get to work and perform her assigned duties. By her own admission, everyone in the Department attempted to be her "mom."

Respondent claims that the Board failed to conform to the provision of the new Jersey Statutes in certifying tenure charges against her. She maintains that she was not properly served.

The facts of this matter clearly demonstrate that Board Secretary Hawn advised respondent in March 1994, that the Board would be discussing her absenteeism at one of its subsequent meetings. Respondent knew that her excessive unauthorized absences would be the subject of the Board's review. Respondent was also aware that her salary and adjustment increment had been permanently withheld for her excessive absenteeism. The Board presented proof that it mailed respondent its Disciplinary Charges and that respondent failed to claim the mail. It can reasonably be inferred that respondent knew the contents of the letters and simply refused to claim them. To suggest that the Board did not properly serve respondent stretches credulity.

I **CONCLUDE** that the Board properly served respondent with the charges against her in accordance with N.J.S.A. 18A:6-11.

Respondent presented no evidence that the Board was, in any fashion, in violation of the OPMA. I **CONCLUDE**, therefore, that the Board complied with the provisions in the holding in Rice v. Union Cty. Reg. High School Bd. of Ed., 155 N.J. Super 64 (App. Div.) 1977) whereby it advised respondent of its intent to discuss her employment status. Respondent's refusal to accept the properly served notice does not give rise to a violation of the OPMA.

I **CONCLUDE**, therefore, that respondent failed to meet her burden, by a preponderance of the evidence, that the Board violated the OPMA.

I **CONCLUDE**, therefore, that the Board has established, by a preponderance of the credible evidence, that respondent's unauthorized absence from duty was, in fact, excessive.

I **CONCLUDE**, that respondent's absenteeism imposed an undue hardship on the operation of the Board's Accounting Department.

I **CONCLUDE** that, pursuant to N.J.A.C. 13:13-2.5(b), the Board made reasonable accommodations for respondent's handicap as it existed in 1988-89.

I **CONCLUDE** that respondent failed to demonstrate a continuing drug addiction or dependency subsequent to her rehabilitation in 1988-89. Clowes, supra at 595. In fact, she denied that her unauthorized absences were related to the use of drugs, contending other reasons for the unauthorized absence.

ORDER

Accordingly, it is **ORDERED** that the action of the Board to terminate respondent's tenured secretary position be and is hereby **SUSTAINED** and that she be **REMOVED** effective on the date of the Board's action, April 26, 1994.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

MAY 3, 1995
DATE

Lillard E. Sawyer
LILLARD E. LAW, ALJ

5/5/95
DATE

Receipt Acknowledged:

[Signature]
DEPARTMENT OF EDUCATION

MAY 12 1995
DATE
psa

Mailed to Parties:

[Signature]
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

WITNESSES

FOR PETITIONER:

CHARLES B. HAWN, JR.
SUSAN G. MAGGIO
DOROTHY MAXWELL-GUZMAN

FOR RESPONDENT:

ILENA PITTS
SHARON JONES

DOCUMENTS IN EVIDENCE

FOR PETITIONER:

P-1 LETTER, APRIL 12, 1995 TO MAUREEN KELLER FROM JOSEPH JACOBS
WITH ATTACHMENTS
P-2 ID ONLY
P-3 ID ONLY
P-4 ID ONLY
P-5 RULES AND REGULATIONS OF THE BOARD OF EDUCATION ADOPTED
1938, REVISED 1965, 1974
P-6 ID ONLY
P-7 ID ONLY

FOR RESPONDENT:

R-1 INTERROGATORIES BY ZELLER TO THE BOARD
R-2 BOARD'S ANSWERS TO ZELLER INTERROGATORIES

IN THE MATTER OF THE TENURE :
HEARING OF SHARON JONES, SCHOOL :
DISTRICT OF THE CITY OF ATLANTIC : COMMISSIONER OF EDUCATION
CITY, ATLANTIC COUNTY. :
: DECISION
: _____:

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions were timely filed by respondent in accordance with N.J.A.C. 1:1-18.4.

Respondent's exceptions assert that she should be permitted to return to work since the continued punishment imposed by the Board violates the intent of state and federal statutes precluding discrimination on the basis of a disability. (Respondent's Exceptions at p. 2) Further, respondent maintains that the Board failed to establish that her absences adversely affected the education process or the ability of the district to operate, and did not jeopardize the health and safety of students or staff. (Id.) Finally, respondent argues that testimony revealed the Board did not have an appropriate attendance policy in place and, consequently, there were no standards by which a staff member could be properly guided. (Id.)

Upon careful and independent review, the Commissioner finds respondent's exceptions to the initial decision rendered in this matter to be without merit. The ALJ specifically determined, and respondent does not refute:

***that respondent failed to demonstrate a continuing drug addiction or dependency subsequent to her rehabilitation in

1988-89 Clowes, supra at 595. In fact, she denied that her unauthorized absences were related to the use of drugs, contending other reasons for the unauthorized absence[s]. (Emphasis added)
(Initial Decision at p. 15)

Consequently, respondent's argument that the Board's punishment violates laws against discrimination is ineffective.

Additionally, the Commissioner notes that respondent stipulated to the fact that her continued absences caused repeated interruptions in the efficient management of the administrative offices and imposed undue hardship on the administrative process of the school system. (Initial Decision at p. 5) The Board is not required to show more.

Finally, respondent's claim as to testimony which disclosed inappropriate Board policy cannot be addressed where respondent fails to provide relevant portions of the transcript of the administrative hearing. In re Morrison, 216 N.J. Super. 143, 158 (App. Div. 1987). Moreover, the Commissioner finds the assertion that respondent was not duly warned of the potential consequences of her excessive absenteeism to be unpersuasive in that "[s]he admitted that from 1988 to 1994 she was advised, annually, that her continued absence would result in the loss of her employment position." (Initial Decision at p. 11) Thus, the Commissioner determines that the record fully supports sufficient cause to terminate respondent from her position as a tenured secretary based upon her excessive absenteeism.

Accordingly, the Commissioner adopts the initial decision of the ALJ for the reasons expressed therein, and directs that respondent be dismissed from her tenured position with the Board of Education of Atlantic City as of the date of this decision.

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

218-95M

BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY, :

PETITIONER, :

v. :

EDWARD MUELLER, :

RESPONDENT, :

AND :

FRANK PANNUCCI, :

PETITIONER, :

v. :

EDWARD MUELLER, :

RESPONDENT. :

_____ :

COMMISSIONER OF EDUCATION
DECISION ON MOTION

OAL DKT. NOS. EDU 4789-94 and EDU 7178-94 (CONSOLIDATED)

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF BRICK, OCEAN COUNTY, :
 :
PETITIONER, :
 :
V. :
 :
EDWARD MUELLER, :
 :
RESPONDENT, :
 :
AND :
 :
FRANK PANNUCCI, :
 :
PETITIONER, :
 :
v. :
 :
EDWARD MUELLER, :
 :
RESPONDENT. :
_____ :

For Respondent, Edward Mueller, Pro Se

For the Board of Education, Nicholas C. Montenegro, Esq. (Wilbert & Montenegro)

For Frank Pannucci, Michael C. Paxton, Esq. (Shea & Novy)

This matter was opened on May 24, 1995 before the Commissioner of Education by way of motion and an affidavit of Respondent Mueller seeking a stay of the Commissioner's decision rendered in the above-captioned matter on May 12, 1995. Responsive papers were filed

by the Board on June 2, 1995 and by Frank Pannucci on June 2, 1995. In support of his claim that a stay should issue pending review of this case before the State Board of Education, respondent's motion essentially presents a recitation of his initial response on the merits of this matter except for his assertion that if the requested stay is not granted he will suffer irreparable harm "emotionally and [in] his belief in due process; and to [the belief in due process by the] voters of the district who chose him*** [by] disenfranchising the majority's votes***." (Motion for Stay at p.1) He also indicates that he will suffer irreparable economic harm if a stay of the Commissioner's decision is not issued as he has deferred acceptance and application of compensation allegedly owed to him and the Brick Township Town News since being sworn to a seat on the Brick Township Board of Education. (Id. at p. 2)


In response, the Board initially points out that respondent's stay application is facially deficient in that the notice of his intention to seek a stay was filed prior to the filing of a notice of appeal to the State Board of Education pursuant to N.J.A.C. 6:2-2.2, and it was not drafted in accordance with that regulation. The Board further argues that respondent's brief does not address the legal standards necessary for the granting of a stay and, thus, must be denied. Lastly, the Board argues that economic harm can never justify the issuance of emergent relief or a stay citing, Crowe v. DeGioia, 90 N.J. 126 (1982). Mr. Pannucci's response incorporates these arguments.

Upon careful review of the papers submitted by the parties, and under the legal standards that apply to an assessment of whether a stay of the Commissioner's decision should be issued, see, Crowe, supra, respondent's motion is hereby denied. It is clear that extraordinary remedy may not be granted where there has been no showing of irreparable harm or likelihood of

success on the merits, or where material facts are in dispute. See, Crowe, and Glassboro v. Gloucester Cty. Bd. of Chosen Freeholders, 98 N.J. 186 (1984) (court considers merits of appeal and whether irreparable harm will result without a stay). In the instant case, the Commissioner agrees with the Board's contention that respondent has failed to address any of the necessary criteria set forth in Crowe, in particular, he has made no showing that he will suffer irreparable harm from complying with the Commissioner's decision in this matter, or that he will prevail on the merits of the appeal before the State Board. Further, respondent advances no basis for a stay but rather reiterates arguments previously raised and rejected by the Commissioner and, in any event, argues he stands to incur a monetary loss which is insufficient grounds for a stay. Crowe, supra; Morton v. Beyer, 822 F. 2d 364 (3rd. Cir. 1987)

Accordingly, as respondent has failed to meet the criteria for granting of a stay, this 15th day of June 1995 the instant Motion for Stay is denied and the Commissioner's decision of May 12, 1995 shall stand.

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

JUNE 21, 1995

DATE OF MAILING JUNE 21 , 1995

220-95

MARGARITA R. NAVARRO, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

STATE-OPERATED SCHOOL DISTRICT : DECISION

OF THE CITY OF PATERSON, PASSAIC :

COUNTY, :

RESPONDENT. :

JUNE 21, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4129-94

AGENCY DKT. NO. 32-2/94

MARGARITA R. NAVARRO,

Petitioner,

v.

**STATE OPERATED SCHOOL DISTRICT
OF THE CITY OF PATERSON, PASSAIC COUNTY**

Respondent.

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

Russel J. Schumacher, Esq., for respondent
(Rand, Algeier, Tosti & Woodruff, attorneys)

Record Closed: May 1, 1995

Decided: May 8, 1995

BEFORE **MUMTAZ BARI-BROWN, ALJ:**

This matter was transmitted to the Office of Administrative Law on April 29, 1994, for determination as a contested case, pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The parties have agreed to a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 8, 1995
DATE

Mumtaz Bari Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

5/10/95
DATE

[Signature]
DEPARTMENT OF EDUCATION
Mailed to Parties: [Signature]
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 12 1995

DATE

OFFICE OF ADMINISTRATIVE LAW

MARGRITA NAVARRO,
Petitioner,

v.

BEFORE THE COMMISSIONER
EDUCATION/OFFICE OF
ADMINISTRATIVE LAW
Agency Ref. No. 32-2/94
O.A.L. Doel No. EDU 4129-94

STATE-OPERATED SCHOOL
DISTRICT OF THE
CITY OF PATERSON,
Respondent.

STIPULATION OF
SETTLEMENT

This matter having been opened to the court on December 5, 1994 and the parties have determined to enter into the following agreement to settle this matter:

1. The respondent will provide to the State Board of Examiners/Division of Teacher Preparation and Certification a letter requesting a change in the recommendation on the petitioner's final comprehensive evaluation report as a provisional teacher. The requested change in recommendation shall be from "Disapproved" to "Insufficient." The request shall be ~~with~~ submitted by December 11, 1994 and shall reflect the following facts:

(a) Petitioner was employed by the respondent from January 11, 1993 as an Elementary Bilingual Teacher under the provisional teacher program of the State Department of Education.

(b) For the remainder of the 1992-93

school year, petitioner was employed as a Bilingual pull-out teacher.

(c) In September, 1993, petitioner was assigned to teach a kindergarten class.

(d) During the months of October and November, 1993, petitioner was absent for several weeks.

(e) Petitioner's original mentor was transferred to another building and the principal did not secure another mentor during the 1993-94 school year.

(f) On November 22, 1993, petitioner was ~~provided~~ provided with 60 days notice of termination and, ^{was} advised ~~that~~ that she would not be recommended for certification as a teacher. Petitioner's last day of work was November 24, 1993.

(g) After reviewing the circumstances regarding petitioner's employment, the respondent has determined that it is both fair and reasonable to change its recommendation from ^{"disappointed"} insufficient to permit petitioner to pursue employment opportunities with other school districts.

(h) The letter the respondent will prepare as referenced above will acknowledge the above-referenced facts and the fact that petitioner had evaluations indicating potential success as a teacher.

2. The above-captioned case will

be held in abeyance pending the respondent's submission of the above-referenced letter to the state Board of Examiners/Division of Teacher Preparation and Certification and the approval of the requested change by that agency. Upon approval of the requested change by that agency, this matter shall be dismissed with prejudice. In the event that the requested change is not approved, the above-captioned matter shall be related for hearing.

Bugbee & Pinedo, Esq.
By ~~Gregory T. Syrek~~
GREGORY T. SYREK
ATTORNEY FOR PETITIONER

~~Margarita Navarro~~
MARGARITA NAVARRO

Rand, Algerie, TOSI & Woodruff
By ~~Russell J. Schumacher~~
Russell J. Schumacher
Attorney for Respondent

December 5, 1994

OAL DKT. NO. EDU 4129-94

MARGARITA R. NAVARRO, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 STATE-OPERATED SCHOOL DISTRICT : DECISION
 OF THE CITY OF PATERSON, PASSAIC :
 COUNTY, :
 :
 RESPONDENT. :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


ACTING COMMISSIONER OF EDUCATION

JUNE 21, 1995

DATE OF MAILING JUNE 21, 1995

221-95

IN THE MATTER OF THE TENURE :
HEARING OF SHAWN DE LANE, STATE- :
OPERATED SCHOOL DISTRICT OF THE :
CITY OF PATERSON, PASSAIC COUNTY. :
_____ :

COMMISSIONER OF EDUCATION
DECISION



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9176-94

AGENCY DKT. NO. 367-8/94

**IN THE MATTER OF THE TENURE
HEARING OF SHAWN DeLANE,
STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF PATERSON,
PASSAIC COUNTY.**

Gregory G. Johnson, Esq., for petitioner

Louis P. Bucceri, Esq., for respondent
(Bucceri & Pincus, attorneys)

Record Closed: April 11, 1995

Decided: May 9, 1995

BEFORE ELINOR R. REINER, ALJ:

On September 6, 1994, petitioner, State-Operated School District of the City of Paterson, (District) certified charges of neglect of duty, excessive absenteeism, failure to call-in intended absences and insubordination against Shawn DeLane, a tenured custodian employed by the District. (It is noted that petitioner alleged that charges had been filed on or about August 10, 1994). On or about August 23, 1994, respondent filed an answer denying the charges. On September 19, 1994, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The matter was assigned to the undersigned judge on September 26, 1994, and a telephone prehearing conference scheduled for November 1, 1994. The telephone prehearing conference was held on November 4, 1994, at which time the issues were isolated, and a hearing scheduled for April 11 and 12, 1995, at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey.

As a result of settlement conferences held on April 11, 1995, a settlement was reached, and the hearing was adjourned.

The parties have agreed to settle this matter and have prepared the attached Settlement Agreement indicating the terms of settlement, which is attached and incorporated herein.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 9, 1995
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

5/10/95
DATE

Walter E. Blackmore
DEPARTMENT OF EDUCATION

MAY 10 1995

Mailed to Parties:

MAY 12 1995

Jeff J. Mani
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

DATE
dgi/e



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

SETTLEMENT AGREEMENT

OAL DKT. NO. EDU 9176-94

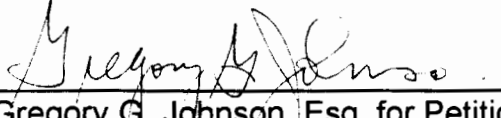
AGENCY DKT. NO. 367-8/94

**IN THE MATTER OF THE TENURE
HEARING OF SHAWN DELANE,
STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF PATERSON,
PASSAIC COUNTY.**

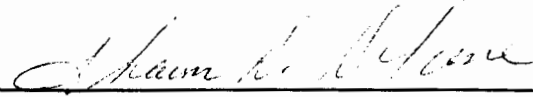
The parties hereby stipulate and agree as follows:

1. Shawn Delane, after being afforded the advice of counsel, agrees to withdraw his answer, defense, and denial of the charge of excessive absenteeism. He understands that the result of this is:
 - a) The charge of excessive absenteeism is sustained;
 - b) He is dismissed from the position of custodian in the State-Operated School District of the City of Paterson; and
 - c) His tenure rights are terminated.
2. The district agrees to withdraw and dismiss all charges against Shawn Delane except for the charge of excessive absence.
3. The district agrees to pay Shawn Delane his regular salary through June 30, 1995.


4. This settlement does not constitute an admission by Shawn Delane as to any charge except the charge of excessive absenteeism.



Gregory G. Johnson, Esq. for Petitioner
State-Operated School District of the
City of Paterson



Shawn Delane, Respondent



Louis Buccheri, Esq., for Respondent



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

SETTLEMENT AGREEMENT

OAL DKT. NO. EDU 9176-94

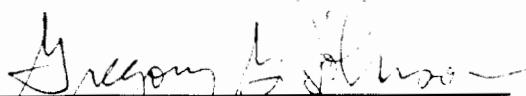
AGENCY DKT. NO. 367-8/94

**IN THE MATTER OF THE TENURE
HEARING OF SHAWN DELANE,
STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF PATERSON,
PASSAIC COUNTY.**


The parties hereby stipulate and agree as follows:

1. Shawn Delane, after being afforded the advice of counsel, agrees to withdraw his answer, defense, and denial of the charge of excessive absenteeism. He understands that the result of this is:
 - a) The charge of excessive absenteeism is sustained;
 - b) He is dismissed from the position of custodian in the State-Operated School District of the City of Paterson; and
 - c) His tenure rights are terminated.
2. The district agrees to withdraw and dismiss all charges against Shawn Delane except for the charge of excessive absence.
3. The district agrees to pay Shawn Delane his regular salary through June 30, 1995.


4. This settlement does not constitute an admission by Shawn Delane as to any charge except the charge of excessive absenteeism.



Gregory G. Johnson, Esq. for Petitioner
State-Operated School District of the
City of Paterson



Shawn Delane, Respondent



Louis Bucceri, Esq., for Respondent

IN THE MATTER OF THE TENURE :
HEARING OF SHAWN DE LANE, STATE- :
OPERATED SCHOOL DISTRICT OF THE : COMMISSIONER OF EDUCATION
CITY OF PATERSON, PASSAIC COUNTY. : DECISION
_____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.



ACTING COMMISSIONER OF EDUCATION

JUNE 21, 1995

DATE OF MAILING JUNE 21, 1995 - 4 -

222-95

GERARD A. DINICOLA ET AL. :

PETITIONERS, :

V. :

BOARD OF EDUCATION OF THE
HUDSON COUNTY AREA VOCATIONAL-
TECHNICAL SCHOOLS BOARD OF EDU-
CATION ET AL., HUDSON COUNTY, :

COMMISSIONER OF EDUCATION

RESPONDENTS, :

DECISION

AND :

HUDSON COUNTY AREA VOCATIONAL-
TECHNICAL SCHOOL EDUCATION
ASSOCIATION, :

INTERVENOR. :

_____ :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2394-93

AGENCY DKT. NO. 25-2/93

GIRARD A. DINICOLA, et al.,

Petitioner,

v.

**HUDSON COUNTY AREA VOCATIONAL-
TECHNICAL SCHOOLS BOARD OF
EDUCATION, et al.,**

Respondents, and

**HUDSON COUNTY AREA VOCATIONAL
TECHNICAL SCHOOL EDUCATION
ASSOCIATION,**

Intervenor.

Frederic H. Pearson, Esq., for petitioners
(Pearson & Shapiro, attorneys)

Alexander W. Booth, Jr., Esq., for respondent
(Brownstein, booth & Barry, attorneys)

Gregory T. Syrek, Esq., for intervenor
(Bucceri & Pincus, attorneys)

Record Closed: May 12, 1995

Decided: May 12, 1995

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

This matter was transmitted to the Office of Administrative Law on March 18, 1993, for determination as a contested case, pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The parties have agreed to a settlement and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 12, 1995
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

[Signature]
DATE

[Signature]
DEPARTMENT OF EDUCATION

MAY 16 1995
DATE

Mailed to Parties: [Signature]
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

RECEIVED

JAN 18 11 02 AM '95

STATE OF NEW JERSEY
OFFICE OF THE CLERK

Attorney(s): PEARSON AND SHAPIRO, ESQS.
Office Address & Tel. No.: 1358 Morris Ave., Union, NJ 07083
(908) 687-3555

Attorney(s) for Defendant


GERARD J. DINICOLA, CHARLES F. GUERRA, MICHAEL HUDACKO, CARL PACILLO AND CAROL A. PIZZELLA,)	BEFORE THE COMMISSIONER
)	OF EDUCATION/OFFICE OF
)	ADMINISTRATIVE LAW
)	
Petitioners)	AGENCY REF. NO. 25-2/93
)	
)	O.A.L. Docket NO. CRT-2394-93
)	
vs)	
)	
HUDSON COUNTY AREA)	
VOCATIONAL-TECHNICAL)	
SCHOOLS BOARD OF EDUCATION)	
and HUDSON COUNTY AREA)	
VOCATIONAL TECHNICAL)	
SCHOOL DISTRICT,)	
)	
Respondents)	
)	
and)	STIPULATION OF SETTLEMENT
HUDSON COUNTY AREA)	AND DISMISSAL
VOCATIONAL/TECHNICAL SCHOOL)	
EDUCATION ASSOCIATION)	
)	
Intervenor)	

The matter in difference in the above-captioned action having been amicably adjusted and thereby settled by and between the parties, it is hereby stipulated and agreed that


the same be and is hereby dismissed.

December 28, 1994


By:


Alexander W. Booth Jr.
Attorney for Respondent
Hudson County Area Vocational
Technical School Board of
Education

By:


Fredric H. Pearson
Attorney for Petitioners

By:


Gregory T. Syrek
Attorney for Intervenor,
Hudson County Area Vocational
Technical School Education
Association

BROWNSTEIN, BOOTH AND BARRY

ATTORNEYS AT LAW
512-42ND STREET
UNION CITY, NEW JERSEY 07087

(201) 866-4949
FAX (201) 866-4161

MAY 12 3 23 PM '95

HOWARD B. BROWNSTEIN*
ALEXANDER W. BOOTH, JR.**
ROBERT E. BARRY

897 BROADWAY, 5th Floor
NEW YORK, NEW YORK 10003
(212) 477-6887

JOYCE CALEFATI BOOTH
*N.J. & N.Y. BARS
**N.J. & D.C. BARS

January 14, 1994

Frederic H. Pearson, Esq.
Pearson & Shapiro
1358 Morris Avenue
Union, New Jersey 07083

Re: Dinicola, et al vs. BOE of The Hudson County Area
Vocational Technical School

Gentlemen:

Yesterday while at Court we agreed to a settlement of this case on the following terms:

1. Each petitioner shall have a starting employment date at Hudson County Area Vocational Technical School (hereinafter HCAVTS) of 9/1/91. This shall be the starting date for all purposes including but not limited to longevity and seniority.

2. Each petitioner who is statutorily qualified shall acquire tenure as of 9/1/94. This settlement agreement is contingent upon that acquisition of tenure and if any petitioner does not so acquire tenure then the agreement is null and void as to that person.

3. Each petitioner shall be given credit for sick days which they had accrued as employees of the Bayonne Board of Education up to fifty (50) days. Anyone who has more than fifty (50) days shall be given credit for fifty (50%) percent of any days over fifty (50).

4. Each petitioner shall execute a release which shall be held by their attorney until this case is dismissed.

5. The parties shall request Judge Springer to place the case on inactive status until September 1994.

6. In September of 1994 after those petitioners statutorily qualified have acquired tenure, Frederic H. Pearson, Esq. shall affect the dismissal of the petition with prejudice.

BROWNSTEIN, BOOTH AND BARRY
ATTORNEYS AT LAW

7. This agreement is subject to the approval of the HCAVTS Board.

If you and your clients agree to settle this matter on these terms indicate by signing below. When I receive signed copies I shall present this matter to the Board. The next scheduled meeting is Thursday, January 20, 1994.

Thank you for your attention.

Very truly yours,

BROWNSTEIN, BOOTH & BARRY

AWB:bh

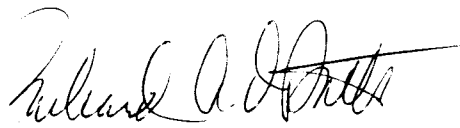
By: Alexander W. Booth, Jr.
ALEXANDER W. BOOTH, JR.

Frederic H. Pearson
FREDERIC H. PEARSON, ESQ.

GERARD A. DINICOLA <u>ET AL.</u>	:	
	:	
PETITIONERS,	:	
	:	
V.	:	
	:	
BOARD OF EDUCATION OF THE	:	
HUDSON COUNTY AREA VOCATIONAL-	:	
TECHNICAL SCHOOLS BOARD OF EDU-	:	
CATION <u>ET AL.</u> , HUDSON COUNTY,	:	COMMISSIONER OF EDUCATION
	:	
RESPONDENTS,	:	DECISION
	:	
AND	:	
	:	
HUDSON COUNTY AREA VOCATIONAL-	:	
TECHNICAL SCHOOL EDUCATION	:	
ASSOCIATION,	:	
	:	
INTERVENOR.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.



ACTING COMMISSIONER OF EDUCATION

JUNE 21, 1995

DATE OF MAILING JUNE 21, 1995

223-95

JOHN VALERIO,

:

PETITIONER,

:

V.

:

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY
OF LONG BRANCH, MONMOUTH
COUNTY,

:

DECISION

:

RESPONDENT.

:



OAL DKT. NO. EDU 8011-94

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

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

JUNE 21, 1995
DATE OF MAILING JUNE 21, 1995

R.L. AND K.L., on behalf of their minor child,	:	
B.L.,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE KINGS-	:	DECISION
WAY REGIONAL HIGH SCHOOL	:	
DISTRICT, GLOUCESTER COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

SYNOPSIS

Petitioning parents of 12th grade student, B.L., alleged their son was improperly excluded from school, effective February 2, 1995, violating his due process rights. Board contended B.L. was excluded for inappropriately touching and/or making vulgar sexual remarks to 7th and 8th grade girls.

ALJ concluded Board did not act in an arbitrary or capricious manner. In light of testimony and evidence, the ALJ concluded that the preponderance of credible evidence showed that B.L. committed many of the offenses set forth by his accusers. ALJ affirmed the modified penalty of the Board placing B.L. on a long-term suspension for the remainder of the school year and continuing to provide homebound instruction.

Commissioner adopted findings and determination in initial decision, noting that having considered the record, including excerpts of transcripts provided, the Commissioner found no cause to challenge any of the determinations or credibility assessments made by the ALJ. Petition was dismissed.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2495-95

AGENCY DKT. NO. 35-2/95

**R.L. AND K.L. ON BEHALF
OF THEIR MINOR CHILD, B.L.,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE DISTRICT
OF KINGSWAY REGIONAL HIGH SCHOOL
DISTRICT, GLOUCESTER COUNTY,**

Respondent.

Carl D. Poplar, Esq., for petitioner (Poplar & Eastlack, attorneys)

Raymond J. Zane, Esq., for respondent (Zane & Lozuke, attorneys)

Record Closed: May 1, 1995

Decided: May 5, 1995

BEFORE **AUGUST E. THOMAS**, ALJ t/a:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, B.L., a twelfth-grade student, was expelled from the high school, effective February 2, 1995, by the Board of Education of the Kingsway Regional High School District (Board) after a hearing before the Board on February 1, 1995. Petitioner's expulsion is based on the Board's determination that he had touched inappropriately and/or made vulgar sexual remarks and suggestions to seven elementary school girls, six of whom are in eighth grade and one of

whom is in seventh grade. Petitioner denied committing any offenses against the girls and appealed his expulsion to the Commissioner of Education. On March 10, 1995, the matter was transferred to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A hearing on petitioner's request for emergent relief was conducted on March 16, 1995, before Administrative Law Judge Joseph E. Kane, who denied petitioner's application for reinstatement in the high school on the same date.

As a result of this determination, petitioner filed a second appeal, which was received in the OAL on March 30, 1995. After a conference call with the parties, hearings were conducted on April 4, 5, 7, 17, 18, 19, and 25, in the Swedesboro Boro Hall, Swedesboro. Seven eighth-grade girls and one seventh-grade girl testified against B.L. Thirteen high school students testified on behalf of B.L. and B.L. testified on his own behalf. Additionally, testimony was offered by a psychiatrist, a school teacher, the school psychologist, school administrators and parents. The alleged incidents occurred in the high school building, which also houses the district's middle school. Although middle school students are generally separated from the high school students, there is some intermingling in the hallways and cafeteria, and in study halls.

DISCUSSION

The record shows that B.L. is taking academic studies and that he intends to go on to college after graduation. His grades are good and he has never before committed any infractions which would invoke disciplinary action by the school officials. The record indicates that he has a sound family background. He played football in his first two years in high school and has played tennis for three years. In court he was well dressed, polite and accompanied each day by his parents and other family members. After the alleged incidents, B.L. was examined by the district's child study team, which determined that he is not handicapped; therefore, he is not eligible for special services. It is in this context that I examine the testimony and the evidence regarding the complaints against him.

The seven eighth-grade girls are good friends. They met at M.D.'s home on the evening of January 10, 1995, to work together on a literature project. Some of them were not being

serious about their homework, prompting M.D. to chastise them about being more mature. As they talked, K.Mc. (who was not a witness at this hearing) began crying because she believed some of the girls were upset with her. As they tried to console K.Mc., another girl began crying, and soon all of the girls were crying. However, before the evening ended, the conversation shifted to B.L. K.D. said that she didn't know what to do about B.L., and that he was doing things she didn't like. M.D. testified that K.Mc. said she saw behaviors she did not like regarding B.L. They decided to meet again at M.D.'s home; however, the next morning at school, K.Mc. said they could meet in the principal's office. The principal was aware of some personal problems involving one of the girls having to do with a recent death in the family and a serious illness in that same family, and he thought the time would be well spent if the girls could resolve their interpersonal relationships. However, during this meeting in the principal's office, B.L.'s name was mentioned again, and although the meeting was not called to discuss B.L., he became the topic of conversation.

During this discussion of B.L., the principal returned and inquired of the girls what their concerns were. The girls related their stories of inappropriate touching, cursing and other actions attributable to B.L. The principal considered this information to be of great severity and took all the girls to the office of the high school principal because their allegations involved a high school student, B.L. The girls were directed to write down their statements. Petitioner states that the girls were coached in writing their statements because many of their statements begin with the phrase, "B.L. has on many occasions" The record shows, however, that after the girls were isolated, one of them said that she didn't know how to begin and M.D. suggested the phrase above, which most of them used as they wrote their individual statements.

M.M., fourteen years of age, who was not in the study group at M.D.'s home, testified to the following incidents. Her problems with B.L. began in November 1994, when he asked her, "Can we have sex?" On another occasion he touched her breast, and on still another occasion he placed his hand on her thigh. During this touching B.L. would say things, such as "When are we going to have sex?" and "Look at that butt." M.M. said, "He unzipped his pants and asked [her friend V.G.] if she would give him a hand with this"; he drew stick figures on her book cover of two people having sex, and a penis with the words "s--- this" (R-1). On another occasion, "B.L.

unzipped his pants and said 's--- on my big meat' while rubbing his leg." M.M. said B.L. called her a little kid. She testified that she heard B.L. say to D.L., "When are we going to have sex," and that "he always said that." M.M. claimed, "He said stuff to me everyday and he touched me occasionally." Her teacher sent D.L. to the principal's office because she yelled at B.L. to leave her alone. She testified also that she saw B.L. put his hand on D.L. and heard him say to her, "When are we going to have sex?" These incidents occurred in study hall and M.M. reported to her teacher only that B.L. was bothering her, and her seat was moved.

K.D., fourteen years of age, lives directly across the street from B.L. She liked B.L. during the summer of 1994. Her infatuation with him began and ended in August. The incidents related here began in the fall of 1994. On the way to lunch, B.L. had a paper rolled up and he said "you're sweating my big meat," which means she "wanted him sexually"; he would hold the rolled-up paper in front of his body nearly every day and stroke it as if to simulate masturbation, saying "you know you want it." K.D. said she and the other girls "thought it was disgusting." In study hall, he would lip synch "I want to have sex with you." On one occasion in the hallway, K.D. said, B.L. "grabbed [her] crotch," laughing as she pushed his hand away. At other times he "grabbed [her] butt" and held her "around [her] waist," and he would say, "Do you want to have sex with me?" She testified that she had visited B.L. in his home several times, the last visit being on Halloween. One of B.L.'s parents was always at home during her visits. K.D. did not tell her mother about these incidents in school because her uncle had just died and her mother's mother was dying. K.D. felt that "it was too much for [her mother] to handle." Her grandmother died on Christmas Eve. During mid-December 1994, B.L. came to her home with his friend. She testified that while his friend played ball outside with her younger brothers, B.L. tried to force her upstairs, and "attempted to pick [her] up." K.D. said she "freaked out" and he then realized she was serious and said, "I only want to be friends."

D.L., fourteen years of age, testified that she has study hall with B.L. six periods per week. She saw him every day and he would always make comments such as "You want to s--- my fat c---" or "S--- my big meat." He unzipped his pants in study hall and in the hallway and grabbed his penis on more than one occasion. D.L. said she never saw his private parts. D.L. stated that B.L. said he wanted to "stick his c--- in [her]," "f--- [her]," "split [her]," and other

stuff like that. In study hall he touched her "once or twice," placing his hand on her leg and on her "boob"; when he touched her breast she told him to stop. He drew dirty pictures on her papers such as people "having sex" and "s---ing his penis" (R-2); he would ask her, "You want to do this?" D.L. said she witnessed him simulate masturbation with a rolled-up piece of paper and she heard him talk dirty to other girls. The only touching of other girls she witnessed was B.L. placing his hand on M.M.'s shoulder. D.L. testified that B.L. made a "flip book" with her literature notebook. He drew stick figures having sex on one corner of about twenty consecutive pages. When the corners of the pages are "flipped" the figures appear to be in motion. D.L. drew a sample in court (P-5).

V.G., fourteen years of age, did not attend the homework session on the literature project on the evening of January 10, 1995. She testified that on one occasion, she was talking to B.L. and his friend D.M. in the hall and B.L. took off his belt, shaped it like a penis and said, "You know you want it -- you know you like it." She was surrounded by the two boys and told them to get away; however, she was touched with the belt around the neck, on her back and on her stomach. B.L. said, "You know you'll feel good." On another occasion, she was going to her locker with D.L. when they met B.L. and his friend J.L. in the hall. B.L. unzipped his pants in the doorway of the boys' bathroom, put his hand in his pants and asked V.G. to "help him with it" while he went to the bathroom. She replied "B.L., you're sick." V.G. also witnessed the simulated masturbation with a rolled-up piece of paper; she testified that "this happened almost every day on the way to lunch." She also heard B.L. say, "You know you sweat my big meat." After these incidents, she took a different route to the lunchroom. She testified that B.L. never exposed himself. Despite these incidents, V.G. didn't expect B.L. to be expelled from school. She said that her friends were "not happy about it" and that she personally "didn't want [B.L.] to be expelled."

M.K., thirteen years of age, testified that she once saw B.L. simulate masturbation with a piece of rolled paper in front of a group of her friends. On another occasion, she heard B.L. say to her, "Oh, you have a nice butt" and "You're looking good today."

S.R., unlike the other girls, is a twelve-year-old seventh grader. She knows B.L., M.M. and D.L. only because they are in her study hall period. She is the equipment manager for the band so she also knows V.G., who plays an instrument in the school band. She testified that during study hall, B.L. would sit next to her and ask her to "f--- him." This happened at least ten times. She said he also asked her to "choke on his big meat." B.L. would not leave her alone so she told her mother, who advised her to stay away from him. He asked her where she lived, but she would not tell, fearing he would come over when her parents were away. S.R. saw B.L. pull on his crotch in the hall while she was bent over a water fountain, but he did not say anything to her. On another occasion, he said, "I have a nice ass."

T.S. is a fourteen-year-old girl who saw B.L. simulate masturbation with a piece of rolled paper on one occasion in the hallway and heard him say something about "s---ing him." She told him to stop staring and making comments to her. He was laughing when he told her she looked good, and she and her girlfriends would say "he's disgusting, or a jerk, or something like that." His actual statement about her was, "Damn she looks good today, I want a piece of that."

M.D. is a fourteen-year-old girl who witnessed the incidents of simulated masturbation with a rolled piece of paper on more than one occasion. She heard no utterances from B.L., but said he was laughing and/or smirking.

Twelve high school students testified on behalf of B.L. Some of them were assigned to the study hall class where many of the alleged incidents reported by the younger girls took place. Generally, they said they never saw B.L. touch any of the girls and that they did not hear him curse or use suggestive sexual language. There was general acknowledgment that students did move around in study hall and sit at each others' tables, and that the girls visited other tables, including B.L.'s table.

S.B. is a good friend of B.L.'s who has several academic classes with him. He and B.L. sat at the same table. He stated that the girls came to their table four or five times a week and interfered with their homework assignments. He did not see B.L. draw stick figures on the girls' papers or books, but he did recall seeing B.L. draw stick figures once at someone's house

depicting volleyball or weightlifting. He never heard B.L. use any untoward language with the young girls and he never saw him with any rolled-up paper. S.B. was not positive about B.L. saying "give me head" to any girl. Although he testified that all of the girls are beautiful, he did not recall ever talking about them. He said he tried to keep a clean mouth around all girls, but admits that both boys and girls use crude words in the high school.

C.M. is an eleventh-grade academic honor roll student, seventeen years old. He has computer drafting class with B.L. five days per week. He did witness B.L. mimic masturbation in the hall with a piece of rolled paper while classes were changing on more than one occasion; however, he believes that this was done only in front of a group of guys and that it was not done to insult or embarrass any girls. He never heard B.L. say anything improper to any of the girls. Later he testified that he did hear B.L. curse in the presence of the girls, but that all young men and young women curse in school. He has heard B.L. use the terms "s--- my c---" and "sweat my meat," but not around the girls.

There was also testimony offered by several of the boys attempting to discredit the girls, especially K.D. and V.G., and establish a motive for their complaints against B.L. The girls were portrayed as less than ladylike. However, J.L., one of B.L.'s best friends, was not believable. He never heard B.L. say any inappropriate words in the school, only around the guys away from school. His testimony about the rolled paper was different. Although he admitted seeing the rolled paper, he said it was held at B.L.'s side and never in front of him, as the others testified. He testified also that after B.L.'s expulsion, K.D. threatened him, saying "If you or your friends say anything about me, I'll say more stuff and get you in more trouble." Another boy, R.K., accused K.D. of "grabbing [his] butt," and he accused V.G. of lifting her skirt and taunting him. On rebuttal the girls denied these accusations.

Finally, B.L. testified and denied all of the charges and accusations leveled by the girls. He said they were made up and that the girls were lying. He specifically denied touching any of the girls or making references to sex to any of them. He did not "doodle" or draw stick figures on any of the girls' books or their papers. He admitted using profanity in front of female friends on occasion, but they've never told him to "stop or cut it out." He has never touched any girl

improperly. B.L. testified that he did not recall any rolled-paper incident, but admitted, "it could have happened."

B.L. opined that the girls were out to get him. He said that K.D. was obsessed with him and that she convinced the other girls to say they saw things that never happened. He accused the school administrators of being part of a conspiracy to sacrifice him to strengthen their plan to demonstrate to the community the need to construct separate buildings for the high school and the middle school students, and they seized upon this incident as the perfect opportunity to further their goal.

The record shows that B.L. has been on homebound instruction since his expulsion on February 2, 1995, with the same teachers he had while attending school. He testified that he is doing better with the homebound study and that his grades are up. He believes he is receiving a better academic education. Nevertheless, he wants to return to school to be with his friends and to participate in tennis.

CONCLUSIONS AND ORDER

After reviewing the testimony and the evidence, including the demeanor of the witnesses at the hearing, I **CONCLUDE** that the preponderance of the credible evidence shows that B.L. committed many of the offenses set forth by his accusers. I cannot conclude that this is a conspiracy among the girls for the following reasons:

1. The suggested motive for a conspiracy was K.D.'s alleged obsession with B.L. and the fact that he had another girlfriend. However, even if this is true, eight thirteen- and/or fourteen-year-old girls could not remember so many events involving B.L. in the same or a similar manner without contradicting each other or being trapped in gross inconsistencies.
2. The admission by B.L.'s friends that he used profanity in and out of school, although not to the degree asserted by the girls. However, his friends' testimony did show that he had the propensity to use inappropriate language, notwithstanding the testimony that "all young people curse in school." Even B.L. admitted cursing in front of female friends, although they've never told me to "stop or cut it out."

3. The seventh grader did not know B.L. or the other girls except through study hall. The record shows that she did not even live in the same town as B.L.; nevertheless, she gave similar damaging testimony against B.L. She clearly was not a part of any alleged conspiracy.
4. I do not believe B.L.'s testimony that he did not know K.D. was an eighth grader. Although she appeared older and more mature than her fourteen years, the record shows that they live directly across the street from each other; they have visited each other's homes; he has played with her younger brothers; he walked her to the school bus stop every day for six weeks and rode to school with her on the bus. They were friendly and talked to each other. Given these facts, I believe B.L. knew K.D.'s grade in school and, consequently, had a good idea about her age.
5. Finally, I believe the high school principal, who testified that he did not suspect a conspiracy, and he based this on a) the emotions of the students when this matter arose; b) the number of students involved; and c) his experience as an educator.

Accordingly, I **FIND** that the charges are in fact true.

Petitioner asserts that the penalty of expulsion is cruel-hearted and that B.L. should be reinstated in school immediately. Through suspension, exclusion and expulsion, B.L. has now been out of school nearly four months. Petitioner argues that the Board has a policy of progressive discipline and that this is a first-offense situation; consequently, he has been punished excessively.

The school's Parent/Student Handbook clearly provides for progressive discipline, in that for the first and subsequent offenses, the suspensions become progressively higher. Section 9 prohibits a student from engaging in obscene or lewd physical acts and Section 13A prohibits sexually assaultive behavior. However, as the administrative law judge stated in the earlier hearing, the policy is modified by the preamble on page 17 which states: "Punishments assigned under this policy can be supplemented by more severe punishment where circumstances warrant."

Statutory provision for suspension and expulsion is found in *N.J.S.A.* 18A:37-1 and 37.2. The authority of a board of education to act is set forth in language appropriate for this matter in *Thomas v. Morris Township Board of Education*, 89 *N.J. Super.* 327, 332 (App. Div. 1965), where it is stated:

When such a body acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable. The agency's factual determinations must be accepted if supported by substantial credible evidence.

There is no showing that the Board action in this matter is arbitrary or capricious. Consequently, it is not the province of this tribunal to determine whether it disagrees or agrees with the Board or to determine whether it would have decided the matter differently had it been a member of the Board or whether the decision is right or wrong.

The Board, through its counsel, stated that it was willing to change the expulsion to a long-term suspension and continue B.L.'s homebound instruction until the end of school so that he will graduate; however, he cannot participate in the graduation ceremony.

Accordingly, and with the above modification, the action of the Kingsway Regional High School District Board of Education placing B.L. on a long-term suspension for the remainder of the school year and continuing to provide homebound instruction is **AFFIRMED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 5, 1995
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ t/a

5/8/95
DATE

Receipt Acknowledged:
[Signature]
DEPARTMENT OF EDUCATION

MAY 12 1995
DATE
NJF

Mailed to Parties:
[Signature]
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

APPENDIX

WITNESS LIST:

Robert Delengowski, secretary, Board of Education

Thomas Coleman, high school principal

K.D., 8th-grade student

M.M., 8th-grade student

D.L., 8th-grade student

Howard Myer, M.D., psychiatrist

Brian Demarest, school psychologist

J.M., high school student

C.H., high school student

M.A., high school student

S.B., high school student

L.S., high school student

D.F., high school student

V.G., 8th-grade student

J.L., high school student

M.K., 8th-grade student

Ms. Vanzoren, study hall teacher

S.R., 7th-grade student

C.M., high school student

Mr. Klasky, principal, middle school

T.S., 8th-grade student

R.K., high school student

Mrs. K., R.K.'s mother

M.D., 8th-grade student

Mrs. D., M.D.'s mother

L.B., high school student

S.F., high school student

D.C., high school student

B.L., petitioner

K.L., student petitioner's step-mother

J.H., high school student

EXHIBIT LIST:

For Petitioner:

P-1 Table configuration drawn by L.S.

P-2 Table configuration drawn by D.L.

P-3 Copy of drawing of January 11, 1995, of stick figures

P-4 Table configuration of where people were situated when D.L. was allegedly touched by B.L.

P-5 Two "flip pages" of stick drawings

For Respondent:

R-1 Picture that M.M. was shown by D.L.

R-2 Drawing of stick figures by D.L. during her direct testimony

R-3 Parent/Student Handbook

R.L. AND K.L., on behalf of their minor child, :
B.L., :
PETITIONERS, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE KINGS- : DECISION
WAY REGIONAL HIGH SCHOOL :
DISTRICT, GLOUCESTER COUNTY, :
RESPONDENT. :
_____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioners' exceptions were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioners' exceptions essentially argue that in reaching his determination that the Board's action in this matter was not arbitrary, capricious or unreasonable the ALJ "did not comprehensively and objectively weigh and evaluate the testimony of numerous witnesses ***but rather culled out selected testimony, of which a significant portion was unsupportable***." (Petitioners' Exceptions at p. 1) Petitioners present a recitation of what they contend was relevant factual testimony and the conclusions which they aver should be adduced from such testimony.

Upon a careful and independent review of the record of this matter, the Commissioner concurs with the findings and conclusions of the ALJ for the reasons expressed by

him in the initial decision. With respect to the exceptions of petitioners, the Commissioner notes that without a review of the transcripts of the seven days of testimony in this matter, which were not a part of the record before him,* it is not possible to reconcile the assertions made by petitioners with respect to proffered testimony. (See In re Morrison, 216 N.J. Super. 143, 158 (App. Div. 1987).) However, it is clear that the existing record provides no cause to challenge any of the determinations or credibility assessments made by the ALJ.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

* It is noted that the record did include "Excerpts of Proceedings, Testimony of: D.L., Friday, April 7, 1995" and such was considered by the Commissioner in making his determination herein.

IN THE MATTER OF THE TENURE :
 HEARING OF NORMA POLLARD, :
 STATE-OPERATED SCHOOL DISTRICT : COMMISSIONER OF EDUCATION
 OF THE CITY OF PATERSON, PASSAIC :
 COUNTY. :

DECISION

SYNOPSIS

Board certified tenure charges of unbecoming conduct (corporal punishment and use of profane language) and insubordination against tenured teaching staff member.

Citing Redcay and In re Fulcomer, the ALJ found that there were certainly enough incidents to sustain dismissal of respondent. In fact, the single allegation that respondent placed several pupils in a closet as punishment was sufficiently flagrant to warrant dismissal. ALJ found that considered alone the charges of corporal punishment, conduct unbecoming a teacher, insubordination and use of profanity justified dismissal; when the charges and supporting evidence were considered together, it was clear that dismissal was the only appropriate penalty. ALJ ordered respondent dismissed as a tenured employee.

Having considered the record, including transcripts of six days of hearings conducted at OAL, the Commissioner concurred with the findings and conclusions of the ALJ that the Board had proven by a preponderance of credible evidence the tenure charges against respondent. Commissioner adopted findings and determination in initial decision and directed respondent be terminated from her position as of the date of this decision and the matter transmitted to State Board of Examiners for further appropriate action.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7289-94

AGENCY DKT. NO. 256-6/94

**IN THE MATTER OF THE TENURE
HEARING OF NORMA POLLARD,
STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF PATERSON,
PASSAIC COUNTY.**

Gregory G. Johnson, Esq., for petitioner

Ashton E. Thomas, Esq., for respondent

Record Closed: February 27, 1995

Decided: May 12, 1995

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

On June 23, 1994, petitioner, State Operated School District of the City of Paterson, certified tenure charges, dated May 18, 1994, of corporal punishment, conduct unbecoming a teacher, use of profane and inappropriate language and insubordination against respondent, Norma Pollard. On July 19, 1994, respondent filed a statement denying the charges. Petitioner filed an answer to respondent's petition of appeal on July 29, 1994. On July 28, 1994, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The matter was assigned to the undersigned judge on August 26, 1994, and a hearing scheduled for October 3, 4, and 5, 1994, at the Office of Administrative Law,

185 Washington Street, Newark, New Jersey. The hearing was held on October 3, 4, 5, November 3, December 20 and 21, 1994. The record closed on February 27, 1995 after the submission of briefs filed in this matter.¹ Based on the administrative law judge's voluminous case load and the complexity of this case, an extension of time to render this Initial Decision was granted to May 30, 1995. Witnesses who testified and exhibits marked into evidence are listed in the attached appendix.

CHARGES

The petitioner, State-Operated School District of the City of Paterson, certified the following tenure charges against respondent, Norma Pollard.

CHARGE ONE: CORPORAL PUNISHMENT

3. The respondent committed numerous acts of corporal punishment with the intent to discipline, harm, punish, intimidate or otherwise embarrass the pupils under her charge:

- a. During the 1988-89 school year while assigned to Public School No. 28, the respondent placed several pupils in the closet as punishment.
- b. On March 30, 1994, the respondent grabbed pupil S.A.'s left hand and scratched him in an attempt to take his notebook away.
- c. On March 24, 1994, the respondent and pupil M.P. had a heated argument, during which the respondent purposely spit directly in M.P.'s face.
- d. On October 1993, while assigned to Public School No. Three, the respondent attempted to slap pupil A.R. and as a result scratched A.R. in the face.
- e. The respondent grabbed pupil Y.A., placed her hands around his arms and violently shook him as punishment for talking.

¹ It is to be noted that subsequent to the conclusion of the hearing, respondent filed a notice of motion, together with supporting certification for dismissal of the charges. Quite clearly, the instant decision is considered a determination on respondent's motion for dismissal and consolidation of the charges.

CHARGE TWO: CONDUCT UNBECOMING A TEACHER

4. The charge of conduct unbecoming a teacher is based upon the same specifications as those set forth above in Charge One. Those specifications are hereby incorporated by reference.

CHARGE THREE: USE OF PROFANE AND INAPPROPRIATE LANGUAGE

5. During the respondent's years of employment, she referred to District employees, pupils and parents in a demeaning and disrespectful manner by using profanity and other derogatory language:

a. On June 15, 1989, the respondent referred to Principal Mary K. Holmes as a "bitch" in the presence of her class and secretary Esther Boone. During the 1988-89 school year, the respondent called several persons "bitches" and other demeaning words at school.

b. During the 1993-94 school year, the respondent referred to several pupils in a derogatory and profane manner:

1. On February 25, 1994 and March 30, 1994, respondent called pupil S.A. a "fat faggot" and "fat whale" and "get your fat freakin' ass out of my class."
2. In January -March 1994, the respondent ordered pupil S.H. to his desk and stated "You cannot see that well. You blind bastard."
3. The respondent ordered pupil T.M. out of class stating, "get your ass down the stairs."
4. The respondent called pupils A.R., S.R. and E.V. "bitches." The respondent regularly repeated the word "shit" in class.
5. The respondent stated to pupil A.R., "You need to lose some weight. You need to go to the bathroom and take a shit." The respondent also said, "F--k you" to A.R.
6. The respondent called pupil J.A. a "dumb ass" when the pupil did not stop talking.
7. The respondent referred to pupils' parents as "bitches" and called parents derogatory names.

CHARGE FOUR: INSUBORDINATION

6. On June 15, 1989, the respondent refused to submit her class register to Principal Mary Holmes, Public School No. 28, and called her a "bitch" in the presence of her class and school secretary Esther Boone.

7. On or about February 25, 1994, the respondent was directed to cease and desist from calling pupil S.A. a "fat faggot." The respondent admitted she called S.A. a "fat faggot." Despite this directive from Principal Lynn Liptak, the respondent again called pupil S.A. a "fat faggot" on March 30, 1994.

8. On or about December 19, 1988, the respondent left her class unattended, refused to teach while her supervisors were conducting an observation and refused to submit individual student improvement plans (ISIP's) for her assigned students.

9. During the 1993-94 school year, the respondent routinely ordered certain students to leave the classroom without reporting same to the office or following procedures. On March 25, 1994, the respondent was directed to follow school procedure.

10. During the 1993-94 school year, the respondent permitted students to leave the class in order to go to the lavatory. When certain students returned, the respondent routinely locked the classroom door excluding pupils such as M.R. from entering the class. The respondent continued to lock the door on pupils despite directives from the principal.

11. On or about March 30, 1994, Principal Liptak requested that Douglas J. Bolton, Supervisor of Social Studies meet with the respondent to improve her teaching effectiveness in the social studies area. The respondent refused to meet with Mr. Bolton.

12. In February, Principal Liptak directed the respondent to stop doing homework assignments in class. The respondent continued to do so despite Principal Liptak's directive.

13. On January 28, 1994, despite requests from Principal Hernandez, the respondent failed to provide grades for the second marking period for her 7th grade class.

TESTIMONY

Mary Holmes has been the principal of school No. 28 since 1985 and she supervised Pollard at school No. 28. Holmes explained the sequence of events during the 1988-89 school year. From September through November 1988 Pollard was a basic skills instructor (BSI), and she was a good teacher. In December she was transferred to the first grade for which she had proper the certification, and she became ineffective (P-1). Pollard refused to conference with Homes and the prior first grade teacher. Holmes testified that when she attempted to observe her, Pollard would not teach. Pollard folded her arms and stopped teaching. Holmes went to get Vice-principal Fulmore. Pollard would not teach for either of them. Holmes noted that a teacher usually wants to make the best impression during an observation, and she could not recall a similar event, where during an observation a teacher ended the lesson. She advised Superintendent Frank Napier in writing that Pollard would not cooperate, and refused to teach or meet with her.

Holmes described other specific incidents. On one occasion the children reported to the office that Pollard was not in the classroom. Holmes went to the classroom to locate Pollard. Pollard, who was present in school on that day, was not in the classroom. Holmes requested to meet with Pollard, who refused to meet with her and did not explain why she was not in the classroom. Holmes referred to a letter she sent to Ms. Pollard (P-2) in which she described the noise in the hallway made by students from Pollard's class. The yelling had to be very loud for her to hear it in her office. In fact the security guard at the front desk heard the noise and came to check on it. Pollard just watched the students and did not take the initiative to control the class. The class was out of control.

Holmes described the events surrounding the letter she wrote to Pollard on December 22, 1988. Holmes saw F.B., a student in Pollard's class, in the hall and she asked her why she was outside. The child said that she had gone to the bathroom and Pollard would not let her back into the classroom. F.B. also indicated that Pollard was placing children in the closet. Holmes went into the classroom, opened the closet door (closed but not locked) and found a child sitting in a fetal

position with his head towards his knees, in the closet. Holmes described the coat closet as three feet in depth which must be opened or closed from the outside; there is no handle inside. If someone was inside the closet, that person could only get out if someone opened the door. Holmes recalled that she questioned several students as to whether they were put in the closet. Three students, F.B., R.G., and J.W. indicated that they had been placed in the closet. Holmes saw one of these students in the closet. By letter (P-22), Holmes requested that Pollard attend a conference to discuss the incident but Pollard refused. Holmes communicated with Dr. Napier.

Holmes testified that register reports are due each month in regard to attendance (P-5). Since Pollard would not submit her attendance report, the other reports could not be completed. Pollard did not submit lesson plans due each month.

In a written notice from Dr. Napier on or about January 17, 1989, Pollard was given ninety-days to correct the deficiencies in her teaching and cooperation. However, during that ninety-day period Pollard would not come in with her plan and would not meet with them; the insubordination continued. Holmes indicated that she and Mr. Fulmore requested several conferences with Pollard (P-7) to no avail. Pollard's end of the year evaluation rated her poor.

Referring to her letter dated June 13, 1989 to Dr. Napier, Holmes recalled that Pollard refused to complete pages six and seven of the register. She refused to cooperate with Ms. Boone, the secretary, and stormed into Holmes' office where there was a conference, and threatened the principal. More particularly, Holmes recalled that an irate Pollard pointed her finger at her from approximately three feet away and said "you will pay." Holmes also recalled a letter from secretary Boone to Pollard regarding completion of the register (P-9). Holmes had asked Boone to get the completed pages of the register from Pollard. Boone went to Pollard's class where Pollard informed her that Mr. Rosenberg, the Board's attorney, told her that she did not have to complete the register. Pollard then said that the administrator (Holmes) was a "bitch." Holmes also stated that Dr. Napier decided to transfer Pollard to school No. 17; Holmes did not request Pollard's transfer.

On cross-examination, Holmes indicated that she transferred Pollard to the first grade during the 1988-89 school year because Ms. Pipkin, the first grade teacher, was ill and there was a possibility that she might take medical leave. Holmes wanted continuity of instruction in the first grade. Pollard has good skills and she knew Pollard

would be present every day. Pipkin took over Pollard's job. After the transfer, Holmes noticed a drastic change in Pollard.

Holmes agreed that the transfer of Pollard (J-1) occurred on December 8, 1988, prior to the Board meeting on January 8, 1989. She contended that this could be done with the assistant superintendent's approval. Pollard was notified prior to December 8, 1988, that she was being transferred, and prior to her receipt of J-1. Holmes opined that she told Pollard the day before that she would be the first grade teacher and gave her the materials the next day. Pollard received the plan book, the record book, and the yellow cards (the register is kept in the office).

The day Holmes learned about the "closet" incident Pollard was in the classroom. She asked Pollard why there was a child in the closet. Pollard did not respond and kept teaching. Homes then asked the child why he was in the closet, and the child said that the teacher had put him there. Holmes had the child come to her office, notified the parent and prepared an incident report. Pollard would not attend a conference with the parent, child and principal. In fact, Pollard would not attend any conference in which Holmes was a participant. Holmes testified that either R.G. or J.W. was in the closet. As part of her investigation, she questioned ten to twelve students in Pollard's class. She prepared an incident report, but did not recall the result of the investigation. She did not notify DYFS. The report was sent to Assistant Superintendent Durgett. Noting that it was up to "them" to follow through with the charge, she did not inquire about the follow-up and did not know the result. She did recall that the vice-principal tried to question Pollard regarding the closet incident and she refused to talk to him about it. Ms. Durgett had a conference with Pollard on the condition that Holmes not be present. Therefore, Holmes did not know what transpired. She noted that there may have been similar complaints of this nature, which would be part of the teacher's file.

Holmes did not recall that Pollard filed a grievance against her on January 27, 1989 (R-2), and did not recall the contents of it being discussed at a meeting with a Paterson Association representative. In referring to the incident described in P-1, Holmes said she was not cognizant that Pollard was ill the days before the December observation. Referring to the noise in the hallway (P-2), Holmes indicated the problem was that Pollard watched the students make noise for ten minutes and did not attempt to discipline them nor ask for Holmes' assistance. Holmes told Pollard, "Quiet your kids

down," but Pollard said nothing. Holmes had the students go inside the classroom. Pollard went inside but said nothing.

Holmes indicated that she received complaints from parents in January 1989 about a lack of education in Pollard's class. Complaints made in February, March, April or May about Pollard's teaching effectiveness would be noted in her personal file. This file was sent to the school where the teacher was sent.

Esther Boone has been the secretary at school No. 28 since December 1, 1980. Boone described the circumstances around the memo to Ms. Holmes dated June 15, 1989 (P-9). She recalled that Holmes told her to take the register book to Pollard for Pollard to complete pages six and seven. Boone went to Pollard's classroom. She knocked and went inside. She recalled that students were in the classroom but not whether Pollard was teaching. She advised Pollard that Holmes wanted her to complete pages six and seven. She could not recall Pollard's response. Referred to her memo to Holmes (P-9), Boone recalled that Pollard said she would not do the register book. As she walked out of the room, Boone heard the word, "bitch." She did not know whether the students heard this and noted it was said in a "quiet" voice. She could not recall another occasion when she heard the word "bitch" used by Pollard. She stated that Pollard refused to have conferences with Holmes.

On cross-examination, Boone indicated that she did not know Pollard's reason for not filling out pages six and seven. She did not recall her saying that she was not the teacher of record in September 1988 and could not fill it out. Boone agreed that although she heard Pollard say the word "bitch," she did not hear Ms. Holmes' name. Boone indicated that she had her back to Pollard, but she believed that Pollard was referring to Holmes. In the memo (P-9), the term administrators referred to Holmes and Fulmore, but Boone could not recall exactly what other time Pollard called them "bitch." Although Pollard referred to her as the "clean-up lady," Boone indicated that she did not think much of this. Boone wrote the letter at Holmes' direction and gave a copy to Pollard either the same or the next day.

Joseph S. Fulmore has been the principal of school No. 6 for the last five years. He was the vice-principal of school No. 28 under Mary Holmes for school years 1987-88 and 1988-89, and he supervised Pollard, a BSI teacher. In December 1988, he accompanied Mary Holmes to conduct an informal observation of Pollard. Some students were not conducting themselves in the best manner and there was disruption

in the classroom. Fulmore stated that when Pollard saw them in the classroom she stopped, folded her hands, sat down and said, "You teach them."

Fulmore recalled that a number of parents visited the school to complain about the instruction or lack of it in Pollard's class. Holmes had told him that Pollard left her class unattended and he knew that the Individual Student Improvement Plans (ISIPs) were not submitted by Pollard as required (R-3). Pollard's classroom control was poor and there was an indication at the main office that the noise level in her classroom was elevated. The basic problems during the year were Pollard's failure to cooperate with the administration, follow directives, and comply with completing the register and records. The principal's requests for conferences with Pollard never materialized. It was difficult to communicate with Pollard; she did not care to have a discussion with him. He noted other problems with Pollard; the inability to observe her because she would not "deliver instruction," the inability of Holmes to have a conference with Pollard, the number of letters from Pollard to him placed in envelopes and given to him at once, and the lack of an opportunity to discuss the issues with her. He recalled the incident when Holmes called him and Mary Boone to her office. Boone informed Fulmore that Pollard called Holmes a "bitch." On cross-examination, Fulmore testified that Boone indicated that this was not the only time Pollard used the term "bitch."

Fulmore testified that Pollard was transferred to the first grade position because Ms. Pipkin, a first grade teacher, was frequently absent, due to poor health, thereby creating poor continuity for the students. After an assessment and evaluation of the teachers, the administrators concluded that it was in the best interest of the first grade children for Pollard to be their teacher.

On cross-examination, Fulmore indicated that there was a problem with Pollard's performance in September 1988 in terms of carrying out directives and responding to administrative concerns about the school. He verbally advised Pollard of these concerns and filed a written report with the principal. He also prepared reports regarding her work in October and November 1988. Fulmore agreed that prior to the transfer, he had written her up regarding communication and not following directives.

Pollard was transferred to the first grade in December; this was not as a result of her evaluations. After an analysis of the teachers' strengths, Pollard was selected to replace Pipkin as the first grade teacher. Pollard was selected in order to maintain some kind of continuity for the first graders at that particular time. Fulmore did not

know if the first grade class was experiencing problems because of this lack of continuity. He did not know times Pipkin had been absent and there was a need for a substitute teacher. He indicated that Pipkin's class was not a particularly difficult one. It contained a group of children who performed at a somewhat higher level than some other classes. Pollard's strength included experience in working with disadvantaged children and students with varying levels of comprehension. Based on her degrees and experience, he thought she would be the best candidate to place in that position. Pipkin took over Pollard's position.

Although Fulmore did not see the grievance filed by Pollard in January 1989, he recalled meeting with a representative from the State along with Ms. Pollard, and he was aware that she had filed a grievance against him and Ms. Holmes. One of her concerns was her transfer to the first grade position. He did not recall her complaining about receiving sixteen memos from the administrators, or that she did not receive written instructions or procedures for duties for the first grade. Fulmore was sure that Pollard received a plan book, a record book and a register for her class.

In regard to the allegation that children were being locked in the closet, Fulmore indicated that the normal response would be to call DYFS. He did not conduct an investigation on his own nor did he report it because it was not reported to him. After December he heard no further allegations of locked students in the closet.

Fulmore had concerns regarding classroom management by Pollard in February and March 1989. He recalled the time Pollard brought her class to the office so that the administrators could see their bad behavior. The administrators then wrote memorandums to Pollard requesting conferences which never took place.

Grisell Hernandez has been the principal of school No. 3 since March 1993. She oversees the operation and safety of the building and supervises and evaluates the staff. In the 1992 school year, Pollard was a fifth grade teacher. In the 1993-94 school year, Hernandez assigned Pollard to the seventh grade to teach literature, since Pollard has a masters degree in reading. She recalled conferences with Pollard concerning the behavior and discipline of students in her class. Hernandez referred to an incident on September 24, 1993, in which Pollard brought the entire class to the front office to call their parents, to come in for a conference, from the telephone designated for staff members. Since a number of classes were being disturbed, Hernandez advised Pollard to take her class back upstairs. In a memo to Pollard,

Hernandez outlined the procedure to follow. She advised that a conduct report form was to accompany a student when a student is sent to the office. The form indicates the misbehavior, what the teacher did in order to alleviate the problem, whether the teacher was able to reach the parent, and measures that could be taken. In response, Pollard thanked her for her memo. Hernandez described her relationship with Pollard as fine until that time.

Hernandez indicated that in 1993 the relationship with Pollard became strained, as there were so many meetings with Pollard, students and parents. Hernandez recalled a meeting between A.R.'s mother and Pollard where both were upset; A.R. claimed Pollard had called her "fat," and told her that if she went to the bathroom she might lose some weight. A.R.'s mother, who wrote a letter about the incident, noted that A.R. was conscious of her weight and was quite upset. Hernandez received other letters from parents who felt that Ms. Pollard undermined them by making remarks about the way the children were raised at home. They also complained about the inappropriate language (e.g. the "f" word) being used in the classroom.

Pollard requested a transfer and sent her request to Dr. DeMolli, assistant superintendent. Hernandez believed the situation could be corrected and that it would be detrimental for the students to change teachers after school year had begun. However, the situation became progressively worse. The parents were concerned about their children's safety and Pollard was afraid the children might harm her. Thus, the president and the vice-president of the home school council volunteered to sit in the classroom to see if the situation would improve. Pollard agreed. Everyday from periods 4 through 6, Albino or Moran sat in the back of the room. The problems continued, *i.e.*, homework, students wanted to be in the bathroom and not stay in the classroom, unannounced tests, no grades, and students' contention that Pollard did not call on them. Since the students were not getting an education (some wandered the hall or hid in the bathroom), Hernandez called Dr. DeMolli and agreed to Pollard's transfer.

Hernandez asked Mr. Campos to take his students to the bathroom before they went to Pollard's class, thereby decreasing the requests for passes to leave Pollard's class. Hernandez spoke to Pollard about locking the classroom door from the outside, and locking the students out of the classroom when they went to the bathroom. The proper procedure was to require a student who left to go to the bathroom to sign out and get a pass. Upon returning the student would return the pass and sign-in the time. Pollard did not follow this procedure. Hernandez went to Pollard's class on two

separate occasions because students were locked out. Asked why the door was locked, Pollard told her that she did not want the students back in her classroom. Hernandez told her that it was illegal to lock the door from the outside for fire safety reasons; the door must remain open at all times. She did not write Pollard up for the incidents. On the second occasion, Pollard had opened the door by the time Hernandez got there, after having been told by the students that they were locked out of the room. Hernandez testified to this sequence of events during the cross-examination.

Hernandez spoke to Pollard and sent her a memo about the need to issue the students' grades. The grades were due in November. She told her on many occasions to send in the grade book. She collected all the teachers' grade books to check the grades. She reviewed Pollard's records. Pollard gave them grades on their report cards for November. There were not sufficient grades to merit some of the letter grades (average of the grades) that the students received on the report cards. For September and October, there was only one set of grades for students per month (P-21). Some students had no grades. (Pollard had only two sets of grades for the entire year in social studies.) On November 8, 1993 (R-10), Hernandez wrote to Pollard advising her to resubmit plans and grades for social studies which were missing. This was in response to documentation (P-21 and R-9) that Hernandez had received. Pollard was given a copy of the grading system. Hernandez indicated that when Pollard was transferred, she took her plan book, attendance book and grading book with her. It was difficult to pickup the pieces. Hernandez asked the students to bring back their report cards. The new teacher had to do the assessments again.

In September and October 1993, Hernandez conducted informal observations of Pollard almost every week. There were constant arguments between the students and Pollard. Hernandez evaluated Pollard and this was combined with Liptak's evaluation for the school year (P-22). She conducted numerous observations of Pollard in preparation of the report and participated in all discussions regarding the ratings. Hernandez agreed with every single item and comment and indicated her specific words in the report and their meaning. Pollard received a satisfactory in knowledge of the subject matter and outstanding in correct use of English. However, in all areas of teaching techniques, the rating indicated needs improvement and she received an unacceptable in social control, since she was unable to control the class. Hernandez removed students (e.g. E.J. and A.R. on certain days) from Pollard's class. Hernandez

did not write Pollard up prior to her transfer. She evaluated her and gave her a second chance at another school.

Hernandez indicated that she did not consider Pollard's class to be made up of "bad kids," but similar to any other class in the building. Mr. Campos, who taught the same students math, health and science did not have any problems with the students. She was "not out to get Ms. Pollard."

On cross-examination, Hernandez agreed that she served as acting principal until January 1994 when the principal retired. In the spring of 1993, Pollard taught a fifth grade class, and Hernandez gave Pollard a satisfactory evaluation. She observed her in April 1993, and found her teaching technique, classroom organization and management satisfactory. She found her professional relationship and achievement traits satisfactory. She received no complaints from parents nor did she recall problems with children leaving the room to go to the bathroom or being locked out of the classroom. Pollard completed her grades for her class, and she did not recall complaints from students about not having enough time to prepare for tests.

In September 1993, there were two seventh grade teachers, Pollard and Campos. Each taught the students in the homeroom for the first three periods. At the end of the three periods, the students switched teachers and received instruction from the other teacher. After two periods, the students returned to the homeroom. Pollard taught language arts to all of the seventh graders, and Campos taught math, science and health.

Although Pollard had some problems with some of the students in her homeroom (e.g., Y.A. and others who switched classes at the beginning of the year), most of the problems Pollard had were with students from Campos' homeroom. However, Campos did not have a problem with those same students. Hernandez spoke to Campos about the problem. He told her that the students indicated that they did not want to go to Pollard's class. Campos requested that the traveling be stopped and that he be allowed to teach his class all subject areas because he was having so many problems when the students came back from Pollard's classroom. He spoke to the students often and there were meetings with the students to try to alleviate the problems. The students believed that Pollard did not respect them, and they lost respect for her. Hernandez did not believe her policy of having the students write about the incidents

eroded Pollard's authority. She opined that the policy helped the teacher because often the teacher and student would agree on the situation.

Hernandez described in detail her communications with Pollard. On September 24, she asked Pollard to identify the students who used obscene language and to prepare conduct reports (P-19). Pollard did not use the conduct report form (R-5) each time that she had a problem with students. As a result of an incident, E.J. was removed from Pollard's class and placed in special education (R-5). Hernandez indicated that she did not receive the report on A.R. (R-6) until the following morning from Ms. Pollard. She asked A.R. to write down what occurred. Hernandez also explained the procedure that each time a student is sent to the office with a conduct report, the student has to write down what occurred. Hernandez impressed on the student to tell the truth and attached the student's letter to the form. Thereafter, there was a meeting with the teacher and/or the parent to discuss the situation. Pollard saw the students' letters when she went to the meetings and did not request copies of the letters.

Hernandez did not recall when she learned that A.R. had said "shut the f--- up" to Ms. Pollard in class, but she did recall that Pollard told her (she did not hear it) that a child had used the "f word" in her class. Pollard repeated the incident, including using the "f" word three times in front of the class. This was inappropriate. Hernandez spoke to Pollard about the inappropriateness of using the "f" word in class.

Hernandez recalled learning that A.R. and Ms. Pollard were making fun of each other. She heard about this when A.R.'s mother complained that Ms. Pollard had called her daughter "fat" and Pollard indicated that they were making fun of her and explained about the "lips." She did not recall that M.R. said something about Pollard's lips.

A.R. and Pollard had a lot of problems. A.R. was not disruptive in homeroom but was disruptive in Pollard's class. Hernandez specified the actions taken to assist Pollard with A.R. and the reprimands that A.R. received. A.R.'s conduct improved when Pollard was no longer her teacher. A.R. had no conduct reports from January to June 1994. Mr. Campos had no problems with A.R.

Hernandez stated that although Pollard took some records with her when she was transferred, she did not write a memo about it. However, it was referred to in the evaluation of March 21, 1994, as part of classroom organization and management.

She noted that they had to retest all of the students to reconstruct the grades. She did not try to contact Pollard to ask her for the grade book, the lesson plans and the attendance books.

On rebuttal, Hernandez testified that Pollard had requested a transfer because she felt she was not safe with the children, and the children were lying about her. Referring to the number of incidents, on many occasions, Pollard said, "If I am the problem, remove me." She tried to talk to Pollard as to what could be done to avoid taking a teacher out of the school in the middle of the school year, and denied her request. Hernandez spoke to Assistant Superintendent DeMolli, who agreed that they should provide all the support that they could to avoid transferring a teacher once the term had begun. She outlined measures to assist Pollard as a classroom teacher. They had volunteer parents, from the Home School Council to sit in on Pollard's class during periods four, five and six. They also called parents in for conferences numerous times. Each time she received a conduct report, she or the guidance counselor contacted the parent. It is customary at school No. 3 to write a conduct report when a student is sent to the office. The bottom of the report has a section: "Things to be done." On many of them, she wrote exactly what was done. (See e.g. P-55A). She never refused to take action once Pollard submitted the conduct reports to her and recalled meetings with parents where she and Pollard were present to resolve problems. She had meetings with Campos and Pollard individually and jointly, and with parents of the students who were in Campos' class.

Hernandez indicated that she wrote (R-10) to Pollard asking her to resubmit plans and indicating that the grades for social studies were missing. They were not submitted on time. Pollard did not submit her plan book or the grade book when she left. Hernandez had no indication as to the students grades for the second marking period (November to January).

Teachers were expected to submit plan books every two weeks for review. Hernandez indicated that there were times when Pollard did not submit them on time. Hernandez did not recall the last time she saw Pollard's plans. The students did not receive grades on a daily basis for homework, class participation and quizzes. Referring to a page from Pollard's grade book (P-21), Hernandez indicated that for November no grades were given; Pollard was responsible for recording those grades. After Pollard left, they had a difficult time ascertaining where the students were in terms of grades and had to test them in order to give them a grade.

Hernandez agreed that her evaluation of Pollard as a fifth grade teacher was favorable. The next year Pollard was assigned as the literature teacher for the seventh grade. Hernandez did not know the classifications of the students in Pollard's or Campos' class but agreed that Campos had a group of limited English proficient students in his class. She agreed that in the fourth period, Campos' class went to Pollard for instruction. Hernandez did not know if it included those students who needed assistance in bilingual instruction. Pollard had students in her fourth, fifth or sixth periods that she was not supposed to teach or grade, *i.e.*, the limited English proficient students from Campos' class. Pollard was not responsible for their grades, but she was told that if the students were comprehending the material, she could teach them. However, the students had assignments from the bilingual ESL teacher (Mr. Soto not Mrs. Kaufman) to complete during the time they were with Pollard.

Hernandez never indicated to Pollard that she wanted a bilingual teacher. At one point, Pollard talked to her about the students who did not understand her. Hernandez explained to Pollard that Mr. Soto was responsible for teaching those students reading, language arts and math. Those students had 45 minutes of reading, 45 minutes of math and 30 minutes of developmental ESL daily. Hernandez did not recall whether this was during the fourth, fifth or sixth periods. Pollard replied that this was not helping the students. Thus, Hernandez replied that perhaps those students would require a self-contained bilingual class the following year. This was the only reference to bilingual instruction. Pollard then indicated that she did not believe in bilingual education.

Hernandez never said that she wanted to replace Pollard with a bilingual teacher, or that she did not like her due to her race. She did not hire a bilingual teacher to replace Pollard. In fact, when Pollard was assigned to school No. 2, she did not know who was going to replace her. She did not interview the person or get a chance to select the teacher who would replace Pollard. Ms. Mosch was sent from downtown to replace Pollard. Although Mosch speaks Spanish, she is not a bilingual teacher nor was her assignment in the school a bilingual position. Mosch had exactly the same assignment that Pollard had as a "regular teacher." The bilingual students in Campos' homeroom were served by a bilingual teacher, Mr. Soto.

Hernandez agreed that Ms. Mosch came from school No. 24 and according to a letter (R-65 for identification), she had been a bilingual teacher. However, Mosch came

to her school as an elementary teacher. Hernandez never called the district office to ask for a bilingual teacher. Hernandez noted that Mosch is not certified bilingual and that she needed a regular teacher.

Lynn Liptak has been the principal of school No. 2. since July 10, 1992, and she is responsible for the entire operation of the plant, all staff evaluations and the safety of the students in the school. During the 1993-94 school year, Mr. Carol was hired as a substitute teacher on a per diem basis to fill a vacancy in the seventh grade. Carol was doing an adequate job. In January of 1994, Pollard was assigned to fill that vacancy. When Pollard was assigned, they discussed the class and Pollard received materials; their relationship was professional in nature.

Liptak testified as to a letter she wrote to Norma Pollard (P-24) and a conference she had with her concerning S.A. The purpose of the letter was to put Pollard on notice that she would not tolerate name calling of students and that continuing to do so would be serious in nature. Liptak recalled that the incident was initially reported to her by Vice-principal Vitone, who heard about it from the students. Vitone spoke to Pollard who confirmed it. The incident reported to her was that the class was coming back from the lunchroom when a verbal confrontation broke out between Ms. Pollard and S.A. S.A. did "some name calling" and Pollard called him a "fat faggot."

Liptak described the incident regarding M.A., a student in Pollard's class. M.A. came to the office and said she had been told to leave the classroom. Pollard claimed that M.A. had left without permission. Liptak testified that school policy required that the incident should have been reported to the office, and she put the policy in writing (P-27). Liptak indicated that a student is not to be told to leave the classroom. If a child leaves without permission, it should be reported to the office. If a child is disrupting the class, the teacher should use the house phone, call the office, and either the security guard or an administrator will be sent to escort the child. She opined that Pollard should have called to report the child was out of the classroom as soon as it occurred. The whereabouts of the students must be known for safety reasons.

Liptak described the events that led to an incident report prepared by the school nurse (P-26), regarding S.A. on March 30. S.A. was in Pollard's class, and he was looking in his desk for his notebook. Pollard approached him, and as she took the notebook from him, squeezed and scratched his hand. When he complained that she had scratched him, she said something to the effect of, "You're too fat to feel it, you

fag." Liptak contended that Pollard's behavior constituted direct insubordination to her earlier letter, specifically, the same words were repeated. Liptak proceeded to investigate the incident, and she questioned the students to verify if what S.A. said was correct (P-25). S.A. was interviewed as was P.A. Liptak stated that she took each child in the stairwell and asked them what had happened between S.A. and Ms. Pollard. She wrote down their comments (P-25). However, she agreed that there was no indication that she recorded a statement from P.A. as to the incident with S.A. She contacted the assistant superintendent after the S.A. incident. Liptak also directed that S.A. be examined, and the nurse found a superficial scrape on his left hand. Liptak indicated that she reported the incident with S.A. to institutional child abuse (P-25c).

Liptak did not believe that she had a conference with Pollard regarding the incident. Liptak recalled that the last meeting she had with Pollard was after her evaluation, and she advised her that she was recommending that her increment be withheld. At that point, Pollard refused to meet with her regarding an observation and her evaluation, despite Liptak's written requests to do so. Pollard had responded in writing that she required more advance notice and that she would not meet without the PBA representative. By the time of the March 30 incident, her relationship with Pollard was "strained." Liptak felt Pollard was insubordinate and abusing students.

Liptak referred to the incident with P.A., in which he asked at 11:50 if he could use the bathroom. Another student reported that he had asked in a respectful way, and when it was denied he left the classroom. Liptak opined that this was atypical behavior for P.A., a serious, honor roll student. P.A. had not had disciplinary problems on a prior occasion nor has he had problems thereafter.

Referring to her notes (P-25b), Liptak recalled that M. reported to her that Pollard had spit on her and M. thought it was on purpose. Initially, M. thought Pollard was speaking too close to her face and she had just been sprayed. When she went to wipe the spit off her face, Pollard said, "That's not spitting, this is spitting," According to M., Pollard spit on her three times. Liptak spoke with Sa.Z., another student, regarding the spitting. Sa.Z. said she saw the incident and believed it was on purpose.

Liptak recalled that S.H. told her that Pollard had said to him, "You're blind." She noted that the charges said, "Blind bastard," because some of the students had reported those words to counsel for petitioner in her presence.

Referring to Pollard's March 23, 1994 letter(P-28), Liptak recalled that when she gave Pollard her evaluation, she had a brief conference with her informing her that she would recommend withholding her increment. She did not recall if Pollard asked her any questions. Pollard's written request covered items that would normally be covered in a conference. Liptak stated that she was available for conferences and yet was receiving directives in writing from a teacher to submit things in writing. It was unusual for her to receive these types of memos and letters from a teacher. Pollard's letter dated March 28, 1994 (P-29), was in response to her letter to Pollard, dated March 25, 1994.

Liptak opined that Pollard was "weak as a teacher." She recalled an informal conference with Pollard regarding homework. Liptak thought they had agreed that homework was to be done at home as opposed to using class time to do homework. She suggested that if the students returned without homework, they should get after school detention.

Initially optimistic that Pollard would be a good teacher, Liptak later recommended suspension. Liptak conducted informal and one formal observation of Pollard. The vice-principal made two formal observations. She received complaints from parents concerning Pollard's behavior towards the students. More particularly, Liptak conferred with two parents, Mrs. McK. and Mrs. H. Mrs. McK. was concerned that her daughter, T.McK., was being treated disrespectfully and reported a bruise on her. Liptak noted that that was the first she heard of the bruise which apparently had occurred sometime before the conference with Mrs. McK. (P-32). Mrs. H. was concerned that S.H. had lost interest in school and that she was having trouble getting him to attend. He had asked to go to the nurse and been denied the opportunity to go. Finally, the social worker apparently got him to the nurse, and he was diagnosed with pink eye. Mrs. H. felt that he should have been allowed to see the nurse.

Liptak testified that she and Hernandez signed off on the final evaluation and that Pollard refused to sign the evaluation (P-23). Liptak referred to a memorandum from Douglas J. Bolton, social studies supervisor, regarding his efforts to confer with Pollard and provide assistance to her. Pollard stated that she did not need any assistance (P-30). Pollard was suspended from her teaching position by letter, dated March 31, 1994 (P-31).

On cross-examination, Liptak indicated that in regard to the alleged spitting incident she did not notify the parent, DYFS, nor did she confront Pollard about it. Normally, she would have a conference with the teacher, but at this point she was not having conferences with Pollard. Referring to the statement of charges, Liptak stated that she did not see all of the documentation on incidents that occurred in other schools nor did she try to get access to information on the charges, prior to signing the statement of charges. She accepted the word of other people as to the incidents that occurred in their buildings. Liptak explained that the statement of charges and evidence was prepared by Mr. Johnson. She saw a draft of the document and made corrections to the part for which she was responsible. Johnson asked her to sign the document. Referring to charge three, ¶ 5B3 which alleged that respondent ordered pupil T.McK. out of the class stating, "Get your ass down the stairs," Liptak learned of this from the vice-principal. She believed the vice-principal found out about this from the students. Liptak did not do a follow-up investigation; the investigation had been done. Liptak learned about the incident involving S.A. on February 25, 1994, from the vice-principal. Pollard admitted to calling S.A. a "fat faggot" on the stairwell, after he had made some comments to her. Liptak believed that S.A. had called Pollard, "bald" and made another comment as well. S.A. was suspended for three days for disrespectful language to Pollard. Ms. Vitone made the decision which Liptak supported. Liptak discussed the incident with S.A.'s parents. Liptak spoke to Pollard that day. Pollard confirmed for Liptak that she had called S.A. a "fat faggot" and signed a letter to that effect. Referred to Pollard's denial (R-12 for identification), Liptak contended that that was the first time she had seen this denial. She alleged that she had never had any problem retrieving mail from her mailbox in her office.

Liptak indicated that S.A. came down to the office and reported an incident to her directly. Liptak recalled that she had seen R-13, but did not know exactly when she had received it. From her questioning of the students in the classroom, Liptak concluded that the stories were similar. S.A. was taking something out of his desk (a notebook) or playing with something on his desk. When Ms. Pollard took it from him, she called him "fat faggot" or "you're too fat to feel it fag" or words to that effect. She testified that S.A. also mentioned a struggle with the notebook.

Liptak recalled that S.H. had said that Pollard called him, "blind." Some students reported hearing the words "blind bastard," others reported that "blind" was said. Liptak did not write the words "blind bastard" on the charges. She heard the words, "blind bastard" from other students, not S.H. Mr. Johnson asked S.H. for clarification, and

Liptak did not recall S.H. saying the words "blind bastard." Asked why she signed off on those words, Liptak indicated that other students had reported them. She did not recall asking S.H. what he or Pollard said or did prior or subsequent to the comment and did not discuss the circumstances with Ms. Pollard. Noting that Pollard refused to meet with her beginning on March 22, 1994, and her notes were dated March 30, 1994, she alleged that it was thus not possible to conference with Pollard. Liptak did not know the date of the incident. She only found out about it when she spoke with the students and "it came out."

Liptak contended that charge four ¶ 9, referred to the incident on March 25, 1994, when M.A. was either told to leave the classroom or left the classroom without permission. Pollard submitted a letter to Liptak indicting that she had told M.A. to leave the classroom. Pollard directed Liptak to advise her as to what had been done about M.A. and to outline all of the circumstances. It contained quite a few directives.

Liptak indicated that normally no more than two students can leave to go to the bathroom at once (it is disruptive). She admitted that when P.A. was refused permission to go to the bathroom, she did not know how many students were already out. She did not believe Pollard kept a sign out book. Questioned as to whether or not other students claimed that Pollard refused them access to the bathroom, Liptak indicated that a number of students had said that. She claimed, however, that this would not be unusual because a teacher cannot let every student leave whenever the student wants to. Many students complained that some students were allowed to go to the bathroom and others were not. Liptak opined that it is a matter she leaves to the discretion of the teacher. Thus, she agreed that if two or three students were out of the classroom, and P.A. indicated he needed to go to the bathroom, the teacher's refusal at that point might not be unreasonable. Questioned about the allegation that Pollard routinely ordered the students to leave the classroom without reporting this to the office, Liptak referred to M.A.'s allegation, the instance with T.McK. (which was reported to the vice-principal) and noted that there may have been several others. She noted that there were several incidents at school 3.

Liptak indicated that she had to remove a number of students from Pollard's class because of conflicts with Pollard. She confirmed that S.A. had problems in other classes (could have been suspended on other occasions) and was not a model student. He was inclined to spread gossip to get other students agitated. S.A. was removed for the first two periods from Pollard's class, and he was then in Pollard's

class only one period a day. There were many complaints about Pollard from students and parents. The teachers also complained about receiving students who had problems with Pollard. It was not good for morale. Liptak was aware that Pollard had the elementary school certification that she needed for her position but knew nothing else about her credentials.

On redirect examination, Liptak agreed that there were certain incidents in the statement of charges that did not occur in her building. She understood that those charges had been documented with the administrators in charge of those buildings and that there was evidence for those charges. She indicated that S.A. was not a model student before Pollard arrived but was "nothing to the extent that he got into later." Liptak described the types of assistance given to Pollard: assigned students to other classes where there appeared to be extreme personality conflicts; contacted parents; conferred with students; frequently removed students from the classroom that Ms. Pollard reported being disruptive; gave after school detention and imposed suspensions.

Catherine Mary Vitone, employed by respondent as vice-principal of school No. 2 for two and one-half years, testified that her main responsibility is to ensure that the students and staff can carry out their functions throughout the school day. For the past year, she was specifically assigned to the older students. She is in charge of technology and media and audio/visual education in the school and has lunch duty. She shares the responsibility to supervise, observe and evaluate teachers with Liptak.

Vitone recalled that S.A. came to her office. He had tears in his eyes and was extremely upset. He said he was coming upstairs from the lunchroom, and Pollard called him a "fat faggot." He was extremely sensitive to the phraseology. Vitone took him to see Pollard. She asked Pollard to step outside into the hallway and advised Pollard what S.A. had said. Pollard admitted that she called S.A. a "fat faggot." Vitone asked S.A. to return to her office. Vitone told Pollard that this was objectionable, out of the ordinary and not something expected from a teacher. Vitone took S.A. back to her office and wrote up the incident (P-24). S.A. was suspended from school because he admitted to saying things to Pollard which were disrespectful.

Vitone noted that on March 21, 1994, she spoke to Pollard about the observations and asked to meet with Pollard about them (P-33). She recalled that she went to Pollard and attempted to meet with her; Pollard refused. Vitone noted that this

was unusual and the first time that this occurred in the building. She explained that an observation is written up, put in the staff member's mailbox or given to them personally. The teacher has time to review it. A conference with the staff member occurs to benefit the teacher, who then signs the observation sheet. Vitone conducted two observations of Pollard (P-34 and P-35). Vitone's entry on P-33 indicates that she asked Pollard to sign the observations of March 18, 1994 and March 16, 1994. Pollard said that "she needed more time and wished to check with someone regarding the signing and would sign in 24 hours." She never signed the observations. Referring to her observation (P-34), Vitone found that Pollard was not really well prepared for the class. The students seemed to be extremely restless and unable to follow her train of thought. They asked some valid questions, which Pollard disregarded. Vitone did not think the class was well organized and opined that the students were not receiving quality instruction. There was no homework assignment given to the students. School policy requires that every student receives homework in every class. Vitone was very concerned about the progress of the class. It was mid-March and the class was still at the beginning of the book.

She observed another class two days later at a different time, and Vitone found that the exact same lesson was taught again. She was thus not sure about the progress. She had had students come to her office upset because the same lesson was taught over and over again. There was a great deal of material in social studies to cover and the class was still studying the early part of the curriculum. During the second observation, it took a while for the lesson to start. There was a lot of class time spent getting organized which Vitone opined should not be occurring at this point in the year with seventh and eighth graders. (Vitone had observed them organized in other classes).

Vitone asked the supervisor for social studies, Dr. Bolton, for assistance. Since social studies was Pollard's main assignment, Vitone asked Bolton to meet with them to discuss ways of helping Pollard with the curriculum. Bolton came on March 30, 1994. Pollard was not at all receptive. As a result of Pollard's reluctance and failure to cooperate, Vitone wrote a memo requesting a formal meeting with Bolton on April 11, 1994, the purpose of which was to discuss the teacher evaluation. Vitone indicated that this was a gesture of assistance.

Vitone met with Mrs. McK. a number of times. T.McK. is a very sensitive young lady, who at times had difficulty with other students. She also had difficulty with

Pollard, whom she felt singled her out and harassed her. Mrs. McK. was extremely upset about it. Vitone spoke to Pollard about T.McK. and her parent. Vitone recalled that T.McK. left Pollard's room, extremely frustrated. She came to Vitone's office, said she was angry and would not go back to Pollard's class. T.McK. told Vitone that Pollard had told her to get her "ass out of the room." Vitone did not ask T.McK. to return to the class.

On cross-examination, Vitone stated that she did not recall seeing R-12, but agreed it was addressed to her. Vitone recalled that S.A. had come to her office and told her that Pollard had called him a "fat faggot" in the stairwell coming up from lunch and that it was not fair. She spoke with Pollard who confirmed that she called him a "fat faggot" because he was making fun of her. He called her "bald" and "fat lips" and spoke unkindly and disrespectfully to her. S.A. admitted to Vitone that he had said those words, and he was suspended for this.

Vitone was not involved in the preparation of the statement of charges nor did she review the statement of charges before Liptak signed it. At no time did she become aware of Pollard's credentials or look at Pollard's file. She understood that Pollard was certified to teach in elementary school. She opined that those are things the principal should know.

E.V., is a thirteen-year-old student at school No. 3, and Hernandez is the school principal. Ms. Pollard was her language arts teacher from September to December 1993, and Mr. Campos taught her math. E.V. testified about several incidents in Ms. Pollard's class that she observed and reported to the principal and to her mother. She also made written notes about the incidents for the principal and these are part of petitioner's exhibits.

Regarding the problem between A.R., a student in her class, and Ms. Pollard, E.V. noted that A.R. is "fat." She recalled that A.R. had requested to go to the bathroom, and Ms. Pollard said, "Yes," but advised A.R. that she could lose five pounds while she used the bathroom. The students started laughing, and A.R. was embarrassed. E.V. further observed Pollard, on the other side of the room, near A.R.'s desk. She heard Pollard call A.R. a "bitch," and saw her "mush" A.R., and tell her to "shut the f--- up." E.V. explained that to "mush" somebody is to put a finger to the head and push it. (P-14). She recalled that the entire class heard Ms. Pollard's comments,

and they determined to tell the principal because a teacher is not supposed to curse at students.

E.V. testified about the time someone threw a paper in class, and Pollard had indicated that the students' houses are a mess, they do this to their parents, and their parents are garbage. (P-15) At another time in Pollard's class, E.V. was pointing to the word she looked up in the dictionary. Although uncertain if it was an accidental or on purpose, she indicated that Pollard scratched her finger, the one she was pointing with. E.V. went to the school nurse. Pollard came to the nurse's office, screamed at her and told her to get out. (P-13). Both Pollard and the nurse closed the door on her, and she sat on the bench. E.V. told her mother about the incident; her mother met with the principal and Pollard.

E.V. testified that Pollard wrote her up and sent her to the office many times but she does not know why. E.V. claimed that she had been a student at school No. 3 since kindergarten and had no previous academic problems or problems with her teachers. E.V. recalled that Pollard made fun of certain students; she made fun of E.'s nose, A.R.'s weight and M.'s weight. She described the time she asked to go to the bathroom and Pollard told her, "No." It was an emergency, and she walked out of the room. Ms. Pollard wrote her up. She also recalled that on several occasions when students went to the bathroom, Pollard "locked the door on them." They went to the principal who brought them back to the classroom.

On cross-examination, E.V. agreed that A.R. was "always disruptive, gave Ms. Pollard problems" and screamed at Pollard. However, she did not recall A.R. saying, "Oh shit," nor was she present when A.R. was fighting with E. Although she recalled A.R. telling Pollard in a low voice to, "Shut the f--- up." Pollard said, "What? You shut the f--- up." On the same day Pollard also called A.R. "a bitch" and "mushed" her. She recalled that A.R. used a "bad word," and Pollard told her to go to the office. She did not recall A.R. using the word "f---" frequently in class. E.V. confirmed that A. R.'s disruptive behavior started after Pollard told her to "lose five pounds while you are in the bathroom."

She agreed that Pollard was in the habit of writing a report anytime she had a problem in class and wrote reports about her. E V testified that whenever Pollard sent her to the office, the principal told her to write a letter about what happened in class. Thus, she wrote reports about Pollard. She told her parents that she had been asked

by the principal to write these letters. The principal did not make any comments about Pollard and did not instruct her to write negative things about Ms. Pollard. She did not tell Pollard about her notes to the principal. She recalled "writing a lot" (approximately five letters). E.V. agreed that her letter on October 4, did not include everything A.R. said. She recalled the day Pollard just kept moving her around in the class for no reason. She wrote about this in a letter (R-4) because the principal had advised her not to argue but just to write down what occurred.

E.V. did not see Pollard "mush" anyone else. Pollard's statement to A.R. about losing the five pounds while she was in the bathroom was prior to October 4. E.V. only heard Pollard use the word "bitch" on October 4, and that was after A.R. said, "Shut the f--- up."

M.M. is the mother of E.V. Prior to the 1993-94 school year, M.M. had not received any complaints about her daughter. E.V. was a very good student and her academic performance was good. During the school year, E.V. complained everyday about how Pollard conducted herself in class. E.V. was very upset because Pollard said that the parents were all garbage. She had a conference with the principal and Ms. Pollard because of the trouble E.V. was having in class. She opined that Pollard picked on her daughter. M.M. received a supplementary report on E.V. from Pollard and she replied: "E.V. will start improving in self-control when you stop picking on her. You have something against my daughter, it better stop soon or I'm taking action. E.V. never had trouble with any other teacher before. She's always been a good student. Mr. Campos has no trouble with my daughter, E.V." (P-16) Despite the conferences with the principal and Pollard, the situation did not improve.

On cross-examination, M.M. stated that she did not believe her daughter was in remedial classes because she was below her grade. She recalled that E.V. told her about A.R., but did not tell her that A.R. was a disruptive student or that she heard A.R. tell Ms. Pollard to, "Shut the f--- up." E.V. told her that students threw paper at Ms. Pollard in the classroom. E.V. also complained that Pollard was always picking on her but M.M. could not recall E.V. telling her that Pollard called her a bad word. M.M. stated that E.V. was written up by Pollard because of her behavior in class. During the conference with the principal and Pollard, they discussed E.V.'s behavior in class. M.M. did not recall Pollard's concerns but did recall that Pollard called E.V. a liar. Although she did not know what "mushing" meant, E.V. had mentioned the word (apparently in regard to Pollard mushing somebody). Aware that her daughter was asked by the

principal to write letters, M.M. told E.V. that every time something happened in class to write it down and give copies to the principal and to her. The letters were written because M.M. wanted action taken by the school; she was ready to remove her daughter from the school. She did not make the letters available to Pollard and did not know what action was planned. M.M. saw all of the letters.

M.M. stated that when Pollard was transferred in March 1994 (not sure of the date) to school No. 2, Ms. Mosch became E.V.'s teacher. E.V. has not had further problems in school.

S.R. was a student at school No. 3 in Pollard's language arts class during the 1993-94 school year. She is fifteen years old. There were about twenty-three students in the class. She had problems with Pollard and described her as unfair. Pollard would not let S.R. use the bathroom, and in one instance when S.R. persisted in her request Pollard called the office; she allowed the Spanish girls to use the bathroom. She answered questions from the students with an attitude. S.R. agreed she wrote P-18, but did not recall giving it to anyone. Due to the problems, the class had to write a letter to Ms. Hernandez about how they felt (P-17). She recalled that somebody had thrown a piece of paper at Pollard. Pollard stated that this was the way they "treat their parents, that they throw garbage at them." She observed A.R. and Ms. Pollard arguing all the time in class. A.R. had said, "Shut the f--- up" to Pollard, and Pollard repeated that back to A.R. A.R. always bothered Pollard. She did not hear Pollard use any other profanity. S.R. never got along with Ms. Pollard and believed Pollard did not like her.

On redirect examination, S.R. stated that she observed students go to the bathroom and return to find the door locked. She noted that Hernandez came to the class to calm them down and at times, took A.R. out of the classroom. The students did not have the same problem in Mr. Campos' class.

On cross-examination, S.R. agreed that she is Spanish and claimed she was referring to the Mexican girls in her class. When questioned as to Pollard's attitude, she indicated that Pollard had a "big mouth" and answered back with an attitude. For example, if she asked if she could go to the bathroom, Pollard screamed, "No."

S.R. opined that Hernandez told them to write the letters when they went to the office and complained. She recalled meetings with the principal, who told them to write letters about how they felt and that Hernandez walked into Pollard's classroom when

Pollard was teaching and asked the entire class to write letters. She admitted that she did not put in her letter A.R.'s specific words to Pollard. Hernandez did not tell her why she wanted her to write the letters, and S.R. never gave the letters to Ms. Pollard. She further recalled that in language arts class Pollard asked the students to write how they felt about her. She did not recall which letter it was.

S.R. recalled that A.R. threw some paper at Pollard, and Pollard then said, "Is that what you do to your parents, throw garbage?" On further questioning, S.R. indicated that Pollard said, "That's the way they treat their parents, throwing them garbage." S.R. agreed that A.R. was usually a disruptive student. She played around, did not do her work, tried to make people laugh, and cursed at Pollard. She called her a "bitch," and a witch. S.R. recalled the one occasion Pollard wrote her up for talking and walking out of class. S.R. did not think that she was ever written up by Pollard for something she did not do.

M.R. is thirteen-years old and was a student at school No. 3 during the 1993-94 school year. Pollard was his teacher, and he had problems with her. Pollard locked the door on students who left the class without permission. On at least four occasions, when he went to the bathroom he was locked out by Pollard. He went to the principal's office and advised her that Pollard had locked him out of the class for no reason. Hernandez brought him back to the classroom.

Noting that he is a "big kid," he recalled that Pollard told him that he was so big he ought to go to the bathroom and lose some weight. The other students in the class started to laugh, and this made him feel, "like sad, mad." He recalled that Pollard said something about S.R., A.R. and other students. If he was late to see a special teacher, he would get into trouble. Pollard cursed at him and told him not to go at that time. She also cursed at A.R. but A.R. also said bad things about Ms. Pollard. Pollard also said that their parents must be "treating them to act immature," probably "their parents were immature."

M.R. admitted that he had been written up by Ms. Pollard and sent to the principal for leaving his seat and not returning to it despite being asked to do so. He did not recall being written up because he refused to take out his book and because he was involved in some disruptive action with A.R. He opined that Pollard wrote him up for something he did not do; somebody else made a paper airplane and threw it, and she believed it had been him.

Referring to Pollard's statement about losing weight in the bathroom, he remembered telling her to leave him alone since she was teasing and bothering him about the way he looked. Another verbal exchange with Pollard started when she thought he was talking and it was really S.A. Pollard had told him to be quiet and said that he was too fat to get a girlfriend. He admitted, however, that he had first said she was so ugly and had big lips, and it was afterward that she said to him, "You so ugly, you probably never even get a wife." S.A. then said, "Oh, look at her, turn her off, turn her off, she's so ugly." On questioning by this judge, M.R. agreed that he made the first comment to Ms. Pollard about having big lips and being ugly and she responded to him.

M.R. further recalled that A.R. cursed at Ms. Pollard, that she said she would not take all her "bull," and that she was not going to do any work until she saw the principal. M.R. recalled that when the class acted up, Pollard indicated that their parents were teaching them to be immature, that they must act up like that to their parents, or their parents must act up like that to them. However, the class was acting up because they wanted to see the principal and Pollard would not let them. The class wanted to see the principal because they believed that Pollard was "saying bad stuff about them." He recalled that Hernandez visited the class while Pollard was there and told them all to write letters on yellow pieces of paper about what occurred and why they were making so much noise. Hernandez read the letters and spoke to them on another day. M.R. could not recall how many letters he wrote. He recalled writing a letter indicating that A.R. used words like "shit" and "f---" in the classroom to Ms. Pollard but opined that A.R. ripped it up and it did not get to the principal. He opined that Hernandez wanted them to write the letters to know what was going on. She did not indicate that she wanted to "get Ms. Pollard."

Y.A., a fourteen-year-old, was a student at school No. 3 during the 1993-94 school year. Ms. Pollard was his teacher for language arts, reading and spelling. He had problems with her. He recalled that sometimes Pollard held on to his arms. Y.A. noted that when he misbehaved or Pollard thought he was acting out, she asked him what was wrong with him, what he was doing and advised him to stop fooling around. She grabbed his arms and shook him a bit. Sometimes, she grabbed him kind of hard and it hurt. He did not feel her fingernails in his arms. No one else observed what occurred because she closed the door. He did not hear Pollard use profanity and was not in A.R.'s class.

Y.A. indicated that Pollard wrote him up for acting improperly, such as saying, "Oh shit." She never wrote him up for something he had not done. Also, when Pollard shook him and asked him what was wrong, he was for example, talking to his friends. He was not asked by Hernandez to write a letter.

On further questioning, Y.A. explained that Pollard spoke to him in her "office." He described the "office" as space in the hallway outside the classroom where the students hung their coats. There were no desks or chairs there. It is outside the classroom and she closed the door to the classroom. Y.A. indicated that Pollard shook him on approximately three or four occasions in her "office." He told his mother, who spoke to Pollard in his presence and Pollard's actions stopped. Pollard had told his mother that she shook him because she was just trying to talk to him.

P.A. was a student in school No. 2 during the 1993-94 school year. P.A. is thirteen years old, and Ms. Pollard was his teacher beginning in January 1994. He testified that he did not really get along with Pollard even though she sent him to the office on only one occasion. Sometimes she would not let him go to the bathroom, and if he did not do his homework, she picked on him. Neither he nor the other students liked the class.

In Pollard's class P.A. sat in front of S.A. S.A. and Pollard had problems. S.A. was looking at cards. P.A. recalled an occasion when Ms. Pollard was standing behind him talking to S.A., but he did not recall what S.A. said. He heard Pollard say, "You fat fag," and S.A. reply, "You scratched me." Pollard said, "How could you feel it, you fat fag?" Although she said it in a rather quiet voice, others heard it; the class was in shock. P.A. did not recall if S.A. remained in class or if he went to the nurse. Both P.A. and S.A. reported the incident.

P.A. recalled that on an occasion he asked to go to the bathroom and Pollard would not let him. He told her that he did not want to "pee" on himself. She said, "Go ahead pee on yourself." He had to walk out of the room. P.A. testified that Pollard told students to get out of the class, apparently without conduct slips.

P.A. indicated that S.H. cannot see very well and uses a computer to do his work. S.H. was sitting next to him. He recalled that Pollard called him "blind" (he could not hear the rest of the sentence and did not know if there was a dispute between the

two before he heard the word "blind"). Other students heard what Pollard said and stared at her; S.H. looked angry. He never heard Mr. Carol, the prior teacher, use profanity or order students to get out.

On cross-examination, P.A. indicated that Ms. Pollard was his teacher until 10:20 a.m. and again from 11:40 to 12:20. He explained that pursuant to the school's policy regarding the bathroom, a student could not go to the bathroom before 10:00 and after 2:00. In an emergency, the teacher was supposed to let the student go with a pass. The bathroom incident occurred during social studies, 11:40 to 12:20. Asked if students claimed there was a bathroom emergency when there was not, he replied, "No." He recalled telling Pollard that it was an emergency and asking her if she wanted him to pee on himself. She replied, "Go ahead." P.A. left the classroom. He noted that he had not asked for permission to go to the bathroom during any of the other periods.

P.A. indicated that Pollard would not call on him when he raised his hand, even if there was only one hand raised.

P.A. stated that the incident involving S.A. occurred in social studies. Pollard walked past him to S.A., who sat directly in back of him. Although P.A. was doing his work, he turned around when Pollard passed by and he heard her talking to S.A. He observed cards on the table and the first thing he recalled hearing was S.A. say, "You scratched me." Pollard said, "How could you feel it, you fat fag?" Noting that he turned around, he actually saw Pollard do it. Although he recalled that Pollard had nails, he did not remember exactly how she scratched S.A. He believed she scratched him somewhere on his hand.

On redirect examination, P.A. indicated that he saw Pollard move her hands towards S.A. More precisely, he indicated that he saw Pollard withdraw her hand. He did not actually see her scratch S.A., nor did he observe the entire incident that occurred. He heard it. On questioning by this judge, he stated that he saw Pollard trying to grab something with two hands. He did not know what she was trying to grab and did not exactly see her scratch S.A.

S.H., a fourteen-year-old student at school No. 2, testified that Ms. Pollard was his teacher the prior school year. He explained that he has a disability in that he is crossed-eyed. He receives help in reading and math and used a closed circuit television in Pollard's class. S.H. had no problems with Mr. Carol, his teacher prior to

Pollard. He had problems with Pollard. Although he did not know the exact location of his desk in terms of S.A.'s desk, he recalled that Pollard called S.A. a "fat fag" and noticed that other students heard it. Other students told the principal. S.H. did not hear S.A. say anything to Ms. Pollard nor did he know why Pollard said this.

S.H. recalled that on one occasion, (sometime in the morning) Pollard called him, "blind." He was at his desk working and had not said anything to Pollard before she made that statement. He stated that this made him "mad" and he told his mother. He reported the incident to the principal. He indicated that other students heard Ms. Pollard call him blind but did not notice their reactions. He recalled that another teacher had called him blind.

On cross-examination, he indicated that he had Pollard first and second periods and in the afternoon. In regard to the incident with S.A., he believed that he was about six feet away from S.A. and that P.A. was in the class. He did not recall the seating relationship, if he could see S.A. from his seat, or if he had to turn around to see him. He did not remember exactly what Pollard was doing, what S.A. was doing (he was not playing with cards), or whether Pollard said or did anything else before he heard her use the words. He did not recall a commotion or disturbance prior to hearing the words and did not recall what occurred after Pollard uttered the words. He only remembered the words "fat fag" from that day.

Questioned as to Pollard calling him "blind," S.H. indicated that he is not really blind. He did not recall what was going on in the classroom at the time, did not recall Pollard saying anything else to him, responding to her, or anything else that happened in that period.

R.G. is twelve years old and a seventh grade student at Northside Chapel school. He remembered Pollard as his substitute teacher at school No. 28 when he was in the second grade. Questioned as to whether he was ever disciplined by Ms. Pollard, he stated, "In the closet." He recalled that he and the class were playing around, and Pollard placed him in the closet. More particularly, R.G. recalled that he stopped playing around, sat in his seat and raised his hand for help. Pollard got mad, grabbed his arm and picked him off the seat, and put him in the paper closet, locked the door and turned out the light. R.G. indicated that the closet was located in the little hall between the next classroom and Pollard's classroom. He was scared because it was dark and he could not see. He was in the closet for a long time. He yelled and

knocked on the door. A lady from next door, whose name he did not know, opened the closet and let him out. He did not know if someone was placed in the closet after he was let out by the lady and taken to the office. He went to the principal's office and spoke with the head principal, Mr. Fulmore. R.G. told his grandmother that he was put in the closet and his great-grandmother, G.D., went to the school.

R.G. testified that while he was a student in Pollard's class he saw other students placed in the closet. They played around and Pollard got mad. "She just started picking kids up and putting them in the closet." R.G. stated that Pollard would then take one out and put the next one in. R.G. indicated that he observed other students being placed in the closet because his desk was in the front near Pollard's desk and near the hall. He could see where she "brung them over there and put them in the closet." He observed J.C.W., his classmate, placed in the closet.

On cross-examination, R.G. stated that Pollard was substituting for his teacher, Ms. Pipkin. He did not recall what the room looked like but there was a bathroom in the classroom and a door to the paper closet, where the paper and pencils were kept for the two classrooms. That closet was between the two classrooms "connected together." One did not have to go through a door to get to that closet. The closet that he was referring to is the paper closet. It was "like a wall."

On further questioning, R.G. advised that he was locked in the closet more than once. Before Pollard put him in the closet, the light was off and another student was taken out of the closet. He did not recall who. From the position of that closet, one could see into the other classroom and see the class being taught. He opined that when one student was taken out of the closet another was put in. On redirect examination, R.G. indicated that he first met Mr. Johnson on the day of the hearing.

Norma Pollard began teaching in September 1961. She received a Bachelor of Science degree in 1961 in elementary education from Seton Hall University, a Master of Arts degree in reading specialization in 1967 from Kean College, and obtained a permanent teaching certificate from the State of New Jersey in 1965. She received a certificate in learning disabilities from Montclair State College and is certified as a reading teacher, a learning disabilities teacher/consultant and a teacher of the handicapped. In 1989, she became a reading specialist.

Pollard claimed that she was forced out of East Side High in 1982 when Joe Clark was the principal. From 1982 to 1986, she did not work for Paterson. In June 1986, she was assigned to school No. 21, but she was transferred to school No. 28 as a basic skills instructor in the fall of 1986. She was evaluated by Joseph Fulmore on May 28, 1987. In the category of classroom organization and management she was rated needs improvement, and in the other categories, she received outstanding or satisfactory ratings. Pollard taught in the school in 1987-88 and was evaluated by Mary Holmes on May 31, 1988. In two categories, she received needs improvement, but received no unacceptable ratings. She was rated outstanding or successful in the other categories. In September 1988, she was a basic skills instructor at school No. 28. She received no negative evaluations in September, October or November 1988. On December 6, 1988, she was transferred to the position of first grade teacher. Pollard recalled that at approximately 12:00 the principal informed her that she was to report immediately to the first grade as the teacher. Pollard questioned this arbitrary action. She was not given the class register, the class list or yellow cards (record cards). Pollard had no idea how many students were in her first grade class nor did she have a list with the students names. She walked into a class and children were sitting "all around the walls. They were running around."

Pollard indicated that by document (J-1) from the Board, dated December 7, 1988, she was transferred pursuant to the Board's meeting in January 1989 to an elementary teacher position on December 8, 1988. Pollard contended that she was evaluated December 7, 1988, by Joseph Fulmore after having been in that classroom less than a day (R-16). Noting that she did not have the register, the yellow cards or the class list, she agreed that she was making name tags for the children in order to create an attendance record. Pollard told Fulmore that she did not have a register and was unable to identify the children. She asked him if he knew the number of children in the classroom. He told her to do "whatever." She noted that the other allegations in the letter, dated December 7, 1988 (R-16), in which Principal Holmes asked her to complete and update student ISIPs, were not true. She was then a classroom teacher and it was a BSI responsibility to complete and update student ISIPs.

Pollard indicated that she was reassigned on December 6, in school on December 7 and absent December 8, 9, 12 and 13, 1988. (R-19) She was observed December 13, 1988, at 10:40 a.m. by Ms. Mary Holmes, a day that she was not in the building (R-20). By letter dated December 15, 1988, Pollard informed Holmes that she was absent December 13, 1988 (R-21); Holmes did not respond to her letter.

Pollard testified to a number of documents in an effort to explain the memos she sent and received. Pollard referred to R-22, sent in response to R-19, R-23 sent in response to R-18, R-24, P-2, R-25, 26, and P-3. Pollard contended that she still did not have the class register, the class list or yellow cards and had received no response to her attempt to get them from the principal and the vice-principal.

Pollard drew a sketch of her first grade classroom (R-37) and indicated that it was a little larger than 17' x 24'. Pollard opined that when she was first assigned to the first grade classroom there was chaos. The children were out of their seats, running and screaming. They ran out the door to the left and into the classroom through the other door. She tried to keep the children in their seats and out of the bathroom. None of the doors were locked, and she did not know which students were in the other class and which were in her class. She discussed the chaotic situation with Holmes, who just walked away. Similarly, Fulmore shrugged his shoulders and left. No administrator in the school rendered assistance to her.

Pollard referred to a diagram (R -37) and indicated where the doors were located and their use. Pollard and D'Olivera, another first grade teacher, could enter one another's classroom where it is marked "exit." The door went into D'Olivera's classroom but did not open into Pollard's classroom. It did not have a swinging hinge. Somebody in the other classroom could enter Pollard's room by pulling the door open. Sometimes the door stayed open. The door was solid wood, and when it was closed, one could not see what was going on in the other room. The door to the storage closet was made of solid wood.

Pollard stated that from the time that she took over the class, to the end of December, there were a minimum of ten visits from Fulmore and a minimum of ten from Holmes. She estimated that between the principal and the vice-principal, they entered her room a more than twenty times. She never knew when they were coming.

Pollard testified that she did not know what incident R.G. was referring to in his testimony. Nothing R.G. described ever occurred in her classroom. The area that he claimed to have been locked in was not in her room. Asked to which closet R.G. referred, Pollard pointed on R-37 to the "exit marked entry other class." Pollard indicated that there was a closet next to that class and it was for storage; it was not in her room but in the other room. She and D'Olivera kept "art papers in that particular

room," and both had access to that area. The area was not locked, did not have a lock, and there was no light bulb in the closet. The door remained open. The only way to have gotten to that area was to enter another teacher's classroom. From December 6 to December 23, that classroom was occupied. The other teacher used that room while she used hers. Pollard stated that R.G. had told her that the class was very mad because Ms. Pipkin was not there. Pollard recalled that from December 6 to December 23, R.G. was involved in quite a few fights with T. and J.C. He made his nose bleed and she would tell him to run to the nurse. Pollard indicated that R.G.'s grandmother and C.'s mother came into the class. C.'s mother wanted to know about a fight with R.G.

Pollard did not recall Ms. Holmes coming into her classroom about an allegation of locking children in the closet. She did not recall any time in December 1988 when she was teaching in the first grade and Ms. Holmes walked into her room and found a child in the closet. She did not recall a discussion with the teacher in the adjoining room about putting children in the closet. Her first notice of the allegation, was when Ms. Holmes came into her room in December and hand delivered P-3 to her. Holmes did not tell her that she found the child in the closet. Pollard handed a written response directly to Ms. Holmes (R-1). Holmes did not respond to that letter. Neither Ms. Holmes or Mr. Fulmore asked for a conference with her.

Referring to photographs of the room (R-38c), Pollard indicated that except for the furniture, the room was substantially the way it was in 1988. The door on the right of the picture leads to the bathroom; the door to the left leads to the other classroom. Referring to R-38b, Pollard indicated that the door in the picture is the exit door into the other classroom. R-38d depicts the rear of the room with what looks like a bulletin board. The blackboard is in the front of the room. Pollard indicated that the bulletin board is actually the cloakroom door, with push in doors. There are pictures on the doors. The children hang their coats in the closet, and they put papers in the closet. (R-38f). R-38f, shows the closet with doors open. Referring to R-38e, Pollard indicated that it is the storage closet and it was in the other room. Art supplies and items for gym were kept there. The storage closet was a little bit larger than three feet deep and did not have a light bulb. R-39 was a picture of her room taken some years before. The door to the left on R-39 leads to the corridor from Pollard's room. There were numerous doors in the room as depicted on the pictures and none of those doors had locks.

Pollard referred to various documents marked into evidence on the issue of submitting attendance reports (R-27, 28, 29, 30, 31, 31, 34, P-12) for the month of December, which Pollard maintained she could not do without the register, class list or yellow cards. Pollard contended that she only saw the official register (P-4) toward the end of the year (definitely after January) when she completed the numbers for the 1989 register. She referred to Holmes' letter to Dr. Napier in which she advised him that the register had not been completed and the monthly report to the district for December could not be completed. Pollard contended that in order to comply she needed P-4 in evidence.

Pollard also requested a transfer from the school, claiming that from the day of the arbitrary transfer in violation of her contract, she had been "harassed, intimidated," and received over sixteen letters, to which she had tried to respond. She was unable to identify the children in her class, did not have regular prep periods, as required by the contract, and received no support. Allegations had been made about her and continuous letters written about her. The transfer request was not approved and Pollard filed a formal grievance on January 27, 1989 (R-2). Pollard testified as to the concerns that she had as set out in the grievance. According to Pollard, as a result of the grievance hearing, she was informed that it was not her responsibility to complete one of the documents. Pollard was also advised that the transfer would not take place. Pollard then requested the specific reasons for the denial of her request for a transfer from Dr. Napier (R-33). Pollard contended that between December 1988 and February 1989, all her letters or memos to Ms. Holmes or Mr. Fulmore were in response to some communication from them.

Pollard stated that she filed a civil complaint against the Paterson Education Association and the Paterson Public School System (R-26), as a result of action that took place at East Side High School, when Joe Clark was principal. The complaint was dismissed by the court September 1988. In September or early October, she had a discussion with a union representative who indicated that she should be very careful because "they were out to get her." Several of the representatives told her to "watch herself." A summary judgment was entered in favor of certain defendants (apparently, including Dr. Napier, (R-44) in December 1988).

Pollard referred to the December 19, 1988 letter (P-1) of Holmes to Dr. Napier which recommended her suspension. Pollard noted that at that point, she had been a first grade teacher for no more than ten days. In January 1989, Dr. Napier gave Pollard

ninety days in which to correct her deficiencies (P-6). Pollard contended that there was no reason to hold her paycheck in June 1989. Advised by Holmes that the board's attorney had told her to hold the check, Pollard called the board attorney and he told Holmes to give Pollard the check. Holmes refused to do so.

Pollard did not recall any incident in which Boone came up to her room and she used the word "bitch." She never called Ms. Holmes or Ms. Boone "bitch." (R-9)

Pollard taught in school No. 28 from September 1986 until June 1989. By letter dated November 17, 1989, she was transferred to school No. 17, effective September 1, 1989 (R-47). In her February 1990 evaluation, she did not receive any unacceptable or needs improvements; her ratings were either outstanding or successful (R-40). She was transferred from the position of BSI at school No. 17 to an unassigned teacher position at School No. 17, effective September 1, 1990 (R-48). In her evaluations she received ratings of either outstanding or successful and no unacceptable or needs improvement ratings (R-41). Pollard was transferred in September 1991 to school No. 12, as a BSI (R-49) and had no problems for the year. Effective September 1, 1992, Pollard was transferred to school No. 3, to be a classroom teacher. Laval Wilson transferred everyone from school No. 12.

Pollard recalled that she had a very nice fifth grade class at school No. 3 for the 1992-93 school year. She had no problems with the class or Mr. Bradshaw, the principal. She received pleasant letters on February 17, 1993, from the students (R-51A-P). Grisell Hernandez became principal in March or April 1993. In the performance report from Hernandez, dated April 7, 1993 (R-53), Pollard was rated outstanding and satisfactory, she had no unacceptable or needs improvement.

In September 1993, at school No. 3, she had a seventh grade class. She had a homeroom of regular, classified and BS students for the first three periods. Pollard's homeroom went to Mr. Campos for further instruction and in turn his students came to her for instruction. Campos' class, a State-classified bilingual class, had regular, classified, BS and ESL students. The ESL students (one-half of the class) were placed in his' class because he spoke Spanish. Pollard noted that her certification allowed her to teach all of the children, but she does not speak Spanish. She was supposed to teach and grade the regular students, but not the ESL students. Another ESL teacher was supposed to teach these children for one of the periods and give them enough work to keep them busy for the two additional periods. Another bilingual teacher who

saw them in the morning while they were in Campos' class was also supposed to give them enough work to occupy them for the fifth and sixth periods. Pollard indicated, however, that the other ESL teacher, Ms. Kaufman, did not always pick up the students. They remained with Pollard when she was absent. Pollard gave them work because they had no assignments and were socializing. Pollard opined that she should have been paid for this. Pollard told Hernandez that the children did not have enough work to occupy the two periods nor was there a teacher to correct their work. The ESL students asked Pollard many questions. The other students complained that they had to work and the ESL students did not have to work. Pollard began to include ESL students in the class, although Hernandez told her that she was not to teach them. Pollard recalled that Hernandez expressed her preference for a bilingual teacher for the class.

Pollard described Hernandez' "bathroom policy," requiring all traveling teachers to take their children to the bathroom before the classes began to travel. At 10:00 every morning, she took her homeroom class to the bathroom. She contended, however, that when she received Campos' class, the students wanted to go to the bathroom or came into her class late, alleging they had been in the bathroom. She told the students to tell Campos that he had to take them to the bathroom, and she also spoke to Campos and Hernandez. (Although she allowed the ESL students to go to the bathroom, because they came from another class, she revised this because the other students claimed she was prejudiced.) She opined that the problem was Hernandez' policy. Hernandez told Pollard that Campos was taking all of his children to the bathroom; the students said he was not.

Pollard chronicled the disciplinary problems that she encountered in the fall of 1993, and claimed that she specifically informed Hernandez of the problems. On September 27, she called the office and told them there was a problem in the classroom; the children were fighting and making racist statements. Neither the security guard nor the office answered her call. A student was sent to the office to tell Ms. Hernandez to come to the classroom; Hernandez did not come. Pollard thus took the entire class down to the office. Pollard asked if she could call the parents of several of the children to let them know how the students were acting in the class, that this activity was disrupting the learning process and that it was dangerous. Pollard wanted to correct the situation and asked to speak to the parents. Pollard opined she could not control the situation. Hernandez told Pollard not to bring them (students) "back." In written instructions to Pollard, Hernandez set out school policy. As a result

Pollard issued conduct reports. Pollard stated that she tried continuously to reach out. However, the problem was not with the children or with her; it was something else.

Pollard indicated that after she received P-19 from Hernandez, she issued conduct reports (R-55A-D). Referring to the September 27 incident, Pollard gave the conduct reports to Ms. Hernandez (R-55A-BB) and asked Hernandez to call the parents to come into school to observe their children's behavior. (One parent came, apologized, and transferred the child out of the school.) Hernandez did not support her or inform her how she was going to handle the discipline. Pollard explained that the students used profanity, walked around the class without permission, walked out of the classroom and threw objects. She called the office for help on October 1 for similar problems and received no response from Hernandez. She had similar problems on October 4. She recalled that the students indicated that they could get her in trouble and that they had done this before. The students let her know they were not going to listen to anything she told them. At this point, she knew the few students that were acting out. Hernandez did not reinforce the instructions of abiding by the school rules. Telling the children they did not have to listen to Ms. Pollard, per se, diminished her authority.

On October 8 (R-55P), a student was talking loudly in class and refused to do his assignment. Pollard forwarded that conduct report to Hernandez, who did nothing about it. (Eventually his mother came in and apologized for his behavior.) There were problems on October 26, when one of the students went into a rage. Pollard called the office and the principal, taking over for Hernandez on that day, removed the student. Some of the children continued to be disruptive. Pollard contended that whenever she reported disciplinary problems, Hernandez replied that she wanted a bilingual teacher in the seventh grade. Pollard maintained that it was at this hearing that she understood that Hernandez was prepping the children to come into her classroom for three periods as an attack against her. Had she known this, she would have used a different approach.

Pollard noted that Hernandez did not respond to the conduct reports she filed. On November 1, 1993, a fight started between two students and she sent three students to the office with conduct slips and received no response from Hernandez. On December 3, 1993, the children threw objects (attached to R-62) at her and she informed the office. Hernandez shrugged her shoulders and contended that she wanted a bilingual teacher in the class. Pollard opined that she did not have to go

about it this way. Pollard referred to other incidents in which she issued conduct reports (R-55Y, R-55Z, R-55-AA, R-55BB), and Hernandez did not respond. It is to be noted that certain of these incidents related to A.R.

By October 6, 1993, Pollard knew that there was definitely a problem and that she could not resolve the situation. Knowing that there was a very hostile, competitive environment, and she could not control the children, she requested a transfer from public school No. 3. Pollard opined that Hernandez had never informed her that the children she sent to the office were asked to write letters about her. Pollard did not know that Hernandez went into Campos' class and that these letters were being written in his class. In thirty years of teaching, she had never known a principal to ask students to write letters about a teacher.

At the end of September 1993, the president of the parents' association, whose son had been in Pollard's fifth grade class, sat in on the class, as did another parent. Although Pollard had informed Hernandez that it was not safe in the classroom, she contended that she was not involved in this decision. The monitors were to remain for the three periods. They did not always stay for the entire three periods and they did not come everyday. The monitors were present from October 1993 to December 1993. Pollard contended that their presence did not affect the conduct of the students. In fact, the monitors took some of the students to the office and indicated that they were creating a problem in the classroom. One of the monitors who had observed Pollard's morning class informed Hernandez that Pollard did not have any problems with her regular homeroom. It was only this class and only some of the children. Pollard stated that the monitors were working with her and really trying; Hernandez did not respond to their efforts. Pollard noted that only one of the conduct reports in R-55A - BB involved a student in her homeroom. (Pollard had no problems or complaints with her homeroom.)

Pollard opined that she had other professional disagreements with the principal. Pollard objected to a survey (R-57) which the principal asked her to distribute to the class. Pollard did not submit it to her class, but responded with her objection to it. Pollard claimed that it was not a multi-cultural survey, but was selectively biased in vocabulary and organization. Hernandez did not respond to her objection. In addition, Hernandez sent a memo on December 6 about a staff cultural representation survey (R-58). Pollard believed that it did not make sense, and she had never seen anything like it before. Pollard claimed that she was eventually replaced by a bilingual teacher.

She found out that she was being replaced from the security personnel and several children who told her that Hernandez had taken the new teacher around to the various classes and introduced her as the new seventh grade teacher. She observed the new teacher talking in Spanish to Mr. Campos.

Pollard then attempted to demonstrate that Hernandez had transferred Afro-Americans out of school No. 3 in an effort to replace them with Hispanic employees. Betsy Banister, a cafeteria director, informed Pollard that the cafeteria workers were being terminated since Hernandez had become principal. Banister was transferred in 1994. Johnny Mack, a food service worker, was transferred to another school because of an incident with a Spanish child and replaced by an Hispanic person. Questioned as to their race, Pollard indicated that she could not tell race by looking at a person, but in appearance Mack and Banister were either African American or Caribbean American. Pollard testified that Francis Wright, a nurse at school No. 3, left and she made a statement at the faculty meeting about the hostility at the school. Her rings had been stolen. Ms. Robinson, an African-American, was written out of a program called the Schoolwide Project and went to another school. Cynthia Williams, a food service employee, told her that Hernandez was removing the black teachers and staff. Williams indicated that Hernandez transferred her because of her color and replaced her with an Hispanic person. Pollard recalled that Dana Bozeman, an African-American, who had been given a long term position in September 1993 was transferred in September or October 1993, amid controversy. Pollard noticed that the cafeteria monitors at school No. 3, who were "of color," were systematically being removed. When two of them told her what was happening, she advised them to tell Hernandez how they felt.

She referred to letters from E.V. dated October 26, 1993 (P-13), and October 4, 1993 (P-14 and P-15) which she had not seen at the time, and indicated that the incidents did not occur in her classroom. Regarding the supplementary report (P-16) that she sent to E.V.'s parent, Pollard opined that she was not picking on E.V. She believed that E.V.'s mother was threatening her by saying, "It better stop." Pollard stated that E.V. had told her that her grandmother and Ms. Hernandez were very good friends, and that Pollard had better leave her alone. Pollard indicated that E.V. was not on a seventh grade level and her social performance was not average; she was definitely disrespectful. She did not agree with the statements in S.R.'s letter (P-17). She alleged that the letters were written by students she had issued conduct reports

for. She had no idea where a page from her class record book (P-21) fit in. Noting that she left everything at the school, she had no idea what happened to her grade book.

Pollard was transferred to school No. 2 in January 1994 as a language arts teacher. She taught reading, writing, composition, language arts and spelling. She also taught seventh grade social studies and eighth grade civics. After her evaluation (P-22), she wrote to Ms. Liptak asking her to clarify which statements she had written and which statements Hernandez had written. She never received a response to that letter.

Pollard indicated that P-23, P-24, P-27 and P-32 were not true. She referred to a drawing of her that S.A. put on her desk. S.A. claimed that he had found it (R-60). Pollard informed Vitone of the drawing. She indicated that the students also called her names. Referring to P-25A, Pollard indicated that P.A. left the class without permission. She called the principal and sent a notice to the office. She called the allegations by S.A. false and said that he walked out of the room, which he did all the time. Pollard maintained that she never said, "You're too fat to feel it, you fag." "No, cause I don't touch the children, I don't put my hands on them." The allegation against her in P-25B concerning M. was not true nor was the allegation involving S.H. She said, "He's not blind." Referring to an incident report on S.A. (P-26), she indicated that she did not know in March 1994 that S.A. had been seen by a nurse. Referring to her comments on the observation dated March 16, 1994 (R-63), Pollard indicated that prior to signing the evaluation, she asked for help with the students. She "wanted some assistance as to her comments so that she could respond to the observation." Referring to an eighth grade evaluation (P-35), she indicated that it was a civics class, not a social studies class. She disagreed with Vitone's comments in R-64. She wanted her to demonstrate a lesson utilizing the materials that Pollard had available to her. The statements in P-33 were not correct. She did not speak to Vitone at all in reference to the evaluations on March 21 and March 24. Pollard indicated that she met with Dr. Bolton contrary to P-30. In fact she had not refused to speak to Bolton and Vitone. She requested that they adhere to the contract and that she would appreciate a demonstration lesson from the supervisor of the social studies department. Pollard referred to R-9, indicating that it referred to Campos' class, but was in her grade book.

Pollard responded specifically to the charges and indicated the following. She denied charge one ¶¶ 3b, 3c, 3d, 3e, charge three ¶¶ 5a, 5b1. Asked if she had a conversation with Vitone as far as an incident with S.A. in February 1994, Pollard

indicated that coming up the stairs from the cafeteria, there could be noise from the classes. She did not know if S.A. had been suspended. She denied charges three ¶¶ 5b2, 5b3, 5b4, 5b5, 5b6, 5b7, and charge four ¶ 10. Questioned as to ¶ 12, Pollard indicated that it was half true, half false. She was directed not to check any homework. The first two or three days, the students continued to bring homework to her, and she informed them that the principal did not want her to correct their homework. She informed Liptak that the parents were complaining about it. Liptak told Pollard that they had hired people outside of school to go over the homework, that it was not her concern, and that she was not to check the homework. Pollard stopped checking it. Referring to charge four, ¶ 13, she indicated that that charge was not true; school was closed most of that week.

On cross-examination, she admitted that during the 1993-94 school year, she was observed by Liptak and Vitone on three separate days. Pollard contended that the observations did not point out weaknesses in her performance. She admitted, however, that No. 8 under teaching skills (P-34) indicated that systematic and orderly progression was not apparent. The writing in the recommendation section did not refer to weaknesses in her performance. Similarly, Pollard did not believe P-35 or P-37 pointed out any deficiencies in her performance. She disagreed with some of the comments of her supervisor; however, she never met with Liptak or Vitone to discuss their observations. She contended that Vitone never requested that she meet with her to discuss her observations. Pollard contended that she never refused to meet with Bolton. Bolton came or was brought to see her at 2:15 while she was in a class and not during her prep period. Although she did not recall that he wanted to discuss her performance in the social studies area, she alleged that they had no time to discuss anything since she had to dismiss her class. She agreed that her following period was prep time, but she contended that the administrators did not adhere to the contract which provided for four days notice to meet with an administrator in the presence of a representative of her choice. She respectfully informed her supervisors that she would meet with them but that they should adhere to the contract. She did not leave them to call a union representative. She was not angry with the administrators. She opined that the observations were very positive in many ways and were not critical of her teaching performance.

Pollard did not recall the incident in which she allegedly called S.A. "a fat faggot." She signed the document (P-24), but she did not engage in a discussion with Liptak about it. Pollard did not recall ever meeting with Vitone to discuss S.A., or

Vitone accompanying S.A. to her class to discuss S.A. with her. She agreed that there was an incident regarding S.A. in the hallway or stairwell on February 25, 1994, but she never referred in any manner to his weight or his looks. She never referred to S.A. as a "fat faggot." She did not know if S.A. made fun of her on that day or if he was suspended from school. She did not recall where P.A. sat in her class. Questioned as to whether some time on March 30, 1994, there was an incident involving S.A. in her class, she indicated, "No, or if it was, I don't recall the specific dates." Pollard maintained that P.A. and S.H. did not testify in court that she called S.A. a "fat fag." "They never did state when they heard the remark or where it took place." She indicated that P.A. was not an honor student, but an "okay" student and not the best as far as self-control.

Pollard stated that P.A. did not ask to go to the bathroom. (Students in her class could sign the sheet and leave.) She never denied him access to go to the bathroom or told him to "pee on himself." Pollard stated that S.H. has a "seeing disability," and "I have no idea. He could be multiply handicapped. He cannot read. He cannot write, he has difficulty expressing himself." She contended she had not been given the information by the nurse as to S.H.'s acuity vision. She agreed, however, that he used a closed-circuit television. She contended that she had not called him "blind something, because he is not blind."

Pollard indicated that she requested a meeting with Liptak or Vitone regarding the observations or evaluations. They did not request a meeting. She left her attendance book and grade book at school No. 3, and all the other documents there when she was transferred. She did not conclude the final grades because she was not the teacher at the end of the marking period. Hernandez did not speak to her about providing the student grades. She admitted that according to a page from her grade book (P-21), there were no grades for November.

Pollard recalled that in 1988-89 she was reprimanded in writing by her supervisors many times. She was also reprimanded by the district superintendent. The reprimand (P-6) concerned her refusal to present herself for review of her teaching technique and ability. It was not true that there were instances where Principal Holmes and Vice-principal Fulmore came to her class to observe her and she refused to teach. (Pollard disagreed with the comment that she refused to conduct the lesson (P-1).) She did not fold her arms and say, "You're the master teachers, you teach."

She had wanted them to demonstrate the lesson, but she did not think she said it "like that."

Pollard maintained that she was never removed from the class, but agreed that Holmes relieved her of duties on a particular afternoon. She did not "place kids in a closet." She contended that Holmes never testified that she came to Pollard's classroom, looked in the closet and found a student in the closet, took the student out of the closet and asked Pollard why the student was in the closet. Pollard indicated that that never happened. She agreed that during the 1988-89 school year, Holmes approached her about kids being placed in the closet.

Pollard agreed that she disputed the transfer from the BSI position to the classroom in December 1988. She had filed a grievance, but the arbitrator never directed the district to place her back in the BSI position. She was angry with the procedures taking place and agreed that she was angry at Holmes and Fulmore. Although Fulmore and Holmes requested to meet with her to discuss their observations, she did not meet with them. (Pollard agreed that she did not meet with Vitone or Liptak.) It was not that she refused to meet with them, but she asked them for four days notice or to have an objective person sit in with them. She disagreed with their observations of her teaching deficiencies, totally disagreed with the conclusions that they reached regarding her performance and disagreed with the evaluations.

Pollard admitted that when she was a teacher at East Side High, there was an incident concerning a locker, as a result of which she was suspended for five days by Joe Clark. She was directed on December 10, 1982, to leave the building. She refused and advised them to adhere to the contract. She concurred that the school district and the administrators were not found liable but the matter was in compensation court. Pollard alleged that once there was a court decision in the law suit, Dr. Napier retaliated against her. Everything that was done was inappropriate and not according to the contract. In fact, Pollard opined that her refusal to meet with Fulmore and Holmes, as well as the other problems that she had at school No. 28, were not based on meritorious reasons but because Napier directed that she be reprimanded. As of April 3, 1989, when she requested a transfer from Napier (R-45), she considered him to be hostile to her request for a transfer.

Pollard agreed that when she did not receive her paycheck on June 15, 1989, she was angry. However, she did not barge into Holmes' office and threaten her.

Pollard admitted that she was directed a number of times to complete pages six and seven of the register by Holmes. She did not refuse the directive but she could not complete a document that she was not responsible for. She stated, "I could not document any names for any child in grade one on September 30. I was not the teacher of record on September 30. I did not have a register. I did not have a class list. I had nothing. I was not the teacher of record." Although Pollard could have asked Pipkin, who was a teacher at school No. 23, and a fellow colleague, about the class register, Pollard contended that there were numerous communications to the principal and vice-principal that she did not have the records for the boys and girls and that she approached Esther Boone to request the grades and attendance. Pollard alleged that she asked Pipkin if she had a class list and Pipkin said, "She was in BSI." However, Pollard claimed that when she went to Pipkin's classroom, as a result of the transfer, Pipkin was flustered and did not know what was happening. Pollard did not request those documents from Pipkin on the day she was transferred to the first grade. She could not certify page six as of June 16, 1989, since she was not the teacher of record. Pollard did not recall that Esther Boone, Holmes' secretary approached her in her class concerning the completion of pages six and seven of the register. Pollard initially stated that Boone did not testify that she went to Pollard's class at Holmes' direction and asked her to complete pages six or seven but that she asked her to "complete the register." Pollard later indicated that Boone testified that she had approached Pollard during class and informed her that the principal wanted her to complete pages six and seven right now. Pollard, questioned as to whether she recalled Boone coming to her class about this matter, indicated that, "She came to my class many times." Of import, Pollard did not recall ever making a remark "bitch," or calling Boone, "Ms. Holmes' clean-up lady."

Pollard asked for the transfer from school No. 3 for her own safety and concern for the children. However, she opined that she was "forced out." In school No. 3, during periods four, five, and six, there was an uproar, confusion, fighting and total disorder; the children were writing letters about her. Hernandez wanted a bilingual teacher. Pollard claimed that she asked for help with the disorder but Hernandez would not let her telephone the parents when the behavior was egregious. Although Pollard agreed that Hernandez offered parental monitoring of the classes to her, she contended that Hernandez did not provide a lot of assistance with regard to the disruptive students or problems she had at school. Problems did not stop with the monitors present. Pollard believed the school was hostile to her.

On redirect-examination, Pollard indicated that she considered P-38 to be a favorable evaluation and explained what she considered favorable about it. Similarly, she indicated what she found favorable in the March 16, 1994 evaluation (R-63) and March 18, 1994 evaluations (R-64). From January to March 1994, she was not requested to and did not meet with the principal and vice-principal about her teaching performance. She disagreed with several of the comments, and she requested Ms. Vitone to demonstrate the lesson utilizing the same materials (R-63 and R-64). She opined that it was not inappropriate to ask a supervisor to demonstrate. She asked for assistance, but never got a response to her request.

Pollard recalled that Vitone brought Bolton to her class and asked Pollard to meet with them in her office after she had dismissed the class. After she dismissed her class, she went to Vitone's office. Pollard asked them to adhere to the contract. She wanted an "objective person" present. She told them that she was willing to accept what Bolton had to offer, but Bolton jumped up from his seat, pushed his chair back, and said, "You will listen." She again asked him to adhere to the contract and that an objective person be present. She said she was leaving and returned to her classroom. There was no agreement as to the follow up.

Pollard reiterated that page six of the register contains the official names of the students that entered school from the first day of September through September 30. She could not complete it because she did not have the official information (the yellow cards, the class list, or the official spellings of the children's names.)

Pollard stated that when she was transferred to the first grade, she asked Boone for information in reference to the children. She asked for the register, a class list, in case of an immediate exit from the building. Boone told her she had to talk to Holmes or Fulmore. Pollard claimed that she made this request several times. Noting that Boone told her that she was following the orders of the principal and the vice-principal, Pollard claimed that she got the impression that Boone was instructed not to turn the material over. Pollard then tried to get the material directly from the principal. Holmes' letter to Napier (dated June 13, 1989 P-8), did not even remotely describe what had occurred. Noting that the letter referred an incident on June 15, Pollard did not recall having any discussion on June 15, 1989, about her check nor did she receive her check that day.

On recross-examination, in answer to whether she knew of any contractual provision that would give a teacher the right to refuse to meet with a principal or vice-principal concerning an observation or evaluation, Pollard indicated that she did not refuse to meet with them regarding an observation.

FINDINGS OF FACT

At the outset, it should be noted that in evaluating the testimony and evidence in this matter, I have considered the seriousness of the charges that have been brought against respondent. Having considered the testimony in this light, I must state that I was persuaded by the testimony of petitioner's witnesses as to respondent's words and actions which formed the basis of the charges. While the testimony was sometimes at odds in regard to the particular words that were spoken, it is quite clear to the undersigned that the testimony was both credible and worthy of belief. The substance of the testimony was corroborated and supported in substantial measure the charges against respondent. Moreover, I am compelled to point out that I found the testimony of respondent to be particularly unconvincing. Respondent essentially denied these charges in whole, as being ludicrous or ridiculous. However, her denial was basically unbelievable. In fact, her dispute of the charges as to errors in time or date, only served to demonstrate that she was seeking some way to refute the charges, which were true in substance. Her denial quite simply did not have the ring of truth. Rather, her demeanor on the stand served to show the undersigned that she was angry in large measure with her supervisors and essentially had had tremendous difficulty coping with the students assigned to her class. The background of this situation, how it arose, and why it reached the level that it did, is not for this judge to determine. Rather, what is of import here is the fact that Ms. Pollard could not cope with her job in a reasonable, proper and legal manner. This was even more distressing, in light of Pollard's impressive credentials. However, it is only Pollard's ability to teach and conduct herself in a positive, appropriate, and professional manner which is at issue here. With this backdrop, I have considered the particular charges against Pollard and whether these charges were proven by a preponderance of the credible evidence.

Charge 1: Corporal punishment

Principal Holmes and student, R.G., gave credible testimony in support of Charge one ¶. 3a. The testimony, as outlined above, indicates that Holmes noticed a pupil standing outside Pollard's classroom. The pupil stated that Pollard was placing

children in the closet. Holmes entered the classroom and opened the door of the coat closet. There she found a child sitting in a fetal position, with his head towards his knees. Holmes removed the child from the closet and questioned the child about why he was in the closet. The child stated that the teacher had put him there. Although Holmes asked Pollard to explain why the child was in the closet, Pollard did not respond nor did she attend a conference to discuss the incident.

Holmes initiated an investigation into the closet incident and questioned ten to twelve students in Pollard's class. Holmes testified that three students in Pollard's class said that they were placed in the closet as punishment (P-4). Holmes did not recall the name of the child found in the closet, but narrowed it down to either J.W. or R.G.

It was clear from the testimony adduced that a student could not open or close the door while in the closet. The door handles to the coat closet were located on the outside of the doors. Holmes concluded that Pollard was guilty of placing pupils in the closet as a disciplinary measure and reprimanded her for this misconduct (P-3). Holmes prepared a report and submitted it to Assistant Superintendent Durgett.

As noted by petitioner, the credible testimony of R.G. corroborated Holmes' testimony. R.G. vividly described a day Pollard was having difficulty with the class; she approached him at his desk, grabbed his arm and forcibly took him to a paper closet. The paper closet was located between Pollard's room and the adjacent classroom. Pollard opened the closet door and took another student out of the closet and placed him in the dark closet. He testified that he was in the closet for a long time and was scared because it was dark. He yelled and pounded on the door until the lady next door (presumably the teacher) rescued him from the closet. R.G. was taken to the principal's office where he reported the incident and he also told his grandmother. He testified that he was locked in the closet more than once and also observed Pollard "get mad" and place other students in the closet, such as J.W.

In regard to charge one ¶ 3b, the evidence supported the fact that respondent grabbed pupil S.A.'s left hand and scratched him in an attempt to take his notebook away on March 30, 1994. Principal Liptak gave credible testimony that pupil S.A. reported to her that he was scratched by Pollard and called a "fat fag" on March 30, 1994. The school nurse examined S.A. on March 30, 1994, and noted a superficial scrape on his left hand (P-26). Liptak questioned S.A. who stated that Pollard

approached his desk and attempted to take his notebook. Pollard squeezed his hand and scratched him. According to Liptak's notes (P-25), S.A. complained to Pollard about being scratched by her. Pollard replied, "You're too fat to feel it, you fag." Liptak questioned several students who corroborated the "fat fag" remark.

P.A., apparently not a disciplinary problem, gave credible and sincere testimony that Pollard approached S.A.'s desk, scratched him and called him a "fat fag." He stated that he was working on his lesson when Pollard approached S.A. He turned to see Pollard withdrawing her hand and then S.A. complaining about being scratched.

In support of charge 1 ¶ 3e, Y.A., assigned to Pollard's class at school No. 3, testified that when he misbehaved Pollard would call him into the area where the students hang their coats. Pollard would grab him by his two arms, scold him and shake him. Y.A. explained that Pollard's grip on him was kind of hard and sometimes hurt him. He stated that this grabbing and shaking occurred three or four times and that he told his mother about it.

It is to be noted, as pointed out by petitioner, that several other pupils gave credible testimony about other acts of corporal punishment committed by Pollard. E.V. testified about Pollard's conduct. She described how during a class, she was pointing to a word in the dictionary and Pollard scratched her fourth finger with her nail. E.V. went to the nurse's office for treatment.

E.V. also gave convincing testimony that she observed Pollard "mush" pupil A.R. On one occasion, E.V. saw Pollard approach A.R.'s desk, call her a "bitch" and place her finger on A.R.'s head and push her head.

Based upon the above review of the testimony in regard to corporal punishment, I FIND that charge one ¶¶ 3, 3a, 3b, and 3e have been proven by a preponderance of the credible evidence. It is to be noted that the parties have agreed that charge one ¶ 3c was not proven by a preponderance of the believable evidence and should be dismissed. In addition, the testimony does not substantiate charge one ¶ 3d, as no testimony was adduced in regard to that charge.

Charge two: Conduct Unbecoming a Teacher

The charge of conduct unbecoming at teacher was based on the specifications outlined in charge one. In actuality, it may be based on any and all the charges that are substantiated. Clearly, all of the charges here if proven would warrant a determination of conduct unbecoming a teacher.

Charge three: Use of Profane and Inappropriate Language

Charge three alleges that respondent repeatedly used profane and inappropriate language directed at pupils, parents and district employees. As pointed out by petitioner, Esther Boone, school secretary, gave credible testimony regarding the profane statement made by Pollard on June 15, 1989. Holmes requested that Boone take the register book to Pollard's classroom and ask that she complete pages six and seven. Students were in class when Boone approached Pollard and advised Pollard of Holmes' request. Pollard refused to complete the register. As Boone was walking toward the classroom door to exit, she heard Pollard utter the word "bitch." Boone felt that Pollard was referring to Holmes and not herself. Boone reported this incident to Holmes who asked her to write a memo (P-9). Fulmore also testified that he was advised about Pollard's "bitch" remark on June 15, 1989, by Holmes and Boone. Boone even hand delivered to Pollard a copy of the memo.

E.V., a pupil at school No. 3, testified that Pollard made a derogatory comment to pupil A.R. about her appearance. In October 1993, Pollard gave A.R. permission to use the bathroom and said, "While you use the bathroom, you can lose at least five pounds." This was a demeaning and personal attack upon A.R. Pollard also used inappropriate language directed at A.R., such as "shut the f---- up."

Pollard called pupil S.A. a "fat faggot" on two separate occasions. S.H., a pupil who had a visual disability, was called a "blind something" by Pollard. P.A. was told to "pee" on himself by Pollard.

In addition, there was much testimony that Pollard spoke about the students' parents in a disrespectful manner. While the specific words used are unclear, apparently Pollard blamed the parents to some extent for the misbehavior of the children and indicated something about the parents treating the students as "garbage" or being treated by the students as "garbage."

In sum, the testimony adduced at the hearing was credible and worthy of belief and supported charge three ¶5 and ¶5a.

In regard to charge three ¶5b, I FIND:

1. On February 25, 1994 and March 30, 1994, respondent called pupil S.A. a "fat faggot."
2. During the period January through March 1994 respondent called pupil S.H. "blind."
4. Respondent called pupil A.R., a "bitch."
5. Respondent stated to pupil A.R., "You need to lose some weight." The respondent also said, "f--- you" to A.R.

In regard to charge three ¶ 5b3, Vice-principal Vitone testified that T.McK. came to the office very upset and informed her that Pollard told her to "get her ass out of the room" and that she had a conference with T.McK.'s parent. This testimony, clearly hearsay, was not supported by any legally competent evidence. That being so, pursuant to the residuum rule, there can be no finding of fact made in regard to this charge. *N.J.A.C. 1:1-15.5(b)*. Charge three, ¶ 5b3 is therefore dismissed.

Charges three, ¶ 5b6, calling J.A. a "dumb ass" when the pupil would not stop talking and charge three, ¶ 5b7, referring to pupils parents as "bitches" and other derogatory names has not been substantiated by the testimony and evidence adduced at the hearing and are also dismissed.

Charge four: Insubordination

Without getting into the specifics as to what occurred when Pollard was assigned to East Side High School as a teacher during the 1982-83 year, it was clear from the testimony and evidence that over the years Pollard encountered a number of difficulties with her superiors. Of import, Pollard was transferred to school No. 28 as a BSI. Mary Holmes was the principal and Joseph S. Fulmore the vice-principal in the 1988-89 school year. The problems began when Holmes transferred Pollard to the position of first grade teacher. Apparently, this transfer was made because the first

grade teacher, Pipkin, had certain health problems. Up to this point, Holmes considered Pollard a good teacher with years of experience as a BSI. Assistant Superintendent Durgett approved Pollard as the new first grade teacher and Holmes notified Pollard a day in advance of the transfer of this change in assignment and made preparation for Pollard to receive the plan book, record book and the yellow cards. Pollard received a notice from Dr. Frank Napier dated December 7, 1988, stating that the transfer was effective December 8, 1988 (J-1). Pollard vehemently protested this transfer and filed a grievance, which was later denied (R-3).

The testimony adduced at the hearing indicated that Pollard's conduct was uncooperative, defiant and unprofessional. In regard to charge four ¶ 8, on December 19, 1988, Holmes wrote to superintendent Dr. Napier (P-1) to report that Pollard refused to teach during an observation and left her class unattended. On the day Holmes entered Pollard's class to conduct an informal observation, she took a seat in the rear of the room, and Pollard folded her arms and stopped teaching. Holmes left the classroom in disbelief and went to get Fulmore. When Fulmore and Holmes returned, Pollard still refused to teach. The administrators could not understand Pollard's conduct under the circumstances.

The testimony indicated that Pollard's conduct continued in this matter through the school year. On January 17, 1989, Dr. Napier reprimanded Pollard for "lack of performance and lack of cooperation" (P-6). Pollard was given ninety days to improve her conduct. Unfortunately, she did not. She refused to attend conferences with her supervisor to discuss concerns regarding her performance, particularly classroom observations.

As to charge four ¶ 6, Pollard refused to complete her class attendance forms, pages six and seven of the register. She ignored numerous requests, verbal and in writing to complete the register. On June 13, 1989, Holmes wrote to Dr. Napier to report her defiance (P-8). Holmes even withheld Pollard's check to get cooperation, but Pollard threatened her. On June 15, 1989, Holmes asked secretary Boone to go to Pollard's classroom to request that Pollard complete the register. Pollard again refused to cooperate. Holmes testified that Pollard never completed the attendance part of the register. Also, Pollard refused to submit student improvement plans (ISIPs) to Vice-Principal Fulmore.

As stated by petitioner, Pollard's conduct was of serious concern to her supervisors during the 1993-94 school year. From September to December 1993, Pollard was assigned to school No. 3, and Grisell Hernandez was the principal. In September 1993, Pollard was assigned to the seventh grade to teach language arts. From September to December 1993, Hernandez had many conferences with Pollard concerning the proper procedure for handling student discipline problems and in regard to locking students out of the class. On September 27, 1993, Hernandez reprimanded Pollard for bringing her entire class downstairs to use the phone to call their parents; Pollard disturbed several classes. She failed to use the conduct report procedure as outlined in the teacher's handbook.

In support of charge four ¶ 10, Principal Hernandez testified that she became aware that some of Pollard's students were wandering the halls. M.R. testified that Pollard frequently locked students out of class when they went to the bathroom and then attempted to return to class. M.R. was locked out by Pollard at least four times. E.V. and S.R. confirmed that Pollard "locked the door on them." Principal Hernandez asked Pollard to stop locking the classroom door. Pollard locked the door from the outside so that the students could not gain entry into the class. Pollard did not issue a conduct report nor did she follow the procedure for using passes and sign out books for going to the lavatory. On one occasion, Hernandez went to Pollard's class and found the door locked. After knocking, Pollard opened the door and Hernandez admonished her for locking the door, which was illegal. Pollard apparently continued to lock out students, and students continued to report her. On another occasion, Hernandez found Pollard unlocking the door when she came up to the classroom; Hernandez had been advised by a student that the door was locked.

As to charge four ¶ 13, Principal Hernandez credibly testified that Pollard did not turn in her grades for social studies which were due. When Pollard left school No. 3, she took her plan book, attendance book and grade books with her. She did not comply with Hernandez' request to submit plans and grades for social studies. This caused quite an upheaval because Hernandez and her staff had to determine the grades. The students had to bring in their prior report cards and, in addition, they had to be retested in order to receive a grade.

Hernandez indicated that the situation with Pollard did not improve despite the many efforts of parents and herself. The pupil and parental complaints continued.

As a result, Pollard was transferred to school No. 2 in January 1994. She replaced long-term substitute, Mr. Carol, as the new seventh grade teacher. Her new supervisors were Principal Lynn Liptak and Vice-principal Catherine Vitone.

Vice-principal Vitone testified as to the February 25, 1994 incident involving S.A. and that she reported it to Principal Liptak. Vitone gave convincing testimony that S.A., a pupil in Pollard's class, came to her office "upset with tears in his eyes." S.A. explained that his class had just returned from lunch when Pollard called him a "fat faggot." Vitone asked S.A. to accompany her to Pollard's class to speak with Pollard. Vitone asked Pollard to step out into the hall with S.A. and questioned Pollard about calling S.A. a "fat faggot." Pollard admitted she made the remark. Pollard complained that S.A. was disrespectful to her by calling her "bald and fat lips." S.A. admitted he made the disrespectful remark about Pollard, and Vitone asked him to return to her office. S.A. was suspended for misconduct and Vitone admonished Pollard not to use objectionable language towards her students.

On February 25, 1994, Pollard was called to the principal's office and issued a written reprimand (P-24) for calling S.A. a "fat faggot." As to charge four ¶ 7, Liptak testified that the reprimand was issued to warn Pollard that name calling of students would not be tolerated and there would be serious consequences if repeated.

Despite receiving a written reprimand at the conference with Principal Liptak, and an admonishment from Vice-principal Vitone, Pollard called S.A. a "fat fag" on March 30, 1994. Several pupils, including P.A. and S.H. heard Pollard make this remark.

There was lengthy testimony regarding the classroom observations of Pollard and that these indicated certain deficiencies in classroom management. Principal Liptak conducted a classroom observation on March 9, 1994 (P-38) and noted that the "lesson lacked a clear objective and focus." Vice-principal Vitone conducted two observations; March 16, 1994 and March 18, 1994 (P-34 and P-35). In the written observations, Vitone voiced her concerns; specifically, the students were not receiving quality instruction, and there was insufficient progress in the social studies curriculum. Vitone requested to meet with Pollard to discuss her two classroom observations. Although she asked Pollard on March 21, 1994 and March 24, 1994 to meet with her, Pollard refused to meet and sign the observations.

Teaching social studies was Pollard's major assignment at school No. 2, and in light of the teaching deficiencies, Vitone requested that Dr. Douglas Bolton, district supervisor of social studies assist Pollard. Pollard was not receptive to meeting with Dr. Bolton. Vitone gave convincing testimony that she and Dr. Bolton went to Pollard's classroom, that Dr. Bolton was introduced to Pollard and that he explained the purpose of his visit. Vitone had arranged this preliminary meeting with Dr. Bolton during Pollard's preparation period. As stated by petitioner, what followed was negative and unprofessional conduct exhibited by Pollard. Pollard was given permission to make a telephone call before entering the meeting. She then came to Vitone's office and proceeded to "take control" of the meeting (P-30). She refused Dr. Bolton's and Vitone's help and exited the meeting. Although Vitone attempted to reschedule the meeting with Pollard and Dr. Bolton, her efforts were to no avail and the meeting was not held.

Several witnesses testified in support of charge four ¶ 9. On February 25, 1994, Pollard failed to report that S.A. left the classroom. Principal Liptak reprimanded Pollard on March 25, 1994, for not reporting that pupil M.A. left the class. M.A. stated that Pollard told her to get out of the classroom. Similarly, on another day, T.McK. came to the office and reported that Pollard told her to "get her ass out of the room." Pollard again failed to report that T.McK. left the classroom.

In addition, and as noted by petitioner on March 21, 1994, Principals Liptak and Hernandez completed a joint year-end evaluation of Pollard. Pollard refused to sign the evaluation.

I FIND based on the testimony and evidence adduced at the hearing, as set forth in the testimony, and as outlined above, that charges four ¶ ¶ 6, 7, 8, 9, 10, 11, and 13 were proven by a preponderance of the credible evidence. As to ¶ 12, continuing to do homework assignments in class despite Principal Liptak's directive, the evidence did not support this allegation and this specific charge is dismissed.

DISCUSSION

Unfitness to remain a teacher is best demonstrated by a series of incidents but might be shown by a single incident if sufficiently flagrant. *Redcay v. State Board of Education*, 130 N.J.L. 369, 371 (Sup. Ct. 1943), *affd*, 131 N.J.L. 326, 327 (E. & A. 1944), *In re Fulcomer*, 93 N.J. Super. 404, 421 (App. Div. 1967). Based on the

testimony and evidence in this matter, there are certainly enough incidents to sustain a dismissal of the respondent since the occurrence of those incidents has been proven by a preponderance of the evidence. In fact, the single allegation that respondent placed several pupils in a closet as punishment is sufficiently flagrant to warrant dismissal.

Corporal Punishment

As stated above, Charge one, ¶¶3, 3a, 3b and 3e, were proven by a preponderance of the believable evidence. These substantiated charges constitute a violation of the prohibition against corporal punishment.

The prohibition against corporal punishment is codified at *N.J.S.A. 18A:6-1* which provides:

No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution; but any such person may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary:

(1) to quell a disturbance, threatening physical injury to others;

(2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;

(3) for the purpose of self-defense; and

(4) for the protection of persons or property;

and such acts, or any of them, shall not be construed to constitute corporal punishment within the meaning and intentment of this section.

The purpose of this legislation has been articulated by the Commissioner of Education in a number of cases.

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

philosophy that an individual has a right not only to freedom from bodily harm but also to freedom from offensive bodily touching even though there be no actual physical harm.

[*In the Matter of the Tenure Hearing of Thomas Appleby*, 1969 S.L.D. 159, 172-173, *affd.*, St. Bd. 1970 S.L.D. 448, *affd.* (App. Div.) 1972 S.L.D. 662 (citing *In the Matter of the Tenure Hearing of Frederick L. Ostergren*, 1966 S.L.D. 185).]

Moreover, the Commissioner has emphasized that

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

[*In the Matter of the Tenure Hearing of David Fulcomer*, 1962 S.L.D. 160, 162, remanded St. Bd. 1963 S.L.D. 251, decision on remand by Commissioner 1964 S.L.D. 142, *affd.* St. Bd. 1966 S.L.D. 225, remanded 93 N.J. Super. 404 (App. Div. 1967), decision on remand by Commissioner 1967 S.L.D. 215, *affd.* (App. Div.) 1967 S.L.D. 220.]

The exemplary restraint and mature self-control expected of teachers has been specifically discussed by the Commissioner. Members of the teaching profession serve a very important role,

they are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other

types of employment.***Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling.***

[*In the Matter of the Tenure Hearing of M. William Cowan*, 1986 S.L.D. 42, 78, aff'd, 224 N.J. Super. 737 (App. Div. 1988) (citing *In the Matter of the Tenure Hearing of Jacque L. Sammons*, 1972 S.L.D. 302, 321).]

As discussed above, petitioner has provided testimony and evidence supporting Charge One: ¶ 3.a., placing several students in a closet as punishment, ¶ 3.b., grabbing and scratching S.A.'s left hand, and ¶ 3.e., grabbing and shaking Y.A. as punishment for talking. In each instance, respondent allegedly resorted to physical force or violence to maintain discipline or punish infractions and failed to exhibit any degree of self-restraint or self-control. Such conduct clearly violates the prohibition against corporal punishment. Moreover, the conduct of placing students in a closet is particularly offensive and, in fact, is sufficiently flagrant to constitute that "single incident" which warrants the disciplinary action of removal.²

Use of Profane and Inappropriate Language

As discussed above, the testimony and evidence has substantiated all charges of this count except for Charge three, ¶ 5.b.6., respondent calling J.A. a "dumb ass" when the pupil would not stop talking, and ¶ 5.b.7., respondent referring to pupils' parents as "bitches" and other derogatory names. The remaining allegations ¶¶ 5, 5a, 5b1, 5b2, 5b3, 5b4, 5b5, all of which occurred in the classroom and in the presence of students, were substantiated either in whole or in part, as discussed above.

The Commissioner has determined that when a teacher uses profanity to a pupil which was heard by other pupils in the classroom, such action cannot be condoned. *In the Matter of the Tenure Hearing of Juanita Zielenski*, 1977 S.L.D. 786, 793. Emphasizing the important role of teachers, the Commissioner stated:

***Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only

² Important factors to be considered when determining a just and reasonable disciplinary action are whether the acts were premeditated, cruel or vicious or done with intent to punish or to inflict corporal punishment and whether the student was injured. *In re Tyler*, 13 N.J.A.R. 297, 318 (1988).

what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher *** violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.****"

[*Id.* at 793-794 (citing *In the Matter of the Tenure Hearing of Ernest Tordo*, 1974 S.L.D. 97).]

The one incident of profanity in *Zielenski* was found to constitute gross misconduct sufficient to substantiate the charge of conduct unbecoming a teacher. *Id.* at 794. That determination coupled with findings of inefficiency warranted the teacher's forfeiture of her rights to tenure in the school district. *Ibid.*

Removal was deemed too harsh a penalty in *In the Matter of the Tenure Hearing of Earmond DeMarco*, 1980 S.L.D. 204, where the teacher used profane and vulgar terms to threaten bodily harm to a pupil during an off-campus ski trip. The Commissioner distinguished the situation in *Zielenski* from *DeMarco* on several factors. The removal in *Zielenski* was predicated upon several instances of inefficiency as well as the profanity, the profanity occurred in a classroom where a teacher should have better control as opposed to the less structured circumstances of a ski trip, and the children were younger, 9 and 10, than those under *DeMarco's* control who were 14 and 15. *DeMarco's* conduct was found inexcusable, nonetheless, and he was denied any salary adjustments or increments to which he might have been entitled during the course of his suspension.

In the present matter, the alleged incidents of profanity occurred in the classroom, were directed at students in five of the incidents and at a staff member in one incident, and were spoken in the presence of students each time. Under either *Zielenski* or *DeMarco*, Pollard's use of profane language would constitute conduct unbecoming a teacher. Although conceivably standing alone such allegations might not warrant removal, in combination with the allegations of corporal punishment they furnish just cause for removal.

Insubordination

The petitioner has proven seven of the eight charges of insubordination. The evidence does not support the allegation that respondent continued to do homework assignments in class despite Principal Liptak's directive that she stop such work. The

remaining charges include intentional failure to follow school procedures, intentional disregard of directives to cease specific conduct towards students, and referring to the school principal as a "bitch" in the presence of students and another staff member.

Insubordination is a form of unfitness generally evidenced by willful disobedience of a substantive nature. *Bd. of Educ. of the Boro. of Edgewater v. Scarpignato*, 1983 S.L.D. 311, 317, *aff'd*. St. Bd. 1983 S.L.D. 338. It embraces conduct which hinders management's efforts to further legitimate educational goals. *Ibid*.

The court has also expressed concerns about the efficient operation of schools to which the Commissioner has agreed and relied upon. In *Pietrunti v. Bd. of Ed. of Brick Twp.*, 128 N.J. Super. 149 (App. Div. 1974), the court stated

a teacher is expected to exhibit loyalty to the district in which he or she is employed and to cooperate with the administration in seeking the education goal ... It is the individuality each teacher brings to the educational scheme that contributes to educational success; that individuality however must be sublimated to the educational goal. A teacher is expected to show a reasonable respect for the authority of his or her employer and to maintain a civility commensurate with his or her professional status.
[Id. at 165, see also *Hunterdon County Schl. Dist. Bd. of Educ. v. McCormick*, 1 N.J.A.R. 231, 238 (1980).]

The charges of insubordination against respondent are substantial and sufficient to sustain her removal. The conduct described is both brazen and bizarre. Clearly, in conjunction with the foregoing charges of corporal punishment and the use of profane language, they justify the termination of her tenure in the school district.

Unbecoming Conduct

As stated above, all of the substantiated charges, constitute conduct unbecoming a teacher.

CONCLUSION

In sum, I **CONCLUDE** that the charges in the instant matter which have been sustained by a preponderance of the credible evidence are serious and substantial.

While I believe that considered alone the charges of corporal punishment, conduct unbecoming a teacher, insubordination, and use of profanity would justify dismissal, when the charges and supporting evidence are considered together, it is clear that dismissal is the only appropriate penalty. Respondent's conduct and attitude, unbecoming and unprofessional, has demonstrated her unfitness to continue teaching in petitioner's school district. It is therefore **ORDERED** that respondent be dismissed as a tenured employee of petitioner.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 13, 1995
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

5/15/95
DATE

Receipt Acknowledged:
Hope K. Stackman
DEPARTMENT OF EDUCATION

MAY 15 1995
DATE
dgi/e

Mailed to Parties:
Jeff Mann
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

APPENDIX

WITNESSES

For Petitioner

Mary Holmes
Esther Boone
Joseph S. Fulmore
Grisell Hernandez
Lynn Liptak
Catherine Mary Vitone
E.V.
M.M.
S.R.
M.R.
Y.A.
P.A.
S.H.
R.G.

For Respondent

Norma Pollard

EXHIBITS

- P-1 Letter to Dr. Napier from Mary K. Holmes, dated December 19, 1988 (2 pages)
- P-2 Letter to Ms. Pollard from Mary K. Holmes, dated December 21, 1988
- P-3 Letter to Ms. Pollard from Mary K. Holmes, dated December 22, 1988
- P-4 Record of pupils enrolled
- P-5 Letter to Frank Napier, Jr., from Mary K. Holmes, dated January 4, 1989
- P-6 Letter to Norma Pollard from Frank Napier, Jr., dated January 17, 1989
- P-7 Letter to Ms. Pollard from Mary K. Holmes, dated March 13, 1989

- P-8 Letter to Frank Napier, Jr., from Mary K. Holmes, dated June 13, 1989
- P-9 Memo to Ms. Holmes from Ms. Boone, dated June 15, 1989
- P-10 Memo to Joseph S. Fulmore from Norma C. Pollard, dated December 16, 1988
- P-11 Letter to Joseph Fulmore from Norma C. Pollard, dated December 20, 1988
- P-12 Letter to Mr. Fulmore from Norma C. Pollard, dated February 10, 1989 (2 pages)
- P-13 Handwritten statement by E.V., dated October 26, 1993
- P-14 Statement by E. V., dated October 4, 1993
- P-15 Handwritten statement of E. V.
- P-16 Supplementary report for E. V.
- P-17 Handwritten statement to Ms. Hernandez from S. R.
- P-18 Handwritten statement by S. R.
- P-19 Memo to Ms. Pollard from Grisell Hernandez, dated September 27, 1993
- P-20 Identification
- P-21 Copy of one page of grade book beginning with student Y. A.
- P-22 Performance report from school No. 2, 1993-94 for Norma Pollard, dated March 21, 1994
- P-23 Statement dated March 30, 1994, signed by Lynn Liptak and Catherine Vitone
- P-24 Letter to Ms. Pollard from Lynn Liptak, dated February 25, 1994, attached to memo to Ms. Liptak from C. Vitone, dated February 25, 1994 (2 pages)
- P-25a Notes by principal beginning March 30, 1994
- P-25b Notes by principal beginning March 29, 1994
- P-25c Notes by principal beginning March 30, 1994
- P-26 Student incident/accident investigation report for S. A., dated March 30, 1994
- P-27 A memo to Norma Pollard from Lynn Liptak, dated March 25, 1994
- P-28 A letter to Lynn Liptak from Norma Pollard, dated March 23, 1994
- P-29 Memo to Lynn Liptak from Norma Pollard, dated March 28, 1994
- P-30 Memo to Lynn Liptak from Douglas J. Bolton, dated March 30, 1994
- P-31 Letter to Norma Pollard from John A. Nolan, dated March 31, 1994
- P-32 Statement by Ms. J. McK., dated March 7, 1994
- P-33 Memo from Catherine Vitone beginning date March 21, 1994
- P-34 Classroom observation of Ms. Pollard, dated March 16, 1994
- P-35 Classroom observation of Ms. Pollard, by C.M. Vitone, dated March 18, 1994
- P-36 Memo to Ms. Pollard from Catherine Vitone, dated March 30, 1994
- P-37 Identification
- P-38 Classroom observation of N. Pollard, dated March 9, 1994, signed by Ms. Pollard March 14, 1994
- P-39 Identification

- J-1 Letter to Ms. Pollard from Frank Napier, Jr., dated December 7, 1988
- R-1 Letter to Mary Holmes from Norma C. Pollard, dated January 3, 1989
- R-2 Paterson Education Association Grievance Form for Norma Pollard, dated January 27, 1989 (4 pages)
- R-3 A memo to Mary K. Holmes from Joseph S. Fulmore, dated December 7, 1988
- R-4 Handwritten letter by E. V., dated October 6, 1993
- R-5 Revised conduct report for A. R., dated September 27, 1993, time 11:44
- R-6 Revised conduct report for A. R., dated September 27, 1993, time of incident 11:32
- R-7 Revised conduct report for A. R., dated October 1, 1993, time of incident 12:39
- R-8 Revised conduct report for A. R., dated September 28, 1993, time of incident 11:27
- R-9 Grade Book Class Roster Section: September to June, Mr. C. beginning name H.A.
- R-10 Memorandum to Ms. Pollard from Ms. Grisell Hernandez, dated November 8, 1993
- R-11 Identification
- R-12 Memo to Ms. Liptak and Ms. Vitone from Ms. Pollard, dated February 28, 1994.
- R-13 Memo to Lynn Liptak from Norma C. Pollard, dated March 31, 1994
- R-14 Performance report for Norma Pollard school year 1986-87, dated May 29
- R-15 Performance report for Norma Pollard school year 1987-88, dated May 31, 1988
- R-16 Memo to Ms. Mary Holmes from Joseph Fulmore, dated December 7, 1988
- R-17 Letter to Ms. Pollard from Mary Holmes, dated December 7, 1988
- R-18 Memo to Mary Holmes from Joseph Fulmore, dated December 7, 1988 regarding nurses report (2 pages)
- R-19 Memo from Office of the Principal to Ms. Norma Pollard regarding illness date, dated December 14, 1988
- R-20 Classroom observation of Ms. Pollard by Ms. Holmes dated December 13, 1988
- R-21 Letter to Mary Holmes from Norma C. Pollard, dated December 15, 1988
- R-22 Memo to Ms. Mary Holmes from Ms. Norma C. Pollard regarding illness date - December 14, 1988, dated December 15, 1988
- R-23 Memo to Joseph S. Fulmore from Norma C. Pollard regarding nurse's report (T. R.) dated December 16, 1988
- R-24 Letter to Ms. Pollard from Joseph S. Fulmore, dated December 19, 1988 (2 pages)

- R-25 Letter to Ms. Pollard from Joseph Fulmore, dated December 22, 1988
- R-26 Letter to Mary Holmes from Norma C. Pollard, dated December 23, 1988
- R-27 Memo from Norma Pollard to Joseph Fulmore, dated January 3, 1989, regarding letter dated December 22, 1988 about Ms. A.G.
- R-28 Letter to Ms. Pollard from Mary K. Holmes, dated January 4, 1989
- R-29 Memo to Ms. Mary Holmes from Norma C. Pollard regarding Memo - January 4, 1989, dated January 5, 1989
- R-30 Letter to Norma C. Pollard from Frank Napier, Jr., dated January 26, 1989
- R-31 Memo to Ms. Norma Pollard from Office of the Principal regarding class register, dated January 27, 1989
- R-32 Memo to Ms. Mary Holmes from Ms. Norma Pollard, dated January 30, 1989
- R-33 Letter to Dr. Frank Napier, Jr., from Norma C. Pollard, dated January 1989 (2 pages)
- R-34 Letter to Ms. Pollard from Mr. Joseph S. Fulmore, dated February 8, 1989 (2 pages)
- R-36 Complaint and jury demand, Docket No. 85-1573 regarding Pollard v. Paterson Education Association (13 pages)
- R-37 Opinion in Civil No. 84-2346 and 85-1573 by District Judge Fisher, dated September 8, 1988, attached to Order and Judgment (9 pages)
- R-37 Handwritten diagram of Ms. Pollard's classroom
- R-38a Photograph of sink
- R-38b Photograph with red and white box in center
- R-38c Photograph with blackboard in center
- R-38d Photograph with bulletin board on right wall
- R-38e Photograph of storage area
- R-38f Photograph of open closet
- R-39 Photograph of classroom No. 104, 1988-89
- R-40 Performance report for Norma Pollard, school year 1989-90, dated February 9, 1990
- R-41 Performance report for Norma Pollard, school year 1990-91, dated February 1, 1991
- R-42 Memo to Norma Pollard from the Office of the Principal, dated June 16, 1989
- R-43 Memo to Ms. Mary Holmes from Ms. Norma Pollard, dated June 19, 1989
- R-44 Order Civil No. 84-2346 (CSF) and Civil No. 85-1573 (CSF), dated December 20, 1988 with attached opinion Civil No. 85-1473 (10 pages)
- R-45 Letter to Frank Napier from Norma C. Pollard, dated April 3, 1989
- R-46 Identification

- R-47 Letter to Norma Pollard from Frank Napier, Jr., dated November 17, 1989
- R-48 Letter to Norma Pollard from Frank Napier, Jr., dated November 13, 1990
(corrected copy)
- R-49 Letter to Norma Pollard from Laval S. Wilson, (undated) effective
dated September 1, 1991
- R-50 Letter to Norma Pollard from Albert Vasquez, dated September 1, 1992
- R-51 A through P letters from students on February 17, 1993 (16 pages)
- R-52 Lesson observed for Norma Pollard, dated April 6, 1993
- R-53 Performance Report for Norma Pollard, school year 1992-93, dated April 7, 1993
- R-54 Chart of Norma Pollard's seventh grade class, fall 1993
- R-55A-BB Conduct reports issued by Norma Pollard, fall 1993 (28 pages)
- R-56 Letter to Grisell Hernandez from Norma Pollard, dated October 6, 1993
- R-57 Survey school No. 3, Awareness of Cultural Diversities
- R-58 Memo to staff from Grisell Hernandez, dated December 6, 1993
- R-59 Annual listing of absent employees for Ludella Pipkin (2 pages)
- R-60 Drawing dated March 24, 1994
- R-61 Employee attendance calendar, July 1993 through June 1994, for Elaine
Kaufman
- R-62 Original revised conduct report for S. L., J. N., E. R., dated December 3, 1993
- R-63 Classroom observation of Ms. Pollard, dated March 16, 1994, time 10:25
- R-64 Classroom observation of Ms. Pollard, dated March 19, 1994, time 11:20
- R-65 Identification

IN THE MATTER OF THE TENURE :
HEARING OF NORMA POLLARD, :
STATE-OPERATED SCHOOL DISTRICT : COMMISSIONER OF EDUCATION
OF THE CITY OF PATERSON, PASSAIC : DECISION
COUNTY. :


The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties. It is herein noted that on Friday, May 26, 1995, respondent faxed a request for an unspecified amount of additional time to file exceptions in this matter which were due on May 30. Respondent's request stated "[t]he decision, a 64 page document, was prepared after an extension was granted to the judge. Fairness requires that counsel be granted time to review and address a complex matter." It is further noted that the Board, by letter filed on May 30, 1995, objected to an extension of time for exceptions being granted in this matter. By letter dated May 30, 1995, which was faxed to the parties, the Director of the Bureau of Controversies and Disputes denied respondent's request stating that N.J.A.C. 1:1-18.8 requires good cause be shown prior to the issuing of an extension order and no such demonstration had been proffered in this matter.

Upon a careful and independent review of the record in this matter, which included transcripts of the six days of hearings conducted at the OAL, the Commissioner concurs

with the findings and conclusions of the Administrative Law Judge that the Board has proven, by a preponderance of the credible evidence, charges of Corporal Punishment, Unbecoming Conduct, Use of Profane and Inappropriate Language and Insubordination against respondent. The Commissioner finds and determines that the record clearly establishes respondent's unfitness for teaching and that the only appropriate penalty in this matter is respondent's dismissal from her tenured teaching position.

Accordingly, for the reasons well expressed therein, the Commissioner affirms the initial decision of OAL. Respondent is hereby terminated from her tenured teaching position in the State-operated School District of the City of Paterson as of the date of this decision. Additionally, a copy of this decision shall be transmitted to the State Board of Examiners for action against respondent's certificate as it deems appropriate.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

JUNE 29, 1995

DATE OF MAILING JUNE 29, 1995 - 70 -

EDU # 7289-94
C# 226-95
SB # 81-95

IN THE MATTER OF THE TENURE :
HEARING OF NORMA POLLARD, : STATE BOARD OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT : DECISION
OF THE CITY OF PATERSON, PASSAIC :
COUNTY. :

Decided by the Commissioner of Education, June 29, 1995

For the Petitioner-Respondent, Gregory G. Johnson, Esq.

For the Respondent-Appellant, Ashton E. Thomas, Esq.

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

December 6, 1995

Date of mailing DEC 08 1995

227-95

FREDRIC KANTER, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION

BOROUGH OF MOUNTAIN LAKES, :

MORRIS COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioning parent alleged the Board failed to implement its own policies regarding gifted and talented students and co-curricular activities.

ALJ concluded that the Board did not violate either the governing law or its own policy statements. No law prescribes the substantive content of a gifted and talented program or imposes any particular regimen on a local school district. ALJ found that petitioner did not demonstrate any legal basis for interfering with district operations. ALJ ordered relief requested by petitioner denied.

Commissioner adopted findings and determination in initial decision as his own, concurring with ALJ's conclusion that Board had not violated its own policies with respect to providing programs for gifted and talented students and offering co-curricular activities and noting that he cannot ascertain merits of petitioner's claims that rely on proffered testimony in the absence of hearing transcripts.

JUNE 29, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5731-94

AGENCY DKT. NO. 81-4/94

FREDRIC KANTER,

Petitioner,

v.

MOUNTAIN LAKES

BOARD OF EDUCATION,

Respondent.

Robin T. McMahon, Esq., for petitioner

(Martin R. Pachman, attorney)

David B. Rand, Esq., for respondent

(Rand, Algeier, Tosti & Woodruff, attorneys)

Record Closed: March 30, 1995

Decided: May 15, 1995

BEFORE KEN R. SPRINGER, ALJ:

Statement of the Case

This is a suit brought by a parent who accuses a local school board of failing to implement its own policies regarding gifted-and-talented students and co-curricular

activities. Basically, petitioner makes four complaints: (1) that the school district is violating its own policy by not using multiple measures to identify gifted-and-talented children at every grade level; (2) that the district does not provide a sufficiently "differentiated" program to meet the needs of gifted-and-talented children; (3) that the parents are not consulted about the purpose and content of the gifted-and-talented program; and (4) that the district does not offer an adequate variety of co-curricular activities in the middle grades. Respondent Mountain Lakes Board of Education ("Mountain Lakes") not only denies the allegations, but also asserts that its program fully complies with all applicable statutes and regulations. For the reasons which follow, petitioner's claims are without merit.

Procedural History

On April 22, 1994, petitioner Fredric Kanter filed a verified petition with the Commissioner of Education ("Commissioner"). Mountain Lakes filed its answer on May 26, 1994. Subsequently, on June 10, 1994, the Commissioner forwarded the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held hearings on March 29 and 30, 1995.

Findings of Fact

I **FIND** the following facts:

Fredric Kantor, a local businessman and the father of three children, resides in the Borough of Mountain Lakes, where he has long been active in civic affairs. He serves on the board of directors of a nonprofit daycare center, does volunteer work at the grade-school library, and regularly attends board of education meetings. Two of his children currently attend Mountain Lakes public schools. Lars, age eleven, is in fifth grade at Wildwood Elementary School. Zack, age nine, is in third grade at the same school. His third child, Max, age fourteen, is now enrolled in eighth grade at a nearby

private school, but previously attended the public school system from kindergarten through sixth grade.¹

Both board policies in question were adopted in October 1990. Policy No. 2464, entitled "Gifted And Talented Pupils," sets forth the district's general procedures for identifying gifted-and-talented children and for developing educational programs "which encourage and challenge them in the specific areas of their abilities." Policy No. 2430, entitled "Co-Curricular Activities," outlines the district's philosophy regarding activities "related to the curriculum" and "conducted wholly or partly outside the regular school day."

At the outset, it is helpful to clarify the nature of Mr. Kanter's objections. Since all three of his sons have participated in Mountain Lakes' gifted-and-talented program, he is not claiming that his children have been wrongfully denied benefits for which they are eligible. Nor is he challenging the selection criteria used by the district to identify children who might benefit from services. Instead, his focus seems to be that the district does not test at an earlier age or pay sufficient attention to creative abilities. In this context, he emphasizes that Policy 2464 obligates the superintendent of schools to "develop procedures, using multiple measures, for the identification of gifted and talented pupils at every grade level."

Unrefuted proofs demonstrate that Mountain Lakes fully satisfies its own standards for assessment of gifted-and-talented children. Bonnie Cytron, the coordinator of the district's gifted-and-talented program, is recognized by Mr. Kanter to be "a talented, professional and responsible educator." Ms. Cytron explained the district's assessment procedures, which have been incorporated into a document. Identification of giftedness is not based on cognitive ability alone, but on a composite of intelligence, creativity and task commitment. Evaluative data include scores on

¹Although any claim may well be moot insofar as Max is concerned, *Feldman v. Linwood Bd. of Educ.*, 1994 S.L.D. _ (Comm'r Nov. 21, 1994), the entire factual record has been carefully examined to ensure that Mountain Lakes is not engaged in a recurring pattern of violation. See *Playcrafters Student Members v. Teaneck Bd. of Educ.*, 177 N.J. Super. 66, 73 (App. Div. 1980), *aff'd* 88 N.J. 74 (1981).

standardized test instruments, teacher observations, and "self-selection" by students who ask for greater challenges. Testing begins in the first and second grades, when the Stanford Achievement Tests are administered. Second and third grade teachers fill out the Renzulli-Hartman Rating Scales, which measure a child's motivation and leadership skills. By third grade, students also take the Torrence Test, designed to provide an objective measure of creativity, and the Otis-Lennon, a group-administered intelligence test. Although actual selection is deferred until the end of third grade, the district seeks to provide "opportunities to meet the needs of all students demonstrating exceptional talents and abilities, regardless of grade." Significantly, petitioner presented no expert opinion that it would be possible, let alone desirable, to start formal testing in kindergarten or to begin drawing definitive conclusions before third grade. Mr. Kanter is understandably proud of the accomplishments of his children. Reportedly, Max has perfect pitch and plays many different instruments. Lars is said to exhibit unusual artistic talent. However, the record does not support the inference that Mountain Lakes neglects abilities in the creative arts. As noted, creativity is one of the qualities considered for admission into the gifted and talented program. If anything, Max's success in music is a natural progression of the clarinet lessons he received in the fourth grade at Mountain Lakes.

During his direct testimony, Mr. Kanter acknowledged that Max was identified as gifted in fourth grade. While he still attended school in the district, Max participated in an enrichment program sponsored by the Gifted and Talented Consortium, a group of school districts in northern New Jersey which pool their resources. Membership in the Consortium enables gifted-and-talented students from Mountain Lakes to meet with their peers from other districts. Max also attended supplemental science classes for gifted children taught by a high school chemistry teacher.

Similarly, Lars was invited into the gifted-and-talented program soon after he entered the fourth grade. As a result, he was afforded an opportunity "to master curriculum in depth and . . . investigate new areas beyond the scope of [the regular] curriculum." In December 1993, Lars was selected to participate in the Science-By-

Mail program produced by the Museum of Science in Boston. Limited to students who are gifted-and-talented, this activity allows specially-selected youngsters to interact with a professional scientist and receive guidance in conducting experiments. For two years, Lars took part in the district's Mentorship Program, "designed to extend talented students in the area of their specific strength." A mentor, either a teacher or a high-school honors student, works with a small group of advanced students in a given subject area. In Lars' case, the mentorship activity was directed toward nurturing his special abilities in mathematics. Last year, Lars had the opportunity to become a contestant in a math contest conducted by the New Jersey League. Mr. Kanter was pleased with this opportunity, but discounted its importance because the contest was open to "all fourth graders." Like his brothers before him, Zack was recently identified as gifted-and-talented and invited to join the Mentorship Program in mathematics.

In addition to the enrichment activities offered to the Kanter children, Ms. Cytron enumerated a wide range of other options available to grade-school children who demonstrate a particular proficiency or interest. Such opportunities include forensic competitions, math marathons, interpretive readings, spelling bees, art workshops and the brain bowl. In-residency programs, funded by contributions from parent groups, bring novelists, playwrights, and dramatists into the children's classroom. Opportunities exist for independent study projects. For example, one student interested in health care was paired with a practicing pediatrician.

Although Mr. Kanter appreciates the value of such activities, he regards them as "just plain good-old teaching." Seizing on the wording of Policy 2464 that gifted-and-talented pupils "require differentiated educational programs and services beyond those normally provided by the regular school program," he insists that the offerings for such children must be "programmatically separate" from what other children receive. But Mr. Kanter's narrow analysis ignores later language in Policy 2464 that "the program offered an exceptional pupil may be *infused* into the pupil's regular instructional program." (Emphasis added.) Mountain Lakes' approach avoids pull-out programs, which have a tendency to stigmatize the brighter students and deprive them of contact

with the rest of their social group. Indeed, Mountain Lakes deserves to be commended, rather than criticized, for not isolating its better students and seeking to blend enrichment activities into the mainstream curriculum. At most, the evidence merely shows that Mr. Kanter prefers a different pedagogical method than do the educators chosen by the school board to manage the Mountain Lakes school system.

Mr. Kanter's complaint about not being consulted adequately about his children's program must also fail for lack of proof. According to his own testimony, the building principal, classroom teacher and enrichment coordinator met personally with him to discuss the district's gifted-and-talented program as it relates to his children.. Ms. Cytron periodically sends letters to parents describing particular enrichment activities and encouraging them to call her if they have any questions. Moreover, Mr. Kanter knows Ms. Cytron personally from other dealings and frequently meets with her, "both formally and informally." If he wanted more information or had any concerns, he had ample opportunity to get his questions answered.

With respect to co-curricular activities, Mr. Kanter relies on the declaration in Policy 2430 that the district's goals and objectives are best achieved "by a diversity of learning experiences." Originally, Mr. Kanter had alleged that "[t]he only co-curricular offering for grades 6-7 is Drama." At the hearing, however, he conceded that this contention is clearly erroneous and that Mountain Lakes offers several other co-curricular activities in middle school, including a school newspaper, yearbook, band, and Project Adventure. Mr. Kanter also alluded to a series of minicourses, covering such diverse topics as cookie bake, chess club, model rocketry, student government and word games. It became readily apparent as his testimony unfolded that Mr. Kanter feels Mountain Lakes spends too much money on sports and not enough on nonathletic pursuits.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Mountain Lakes has not violated either the governing law or its own policy statements.

No law prescribes the substantive content of a gifted-and-talented program or imposes any particular regimen on a local school district. Proposed legislation which might require local districts to establish homogeneous grouping and pull-out classes for academically accelerated and gifted children has not yet been enacted. See, e.g., *Assembly Bill No. 1401* (1994). Pursuant to the Public School Education Act of 1975, a major element of a thorough and efficient education is "a breadth of offerings designed to develop the individual needs and abilities of pupils." *N.J.S.A. 18A:7A-5(d)*. Prior state regulations mandated that each school district must provide "educational opportunities" for exceptionally gifted and talented pupils. Use of the word "opportunities" was carefully chosen to convey the meaning that "the activities offered to the exceptionally gifted and talented [should] be extensions of ongoing programs." *Humcke v. Tinton Falls Bd. of Educ.*, 1981 S.L.D. 165 (Comm'r Dec. 12, 1980).. Quoting from an internal departmental memorandum, the Commissioner noted approvingly that,

. . . While some schools may wish to provide the gifted and talented with a program, it would be unrealistic to expect schools to offer separate programs for each and every exceptionally gifted and talented pupil. However, it is realistic to expect schools to provide opportunities for these pupils.

Humcke, at 170.

Although current guidelines for state monitoring require that a local district "make provisions for identifying pupils with gifted and talented abilities and for providing them with an educational program and services," *N.J.A.C. 6:8-4.5(a)(4)*, there is no reason to suppose that this rule was intended to impose greater substantive burdens on local districts. Rather, the intent was to recodify existing authority that the state standards

for gifted and talented programs “are guidelines and not, underscored, a monitoring checklist.” *Humcke*, at 170. In any event, no evidence has been adduced that Mountain Lakes ever failed the monitoring system for perceived inadequacies in its gifted-and-talented program.

Traditionally, schools have provided opportunity for a wide variety of extra-classroom activities in which pupils are encouraged to explore and pursue individual interests. *Smith v. Paramus Bd. of Educ.*, 1968 S.L.D. 62, 65 (Comm’r March 28). Such activities, while certainly part of the total school curriculum, are not part of the classroom teaching program. *Willett v. Colts Neck Bd. of Educ.*, 1966 S.L.D. 202, 206 (Comm’r Dec. 2, 1966). Again, the law does not attempt to dictate the scope and content of co-curricular offerings. Appropriately, the monitoring procedures are silent regarding this subject.

For purposes of this proceeding, it will be assumed that a local board of education is bound by its own policy statements, provided that such policies are consistent with the controlling statutes and regulations. Although a board of education formulates general policy objectives for governance of the district, ultimate responsibility for carrying out the details belongs to the professional staff. Acting within the constraints of board policy, the Mountain Lakes school administration has implemented procedures to identify gifted-and-talented children at every grade level, to provide meaningful opportunity for developing their potential, to consult with parents about available opportunities, and to offer all children in the district a choice of learning experiences beyond the regular classroom. While Mr. Kanter’s concern for improving the quality of education in his community is laudable, he simply has not demonstrated any legal basis for interfering with district operations.

Order

It is **ORDERED** that the relief requested by petitioner is denied.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 15, 1995
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

[Signature]

5/15/95
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties: [Signature]
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 17 1995
DATE

OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

1. Frederic M. Kanter
2. Bonnie Cytron, enrichment/gifted and talented coordinator,
Mountain Lakes school district

List of Exhibits

No.	Description
J-1	Copy of policy statement No. 2464 of the Mountain Lakes Board of Education regarding gifted and talented pupils, adopted October 1, 1990
J-2	Copy of policy statement No. 2430 of the Mountain Lakes Board of Education regarding co-curricular activities, revised October 1, 1990
J-3	Copy of schoolwide enrichment program guide for Mountain Lakes schools, dated July 1989
P-1	Id. Copy of regulation guide for gifted and talented pupils published by Strauss Esmay Associates, Inc., copyright 1988
P-2	Id. Copy of regulation guide for co-curricular activities published by Strauss Esmay Associates, Inc., copyright 1988

- P-3 (a) Copy of letter to John Sakala from Monica and Fred Kanter, dated June 1, 1993
- (b) Copy of scores on Stanford Achievement Test, dated April 1991
- P-4 Copy of a letter to Mr. and Mrs. Kanter from Bonnie Cytron, undated
- P-5 Copy of a letter to Mr. and Mrs. Kanter from Bonnie Cytron, dated December 1, 1993
- P-6 Copy of a letter addressed to Dear Parents from Bonnie Cytron, dated December 6, 1993
- P-7 Copy of a letter to Mr. and Mrs. Kanter from Bonnie Cytron, dated October 25, 1994
- P-8 Copy of a letter to Mr. and Mrs. Kanter from Bonnie Cytron, dated March 16, 1995
- P-9 Copy of a letter to Mr. and Mrs. Kanter from Bonnie Cytron, dated October 18, 1994
- P-10 Id. Copy of interrogatories and request for production of documents propounded by petitioner, dated October 24, 1994
- P-11 Id. Copy of respondent's answers to interrogatories, certified by John Sakala on October 20, 1994
- P-12 Copy of a letter to Mr. and Mrs. Kanter from Bonnie Cytron, dated March 10, 1994

- P-13 Copy of mini courses at Briarcliff Middle School during the first marking period 1993
- P-14 Copy of level II activities check list in grade four for 1993-94
- P-15 Copy of level I activities check list in grade five for 1993-94
- P-16 Id. Copy of Joseph S. Renzulli & Sally M. Reis, *A Comprehensive System for Educating the Gifted & Talented*, published by Creative Workshop Associates (undated)
- R-1 Copy of pamphlet entitled Third Grade Writings, dated May 13, 1993

FREDRIC KANTER, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 BOROUGH OF MOUNTAIN LAKES, :
 MORRIS COUNTY, :
 :
 RESPONDENT. :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions were timely filed by petitioner in accordance with N.J.A.C. 1:1-18.4.

Initially, petitioner excepts to the Administrative Law Judge's (ALJ) exclusion of two documents from evidence which are alleged to be respondent's regulations concerning gifted and talented pupils and co-curricular activities. Petitioner argues that, inasmuch as these exhibits (P-1 and P-2) were provided by respondent in its answers to interrogatories, they constitute admissions by a party and are admissible as evidence. (Petitioner's Exceptions at p. 2) Petitioner concludes,

***it was palpably erroneous for the ALJ to exclude them in this administrative proceeding where, pursuant to N.J.A.C. 1:1-15.1, the parties are not bound by the rules of evidence unless specifically provided by them. Had the regulations been admitted, the ALJ would have been compelled to conclude that the Respondent was not following its policies and procedures. (Id. at p. 3)

Petitioner next asserts that the ALJ erred in finding that respondent's program offered to gifted and talented students conforms with district policy. Here, petitioner argues that his testimony belied such a conclusion since he "****testified, without rebuke, that he had never been provided a written description of an infused program for his admittedly gifted and talented children" (*Id.* at p. 5) in spite of respondent's answers to interrogatories which indicate that all gifted programs are infused into the student's regular program. Petitioner further contends that the activities highlighted by the ALJ do not constitute "****'differentiated' educational programs and services beyond those normally provided by the regular school program****" as the district's policy requires. (*Id.* at p. 7)

Finally, petitioner avers that the ALJ erred in failing to find that respondent was violating its policy and procedures regarding co-curricular activities. Petitioner maintains that the testimony demonstrates the district does not annually assess its co-curricular activities, contrary to its own policy and procedures. (*Id.* at p. 9) Moreover, the activities which the ALJ highlights, petitioner maintains, do not constitute co-curricular activities within the meaning of the district's policy, but are, instead "****busy work designed to relieve teachers from the classroom." (*Id.* at p. 10)

Upon careful and independent review of the record, which, the Commissioner notes, did not include transcripts of the administrative hearing, the Commissioner finds petitioner's exceptions to be without merit, and concurs with the ALJ's conclusion that the Board has not violated its own policies with respect to providing programs for gifted and talented students, and offering co-curricular activities. Additionally, the Commissioner finds no cause to disturb the ALJ's evidentiary rulings in this matter, as he is cognizant of the ALJ's discretionary authority granted by N.J.A.C. 1:1-15.1. Finally, the Commissioner notes that, to the extent

petitioner's challenge to the findings of the ALJ relies on proffered testimony, he cannot, in the absence of hearing transcripts, ascertain the merits of the claims. In re Morrison, 216 N.J. Super. 143, 157, 158 (App. Div. 1987).

Accordingly, the initial decision of the Office of Administrative Law is adopted for the reasons expressed therein, and relief requested by petitioner is denied.

IT IS SO ORDERED.

Handwritten signature in cursive script, appearing to read "Robert G. ...".
COMMISSIONER OF EDUCATION

JUNE 29, 1995

DATE OF MAILING JUNE 29, 1995

228-95

TAMARA DRAGON,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWN-	:	DECISION
SHIP OF OLD BRIDGE, MIDDLESEX	:	
COUNTY,	:	
	:	
RESPONDENT.	:	



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8674-93

AGENCY DKT. NO. 304-8/93

TAMARA DRAGON,

Petitioner,

v.

OLD BRIDGE TOWNSHIP

BOARD OF EDUCATION,

Respondent.

Arnold M. Mellk, Esq., for petitioner (Wills, O'Neill & Mellk, attorneys)

Harold G. Smith, Esq., for respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: May 9, 1995

Decided: May 16, 1995

BEFORE STEVEN C. REBACK, ALJ:

This matter was transmitted to the Office of Administrative Law on September 14, 1993, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a letter/stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

5/23/95
DATE

Steven C. Reback
STEVEN C. REBACK, ALJ

Receipt Acknowledged:

5/18/95
DATE

Hope R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 23 1995
DATE

Jeff L. Marin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

tmp

RECEIVED
STATE OF N.J.
OFFICE OF THE
CLERK OF THE SUPERIOR COURT
TREASURY

Arnold M. Mellk, Esq.
WILLS, O'NEILL & MELLK
10 NASSAU STREET
P. O. BOX 614
PRINCETON, NEW JERSEY 08542
(609) 924-0700
ATTORNEYS FOR **Petitioner**

TAMARA DRAGON,	:	BEFORE THE COMMISSIONER OF
	:	EDUCATION OF NEW JERSEY
Petitioner,	:	
	:	Agency Docket No. 304-8/93
v.	:	OAL Docket No. EDU-08674-93S
	:	
OLD BRIDGE TOWNSHIP BOARD	:	
OF EDUCATION,	:	
	:	
Respondent.	:	

SETTLEMENT AGREEMENT

This Agreement made on this 25 day of April, 1995 by and between the Old Bridge Township Board of Education ("Board") and Tamara Dragon ("Dragon"); and

WHEREAS, Dragon is employed as a tenured physical education/health teacher in the Old Bridge Township School District; and

WHEREAS, in or about April 1992, the Board voted to terminate Dragon's position effective June 30, 1992; and

WHEREAS, Dragon was recalled in August 1992 to a two-fifths position as a physical education/health teacher for the month of September 1992 and thereafter as a three-fifths physical education teacher through June 1993; and

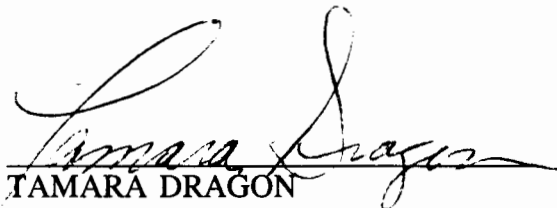
WHEREAS, upon learning that the termination reduction of her position was in derogation of the procedures set forth in the Tenure Employee Hearings Law, and in violation of her tenure and seniority rights pursuant to *N.J.S.A. 18A:28-5, N.J.S.A. 18A:6-10, et seq., N.J.S.A. 18A:28-9, et seq., and N.J.A.C. 6:3-10.1, et seq.*, Dragon filed a petition with the Department of Education; and

WHEREAS, in light of the differing positions of the parties as to the matters in contest, it is in the best interest of the parties to resolve the pending actions before the Commissioner of Education;

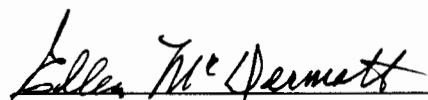
NOW, THEREFORE, the parties hereto agree to the following terms:

1. The Board will immediately pay to Dragon the sum of \$11,500;
2. The pending petition, Agency Docket No. 304-8/93 (OAL Docket No. EDU 08674-93S) shall be withdrawn, with prejudice, subject to the approval of this Agreement by the Commissioner of Education.

OLD BRIDGE TOWNSHIP
BOARD OF EDUCATION


TAMARA DRAGON

Date:

By: 

Date: 4-6-95

jlh/c:njea/drgnslmt.agr

WILLS, O'NEILL
& MELLK
ATTORNEYS AT LAW
10 NASSAU STREET
P O BOX 614
PRINCETON, NJ 08542

RECEIVED
STATE OF N.J.
OFFICE OF ATTORNEY GENERAL
MAY 3 1993

Arnold M. Mellk, Esq.
WILLS, O'NEILL & MELLK
10 Nassau Street, P.O. Box 614
Princeton, NJ 08542
609-924-0700
Attorneys for Petitioner

TAMARA DRAGON,	:	BEFORE THE COMMISSIONER OF
	:	EDUCATION OF NEW JERSEY
Petitioner,	:	
	:	Agency Docket No. 304-8/93
v.	:	OAL Docket No. EDU-08674-93S
	:	
OLD BRIDGE TOWNSHIP BOARD	:	
OF EDUCATION,	:	
	:	
Respondent.	:	

STIPULATION OF SETTLEMENT

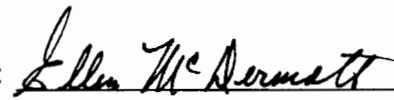
The parties having amicably resolved their differences, the petition of appeal herein is dismissed, with prejudice, on the following terms:

The respondent, Old Bridge Township Board of Education shall pay to petitioner, Tamara Dragon, the sum of \$11,500.

OLD BRIDGE TOWNSHIP
BOARD OF EDUCATION


TAMARA DRAGON

Date:

By: 

Date: 4-6-95

Approved by:

Steven C. Reback, Administrative Law Judge

Date:


jlh/c:njea/drgn2.agr

WILLS, O'NEILL
& MELLK
ATTORNEYS AT LAW
10 NASSAU STREET
P.O. BOX 614
PRINCETON, NJ 08542

TAMARA DRAGON, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE TOWN- : DECISION
 SHIP OF OLD BRIDGE, MIDDLESEX :
 COUNTY, :
 :
 RESPONDENT. :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

JUNE 29, 1995

DATE OF MAILING JUNE 29, 1995

229-95

INTERNATIONAL BROTHERHOOD OF :
 ELECTRICAL WORKERS, LOCAL 269, :
 PETITIONER, :
 V. :
 BOARD OF EDUCATION OF THE HOPE- :
 WELL VALLEY REGIONAL SCHOOL :
 DISTRICT, MERCER COUNTY, :
 RESPONDENT. :

COMMISSIONER OF EDUCATION
 DECISION



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11972-94S

AGENCY DKT. NO. 334-7/94

**INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS,
LOCAL 269,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE
HOPEWELL VALLEY REGIONAL
SCHOOL DISTRICT, MERCER
COUNTY,**

Respondent.

Ira C. Miller, Esq., for petitioner (Pellettieri, Rabstein and Altman, attorneys)

Robert P. Martinez, Esq., for respondent Hopewell Valley Regional School District
(Martinez and Jennings, attorneys)

Record Closed: May 11, 1995

Decided: May 17, 1995

BEFORE JEFF S. MASIN, ALJ:

This matter was transmitted to the Office of Administrative Law from the Department of Education, on December 13, 1994, for a hearing, pursuant to *N.J.S.A.* 52:14B-1 to -21 and *N.J.S.A.* 52:14F-1 to -13.

This matter arises from a petition brought by International Brotherhood of Electrical Workers Local 269 ("petitioner") to the Commissioner of Education seeking consideration of a controversy which arose between petitioner and the Hopewell Valley Regional School District ("respondent") and Wagner-Hohns-Inglis regarding a May 20, 1994, public bid to replace boilers at the Tollgate Grammar School and to replace burners at the Timberland School.

The parties consented to and Wagner-Hohns-Inglis has been dismissed as a party in this matter by an Order of Dismissal issued by the undersigned on May 18, 1995.

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement and of Dismissal ("Stipulation") indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND**:


1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.


I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

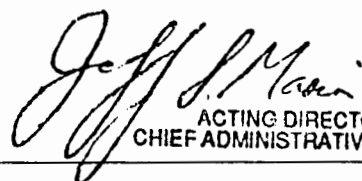
5/17/95
DATE


JEFF S. MASIN, ALJ
Receipt Acknowledged:

5/19/95
DATE


DEPARTMENT OF EDUCATION

MAY 24 1995
DATE
mjm
Attachment

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

MAY 11 10 50 AM '95

STATE
OFFICE

Martinez & Jennings
2109 Pennington Road
West Trenton, NJ 08638
Te: 609-883-8000
Attorneys for Respondent School District

IBEW Local 269,
Petitioner

vs.

Wagner Hohns Inglis, Inc. and
Hopewell Valley Regional
School District, Mercer County,
Respondents

Before The Commissioner of
Education, State of New Jersey

Agency Docket No. 334-7/94
OAL DOCKET NO. EDUOT 11972-94S

STIPULATION OF SETTLEMENT
AND OF DISMISSAL

This matter having brought on by petition of IBEW Local 269, and the respondent, Wagner Hohns Inglis, Inc. having been dismissed as a party by consent, and counsel for petitioner and for the remaining respondent, the Hopewell Valley Regional School District, having pursued discovery and having exchanged views and agreed upon the substantive matters previously thought to be in dispute, it is, on this 20th day of March, 1995,

Stipulated and Agreed as follows:

1. This Stipulation of Settlement and of Dismissal is made and entered subject to the approval of same by the Administrative Law Judge and Commissioner of Education, as provided by law in such case. In the event such approval is not granted, the fact of this stipulation shall not be deemed to prejudice either party's ultimate position.

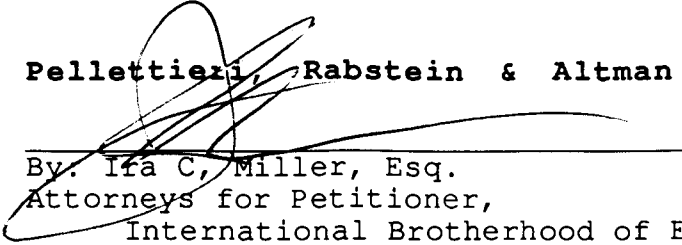
2. The parties agree that in circumstances where the provisions N.J.S.A.18A:18A-18 apply, petitioner shall have the right, with advance notice to the secretary of respondent board and with appointment made during normal business hours of respondent board, to inspect the specifications for and bids received and opened pursuant to such statute, including the identification made of subcontractors in any such bid submitted.

3. The parties agree that in circumstances where construction work to be bid pursuant to N.J.S.A.18A:18A-4 is of a character involving only a single prime trade listed in N.J.S.A. 18A:18A-18, and where such single prime trade may subcontract or require the services of another listed trade, and where the estimated cost of the latter trade, including services and materials, is less than the threshold amount for which bids are required pursuant to N.J.S.A. 18A:18A-3, then in such circumstances the pre-bid listing of subcontractors in said latter trade is not necessary. In such circumstances, respondent may proceed either by separate award to the second trade under N.J.S.A. 18A:18A-3 or by single bid under N.J.S.A. 18A:18A-18. Respondent shall be entitled to rely upon the written estimate of its design professional in establishing the value of such second trade materials and services prior to bid. Petitioner shall have the right, with advance notice to the secretary of respondent board and with appointment made during normal business hours of respondent, to inspect such written estimate after bids, if any, are submitted and opened.

4. The parties agree that the petition seeking relief in the case of the Monarch Boiler Construction Co. contracts is now moot

and shall be dismissed with prejudice, each party to bear its own costs.

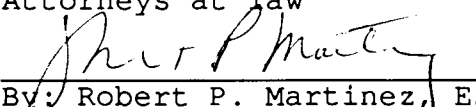
Pellettier, Rabstein & Altman


By: Ifa C. Miller, Esq.
Attorneys for Petitioner,
International Brotherhood of Electrical Workers
Local Union No. 269
Suite 111
100 Nassau Park Boulevard
CN 5301
Princeton, NJ 08534-5301

Dated: May , 1995

Martinez & Jennings

Attorneys at law


By: Robert P. Martinez, Esq.
Attorneys for Respondent
Hopewell Valley Regional School District
2109 Pennington Road,
West Trenton, New Jersey 08638-1415


Dated: May 2, 1995

OAL DKT. NO. EDU 11972-94S

INTERNATIONAL BROTHERHOOD OF :
ELECTRICAL WORKERS, LOCAL 269, :
 :
PETITIONER, :
 :
V. : COMMISSIONER OF EDUCATION
 :
BOARD OF EDUCATION OF THE HOPE- : DECISION
WELL VALLEY REGIONAL SCHOOL :
DISTRICT, MERCER COUNTY, :
 :
RESPONDENT. :
_____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

JUNE 29, 1995

DATE OF MAILING JUNE 29, 1995

230-95E

D.K, on behalf of her minor son, D. K., :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN-
SHIP OF EDISON, MIDDLESEX COUNTY, :

DECISION ON MOTION

RESPONDENT. :

_____ :

JUNE 29, 1995

D.K., on behalf of her minor son, D. K.,	:	
	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN-	:	DECISION ON MOTION
SHIP OF EDISON, MIDDLESEX COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

For petitioner, D.K., pro se

For Respondent, Viola Lordi, Esq.

This matter was opened before the Commissioner of Education on June 13, 1995, by way of a Petition of Appeal and Motion for Emergent Relief filed by D.K., on behalf of her son, D.K., seeking an order permitting D.K. to participate in graduation ceremonies from Edison High School on June 15, 1995, and seeking a judgment stating that D.K.'s coursework is complete so that he is not required to attend summer school. On June 10, 1995, the Board of Education of the Township of Edison denied petitioner's appeal of the Board's decision that D.K. violated the Edison Township Board of Education Student Attendance Policy (hereinafter referred to as "Attendance Policy") by having excessive absences and, therefore, insufficient course credit to graduate or to participate in graduation ceremonies. This matter was filed with the Commissioner after the Board denied petitioner's appeal to it under the provisions of the Attendance Policy.

On June 13, 1995, oral argument was heard by telephone conference call by Gary Reece, Assistant Commissioner for the Office of Standards and Assessment, who was designated to hear and decide this matter, pursuant to the Commissioner's authority under N.J.S.A. 18A:4-34. Upon consideration of arguments, the Assistant Commissioner found that petitioner had not met the standards for granting injunctive relief set forth in Crowe v. DeGoia, 90 N.J. 126 (1982).

Petitioner was advised of the decision telephonically on June 15, 1995. The Crowe standards required petitioner to show that D.K. would be irreparably harmed if not permitted to attend the graduation ceremony, that D.K. has a substantial likelihood of prevailing on the merits of the claim, and that in balancing the interests of the parties, the harm to D.K. would be greater than the harm to the Board should the requested relief not be granted.

Petitioner asserts that the Board's action denying her appeal at the local level was arbitrary, capricious and an abuse of discretion because D.K. had a chronic illness note on file with the high school since the beginning of the school year excusing his absences. Relying on a statement in the Attendance Policy, petitioner argues that "Chronic Illness is an exception to the Attendance Policy." (Attendance Policy at p. 6) The Attendance Policy permits twelve absences by a student in one school year. The chronic illness exception to the Attendance Policy is valid when a doctor submits a note to the school district indicating that a "chronic medical condition" exists. The Board does not dispute that petitioner's chronic illness note was in place, nor does the Board contend that it was defective. Based on such note, petitioner argues that D.K.'s absences should not have been charged against D.K. to prevent him from graduating with his class.

In response, the Board argues that its policy on chronic illness requires the following in order for the exception to be operative and absences approved accordingly: “Once the doctor’s note is accepted and approved, absences will be excused only if a parent calls the attendance office on the day of the absence and specifies that the absence is due to the chronic condition.” (Attendance Policy at page 6, paragraph 2) The Board contends, and petitioner admits, that a parent did not call the attendance office on many days that D.K. was absent.

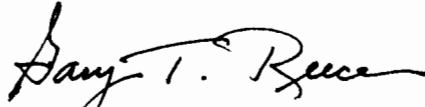
The Board also argues that petitioner’s claims that D.K.’s absences were due to D.K.’s chronic illness came too late in that the policy further states that, “Absences/tardies/early dismissals will not be excused if notification is received the day after. A call must be made the day of in order to be excused.” (*Id.* at paragraph 5) Additionally, the Board argues that petitioner had called on several occasions to inform the school when D.K. was absent due to his chronic illness and that those absences were excused. The Board further acknowledged that it did accept those doctor’s notes that were timely submitted as, “Exceptions for chronic illness become effective from the date the doctor’s note is received and approved.” (*Id.* at paragraph 6)

The Board asserts that it has properly applied its policy, that D.K. has been excessively absent, and that his parents were notified that he was in non-credit status by certified mail. It asserts that the consequences of violating the Attendance Policy are contained in the letter, as well as the district’s student handbook which was provided to petitioner prior to the commencement of the school year. Moreover, the Board asserts that petitioner signed a letter acknowledging that she read the handbook and agreed to be bound by its requirements.

A weighing of the arguments of the parties leads the Assistant Commissioner to conclude that petitioner has not demonstrated entitlement to injunctive relief. Accordingly, the

Motion for Emergent Relief is denied and the matter is ordered transmitted to the Office of Administrative Law for further proceedings.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Gary L. Reese". The signature is fluid and cursive, with a long horizontal stroke at the end.

ASSISTANT COMMISSIONER OF EDUCATION

JUNE 29, 1995

DATE OF MAILING JUNE 29, 1995

231-95E

D.M., on behalf of her minor child, J.M., :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF MONROE, GLOUCESTER :
COUNTY, :

DECISION ON MOTION

RESPONDENT. :

In response, the Board argues that J.M. chose to take the class and decided to remain in January, despite difficulties she was experiencing, and that she had received notice of her possible failure and was provided with additional assistance. Her parents were aware of the requirement that J.M. pass English in order to graduate as it was included in the district's student handbook which was provided to petitioner prior to the commencement of the school year. The Board argues that the principal, James Greczek, was only notified of petitioner's requests to transfer J.M. to another English class in the middle of the fourth marking period when it was too late in the year to make such a transfer.

A weighing of the arguments of the parties leads the Assistant Commissioner to conclude that petitioner has not demonstrated entitlement to injunctive relief as J.M. failed a required course and lacked sufficient credits to graduate. Accordingly, the Motion for Emergent Relief is denied and the matter is ordered transmitted to the Office of Administrative Law for further proceedings.

IT IS SO ORDERED.


ASSISTANT COMMISSIONER OF EDUCATION

JUNE 29, 1995

DATE OF MAILING JUNE 29, 1995

(231-95E)
67-97

D.M., on behalf of her minor child, J.M., :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE :
TOWNSHIP OF MONROE, GLOUCESTER :
COUNTY, :

DECISION

RESPONDENT. :

_____ :

OAL DKT. NO. EDU 7064-95
AGENCY DKT. NO. 213-6/95

D.M., on behalf of her minor child, J.M., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF MONROE, GLOUCESTER :
COUNTY, :
RESPONDENT. :
_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

FEBRUARY 11, 1997
DATE OF MAILING FEBRUARY 11, 1997

232-95E

A.S., on behalf of her minor child, D.S., :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF :
SOUTH AMBOY, MIDDLESEX COUNTY, :

DECISION ON MOTION

RESPONDENT. :

_____ :

A.S., on behalf of her minor child, D.S.,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY OF	:	DECISION ON MOTION
SOUTH AMBOY, MIDDLESEX COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

For Petitioner, A.S., pro se

For Respondent, Clark Convery, Esq.

This matter was opened before the Commissioner of Education on June 13, 1995, by way of a Petition of Appeal and Motion for Emergent Relief filed by A.S., on behalf of her minor daughter, D.S., seeking an order permitting D.S. to participate in graduation ceremonies from South Amboy's H.G. Hoffman High School on June 14, 1995. On June 9, 1995, the Superintendent of the District of South Amboy denied petitioner's appeal of the principal's decision that D.S. was ineligible to graduate because of her asserted failure to successfully complete 11th grade physical education, and, therefore, had insufficient course credit to graduate or to participate in graduation ceremonies. Petitioner is not contesting that D.S. has to make up her absences in summer school, but is appealing the superintendent's determination to prohibit D.S. from participating in the graduation ceremony.

This matter was filed with the Commissioner after the superintendent denied petitioner's appeal to it under the provisions set forth in the South Ambøy Board of Education Policy Manual (hereinafter referred to as "Attendance Policy").

On June 13, 1995, oral argument was heard by telephone conference call by Ellen Schechter, Assistant Commissioner for Academic Programs and Standards, who was designated to hear and decide this matter, pursuant to the Commissioner's authority under N.J.S.A. 18A:4-34. Upon consideration of arguments, the Assistant Commissioner found that petitioner had not met the standards for granting injunctive relief set forth in Crowe v. DeGoia, 90 N.J. 126 (1982).

Petitioner was advised of the decision telephonically on June 15, 1995. The Crowe standards required petitioner to show that D.S. would be irreparably harmed if not permitted to attend the graduation ceremony, that D.S. has a substantial likelihood of prevailing on the merits of the claim, and that in balancing the interests of the parties, the harm to D.S. would be greater than the harm to the Board of Education should the requested relief not be granted.

In assessing a likelihood of success on the merits, the applicable law controlling the physical education requirement was considered:

N.J.S.A. 18A:35-5 provides in full as follows:

Each board of education shall conduct as a part of the instruction in the public schools courses in health, safety and physical education, which courses shall be adapted to the ages and capabilities of the pupils in the several grades and departments. To promote the aims of these courses any additional requirements or rules as to medical inspection of school children may be imposed.

N.J.S.A. 18A:35-7 provides in full as follows:

Every pupil, except kindergarten pupils, attending the public schools, insofar as he is physically fit and capable of doing so, as determined by the medical inspector, shall take such courses, which shall be a part of the curriculum prescribed for the several grades, and the conduct and attainment of the pupils shall be marked as in other courses or subjects, and the standing of the pupil in connection therewith shall form a part of the requirements for promotion or graduation.

The Board requires its pupils to achieve a passing grade in physical education each year of school to meet graduation requirements.

Petitioner asserts that the Board's action denying her appeal at the local level was arbitrary, capricious and an abuse of discretion because D.S. failed physical education class due to a medical problem and should have been excused for her absences. The Attendance Policy permits absence due to illness as verified only by a doctor's note. Petitioner argues that D.S. has presented doctor's notes in her appeal but that the school will not accept them at this time. Based on such notes, petitioners argue that D.S.'s absences should not have been charged against D.S. to prevent her from graduating with her class. The superintendent contends, and petitioner admits, that a doctor's note was not received in school on many days that D.S. did not take gym class.¹ Petitioner states that D.S. attempted to make up classes during the year, but that the gym teacher's schedule could not accommodate D.S.'s schedule.

In response, the Board argues that D.S. had the opportunity to make up missed classes but could only do so based on the teacher's schedule to accommodate the student as it is done outside of the regular school day. The school policy specifically states that, "all classwork

¹ It is also noted that petitioner passed senior gym while simultaneously failing junior gym, a class she was repeating in her senior year.

must be made up at the initiative of the students under the direction of the teacher.” (Attendance Policy at p. 4) The Board argues that it has an interest in enforcing its Attendance Policy. It asserts that it has properly applied its policy, that D.S. has been excessively absent, and that her parents were notified that she was in non-credit status by mail. It asserts that the consequences of violating the Attendance Policy are contained in the letter and in the district’s student handbook which was provided to petitioner prior to the commencement of the school year. Moreover, the Board asserts that petitioner signed a letter acknowledging that she read the handbook and agreed to be bound by its requirements.

A weighing of the arguments of the parties leads the Assistant Commissioner to conclude that petitioner has not demonstrated entitlement to injunctive relief.

Accordingly, the Motion for Emergent Relief is denied and the matter is ordered transmitted to the Office of Administrative Law for further proceedings.

IT IS SO ORDERED.


ASSISTANT COMMISSIONER OF EDUCATION

JUNE 29, 1995

DATE OF MAILING JUNE 29, 1995

(232-95E)
410-95

A.S., on behalf of her minor child, D.S., :

PETITIONER, :

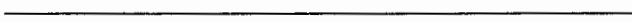
V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY :
OF SOUTH AMBOY, MIDDLESEX :
COUNTY, :

DECISION

RESPONDENT. :





State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 7063-95

AGENCY DKT. NO. 212-6/95

**A.S. ON BEHALF OF HER
MINOR CHILD, D.S.,**

Petitioner,

v.

**BOARD OF EDUCATION OF
THE CITY OF SOUTH AMBOY,**

Respondent.

A.S., petitioner, *pro se*

Clark W. Convery, Esq., for respondent (Convery, Convery & Shihar, attorneys)

Record Closed: September 28, 1995

Decided: October 2, 1995

BEFORE BRUCE R. CAMPBELL, ALJ:

This matter was opened in June 1995 on a request for emergent relief made to the Commissioner of Education. The Commissioner designated an assistant commissioner to hear the case on June 14, 1995. The request was denied after oral argument. The Commissioner's designee memorialized the decision on June 29, 1995 and the matter was transmitted to the Office

of Administrative Law on July 6, 1995 for disposition as a contested case pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14-1 through -13. The matter was assigned to me on September 8, 1995.

Upon review of the file, the matter appeared moot. On January 12, 1995, I wrote to the parties, stating:

This matter has been assigned to me. In reviewing the file, I find this was a request for emergent relief in connection with June 1995 graduation exercises. Inasmuch as the Commissioner denied the request, is there any issue remaining before me?

Please advise me of the status of this case by September 25, 1995.

Allowing three days for movement of the mails, and having received no response, I closed the record on September 28, 1995.

Having reviewed the papers, I **FIND** and **CONCLUDE** that this matter no longer contains a justiciable issue and, therefore, is **MOOT**.

Accordingly, the matter is **DISMISSED WITH PREJUDICE**. It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

2 OCTOBER 1995
DATE

Bruce R. Campbell
BRUCE. R. CAMPBELL, ALJ

10/4/95
DATE

Receipt Acknowledged:

DNA
DEPARTMENT OF EDUCATION

OCT 12 1995
DATE

Mailed to Parties:
Jeff L. Marin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cae

OAL DKT. NO. EDU 7063-95

A.S., on behalf of her minor child, D.S., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY : DECISION
OF SOUTH AMBOY, MIDDLESEX :
COUNTY, :
RESPONDENT. :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner affirms the initial decision of the Administrative Law Judge dismissing this matter as moot following the Commissioner's denial of emergent relief concerning petitioner's challenge to participate in graduation ceremonies, which date has since passed.

Accordingly, the Commissioner adopts the initial decision and the within appeal is hereby dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

NOVEMBER 13, 1995

DATE OF MAILING NOVEMBER 13, 1995

233-95

OAL DKT. NO. EDU 10162-94

JOSEPH COZZA,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE UNION	:	DECISION
COUNTY REGIONAL HIGH SCHOOL	:	
DISTRICT NO. 1, UNION COUNTY,	:	
	:	
RESPONDENT.	:	



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10162-94

JOSEPH COZZA

Petitioner,

v.

**UNION COUNTY REGIONAL
HIGH SCHOOL**

Respondent

Gloria L. Buxbaum, Esq. for petitioner
(Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Lawrence S. Schwartz, Esq. for respondent
(Schwartz, Simon, Edelsein, Gelso, Kessler, attorneys)

Record Closed: May 5, 1995

Decided: May 18, 1995

BEFORE **IRENE JONES**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 19, 1994 for a hearing pursuant to *N.J.S.A. 52:14B-1 et seq* and *N.J.S.A. 52:14F-1 et seq*.

The matter was scheduled for evidentiary hearings on October 5, 6, 1995. Prior to the scheduled hearing dates the parties had agreed to settle the matter and have prepared the attached stipulation indicating the terms of the settlement.

I have reviewed the record and the settlement terms and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.


I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

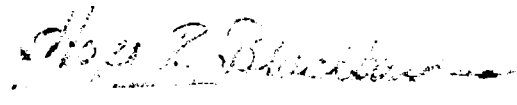
Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500**, Trenton, New Jersey 08625, marked "Attention Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

5/18/95
Date

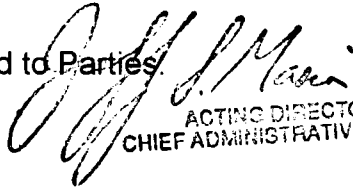

IRENE JONES, ALJ

Receipt Acknowledged:

5/22/95
Date


DEPARTMENT OF EDUCATION

MAY 22 1995
Date

Mailed to Parties 
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sej

SETTLEMENT AGREEMENT AND RELEASE

This Agreement is made and entered into as of this 29 day of March 1995, by and between the UNION COUNTY REGIONAL HIGH SCHOOL BOARD OF EDUCATION (hereinafter referred to as "the Board") and JOSEPH COZZA.

WHEREAS,

A. Mr. Cozza was originally employed by the Board on or about September 1, 1979; and

B. Mr. Cozza's employment was terminated by the Board on August 2, 1994 as part of a reduction in force; and

C. Mr. Cozza subsequently filed a Petition of Appeal with the Commissioner of Education, OAL Dkt. No. EDUOR 10162-94N, contesting the legality of his termination by the Board; and

D. It is in the best interests of the parties to resolve this matter by mutual agreement, permanently and without further disruption to the school District;

NOW THEREFORE, in consideration of the mutual promises of the parties,

IT IS on this 29 day of March, 1995, agreed:

1. In return for compliance with this Agreement, Mr. Cozza will withdraw with prejudice his Petition of Appeal filed with the Commissioner of Education in the action known as Joseph Cozza v. Board of Education of Union County Regional High School District No. 1, Agency Ref. No. 359-9/94, OAL Docket No. EDUOR 10162-94N.

2. In return for Mr. Cozza's compliance with this Agreement, the Board agrees to:

(a) Pay Mr. Cozza the sum of \$5,300.00 (Five Thousand Three Hundred Dollars). Said amount shall be paid in a lump sum upon receipt of approval by the Commissioner of Education to the withdrawal of the case; and

(b) Place Mr. Cozza on the Board's preferred eligibility list for recall in his areas of certification.

3. Mr. Cozza shall not be entitled to any other benefits or emoluments of employment except as set forth in this Agreement.

4. Mr. Cozza, in consideration of this Agreement, releases and forever discharges the Board and the Board's members, directors, trustees, officers, employees and assigns (the Board and the foregoing persons and entities are hereinafter collectively referred to as the "Releasees") from:

- (a) Any and all claims asserted or which could have been asserted;
- (b) Any and all claims, charges or complaints asserted, or which could have been asserted concerning any aspect of Joseph Cozza's employment with the Board, any agreement concerning such employment or the termination of such employment, including, but not limited to, any and all claims of wrongful discharge or breach of contract, any and all claims for equitable estoppel, any and all claims for employee benefits, and any and all claims of discrimination on any basis including, but not limited to the New Jersey Law Against Discrimination, Federal laws against discrimination and the Americans with Disabilities Act;

- (c) Any and all claims for back pay, vacation pay, liquidated, compensatory and punitive damages, reinstatement, and attorneys' fees, disbursements and costs;

Nothing in this release shall be deemed to bar the right of Mr. Cozza to pursue a claim to enforce the terms of this Agreement.

5. The Board, in consideration of this Agreement, releases and forever discharges Mr. Cozza from any and all claims asserted or which may be asserted against him related to any aspect of his employment with the Board, including, but not limited to, any claims for wrongful conduct, contribution, indemnity or any matter related to the payment of his salary or benefits. Nothing in this release shall be deemed to bar the right of the Board to pursue a claim to enforce the terms of this Agreement.

6. This Agreement shall be interpreted, construed and enforced pursuant to the laws of the State of New Jersey.

7. This Agreement sets forth the entire agreement between the parties hereto, and incorporates the complete financial obligation of the Board to Mr. Cozza.

8. This Agreement shall not in any way be construed as an admission by the Board or Joseph Cozza of any liability, or of any unlawful acts whatsoever; and the Board and Joseph Cozza specifically disclaim any liability for any wrongful or unlawful acts whatsoever.

9. Both Mr. Cozza and the Board expressly acknowledge, represent and warrant that the terms and provisions of this Agreement are the only consideration for signing this Agreement; that no other promise or agreement of any kind has been made to or with any person or entity whatsoever to cause the signing of this Agreement; and that in executing this Agreement, Mr. Cozza does not rely and has not relied upon any representation or statement made by any of the Board's agents, representatives or attorneys with regard to the subject matter, basis or effect of this Agreement or otherwise.

10. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Agreement and bind the Board to its terms.

11. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

12. Nothing in this Agreement shall be construed as conferring any benefit upon any person, group or association not a direct signatory hereto. Further, this Agreement shall not be deemed to establish any "past practice" or "precedent" requiring or restricting the Board in providing any benefit to any person group or association other than Mr. Cozza.

13. Mr. Cozza expressly acknowledges, represents and warrants that he has carefully read this Agreement and has fully reviewed and discussed its terms with his attorneys; that Mr. Cozza fully understands this Agreement's terms, conditions and significance; and that Mr. Cozza has executed this Agreement voluntarily, knowingly and with the advice of his competent representative(s).

UNION COUNTY REGIONAL HIGH SCHOOL
BOARD OF EDUCATION

By: *Joan Toth*
~~Burton Bitomer~~, President
JOAN TOTH

Attest: *Peter Lanzi*
Peter Lanzi, Business Administrator/Board Secretary

Dated: 5/2/95

JOSEPH COZZA

Joseph Cozza

Witness: *Gloria Buxbaum*

Dated: March 29, 1995

STATE OF NEW JERSEY)
 :SS:
COUNTY OF Morris)

On March 29, 1995, before me personally came JOSEPH COZZA to me known and known to me to be the individual described in and who executed the foregoing Agreement, and he duly acknowledged to me that, with the advice of counsel, he voluntarily and knowingly executed the said Agreement, after having read and understood said document.

Rosemarie Triantafellow

ROSEMARIE TRIANTAFELLOW
A Notary Public of New Jersey
My Commission Expires Dec. 14, 1999

OAL DKT. NO. EDU 10162-94

JOSEPH COZZA, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE UNION : DECISION
 COUNTY REGIONAL HIGH SCHOOL :
 DISTRICT NO. 1, UNION COUNTY, :
 :
 RESPONDENT. :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

JUNE 30, 1995

DATE OF MAILING JUNE 30, 1995

234-95

IN THE MATTER OF THE CAP WAIVER :
 APPEAL OF THE BOARD OF EDUCATION :
 OF THE TOWNSHIP OF MIDDLETOWN, : COMMISSIONER OF EDUCATION
 MONMOUTH COUNTY. : DECISION
 _____ :

SYNOPSIS

Board appealed \$3,685,080 of the General Fund cap waiver rejected by voters.

Upon review of the record, Commissioner determined to order the increase of \$3,016,080 in cap waiver monies, offset by reallocation of \$435,500 from Other Employee Benefits for a total General Fund tax levy of \$64,586,822 for the 1995-96 school year.

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION :
OF THE TOWNSHIP OF MIDDLETOWN, : COMMISSIONER OF EDUCATION
MONMOUTH COUNTY. : DECISION
_____ :

For Petitioner, Peter P. Kalac, Esq. (Kalac, Newman, Lavender & Campbell)

For Township, John T. Lane, Jr., Esq. (Dowd & Reilly)

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education on May 26, 1995, through the filing of a Petition of Appeal, Motion for Emergent Relief¹ and a Position Statement by the Board of Education of the Township of Middletown (Board), seeking inclusion in its 1995-96 budget partial amounts included in its voter cap waiver request at the annual school election on April 18, 1995.

At that election, the voters rejected two separate public questions proposing a General Fund Tax Levy of \$67,691,322 for the 1995-96 school year, including one question for \$62,006,242 in the General Fund base budget and the other for a \$5,685,080 cap waiver request. On April 20, 1995, following consultation with the Board as required by law, the Township adopted a resolution determining to certify a General Fund tax levy of \$62,006,242 as sufficient

¹ Inasmuch as this decision constitutes a decision on the merits which has been considered expeditiously, the Motion for Emergent Relief will not be herein addressed.

to provide for a thorough and efficient system of education (T&E) in the district. Although the Township resolution proposed fourteen (14) specific line-item reductions, for a total reduction of \$1,750,000, it also recommended increasing two line items in that same amount, resulting in no reduction in the amounts sought by the Board. The resolution essentially sought to reallocate certain amounts originally funded by the voter cap waiver into the base budget. The Township then resolved to support the Board's cap waiver appeal in the amount of \$3,685,080.

The amounts sought in this appeal are as follows:

<u>Tax Levy (Proposed by Board)</u>		<u>Tax Levy Certified by Township</u>	
General Fund	\$62,006,242	General Fund	\$62,006,242
Cap Waiver	<u>5,685,080</u>	Cap Waiver	<u>- 0 -</u>
Total	\$67,691,322	Total	\$62,006,242
 <u>Amount of Reduction by Township</u>		 <u>Amount of Cap Waiver Request</u>	
General Fund	- 0 -		\$3,685,080

On June 1, 1995, the Township submitted a letter and copy of the resolution in support of the Board's cap waiver appeal.

On June 15, 1995, the County Superintendent filed his affidavit and supporting documents attesting to the process of review and analysis that led to his conclusion, and that of the Department of Education's Cap Waiver Panel, that a \$5,435,080 voter cap waiver should be conditionally certified as essential to the provision of T&E, and, further, attesting to the changed circumstances permitting the reallocation within the base budget proposed by the Township in its resolution and sought by the Board in the amount of \$1,750,000. On June 21, 1995, the Board submitted the affidavit of Steven K. Robinson, Deputy Business Administrator and a Certified Public Accountant, in response to this affidavit.

analysis of the anticipated free balance reveals the possibility of reallocation of an additional \$135,036 in surplus in excess of the 3 percent permissible pursuant to N.J.A.C. 6:20-2A.11.

The Board, in response, while not denying the possible existence of the additional surplus, asserts that it is premature to estimate that such amounts will in fact be available and, further asserts that “[u]ntil such time as the Board has received its 1994-95 comprehensive annual financial report (due to be filed in October of 1995), the Board cannot anticipate the surplus would exist.” Affidavit of Steven K. Robinson at p. 3.³ In addition, the Board asserts that the additional funds should not be used for tax relief because “***its 1996-97 budget must begin with the Board allocating \$3,150,528 already utilized for tax relief in the 1995-96 budget. By adding \$135,036 to this amount, the Commissioner of Education would further negatively impact the 1996-97 proposed budget.” Id.

In order to independently assess whether these amounts may be further appropriated, the Director of the Bureau of Controversies and Disputes requested further information as to the district’s financial condition as of the close of business on June 23, 1995. This documentation was submitted by the Board on June 23, 1995.

Based on the above, and relying on the Board’s financial report as of June 23, 1995, the Commissioner determines that the additional \$135,036 identified by the County Superintendent is not available to partially fund the cap waiver amounts specified in this decision, subject to verification through the Board’s 1994-95 annual year-end audit report.

³ The implication of the Robinson statement that the district’s financial reports cannot be relied upon prior to completion of the annual independent audit has no merit and bears upon the credibility of his affidavit. It is both the professional and statutory obligation of the board secretary and/or business administrator to provide current and accurate financial reports throughout the year on which the board, school management, the public and governmental agencies can rely. It should be noted that Robinson is a certified public accountant.

Based on analysis of the materials submitted on June 23, 1995, the district's unreserved, undesignated general fund balance of \$2,214,507 is below the regulatory requirement of 3 percent and contains \$1,583,178 which may be necessary to be expended if the Board decides to change health insurance carriers as it contemplates.

REALLOCATIONS

In its advertised budget the Board reflected \$5,793,006, \$7,683,625 and \$7,750,000 for Other Employee Benefits (Account No. 11-000-290-290) for fiscal years 1993-94, 1994-95 and 1995-96, respectively. This amount for the most part is needed to fund the district's employee health benefits plan and to a lesser degree workers' compensation. The amount budgeted to 1995-96 shows a 28 percent increase over the actual audited amount expended during 1993-94. As such, both the County Superintendent and the director, Bureau of Controversies and Disputes, requested additional documentation and narrative explanation of the amount necessary for health benefits. The pertinent facts follow:

1. The Board in collaboration with the municipality agreed to reallocate \$314,500 from this account as part of the \$1,750,000 reallocation to reduce the cap waiver request which resulted in an adjusted appropriation in this account of \$7,435,500. A reduction in staff and level premiums were cited as rationale.
2. The Board has reduced the 1994-95 appropriation of \$7,683,625 by \$545,502 between February 1, 1995, and June 23, 1995, and reallocated this amount to other areas of the budget for expenditure citing a lower than expected health claims experience for the year.

3. Actual expenditures for the 1994-95 year as reflected on the June 23, 1995, financial report were \$6,806,573 which is \$877,052 less than originally budgeted for 1994-95 and \$628,927 less than the adjusted appropriation of \$7,435,500 for 1995-96.
4. Quotes obtained from other health insurance carriers, and entered into the record, included one which guaranteed an annual cost of \$6,501,083.


Based on the weight of the evidence entered in the record and the failure of the Board to provide a more definitive accounting of its health benefits needs and final choice of carriers, the Commissioner finds that another \$435,500 can be conservatively reallocated from this account to fund items contained in the cap waiver.

Accordingly, the Commissioner directs the following:

<u>Account</u>	<u>Description</u>	<u>Sustained</u>	<u>Restored</u>
12-000-400-450	Construction Services	\$669,000	\$3,016,080
		_____	_____
Total Line-Item Determinations:		\$669,000	\$3,016,080
Tax Levy Certified by Township:			\$62,006,242
Amount of Cap Waiver Ordered:			3,016,080
Amount of Restoration Funded by Reallocation			(435,500)
			\$64,586,822

Accordingly, the Monmouth County Board of Taxation is directed to make the necessary adjustments as set forth above, subject to verification of surplus amounts through the year-end audit, to reflect a total of \$64,586,822 to be raised in tax levy for General Fund purposes for the Middletown Township Board of Education for the 1995-96 school year.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

JUNE 30, 1995
 DATE OF MAILING JUNE 30, 1995

235-95

OAL DKT. NO. EDU 6017-95

EL WIRA MICHALAK,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE LOWER	:	DECISION
CAMDEN COUNTY REGIONAL HIGH	:	
SCHOOL DISTRICT NO. 1, CAMDEN	:	
COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

July 7, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

**ORDER DENYING
PETITIONER'S APPLICATION
FOR EMERGENCY RELIEF
OAL DKT. NO. EDU 6017-95
AGENCY DKT. NO. 198-6/95**

ELWIRA MICHALAK,

Petitioner,

v.

**BOARD OF EDUCATION OF
LOWER CAMDEN,**

Respondent.

Elwira Michalak, petitioner, pro se

Robert E. Birsners, Esq., for respondent

BEFORE STEVEN C. REBACK, ALJ:

This matter having come before the undersigned for oral argument on June 14, 1995, on the petitioner's application for emergent relief, and petitioner appearing pro se, and Robert E. Birsner, Esquire appearing on behalf of respondent and the Administrative Law Judge having reviewed the petition in this matter and having heard and considered the oral arguments of the parties and the testimony of witnesses and good cause not having been shown:


It is on this 15th day of June 1995 **ORDERED** that the petitioner's application for emergent relief, so that she may participate at the graduation ceremony of respondent school district, as a member of its senior class and that she may be awarded a diploma as an incident to those graduation ceremonies be and is hereby **DENIED**.

I recommend that the Commissioner of Education, following the filing of exceptions, if any, return the matter to the Office of Administrative Law as soon as possible so that the petitioner may have a full adjudication on the merits in respect to the calculation of the quality and quantity of credits earned by her as it relates to her ability to be graduated.

A transcribed oral ruling setting forth the reasons for this decision contained in an audio cassette tape which accompanies this order.

This order on application for emergency relief may be adopted, modified or rejected by who/which by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A. 52:14B-10*.

6/15/95
DATE




STEVEN C. REBACK, ALJ

ELWIRA MICHALAK, :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE LOWER : DECISION
 CAMDEN COUNTY REGIONAL HIGH :
 SCHOOL DISTRICT NO. 1, CAMDEN :
 COUNTY, :
 RESPONDENT. :
 _____ :

This matter was received on an emergent relief basis and transmitted to the Office of Administrative Law for a hearing. The ALJ rendered a decision and transmitted the case to the Commissioner of Education for a final determination on the emergent relief aspect to be issued within forty-five (45) days. No exceptions were filed by the parties. Upon independent review, the Commissioner affirms the initial decision of the ALJ denying emergency relief.

By letter dated June 16, 1995, petitioner withdrew this petition on the merits. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

(235-95)
414-95

EL WIRA MICHALAK, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE LOWER :
CAMDEN COUNTY REGIONAL HIGH :
SCHOOL DISTRICT NO. 1, CAMDEN :
COUNTY, :

DECISION

RESPONDENT. :

_____ :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION DISMISSAL

OAL DKT. NO. EDU 6017-95

AGENCY DKT. NO. 198-6/95

ELWIRA MICHALAK,

Petitioner,

v.

**BOARD OF EDUCATION
OF LOWER CAMDEN,**

Respondent.

Elwira Michalak, petitioner, pro se

Robert E. Birsner, Esq., for respondent

Record Closed: October 10, 1995

Decided: October 11, 1995

BEFORE STEVEN C. REBACK, ALJ:

This is an appeal instituted by the petitioner for emergent relief before the Commissioner of Education and heard before me on June 14, 1995. On June 15, 1995, I issued an Order Denying Petitioner's Application for Emergency Relief. The petitioner has not requested a plenary hearing on the other issues in this case.

Presumably the Commissioner of Education affirmed my decision through silence after 45 days from his receipt.

Accordingly, and based upon the foregoing, I **CONCLUDE** that the petitioner is no longer interested in pursuing this matter and it is **ORDERED** that the matter be and is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

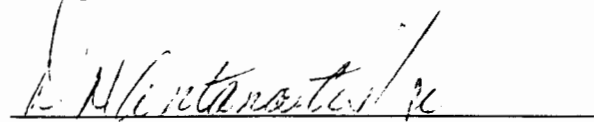
This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

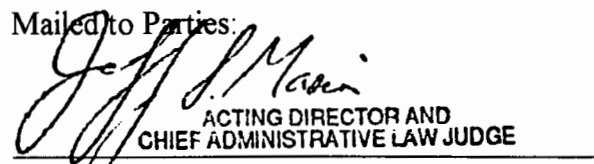
10/11/95
DATE


STEVEN C. REBACK, ALJ

10/11/95
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

OCT 19 1995
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

tmp

ELWIRA MICHALAK, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE LOWER :
 CAMDEN COUNTY REGIONAL HIGH :
 SCHOOL DISTRICT NO. 1, CAMDEN :
 COUNTY, :
 RESPONDENT. :

DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed.

Upon review, the Commissioner notes that the within petition on the merits was withdrawn by petitioner by letter dated June 16, 1995, and said withdrawal was duly approved in accordance with the Commissioner's decision of July 7, 1995, affirming the ALJ's denial of petitioner's application for emergent relief¹.

Accordingly, this matter is dismissed as of July 7, 1995, in accordance with the above-noted decision.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

¹ The initial decision of October 11, 1995 erroneously suggests that the Commissioner affirmed the ALJ's denial of emergent relief on June 15, 1995 in this matter "***through silence after 45 days from his receipt." (Initial Decision at p. 1)

236-95

LINDA BARCALOW, on behalf of the minor :
child, V.H.C., :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE MON- :
MOUTH REGIONAL HIGH SCHOOL :
DISTRICT, MONMOUTH COUNTY, :

DECISION

RESPONDENT. :

SYNOPSIS

Petitioner, host sponsor of V.H.C., an exchange student from Mexico, sought permission to allow V.H.C. to take part in the graduation processional and ceremony to receive a certificate of attendance or recognition, although he was not graduating.

ALJ denied petitioner's request for relief. ALJ found that throughout the years, the Board enforced its policy without exception. Exchange students are included in the ceremony and they are afforded recognition from the podium, but they are denied graduation and a processional where the exchange student has not earned the same credits as the graduates. Board's motion to dismiss was granted.

Commissioner concurred with findings and conclusions of the ALJ. Petition was dismissed.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4305-95

AGENCY DKT. NO. 92-4/95

**LINDA BARCALOW ON BEHALF OF
MINOR V.H.C.,**

Petitioner,

v.

**MONMOUTH REGIONAL HIGH
SCHOOL DISTRICT BOARD OF
EDUCATION, MONMOUTH COUNTY,**

Respondent.

Gene J. Anthony, Esq., for petitioner

Martin M. Barger, Esq., for respondent (Reussille, Mausner, Carotenuto, Bruno & Barger, attorneys)

Record Closed: May 3, 1995

Decided: May 23, 1995

BEFORE JOSEPH LAVERY, ALJ:

Petitioner, Linda Barcalow, asks that V.H.C., an exchange student, be allowed to participate in the June 1995 graduation processional and ceremony, with cap and gown, and to receive a certificate of attendance or recognition, although he will not be graduating.

Respondent, Monmouth Regional High School District Board of Education, contests the appeal, citing its policy of not allowing students who do not graduate to march in cap and gown.

PROCEDURAL HISTORY

On April 28, 1995, the Commissioner of Education declared this dispute a contested case, pursuant to *N.J.S.A.* 52:14B-9 and -10, by forwarding it the Office of Administrative Law (OAL) as an emergent matter. At the hearing on May 3, 1995, on petitioner's motion for emergent relief, the parties agreed that rapid plenary hearing and decision better served adjudication of the issues. Consequently, the matter went forward to full hearing on May 18, 1995, and an oral decision issued. Today's initial decision memorializes that ruling.

ANALYSIS OF THE RECORD

Background:

Petitioner is the host sponsor of V.H.C., an exchange student from Mexico. She has full power of attorney to act in the place of his parents. Her charge has attended Monmouth Regional High School since September 1994, and he has been a participating member of the soccer, swimming and track teams.

In March 1995, petitioner asked the district superintendent, Patrick Colum, to allow V.H.C. to take part in the graduation processional. Petitioner did not ask that V.H.C. be graduated. The boy will be formally graduating from his own school in Mexico this summer. Moreover, in March 1995 V.C.H. had not taken the High School Proficiency Test (HSPT), and had completed only one of the requisite two American History courses. There is no dispute that his schedule during the one year of his exchange presence could not have accommodated both courses. V.H.C. has since taken the HSPT, and no one expects him not to pass.

The superintendent denied petitioner's request, grounding his decision on Board policy which prohibits such participation by non-graduating exchange students. However, the superintendent did encourage having V.H.C. present in normal dress at the ceremony, where there would be oral recognition of the boy as part of the proceedings. The District custom is for exchange students to take their seats on the stage, with, but apart from, the graduates.

Not satisfied with this response, petitioner accumulated signatures on a petition to the Board, asking that V.H.C. be allowed to march in cap and gown. When the Board would not overrule the superintendent's position, petitioner brought the instant appeal. She now seeks the following relief:

1. Participation of V.H.C. in the graduation processional, with cap and gown.
2. Award at the ceremony of a certificate of recognition or attendance.
3. Award of compensatory damages.
4. Award of incidental and consequential damages.
5. Counsel fees.
6. Any other relief deemed equitable.

Arguments of the Parties:

Petitioner's argument:

Pointing out that V.H.C. had actively participated in the life of the school, and had developed many close friendships with his classmates, **petitioner** asked that the Board's policy be changed. She observed that exchange students in two other school districts had joined in graduation processionals. Additionally, petitioner claimed, within the past four years, one American student drop-out from the district, with insufficient credits to graduate, had obtained permission to join in the march with graduates, though he would not have graduated (the student cited eventually chose not to take part, petitioner acknowledged). Although petitioner subpoenaed the former student for the hearing on May 18, he did not appear.

In her own testimony, petitioner contended that at the beginning of V.H.C.'s school year she had spoken with a guidance counselor, who obtained confirmation from her supervisor that V.H.C. would participate in all activities undertaken by other seniors. Petitioner conceded that the guidance counselor did not define "participate," and the counselor did not specifically mention graduation as one of the senior activities. V.H.C. gave the same testimony with respect to the guidance counselor's statements. In addition, he recalled that other teachers and students offered assurances that V.H.C. actually would take part in the graduation ceremony.

As a matter of law, petitioner argues that the Board has violated education law, the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 through 10:5-42, and the federal Equal Educational Opportunities Act (EEOA), at 20 *U.S.C.A.* § 1701. Petitioner believes the Board has also deprived V.H.C. of his rights to substantive due process and equal protection under the U.S. Constitution. Further, in petitioner's view, V.H.C. has been denied his rights under the constitution of this State. She argues that it would be unfair and discriminatory to segregate V.H.C. on stage, since he is the only exchange student to be leaving this year.

The Board's reply:

The Board did not submit a reply brief. Instead it supplied testimony at the request of the administrative law judge (ALJ), and moved to dismiss at the end of petitioner's case.

When questioned by the ALJ, Superintendent **Patrick Colum** observed that he had been with the District since 1978. Throughout that time, the currently enforced policy concerning exchange students had been in place. Exchange students joined the graduation class on the stage, and were given oral recognition. They did not graduate, nor did they march in cap and gown. In like fashion, four-year District students who did not have the required credits for graduation also were barred from the processional, and from receiving a diploma or certificate of any kind.

The superintendent was certain that there had never been an exception to this policy. He had researched school records to find the student suggested by petitioner. Only one person of that name could be found. He had been assigned to another school in the district. Eventually, he

dropped out, not four, but seven years ago. There was no record of any request, or documented permission, for that student to march in the Monmouth Regional High School graduation. Superintendent Colum observed that his permission would have been required for such an exception in any case. He added that neither he, the school principal, nor the director of guidance had ever informed petitioner that an exception would be made.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact:

To resolve the only material facts disputed, I make the following **FINDINGS**:

1. From at least 1978, the District policy has been to include non-graduating exchange students in the ceremony at Monmouth Regional High School. However, that participation has been limited to seating on stage with the graduates, without cap and gown, and without marching in the processional. Instead of a diploma or certificate, they are given oral recognition by the presiding school officials.
2. The District policy also prohibits students who are four-year students from participating in the processional, and from wearing caps and gowns, if they have not accrued enough academic credits to graduate. No one lacking that status, whether domiciled District student or resident exchange student, has ever been granted an exception to this policy by school officials with requisite authority.

Conclusions of Law:

The burden of proof:

Petitioner must prove her case by a preponderance of the credible evidence, which is the standard in administrative proceedings. *Atkinson v. Parsekian*, 37 N.J. 143 (1962). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be

such as to lead a reasonably cautious mind to a given conclusion. *Bornstein v. Metropolitan Bottling Co.*, 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. *State v. Lewis*, 67 N.J. 47 (1975). Credibility, or more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. *Spagnuolo v. Bonnet*, 16 N.J. 546, 554-55 (1954).

The controlling legal standard:

The legal standard to be applied here is well-settled. Petitioner must demonstrate with preponderating evidence that the Board's action exceeded the reasonable use of its broad discretionary powers. The Board's decision may not be upset unless it can be demonstrated to be patently arbitrary, capricious or unreasonable. *Kopera v. West Orange Bd. of Educ.*, 60 N.J. Super. 288, 294 (App. Div. 1960). In the absence of such anomaly, the ALJ cannot recommend reversal, nor can the Commissioner intervene to do so.

The facts of record disclose that the Monmouth Regional High School District Board of Education acted within the acceptable limits of its discretion: No student who is not graduating may march in the processional, be seated in cap and gown, or receive a diploma or certificate.

Petitioner does not dispute that the Board has power to set policy for the graduation ceremonies. Instead, she believes the policy should be changed, or that an exception should be made for V.H.C. In her concern for her charge as host sponsor, petitioner's insistence is understandable. Nevertheless, she has not proven the Board's policy to be arbitrary, capricious or unreasonable, and only such proof can reverse its action.

Throughout the years, the Board has enforced its policy without exception. Significantly, exchange students *are* included in the ceremony, and they *are* afforded recognition by officials from the podium. What is denied is graduation and a processional where the exchange students have not earned the same credits as the graduates. This is not an unlawful classification. Members of the class are barred whether they are students domiciled in the District for four years, or

shorter-term exchange students from other countries. Despite petitioner's complaint, no law cited or found obligates the Board to alter its course schedule so that one-year exchange students can accrue the necessary credits to graduate.

Petitioner's legal arguments:

Even if it were to be assumed, solely for the purpose of addressing petitioner's legal arguments, that the benefit of our constitution and laws would be relevant to students in an exchange program, petitioner cannot obtain relief here.

First, administrative agencies have power to pass on constitutional issues only where relevant and necessary to the resolution of a question concededly within their jurisdiction, *Christian Bros. Inst. v. Northern N.J. Interschol. League*, 86 N.J. 409, 416 (1981). There is no need to explore constitutional relevance where it can be found that the Board satisfies the *Kopera* standard.

Second, petitioner has not cited any specific section violated in the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 through N.J.S.A. 10:5-42. More to the point, she has not made a *prima facie* showing of intent to discriminate. The Board has maintained its policy uniformly. No evidence suggests that it has done so for purposes of excluding anyone other than those who are not eligible to graduate. This is plainly a "legitimate, nondiscriminatory reason," not in any way pretextual, and within sound discretion. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-56, 67 L. Ed. 2d 207, 215-17, 101 S. Ct. 1089, ___ (1981).

Third, relief from an ostensible violation of the Equal Educational Opportunities Act must be sought in a different forum:

An individual denied an equal educational opportunity, as defined by this subchapter may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate. The Attorney General of the United States (hereinafter in this chapter referred to as the

“Attorney General), for or in the name of the United States, may also institute such a civil action on behalf of such an individual.

[20 U.S.C.A. § 1706]

The appropriate district court of the United States shall have and exercise jurisdiction of proceedings instituted under section 1706 of this title.

[20 U.S.C.A. § 1708]

It can be seen that the Commissioner of Education and, therefore, this tribunal lack jurisdiction to entertain petitioner’s EEOA claim.

The Board’s motion to dismiss:

On the facts and the law, petitioner has not demonstrated a right to relief. She has failed to introduce any evidence which, taken together with all favorable inferences possible, would sustain a judgment in her favor. She has not entered a *prima facie* case. *Cf. Pressler, Current N.J. Court Rules*, comment on *R. 4:37-2* (1995). The Board’s motion must therefore be granted.

ORDER

I ORDER therefore that petitioner’s request for relief be **DENIED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is

otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 23, 1995

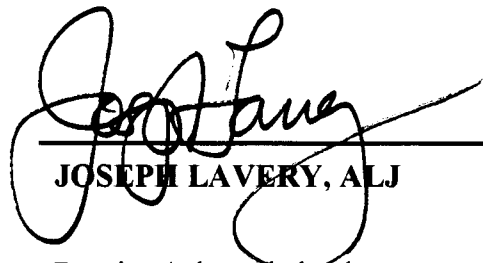
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MAY 26 1995

DATE



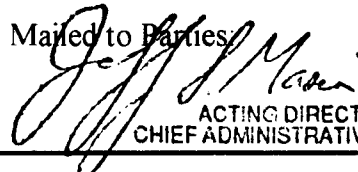
JOSEPH LAVERY, ALJ

Receipt Acknowledged:



DEPARTMENT OF EDUCATION

Mailed to Parties



ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

WITNESS LIST

For petitioner:

V.H.C.
Linda Barcalow

For respondent:

Patrick Colum

DOCUMENTS IN EVIDENCE

For petitioner:

None

For respondent:

None


LINDA BARCALOW, on behalf of the minor :
child, V.H.C., :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE MON- : DECISION
 MOUTH REGIONAL HIGH SCHOOL :
 DISTRICT, MONMOUTH COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ) that Respondent Board's policy concerning participation in its graduation ceremonies may not be upset unless it can be demonstrated to be patently arbitrary, capricious or unreasonable. Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). The Commissioner further concurs with the ALJ that the Board's decision to prohibit the exchange student under petitioner's charge from walking in its graduation procession in full cap and gown, where the student did not earn a high school diploma, did not exceed the reasonable use of the Board's broad discretionary authority.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision of the Office of Administrative Law and finds that the within Petition of Appeal must be dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

JUNE 30, 1995

DATE OF MAILING JUNE 30, 1995 - 12 -

237-95

REGINALD JONES,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF PATERSON, PASSAIC	:	
COUNTY,	:	
	:	
RESPONDENT.	:	



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10604-94

AGENCY REF. NO. 422-10/94

REGINALD JONES,

Petitioner,

v.

**State-Operated School District of
the CITY OF PATERSON,**

Respondent

Mary J. Hammer, Esq., for petitioner
(Bucceri & Pincus, attorneys)

Gregory G. Johnson, Esq., Special Counsel, for respondent

Record Closed: May 26, 1995

Decided: May 30, 1995

BEFORE: JEFFREY A. GERSON, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 31, 1994 for a hearing pursuant to *N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached documents.

Having reviewed the contents of the attached documents, I **FIND** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached documents meet the requirements of *N.J.S.A. 1:19.1* and I **HEREBY** approve same. In conjunction therewith, I **ORDER** that the parties comply with their contents and that these proceedings be (and are hereby) **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

MAY 30 1995
DATE

6/1/95
DATE

JUN 2ND 1995
DATE

[Signature]
JEFFREY A. GERSON, ALJ

Receipt Acknowledged:
[Signature]

DEPARTMENT OF EDUCATION
[Signature]
Mailed to Parties
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

R. JONES

MAY 26 11 04 AM '95

IN THE MATTER OF THE TENURE HEARING OF REGINALD JONES, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW O.A.L. DOCKET NO. EDU 1064-94 AGENCY REF. NO. 422-10/94 SETTLEMENT AGREEMENT
---	---

The parties hereby agree as follows relative to the tenure charges filed against the respondent Reginald Jones by the petitioner, State Operated School District of the City of Paterson ("District"):

1. The district certified tenure charges against the respondent on October 11, 1994.
2. The respondent filed his Answer to the charges on October 24, 1994.
3. On January 18, 1995, a prehearing conference in this matter was conducted by the Honorable Jeffrey Gerson, A.L.J. The following dates were set aside for the hearing, May 18 and 19, 1995.
4. The respondent, Mr. Jones, tenders his resignation to be effective July 1, 1995.
5. The District hereby agrees, upon receipt of the signed settlement agreement and written resignation, to withdraw the tenure charges filed with the Commissioner on October 17, 1994, Agency Ref. 422-10/94 and O.A.L. Docket No. 10604-94N.

6. Respondent shall remain on the District's payroll until June 30, 1995. All rights to salary and any fringe benefits, including sick leave will cease as of July 1, 1995.

assuming this agreement is approved by the Commissioner of Education and Administrative Law Judge. If the commissioner of Education disapproves this settlement, the resignation of the respondent, a copy of which is attached hereto, shall be null and void.

7. The parties respectively acknowledge that each has had ample opportunity to seek independent legal counsel, financial or other advice regarding this agreement, and that each is signing this Agreement freely and voluntarily, without coercion, duress or pressure from the other party.

8. By entering this Agreement, each party releases and discharges the other with respect to all claims of rights that either party may have against the other. This includes all claims, including those of which either party is not aware and those not mentioned herein. The releases by each party apply to all claims resulting from anything which has happened up to now. It specifically includes, without limitation, all claims which Jones may have respecting tenure, discrimination on any basis, rights under any collective bargaining agreement, disability payments, sick leave, salary or any other matter pertaining to his employment.

9. This Agreement is subject to approval by the Office of Administrative Law and the Commissioner of Education.

FOR THE RESPONDENT

FOR THE STATE-OPERATED SCHOOL DISTRICT OF PATERSON

Reginald Jones
Reginald Jones

Laval S. Wilson^{MSW}
Dr. Laval S. Wilson

Dated: 5-15-95

Dated: _____

Mary J. Hammer
Mary J. Hammer

Louis M. Flora
Louis M. Flora, ESQ.

Dated: 5-15-95

Dated: May 16, 1995

RECEIVED

MAY 26 11 04 AM '95

STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL

REGINALD JONES
307 NINTH AVENUE
PATERSON, NEW JERSEY 07514-2308

JULY 1, 1995

Leval Wilson, State Superintendent
State-Operated School District of Paterson
33-35 Church Street
Paterson, NJ 07505-1306

Re: Letter of Resignation

Dear Dr. Wilson:

I hereby tender my resignation effective July 1, 1995.

Respectfully submitted,


Reginald Jones

/lg

REGINALD JONES,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF PATERSON, PASSAIC	:	
COUNTY,	:	
	:	
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.


 COMMISSIONER OF EDUCATION

JUNE 30, 1995

DATE OF MAILING JUNE 30, 1995 3

238-95

DAVID THOMAS,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF TRENTON, MERCER COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

OAL DKT. NO. EDU 9906-94

DAVID THOMAS, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE CITY : DECISION
 OF TRENTON, MERCER COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

:
 COMMISSIONER OF EDUCATION

JULY 5, 1995

DATE OF MAILING JULY 5, 1995

239-95

BOARD OF EDUCATION OF THE
BOROUGH OF COLLINGSWOOD,
CAMDEN COUNTY,

:
:

PETITIONER,

:

COMMISSIONER OF EDUCATION

V.

:

DECISION

CHARLES J. AMET,

:

RESPONDENT.

:


JULY 5, 1995

OAL DKT. NO. EDU 9849-94

BOARD OF EDUCATION OF THE :
BOROUGH OF COLLINGSWOOD, :
CAMDEN COUNTY, :
PETITIONER, : COMMISSIONER OF EDUCATION
V. : DECISION
CHARLES J. AMET, :
RESPONDENT. :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

JULY 5, 1995

DATE OF MAILING JULY 5, 1995

240-95

BOARD OF EDUCATION OF THE
BOROUGH OF FAIR LAWN, BERGEN
COUNTY,

PETITIONER,

V.

SHARON KELLER, TOM KELLER
AND EDWARD FELDMAN,

RESPONDENTS.

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COMMISSIONER OF EDUCATION

DECISION

OAL DKT. NO. EDU 5993-91

BOARD OF EDUCATION OF THE
BOROUGH OF FAIR LAWN, BERGEN
COUNTY,

PETITIONER,

V.

SHARON KELLER, TOM KELLER
AND EDWARD FELDMAN,

RESPONDENTS.

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COMMISSIONER OF EDUCATION

DECISION

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

JULY 6, 1995

DATE OF MAILING JULY 6, 1995

OAL DKT. NOS. EDU 4128-94 AND 6961-93 (CONSOLIDATED)

BOARD OF EDUCATION OF THE
BOROUGH OF RIVERDALE, MORRIS
COUNTY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE
BOROUGH OF KINNELON, MORRIS
COUNTY,

RESPONDENT.

AND

BOARD OF EDUCATION OF THE
BOROUGH OF KINNELON, MORRIS
COUNTY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE
BOROUGH OF RIVERDALE, MORRIS
COUNTY AND BOARD OF EDUCATION
OF THE BOROUGH OF POMPTON LAKES,
PASSAIC COUNTY,

RESPONDENTS.

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COMMISSIONER OF EDUCATION

DECISION

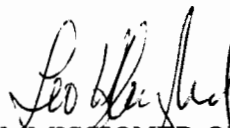
OAL DKT. NOS. EDU 4128-94 AND 6961-93 (CONSOLIDATED)

BOARD OF EDUCATION OF THE	:	
BOROUGH OF RIVERDALE, MORRIS	:	
COUNTY,	:	
	:	
PETITIONER,	:	
	:	
V.	:	
	:	
BOARD OF EDUCATION OF THE	:	
BOROUGH OF KINNELON, MORRIS	:	
COUNTY,	:	COMMISSIONER OF EDUCATION
	:	
RESPONDENT.	:	DECISION
	:	
AND	:	
	:	
BOARD OF EDUCATION OF THE	:	
BOROUGH OF KINNELON, MORRIS	:	
COUNTY,	:	
	:	
PETITIONER,	:	
	:	
V.	:	
	:	
BOARD OF EDUCATION OF THE	:	
BOROUGH OF RIVERDALE, MORRIS	:	
COUNTY AND BOARD OF EDUCATION	:	
OF THE BOROUGH OF POMPTON LAKES,	:	
PASSAIC COUNTY,	:	
	:	
RESPONDENTS.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The

Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

JULY 6, 1995

DATE OF MAILING JULY 6, 1995

242-95E

S.K., on behalf of her minor child, T.T.,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION ON MOTION
	:	
BOARD OF EDUCATION OF THE CITY	:	
OF CLIFTON, PASSAIC COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

JULY 7, 1995

S.K., on behalf of her minor child, T.T., :
PETITIONER, : COMMISSIONER OF EDUCATION
V. : DECISION ON MOTION
BOARD OF EDUCATION OF THE CITY :
OF CLIFTON, PASSAIC COUNTY, :
RESPONDENT. :
_____ :

For Petitioner, Katie Stylianou, Esq. (Stylianou & Fonseca)

For Respondent, Anthony D'Elia, Esq.

This matter was opened before the Commissioner of Education on June 21, 1995, by way of a Petition of Appeal and Motion for Emergent Relief filed by S.K., on behalf of her minor son, T.T., seeking an order permitting T.T. to participate in graduation ceremonies from high school on June 21, 1995. On June 16, 1995, the principal of the high school denied petitioner's appeal, finding that T.T. was ineligible to graduate because of his asserted failure to successfully complete an arts and crafts course, resulting in insufficient course credit.

This matter was filed with the Commissioner after petitioner attempted to resolve this matter on the local level with the high school principal but testified that telephone calls and to the district superintendent were not returned. Additionally, petitioner was not informed that there was a school board meeting scheduled for June 21, 1995 where this matter could have been addressed.

On June 22, 1995, oral argument was heard by telephone conference call by Gary T. Reece, Assistant Commissioner for Standards and Assessment, who was designated to hear and decide this matter, pursuant to the Commissioner's authority under N.J.S.A. 18A:4-34. Upon consideration of arguments, the Assistant Commissioner found that petitioner had met the standards for granting injunctive relief set forth in Crowe v. DeGioia, 90 N.J. 126 (1982) and granted emergent relief permitting T.T. to participate in graduation ceremonies.

Petitioner was advised of the decision telephonically on June 22, 1995. The Crowe standards required petitioner to show that T.T. would be irreparably harmed if not permitted to attend the graduation ceremony, that T.T. has a substantial likelihood of prevailing on the merits of the claim, and that in balancing the interests of the parties, the harm to T.T. would be greater than the harm to the Board of Education should the requested relief not be granted.

The Clifton Board requires its pupils to achieve 130 cumulative credits in order to graduate. Petitioner asserted that the failing mark that T.T. received in Arts and Crafts in his senior year, which resulted in his being denied a high school diploma and participation in graduation ceremonies, was arbitrary, capricious and an abuse of discretion. Petitioner disputes the reasonableness of the method used by respondent to compute T.T.'s final grade, arguing that while T.T. received a 67 for the year, when 70 was necessary to pass, the teacher's grade was discretionary and based on a personal conflict with the student. Petitioner presented T.T.'s report card which evidenced that he had average grades in other subjects, including a very high average in Paint and Draw, another class requiring art skills. Petitioner also asserted that T.T. had a solid attendance record.

In response, the Board argues that T.T. did not meet the stated requirements of 130 credits to graduate, and that in order to uphold academic standards, he should not be allowed to participate in the graduation ceremony or receive a diploma. The Board does not dispute that T.T. had a solid record of attendance, nor did it provide such attendance record for review.

A weighing of the arguments of the parties leads the Assistant Commissioner to conclude that petitioner has demonstrated entitlement to injunctive relief. Petitioner has established that T.T. passed all required courses, that he has passed the HSPT11, that T.T.'s Arts and Crafts grade could be subjective, that he earned a third marking period grade of 85 in this course, as well as the fact that he was only three points within passing the course and graduating. Also, the Assistant Commissioner noted that the district did not provide a fourth marking period and final exam grade for review as was requested by him, nor did the district provide contrary evidence or testimony to the petitioner's assertion that T.T. had a solid attendance record. Based on these factors, the Assistant Commissioner found a likelihood of success on the merits. Additionally, a weighing of the equities demands this result as the Assistant Commissioner was particularly mindful that despite her attempts, petitioner was not able to have this matter addressed on the local level, nor was petitioner notified that there was a Board meeting scheduled June 21, 1995, where this matter may have been addressed.

Accordingly, the Motion for Emergent Relief is granted and the matter is ordered transmitted to the Office of Administrative Law for further proceedings.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Gary T. Beece". The signature is fluid and cursive, with a prominent initial "G" and a long, sweeping underline.

ASSISTANT COMMISSIONER OF EDUCATION

JULY 7, 1995

DATE OF MAILING JULY 7, 1995

JEROME ELSON, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE :

HUDSON COUNTY AREA VOCA- :

TIONAL-TECHNICAL SCHOOLS, :

HUDSON COUNTY, :

RESPONDENT. :

DECISION

SYNOPSIS

Petitioner, former school psychologist and child study team member who was rified, alleged his tenure and seniority rights were violated by the Board's use of Independent Child Study Teams, Inc. (ICST) to provide child study team and school psychologist services for the pupils in the district.

Having considered the record and the testimony of witnesses, the ALJ concluded that petitioner's claims were not moot, that the provision of services contracted for by the Board with ICST did not constitute supplemental independent child study team evaluations and/or child study team diagnostic services, that provision of such services was contrary to N.J.A.C. 6:28-5.1(c)1i, that the Board should have offered petitioner a part-time position for the 1993-94 school year and that if petitioner is reemployed by the Board in the future, petitioner is entitled to seniority for the period from August 10, 1993, the effective date of the contract with ICST, through August 12, 1994, the date of petitioner's notification to the Board that he was declining part-time employment for the 1994-95 school year. ALJ ordered that petitioner be deemed to have seniority with the Board for the period from August 10, 1993 through August 12, 1994 on a part-time basis.

Commissioner adopted findings and determination in initial decision as his own.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 12011-93

AGENCY DKT. NO. 401-12/93

JEROME ELSON,

Petitioner,

v.

**HUDSON COUNTY AREA
VOCATIONAL-TECHNICAL
SCHOOLS BOARD OF EDUCATION,**

Respondent.

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

Alexander W. Booth, Jr., for respondent
(Brownstein, Booth & Barry, attorneys)

Record Closed: April 12, 1995

Decided: May 30, 1995

BEFORE **DIANA C. SUKOVICH.,** ALJ:

PROCEDURAL HISTORY

On December 1, 1993, Jerome Elson (petitioner or Elson) filed a petition with the Commissioner of the Department of Education (DOE) contesting action by the Hudson County Area Vocational-Technical Schools Board of Education (respondent or Board). The Board filed an answer on December 13, 1994, and the DOE transmitted the matter to the Office of Administrative (OAL) on December 16, 1993 for determination as a contested case pursuant to *N.J.S.A. 52:14F-1 to -13*.

Conferences were conducted throughout the proceedings. Hearings scheduled for October 1994 were adjourned because petitioner was in a car accident. A hearing was held on March 15, 1995. Post-hearing memoranda were filed by Elson and respondent on April 7 and April 12, 1995, respectively. The record was closed on April 12, 1995.

NATURE OF THE CASE

Elson is a certified school psychologist who was employed by the Board on one of its child study teams (Teams). Petitioner was previously subject to a reduction in force (RIF). The Board subsequently contracted certain services, including those of Team psychologist, to an outside private child study team. Petitioner argues that he should have been rehired because of his seniority. The issue in this respect focuses on whether respondent's determination to contract services out to a private team was consistent with *N.J.A.C. 6:28-5.1*. The case also raises issues regarding what relief, if any, can be awarded to petitioner if he prevails. Elson has been employed by another district at a higher salary.

STIPULATIONS

The parties stipulated to the following facts:

1. Petitioner holds an Educational Services Certificate with an endorsement as a school psychologist.
2. Petitioner was employed by respondent as a school psychologist. As a result of his service with respondent, petitioner gained tenure pursuant to *N.J.S.A. 18A:28-5*.

3. While employed by respondent, petitioner was a member of the school district's Team.
4. Petitioner was initially employed by respondent, effective September 1, 1981. His position of employment was abolished, and his employment was terminated, effective June 30, 1989. (Ex. J-1).
5. A copy of respondent's adopted job description for the position of School Psychologist is Ex. J-2.
6. On June 1, 1993, respondent adopted the following resolution:

BE IT RESOLVED THAT this Board of Education does hereby ratify, confirm and approve the submission of the Agreement for Examination and Classification Services for the 1993-1994 school year between the Hudson County Area Vocational-Technical Schools' District and Independent Child Study Teams, Inc. as attached. (Ex. J-3).

A copy of the Agreement in question is Ex. J-4.

7. The proposed agreement (Ex. J-4) was submitted to the Hudson County Superintendent of Schools (County Superintendent) for review and approval. The County Superintendent did not approve the proposed agreement and requested certain modifications.
8. On August 10, 1993, respondent adopted the following resolution:

BE IT RESOLVED THAT this Board of Education does hereby approve the Agreement between the Hudson County Area Vocational-Technical Schools' District and the Independent Child Study Team, Inc. as

amended and attached, for the 1993-1994 school year. (Ex. J-5).

9. A copy of the agreement to which reference is made in respondent's August 10, 1993 resolution is Exhibit J-6. This agreement is dated August 13, 1993.
10. The agreement dated August 13, 1993 (Ex. J-6) was submitted to the County Superintendent for review and approval.
11. The agreement of August 13, 1993 was approved by the County Superintendent, as set forth in his letter dated October 4, 1993. (Ex. J-7).
12. Requisition forms for services provided by Independent Child Study Teams, Inc. (ICST), dated March 24, 1994 and May 31, 1994, are Exs. J-8 and J-9.
13. Respondent has not continued the use of services from ICST for the 1994-95 school year.
14. By letter dated August 9, 1994, respondent offered petitioner part-time employment for the 1994-95 school year. (Ex. J-10).
15. By letter dated August 12, 1994, counsel for petitioner notified counsel for respondent that petitioner was unable to accept the offer. (Ex. J-11).
16. A document captioned "Specifications for Child Study Team Services in Compliance with *N.J.A.C. 6:28-1.1 et seq.*" was prepared by ICST and provided to respondent as an indication of services it was capable of providing. (Ex. J-12). Not all such listed services were utilized by respondent.

FINDINGS OF FACT

Petitioner testified on his own behalf. Petitioner also presented the testimony of Joseph P. Sirangelo (Sirangelo), respondent's Assistant Superintendent in charge of the Business Office; Alexander DeNoble (DeNoble), the Director of Special Services for the Board; and Dr. Lisa Tomasini (Tomasini), a psychologist under contract with ICST who provided services to respondent during the school year in question. DeNoble also testified on behalf of respondent.

Sirangelo, DeNoble, and petitioner testified regarding the provision of services to classified students in general in the district. DeNoble and Sirangelo also testified regarding the determination to enter into a contract with ICST and the nature of the services provided. Tomasini testified in more detail in the latter respect, focusing on the services which she rendered. Elson also testified regarding his employment subsequent to the RIF and his reaction to a subsequent offer for employment with the Board.

All of the witnesses were credible. Their testimony was not discredited on cross-examination and is not in dispute. It is clear that the material facts are not contested. The dispute focuses on how the services rendered to the Board by ICST should be characterized pursuant to the pertinent regulation.

Based upon a review of the entire record, I **FIND** the following to be **FACTS**.

The district is composed of three high schools, which are located in Bayonne, North Bergen, and Jersey City, New Jersey. The process leading to execution of a contract between ICST and respondent commenced in early 1993, when the Board started budgeting for positions for its Teams. Approval was received at the State level by February 1993. DeNoble, who is respondent's Director of Special Services, recommended the provision of additional services. Although he did not specifically recommend ICST, he reviewed the pertinent contract documents.

At the time, respondent had a child study team consisting of three professionals, employed on a full-time basis, and an additional learning consultant, also employed full-time. DeNoble requested an additional Team. In approximately December 1992, a special education plan, submitted under DeNoble's auspices, was provided to the Board. The plan identified the need for the following school year for an additional Team, providing services "as needed." The Board approved the proposal for another Team to provide all services, including social worker, psychologist, and learning consultant services, sometime between November 1992 and January 1993.

The document entitled "SPECIFICATIONS FOR CHILD STUDY TEAM SERVICES IN COMPLIANCE WITH N.J.A.C. 6:28-1.1 ET. SEQ." (Ex. J-12) was initially attached to the initial draft contract (Ex. J-4). Both documents were drafted by ICST. The County Superintendent communicated to Sirangelo that he (the County Superintendent) preferred that the specifications document not be included with the contract. The only change between the initial draft contract and that executed by ICST and respondent was deletion of the specifications document. The term of the executed contract was September 1, 1993 through June 30, 1994.

Subsequent to approval of the executed contract by the County Superintendent, the first meeting between respondent's personnel and that of ICST personnel occurred in late October 1993. ICST commenced providing services to students of the Board, pursuant to the executed contract, in November 1993. In general, ICST personnel provided evaluation and diagnostic services relevant to the areas of psychologist, learning consultant, and social worker services.

Respondent's in-house Team determined which students needed special education services and the type of such services. Initial evaluations were performed by members of respondent's Team. Respondent's Team performed evaluations still required by late 1993. Team members decided which member of the ICST team would provide services for individual students for annual reviews. Specific assignments were

transmitted by respondent to ICST personnel, who, in turn, distributed them among Tomasini and the other consultants. All documents were typed by ICST personnel.

The ICST social worker assigned to respondent, Judy Gibbons, provided annual review services to the Board, including diagnostic services, completion of social histories, including meeting with parents and obtaining information pertaining to the family, and diagnostic/evaluation services. These services were provided during school hours, 8:30 a.m. until 3:00 p.m. ICST personnel also conducted student observations during school hours, interviewed teachers, and participated in the development of individual educational plans (IEPs) for students. The ICST social worker participated in the entire evaluation process, up to the conference with parents. ICST also provided related clerical services to the Board, which represented one of respondent's "greatest needs" at the time.

The ICST learning consultant was not available commencing in approximately February 1994 and was replaced in approximately April 1994. When available, the ICST learning consultant provided reevaluation and diagnostic services to respondent. These included educational assessments, classroom observations, records reviews, teacher interviews, standardized educational evaluations, and other testing. The ICST consultant performed complete educational assessments, including participation in reevaluations and the development of IEPs, up to the point of the conducting of a parent conference. When the learning consultant left, Tomasini filled the void. Initially, it was contemplated that the learning consultant would be responsible for fifty percent of the caseload assigned to ICST by respondent.

Reevaluations in general incorporate standard tests, the development of IEPs, and presentation of IEPs to students' parents. In general, reevaluations are conducted every three years for a particular student. Diagnostic services are, in general, provided on an annual basis unless there are major program changes or extenuating circumstances.

ICST personnel did not provide any follow-up services required pertinent to annual reviews and reevaluations. They also were not involved in implementation of IEPs. None of the ICST consultants provided counseling services to students. Such services, which are generally provided to a school district, include consultations with teachers regarding texts, the provision of and attendance at work shops, appointment to committees, the design of new programs, and case manager duties. ICST personnel were not involved in the operation of resource centers in the district, the provision of work-shops to Board personnel, and the development of long-range plans, programs and policies. ICST personnel were not involved at any time subsequent to the conducting of parent meetings, at which time a final IEP draft was completed. Subsequent to parent meetings, case management functions came into play and were provided by respondent's in-house Team.

Respondent's full-time school psychologist on the in-house Team during the period in question was Stephanie Saracino (Saracino); its learning consultant, Ann Gerardi (Gerardi), and its social worker; Eugene Wallace (Wallace). The part-time learning consultant, Veronica Romano (Romano), divided her time among the three school facilities which comprise the district.

Tomasini's primary interaction with respondent's personnel was with Saracino, although Tomasini also had contact with DeNoble. Saracino provided an introduction to ICST personnel with respondent's system and functioned as the case manager for annual reviews. Tomasini did the "leg work" and provided IEP documentation for Saracino for the latter's ultimate approval. Gerardi, in addition to Saracino, also reviewed recommendations of ICST personnel pertinent to reevaluations.

Tomasini provided school psychologist services to respondent during the 1993-94 school year. She was employed by ICST at the time. Tomasini's first meeting with Board personnel, DeNoble and Saracino, was in October 1993. Tomasini commenced providing services to respondent early in November 1993.

Tomasini functioned as an independent consultant to the Board. As such, she did not have a regular schedule with respondent, but was present at school facilities according to her work load, which varied. Services required were more intensive during the spring. During such periods, she worked from approximately 10:00 a.m. until 2:00 p.m., four days a week. Tomasini completed the work required for the Board by the end of May 1994 or early June 1994. Except for reports which she typed at home on her computer, Tomasini provided all services rendered to respondent at the Board's facilities. The bulk of her time was devoted to evaluations and the provision of diagnostic services. During the 1993-94 school year, Tomasini, on average, worked the equivalent of a half-time employee.

In general, Tomasini provided services to respondent in the nature of testing, preparation of reports, preparation of IEPs, including responsibility for IEPs in certain cases, and diagnostic services. She also had contact with students, parents, and teachers. However, Tomasini did not provide any follow-up services nor counseling services. These were provided by in-house Team members. In certain cases, Tomasini was designated as a "sub-case manager." Saracino functioned as case manager.

For those students assigned to Tomasini, both Tomasini and another ICST consultant provided reevaluation services. Consultants from two different disciplines were always assigned by ICST to perform reevaluations. ICST also provided, as needed, other consultants, such as psychiatrists, for reevaluations.

Services provided by Tomasini in reevaluations included administration of intelligence tests, class observations, teacher interviews, administration of other tests, such as projective and coordination tests, review of student records, determinations as to eligibility for services, development of IEPs, including classification and programs, and the conducting of meetings with parents for a review of results. She spent approximately two to three hours' time on the preparation of IEPs, including interaction

with students and parents. The time spent by Tomasini in a particular case for writing reports and evaluations totaled several hours.

Tomasini also provided diagnostic services, leading to annual reviews, for respondent, not including testing and preparation of reports for students. Services for particular students, in other respects, were the same as those provided in reevaluations. She was involved in this respect in updating IEPs consistent with a student's current or changed needs. Tomasini was the only ICST personnel who provided diagnostic services.

After receiving documents, respondent's personnel communicated any questions or changes desired to ICST personnel during an "interactive" period subsequent to the transmission of reports to the Board. Respondent's personnel did not make "official changes." Comments were communicated to Tomasini, who met with parents, and whose "name" was on the IEP.

During the 1993-94 school year, Tomasini was involved in 30 to 40 reevaluations for respondent. She participated in approximately 100 annual reviews. Tomasini earned between \$22,000 and \$23,000 during her tenure with ICST as a result of services she performed for respondent.

Pursuant to the contract, payments by respondent to ICST were based on the number of evaluations performed by ICST personnel. ICST's work product was ultimately reviewed by DeNoble, who then referred matters to Sirangelo for payment. It was Sirangelo's responsibility to review vouchers and approve payments.

During the 1993-94 school year, approximately 200 annual reviews were performed for students of respondent. ICST personnel participated in 116 of them. A total of approximately 60 reevaluations were conducted; ICST personnel participated in 33. Two hundred diagnostic services were performed. ICST personnel provided 116.

Personnel on respondent's in-house Team participated in all the evaluations. ICST provided the following services to respondent during the year in question:

<u>Nature of Services</u>	<u>Number of Students</u>	<u>Costs</u>
Diagnostic Services	116 students	\$34,800
Psychological	9 students	3,600
Educational Assessment	8 students	3,200
Social Assessments	3 students	1,200
Reevaluations (2 components)	23 students	18,400
Reevaluations (3 components)	1 student	<u>1,200</u>
Total Costs		\$62,400

Those classified students spending approximately one-half of their school time in the sending district and one-half in respondent's facilities are referred to as "shared time" students. Responsibility for services provided to shared time students was largely with the sending school districts; those students included out-of-district students but children from within Hudson County. Classified students spending all of their time in the Board's facilities are referred to as "full-time students." As of 1989, there was a shared time special needs education program at the Jersey City and North Bergen centers, the two centers in existence at the time. Respondent employed a full-time special education teacher. During the prior ten years, none of the shared time special needs program students were mainstreamed.

There are differences between the current special education program operated by the Board and that in existence in 1989. At the current time in respondent's district in its entirety, there are 600 students classified. There are 100 students in the shared time program who are mainstreamed. Respondent provides some services, such as resource room availability, to approximately thirty. The individual currently functioning as a second learning consultant has responsibility for liaison with the three centers pertaining to the shared students. One hundred forty students in the full-time program are mainstreamed; for the others, the Board has primary responsibility regarding the development of IEPs, annual reviews, plus reevaluations and the delivery of

educational services. Their sending school districts have responsibility for evaluations and annual reviews.

During the time Elson last was employed by the Board, he was assigned to what was referred to as "Team B," which was designed to "supplement" another team of the Board, referred to as "Team A," based on services Team A felt they could not handle. Such services included, for example, providing testing, reevaluations, and "leg work" to students in respondent's shared time program. Team A was involved in some reevaluations. In general, Team B handled the "surplus" caseload of Team A regarding full-time students in addition to admission responsibilities pertaining to shared time students.

Petitioner worked at facilities located in Jersey City and North Bergen. He was involved in any follow-up needed, generally for shared time, not full-time, students. Elson was involved in annual reviews, reevaluations, the entire diagnostic process, and any required follow-up. Petitioner's responsibilities when involved in annual reviews included interactions with teachers, attendance at meetings, etc.

Respondent's current staffing of Team members includes a full-time psychologist at an annual salary of \$75,000 and the equivalent of 30 percent thereof in benefits and a social worker and learning consultant, each earning an annual salary of \$40,000, with benefits. During the 1994-95 school year, Tomasini has been employed by petitioner directly on a part-time, per diem basis, working two days per week for the Board. The services she provides are more expansive than those she rendered when employed as a consultant by ICST and include the provision of counseling services, attending and providing workshops, involvement in annual reviews and reevaluations, and case manager duties for those students to whom she is assigned.

Elson is currently employed by the Irvington, New Jersey, school district on a full-time basis as a school psychologist. His annual salary is \$67,000, and his benefits include pension and health benefits. Elson commenced this employment three days

subsequent to termination by respondent, and he has tenure in the Irvington district. His salary during the 1993-94 school year was \$64,000.

Elson never inquired of respondent's personnel concerning the salary of the part-time position which he was offered for the 1994-95 school year, and they never informed him. Respondent did not offer petitioner employment for the 1993-94 school year. Petitioner was the first individual to whom respondent offered the part-time position available for the 1994-95 school year.

The August 12, 1994 letter submitted by Elson's counsel on petitioner's behalf to the Board stated that petitioner was unable to accept the position for economic reasons because "the part-time position will not provide a salary necessary to support Mr. Elson and his family." (Ex. J-11). The letter stressed that it was not a waiver of any tenure or seniority rights petitioner might have to any full-time positions in respondent's district and that petitioner was ready and willing to accept a full-time position, if available.

DISCUSSION

The Commissioner of the DOE (Commissioner) generally has jurisdiction to hear and determine all controversies and disputes arising under the school laws. *N.J.S.A. 18A:6-9*.

The services of teaching staff members serving in any school district or under any board of education shall be under tenure during good behavior and efficiency, and such individuals shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause. *N.J.S.A. 18A:28-5*. (Supp. 1994-95).

However, the local board of education can reduce the number of teaching staff members employed in the district whenever, in the board's judgment, it is advisable to abolish such positions for reasons of economy, because of a reduction in the number of

pupils, because of a change in the administrative or supervisory organization of the district, or for other good cause. *Id.* at §9. Any such RIF shall be made on the basis of seniority according to standards established by the Commissioner with the approval of the State Board. *Id.* at §10. The board of education shall determine the seniority of the persons affected and shall notify such persons regarding their seniority status. *Id.* at §11.

A person dismissed as a result of a RIF shall remain on a preferred eligibility list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person is qualified. Such person shall be reemployed if and when such vacancy occurs. In determining seniority and computing length of service for reemployment, full recognition shall be given to previous years of service. *Id.* at §12. (Supp. 1994-95). The Commissioner may also award prejudgment and/or post-judgment interest in any circumstance in which an individual has sought relief and has successfully established entitlement to a monetary award. *N.J.A.C. 6:24-1.16(b)1.*

A tenured teacher has the ultimate burden when contesting action by a board of education of demonstrating both that his/her seniority rights were violated and that he/she suffered harm so as to entitle him/her to redress as a result of that violation. *James Parker and Joseph Pellegrino v. Board of Education of the Matawan-Aberdeen Regional School District*, 1990 S.L.D. 1778, 1779. Tenured school board employees who have been improperly denied reemployment are entitled to such reemployment in addition to back pay and emoluments. A person holding employment in a public school system of the State who is illegally dismissed or suspended is entitled to "compensation" for the period covered by the illegal dismissal or suspension if such is finally determined to have been without good cause. *N.J.S.A. 18A:6-30.*

The obligation of a board of education to recall an employee from a preferred eligibility list is deemed to occur whenever a vacancy itself comes into existence. *Mueller v. Hunterdon Central Regional High School District Board of Education*, 93 *N.J.A.R. 2d* (Vol. 4A) 419, 421 (Dept. of Ed.) (*Mueller*). However, a petitioner fails to

state a claim upon which relief can be granted unless he/she is actually subject to a loss of position and reduction in pay pursuant to a RIF. *Ibid.* Seniority cannot limit a teacher's tenure rights over nontenured teachers. *Ibid.* A prevailing teacher that contests action is entitled to appointment to an available position, back pay, and other economic emoluments of "employment," including appropriate pension fund adjustments. *Mueller* at 422.

However, an individual subject to dismissal or suspension has a duty to mitigate his/her damages. *Mullen v. Board of Education of Jefferson Township*, 81 N.J. Super. 151 (App. Div. 1963) (*Mullen*). *West Orange Supplemental Instructors Assoc. v. Board of Education of the Township of West Orange*, 1991, S.L.D. 1 (October 12, 1990), *aff'd* 1991 S.L.D. 99 (State Board of Education, July 3, 1991), *appeal dismissed*, A-6033-90T1(App. Div., October 1991) (*West Orange*). Any actual pay that the employee earned must be set off from an award of back pay. *West Orange, supra*. An individual who obtains employment at a higher salary, is no longer employed by the board which took the action in dispute, and does not intend to return to that board is not entitled to a "windfall." *Mullen*, at 160.

Child study teams are intended to represent a multidisciplinary approach to identifying, evaluating, and planning suitable educational programs for children with learning difficulties. *Cochran v. Watchung Hills Regional High School Bd. of Educ.*, 1985 S.L.D. 1878, *aff'd*, A-2327-85T7 (App. Div. Dec. 22, 1986) (*Cochran*). N.J.A.C. 6:28-1.3. Regulations promulgated by the DOE address the requirement and duties of child study teams. For students over the age of five years, a team shall consist of a school psychologist, a learning disabilities teacher-consultant, and a school social worker. Team members shall be employees of the local board of education and shall be available during hours pupils are in attendance. N.J.A.C. 6:28-3.1(b). One team member shall be designated at the case manager for each pupil with an educational disability. *Id.* at §(e).

The child study team shall be responsible for the initial evaluation of students and participation in the determination of eligibility for special education and/or related services; coordination of the development, monitoring, and evaluation of the effectiveness of the IEP; deliverance of appropriate related services to pupils with educational disabilities; provision of preventive and support services to nondisabled pupils; and provision of services to the general education staff regarding techniques, materials, and programs for pupils experiencing learning difficulties. *Id.* at §(a). The team shall act in consultation with other professionals as appropriate. *Id.* at §(c). At least one member of the team shall be knowledgeable about placement options for pupils with educational disabilities. *Id.* at §(d).

An initial evaluation shall consist of an assessment by all team members as well as a physician employed by the school and shall include an appraisal of the pupil's current functioning and an analysis of instructional implications appropriate to the child study team member reporting. Initial evaluations shall include, among other items, standardized tests, where appropriate, and functional assessments. *Id.* at §§3.4(a)-(d). Psychological assessments shall be the responsibility of the school psychologist employed by the local board of education and shall include an appraisal of the pupil's current cognitive, social, adaptive and emotional status. *Id.* at §(e)2. Each team member shall prepare a written report of the results of his/her assessments. *Id.* at §(f). A team report is required when an initial evaluation is completed. *Id.* at §3.5.

An IEP shall be written upon the completion of the team's evaluation and prior to the pupil's placement in the special education program. *Id.* at §3.6(a). The IEP shall be developed with participation of parents and members of the district board of education team who have participated in the evaluation and any additional persons required. *Id.* at §(b). IEPs are required to contain certain minimum information and data. *Id.* at §(d). Annually, or more frequently if necessary, the case manager, parents, teachers and other appropriate individuals shall meet to review and revise the IEP and determine placement. *Id.* at §(f). A reevaluation and an IEP shall be completed within three years of the date of the previous classification, or sooner if warranted. *Id.* at

§3.7(a). The child study team shall determine which members and/or specialists will conduct the evaluations. A reevaluation shall include assessment by at least two team members. *Id.* at §(a)1.

Related services shall be provided to a pupil with an educational disability according to his/her IEP. Related services may include counseling services, which shall be provided by certified school psychologists, social workers or guidance counselors, counseling and/or in-training services for parents, and therapies. *Id.* at §3.8.

Despite the requirement that a school district's team consist only of district employees, the pertinent regulations permit local boards of education to contract for certain services. Clinics and agencies approved by the DOE may provide such contracted services; such clinics and agencies shall be approved annually by the DOE. *Id.* at §§5.1(a) & (b). Only specified services may be contracted. For public school pupils, these are:

- (c)
 - i. Independent child study team evaluations and/or child study team diagnostic services to supplement existing local district services;
 - ii. The related services of occupational therapy and physical therapy; and
 - iii. Home instruction. *Id.* at §(c).

A local board cannot subcontract the services of its child study team to outside individuals. A board may supplement such services, but this situation presupposes an existing team with members who are employed by the district. Outside contractors are permitted in limited circumstances and only to supplement services provided by existing team members. *Mullin v. Boonton Town Board of Education*, 94 N.J.A.R. 2d (Vol. 4B) 583 (Dept. of Ed.) (*Mullin*). *Cochran, supra*. General team work is still intended to be performed by employees of the local board. *Cochran, supra*. The determination as to

whether the utilization of outside contracted services constitutes a supplanting or supplementing of the existing team members "involves a review of all surrounding facts and circumstances." *Mullin* at 590.

In *Mullin*, former members of a team, including a psychologist, claimed that the abolishment of their positions pursuant to a RIF violated their tenure rights. The RIF coincided with the school board's decision to contract with non-board members for the provision of team services. Prior to the RIF, the district had two teams, one full-time and the other part-time, each comprised of three professionals. The school district abolished the part-time team and retained the full-time one. Rather than engage contractors to perform all of the work of the prior part-time team, the district utilized members of the existing team in the summer. The school district also utilized the services of outside contractors during summer months and during the school year. The administrative law judge (ALJ) found that the contracted services were supplemental to the remaining full-time team. The judge distinguished the case before him from the facts in *Cochran*.

Cochran involved action by the local district reducing its only child study team to half-time and contracting out the balance of team services to the Somerset County Educational Services Commission. Finding that the board's intention was not an actual abolishment of position, but a mere reorganization and transfer of duties to a less expensive provider, the State Board of Education upheld determinations of the presiding ALJ and the Commissioner voiding the RIFs in question as being in violation of petitioners' tenure rights.

In *Impey v. Bd. of Educ. of Shrewsbury*, 273 N.J. Super. 429 (App. Div. 1994) (*Impey*), the court affirmed determinations of the presiding ALJ and of the Commissioner upholding action by a local board abolishing the position of a tenured part-time speech correctionist and contracting with the Educational Services Commission of Monmouth to provide speech correction services for the district's pupils. Finding that such contracting out of services was authorized by statute, *N.J.S.A.*

18A:46-14, and pertinent regulations, the court found that the board had the authority to abolish the position for reasons of economy pursuant to *N.J.S.A. 18A:28-9*. The court distinguished situations involving the mere re-titling of a position in order to remove an intended incumbent. *Impey* at 435.

CONCLUSIONS

A threshold issue is whether Elson's substantive claim should not be reached because the dispute is moot in light of the fact that he has suffered no damages. The Board argues that the petition should be dismissed based on petitioner's failure to show that he was damaged by its actions. Elson argues that dismissal is not warranted because a decision on the substantive issues is essential to inform the parties of their respective rights and responsibilities in the future and also to protect Elson's claims regarding his tenure status and reemployment rights arising therefrom. Alternatively, petitioner argues that his pleadings should be deemed to be amended to request a declaratory ruling.

As responded argues, Elson had a duty to mitigate damages. His actual earnings are relevant in this respect. It is clear that Elson suffered no monetary damages regarding his salary status. In fact, petitioner does not argue that he suffered any financial damage at all. It is reasonable to infer that his pension and related benefits would have been decreased if he accepted a part-time position with respondent rather than full-time employment in another district.

However, I am persuaded that Elson has a sufficient stake and real adverseness in the outcome of the current matter. "A controversy is justiciable in cases where 'the litigants' concern with the subject matter evidence(s) a sufficient stake and real adverseness.'" *In re Boardwalk Regency Corp. Casino License*, 90 N.J. 361, 368 (1982) (*Boardwalk Regency*).

Elson testified that he could not say whether or not he would have accepted part-time employment with respondent if it had been offered to him. Although respondent's argument that it is reasonable to conclude that petitioner would not have been available for a part-time position during school hours has some persuasion in light of petitioner's subsequent refusal of a part-time position because of economic considerations, Elson's argument is more consistent with the applicable legal principles. As petitioner argues, the current matter demonstrates the difficulty presented to individuals affected by board action later deemed to be contrary to the law. Elson testified that if he had been offered the position in question, he could have considered his options. As he argues, it is impossible to subsequently determine what one would have done if given the option.

If he had accepted part-time employment with respondent, if offered in August 1993, petitioner would have continued to incur seniority with the Board. Seniority is determined according to the number of academic or calendar years of employment, or a fraction thereof, in a school district in specific categories. *N.J.A.C. 6:3-5.1(b)*. Petitioner remains on respondent's preferred reemployment list and has indicated interest in a full-time position with the Board. I am persuaded that petitioner should be accorded seniority from August 10, 1993, the effective date of the contract, until August 12, 1994, the date of his notification to respondent that he was declining part-time employment for the 1994-95 school year, if the Board's decision to contract with ICST was in violation of the applicable regulation. For reasons of administrative efficiency, I am persuaded that the latter issue should be addressed in the current case. See, *N.J.A.C. 1:1.3(a)*. The possibility of future involvement of seniority claims establishes a sufficient stake and real adverseness. See, *Boardwalk Regency, supra*. It is therefore not necessary to reach Elson's arguments that his petition should be deemed to be amended to request a declaratory ruling and whether or not such request should be granted.

Pursuant to the executed contract, ICST was required to provide child study team services to the Board for all eligible children enrolled in the district upon receipt of

a written form requesting such service. The term of the agreement was for one year, subject to cancellation by either party upon ninety days written notice. (Ex. J-6, pp. 1-2). ICST agreed to conduct the evaluations at the specified rate and to make staff available to provide diagnostic services "to supplement" existing district services "on an as-needed basis." When requested, ICST also was required to review pupil progress and records, observe students in classroom settings, confer with teachers and district team personnel, conduct assessments, when applicable, and provide written reports to teachers and the administration of all findings. *Id.* at 2. The specifications prepared by ICST and provided to respondent as an indication of services ICST was capable of providing included reference to "comprehensive basic child study team" evaluations for all referred children, including psychological, educational, and social assessments. (Ex. J-12, p. 1). The listing of possible services also included determinations of pupil eligibility, classification, specialist services, development of IEPs, the provision of updates for annual reviews, and triennial evaluations (Ex. J-12).

Although characterized as "supplemental" in the contract, it is clear that the agreement executed in August 1993 did not incorporate a numerical limit on the number of students for which ICST would provide reevaluation services. The specification of services which ICST could provide, although not all utilized by respondent, was substantially broader. In addition, it is clear from the nature of services actually provided by ICST, especially those provided by Tomasini, that such were not supplemental to those provided by respondent's in-house Team.

Tomasini provided a broad range of diagnostic and evaluative services to a significant portion of respondent's classified students. Respondent had a legal obligation to provide the services rendered by ICST to the students in question. Presumably, this number of students could not be handled by one full-time team and had been provided services by part-time staff personnel, even prior to the RIF in question. During Elson's tenure, as found, respondent had more than one team and more recently employed, and still employs, a part-time learning consultant. At some point, which cannot be determined from the record, respondent would presumably have

had to employ another full-time team if the number of classified students increased dramatically. However, such consideration is not determinative of the question presented in this case. I am persuaded that the services contracted for with ICST and actually provided by ICST were not supplemental evaluative and diagnostic services.

As Elson argues, and as the applicable regulations and the *Mullin* case make clear, a local board is not generally permitted to provide professional services to children through the use of non-employees. In light of this situation, and in light of the lack of a broad statutory mandate for the provision of services by non-school employees, such as is the case regarding cooperative endeavors, petitioner's argument that *N.J.A.C. 6:28-5.1(c)1* should be narrowly construed is meritorious.

During his tenure with the Board, Elson provided services similar in nature to those provided by ICST, although, as the record indicates, the structure of the provision of special education services changed somewhat subsequent to the RIF of Elson. The nature of the responsibilities of a district school psychologist (Ex. J-12) are essentially the equivalent, with minor exceptions, to those services contracted for with ICST by respondent and actually provided to the Board. The fact that Tomasini's services alone were the equivalent of a half-time position also supports the conclusion that all the services provided by ICST were not supplemental.

In addition, the approval letter of the County Superintendent reinforced the requirement that services to public school students pursuant to contract were restricted to evaluations and diagnostic services to supplement existing local district services and that it was incumbent upon the Board to evaluate its staffing needs and make any necessary adjustments for the 1994-95 school year to employ sufficient staff to ensure the provision of services. The notification concluded that services could not be delivered through a contract with an individual agency on a permanent basis.

The facts of this case are more akin to those considered in *Cochran*, where a full-time in-house team was reduced to a part-time one by a RIF with a subsequent

engagement of outside contractors to perform services in equal amount to those performed by the remaining part-time team, than to the facts of *Mullin*, which involved limited instances of contracting out of services. This case is distinguishable from *Impey, supra*, in which the court found broad statutory and regulatory authority for a local board to enter and to join agreements with other school districts for the provision of special education services. There is no such broad authority pertinent to child study teams in general. As discussed, a local board may only contract team evaluation and diagnostic services to supplement existing local district services, not to supplant them.

I **CONCLUDE** that petitioner's claims are not moot, that the provision of services contracted for by respondent with ICST did not constitute supplemental independent child study team evaluations and/or child study team diagnostic services, that the provision of such services by ICST to students of respondent pursuant to the agreement in question was contrary to *N.J.A.C. 6:28-5.1(c)1i*, that respondent should have offered petitioner a part-time position for the 1993-94 school year, and that if petitioner is reemployed by respondent in the future, Elson is entitled to seniority for the period from August 10, 1993 through August 12, 1994.

ORDER

It is hereby **ORDERED** that petitioner be deemed to have seniority with respondent for the period from August 10, 1993 through August 9, 1994 on a part-time basis.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Aug 30, 1995
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

6/1/95
DATE

Hope R. Blackburn
DEPARTMENT OF EDUCATION

JUN 2nd 1995
DATE
le

Mailed to Parties:
Jeff J. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

LIST OF WITNESSES

For Petitioner:

Alexander DeNoble, Ph.D.
Joseph P. Sirangelo
Jerome Elson,

For Respondent:

Alexander DeNoble, Ph.D.
Lisa Tomasini, Ph.D.

LIST OF EXHIBITS IN EVIDENCE

- J-1 Statement of petitioner's employment status with respondent
- J-2 Job description of school psychologist
- J-3 Letter dated June 3, 1994
- J-4 Executed agreement for examination of classification service
- J-5 Resolution dated August 10, 1993
- J-6 Agreement for child study services dated August 13, 1993
- J-7 Letter dated October 4, 1993
- J-8 Requisition dated March 24, 1994
- J-9 Requisition dated May 31, 1994
- J-10 Letter dated August 10, 1994
- J-11 Letter dated August 12, 1994
- J-12 Specifications for child study team services
- J-13 Requisition dated July 20, 1994
- J-14 Invoice dated October 14, 1994

JEROME ELSON,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	
HUDSON COUNTY AREA VOCA-	:	DECISION
TIONAL-TECHNICAL SCHOOLS,	:	
HUDSON COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record, the Commissioner concurs with the findings and conclusions of the ALJ in her initial decision for the reasons clearly articulated by her therein.

Accordingly, the recommended decision of the Office of Administrative Law is adopted as the final decision in this matter, deeming petitioner to have seniority with respondent for the period August 10, 1993 through August 12, 1994 on a part-time basis.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

245-95

PETER DOLESE, NICK BUCCI, FRANCIS :
HOLTERHOFF, ANN BECKETT, JOYCE :
LANDAU, HOWARD ANDERSON, :
NICHOLAS ACKERSHOEK, JR., AND :
MAE JOHNSTON, :

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

STATE-OPERATED SCHOOL DISTRICT :
OF THE CITY OF PATERSON, :
PASSAIC COUNTY, :

DECISION

RESPONDENT. :

_____ :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9877-94

AGENCY DKT. NO. 314-7/94

**PETER DOLESE, NICK BUCCI,
FRANCIS HOLTERHOFF, ANN BECKETT,
JOYCE LANDAU, HOWARD ANDERSON,
NICHOLAS ACKERSHOEK, JR., AND
MAE JOHNSTON,**

Petitioners,

v.

**STATE-OPERATED SCHOOL DISTRICT OF
THE CITY OF PATERSON, PASSAIC COUNTY,**

Respondent.

David M. Hawkins, Esq., for petitioners (Purcell, Ries, Shannon, Mulgahy &
O'Neill, attorneys)

Louis P. Bucceri, Esq., for respondent (Bucceri & Pincus, attorneys)

Record Closed: June 5, 1995

Decided: June 6, 1995

BEFORE EDITH KLINGER, ALJ:

On October 11, 1994, this matter was transmitted to the Office of Administrative Law as a contested case pursuant to *N.J.S.A. 52:14F-1 to -15* and *N.J.S.A. 52:14F-1 to*

-13. A prehearing conference scheduled on January 19, 1995 was adjourned to February 1, 1995.

On February 1, 1995, the parties advised the undersigned that this matter had been settled. On June 5, 1995, the parties submitted the attached Settlement Agreement indicating the terms of settlement which are incorporated herein by reference.

I have reviewed the record and the settlement terms and I **FIND**:

1. The parties have voluntarily agreed to the settlement, as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton,**

New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 6, 1995
DATE

Edith Klinger
EDITH KLINGER, ALJ

6/7/95
DATE

Receipt Acknowledged:
Hope R Blackburn
DEPARTMENT OF EDUCATION

JUN 07 1995
DATE
md

Mailed to Parties:
Jeff S. Mani
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(201) 773-5665
Counsel for Petitioners

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Jun 5 11 27 AM '95

PETER DOLESE, NICK BUCCI, : BEFORE THE NEW JERSEY
FRANCIS HOLTERHOFF, : COMMISSIONER OF EDUCATION
ANN BECKETT, JOYCE LANDAU, :
HOWARD ANDERSON, NICHOLAS :
ACKERSHOEK, JR. and : AGENCY DKT. NO. 314-7/94
MAE JOHNSTON, : O.A.L. DKT. NO. EDU 09877-94
: :
Petitioners. :
v. :
STATE-OPERATED SCHOOL DISTRICT :
OF THE CITY OF PATERSON, :
Respondent. : SETTLEMENT AGREEMENT

The parties hereto, having reached an agreement to resolve all outstanding differences between them, do hereby stipulate and agree as follows:

1. The parties acknowledge that the claims of petitioners Peter Dolese, Nick Bucci, Francis Holterhoff, Ann Beckett and Mae Johnston, have all been withdrawn by previous notice of January 20, 1995, to the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2.

2. As to the claims of petitioners Joyce Landau, Howard Anderson and Nicholas Ackershoek, Jr., the respondent, State-Operated School District of the City of Paterson hereby agrees to assign each of said individuals to a full time position exclusively in one of its high schools or in its Sage Program for the 1995-96 school year, within the scope of their respective certificates.

3. Petitioners Landau, Anderson and Ackershoek waive any and all claims to be reassigned for the 1994-95

school year to high school positions beyond the extent to which they are already currently so assigned.

4. Since no party has suffered a financial loss, this settlement fully and fairly resolves all outstanding issues presented by the petition in this matter.

5. This settlement is subject to approval by the Office of Administrative Law and the Commissioner of Education and shall be of no force or effect until so approved.

6. Nothing contained in this settlement may be construed as an admission of error or wrongful conduct by any of the parties or their agents.

For Petitioners:

Joyce Landau
Joyce Landau
Dated: March 15, 1995

Howard Anderson
Howard Anderson
Dated: March 14, 1995

Nicholas Ackershoek, Jr.
Nicholas Ackershoek, Jr.
Dated: 3/20/95

Witness:

Peter Tirri
Peter Tirri, President
Paterson Education Association
Dated: March 20, 1995

Louis P. Bucceri, Esq.
Louis P. Bucceri, Esq.
Dated: 5/1/95

For Respondent
State-Operated School District
of the City of Paterson

Frank W. W. W. W.
Dated: 5/5/95

Witness:

Frank W. W. W. W.

PETER DOLESE, NICK BUCCI, FRANCIS :
HOLTERHOFF, ANN BECKETT, JOYCE :
LANDAU, HOWARD ANDERSON, :
NICHOLAS ACKERSHOEK, JR., AND :
MAE JOHNSTON, :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION


STATE-OPERATED SCHOOL DISTRICT : DECISION
OF THE CITY OF PATERSON, :
PASSAIC COUNTY, :

RESPONDENT. :

_____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

July 10, 1995
Date of Mailing July 10, 1995

246-95E

WOOD-METAL INDUSTRIES, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF WEST :
WINDSOR-PLAINSBORO REGIONAL :
SCHOOL DISTRICT, MERCER COUNTY :
AND DEAN EQUIPMENT AND :
FURNITURE COMPANY, INC., :

DECISION ON MOTION

RESPONDENTS. :

_____ :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 4686-95

AGENCY DKT. NO. #137-4/95

WOOD-METAL INDUSTRIES,

Petitioner,

v.

**BOARD OF EDUCATION OF WEST
WINDSOR-PLAINSBOR REGIONAL
SCHOOL DISTRICT, MERCER COUNTY
AND DEAN EQUIPMENT AND
FURNITURE COMPANY, INC.,**

Respondent.

Robert V. Dell'Osa, Esq., for petitioner (Cozen & O'Connor, attorneys)

William C. Baggitt, Esq., for respondent Board of Education of West Windsor-Plainsboro Regional School District

James J. Ross, Esq., for respondent Dean Equipment & Furniture Company, Inc. (Wolff & Samson, attorneys)

Record Closed: May 26, 1995

Decided: May 31, 1995

BEFORE JOHN R. FUTEY, ALJ:

PROCEDURAL STATEMENT

Petitioner, Wood-Metal Industries (Wood-Metal) seeks emergency relief pursuant to N.J.A.C. 6:24-1.5 in the form of an Order staying the award of a contract for the purchase of premanufactured wood casement systems and equipment by respondent, the Board of Education of West Windsor-Plainsboro Regional School District (Board of Education) to respondent Dean Equipment and Furniture, Inc. (Dean). Petitioner contends that since it presented a lower bid on the contract than did respondent Dean, the bid should have been awarded to it. The Board of Education has filed an answer to the Petition of Appeal and Brief in Opposition to the request for emergent relief along with supporting affidavit. It is the Board's position that, although petitioner was a lower bidder, it maintains that petitioner was not the most responsible bidder because it failed to comply with the specifications which were mandated in the bid offering. The Board of Education also contends that any further delay regarding the awarding of this contract will prejudice the ability of the school district in its construction schedule. Respondent Dean, also filed an answer to the Petition of Appeal and a Brief in Opposition along with a supporting affidavit. It is Dean's position that petitioner Wood-Metal is not entitled to emergency relief due to (1) its failure to file its Petition of Appeal with "utmost promptitude" (2) that Wood-Metal failed to comply with the specification requirements for the bid offering and (3) that Dean has already incurred considerable expense in accordance with the contract which was awarded to it by the Board of Education in this matter.

Subsequent to the filing of the appeal in this matter, petitioner filed a motion to take the oral deposition of Linda Andreychik, a principle in the architectural firm of Jordan and Pease, which is the school district's architect on the project. A telephone conference was conducted by this tribunal with counsel on May 17, 1995, regarding the application for deposition, at which time this tribunal ordered that the depositions of Linda Andreychik, as well as Carl Fernandes, who is the sales manager for T. O. Gronlund, Inc., which is a distributor for petitioner Wood-Metal Industries. The depositions were ordered to take place on May 24, 1995, after which argument on the application for emergent relief was conducted at the Office of Administrative

Law, Mercerville, on May 26, 1995. At the conclusion of the hearing on that date, the hearing record closed for purposes of this application.

STATEMENT OF FACTS

The relevant facts adverd by petitioner Wood-Metal, the Board and Dean are essentially not disputed. The bids for the purchase of premanufactured wood casement and equipment were solicited and received by the Board of Education on February 22, 1995, relative to Contract No. 7. Respondent Dean, which is a distributor of Campbell Rhea Wood Casements, submitted a base bid for contract No. 7 based upon the specifications for Campbell Rhea Wood Casement for a specified price of \$684,050. Petitioner Wood-Metal submitted an alternate (non-base) manufacturer bid regarding the same Contract No. 7 in the amount of \$620,000. There was a third manufacturer who submitted a bid which was lower than both the Dean and Wood-Metal bids. However, the respondent Board of Education at a regular meeting held on February 28, 1995, awarded Contract No. 7 to Dean, even though its bid was \$64, 050 higher than Wood-Metal's bid. The third party bid has also been rejected because, even though it supplied an appropriate base bid, it failed to supply complete and proper documentaion with it.

On or about March 3, 1995, Wood-Metal's Sales Representative Carl M. Fernandes contacted Linda Andreychik, a principal in the architectural firm of Jordan & Pease (the architect on the Board's high school building project) and asked her to explain why Contract No. 7 was awarded to Dean even though Wood-Metal's bid was \$64,050 less than Dean's bid. Andreychik told Fernandes that there was nothing wrong with Wood-Metal's product and that Jordan & Pease did not know anything that could be wrong with the product. However, since Wood-Metal's bid was submitted as an alternate bid and not a base bid or equal (equivalent), Jordan & Pease did not feel it was necessary to look at that bid since a base bid had been submitted which included the specified Campbell Rhea product. Respondent Dean signed its contract with the Board of Education on April 5, 1995. On or about April 17, 1995, petitioner Wood-Metal filed a complaint in Superior Court, Middlesex County, hut then it subsequently determined to refile before the Commissioner of Education on April 27, 1995. The instant emergent relief application, which seeks temporary restraint, has been requested as part of that filing.

In its answer to petitioner's petition, the respondent Board of Education has included the affidavit of Linda Andreychik in which she stated, at paragraph 2, that her office examined the package submitted by Wood-Metal and determined that "the bid should be rejected because it should not have been submitted as an alternate, but should have been submitted under the base bid as an equal." She then noted, in the same paragraph, that "Wood-Metal Industries did not submit a completed line-by-line comparison of their product with the Campbell Rhea which was specified. The bid was, therefore, rejected on both bases." (Affidavit of Andreychik, at paragraph 2.)

At the deposition of Linda Andreychik which was ordered by this tribunal and held on May 19, 1995, Andreychik reviewed the bid submitted by Wood-Metal, which was contained as Exhibit H on petitioner's Verified Petition. When asked whether or not Wood-Metal complied with the bid specification for the production of data required with substitution requests (See, affidavit of Michael Hoffman, Exhibit E §1600-6(F) 1 through 9), Andreychik indicated that Wood-Metal had failed to submit the required information regarding all areas except for item No. 7, which required the submission of a list of maintenance services and replacement materials available. The information which Wood-Metal failed to supply included: (1) identify product by specification section and paragraph number. (2) Manufacturer's name and address, trade name and model number of product (if applicable), and name of fabricator or supplier (if applicable). (3) Complete product data. (4) A list of other products on which the proposed product has been used, with product name, the design professional's name, and owner contact. (5) An itemized comparison of the proposed product to the specified product, based upon the cited requirements of the individual specification sections. (6) Net amount of change to the contract sum. . . . (8) Statement of the effect of the substitution on the construction schedule. (9) Description of changes that will be required in other work or product if the substitute product is approved.

In addition, at the deposition held on the same date of May 19, 1995, Carl Fernandes conceded that petitioner Wood-Metal did not submit an appropriate prequalifying statement at the time Wood-Metal's bid was submitted, even though he contended that Wood-Metal was qualified on the date of bid submission (See, Fernandes deposition at page 25, line 1 through 24). In addition, in response to the allegation that Wood-Metal had failed to satisfy the line-by-line

bidding requirements, Fernandes contended that, by submitting a two page summary comparison chart to its alternate bid (See, Hoffman, affidavit Exhibit B, last two pages of bid) Wood-Metal had satisfactorily complied with the line-by-line specification requirement.

Petitioner contends that by not even considering alternate bids, the respondent Board of Education violated the State Bidding Law regarding the award of contracts. In addition, since the architect never even considered Wood-Metal's bid, any claim by the architect that Wood-Metal's bid was rejected due to its failure to comply with a line-by-line comparison was, at best, a pretext. However, at the same time, petitioner argued that it could not comply with the bidding requirements which it viewed as being too onerous and unreasonable under the circumstances. Finally, petitioner contended that, by failing to consider its alternate bid, the Board of Education's architect demonstrated favoritism in violation of N.J.S.A. 18A:18A-15(d) which prohibits specifications which would require "with regard to any purchase, contract or agreement, the furnishing of any 'brand name,' but may in all cases require 'brand name or equivalent,'" Finally, petitioner contends that Dean did not incur any hardship, even though some work has been generated by it since March 30, 1995, since Dean was not allegedly entitled to the contract in the first place.

In reply, the respondent Board of Education indicated that the school is under a tight building construction schedule and that the Board accepted the recommendations of its architect based upon the bid submissions made prior to February 28, 1995. The Board indicated that Dean complied with the specifications, including the requirement to submit a base bid, and since they were the only contractor to do this with appropriate backup information, that bid was the lowest responsible bid at the time. Further, since Wood-Metal did not provide a base bid but instead, relied only upon an alternate bid, the Board was under no obligation to consider it unless all bids exceeded the fully budgeted amount. The Dean fell well within those limits. Further, the Board was satisfied that the architect properly rejected Wood-Metal's bid when it failed to comply with the line-by-line requirements set forth in the bid specification. As a result, it was Wood-Metal which defeated its own ability to submit an acceptable bid.

Respondent Dean contends, among other things, that Wood-Metal failed to act with "utmost promptitude" when it failed to challenge the award of Contract No. 7 in a timely fashion.

It relied upon the case of Richardson Engineering Co. v. Rutgers, et al, 51 N.J. 207, 219 (1968), in which the New Jersey State Supreme Court set specific time limits on the length of time within which an unsuccessful bidder must commence its legal challenge to an award of a public contract. In that regard, Dean contends that within ten days of the awarding of the contract, Wood-Metal should have sought restraints but instead allowed this matter to continue until almost three months before an emergent hearing was ultimately heard by this tribunal.

In addition, Dean contends that Wood-Metal failed to conform to the specifications to a substantial degree. Further, Wood-Metal failed to submit a prequalifying statement, which was also required in the bid specifications. By showing noncompliance with the bid specifications, Wood-Metal jeopardized its right to be considered a responsible bid under the circumstances. In that regard, Dean contends that Fernandes's two page comparison summary did not provide specific product data to respond to the requirements of the bid specification for Contract No. 7.

LEGAL ANALYSIS, FINDINGS, CONCLUSION AND ORDER

Emergent relief is available from the Commissioner of Education pursuant to N.J.A.C. 6:24-1.5. This Rule provides that the standards for granting such relief shall be those articulated by the New Jersey Supreme Court in Crowe v. DeGioia, 90 N.J. 126 (1982). The Crowe decision underscores the time honored equitable principles to be used when assessing whether preliminary relief should issue. These are: Whether irrefutable harm will ensue if the emergent relief is not provided; whether the applicant can show that the legal right underlying the claim is settled as a matter of law; whether the applicant can demonstrate a preliminary showing of a reasonable probability of ultimate success on the merits; and the relative hardship to the parties in granting or denying relief. Applying those standards to the instant situation, I **FIND** that petitioner Wood-Metal has not carried this burden and that the application for emergent relief should be **DENIED**.

In assessing whether reasonable probability of success on the merits has been demonstrated by petitioner, it is essential to review the statutory provision which governs the award of a public contract by a local school district. In pertinent part, N.J.S.A. 18A:18A-37 provides:

All purchases, contracts or agreements which require public advertisement for bids shall be awarded to the lowest responsible bidder. . . .; provided, however, that if the contracted agent, . . . having sought such quotation determines that it should not be awarded on the basis of the lowest quotation received, the contracting agent shall file a statement of explanation of the reason or reasons therefore, which shall be placed on file with said purchase, contract or agreement.

A major objective of this statute, as with all public bidding statutes, is “to guard against favoritism, improvidence, extravagance and corruption” and “to secure for the public the benefit of unfettered competition.” Terminal Const. Corp. v. Atlantic Sewerage Authority, 67 N.J. 403, 409-10 (1975). Thus, the award is to be made to the lowest bidder, but in recognition of the need to assess the effect on the public interest in making the award for the provision of goods or services to the public, the governing body is required to assess the responsibility of the bidders and award only to the lowest responsible bidder, stating the cause for any determination that responsibility is lacking in the lowest bidder.

It is to be noted that Case Law in New Jersey in assessing the awarding of public bids has long recognized that the bidder who achieves the status of the lowest bid enjoys a status that may not be lightly disturbed. Sellitto v. Cedar Grove Township, 133 N.J.L. 41, 42 (Supreme Ct. 1945). A question of whether an individual is the lowest responsible bidder is a question of fact which is a matter for determination by the governing body awarding the bid. Id. at 43.

Responsibility has been defined as the “characteristic the absence of which ‘would cause fair-minded and reasonable men to believe’ that it was not in the best interest of the municipality to award the contract to the lowest bidder. Arthur Venneri v. Paterson Housing Authority, 29 N.J. 392, 402 (1959).” Suburban Restoration Co. v. Jersey City Housing Authority, 179 N.J. Super. 479, 483 (App. Div. 1981).

Here, Wood-Metal failed to comply at the outset regarding the submission of a base bid or equal, which was provided for in the bid specification. Instead, it chose to submit an alternate bid. The school board relied upon the recommendations of its architect which determined that alternate bids were not even to be considered where valid base bids were otherwise submitted by

even just one contractor. Under the circumstances, I can **FIND** absolutely no fault with the determination of the architect to consider only base bids or equal where the base bid fell within the budgeted amount for the Board's high school. I also **FIND** totally unpersuasive Wood-Metal's argument that it had substantially complied with the line-by-line specifications of the bid when it submitted its comparison chart along with its bid. I specifically **FIND** that Wood-Metal's comparison chart grossly deviated from a minimum level of acceptability under the circumstances and its paucity of specific information is equally astonishing considering the fact that, plaintiff's counsel's Wood-Metal's representative, Fernandes, has approximately forty years in the business. One would have expected the type of bid which Wood-Metal submitted to have been prepared by a mere novice in the field rather than one with considerable alleged experience. If anything, the singular failing on the part of Wood-Metal to submit a compliant bid with sufficient data to enable the architect to reasonably even consider the bid at all represents a significant and material defect which, in itself, defeats the ability of Wood-Metal to prevail upon the merits at a full plenary hearing to be held in this matter. And I so **FIND**. Similarly, armed with the alleged knowledge and experience of Fernandes, Wood-Metal should have known that the submission of an alternate bid under the circumstances was inappropriate, incorrect, and ill-advised. Instead, it should have submitted a base bid or equal and should have provided the specific information as was required by the bid specification. That also constitutes a material and independent failing on Wood Metal's part. And I so **FIND**. In addition, I am concerned about the failure on the part of Wood-Metal to submit a valid prequalifying statement along with its bid, even though it contends that it was otherwise qualified at the time. The specifications were meant to be honored, not altered or disregarded. Instead, Wood-Metal, for whatever reason, chose to submit a bid which substantially failed to address the contract requirements of the Board. Under those circumstances alone, I **FIND** that Wood-Metal committed a serious breach of professional responsibility regarding the bid process when it submitted its alternate bid for the individual reasons set forth hereinabove.

Further, I am also satisfied that Wood-Metal was derelict in the prosecution of its appeal when it failed to articulate its objections "with utmost promptitude" in accordance with Richardson Engineering Co. v. Rutgers, supra. I **FIND** that, unlike loose furniture and/or appliances which can be created and supplied late in the construction of a school facility, the work

required for the design and construction of premanufactured wood casement systems and equipment must be initiated early on in the process. It must be coordinated with the plumbers, heating and ventilation contractors, particularly here where the items were to be used regarding the installation of science laboratories. As a result, it was incumbent upon Wood-Metal to initiate its appeal in an expeditious fashion and, when it failed to do so until April 27, 1995, some two months after the bid was awarded, Wood-Metal severely exceeded reasonable limits regarding the prosecution of its claim. And I so **FIND**. In the process, Dean went ahead with its contract and did incur sufficient hardship already despite the claim by Wood-Metal that Dean should have halted its work earlier on than the date of filing of the instant appeal. I **FIND** no excuse on the part of Wood-Metal which reasonably excuses it from a affirmative obligation to have filed its claim with utmost promptitude under the circumstances. In the process, I reject Wood-Metal's claim that its delay was, in part, occasioned by representation by the Board attorney that for a period of time after the bid award, the Board was predisposed to consider reawarding this contract. That allegation was not substantiated, nor corroborated at the hearing. As a result, and independent of my findings with reference to the above-cited inaccuracies of the alternate bid submitted by Wood-Metal, I **FIND** and **CONCLUDE** that Wood-Metal's failure to timely process its claim was a substantial breach which also causes its request for temporary restraints to fail at this time.

Overall, I **FIND** that petitioner has fallen very short of establishing anycausal basis to allow for the grant of emergency relief at this time. As such, I reject its arguments that the award of the bid to Dean should fail. Instead, Dean was the only bidder which submitted an appropriate base bid with appropriate and satisfactory documentation to convince the architect that it was the lowest responsible bid under the circumstances. By contrast, and for the reasons stated hereinabove, I **FIND** that petitioner failed to satisfy a whole host of requirements when it submitted its alternate bid in February 1995.

When coupled with the inappropriate delays which it generated in pursuit of its application for emergent relief, one may become initially perplexed by the apparent cavalier approach taken with reference to the submission of Wood-Metal's bid for Contract No. 7. Fernandes has had almost forty years of experience in the industry and yet the contract bid

appears glaringly deficient for the reasons stated hereinabove. An explanation perhaps lies in the admission made by plaintiff's counsel when he contended that petitioner could not comply with the bid requirements because it found them to be too onerous and unreasonable. I have not been presented with any sufficient data to suggest that efforts were made by Wood-Metal to challenge the entire bid process in a timely fashion in order to forestall the awarding of the bid in February 1995. Instead, petitioner submitted its alternate bid, lost out on the award, and only some two months later it proceeded to issue the current challenge. On balance, I **FIND** this approach to be less than adequate and somewhat half-hearted at best. At the same time, I **FIND** and **CONCLUDE** that the applicant has not demonstrated any legal right underlying its claim is settled as a matter of law. I am not convinced that the architect was unreasonable in its approach toward demanding base line bids or equals at the time or that its rejection of alternate bids was somehow to be construed as being inappropriate. I also do not **FIND** any favoritism, improvidence, extravagance or corruption by the Board requiring the use of base bids or equal where valid base bids were submitted under budget. In fact, the architect recommended the rejection of the true lowest bid when it also failed to meet minimum standards of acceptability.

Based on all the foregoing I also **CONCLUDE** that petitioner has not demonstrated preliminarily a reasonable probability of ultimate success on the merits. If anything, the depositions taken of Linda Andreychick and Carl Fernandes, the former at the specific request of petitioner in this current application, has convinced me by a preponderance of the credible evidence that Linda Andreychik's handling of this matter on behalf of the respondent Board was totally appropriate and consistent with the requirements of the law. In addition, I **CONCLUDE** that irreparable harm will not ensue to Wood-Metal if the emergent relief is not provided. Petitioner is always entitled to bid appropriately as projects and this **ORDER** is not a bar to those efforts in the future. By contrast, harm will occur to Dean and the Board, since Dean has already properly initiated work in accordance with its bid award. I also **CONCLUDE** that there would be a significant hardship to the respondent Board should a temporary restraint be imposed at this time since as a practical matter the School Board is under a scheduled completion date and the Contract No. 7 is an integral part of that process. It is **ORDERED** that the request for emergent relief is **DENIED**..

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but not later than forty-five days following the entry of this order. If the **COMMISSIONER OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

May 31, 1995
DATE


JOHN R. FUTEY, ALJ

km

WOOD-METAL INDUSTRIES, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF WEST : DECISION ON MOTION
 WINDSOR-PLAINSBORO REGIONAL :
 SCHOOL DISTRICT, MERCER COUNTY :
 AND DEAN EQUIPMENT AND :
 FURNITURE COMPANY, INC., :
 :
 RESPONDENTS. :
 :
 _____ :

The record of this matter and the Order Denying the Motion for Emergency Relief of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record, including tapes of the hearing held on May 26, 1995, and the Order Denying the Motion for Emergent Relief, the Commissioner agrees with the findings and conclusions of the Administrative Law Judge for the reasons clearly articulated by him in the order.

Accordingly, the recommended decision of the ALJ is adopted and the matter is ordered transmitted to the Office of Administrative Law for further proceedings as necessary to bring it to conclusion.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

July 10, 1995
Date of Mailing July 10, 1995

THOMAS G. DUNN, JR.,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE	:	
CITY OF ELIZABETH, UNION COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning Superintendent, employed by contract pursuant to N.J.S.A. 18A:17-15 et seq., appealed Board of Education's action to retain his employee status, but relieve him of his duties as Superintendent and assign him to perform the duties of Assistant Superintendent instead. Petitioner contended that he could not be removed from his position of Superintendent without filing of tenure charges, and that the tenure bestowed on him for the duration of his contract by N.J.S.A. 18A:17-15 et seq. expressly entitled him to function as, and perform the duties of, Superintendent during that time.

ALJ found that petitioner retains his employment and continues receiving all other benefits of his contract, so that the Board's action is consistent with the statutory scheme as previously interpreted by the Commissioner. (Harrington) Petition was dismissed.

Commissioner modified initial decision to address concomitant holding of Harrington that duly contracted Superintendent, like any other contractually employed teaching staff member, may be relieved of duties by the Board of Education for the duration of the contract. (N.J.S.A. 18A:27-9) Commissioner further found, however, that controlling statute did not contemplate assignment of alternative duties in such cases, so that, while the Board could relieve petitioner of his duties while retaining his employment as Superintendent, it could not assign him the duties of Assistant Superintendent in their stead. Board was ordered to cease and desist requiring petitioner to perform such duties.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION GRANTING
RESPONDENT'S CROSS-MOTION
FOR SUMMARY DECISION AND
DENYING RESPONDENT'S CROSS-
MOTION FOR ENFORCEMENT OF A
SETTLEMENT AGREEMENT**

OAL DKT. NO. EDU 7090-94
AGENCY DKT. NO. 269-7/94

THOMAS G. DUNN, JR.,

Petitioner,

v.

ELIZABETH BOARD OF EDUCATION,

Respondent.

Martin M. Barger, Esq., for petitioner
(Reussille, Mausner, Carotenuto, Bruno & Barger, attorneys)

Richard H. Bauch, Esq., for respondent
(DeMaria, Ellis, Hunt, Salsberg & Friedman, attorneys)

Decided: May 12, 1995

BEFORE MARYLOUISE LUCCHI-McCLOUD, ALJ:

This case comes by way of a petition filed on behalf of Thomas G. Dunn, Jr., with the Department of Education on July 1, 1994. An answer was received by the Department on July 15, 1994 and on July 25, 1994 the matter was transmitted to the

Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

In addition to the ultimate issues in this case which are resolved by this initial decision granting the cross-motion for summary decision, a number of other motions were filed. Cross-motions for emergent relief were originally filed and heard by the Honorable Richard McGill, ALJ on July 28, 1994. Both motions were denied and the matter proceeded for scheduling.

DISCUSSION

Although this initial decision is captioned with the two motion decisions which are dispositive of the entire case a number of other motions were filed and must be detailed here for clarity. As a number of the motions were filed prior to December 6, 1994, oral argument was scheduled on that date for the motions. The first of these that will be discussed was a motion to dismiss the action against one of the individuals named in addition to the Elizabeth Board of Education. At the time of the oral argument on December 16, 1994 that motion was granted and it was also ordered that the matter be dismissed against each of the named individuals consisting of Urbano Venero, Newton J. Burket, Jr., Lelia Poch, Daniel P. Sullivan and Carolyn Cole. That order is based upon the reasons given on the record on that date. In the briefest of possible terms it is apparent that while the Board of Education may come under the auspices of the Department of Education each of these individuals may not be sued on an individual basis in this particular forum.

Expedited scheduling was attempted in this matter however the parties advised that a temporary resolution which would allow for the appropriate filing of motions and the discovery process had been accomplished and, as a result, the matter continued allowing the parties to file motions. Among those motions were cross-motions for summary decision. Although the parties had filed the motions there was a request that

the undersigned await the decision of the Commissioner of Education in the case of *Robert M. Harrington v. Board of Education of the Township of Clinton, Hunterdon County*, OAL Dkt. No. EDU 10750-93 which had a final decision date of February 16, 1995 and was then provided to the undersigned. The parties had indicated during oral argument that this case was pending before the Honorable Kathleen Duncan, ALJ and might be illustrative as to the question being presented in this case.

ISSUES AND DISCUSSION

The facts in this case are not in dispute and as a result the matter is ripe for summary decision.

The essential facts that exist in this case are that by contract dated August 15, 1991, the respondent, Elizabeth Board of Education, (BOE) appointed the petitioner, Thomas G. Dunn, Jr., to serve as superintendent of schools for five years. The contract contained no termination provision but required the respondent to provide petitioner with at least one year notice of its intention not to renew the contract.

By a five-to-four vote, the respondent adopted a resolution on June 29, 1994, not to renew the petitioner's contract and terminating his services as superintendent effective June 30, 1994. The respondent has continued to pay the petitioner pursuant to his contract although he has not been functioning in the role of superintendent. Voting during that particular vote was Lila Poch and the petitioner questioned her residency during the course of this matter.

On February 8, 1995 the respondent passed a second resolution of nonrenewal of the petitioner's employment contract by a vote of eight-to-zero. As a result subsequent filings were received espousing the idea that regardless of the status of Ms. Poch at the time of the original vote the matter is now moot.

At no time during this action have proceedings been commenced against the petitioner for inefficiency, incapacity or conduct unbecoming a superintendent. This dispute revolves entirely around the position of superintendent and the statute and related case law surrounding it. The petitioner maintains career tenure in his former position of assistant superintendent pursuant to *N.J.S.A. 18A:17-20.4*.

In July 1994 some discussions in the nature of the possibility of settlement took place. No settlement agreement was ever signed by the parties although a vote was taken by the respondent board of education regarding certain terms of what might have been a proposed settlement. Those terms were approved by the board of education.

DISCUSSION

For purposes of ease it may be best to deal with the motion to enforce the "settlement" first. In this case no written document was ever exchanged and signed by the parties. It is clear from the filings that there is a dispute that any meetings of the minds ever existed. A settlement pursuant to *N.J.A.C. 1:1-2.1* means any agreement between parties which resolves disputed matters and may end all or part of the case. Settlements are more particularly described in *N.J.A.C. 1:1-19.1* which states that when the parties to a case wish to settle the matter the judge shall require the parties to disclose the full settlement terms in writing by consent order or stipulation signed by all parties or their attorneys or, orally, by the parties or their representatives. It is then up the administrative law judge to determine whether the stipulation of settlement or the parties' oral declaration of a settlement under oath is voluntary, consistent with the law and fully dispositive of all issues in controversy. *N.J.A.C. 1:1-19.1(b)*. Should those things be found the administrative law judge (ALJ) is required to issue an initial decision incorporating the full settlement terms and approving the settlement. In cases such as this the matter would then be transmitted to the Department of Education for a final decision on the settlement.

In this case there is no question that none of these things occurred. Whether or not there might have been, if not a meeting of the minds, a closing in on position of the parties, there has never been a settlement disclosed to the undersigned by which a determination can be made that that settlement is voluntary, consistent with the law and fully dispositive of all issues in controversy pursuant to *N.J.A.C. 1:1-19.1*. Absent such ability to make a determination no settlement has occurred, least of all been accepted by way of initial decision and subsequently final decision by the Department of Education. As a result the motion to enforce the terms of the alleged "settlement" must be denied. No settlement has ever been disclosed to the undersigned that complies with the Administrative Procedure Act and the Uniform Administrative Procedure Rules. Additionally no settlement has ever been finally accepted by the Department of Education and as such none exists in this case.

In the petition there are requests made for compensatory and punitive damages based upon an allegation of malicious interference with the petitioner's contractual rights as well as a request for damages for humiliation, mental pain and anguish and attorney's fees. These matters may be dealt with simultaneously for the purposes of this initial decision. The jurisdiction of the Commissioner of Education is set forth in *N.J.S.A. 18A:6-9* which provides that the Commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the State Board or of the Commissioner. The courts have "repeatedly reaffirmed great breadth" of his power, *Hinfey v. Matawan Regional Bd. of Ed.*, 77 N.J. 514, 524 (1978), however this is not limitless.

One area specifically exempted from the Commissioner's jurisdictional grant is contractual disputes unless only incidental interpretation of the contract is necessary to resolve the claim. *New Jersey Educ. Ass'n. v. Trenton Bd. of Educ.*, 92 N.J.A.R. 2d (EDU) 481, 489. For example, the Commissioner lacks jurisdiction to

decide issues arising from an employment contract between a janitor and a school board. (Citation omitted) He does not have jurisdiction to decide issues arising from a contract between a milk supplier and a board. (Citation omitted). Nor can he exercise jurisdiction over a contract dispute between an architect and a board of education, (citation omitted) or interpret a contract in a tenure dispute . . . (citation omitted). [Ibid.]

The courts have affirmed the Commissioner's lack of jurisdiction over contractual disputes. See *Picogna v. Bd. of Ed. of Cherry Hill Twp.*, 249 N.J.Super. 332, 335 (App. Div. 1991); *South Orange-Maplewood Ed. Ass'n. v. Bd. of Ed. of South Orange*, 146 N.J.Super. 457, 463 (App. Div. 1977); *Newark Teachers' Union v. Bd. of Ed. of Newark*, 149 N.J.Super. 367, 372 (Ch. Div. 1977). The reasoning for this has been that there is no need to defer to administrative expertise since the only question properly presented to the court in contract disputes is one of contract interpretation.

It has also been consistently held that the Commissioner cannot award punitive damages, *North Bergen Fed. of Teachers Bd. of Ed. of Bergen*, 1975 S.L.D. 461, 467 or counsel fees, *Balsley v. North Hunterdon Bd. of Ed.*, 117 N.J. 434, 442-43 (1990). It has also been held that the Commissioner cannot award legal costs. *Lilenfield v. Bd. of Ed. of Watchung*, 1977 S.L.D. 315, 323; *Watsula v. Bd. of Ed. of Plumstead*, 1977 S.L.D. 692, 695. Moreover, the payment of any damages other than lost earnings or restoring an increment which has been improperly withheld, is not within the Commissioner's authority. *McLean v. Bd. of Ed. of Glen Ridge*, 177 S.L.D. 311, 314; *Smith v. Bd. of Ed. of Hamilton*, OAL Dkt. No. EDU 5468-87, adopted in part and rejected in part on other grounds, Comm. Of Ed. Dec. (April 21, 1988).

In the present matter the petitioner asserts malicious interference with contract. This claim is purely one of contract interpretation and requires no administrative expertise and is, therefore, not within the scope of the Commissioner's jurisdiction. As a result that portion should, and hereby is **DISMISSED**. As to the petitioner's request for punitive damages, counsel fees and costs, the case law clearly establishes that the

Commissioner lacks the authority to grant such relief and those requests are hereby **DISMISSED.**

We now turn to the motion to compel the deposition of Lila Poch based upon an allegation that she did not, in fact, have appropriate residency within the City of Elizabeth while acting as a board member. Determining the residency of Ms. Poch will not affect the outcome of the board vote at issue because, at the very least, she was a *de facto* member of the board which thereby rendered her vote to be valid. The definition of a *de facto* officer was set forth in *Jersey City v. Department of Civil Service*, 57 N.J. Super. 13 (App. Div. 1959) as follows:

An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised,

First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people without inquiry to submit to or invoke his action, supposing him to be the officer he assume to be.

Second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like.

Third, under color of a known election or appointment, void because the officer was not eligible, or because there was want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public.

Fourth, under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such. *Ibid.*

The legality of a *de facto* officer has also been considered by the Commissioner of Education in *Monsees v. Bloomingdale Bd. Of Ed.*, 1982 S.L.D. 1384. The Commissioner stated that:

A *de facto* school officer is one who has entered into possession of a school office and assumed to exercise the function thereof by virtue of an apparent election or appointment which is illegal or irregular. (Citation omitted). It is also well established that the acts of a *de facto* officer are valid and may not be challenged and set aside on the grounds that he did not hold title *de jure*. The official acts of a *de facto* school officer, which a *de jure* officer would be authorized to do, are, if formed in the prescribed manner, as valid and binding on the public and third persons as the acts of *de jure* officers, and authority to act cannot be questioned collaterally. This is true even though the acts are performed pending a contest or *quo warranto* proceeding which subsequently terminates in the ouster of the *de facto* officer from office. (Citation omitted) *Id.* At 1409-10.

As the result of this, the vote of Ms. Poch, cannot be used to invalidate the board's resolution of June 29, 1994. Based upon this analysis the motion to compel Ms. Poch's deposition is hereby **DENIED**. This denial is based upon the above reasoning and not predicated upon the subsequent vote by the respondent board on February 8, 1995 passing a second resolution by a vote of eight-to-zero in which Ms. Poch did not participate. It is not necessary to reach the question of whether or not this subsequent vote moots the issue of Ms. Poch's participation.

The respondent also brought a motion for sanctions based upon an alleged refusal to provide discovery or for more specific answers. A counterclaim was made by the petitioner that sanctions should be imposed upon the respondent. Pursuant to *N.J.A.C. 1:1-10.5* sanctions may be imposed by an ALJ pursuant to *N.J.A.C. 1:1-14.4* for failure to comply with the requirements of the discovery subchapter of the rules. Before imposing sanctions, the judge shall provide an opportunity to be heard to each of the parties. Based upon the ultimate decision in this case the issue of sanctions becomes moot and any further hearing is not required. Additionally the imposition of

sanctions would be inappropriate absent the ability of both parties to be heard on the issue. It should be noted that sanctions may be granted for the unreasonable failure to comply with any order of a judge or any requirements of the Uniform Procedure Rules. Those sanctions run the gamut from continuing a proceeding to dismissing or granting a motion or application and include the suppression of a defense or claim and the exclusion of evidence. There also exists the catchall phrase that the judge may "take other appropriate case-related action." *N.J.A.C.* 1:1-14.5. These issues become moot in light of the ultimate determination in this initial decision and therefore both applications are **DENIED**.

All of this legal analysis brings us finally to the question of appointment of superintendents pursuant to *N.J.S.A.* 18A:17.15. That provides that the board of education may by contract appoint, for a term of not less than three nor more than five years. At the conclusion of the term of the initial contract or of any subsequent contract as hereinafter provided, the superintendent shall be deemed reappointed for another contract term of the same duration as the previous contract unless, at least one year prior to the expiration of the first or any subsequent contract, the board shall notify the superintendent in writing that he will not be reappointed at the end of the current term, in which event his employment shall cease at the expiration of that term.

In this case much has been made of what the term employment means. Thomas G. Dunn, Jr. remains employed by the district and has received notice that the board, at least by way of the February 8, 1995 vote, had passed a second resolution which was one of nonrenewal of his contract. During the entire time of this proceeding the petitioner has retained employment with the district and has not had a reduction in salary from that found in his contract. No action has ever been taken in the context of this case to affect the tenure rights which the petitioner has in any other position. The position of superintendent is by contract through the statute only. The petitioner continues employment and continues receiving all of the benefits of the contract.

The Commissioner of Education has stated that the scheme established by *N.J.S.A. 18A:17-15. to 20.5* provides for a superintendent to be employed through one or more three to five year contracts, with employment following the initial contract to either continue via a succession of subsequent contract(s), or cease upon expiration of the current contract following due notice of nonrenewal, or alternatively, upon dismissal through tenure proceedings. The Commissioner of Education has pointed out that there is neither mention of, nor place for a unilateral termination, notwithstanding a payout situation involving a sum equivalent to remaining salary based upon the contract. While having pointed that out in *Harrington v. Bd. of Ed. of the Twp. of Clinton, Hunterdon County*, Commissioner Decision (February 16, 1995) the Commissioner also points out that this scheme expressly provides for employment for the duration of a superintendent's contract, thus conferring a status beyond mere entitlement to money. This of course leaves open the question of whether or not the continued employment compels a board to file tenure charges or continue, for practical purposes, a working relationship it no longer finds satisfactory. There is however a recognition that a notice of nonrenewal may be given pursuant to *N.J.S.A. 18A:17-20.1* that employment will not be continued beyond the term of the contract.

In the case of Thomas G. Dunn, Jr. he has retained his employment with the District, although his duties have changed, and not been subject to a payout of the remaining contractual period. In this case the petitioner has not been dismissed but retains employment through the District as well as all the benefits of the contract. The only thing required by the law is "employment" for the duration of a superintendent's contract. This confers a status beyond mere entitlement to money. The petitioner in this case retains his employment and retains all of the benefits although his duties have been changed and amended over time. As a result the petitioner's motion for summary decision is hereby **DENIED** and the respondent's cross-motion for summary decision is hereby **GRANTED**.

ORDERS

Based upon the foregoing it is hereby **ORDERED** that

1. The motion to enforce the alleged settlement is hereby **DENIED**.
2. The claim is for malicious interference with contract, compensatory damages, punitive damages, and attorney's fees and costs are hereby **DENIED** and the cross-motion for summary decision on those issues is hereby **GRANTED** for the reasons stated above.
3. The motion to depose Lila Poch is hereby **DENIED**.
4. Cross-motions for the imposition of sanctions for alleged discovery violations are hereby **DENIED**.
5. The petitioner's motion for summary decision is hereby **DENIED**.
6. The respondent's cross-motion for summary decision is hereby **GRANTED** for the reasons stated above and the petition is hereby dismissed in its entirety.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision on this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14b-10.

Within thirteen (13) days from the date on which this recommended decision is received by the parties, any party may file exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, 8th Floor, CN 500, Trenton, NJ 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

5/12/95

DATE



MARYLOUISE LUCCHI-McCLOUD, ALJ

5/16/95

DATE

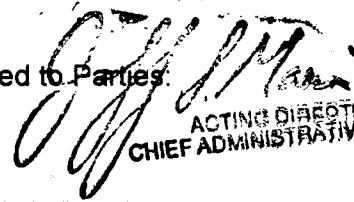
Receipt Acknowledged:



DEPARTMENT OF EDUCATION

MAY 16 1995

DATE

Mailed to Parties.


ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

am(FV)mxl

THOMAS G. DUNN, JR.,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE	:	
CITY OF ELIZABETH, UNION COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner pursuant to N.J.A.C. 1:1-18.4, as were replies thereto by the Board of Education. Exceptions by the Board on the issue of sanctions were also filed with the Director of the Office of Administrative Law pursuant to N.J.A.C. 1:1-14.14.

On exception before the Commissioner, petitioner urges reconsideration of his prior briefs and, in particular, renews his argument that the law entitles him not only to continued employment for the term of his contract, but specifically to employment in the position of Superintendent, with all of the duties, rights and amenities attendant thereto. Petitioner contends:

The key issue, and the issue that Judge Lucchi-McCloud seems to side-step and won't address for some reason is Petitioner's right to employment as Superintendent of Schools through June 30, 1996. The Court below never addresses, or even mentions, N.J.S.A. 18A:17-20 and N.J.S.A. 18A:17-20.2, the specific statutes that establish tenure during the term of the contract, ignores the extensive legislative history presented to it, and fails to recognize the complex issues that must be resolved. The decision is merely a conclusion, with nothing to support it. Less than two pages are devoted to the main issue in the litigation, and there is certainly no in-depth analysis of this issue by the Court. (emphasis in original) (Petitioner's Exceptions at p. 2)

In reply, the Board contends that petitioner's exceptions ignore the Commissioner's decision in Harrington, supra, which expressly holds that a board may relieve a

superintendent of his or her duties at any time between notice of termination and expiration of contract.

Upon review of the record and consideration of the parties' arguments on exception, the Commissioner determines to affirm the initial decision with modification as set forth below.

Initially, the Commissioner notes his full concurrence with the ALJ's determinations regarding the parties' purported settlement agreement, petitioner's claims for punitive damages and attorney fees and his related contractual claims, and compelling the testimony of Board member Poch. (Initial Decision at pp. 4-8)

The Commissioner further concurs with the ALJ's conclusion, based on Harrington, supra, that the statutory scheme governing appointment of superintendents does not permit unilateral termination of a superintendent's employment, but rather requires either that employment be maintained for the duration of the contract or that tenure charges be brought pursuant to N.J.S.A. 18A:6-10 et seq. (Initial Decision at pp. 9-10) Where the ALJ's analysis falls short, however, is in failing to include, and to apply to the facts of this matter, the concomitant holding of Harrington that a superintendent may be relieved of his or her duties during the period between notice of nonrenewal pursuant to N.J.S.A. 18A:17-20.1 and actual expiration of the employment contract.

Specifically, in Harrington, the Commissioner held that:

***the law's requirement for continued employment does not compel a board to either file tenure charges or continue, for practical purposes, a working relationship it no longer finds satisfactory. Rather, as with any other contracted teaching staff member, the board may elect to relieve the superintendent of the performance of his or her duties during any time between the giving of notice pursuant to N.J.S.A. 18A:17-20.1 that employment will not be continued beyond the term of the current contract and the actual termination of employment upon that contract's expiration. N.J.S.A. 18A:27-9. Such a result recognizes both the employment entitlement of the tenured superintendent and the need for a reasonable degree of flexibility on the part of the employing board of education.

(Slip Opinion at pp. 21-22)

Thus, as noted by the Board, petitioner's argument to the effect that, so long as petitioner remains entitled to the position of Superintendent, he must be allowed to actually perform the duties attached to that position, has been negated by the Commissioner's holding in

Harrington. Therefore, the Commissioner finds the action of the Board herein in relieving petitioner of his duties as superintendent while maintaining his status as an employee of the district was neither contrary to law nor violative of petitioner's tenure right. However, the inquiry does not end with this finding.

In the present matter, petitioner was not merely relieved of his duties as Superintendent. The record shows, and the parties do not dispute, that subsequent to being informed that he was no longer to perform the duties of Superintendent, petitioner was directed to perform instead the duties of Assistant Superintendent, and to report to the Acting Superintendent appointed to carry out the duties of which petitioner had been relieved. The Board views this arrangement as acceptable, even commendable, as the duties of Assistant Superintendent are within the scope of petitioner's certification, petitioner has tenure rights in the position of Assistant Superintendent, and the Board needs these functions filled because the person formerly performing them has been appointed Acting Superintendent. The Board further contends that educational continuity is being served, as it intends to appoint the Acting Superintendent to the position of Superintendent upon expiration of petitioner's contract.

The difficulty with this arrangement, however, is that it ignores petitioner's statutory entitlement to the position of Superintendent for the duration of his contract and subverts the intent of N.J.S.A. 18A:17-15 et seq. to strike a balance of power between the board and its superintendent through the hybrid mechanism of contractual tenure. In effect, the Board herein has removed petitioner from the position of Superintendent and transferred him to the distinct position of Assistant Superintendent, notwithstanding that he retains the salary and benefits due him under his contract as Superintendent. This the Board cannot do and still abide by the intent of the law, which is not now, and never was, to permit a board to replace a duly contracted superintendent easily or without meaningful practical consequence. Rather, under the statutory scheme, a board is given the benefit of having its employment obligation to any superintendent limited to 3 - 5 years; but the superintendent is given the benefit, for reasons of both personal stability and educational integrity, of employment security and a degree of professional independence for that period of time. It is axiomatic that, when entering into an employment contract with a superintendent, a board must expect to make a commitment to live and work with him or her during the term of the contract, and if the board in that time becomes

dissatisfied, it cannot merely dismiss the superintendent, impose a unilateral “buyout” or effectuate what amounts to an involuntary transfer to another position in the district. Rather, the board must conclude that the prospect of continuing the working relationship, for a period which by law cannot be more than 5 years and in reality is likely to be considerably less, is so untenable that, in the absence of a mutual separation agreement, it warrants the serious step of either filing tenure charges or relieving the superintendent of the performance of his or her duties under a statute (N.J.S.A. 18A:27-9) which does not contemplate performance of other work in lieu of the relieved duties, notwithstanding that the affected teaching staff member retains employee status for the remainder of the contract and the board obtains no benefit in return for salary and emoluments proffered during that time.

Thus, in the present instance, while the Board was free to unilaterally relieve petitioner of his duties for the remainder of his contract, it was not free to assign him the duties of Assistant Superintendent instead. Petitioner’s tenure right to that position, should he choose to exercise it, will arise upon expiration of his contract, and should the Board need the functions of Assistant Superintendent filled in the interim, it must make some arrangement other than assigning these duties to petitioner. Neither will this prohibition result in harm to educational continuity, as there is nothing to prevent the Board from continuing with its plan to appoint the current Acting Superintendent, to whom the Assistant Superintendent must report and from whom he or she must take assignments, to the position of Superintendent upon expiration of petitioner’s contract.

Accordingly, the Commissioner affirms the initial decision of the Office of Administrative Law as modified above, so that the Board is directed to cease and desist requiring petitioner to perform the duties of Assistant Superintendent for the duration of his contract. As in Harrington, supra, to the extent that petitioner may be entitled to any further relief as a result of the Board’s ultra vires action herein, the Commissioner declines to so order in view of the recency of the controlling statutory scheme and the absence of prior interpretation by the Commissioner and State Board on the question of alternative assignment upon relieving a superintendent of duties.

The Commissioner makes no determination on the issue of sanctions, as that function is reserved to the Director of the Office of Administrative Law pursuant to N.J.A.C. 1:1-14.14.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

EDU #7090-94
C # 247-95
SB # 86-95

THOMAS G. DUNN, JR.,	:	
	:	
PETITIONER-APPELLANT,	:	
	:	
V.	:	STATE BOARD OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF ELIZABETH, UNION	:	
COUNTY,	:	
	:	
RESPONDENT-CROSS/APPELLANT.	:	

Decided by the Commissioner of Education, July 10, 1995

For the Petitioner-Appellant, Reussille, Carotenuto, Bruno & Barger
(Martin M. Barger, Esq., of Counsel)

For the Respondent-Cross/Appellant, DeMaria, Ellis, Hunt & Friedman
(Richard H. Bauch, Esq., of Counsel)

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

Dr. Ronald K. Butcher and Dr. Orlando Edreira abstained.

December 6, 1995

Date of mailing DEC 08 1995

STATE-OPERATED SCHOOL DISTRICT	:	
OF JERSEY CITY, HUDSON COUNTY,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
NEW JERSEY STATE DEPARTMENT	:	DECISION
OF EDUCATION, DIVISION OF	:	
ADMINISTRATION AND FINANCE,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning District appealed determination that it return \$349,930 in grant funds to respondent Department for failure to expend or commit said funds by June 30, 1992.

ALJ concluded that respondent's demand for the return of the grant funds was not arbitrary or unreasonable. ALJ concluded that the District failed to expend or commit the funds in fiscal 1992 and thereby violated the conditions imposed by the Commissioner in the award of the discretionary aid grant. For the funds to be committed, the District had to be contractually or otherwise legally bound to invest resources by June 30, 1992. ALJ ordered that the Department was entitled to recover the grant funds not committed by June 30, 1992.

Commissioner adopted findings and determination in initial decision as his own and directed the adjustment of the District's 1995-96 state aid to recover the funds at issue.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO EDU 3044-94
AGENCY NO. #33-2/94

**STATE OPERATED SCHOOL DISTRICT
OF JERSEY CITY, HUDSON COUNTY,**

Petitioner,

v.

**NEW JERSEY DEPARTMENT OF
EDUCATION,**
Respondent.

Charlotte Kitler, Esq., for petitioner

Arlene Goldfus Lutz, Deputy Attorney General, for respondent.
(Deborah T. Poritz, Attorney General of New Jersey, attorney)

Record Closed: March 29, 1994

Decided: May 19, 1995

BEFORE **MUMTAZ BARI-BROWN, ALJ**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Jersey City School District (District), appeals from the decision that it return \$349,930 to respondent, Division of Administration and Finance of the New Jersey Department of Education (Department). The District received the money

through a grant from the Commissioner of Education's discretionary aid fund. The terms of the grant required that the funds be either expended or committed by June 30, 1992. Respondent argues that petitioner did not comply with those conditions because the monies were neither expended or committed by June 30, 1992. Therefore, respondent demands that the District return these grant funds. The District concedes that it had not expended the monies by June 30, 1992, but maintains that it had committed the grant funds by June 30, 1992.

The matter was transmitted to the Office of Administrative Law (OAL) on March 30, 1994, as a contested case pursuant to *N.J.S.A. 52:14B-1 to-15* and *N.J.S.A. 52:14F-1 to -13*. A prehearing conference was held on August 11, 1994, and hearings were held on January 23 and 24, 1995. The parties submitted post hearing briefs and the record closed on March 29, 1995.

ISSUES

1. Is the Department's demand that the District return \$349,930 in grant funds arbitrary and unreasonable?
- 2a. Did the District commit the grant funds for the District's Early Childhood Program by the end of fiscal year 1991-92? and if so,
- 2b. Was the commitment of grant funds consistent with the Commissioner's letter dated October 21, 1991.
- 3a. Is the purchase order issued to the District (*i.e.*, building renovations and repairs) a commitment for purposes of the grant, and if so,
- 3b. Did the District substantially comply with the conditions of the grant?
4. Was the District's commitment and use of grant funds consistent with the statutory purpose of the discretionary aid fund?

FACTS

The parties have stipulated to the following facts:

1. A discretionary aid account of \$25 million was established within the New Jersey Department of Education by L. 1991, c. 62, § 39, enacted and effective on March 14, 1991. This account was established for use by the Commissioner of Education to provide aid to school districts in order to ensure the continuation of educational quality during the period of transition to the new State aid program under the Quality Education Act, L. 1990, c. 52 as amended by L. 1991, c. 62.
2. The Commissioner of Education, by memo of April 25, 1991, advised school districts of the discretionary aid funding program and invited the submission of grant proposals.
3. The petitioner, Jersey City School District submitted a proposal for discretionary aid funds on May 15, 1991, seeking funding in the amount of \$9,185,748.
4. On July 22, 1991, the Commissioner of Education advised the District of the ability to provide funding in the amount of \$2.5 million and requiring the submission of a proposal revised according to the funding amount.
5. The District submitted a revised proposal on October 3, 1991. The proposal included a plan for expansion of the District's Early Childhood Program by establishing additional pre-kindergarten classes within the public schools and also in rented space within local housing projects.
6. By letter of October 21, 1991, the Commissioner of Education awarded a discretionary aid grant totaling \$2,414,595 for implementation of the District's proposal, including \$2,284,904 for implementation of the Early Childhood Program. The Commissioner's letter stated that "All funds not

expended or committed at the conclusion of the fiscal year shall be returned to the Department of Education.”

7. By June 4, 1992, the District was in the process of finalizing a written lease to rent space at the A. Harry Moore Apartments on Duncan Avenue, Jersey City, (Duncan Project) for use as an Early Childhood Development Center. The written lease was entered between the Jersey City Housing Authority and the District.
8. On June 9, 1992, the District submitted educational specifications to the respondent's Bureau of Planning concerning the Early Childhood Development Center to be housed at the Duncan Project.
9. The Bureau of Facility Planning approved the educational specifications by letter dated June 30, 1994.
10. The District reserved \$349,930.38 in discretionary aid funds for building renovations for preschool classrooms, by purchase order dated June 30, 1992. It canceled the purchase order on July 1, 1992.
11. The District advertised for bids on July 18, 1992 and July 19, 1992, for renovation work for the Early Childhood Development Center at the Duncan Project and opened bids on July 28, 1992.
12. Contracts for the renovation work were awarded by the District on August 6, 1992, to Groeschke Construction Co., for general construction work in the amount of \$298,600, and to G&T Mechanical Co., Inc., for mechanical/plumbing work, in the amount of \$97,000.

13. The total amount paid by the District for the renovations at the Duncan Project, after change orders, was \$412,535.54.
14. The District charged \$326,472.64 of the total cost of the renovation work at the Duncan Project to the discretionary aid grant funds.
15. Respondent commenced an audit of the discretionary aid grant on January 11, 1993, and reported its findings on June 28, 1993. The audit indicated that grant funds should be disallowed for the building repairs and renovations at the Duncan Project because no contracts had been signed and no bids has been solicited for the work by June 30, 1992.
16. By letter of January 26, 1994, respondent determined that the District should refund \$349,930.38 of the discretionary aid grant as the questioned costs for the building program at the Duncan Project.

Based on the evidence, I further **FIND** the following as **FACT**:

On April 25, 1991, the Commissioner advised the District of the grant and invited grant proposals. The Commissioner also informed the District that "the Commissioner's QEA fund is a one-time-only supplemental state aid appropriation which must be expended during FY '92 (1991-92)." (J-1).

On October 21, 1991, the Commissioner informed the State District Superintendent, Dr. Elena Scambio, that the District had been approved to receive \$2,414,595 in discretionary funds, including \$2,284,904 for implementation of the Early Childhood Program. The Commissioner also notified the District that a "[s]eparate accounting must be maintained for each program. All funds not expended or committed at the conclusion of the fiscal year shall be returned to the Department of Education." J-8. The Commissioner further advised the District that "[i]n the event the program

cannot be implemented as approved, the regional director of the Urban Assistance Center should be contacted immediately." *Ibid.*

On January 24, 1992, Thomas J. King, Acting Director, Division of Compliance, (Division) informed the District that it would audit the QEA discretionary funds awarded in FY '92. (J-9). Moreover, the auditors would review the following requirements:

2. All funds not expended or committed by June 30, 1992 shall be returned to the Department of Education.

4. In the event that a program cannot be implemented as approved, the county superintendent's office must be contacted and a decision made on appropriate action.

Thus, on three occasions, the Commissioner advised the District to take action on the funds in fiscal year 1991-92. The parties agree that the District did not expend the funds by FY '92. They dispute that the District "committed" the grant funds by June 30, 1992.

POSITIONS OF THE PARTIES

Petitioner contends that respondent's demand for the District to return \$349,930 in discretionary aid grant funds is arbitrary and unreasonable because the District did commit those funds in accordance with the conditions in the Commissioner's grant and consistent with the purpose and intent of the governing statute. Petitioner asserts that before the end of fiscal year 1992, it "reserved" the funds remaining in the grant by issuing a "purchase order" to itself. The purchase order stated that the funds were needed for the renovation of the preschool classrooms used in the Early Childhood Program. Thus, petitioner submits that the "pledge" of funds to a particular disposition satisfied the requirement that it "commit" the funds by June 30, 1992.

Alternatively, petitioner contends that the District should not be required to return the funds because it substantially complied with the conditions of the Commissioner's grant award. Petitioner avers that due to unanticipated difficulties in securing space for the Early Childhood Program, it could not expend the grant funds by June 30, 1992. However, within seven weeks from June 30, 1992, the District had incurred contractual liabilities for the program. Indeed, by August 19, 1992, the District entered into a lease agreement, opened bids for the renovation at the project, awarded construction contracts, and issued purchase orders to contractors. Thus, petitioner submits that grant funds expended within a relatively short time span after June 30, 1992, complied substantially with the grant conditions.

Respondent argues that the money was not committed as of June 30, 1992, because no contracts had been signed for services or bids solicited from contractors. Respondent further argues that a valid commitment must create a liability in the initiator. Here, there was no valid purchase order to a third party vendor. Thus, there was no valid encumbrance of funds or commitment by June 30, 1992.

Respondent argues that substantial compliance with the terms of the grant is not sufficient. Moreover, respondent asserts petitioner did not substantially comply with the terms of the grant.

DISCUSSION AND CONCLUSIONS

I

The Quality Education Act of 1990, (QEA or Act) established a new method for distributing State aid to school districts. *N.J.S.A. 18A:7D-1 to -37*. On March 14, 1991, an amendment to the Act, *L. 1991, c.62, § 39*, appropriated \$25 million for the Commissioner of Education to use for supplemental State aid to school districts. Specifically, the Legislature set up the "[s]pecial account to ensure educational quality during transition to New State Aid Program." *N.J.S.A. 18A:7D-28 Historical and Statutory Notes*. The statutory provision provides in part:

There is established within the Department of Education a special account into which the State Treasurer shall deposit \$25,000,000. The Commissioner of Education shall utilize the monies in the fund for supplemental State aid to school districts in order to ensure the continuation of educational quality during the period of transition to the new State aid program established pursuant to P.L. 1990, c.52 (C.18A:7D-1 et al.). Any supplemental State aid provided to a school district from this account shall not be included in the calculation of the spending limitations established pursuant to section 85 of P.L. 1990, c.52 (C.18A:7D-28).

The District received the grant from the \$25,000,000 discretionary fund administered by the Department.

Neither QEA nor the amendment provides for the return of funds by school districts. *But see Essex County Educational Services Comm. v. N.J. Dept. of Educ.*, 93 N.J.A.R. 2d (Vol. 4A) 522 (Dep't. of Ed.) (where the district was required to return unexpended funds to the Department of Education because the aid programs governed by the statutory provision required the return of unexpended funds, N.J.S.A. 18A:46-19.8). Moreover, the statute does not specify the manner in which grants from the discretionary fund are to be administered. Rather, the statute vests the Commissioner with broad discretion over such matters. Accordingly, the Commissioner's October 21, 1991 letter awarding the grant funds to the District explicitly directed that funds not "expended or committed" by the end of the fiscal year must be returned to the Department. (J-8). The Commissioner further directed the District to contact the regional director of the Urban Assistance Center if the program could not be implemented as approved. *Ibid.*

Where the terms of a contract are clear and unambiguous, the courts must enforce those terms as written. *Karl's Sales & Serv., Inc. v. Gimbel Bros.*, 249 N.J. Super. 487, 493 (App. Div. 1991), *certif. denied*, 127 N.J. 548 (1991), citing *Kampf v. Franklin Life Ins. Co.*, 33 N.J. 36, 43 (1960); *Levison v. Weintraub*, 215 N.J. Super. 273, 276 (App. Div. 1987), *certif. denied*, 107 N.J. 650 (1987). The ordinary meaning is to

be given to words, unless circumstances show that a different meaning is applicable. *Deerhurst Estates v. Meadow Homes, Inc.*, 64 N.J. Super. 135, 148 (App. Div. 1960), *on remand*, 71 N.J. Super. 255 (Law Div. 1961). Technical terms of art should be given their technical meaning unless the context indicates otherwise. *Deerhurst, supra*, 64 N.J. Super. at 150. Often, the same word may have a variety of ordinary or technical meanings. *Ibid.* The standard of interpretation of a contract is the meaning that would be ascribed to it by a reasonably intelligent person who was acquainted with all the operative usages and the circumstances surrounding the making of the writing. *Id.* at 149. Where there is ambiguity in a contract, words are to be construed against the drafter. *Karl's Sales & Serv. v. Gimbel Bros., Inc., supra.*, 249 N.J. Super. at 493; *Matter of Community Medical Center*, 623 F. 2d 864 (3d Cir. 1980).

On the other hand, where a grant agreement contains ambiguous terms, e.g., to "commit," the ambiguity should not necessarily be resolved against the Commissioner as the drafter of the grant agreement. In *Bennett v. Kentucky Department of Education*, 470 US 656, 105 S.Ct. 1544, 84 L.Ed. 2d 59d (1985) the Court addressed the contractual nature of federal grant agreements and stated that:

Unlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy....Given the structure of the grant program, the Federal Government simply could not prospectively resolve every possible ambiguity concerning particular applications of the requirement of Title [citation omitted]. ... Moreover, the fact that Title I was an ongoing, cooperative program meant that grant recipients had an opportunity to seek clarification of the program requirements. Accordingly, we do not believe that ambiguities in the requirements should invariably be resolved against the Federal Government as the drafter of the grant agreement.

[*Bennett v. Kentucky, supra*, 470 U.S. at 699, 84 L. Ed. 2d at 601.]

Here, neither party has demonstrated that the term "committed" has a special meaning in the context of school funding. *Webster's Third International Dictionary* 457 (1976) defines the term to commit: "to obligate or bind to take some moral or intellectual position or course of action . . . to pledge to some particular course or use: contract or bind by obligation to a particular disposition." Thus, the term commit connotes an

obligation of the committing party to a particular disposition or course of action. In its most liberal sense, the term means simply to pledge.

I have considered the District's position that it pledged the funds to a particular disposition, albeit not to a particular vendor. Indeed, on June 30, 1992, the District put aside the funds "for their express use for the building renovations for the pre-school program at the Duncan Avenue housing project." Petitioner's Initial Brief at 21-22. With the authorization of its "high-level officials," the District sought to establish a reserve through a purchase order "to carry those funds over to the next fiscal year for expenditure for their particular use". *Id.* at 22. The District issued the purchase order in its own name because this was the "only way it could find to document the reserve for financial recording keeping." *Ibid.* Thus, the District submits that under the ordinary meaning of "commit" its actions evinced a commitment of the grant funds to the Early Childhood Program.

I have also considered the context surrounding the Commissioner's use of the term "committed." Robert Finger performed the audit for the Department. Finger testified that a "commitment" is a liability to a third person vendor for goods or services. Further, a commitment which is represented by a valid purchase order must include a description of the goods or services to be purchased or delivered, an estimate, a bid or quote of the purchase price, and it must identify the vendor. And, a purchase order must be written to a third party. Essentially, the purchase order sets aside funds that will eventually become a payment or an expenditure after the service is performed or the goods are delivered. Additionally, the Department's guidelines used by school districts for keeping records and making reports about school financing state that "[a] purchase order constitutes a legal document binding the Board of Education upon the receipt of the articles or services listed." *Directions for Using New Jersey Public School Financial Accounting System.* J-32 at 17.

Finger concluded that the District's purchase order was not a valid commitment because it did not create a commitment to a third party vendor. Further, the purchase order did not create a valid encumbrance of funds and it could not be treated as an accounts payable by the District because there was no one to pay other than the District. Rather, the District's purchase order, written to itself, created a reserve of funds. Moreover, after the District canceled the purchase order, the funds reverted to the free balance to be used again.

The use of the term "commitment" in other contexts demonstrates that it is more than a mere pledge. See *Dubin Weston, Inc. v. Louis Capano & Sons, Inc.*, 394 F. Supp. 146, 154 (D.C. Del. 1975). A "commitment" for a mortgage loan is generally defined as a mutual agreement between a lender and the borrower that the former will grant the mortgage loan according to certain terms. *In re Rexplore, Inc. v. Securities Litigation*, 671 F. Supp. 679, 692 (N.D. Cal. 1987). As used in the Depository Institutions to Regulation and Monetary Control Act of 1980, a "commitment" means an enforceable agreement to provide a loan. The Natural Gas Policy Act of 1978, 15 U.S.C.A. § 3301 to -3432, uses the phrase "committed or dedicated to interstate commerce" to mean gas which is required to be sold under the terms of any contract, certificate under the Natural Gas Act, or any provision of the Act. 15 U.S.C.A. § 3301(18)(A)(ii). See *Falcon Petroleum v. Federal Energy Regulatory Commission*, 642 F.2d 780, 784 (5th Cir. 1981).

Finally, I have considered the significance of the change in the conditions of the terms of the grant. In his initial letter on April 25, 1991, the Commissioner used the term "expended" not coupled with the term "committed." In his second letter on October 21, the Commissioner "liberalized the conditions of the grant [by adding the word "committed"] and, therefore made it easier for districts to comply therewith, when he advised districts it would be sufficient if they merely committed the funds, rather than having to fully expend them." Respondent's Initial Brief at 3. Consequently, the Commissioner broadened the conditions of the grant terms by requiring that the funds

be "expended or committed" by June 30, 1992, the close of the fiscal year. (J-8, J-9). The time limitation imposed by the Commissioner is an exercise of fiscal management over statutory created school funds. In general, purpose limitations directly imposed by grant conditions must be construed and applied strictly. See *Valente, Education Law - Public and Private* § 20.42 at 306 (1985). Therefore, a liberal application to the term "committed" that included a non-binding pledge would be too broad and unrealistic.

I therefore **CONCLUDE** that for the funds to be "committed" by June 30, 1992, the District must be contractually or otherwise legally bound to invest resources in the Early Childhood Program by June 30, 1992.

Prior to the end of the 1992 fiscal year, petitioner failed to enter into any legally binding relationship with a third party vendor for the Early Childhood Program. Although the District took steps towards committing the funds prior to June 30, e.g., J-10, to J-16, the "purchase order" executed by petitioner to itself on June 30, 1992, created no legal obligation on petitioner's behalf. At most, the District was committed to the program as a matter of policy. Because petitioner was neither contractually nor otherwise legally bound to make the expenditures on the program it was also free to abandon its "commitment" to the program without legal consequence. Accordingly, I reject petitioner's interpretation that the term "committed" includes action which has no legal consequence.

I also reject petitioner's interpretation that the funds were committed by June 30, based on the District's view that respondent's audit confused various terms, such as "redefining 'expenditures' to mean payment, and equating 'commitment' with the term 'expenditure'." Petitioner's Initial Brief at 17, 26. Ambiguities should not be resolved against the Commissioner. See *Bennett v. Kentucky*, supra. 470 US at 649, 84 L.Ed 2d at 601. I **CONCLUDE** that the purchase order issued to the District was not a commitment for purposes of the grant.

Based on the above, I further **CONCLUDE** that the District failed to expend or commit the funds in fiscal year 1992 and thereby violated the conditions imposed by the Commissioner in the award of the discretionary aid grant.

II

I reject petitioner's assertion that the District should not be required to return the funds because it substantially complied with the conditions of the Commission's grant award. The conditions of the grant required that the funds be expended or committed in fiscal year 1992. Thus, action taken after June 30, 1992 does not comply with the terms of the grant. Indeed, within the context of federal funding of education programs the U.S. Supreme Court rejected the doctrine of substantial compliance. In *Bennett v. Kentucky Dept. of Educ.*, 470 U.S. 656, 105 S.Ct. 1544, 84 L.Ed. 2d. 590 (1985), the Court held that neither substantial compliance nor the absence of bad faith absolves the state from liability for spending funds contrary to the terms of the grant. Therefore, the Court granted the Secretary of Education's demand for repayment. Notwithstanding the District's good faith efforts to comply with the grant terms and assuming that its efforts constituted substantial compliance with the grant terms, I **CONCLUDE** that the District is liable for repayment of the funds. *Bennett v. Kentucky, supra*.

Having concluded that substantial compliance does not absolve the school district from liability to return the grant funds, it is not necessary to determine whether the District substantially complied with the terms of the grant.

III

The Department has indicated that should it prevail, it will recover the funds by reducing the District's State aid by the amount at issue. "Adjustments in funds between

a district and the Department are usually made by adjusting state aid.” Respondent’s Initial Brief at 16.

The District avers that its expenditure of grant funds for its pre-school program at the Duncan housing project furthers the legislative purpose of providing quality educational services. Therefore, if the Department demands the return of monies, the legislative goals of benefiting the education of schoolchildren will be defeated. Thus, I have carefully reviewed the evidence showing the District’s total action taken to implement the Early Childhood program in the Duncan housing project.

The Discretionary Aid funds were used for its intended purposes. The pre-school program at the Duncan housing project opened for classes on December 21, 1992. Considering the obstacles petitioner encountered to secure the space from the housing project, I commend the District’s efforts in implementing the pre-school project within four and a half months from the time it awarded construction contracts in August 1992. Moreover, this is not a situation where funds were mis-used for improper purposes. The cost to the District for the renovation work at the Duncan project was \$412,535, an excess of \$86,063 above the amount in question. Thus, the District paid an amount greater than the grant funds in question for the renovation work at the Duncan project but charged \$326,472 of the total cost to the Discretionary Aid funds. These expenditures provided a quality pre-school program and educational services to the school children in Jersey City.

I am persuaded by the witness’ demeanor that they were committed to implementing the a pre-school program at the earliest possible time after it received the grant award on October 21, 1991. Moreover, I reject respondent’s assertion that “[a]ny activity that took place after the expiration of the grant was irrelevant because it was not within the period of the grant.” Respondent’s Initial Brief at 4. To the contrary, the Department’s auditor reviewed the District’s books for fiscal year 1992-93 and confirmed that the District expended the grant funds and issued purchase orders for the

renovation work within seven weeks of June 30, 1992. Upon the completion of renovations at the Duncan housing projects, the pre-school program opened for classes on December 21, 1992. Based on the evidence, I **CONCLUDE** that the District's use of the grant funds was consistent with the statutory purpose of the Discretionary Aid fund. Thus, I have also considered the consequences to the District's ability to continue its program if it required to return the money.

Where an agency has properly determined that funds were misspent, a reviewing court has no independent authority to excuse repayment based on considerations of equities. *Bennett v. New Jersey*, 470 U.S. 632, 105 S.Ct. 1555, 84 L.Ed.2d. 572 (1985). *Bennett v. Kentucky Dept. of Educ.*, 470 U.S. 656, 105 S.Ct. 1544, 84 L.Ed.2d. 590 (1985). However, an agency has discretion to decide whether special circumstances exist that would warrant a waiver of recoupment. *Chicano Educ. & Manpower Serv. v. Dept. of Labor*, 909 F.2d. 1320 (9th Cir. 1990).

Indeed, in *Newark Bd. v. Division of Compliance*, 94 N.J.A.R. 2d (EDU) 156, the Commissioner exercised her discretion to either withhold or adjust transportation aid based on the school district's improper conduct. There, the Newark Board of Education (Board) admitted that it violated regulations regarding bidding procedures for school transportation for special education students. Specifically, the Board misconstrued the regulatory requirement that it provide transportation to only those special education children whose IEP required it or as prescribed by the school physician. *N.J.A.C. 6:28-3.8(a)(5)*. Instead, the Board's transportation policy provided busing to all special education children in the district. Consequently, the Board's policy led it to wrongly bid its contracts for transportation. A Department audit of the Board's pupil transportation program resulted in the Department's action to recover the funds by reducing the aid given to the school district. The Commissioner rejected the ALJ's recommendation that an adjustment be made to the full amount of reimbursement claimed by the Department. Although the Board's conduct was not the result of any improper or dishonest motive, the Commissioner found that the Board should be sanctioned for the

total amount of monies sought. Moreover, the Commissioner would not compel the State to adjust the amount of reimbursement because the Board's policy of busing all its special education students was not required by law. Also, the Commissioner considered whether the children would suffer from withholding transportation aid from the state aid given to the school district and the board's systemic failure to ensure that its bidding procedures and transportation contracts were in accord with the law. She determined that under the circumstances an adjustment to transportation aid for the improper award of contracts was not appropriate. *Newark Bd. v. Division of Compliance*, 94 N.J.A.R. 2d (EDU) at 162.

Here, the Early Childhood Program is a worthwhile endeavor and serves a necessary purpose. Indeed, the facts strongly support a determination that the children in Jersey City will suffer in "exacting" from the District's State aid by the amount at issue. Although the Department is entitled to a return of the grant funds not committed by June 30, 1992, the Commissioner may also determine that under the circumstances in this matter a recoupment should not be issued against the District's State aid. *Newark Bd. v. Division of Compliance*, 94 N.J.A.R. 2d (EDU) 156.

I am mindful, however, that the school districts and officials in charge of such programs must be required to adhere to all terms and conditions of any grant agreement. Strict compliance with grant conditions furthers effective fiscal management practices by school districts. Also, strict compliance permits the State to ensure that grant funds are properly expended and promotes the sound administration of education funds. Indeed, the State took over the Jersey City School District, in part, due to the mismanagement of school funds. *McCarrol v. Bd. of Ed. of Jersey City* 1989 S.L.D. 2337. Consequently, the State is now directly responsible for improving the operation of the Jersey City School District and ensuring that its students receive a thorough and efficient system of education. It is appropriate that the State require that its own appointee, the State District Superintendent, to comply with the conditions of all grant awards.

Based on the above, I **CONCLUDE** that the respondent's demand for the return of the grant funds because the District failed to expend or commit the funds by June 30, 1992, is neither arbitrary nor unreasonable.

ORDER

It is hereby **ORDERED** that the Department is entitled to recover the grant funds not committed by June 30, 1992.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 19, 1995
DATE

5/23/95
DATE

MAY 25 1995
DATE

Mumtaz Bari Brown
MUMTAZ BARI, BROWN, ALJ

Receipt Acknowledged:
Tracy K. Stackhouse

DEPARTMENT OF EDUCATION

Mailed to Parties:
Jeff S. Mann
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

Patricia Noonan
Dr. Charles R. Smith
Charles Lombardi

For Respondent:

Robert S. Finger

Exhibits:

- J-1 Memorandum from Commissioner John Ellis to Chief School Administrators dated April 25, 1991.
- J-2 Letter from State District Superintendent Elena J. Scambio to Commissioner John Ellis dated May 15, 1991.
- J-3 Jersey City Public Schools Request for QEA Supplemental State Aid dated May 15 1991.
- J-4 Letter from Commissioner John Ellis to State District Superintendent Elena Scambio dated July 22, 1991.
- J-5 Memorandum from Hudson County Superintendent of Schools Louis C. Acocella to State District Superintendent Elena J. Scambio dated July 30, 1991.
- J-6 Letter from State District Superintendent Elena J. Scambio to Ms. Juanita H. Brandford dated October 3, 1991.
- J-7 Discretionary Aid Spending Plan submitted by Jersey City Public Schools.
- J-8 Letter from Commissioner John Ellis to State District Superintendent Elena J. Scambio dated October 21, 1991.
- J-9 Letter from Thomas J. King to State District Superintendent Elena

- J. Scambio dated January 24, 1992.
- J-10 Addendum No. 3 between Owner and Consultant (District and Engineer) dated April 3, 1992.
- J-11 Letter from Dominic B. Carrino, P.E., to Mr. Victor Demming dated May 1, 1992.
- J-12 Letter to Arthur Pugh, Director of Tenant Services, to State District Superintendent Elena J. Scambio dated June 4, 1992.
- J-13 Inter-Office Memorandum from Arthur Pugh, Director of Tenant Services, to Robert J. Rigby, Jr. dated June 23, 1992.
- J-14 Resolution of Housing Authority of City of Jersey City, signed by Robert J. Rigby, Jr., Secretary Executive Director dated July 1, 1992.
- J-15 Agreement for Use of Space between Jersey City School District and Jersey City Housing Authority dated July 1, 1992.
- J-16 Letter with attachment from Charles Lombardi, Director of Maintenance to Michael D. Macaluso dated June 9, 1992.
- J-17 Letter from Michael D. Macaluso to State District Superintendent Elena J. Scambio dated June 30, 1992.
- J-18 Purchase Order of Jersey City Public Schools dated June 30, 1992.
- J-19 Purchase Order of Jersey City Public Schools to G & T Mechanical Inc. dated August 19, 1992.
- J-20 Purchase Order of Jersey City Public Schools to Groeschke Construction Company dated August 19, 1992.
- J-21 Jersey City Public Schools Bid Spread Sheet for Early Childhood Center dated July 28, 1992.
- J-22 Jersey City Public Schools Action Form for Award of Contracts for Early Childhood Development Center at Duncan Project date of approval August 6, 1992.
- J-23 Temporary Certificate of Occupancy dated December 18, 1992.
- J-24 Letter with Attachment from Frank D. Van Camp, Chief Auditor, to

State District Superintendent Elena J. Scambio dated December 9, 1992.

- J-25 Letter with Attachments from Frank D. Van Camp, Chief Auditor, to Victor Demming, Acting State District Superintendent dated June 28, 1993.
- J-26 Letter from Assistant Commissioner Robert H. Davis to State District Superintendent Elena J. Scambio dated January 26, 1994.
- J-27 Project Manual and Bid Specifications for Early Childhood Development Center, Duncan Project, Jersey City School District, Hudson County dated July 20, 1994.
- J-28 New Jersey State Department of Education Budget/Actual Expenditure Report for Fiscal Year 1992 QEA Discretionary Funds Award.
- J-29 Purchase Order of Jersey City Public Schools dated June 30, 1992.
- J-30 New Jersey State Department of Education, Division of Finance Transmittal Form with Attachments to Tighe, Doty, Carrino, PA.
- J-31 Public Notices of Jersey City Public Schools in the "Newark Star Ledger" dated July 19, 1992, and "Jersey Journal" dated July 18, 1992.
- J-32 Directions for Using New Jersey Public School Financial Accounting System dated 1984.
- J-33 Contractual Order Operation for New Jersey School Districts Procedural Guide dated 1975.

STATE-OPERATED SCHOOL DISTRICT :
OF JERSEY CITY, HUDSON COUNTY, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF : DECISION
EDUCATION, DIVISION OF ADMINIS- :
TRATION AND FINANCE, :
RESPONDENT. :
_____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions of both petitioner and respondent and reply exceptions of respondent were timely filed in accordance with N.J.A.C. 1:1-18.4.

Respondent's exceptions urge the Commissioner's adoption of the ALJ's decision averring that the decision correctly found that, "in the absence of a legally binding commitment [for the monies herein at issue] by June 30, the district failed to comply with the Commissioner's mandate that the district expend or commit the funds by the end of the school year," and respondent is, therefore, entitled to recover these funds. (Respondent's Exceptions at p. 2)

Petitioner excepts to the ALJ's conclusion that, under the circumstances existing in this matter, strict compliance with the terms of the discretionary grant was reasonable, therefore, requiring recoupment of these monies. Rather, it asserts that "[r]equiring strict adherence to the June 30, 1992 deadline is inequitable *** particularly in light of the Judge's findings that the District's use of the grant funds was proper, consistent with the statutory

purpose and resulted in a 'quality pre-school program and educational services to the school children in Jersey City' ****" (Petitioner's Exceptions at p. 7) Petitioner notes that the ALJ determined that timelines for expenditure of these funds were agency rather than statutorily determined and, therefore, the Commissioner has the discretion to decide whether special circumstances exist which would warrant a waiver of recoupment. It urges that such special circumstances are clear in this matter. Specifically, the District contends that the ALJ found

- . The District's use of the funds was consistent with the statutory purpose of the Discretionary Aid fund.
- . The funds were used for their proper and intended purposes, i.e., to provide a quality pre-school program and educational services to the school children of Jersey City.
- . There was no mis-use or improper expenditure of funds. In fact, the District spent \$412,535 on renovations for the pre-school program, an amount of \$86,063 in excess of the charged grant monies.
- . Although the District did not legally commit the funds by June 30, 1992, it did incur contractual liabilities for the program by August 19, 1992, just seven weeks after the end of the fiscal year.
- . The District's staff acted in good faith and were committed to implementing the pre-school program at the earliest possible time.
- . The District's use of the monies was for a worthwhile endeavor and serves a necessary purpose.
- . The facts strongly support a determination that the children in Jersey City will suffer if the District's state aid is reduced by the amount at issue.

(Petitioner's Exceptions at pp. 3-4)

Petitioner further contends that in light of these facts and the equities existing in this matter, the ALJ "virtually invited the Commissioner to exercise his discretion and waive recoupment." (Petitioner's Exceptions at p. 2) Petitioner distinguishes this matter from Newark Bd. of Ed. v. Division of Compliance, 94 N.J.A.R. 2d (EDU) 156, 162, discussed by the ALJ in

her initial decision, where the Commissioner rejected the ALJ's recommendation for equity and directed the return of state aid. It contends that here, unlike Newark, there was no violation of law, regulation or public policy in the District's inability to use the grant funds by June 30, 1992.

Petitioner next excepts to the ALJ's determination that an examination of whether the District "substantially complied" with the terms of the grant was unnecessary as strict compliance with the grant's terms was required. It argues that substantial compliance has been held sufficient in areas where statutory rather than agency imposed requirements are involved. Petitioner cites case law in the areas of school elections and public contract bidding where it contends the Commissioner has held that substantial compliance with strict requirements is acceptable when furthering legislative goals.

In conclusion, as the District substantially complied with the terms of the grant or, alternatively, because the facts in this case strongly and fairly warrant a waiver of recoupment, petitioner urges the Commissioner "to accept the suggestion stated by the Administrative Law Judge and '...determine that under the circumstances in this matter a recoupment should not be issued against the District's State aid' ***." (Petitioner's Exceptions at p. 10)

In reply, respondent argues that it acted properly in requesting the return of the funds at issue. It posits that the District was advised on three separate occasions that the grant monies must be utilized during the 1991-92 school year. Further, it asserts that the District was also twice notified to advise the Department if implementation of the grant funds could not be accomplished as required. Notwithstanding this clear notice, the District presented no evidence whatsoever that it advised the Department that it would have difficulty complying with the conditions of the grant. (Respondent's Reply Exceptions at pp. 1-2)

Respondent next asserts that while petitioner contends that the ALJ in her initial decision “invited” the Commissioner to utilize his discretionary power and allow the District to retain the grant funds, it chose to ignore the ALJ’s subsequent discussion on page 16 of her initial decision with respect to this potential option:

I am mindful, however, that school districts and officials in charge of such programs must be required to adhere to all terms and conditions of any grant agreement. Strict compliance with grant conditions furthers effective fiscal management practices by school districts. Also, strict compliance permits the State to insure that grant funds are properly expended and promotes the sound administration of education funds. Indeed, the State took over the Jersey City School District, in part, due to mismanagement of school funds. McCarroll v. Bd. of Ed. of Jersey City, 1989 S.L.D. 2337. Consequently, the State is now directly responsible for improving the operation of the Jersey City School District and insuring that its students receive a thorough and efficient system of education. It is appropriate that the State require that its own appointee, the State District Superintendent to comply with the conditions of all grant awards.

(Respondent’s Reply Exceptions at pp. 2-3)

With respect to petitioner’s arguments as to substantial compliance being sufficient in the within matter, respondent discounts such an assertion arguing that public policy dictates that where public funds are concerned, all depositories of such monies must be held to a strict accountability and absolute compliance. It argues, as noted in Connor v. Morse, 20 N.E. 2d 424 (Mass. Sup. Jud. Ct. 1939), “the safeguards erected to protect public treasuries are not to be thrust aside or evaded because public officers believe in particular circumstances that their operation is harsh, but there should be strict application to particular instances.” (Respondent’s Reply Exceptions at p. 3)

In conclusion, respondent renews its assertion, advanced in its post-hearing submission to the ALJ, that the Commissioner’s establishment of a June 30, 1992 limitation on

the commitment of funds was statutorily compelled and, consequently, the Commissioner lacks the discretion to permit a district to utilize these funds after the fiscal year at issue.

Upon a careful and independent review of the record in this matter, the Commissioner finds the exceptions advanced by petitioner unpersuasive, and adopts the ALJ's conclusion that, as petitioner failed to comply with the terms and conditions under which the discretionary grant monies were awarded, respondent's demand for return of these funds is neither arbitrary nor unreasonable.

Initially, the Commissioner notes that he concurs with the ALJ's determination, for the reasons clearly articulated in the initial decision at pp. 8-12, that the District failed to "expend or commit" the funds at issue herein by June 30, 1992 as clearly mandated by the terms of the discretionary grant. Further, while the Commissioner recognizes and commends the efforts expended by the District which, ultimately, resulted in a quality pre-school program and educational services for the school children of Jersey City, public policy and the facts in this matter require him to reject petitioner's argument that its substantial compliance with the grant's terms or the equities of this matter compel the Commissioner to exercise his discretion and permit the District to retain these funds. Even accepting, arguendo, that the Commissioner has such discretion, he would be precluded from this course of action by the following considerations.


As aptly noted by the ALJ, even assuming that the District exercised good faith efforts to comply with the terms of the grant and such efforts constituted "substantial compliance" with such terms, this is not sufficient to absolve the District from liability for expending the monies contrary to the grant's specific conditions and, consequently, does not operate to insulate the District from liability to return the grant funds. (See Bennett v. Kentucky

Dept. of Ed., supra) Notwithstanding petitioner's contention that substantial compliance may be tolerated in areas of school elections and public contract bidding where the Commissioner has declined to invalidate elections for "minor irregularities" or has found that "technical omissions" will not vitiate a bid where a bidder substantially conforms to specifications, the instant matter is distinguishable in that it involves the expenditure of public monies and, therefore, requires the highest level of assurance that the public trust be maintained. (Petitioner's Exceptions at p. 9) The Commissioner must remain mindful of his responsibility to safeguard public assets which have been entrusted to him. As such, he must exercise sound fiscal policy in the administration and handling of these monies which includes attaching such terms and conditions to the grant of these funds as he determines are necessary to insure their effective utilization, and recipients of the monies must be held strictly accountable for acting within this established framework.

The Commissioner further finds that the District's failure to comply with the timeliness requirement, particularly when it had been specifically advised and invited, on two separate occasions, to report and discuss any potential difficulties in this regard with Department officials, strongly belies an argument that fairness and equity compel a waiver of the penalties necessitated by its actions.

Accordingly, the initial decision of the Office of Administrative Law is affirmed. The Commissioner directs the adjustment of the State-operated School District's 1995-96 state aid to recover the funds at issue.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

250-95

JOSEPH P. ZARZACA,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF WILLINGBORO,	:	
BURLINGTON COUNTY,	:	
	:	
RESPONDENT.	:	
	:	
_____	:	

SYNOPSIS

Petitioning attendance officer challenged Board's action denying an extension of his sick leave as violative of N.J.S.A. 18A:30-1 through 30-3. Petitioner subsequently retired.

ALJ found that since petitioner submitted updated medical information when the Board requested it, attesting to the continued inability of petitioner to work, the Board's denial of extension of sick leave, without medical review or advice, was arbitrary. Petitioner was entitled to use his accumulated sick leave up to the effective date of his retirement. Board was ordered to pay petitioner for the available sick days between the last day for which he received payment and the effective date of his retirement.

Commissioner adopted findings and determination in initial decision as his own and directed payment for the accumulated sick days.

JULY 17, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8494-94S

AGENCY DKT. NO. 332-8/94

JOSEPH P. ZARZACA,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF WILLINGBORO,
BURLINGTON TOWNSHIP,**

Respondent.

Frederick W. Hardt, Esq., for petitioner

James P. Granello, Esq., for respondent

Record Closed: May 12, 1995

Decided: June 1, 1995

BEFORE JEFF S. MASIN, ALJ:

Joseph P. Zarzaca filed a civil suit in the Superior Court of New Jersey, challenging the action of the respondent Board of Education, which had denied an extension of Mr. Zarzaca's sick leave. He contended that the Board violated his rights under the sick leave provisions of *N.J.S.A.* 18A:30-1 through 30-3. The court transferred the matter to the Department of Education, which received the matter on August 23, 1994, and then transferred the contested hearing to the Office of Administrative Law ("OAL") on September 1, 1994, pursuant to *N.J.S.A.* 52:14B-1 to -21 and *N.J.S.A.* 52:14F-1 to -14. After a prehearing conference held on October 24, 1994, the case was scheduled for hearing on February 9, 1995, but was adjourned from that date and was subsequently heard by this judge on April 4, 1995, at the OAL offices in

Mercerville. The attorneys filed briefs and closing statements on April 28 and May 10, 1995, and the record closed on May 12, 1995.

The essential facts which underlie this case are not in dispute. Mr. Zarzaca was employed by the Willingboro Board of Education as an attendance officer and registrar. He had begun his employment with the District in January, 1970, after having served as a police officer for 18 years with Willingboro Township, ending his police career as a Detective Sergeant. He worked until 1993; however, according to Mr. Zarzaca, beginning in 1986 he began to experience back pain. By 1993 the pain had become intense. After a severe spasm during his vacation in Vermont, he returned home and was examined by his family physician, Dr. Daniel Tran. The doctor advised Mr. Zarzaca that he should not return to work, and Mr. Zarzaca went out on medical leave. At the time he had accumulated 223 sick days with the District. He provided a medical report from Dr. Tran in support of his request for sick leave. From August 1993 until March 1994, he remained out on sick leave, apparently without questions being raised by the Board. Then, in March, 1994, the Director of Personnel for the Board, Dr. Phyllis Young, wrote to Mr. Zarzaca and requested another letter from his physician "stating a current diagnosis and prognosis for your condition with an approximate date of return if applicable." In response, Mr. Zarzaca forwarded a letter from Dr. Tran, date March 18, 1994, (P-2), in which the doctor stated that Mr. Zarzaca was still "experiencing much difficulty with his back pain," had exhibited "no improvement" and was to "remain home from work." The doctor noted that Mr. Zarzaca was to see a neurosurgeon on April 19 and that the doctor would review the report from that doctor. He invited Dr. Young to contact him if she had any questions regarding Mr. Zarzaca's condition.

On April 21, the Board issued a letter to Mr. Zarzaca, advising him in accordance with legal requirements that on May 2, at a closed session of the Board, he "may be discussed" in regard to a "Ratification of Extension of Leave of Absence With Pay." On May 3, Dr. Young again wrote, this time advising that the Board had not approved an extension of the leave of absence with pay and that the time frame covered was from 11/2/93 to 4/19/94. Minutes of the meeting show that the motion to ratify the extension failed for want of a second.

On May 18, Mr. Zarzaca sent the Board a second letter from Dr. Tran, dated May 17, 1994, in which the doctor wrote that Mr. Zarzaca had visited his office on the 17th, complaining

of continuing severe low back pain, which pain radiated down the buttocks and legs, and numbness in the right leg. Dr. Tran also noted the presence of a left side paraspinal mass, extending from L3 to L5, and degenerative disc disease. The letter reflected the findings on examination as well. The doctor concluded that

Because of Mr. Zarzaca's symptoms, he is unable to perform normal daily activities. Any activities aggravate his pain.

Mr. Zarzaca testified that when he did not receive his pay for the pay period ending on May 15, he called the Board's accountant and was told that there was a problem. The accountant later advised that Dr. Young had advised the accountant that the Board had acted to "hold" the pay. Mr. Zarzaca had not heard anything about this action up to that time.

On May 18, Dr. Young wrote to advise the petitioner that the Board might discuss him in closed session on the 23rd of May, regarding "status of medical leave." On May 25, Dr. Young again wrote, this time advising that at its executive session on the 23rd the Board reviewed the May 17 letter from Dr. Tran and

considered the fact that no report has been received from the neurosurgeon you were to have seen. Please be advised that there has been no change in the Board's decision of May 2, 1994 and that you are not on an approved medical leave. Therefore, you are directed to return to work. If you do not return to work immediately, you will be removed from the payroll.

On June 1, 1994, Frederick W. Hardt, Esq., the attorney representing Mr. Zarzaca, wrote to Ms. Josephson, the attorney representing the Board. Mr. Hardt enclosed the report received from Dr. Balderston of the Rothman Institute, the neurosurgical consultants who had evaluated Mr. Zarzaca at Dr. Tran's request. He asked if reconsideration of the Board's decision would occur in light of the report, or if not, whether Ms. Josephson could accept service of process for the Board. Ms. Josephson responded on June 3, writing that the Board clearly had a managerial prerogative to assure that employees did not abuse sick leave and pointing out that "accumulated sick time is only to be used if an employee is unable to work because of illness" and that it was

“not the employees’ option not to come to work because the time has been accumulated.” Ms. Josephson then wrote

If anything the Rothman report confirms the Board’s decision that Mr. Zarzaca is fit to return to work. The report concludes: “His only medical problem is hyperthyroidism for which he takes Synthroid. Physical examination today shows a well developed, well nourished white male in no acute distress.” (Emphasis in the original).

Ms Josephson ended by suggesting that Mr. Zarzaca’s alternatives were to retire or return to work immediately.

On a date in June which has not been specifically determined in this hearing, but which was apparently sometime after the issuance of the June 3 letter from Ms. Josephson, Mr. Zarzaca wrote to the Board to advise that he had decided to retire, effective September 1, 1994. A notice of June 14, 1994, advised him that his retirement and reappointment might be discussed at the Board’s closed session of June 14, 1994. On July 5, a letter from Dr. Young confirmed that the Board had accepted the letter of retirement at its June 27 meeting. Mr. Zarzaca’s retirement became effective on September 1, 1994.

Mr. Zarzaca testified that in conversations with Dr. Young, he had advised her that he was to undergo an MRI at Dr. Balderston’s request about a week to ten days after seeing the doctor. In fact, the test was performed about 8-10 days after he saw the doctor. However, the witness explained that even up to this day he has never been able to obtain the MRI. He was never asked by the Board to see any other physician. No doctor ever advised him that he was well enough to return to work.

Dr. Tran testified regarding his examinations of Mr. Zarzaca and his diagnosis. According to the doctor, Mr. Zarzaca was seen on 10 occasions between April 2, 1992, and September 15, 1994, and during that whole period his condition was essentially unchanged. He was suffering from severe back pain, and an MRI study performed in January 1993 confirmed multiple level disc degeneration and the presence of a large lesion in the paraspinal muscle on the left side running from S-1 to L-3. Mr. Zarzaca had been out of work since August 2, 1993, and he agreed with the

patient that he was in too much pain to work. The doctor did not question Mr. Zarzaca about the nature of his duties with the Board. He assumed that he worked at a desk job, but he admitted that it would have mattered to him to know the exact duties. The referral to the Rothman Institute was basically for the purpose of ascertaining whether the lesion could be removed. Dr. Tran was never contacted by anyone on behalf of the Board regarding Mr. Zarzaca.

Dr. Phyllis Young, now an assistant principal in a junior high school in the District, was formerly Director of Personnel for the Board. She explained that the March 1994 letter to Mr. Zarzaca was sent in the normal course of business, as it was the time of year for the Board to determine who it would be employing for the next school year. When she received Dr. Tran's letter in March she shared it with the Board, but does not recall whether she recommended any course of action at that time. She was instructed to contact Mr. Zarzaca regarding the neurological report. She wrote to him, but does not recall seeing the response from Dr. Tran of May 17 (P-3). As for P-4, the Rothman Institute report, the witness did not recall if she was present when the Board discussed it. After the Board met she was told to ascertain the results of the MRI. She was also told to advise Zarzaca to report for work, as the Rothman report did not say that Mr. Zarzaca couldn't work. She doesn't recall whether she was ever told to secure an independent medical evaluation of either the letters from Dr. Tran and/or Rothman Institute. She was unaware of whether there was any Board policy regarding independent evaluations or any past history of other employees who had been required to obtain such evaluations. She did remember being asked by the Board how many accumulated sick days Mr. Zarzaca had available to use.

Dr. Young explained that after June 1 she was told to contact Mr. Zarzaca about the MRI. She had spoken with Ms. Josephson about having a Board selected doctor review the MRI. Conversations were held with the Board's Workers' Compensation counsel regarding the names of physicians available for this task. Mr. Zarzaca was never told that his sick leave was being withheld pending submission of the MRI. Once he submitted his letter of resignation she viewed the issue as moot.

Board President Linda Taylor testified that she was present at the May 23, 1994, meeting. At an executive session that evening the Board discussed Mr. Zarzaca. No physician was a

member of the Board at the time. She did not recall reviewing any documents regarding Mr. Zarzaca.

The Board has a sick leave policy, and extensions are granted at the discretion of the Board. The Board did have the Tran report, but had no recommendation from any school official regarding the extension. Ms. Taylor explained that the Board did not review or reconsider the matter after June 1.

Edison Holley, another member of the Board, was present on May 2, when the motion seeking to approve an extension failed to receive a second. He did not recall if he had seen any medical reports, or whether the Board was given any distillation of such material.

The parties stipulated that unaffiliated employees such as Mr. Zarzaca did not receive written contracts in 1994-95, and Mr. Zarzaca had an oral contract for the period from July 1 to September 1, when his retirement became effective.

DISCUSSION

The decision of a school board as to whether to extend a sick leave is discretionary in nature. As such, the standard by which the actions of the board are tested is whether it acted in an arbitrary, capricious and unreasonable manner. *Dore v. Bedminster Township Board of Education*, 185 N.J. Super. 447 (App. Div. 1982). If it did not, then the Commissioner of Education will not interfere with the local board's decision. *Denney v. Board of Education*, 131 N.J. 626 (1993).

In the present case, I **FIND** that the undisputed facts reveal that Mr. Zarzaca had a long history of back trouble. For a number of years, he managed to come to work and perform his duties as required, despite the pain and discomfort that afflicted him. Eventually, in 1993, after a significant flareup while on vacation, he discussed his problem with his personal physician, Dr. Tran, and the result was the advice that Mr. Zarzaca should not go to work, due to the back condition. The Board accepted Dr. Tran's opinion, at least to the extent that it agreed to a paid sick leave credited against Mr. Zarzaca's accumulated sick leave from August 3, 1993.

When the Board's representative, Dr. Young, advised Mr. Zarzaca in March, 1994, that the Board needed to obtain updated medical information, Mr. Zarzaca contacted Dr. Tran, who supplied the Board with a new letter, attesting to the continued inability of Mr. Zarzaca to work. It was admitted during the hearing that Dr. Tran did not actually discuss the details of Mr. Zarzaca's work activities with Mr. Zarzaca. Nevertheless, the Board was not then aware of this fact, (it does not appear that a detailed description of those duties would have dissuaded Dr. Tran from his opinion, as the job was in fact both a desk job and also involved "outside" work), and as of the date upon which it received Dr. Tran's letter of March 18, 1994, the only evidence which the Board possessed about Mr. Zarzaca's medical condition and his ability to perform the duties required of his job from any medical professional was that received from Dr. Tran, to wit: Mr. Zarzaca was still disabled from performing his job. It also knew that Mr. Zarzaca was to see a neurosurgeon on April 19th.

Additionally, I **FIND** that when the Board considered a motion to extent Mr. Zarzaca's leave on May 2, 1994, it had no additional information available to it as to his condition beyond that which it had after receiving Dr. Tran's March 18 letter. It was not then aware of any results of the scheduled April 19 neurosurgical consult. For reasons which are not evidenced in the record of either the Board meeting or this hearing, the motion was not seconded, and therefore failed. Thereafter, the Board, through Dr. Young, advised Mr. Zarzaca that the motion had not passed. It did not provide any reason for this failure of passage, and did not suggest that the failure had been influenced by a desire for the neurosurgeon's report, or for any other reason.

Following his receipt of the notice that the Board had not approved the extension, Mr. Zarzaca submitted a second letter from Dr. Tran, which stated in clear language that Mr. Zarzaca was "unable to perform normal daily activities." Despite its receipt of this report, the Board once again denied the extension. Here again, at the time of this second consideration of Mr. Zarzaca's request for an extension, the only report available to the Board from a medical person as to the condition and fitness of its employee was Dr. Tran's report.

Following the Board's May denial of an extension, the Board, through Dr. Young, advised Mr. Zarzaca by letter of May 25, that it had not received any neurosurgical report and that the

extension had been denied. Until the letter of May 25, the Board had made no request for the neurosurgical report and the exact influence which the lack of the receipt of this report exerted upon the determination to deny the extension was not stated, although by this time it could be inferred. Indeed, in response to this letter, Mr. Hardt submitted the neurosurgical report to the Board's attorney on June 1.

The June 6, 1994, letter from Ms. Josephson to Mr. Hardt is quite significant. Ms. Josephson quite correctly notes that sick time is only to be used when the employee is unable to work because of illness and that verification of illness is a management prerogative. She then asserts that the Rothman report "confirms the Board's decision that Mr. Zarzaca is fit to return to work."

It is not clear how the Board or Ms. Josephson determined that the quoted comments from the Rothman report "confirmed" any such notion. The hearing record revealed that no qualified medical personnel sat on the Board, and Ms. Josephson's letter does not suggest that any medical *expert*, let alone any medical personnel, had reviewed the report and advised the Board that the fact that the report stated that Mr. Zarzaca was not in "acute distress" or that his only "medical" problem was hyperthyroidism, or that the report did not specifically conclude that he could not work, "confirmed" Mr. Zarzaca's fitness to work, and that as a result Dr. Tran's opinion should be ignored. In fact, what apparently occurred was that the Board, a group of lay individuals, or perhaps their attorney acting as their advisor, took it upon themselves or herself to decide that if Mr. Zarzaca was not in "acute" distress (as opposed to "chronic")¹ when seen by Dr. Farmer and/or Dr. Balderston at Rothman, he was therefore capable of working, and that the proper reading of the reference to the single "medical" problem contained in a report rendered from a medical person to a medical person, *i.e.*, a report which might perhaps be written in the jargon and language of the profession, was that Mr. Zarzaca was now fit to work. Any such conclusion as to his fitness to return which they drew from the Rothman letter would have been reached despite the fact that the report did diagnose "right side back pain and left paraspinal tumor" and called for another MRI. Further, the Board did not appear to have had any

¹ "Acute" is defined in regard to "disease" as "brief and severe (as opposed to chronic)." "Chronic" is defined in the medical sense as "having long duration (opposed to acute)." That one may be disabled by chronic, as opposed to acute, disease or other physical/medical problems seems self-evident.

knowledge of whether the Rothman consultants were even asked to express an opinion as to whether the patient could work.

On the whole, the statements and conclusions in Ms. Josephson's letter reflect a determination regarding a medical issue by lay persons which, in the absence of medical guidance, was at best arbitrary. Despite the fact that the Board clearly had the statutory authority to compel Mr. Zarzaca to submit to an examination by a doctor of the Board's own choosing, it failed to ask him to do so. *N.J.S.A.* 18A:30-4. Instead, at the hearing, it offered that it consulted with its worker's compensation attorneys as to the names of possible examiners to whom he might have been referred if the Board had received the MRI report. However, the evidence reflects and I **FIND** that, by that time the Board had determined for itself that the Rothman report "confirmed" that Mr. Zarzaca could work, and its counsel's letter had offered Mr. Zarzaca only the cold alternatives of a return to work or retirement, a "come back or get out" approach which did not appear to even hint at any further review of the issue upon the submission of the MRI report.

Counsel for the Board argues that Mr. Zarzaca retired and wanted to be paid for used sick time. She contends that sick time may only be used when the absent employee intends to return to work, and since Mr. Zarzaca did not intend to return he therefore was not entitled to use the sick time. Counsel relies upon *Sharp v. Bayonne Board of Education*, 1978 *S.L.D.* 807 and *Costanzo v. Lakewood Township Board of Education*, Commissioner's Decision # 384, issued on September 5, 1980, in support of this proposition. Neither case supports counsel's argument as applied to the facts of this case.

In *Sharp*, the employee was involuntarily retired by action of the PERS Board of Trustees due to physical incapacity. The effective date of the retirement was July 20, 1977, the date upon which the PERS Board voted to retire the employee. As of that date, Sharp was retired, and clearly as of that date there no longer existed any contractual or other employment relationship between Sharp and the Board. Thus, any claim for any continued sick leave was terminated as of that date. Here, the effective date for the petitioner's retirement was not until September 1, and he remained in an employment relationship with the Board until that date. That he was unable to work as of the date of the approval of his retirement (at least according to the only available medical assessment), and might well remain incapacitated up to the actual retirement date, did not

diminish his right to seek to use remaining accumulated sick time up to the date of his retirement, and the Board's obligation to deal with that request in a fair and reasonable manner. As for *Costanzo*, in that case Mr. Costanzo had suffered a work related accident and had been on paid leave since May 20, 1974. He was paid pursuant to statute, due to the work-related nature of the incident, his accumulated sick leave was not charged. However, his retirement became effective in December, and the decision held that as of that time he was not entitled to receive any sick leave or payment therefore. As the administrative law judge noted, once retired, the employee was no longer prevented by the illness or injury from attending to his post of duty. "A retired person has no post of duty of employment to which attendance is expected." *Costanzo*, OAL DKT. NO. EDU 3519-79, initial decision at page 4. Here, Mr. Zarzaca was not effectively retired until September 1, and until that date he had a position to which he would have been expected to report unless he had some legitimate reason not to do so, *i.e.*, a condition which disabled him from working. Thus, unless the Board acted reasonably in denying an extension of the sick leave, Mr. Zarzaca was entitled to use his accumulated sick leave up to the effective date of retirement.

Ultimately, the action of the Board in this case was presented as a rational exercise of its duty to assure that sick leave is not abused. There can be no doubt whatsoever that the Board is charged with precisely that responsibility, as a necessary check upon the possibility of damage to the effectiveness, morale and integrity of its school system, and as a precaution against harm to the public fisc. However, in exercising its supervisory role and the discretion inherent therein, the Board is constrained to act reasonably, not arbitrarily. Here, I **FIND** that the facts available to the Board, at least as they are spread upon the record of this hearing, demonstrate no reason to have suspected any fraud, and the record merely shows that both when he first asked for a leave, and later when he was asked to supply updated medical support for the leave, Mr. Zarzaca did exactly as asked. If the Board doubted Dr. Tran's assessment, or if it truly felt that it needed to see the results of additional tests before deciding upon the matter of an extension, it could have communicated these determinations to Mr. Zarzaca or his physician. It never clearly did so, but even when he did submit a consult report which confirmed the pain and the tumor which had been noted in Dr. Tran's reports, rather than ask for an examination by a physician of its choosing, as was its right, or even decide to withhold judgment until receipt of the MRI report, the Board, on its own, without medical review or advice, elected to reject an extension and order Mr. Zarzaca to

return to work or to retire. On the record herein, I **CONCLUDE** that such action was arbitrary and unreasonable.

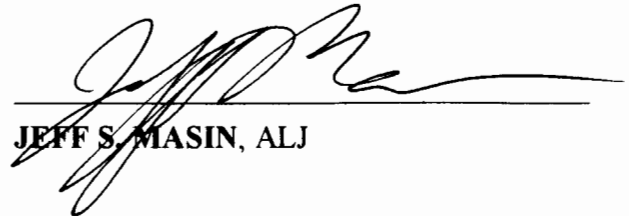
It is **HEREBY ORDERED** that the Board of Education shall pay the petitioner for the available sick days between the last day for which he received payment and the effective date of his retirement.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

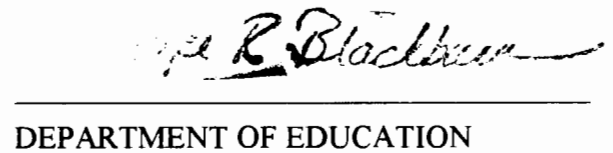
Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 1, 1995
DATE


JEFF S. MASIN, ALJ

Receipt Acknowledged:

6/5/95
DATE


DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 07 1995
DATE
mjm

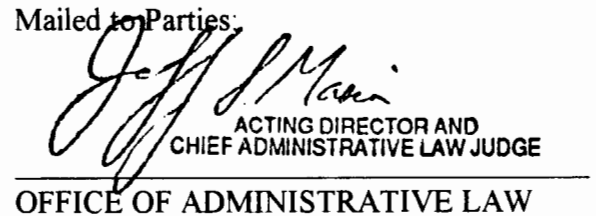

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

EXHIBIT LIST

FOR THE PETITIONER:

- P-1 Letter dated August 23, 1993, from Daniel Tran, M.D.
- P-2 Letter dated March 18, 1994, from Daniel Tran, M.D.
- P-3 Letter dated May 17, 1994, from Daniel Tran, M.D.
- P-4 Consultation, dated April 19, 1994
- P-5 MRI Diagnostic Center letter dated January 19, 1993, from Michael M. Margolin, M.D.,
to Daniel Tran, M.D.
- P-6 Letter dated January 27, 1993, from Irving P. Ratner, M.D. to Ngoc Tran, M.D.
- P-7 Letter dated March 16, 1994, from Phyllis Young to Mr. Joseph P. Zarzaca
- P-8 Letter dated April 21, 1994, from Phyllis Young
- P-9 Letter dated May 18, 1994, from Phyllis Young to Mr. Joseph Zarzaca
- P-10 Letter dated May 25, 1994, from Phyllis Young to Mr. Joseph Zarzaca
- P-11 Letter dated May 3, 1994, from Phyllis Young to Mr. Zarzaca
- P-12 Willingboro Township Board of Education Agenda
- P-13 Letter dated June 1, 1994, from Frederick W. Hardt to Joan K. Josephson, Esquire
- P-14 Letter dated June 3, 1994, from Joan Kane Josephson to Frederick W. Hardt, Esq.
- P-15 Minutes of Willingboro Township Board of Education Regular Meeting of May 2, 1994
- P-16 Letter dated June 14, 1994, from Phyllis Young to Joseph Zarzaca
- P-17 Minutes of Willingboro Township Board of Education Regular Meeting of May 23, 1994
- P-18 Minutes of May 23, 1994, Executive Session
- P-19 Willingboro Township Board of Education Agenda regarding retirements
- P-20 Letter dated July 5, 1994, from Phyllis Young to Mr. Zarzaca
- P-20b Willingboro Township School District Exit Interview form
- P-21 Letter dated June 27, 1994, from Geraldyn O. Foster, Ph.D., NCC, to Mr. Joseph P.
Zarzaca
- P-22 Letter dated October 24, 1994, from William A. Greene, Jr., to Ms. Joan Josephson

FOR THE RESPONDENT:

- R-1 Job Descriptions for Registrar and Attendance Officer

JOSEPH P. ZARZACA, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 TOWNSHIP OF WILLINGBORO, :
 BURLINGTON COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The Board's exceptions and petitioner's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

The Board excepts to the ALJ's finding that it acted arbitrarily and unreasonably in denying petitioner use of his accumulated sick days, and submits that there is no statutory obligation to support the ALJ's finding that the Board has a duty to secure independent medical evaluation of petitioner's fitness for work. The Board argues that N.J.S.A. 18A:16-2 authorizes a board's discretion with respect to requiring additional independent psychiatric or physical examinations of an employee. The Board continues:

There is no requirement in this statute that a Board must confirm by way of a medical expert the information provided pursuant to N.J.S.A. 18A:30-4, which states in pertinent part: "In case of sick leave claim, a board of education may require a physician's

certificate to be filed with the secretary of the board of education in order to obtain sick leave.” (Board’s Exceptions at p. 2)

The Board concludes that the statement provided by the Rothman Institute could be interpreted by a lay person to mean that petitioner was fit to return to work. The Board contends, “If that was not the import of that letter, then the burden rested on the petitioner to clarify that point in light of the fact that he was seeking the use of his accumulated sick leave days.” (Id.)

Petitioner’s reply to these exceptions essentially recasts his argument as embodied in post-hearing submissions before the ALJ.

Upon careful and independent review, the Commissioner finds the Board’s exceptions to be without merit, and concurs with the findings and conclusions of the ALJ that the Board’s action in denying petitioner’s use of accumulated sick leave was arbitrary and unreasonable under the circumstances herein.

Accordingly, the Commissioner adopts the initial decision of the ALJ for the reasons articulated therein, and orders that the Board of Education pay petitioner for his available sick days between the last day for which he received payment and the effective date of his retirement.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

JULY 17, 1995

DATE OF MAILING JULY 17, 1995

251-95

IN THE MATTER OF THE TENURE HEAR- :
ING OF DOROTHY HOUSTON, BOARD :
OF EDUCATION OF THE TOWNSHIP OF :
PEMBERTON, BURLINGTON COUNTY. :

COMMISSIONER OF EDUCATION
DECISION

JULY 17, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 08082-94S

AGENCY DKT. NO. 297-7/94

**IN THE MATTER OF THE TENURE
HEARING OF DOROTHY HOUSTON,
BOARD OF EDUCATION OF THE
TOWNSHIP OF PEMBERTON,
BURLINGTON COUNTY.**

Louis N. Caggiano, Jr., Esq., for Dorothy Houston

Frederick W. Hardt, Esq., for the Board of Education of the Township of Pemberton

Record Closed: May 30, 1995

Decided: June 7, 1995

BEFORE JEFF S. MASIN, ALJ:

This matter was transmitted to the Office of Administrative Law from the Department of Education on August 19, 1994, for a hearing, pursuant to *N.J.S.A. 52:14B-1 to -21* and *N.J.S.A. 52:14F-1 to -13*.

This matter arose when the Board of Education for the Township of Pemberton certified tenure charges to the Commissioner of the Department of Education which contained 19 charges set forth in a Statement of Charges and Statement of the Evidence Supporting the Charges. A Prehearing Order was issued on October 27, 1994, and the matter was partially heard on April 27 & 28, 1995. The parties then agreed to settle the matter and prepared the attached Settlement

Agreement, which appears to be in the best interests of all concerned in light of the nature of the alleged violations, expense involved and nature of the proceedings

I have reviewed the record and the settlement terms and **FIND**:


1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

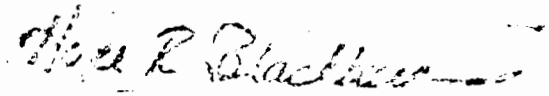
This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

DATE June 7, 1995



JEFF S. MASIN, ALJ
Receipt Acknowledged:

DATE June 9, 1995

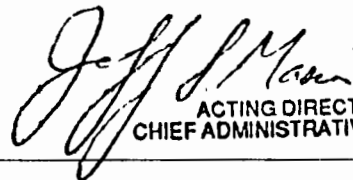


DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 13 1995

DATE
Attachment
mjm



ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

FREDERICK W. HARDT

SUITE 101
300 CHESTER AVENUE
P.O. BOX 840
MOORESTOWN, N.J. 08057
(609) 234-4141
(609) 387-0054

ATTORNEY FOR Petitioner

IN RE TENURE CHARGES AGAINST : BEFORE THE COMMISSIONER OF
DOROTHY HOUSTON, EDUCATION OF NEW JERSEY
BOARD OF EDUCATION OF THE : OAL Docket No. EDUTH 08082-94S
TOWNSHIP OF PEMBERTON AGENCY Ref. No. 297/7/94

SETTLEMENT AGREEMENT

This matter being opened to the Court on the petition of the Pemberton Board of Education of the Township of Pemberton, Frederick W. Hardt, Esquire appearing and the matter having been answered by Dorothy Houston, Louis N. Caggiano, Jr., Esquire, now appearing, and the parties having met and resolved the dispute between them, it being appropriate to enter this Order memorializing this agreement and good cause appearing;

RECITAL

The parties agree and recite the facts agreed upon in this matter as follows:

1. Dorothy Houston is a secretary holding tenure with the School District of the Township of Pemberton pursuant to N.J.S.A. 18A:17-2.
2. As a tenured employee Dorothy Houston may not be dismissed,

suspended or reduced in compensation except for neglect, misbehavior, or other offense.

3. Dorothy Houston is a confidential employee of the payroll department of the District having various responsibilities of a financial nature with the District.

4. Pemberton Board of Education has instituted tenure charges against Dorothy Houston alleging a variety of offenses said to be sufficient to warrant dismissal from her office. They, in essence, involve:

a. An allegation that she used her office improperly to issue herself a payroll check on or about February 25, 1994.

b. Improperly used her office to cause a hand check to be issued by the District to her from the payroll account on or about April 22, 1994.

c. Improperly used her office to aid her daughter in obtaining a loan from a lending institution.

d. Has engaged in negligent behavior while an employee of the District.

5. Dorothy Houston has steadfastly denied any intent to take any of the actions described within the Board's statement of charges and has suggested on her own behalf that:

a. She was entitled to the payroll check issued on or about February 25, 1994 having actually worked for the overtime pay due to a snow holiday.

b. Had not improperly issued a hand check to herself on or about April 22, 1994 having put a stop on against a deduct from her payroll which transferred funds to a local financial institution prior to causing the hand check to be issued.

c. Had not used her office to assist her daughter to obtain improper credit for an automobile.

d. Had not engaged in any negligent behavior but had instead attempted to comply with all regulations in the District which were confusing and not administered properly.

6. Both the Board and Mrs. Houston agree that protracted litigation of the issues set forth within the Statement of Charges would be expensive to both parties and counter-productive to all concerned.

7. The current settlement is designed to resolve the dispute between the parties without an acknowledgment by Mrs. Houston or wrong doing and without an admission by the Board that it improperly brought charges, but with a recognition that the cost of litigation will far exceed the numbers agreed to in the matter..

NOW, THEREFORE, it is agreed that :

1. Dorothy Houston effective April 27, 1995 submits and the Board accepts her resignation from her position with the District; as of the date specified all benefits due and owing to Mrs. Houston from the District will cease except as provided within this Agreement.

2. The Board agrees to pay Mrs. Houston the sum of \$17,500.00 due

upon execution of this Agreement. This sum shall have deducted from it all appropriate statutory deductions and voluntary deductions normally deducted from Mrs. Houston's pay check.

3. The parties agree that the Pemberton Township School District will issue only a neutral recommendation concerning Mrs. Houston's employment with the District and will not discuss in the recommendation the nature of charges proffered by the District in the matter out of which this settlement arises.

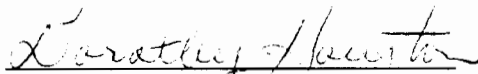
4. The Board will dismiss any and all proceedings against Dorothy Houston pending in any form which have been instituted by the Board and involve any of the facts set forth in the Statement of Charges.


5. The settlement reached by this Agreement shall not be deemed an admission by Mrs. Houston of any wrong doing but rather an acknowledgment of the high cost of litigation which would not serve the interest of anyone in the proceeding.

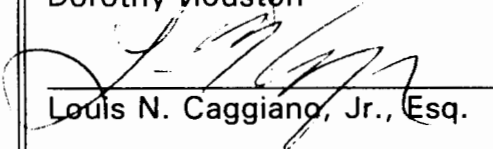
6. In compliance with the payment provisions of this Order shall take place within thirty (30) days of the date the Order is approved by the Commissioner of Education.

HONORABLE JEFF S. MASIN

Consented to as to Form and Substance


Dorothy Houston


Frederick W. Hardt, Esq.



Louis N. Caggiano, Jr., Esq.

Law Offices of
FREDERICK W. HARDT
SUITE 101
300 CHESTER AVENUE
P.O. BOX 840
MOORESTOWN, NJ 08057

IN THE MATTER OF THE TENURE HEAR- :
ING OF DOROTHY HOUSTON, BOARD :
OF EDUCATION OF THE TOWNSHIP OF : COMMISSIONER OF EDUCATION
PEMBERTON, BURLINGTON COUNTY. : DECISION

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.


ACTING COMMISSIONER OF EDUCATION

JULY 17, 1995

DATE OF MAILING JULY 17, 1995

252-95

IN THE MATTER OF THE TENURE :
HEARING OF BRENDA JOHNSON, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
LONG BRANCH, MONMOUTH COUNTY. :
_____ :

JULY 17, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5244-94

AGENCY DKT. NO. 139-5/94

**IN THE MATTER OF THE TENURE
HEARING OF BRENDA JOHNSON,
SCHOOL DISTRICT OF THE CITY
OF LONG BRANCH, MONMOUTH
COUNTY.**

J. Peter Sokol, Esq., for petitioner, Board of Education of the School District of Long Branch (McComber & McComber, attorneys)

Thomas W. Cavanaugh, Jr., Esq., for respondent, Brenda Johnson (Chamlin, Rosen, Cavanaugh & Uliano, attorneys)

Record Closed: May 2, 1995

Decided: June 5, 1995

BEFORE DANIEL B. MCKEOWN, ALJ t/a:

INTRODUCTION

Brenda Johnson (respondent) is a school matron with tenure in the employ of the Long Branch Board of Education (Board). On April 28, 1994, the Board determined to certify charges of excessive absenteeism against respondent to the Commissioner of Education for determination under the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. Respondent was not suspended from her duties during the pendency of the charges. The charges were received by

May 3, 1994 at the Department of Education, after which the matter was transmitted May 26, 1994, to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14B-1 and N.J.S.A. 52:14F-1 through -13. A telephone conference call was initiated and held by this judge July 6 and continued, by agreement, to August 8, 1994. This date was adjourned at the request of the parties, rescheduled, and adjourned again. The telephone conference call was finally continued on September 21 at which time the parties waived a formal prehearing conference and agreed that this case should be scheduled for hearing on the same day as a case regarding tenure charges against a clerk in its employ.¹ The request of the parties was honored and this case, with the Jimenez case, was to commence December 12 while the remaining case, Desmond, was to begin the following week beginning December 19, 1994.

Prior to December 12 the parties advised that all three cases were settled and a Settlement Agreement would be submitted by the end of that month for submission to the Commissioner for approval. The scheduled hearings were canceled upon that representation. Not having received a proposed Settlement Agreement by the end of December, the undersigned learned during a telephone call to board counsel on January 17, 1995 that counsel for respondent was in possession of the Agreement and was adding language to avoid later rejection by the Commissioner. After a letter was sent the parties March 7, 1995 to determine the status for the proposed Settlement, it was determined that while the parties fully intended to settle all three cases the propriety of one or more settlement terms became subject to disagreement for various reasons. During an informal telephone conference call on or about April 19, 1995, a hearing was scheduled and conducted in the Johnson and Jimenez cases on May 1, 1995 at the Freehold Township Municipal Building Courtroom at which time counsel announced a Settlement Agreement had in fact been reached and jointly entered the settlement terms on the record.

For the reasons which follow, this initial decision recommends that the Commissioner of Education accept the Settlement Agreement as a full and final disposition of In the Matter of the Tenure Hearing of Brenda Johnson, OAL DKT. NO. 5244-94, AGENCY DKT. NO. 139-5/94²,

¹ See In the Matter of the Tenure Hearing of Gloria Jimenez, OAL DKT. NO. 5246-94, AGENCY DKT. NO. 141-5/94 and In the Matter of the Tenure Hearing of Ruth Desmond, OAL DKT. NO. 5245-94, AGENCY DKT. NO. 140-5/94.

² A separate initial decision is issued this day in Jimenez case which recommends the Commissioner approve the settlement agreement.

so that both sides may devote their full attention, energy, and Board resources to the real public interest of providing their pupils the opportunity for a thorough and efficient program of education.

SETTLEMENT AGREEMENT STANDARDS

The State Board of Education's standards for approving settlement agreements in tenure cases are stated in In re Tenure Hearing of Frank Cardonick, Brooklawn Borough Board of Education, 1982 S.L.D. - - - (Aug. 4, 1982). It is necessary to insure that the standards announced for the approval of tenure charge settlements by the State Board of Education are met. Therefore, it is appropriate to briefly discuss the tenure charges which allege respondent engaged in excessive absences. The charge of excessive absenteeism is a serious matter. It should not be made lightly by the charging party, nor taken lightly by the accused for it is not taken lightly by either the Commissioner or State Board of Education.

While the Board found probable cause to credit the evidence against respondent, it is well within its authority to assess, in good faith, the strength and/or weaknesses of its competent, credible evidence to prove the truth of the charges and to have entered negotiations with respondent for purposes of settlement. In Cardonick, supra, the State Board of Education recognized that

The New Jersey courts have looked with great favor upon the voluntary resolution of litigation through settlement. [Citations omitted.] As a general principle, and without considering the toll of human resources, the settlement of lawsuits in good faith can be said to save time, money and proof problems. School boards, in their efforts to conserve public funds, no less than private parties, have been encouraged by the state and federal courts to carefully consider equitable settlement possibilities.

(Slip opinion, at p. -----)

Nevertheless, the State Board also cautions that the boards of education which settle litigation "must act in the public interest, lawfully, constitutionally, reasonably and in accordance with duly

enacted rules and regulations of the Commissioner of Education and State Board of Education.”
(Id.)

In Passaic Board of Education v. James Viani, 92 N.J.A.R. 2d (EDU) 76, the Passaic Board certified charges of excessive absences to the Commissioner for determination against custodian Viani. The evidence submitted convinced the Commissioner that Viani’s absences were shown to be “grossly excessive.” The Commissioner noted that evidence was absent regarding prior notice the board gave Viani of “its concern for his excessive absences,” nor did it present evidence that Viani’s absences had an “adverse impact on the educational process or [their] ramifications.” By way of direction to all boards of education, the Commissioner noted “. . . the Board’s burden in a case seeking dismissal of a tenured janitor due to alleged excessive absenteeism is to demonstrate the extent of harm such performance of a custodial employee has on the provision of a thorough and efficient education in an ‘adequately equipped, sanitary and secure physical facilities . . . [citations omitted.]’” It is inferred that ‘such performances’ means the affected employee must be shown to have aggregated sufficient absences from work, on a case-by-case basis, to constitute ‘excessive absenteeism’. Viani was not terminated from his employment. He received a warning that by having to go through the tenure charge process he was “apprised as to the impropriety of excessive absenteeism and the need to significantly improve his absenteeism or else be subject to future disciplinary action.”

In a subsequent case, In the Matter of the Tenure Hearing of David Riddick, State-Operated School District of the City of Paterson, Passaic County, 93 N.J.A.R. 2d (EDU) 345, school custodian Riddick was found to have engaged in excessive absenteeism, among other kinds of misbehavior. The administrative law judge recommended termination of Riddick’s employment for several reasons, including excessive absenteeism, after having determined:

Based on the facts found, Riddick has been excessively absent . . . I find that there have been efforts made by various district personnel . . . to get Riddick to correct the pattern of absenteeism. Specific periods of improvement were shown when Riddick was warned that negative action would be taken against him if improvement was not demonstrated during those periods. Nevertheless, despite the improvement, the absence pattern returned as well as the leaving work early and not attending to certain work directives.

In the recent decision of the Commissioner of Education [Viani, supra,] noted that excessive absenteeism by a custodian is not sufficient grounds for dismissal on its own, unless there is demonstration of the extent of harm the employee's performance has on the provision of a thorough and efficient education in having adequately equipped, sanitary and secure physical facilities. In the record in this matter, excessive absenteeism has been demonstrated to have had a negative impact on the condition of the building

(Viani, 92 N.J.A.R. 2d, at p. 349)

CHARGES

The certified charges in this case allege respondent accumulated the following number of absences from her employment.

- a) during the 1991-92 school year, a total of 41.5 absences;
- b) during the 1992-93 school year, a total of 45.5 absences;
- c) during the 1993-94 school year, a total of 38 absences, as of March 25, 1994.

In the Answer, respondent does not contest the number of absences alleged. Rather, in five separate defenses she asserts that termination of her employment is excessive and severe based on the nature and quantity of the absences; that the Board failed to use proper progressive discipline or correction with her; that she has evidence to justify many of the absences complained of; that none of her absences caused the Board harm in any manner; and, that the Board failed to give her appropriate warning and correction nor did it provide her the opportunity to improve her record as is required under Viani, supra, and Raddick, supra.

PROPOSED SETTLEMENT AGREEMENT

The Board and respondent agree that in return for a dismissal of the present charges, respondent would have withheld from her any 1995-96 salary and/or adjustment increment to which she would otherwise be entitled.

The Board, after having considered the two cases cited above and its evidence in support of the charges against respondent, determined that while it may establish by a preponderance of credible evidence respondent was absent from her duties on numerous occasions, supervisory evaluations of her performance make no mention of any negative impact her absences had on having adequately equipped, sanitary and secure physical facilities. Nor is the Board confident it will be able to show progressive discipline or prior warning to respondent that her attendance is poor and must improve. Finally, the Board is sensitive to the fact that prosecution of these charges will divert substantial financial and human resources from its pupils whom it is to serve and it notes that respondent's attendance has improved significantly since these charges have been certified. The Board notes that as of May 1, 1995 respondent was absent a total of three days for the entire 1994-95 school year. Consequently, it seeks to settle the case in a manner which will serve its purpose of impressing upon respondent the need for her attendance to significantly improve and for the benefit of its pupils and school district as a whole in using its scarce resources in support of its educational program.

Respondent says that many of her absences were approved before taken, many were health-related, that she never received any kind of formal directive to improve her attendance that she was subjected to no prior discipline which could constitute progressive discipline, and that there is no evidence to show her absences resulted in any harm or negative impact upon the sanitary conditions of the school to which she was assigned. Indeed, respondent notes that included within the total number of absences are days she was subpoenaed to appear in court on a family matter, days missed because of deaths in her family, and a Board approved leave of absence among other days for which she had received prior approval.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

June 5, 1995
DATE

Daniel B. McKeown
DANIEL B. MCKEOWN, ALJ

June 9, 1995
DATE

Receipt Acknowledged:
Dee R. Blackman
DEPARTMENT OF EDUCATION

JUN 13 1995
DATE

Mailed to Parties:
Jeff S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jz

CONCLUSION

Based on the record in this case including society's interest in the nature of the charges as well as the interests of the Board, the interests of respondent and of the school district as a whole, the likelihood of whether the charges may be supported by proofs reasonably anticipated by the Board to be offered at hearing, the terms of the proposed Agreement including the absence of an exchange of public funds for service not rendered, and the consistency of the Agreement with existing law, I **CONCLUDE** that the proposed Settlement Agreement, which is represented by counsel as having been freely entered into by the parties, with full knowledge of their rights and each of whom are represented by competent counsel, is a full, fair, lawful and final disposition of the issues presented in this case.

ORDER

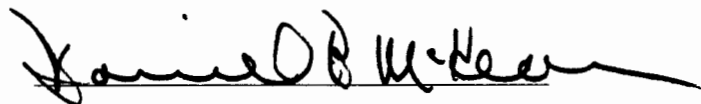
The parties are **ORDERED** to fully comply with the terms of the Settlement Agreement as set forth herein.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

June 5, 1995

DATE

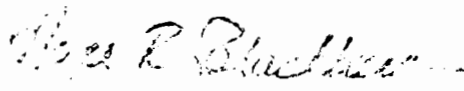


DANIEL B. MCKEOWN, ALJ

June 9/1995

DATE

Receipt Acknowledged:

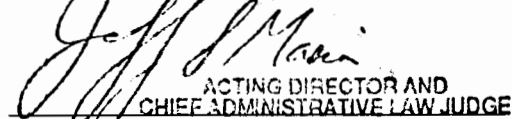


DEPARTMENT OF EDUCATION

JUN 13 1995

DATE

Mailed to Parties:


ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

jz

IN THE MATTER OF THE TENURE :
HEARING OF BRENDA JOHNSON, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
LONG BRANCH, MONMOUTH COUNTY. :
_____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.



ACTING COMMISSIONER OF EDUCATION

JULY 17, 1995

DATE OF MAILING JULY 17, 1995

IN THE MATTER OF THE ANNUAL SCHOOL :
 ELECTION HELD IN THE PRINCETON : COMMISSIONER OF EDUCATION
 REGIONAL SCHOOL DISTRICT, : DECISION
 CONSTITUENT DISTRICT OF PRINCETON :
 TOWNSHIP, MERCER COUNTY. :
 _____:

OAL DKT. NO. EDU 5221-95

IN THE MATTER OF THE ANNUAL SCHOOL :
ELECTION HELD IN THE PRINCETON : COMMISSIONER OF EDUCATION
REGIONAL SCHOOL DISTRICT, : DECISION
CONSTITUENT DISTRICT OF PRINCETON :
TOWNSHIP, MERCER COUNTY. :
_____ :

The record of this matter and notice of failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to N.J.A.C. 1:1-14.4, along with copies of notifications sent to the parties by OAL on June 28, 1995, providing petitioner with ten (10) days to submit an explanation for such failure to appear, have been reviewed. There being no explanation filed by petitioner, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

July 17, 1995
Date of Mailing July 18, 1995

IN THE MATTER OF THE ANNUAL SCHOOL :
 ELECTION HELD IN THE SCHOOL DIS- : COMMISSIONER OF EDUCATION
 TRICT OF MANALAPAN-ENGLISHTOWN : DECISION
 REGIONAL, MONMOUTH COUNTY. :
 _____ :

The announced results of the balloting for three members for full terms of three years each on the Board of Education of the Manalapan-Englishtown Regional School District at the annual school election held on April 18, 1995 were as follows:

THREE-YEAR TERM

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTALS</u>
Michele Stipelman	950	191	1,141
Anthony J. Musich	917	147	1,064
Maryanne Toto	925	140	1,065
Paul J. Beinert	816	191	1,007

Pursuant to a letter application from Paul J. Beinert, a defeated candidate, filed on April 19, 1995, the Commissioner of Education directed his representative from the Office of the Monmouth County Superintendent of Schools to conduct a recheck of the votes cast on the voting machines pursuant to N.J.S.A. 18A:14-63.2 This recheck was conducted on May 15, 1995 at the Voting Machine Warehouse, 300 Halls Mills Road, Freehold. At the conclusion of the recheck of the votes cast on the voting machines, the tally stood unchanged, remaining as follows:

THREE-YEAR TERM

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTALS</u>
Michele Stipelman	950	191	1,141
Anthony J. Musich	917	147	1,064
Maryanne Toto	925	140	1,065
Paul J. Beinert	816	191	1,007

Absentee tallies on recount are as reported by the Monmouth County Board of Elections. No application for a recount of absentee ballots had been made to Superior Court as of the date of the Commissioner's recheck of the voting machines.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions set forth therein.

Accordingly, the Commissioner determines that, as originally announced, Michele Stipelman, Anthony J. Musich and Maryanne Toto were elected to full terms of three years each on the Manalapan-Englishtown Board of Education.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE :
 SCHOOL DISTRICT OF THE CITY OF :
 LONG BRANCH, MONMOUTH COUNTY. :
 _____ :

COMMISSIONER OF EDUCATION
 DECISION

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE :
 SCHOOL DISTRICT OF THE CITY OF : COMMISSIONER OF EDUCATION
 LONG BRANCH, MONMOUTH COUNTY. :
 _____ : DECISION

The announced results of the balloting for three members for full terms of three years each on the Board of Education of the City of Long Branch at the annual school election held on April 18, 1995 were as follows:

THREE-YEAR TERM

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTALS</u>
Susan L. Woolley	560	69	629
David A. Kaplan	439	50	489
Armand R. Zambrano, Jr.	425	32	457
Joseph E. Sirianni	395	52	447
Andrew Koch	346	4	350
Harold F. Cooper	225	6	231
Lewis I. Hagan	170	2	172
Antonio Malave	123	4	127

Pursuant to a letter application from Joseph E. Sirianni, a defeated candidate, filed on April 27, 1995, the Commissioner of Education directed his representative from the Office of the Monmouth County Superintendent of Schools to conduct a recheck of the votes cast on the voting machines pursuant to N.J.S.A. 18A:14-63.2. This recheck was conducted on May 15, 1995

at the Voting Machine Warehouse, 300 Halls Mills Road, Freehold. At the conclusion of the recheck of the votes cast on the voting machines, the tally changed slightly as follows:

THREE-YEAR TERM

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTALS</u>
Susan L. Woolley	560	69	629
David A. Kaplan	439	50	489
Armand R. Zambrano, Jr.	425	32	457
Joseph E. Sirianni	395	52	447
Andrew Koch	346	4	350
Harold F. Cooper	225	6	231
Lewis I. Hagan	170	2	172
Antonio Malave	124	4	128

Absentee tallies on recount are as reported by the Monmouth County Board of Elections. No application for a recount of absentee ballots had been made to Superior Court as of the date of the Commissioner's recheck of the voting machines.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions set forth therein.

Accordingly, the Commissioner determines that, as originally announced, Susan L. Woolley, David A. Kaplan, and Armand R. Zambrano, Jr., were elected to full terms of three years each on the Long Branch Board of Education.

IT IS SO ORDERED.


 ACTING COMMISSIONER OF EDUCATION

256-95

GEORGE SEFCIK, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE RED : DECISION

BANK REGIONAL HIGH SCHOOL :

DISTRICT, MONMOUTH COUNTY, :

RESPONDENT. :

SYNOPSIS

In consolidated matters, petitioner, vocational education teacher who was reduced from full-time position to half-time position in 1988, contended as a tenured teacher he was entitled to certain classes, assigned for 1994-95 to a nontenured teacher, which would provide him with a full-time schedule. Petitioner further alleged he was not placed in full-time position in retaliation for his refusal to settle the tenure entitlement claim.

ALJ found that although petitioner could seek to claim classes by tenure right, he could not teach Small Engine Mechanics because he was not properly certificated to do so, owing to the distinction between industrial arts courses and trades courses. Moreover, petitioner failed to establish that he was the subject of retaliation for failing to accept a settlement offer. Petition was dismissed.

Commissioner adopted findings and determination in initial decision with modification. Commissioner found that even if petitioner were properly certificated to teach the course at issue, he would not be entitled to claim it as a matter of tenure right. Petitioner was not a tenured employee at the time his position was reduced to half-time, being precluded from such status as a matter of law because he was teaching under an emergency certificate; thus, he had no entitlement to full-time employment arising from his 1988 RIF. Petitioner, who obtained tenure in 1990 through acquisition of a standard certificate, suffered no subsequent reduction in employment, so that his tenure rights were not triggered by the Board's action to assign available classes to a nontenured teacher.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. EDU 11867-93
AND EDU 9905-94
AGENCY DKT. NOS. 383-11/93
and 379-9/94
(CONSOLIDATED)

GEORGE SEFCIK,

Petitioner,

v.

**RED BANK REGIONAL HIGH SCHOOL
BOARD OF EDUCATION,**

Respondent.

Stephen B. Hunter, Esq., on behalf of petitioner (Klausner, Hunter & Seid,
attorneys)

James P. Granello, Esq., on behalf of respondent

Record Closed: April 24, 1995

Decided: June 6, 1995

BEFORE SOLOMON A. METZGER, ALJ:

This matter arises out of two petitions filed with the Department of Education (DOE) pursuant to *N.J.S.A. 18A:28-5 et seq.* and regulations promulgated thereunder. The matters were

transmitted to the Office of Administrative Law as contested cases pursuant to *N.J.S.A.* 52:14F-1 through -13 and consolidated. A hearing was conducted on January 4 and 5, 1995, and the record closed on April 24, 1995, with receipt of the last posthearing submission.

The questions presented are whether petitioner's certification as a teacher of "Skilled Trades: Auto Mechanics" entitled him to teach a course in "Small Engine Mechanics" during the 1993-94 school year and whether respondent retaliated against petitioner in preparing his 1994-95 schedule, for failing to settle his claim in connection with that question.

The basic facts are undisputed. Petitioner was first employed by respondent in September 1984 under an emergency certificate as a teacher of "Skilled Trades: Auto Mechanics." From the 1984-85 school year through the 1989-90 school year, petitioner's emergency certificate was renewed annually while he pursued courses required for a standard certificate. In March 1990, petitioner received his standard certificate as a teacher of "Skilled Trades: Auto Mechanics." Starting with the 1988-89 school year, petitioner's full-time position was reduced to half-time, as a result of a reduction in force (RIF), brought about by declining enrollment in his auto mechanics courses. He continues to teach auto mechanics on a half-time basis, which consists of four instructional periods; teaching five or six instructional periods is considered full-time within the district.

On June 16, 1993, respondent hired Robert Franchino as a teacher of industrial arts/technology education for the coming school year and his schedule included two single periods of Small Engine Mechanics. On November 15, 1993, petitioner filed an appeal with the DOE contesting this action and asserting his entitlement to the assignment. On December 3, 1993, Donald D. Warner, respondent's superintendent of schools, wrote to Michael Maddaluna, Monmouth County superintendent of schools, seeking clarification concerning petitioner's claim (R-2). By letter of April 29, 1994, Mr. Maddaluna notified the district of his conclusion that petitioner was not eligible to teach Small Engine Mechanics (R-1).

The Small Engine Mechanics course has always been listed in the industrial arts education section of respondent's curriculum guides and was until recently described as follows:

Each student will completely disassemble and reassemble a single cylinder engine. Component inspection, system troubleshooting, and overhaul procedures will be emphasized. The theory and use of hand tools, special tools and test equipment will be pursued. The course is an excellent first experience for students interested in further work in Auto and Power Mechanics.

[P-7 and P-8]

In the 1994-95 curriculum guide the course was retitled "Small Engine Technology" and was described as follows:

Students will experience a variety of technology activities which demonstrate alternate forms of energy and how energies can be applied to transportation systems. Aerodynamics, environmental restrictions as well as future transportation systems will be explored and discussed.

[P-9]

Mr. Franchino is integrating new material into the course this school year and expects in time to convert the class in accordance with the new curriculum guide. The course, however titled, was and continues to be a one-period class

On April 20, 1994, approximately five months after he filed his first appeal, petitioner was reappointed to a half-time slot. On June 14, 1994, petitioner's department supervisor, Thomas Conlon, issued a tentative schedule for him for the 1994-95 school year. There were twenty-eight students interested in the Auto Mechanics I class and this meant that there would be two sections, which in combination with Auto Mechanics II and III, yielded a full-time schedule (P-17). Virginia George, president of the Red Bank Teachers' Association, advised petitioner in late June 1994 that she had spoken with Superintendent Warner, who told her that petitioner was to receive a full-time contract for the 1994-95 school year. An agenda was prepared on or about July 9, 1994, for a July 13, 1994 Board of Education meeting, which contained a provision ratifying this change (P-19). On the day of the meeting that agenda item was deleted and no action was taken to adjust petitioner's work schedule for the coming school year (P-20).

John W. Orr is certified as a teacher of vocational/technical-related subjects, as well as a teacher of electronics technology; he has no certificate to teach auto mechanics. Mr. Orr has been teaching in the district for some twenty-five years. In the spring of 1994 he received his usual full-time teaching assignment, but there were two periods missing; this was not unusual and he anticipated that these would be filled later. He was given no notice that he might be subject to an RIF. Robert Nogueira is respondent's high school principal. In August 1994 Dr. Nogueira informed Mr. Orr that he would be teaching the electronics component of Auto Mechanics I in the coming year and that he was to collaborate with petitioner to divide the course along these lines. Mr. Orr submitted a curriculum in early September (P-26). The course was split and the students alternate in six-week intervals between petitioner in the auto shop, and Mr. Orr in the electronics laboratory. They are with petitioner for three marking periods and with Mr. Orr for three marking periods. Mr. Orr's assessment of each student is given to petitioner, who incorporates it into his grade for the student. This structure provided Mr. Orr with a full-time teaching load, but had the effect of negating the increased enrollment in Auto Mechanics I, which had been the basis for petitioner's tentative full-time schedule. The students who had enrolled in the Auto Mechanics I course at the end of the previous school year were disappointed at the loss of time in the auto shop.

Petitioner testified that his certification entitles him to teach courses in power mechanics under a matrix disseminated by the DOE and that the small engines course falls in that category (R-3 & R-4). Moreover, Small Engine Mechanics was for many years either a prerequisite for, or recommended before taking, Auto Mechanics I, and if he could teach the more advanced course he should be able to teach the foundation course. Petitioner testified that Small Engine Mechanics was and continues to be a hands-on course; he frequently observes Mr. Franchino teaching it and generally the students are engaged in repairing engines. Although the course has now been renamed Small Engine Technology, it remains the same.

Petitioner testified that when Mr. Conlon gave him a tentative schedule in June 1994 he asked "Does this mean I'm full-time?" and Mr. Conlon responded affirmatively. Although he understood that this was a tentative schedule, his tentative schedules had never before changed.

In August 1994, Mr. Conlon informed him that the Auto Mechanics I students would be split between himself and Mr. Orr.

John Orr testified that sometime around the second week of August 1994, Dr. Nogueira advised him of his plan to sever the electronics component from petitioner's Auto Mechanics I course. This had not been discussed before and he is not aware of any district that does this. Dr. Nogueira explained that motor vehicle electrical systems were becoming more complex and that the courses needed to reflect this trend. Mr. Orr testified that the students work on distributors, alternators and other electronic components in the laboratory. He testified that he has received late assignments in the past that required him to prepare new materials.

Roger Schneider taught Small Engine Mechanics for respondent from 1970 until his retirement in June 1993. This was a vocational course and was a useful preparation for the auto mechanics courses. He spoke with Mr. Franchino a few times after his retirement and Mr. Franchino made no mention of redesigning the course. Mr. Schneider holds a certificate in industrial arts, among others, and this is what he used to teach Small Engine Mechanics.

Dr. Robert Nogueira has been the principal of Red Bank Regional High School since 1980. He has taught industrial arts and electronics, was department chair, and before appointment as principal was the supervisor of vocational education. Dr. Nogueira testified that the area of technology education is transforming from hands-on work to more abstract learning and the Small Engine Mechanics course is changing as well. He explained that Small Engine Mechanics was and is an industrial arts course and cannot be taught by someone with a skilled trades certificate. Industrial arts is an academic program and petitioner's ability to teach a hands-on course about more complex engines does not qualify him to teach an academic program about small engines. Dr. Nogueira testified that skilled trades certificates are precise and the holder may only teach in the area specified. He testified that occupational preparation courses are double periods; Small Engine Mechanics is a single-period class. Dr. Nogueira acknowledged that certification questions can become intricate, and confirmation of petitioner's qualifications was obtained from Superintendent Maddaluna, as well as from Mr. Earl Brancolino, a specialist in industrial arts education at the DOE.

Dr. Nogueira testified that he authorized the tentative full-time schedule for petitioner in June 1994 because of an increase in student enrollment. There are, however, many revisions made to the master schedule over the course of the summer and by July he knew that he would need a number of extra half-time teachers in other subjects. He so advised Dr. Warner. In August 1994 five or six half-time teachers were hired in social studies, science and English to fill needed slots. Mr. Orr's schedule had not yet been filled in, and splitting the Auto Mechanics I class made sense to him. Dr. Nogueira testified that automobiles are increasingly controlled by microprocessors and microchips and this was an opportunity to enhance the class. He did not seek advice from Superintendent Maddaluna when he made this decision. Dr. Nogueira testified that the issue of settlement was never raised in any of his discussions with Dr. Warner.

Michael Maddaluna is the Monmouth County superintendent of schools. He was contacted by Dr. Warner concerning the question at bar and after researching it with his staff and speaking with the DOE's Mr. Brancolino, he concluded that petitioner could not teach Small Engine Mechanics. He acknowledged that he is not an expert on certification questions and that he relied in large measure on the information he received from others.

Earl Brancolino has been employed by the DOE for seventeen years and is an education program specialist in the Office of School to Work Initiatives. He holds a BA and an MA in industrial arts education. Mr. Brancolino's duties include assisting school districts with certification questions. Mr. Brancolino testified that to teach an industrial arts course, one must hold an industrial arts certificate, and to teach a trades course, one must hold a skilled trades certificate. These are not interchangeable. There are no skilled trades people teaching industrial arts courses and his office has always responded to such inquiries in the negative. Industrial arts courses are typically one period, while trades courses are double periods.

Mr. Brancolino testified that he is not the author of the DOE matrix that petitioner is relying on, he does not use it to decide certification questions and he does not think it can be used for that purpose. The matrix does not mean to convey that the job title categories listed can be taught by anyone holding a certification code included under that grouping. These may have been assembled for other purposes, although he was not certain what these might be.

Dr. Donald Warner has been the district's superintendent of schools for twenty years. He testified that he is not involved in the preparation of teaching schedules, but is consulted on new hires or problems. In June 1994, he spoke with Ms. George, the incoming president of the teachers' association, about outstanding issues including petitioner's grievance, and he informed her about the decision to offer petitioner a tentative full-time schedule. There was no *quid pro quo* for this; the students were there. Dr. Warner was still under this impression on July 9, 1994, when he included an agenda item on the subject for the school board's consideration. On July 13, 1994, the day of the meeting, Dr. Nogueira informed him that several half-time positions would be needed in other areas, so he pulled this agenda item to retain as much fiscal flexibility as possible. He was not aware at that time of any settlement discussions, but did later authorize counsel to probe this possibility. Petitioner's attorney was contacted on or about July 28, 1994, with an offer of settlement. Dr. Warner testified that he was keeping his options open during this period, as the schedule continues to shift throughout August and sometimes into September. He informed Dr. Nogueira that a full-time teaching load would have to be found for Mr. Orr so that he could justify his salary to the school board. Dr. Warner testified that after the 1988 RIF involving petitioner, he contacted other superintendents and found a full-time position for him; petitioner decided to stay with respondent.

Robert Franchino testified that he is a graduate of Trenton State College, Department of Technical Studies, and holds a certificate in industrial arts and technology education. He has passed the national teachers' examination in technology, which is a prerequisite for certification in this state. The field is moving toward technology education and he is taking the Small Engine Mechanics course in that direction. This is the substance of the record.

Petitioner must show by a preponderance of the credible evidence that he was entitled to teach Small Engine Mechanics. He must also show that the offer of a tentative full-time schedule for the 1994-95 school year was withdrawn in retaliation for his decision to reject respondent's settlement offer. Neither case has been proven.

Respondent argued initially that petitioner had no right to teach Small Engine Mechanics as a matter of law, because he did not obtain a standard certificate in "Skilled Trades: Auto

Mechanics” until after the RIF that reduced him to part-time status. Respondent’s March 22, 1995 brief at 8-9, citing *Francey v. Board of Education of the City of Salem*, 92 N.J.A.R.2d (Vol. 4A) 449 (Education), and *Johnstone v. Board of Education of the Township of Cinnaminson, Burlington County*, 92 N.J.A.R.2d (Vol. 4A) 506 (Education). I do not agree. These cases stand for the proposition that tenure and seniority rights are triggered and frozen at the point of an RIF and certificates and endorsements in *new* areas do not confer additional rights. Here, however, petitioner held an emergency certificate in “Skilled Trades: Auto Mechanics” and acquired a standard certificate in “Skilled Trades: Auto Mechanics.” *Francey* and *Johnstone* reason that it would burden school districts administratively to allow employees to accrue seniority for certifications and endorsements collected after an RIF, and would unduly limit hiring choices. That is not the case here. Moreover, this result would contravene *N.J.A.C. 6:3-5.1(e)*, which entitles the holder of an emergency certificate to that time for seniority purposes, once a standard certificate is issued.

Petitioner maintains that his certificate entitles him to teach Small Engine Mechanics because the DOE matrix allows it, it has always been taught as a vocational preparation course and, logically, since his course relates to a more complex engine, he ought to be able to teach about a simpler group of engines. Dr. Nogueira and Dr. Warner felt that petitioner did not satisfy certification requirements because trades certificates are narrowly tailored to subject matter and do not entitle the holder to teach outside that area. Mr. Schneider, who taught Small Engine Mechanics for many years, used his industrial arts certificate to do so and the course has always been considered part of respondent’s industrial arts program (P-7 through P-9). Nevertheless, they put the question to Superintendent Maddaluna, and to Mr. Brancolino of the DOE, who supported their view. The distinction mainly seems to be that industrial arts education is an academic pursuit and requires qualifications distinct from those expected for trades courses. Thus, two classes could have the same title, but would be taught by different certificated individuals depending on whether they were within a single-period industrial arts framework, or a double-period skills preparation program. These explanations are consistent with the regulatory scheme. *See N.J.A.C. 6:11-6.2(a)13, 27 and 29; N.J.A.C. 6:43-3.1, -3.3, and -1.2.*

Despite vigorous cross-examination, Mr. Brancolino would not accept petitioner’s assumption that the DOE matrix bore on the question at hand. He was the only avowed expert

presented on the subject, and he testified credibly. Thus, I have largely discounted the matrix in this opinion. I must acknowledge that this case is my introduction into the world of teacher certification and the tug-of-war over the matrix made the subject seem quite obscure.

As to the question of retaliation, respondent authorized a tentative full-time schedule for petitioner in June 1994 based on increased enrollment, but then chose not to ratify that decision on July 13, 1994. These facts are a problem for petitioner's argument. The tentative schedule was not contingent on any reciprocal agreement by petitioner to withdraw his earlier claim and if respondent had been as calculating as petitioner suggests, it had no incentive to make this assignment. Further, the full-time offer was tabled two weeks before respondent made its July 28, 1994 settlement offer through counsel. Thus, respondent was reconsidering petitioner's assignment prior to the incident which purportedly provoked the retaliation.

Petitioner's proofs improve with the August decisions. Dr. Warner allowed that he was keeping his options open, which translated means that a full-time slot might have been arranged for petitioner as part of a settlement, but when discussions faltered he decided to use the money elsewhere and in the bargain found a way to use Mr Orr. The late decision to split petitioner's classes, though this had never been done before, raises some questions about respondent's motives. Dr. Nogueira's explanation that changing auto technology made this a logical step would be unassailable if it had ever been discussed previously. Yet, Dr. Nogueira and Dr. Warner were generally credible witnesses and I am not prepared to say that they swore falsely. Their testimony that there are many late and sometimes imperfect changes made to the master schedule was uncontroverted and somewhat blunts the argument that what occurred here was suspicious for its novelty. It may be that there is more here than meets the eye, but the evidence does not quite show it.

Petitioner further supports his argument by suggesting that if respondent's motives were unalloyed, it would have asked Superintendent Maddaluna in advance about splitting his course with someone who is not certified in auto mechanics, as is required under *N.J.A.C.* 6:11-3.3. That it did not do so reveals a fear that the superintendent might obstruct the plan. It is difficult to assess this argument, because the record is sparse on the point. As it happens, Superintendent

Maddaluna was a witness in this case and petitioner did not take the opportunity to inquire along these lines. There is no basis here for concluding that respondent improperly assigned Mr. Orr.

Based on the foregoing, it is my conclusion that petitioner has failed to establish that he is entitled to teach Small Engine Mechanics, or that he was the subject of retaliation for failing to accept a settlement offer. It is **ORDERED** that this petition be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6/9
DATE 11

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

6/7/95
DATE

Hope R. Blackburn
DEPARTMENT OF EDUCATION

JUN 09 1995
DATE

Mailed to Parties
Jeff S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cae

LIST OF WITNESSES

On behalf of Petitioner:

George Sefcik
John Orr
Roger Schneider

On behalf of Respondent:

Michael Maddaluna
Robert Nogueira
Earl Brancolino
Donald Warner
Robert Franchino

LIST OF EXHIBITS

On behalf of Petitioner:

- P-1 Certificate to George Sefcik for Teacher of Auto Mechanics
- P-2 Certificate to George Sefcik for Teacher of Skilled Trades: Auto Mechanics
- P-3 Letter dated January 13, 1993, with attachments
- P-4 Letter dated February 11, 1993
- P-5 Letter dated September 30, 1993
- P-6 Letter dated August 9, 1994
- P-7 Curriculum Guide, 1989-1990
- P-8 Curriculum Guide, 1992-1993
- P-9 Curriculum Guide, 1994-1995
- P-10 Pages of Minutes of Regular Monthly Meeting of August 26, 1992 (3 pp.)
- P-11 Pages of Minutes of Regular Monthly Meeting of August 25, 1993 (3 pp.)
- P-12 Pages of Minutes of Regular Monthly Meeting of August 31, 1994 (3 pp.)
- P-13 Proficiency List #636
- P-14 Proficiency List #637
- P-15 Proficiency List #638
- P-16 Grade Reporting Course Display for student Daniel Weader
- P-17 Tentative Teaching Schedule 1994-1995
- P-18 Tentative Teaching Schedule 1993-1994
- P-19 Agenda for Red Bank Regional High School board meeting, dated July 13, 1994
- P-20 Board Meeting Memo
- P-21 Auto Mechanics Enrollment
- P-22 Schedule for Vocational-Technical department for school year 1992-1993
- P-23 Schedule for Vocational department for school year 1993-1994

- P-24 Schedule for Vocational department for school year 1994-1995
- P-25 Final Exam for Small Engines for school year 1993-1994
- P-26 Automotive Electronics course description
- P-27 Schedules for John Orr and George Sefcik for school year 1994-1995
- P-28 Memo to George Sefcik from Allan J. Morrison, dated October 31, 1991
- P-29 Text entitled "Small Engines"
- P-30 Letter dated October 25, 1993
- P-31 Small Engines Technology course description
- P-32 Test on Ignition System
- P-33 Text entitled "Energy and Energy Systems"
- P-34 Vocational/Technology Department Problem Solving Quiz

On behalf of Respondent.

- R-1 Letter dated April 29, 1994
- R-2 Letter dated December 3, 1993
- R-3 Development Program for 1993-94 Fall Survey Certification Code Matrix
- R-4 Development Program for 1993-94 Fall Survey Certification Code Matrix
- R-5 1992-93 Fall Report for Certificated Staff Status Coding Manual
- R-6 Employment History for George Sefcik

GEORGE SEFCIK, :
 :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 RED BANK REGIONAL HIGH SCHOOL :
 DISTRICT, MONMOUTH COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record of these consolidated matters and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by both parties pursuant to N.J.A.C. 1:1-18.4, as was a reply to petitioner’s exceptions by the Board. Petitioner’s reply to the Board’s exceptions was incorporated into his primary filing.

In his exceptions regarding entitlement to teach Small Engine Mechanics, petitioner contends that the ALJ erred in discounting the DOE Fall Survey Certification Code Matrix, which clearly shows that he is properly certificated to teach the course. This matrix, petitioner argues, “has been historically utilized by Department of Education personnel to determine the appropriate endorsements that can be held so as to entitle certificated teachers to teach various courses in public education. The apparent determination of Judge Metzger to credit Mr. Brancolino’s testimony that this certification code matrix was irrelevant regarding certification related issues is devoid of any factual or legal support.” (Petitioner’s Exceptions at pp. 2-3, quoted passage at p. 3) Petitioner further reiterates his post-hearing arguments regarding the history and nature of the disputed course and claims that the ALJ has failed to recognize the primacy of a tenured teacher’s rights as against those of the nontenured staff member now teaching that course. (Id. at pp. 4-5)

With regard to his claim of retaliation, petitioner seeks to demonstrate that the record herein, contrary to the determination of the ALJ, does in fact evince that the Board, “at the eleventh hour, made a series of bizarre personnel moves to deprive Petitioner of full-time employment for the 1994-95 school year” in retaliation for his refusal to settle pending litigation

on terms not beneficial to him. In particular, petitioner avers that the ALJ failed entirely to consider the implications of petitioner's claim that Automotive Electronics was a component of a team-taught Automotive Mechanics course and was handled by a teacher (John Orr) not certified to teach Auto Mechanics. (Id. at pp. 6-9)

In reply, the Board observes that petitioner brings no testimony or evidence in support of his claim regarding the DOE matrix, and that his casting of events so as to support a claim of retaliation ignores the credible and uncontroverted testimony of Dr. Nogueira and Dr. Warner. (Board's Reply Exceptions at pp. 1-2)

In its own primary exceptions, which petitioner urges the Commissioner to reject as incorrect for the reasons expressed by the ALJ, the Board contends that the ALJ erred in concluding that petitioner was entitled to tenure and seniority rights on the basis of a certificate acquired after he was rified from full-time to part-time status while teaching under an emergency certificate. The Board states:

At the time of his reduction from a full-time to a part-time position [in 1988], petitioner was recognized as a nontenured teacher and was not placed on a preferential rehiring list. Nor was he placed on a preferential rehiring list when he obtained his regular teaching certificate in March, 1990. Petitioner remained employed as a half-time teacher from the 1988-89 school year to present. The hiring of a new industrial arts/technology education teacher in 1993-94 did not give rise to a further reduction in the petitioner's position. Respondent Board of Education argued that tenure and seniority rights are triggered by a reduction in force. (citation omitted) Post-RIF acquisition of certificates/endorsements does not create additional entitlements. (citations omitted)

The Administrative Law Judge states that the respondent's argument runs contrary to the administrative code regarding the recognition of service under an emergency certificate for seniority purposes. (citation omitted) But this provision is only triggered at the time of a reduction in force, not at the time when a teaching staff member acquires a regular teaching certificate after teaching for several years under an emergency certificate. It is respectfully submitted that there is no inconsistency with administrative code regulations or case law if the only time you need to recognize whether seniority and tenure rights exist is at the time of the reduction in force. Once a teaching staff member holding tenure is placed on a preferred rehiring list, that list remains in effect; but if there is no tenure held at the time of the reduction in force, there should be no need to revisit that issue subsequently simply because the teaching staff member has acquired a "new" regular teaching certificate.

(Respondent's Exceptions at pp. 1-2)

Upon consideration of the record and the arguments of the parties in this matter, the Commissioner affirms the ultimate recommendation of the initial decision that petitioner's appeal be dismissed, but modifies the ALJ's conclusions as follows.

Initially, with respect to petitioner's claim that the Board denied him a full schedule in 1994-95 in retaliation for his refusal to settle pending litigation, the Commissioner finds no basis in the transcripts of hearing, or elsewhere, to challenge the credibility assessments of the ALJ or fault his perception of underlying events. Certainly, petitioner's challenge regarding the certification of another staff member (Orr) and his role in team teaching the Auto Mechanics course is not sufficient to alter this result. Rather, the overwhelming body of credible testimony and factual evidence run counter to petitioner's position and, instead, support the conclusion of the ALJ.

Similarly, on the question of petitioner's claim to the Small Engine Mechanics course by tenure right, the Commissioner concurs with the ALJ, for the reasons expressed in the initial decision, that petitioner could not be assigned to this course under any circumstances, as he is not properly certificated to teach it. In so holding, the Commissioner notes that petitioner has adduced no evidence whatsoever in support of his claim as to the nature and purpose of the DOE matrix, which runs counter to the only credible testimony brought forward on this issue, that of DOE employee Brancolino. Neither does the parol or documentary evidence proffered in support of petitioner's claims regarding the nature and purpose of the disputed course itself carry the required burden, nor does it suffice to overturn the credible testimony of district administrators Nogueira and Warner.

However, even if petitioner were properly certified to teach the course at issue, he may not lay claim to it as a matter of tenure right. Here, the Commissioner rejects the ALJ's analysis at pp. 7-8 above, which concludes that case law fixing tenure and seniority rights at the point of RIF does not apply to circumstances such as are present herein, where a standard certificate is acquired post-RIF following continued service under emergency certification. This analysis fails to consider that employment entitlement rights do not exist in the abstract or in a temporal continuum; rather, they arise specifically upon the point at which a tenured employee is subjected to a reduction in force. Francey, supra, Johnstone, supra; Gloria Benson v. Board of Education of the Borough of Rockaway, Morris County, 1991 S.L.D. 2194, affirmed State Board

of Education, May 6, 1992. At the time petitioner's position was reduced to half-time, he was not tenured, and could not be as a matter of law. Thus, he had no entitlement, no full-time position was offered him, and he was not placed on the preferred eligible list resulting from that reduction. Since he obtained tenure in 1990, when he was employed as a half-time teacher, petitioner has suffered no RIF; his status now remains as it was at that time. Therefore, petitioner has no basis on which to claim a full-time schedule herein as a matter of tenure right. Neither is this result contrary to N.J.A.C. 6:3-5.1(e), as petitioner would be fully credited for his time under an emergency certificate upon any reduction in force occurring subsequent to his having achieved tenured status.

Accordingly, as modified with respect to petitioner's tenure entitlement claim, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal is affirmed for the reasons expressed therein.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

EDU #11867-93 and #9905-94 (consolidated)
C # 256-95
SB # 87-95

GEORGE SEFCIK, :
 :
 PETITIONER-APPELLANT, :
 :
 V. : STATE BOARD OF EDUCATION
 :
 BOARD OF EDUCATION OF THE RED : DECISION
 BANK REGIONAL HIGH SCHOOL :
 DISTRICT, MONMOUTH COUNTY, :
 :
 RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, July 17, 1995

For the Petitioner-Appellant, Klausner, Hunter & Seid (Stephen B. Hunter, Esq., of Counsel)

For the Respondent-Respondent, James P. Granello, Esq.

The decision of the Commissioner of Education dismissing the instant petition is affirmed substantially for the reasons expressed therein. We fully agree that petitioner's acquisition of a permanent instructional certificate subsequent to his reduction to part-time status in 1988, when he was serving under a substandard emergency certificate, does not alter the fact that he was not tenured at the time of the reduction so as to provide him with tenure and seniority rights arising from that particular reduction. As correctly pointed out by the Commissioner, petitioner would receive full seniority credit for his service under the emergency certificate in any staff reductions occurring after he

Dec. 6, 1995

achieved tenure as a result of his acquisition of a permanent certificate in 1990.

N.J.A.C. 6:3-5.1(e).

In light of our conclusion that petitioner had no tenure rights arising from his reduction to part-time status in 1988, we have not considered the Commissioner's determination that petitioner's instructional certification in "skilled trades: auto mechanics" did not authorize him to teach a claimed course in small engine mechanics.

Margaret M. Bennett abstained.

December 6, 1995

Date of mailing DEC 08 1995

IN THE MATTER OF THE TENURE	:	
HEARING OF HOWARD EFFEREN,	:	
SCHOOL DISTRICT OF THE BOROUGH	:	
OF BERGENFIELD, BERGEN COUNTY.	:	
AND	:	
	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF BERGENFIELD,	:	
BERGEN COUNTY,	:	DECISION ON REMAND
	:	
PETITIONER,	:	
	:	
V.	:	
	:	
HOWARD EFFEREN,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

In consolidated matters, Board certified tenure charges of unbecoming conduct against respondent, tenured custodian, for alleged criminal sexual contact and sought ruling that respondent forfeited his employment pursuant to N.J.S.A. 2C:51-2(a)(2) by virtue of judgment of conviction.

Granting motion for summary decision, the ALJ concluded that respondent forfeited his position as offense involved and touched his employment and, thus, it was unnecessary to reach a determination on the tenure charges. On June 24, 1994, Commissioner reversed and remanded matter for full hearing to reach determination as to whether he forfeited his public employment. Commissioner ordered this matter to proceed to hearing on the merits if it was concluded on remand that respondent did not forfeit his employment.

On remand, Commissioner concurred with the ALJ that the offense to which respondent pled guilty did not touch and involve his employment as a school custodian, consequently, he was not deemed to have forfeited his employment pursuant to N.J.S.A. 2C:51-2. However, the Commissioner further agreed with the ALJ that the circumstances underlying respondent's guilty plea constituted unbecoming conduct and termination was the appropriate penalty given the seriousness of his acts.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6487-94
(ON REMAND EDU 8099-93 and 8672-93)
AGENCY DKT. NOS. 275-7/93 & 308-8/93

**BOROUGH OF BERGENFIELD
BOARD OF EDUCATION,**

Petitioner,

v.

HOWARD EFFEREN,

Respondent.

Monica E. Peck, Esq., for petitioner
(Young, Dimiero & Sayovitz, P.C., attorneys)

Harold N. Springstead, Esq., for respondent
(Springstead & Maurice, attorneys)

Record Closed: April 19, 1995

Decided: June 5, 1995

BEFORE **DIANA C. SUKOVICH., ALJ:**

PROCEDURAL HISTORY

On June 19, 1993, the Superintendent of Schools of the Borough of Bergenfield (Borough) filed tenure charges and a sworn statement of evidence against Howard Efferen (Efferen or respondent), a tenured custodian, with the Acting Secretary of the district's Board of Education (Board or petitioner). Respondent did not submit a written statement of evidence in opposition. On July 13, 1993, the Board passed a resolution certifying tenure charges to the Commissioner of the State Department of Education (DOE) seeking dismissal of respondent. Efferen was suspended without pay. The

DOE transmitted the matter to the Office of Administrative (OAL) on August 26, 1993 for determination as a contested case pursuant to *N.J.S.A. 52:14F-1 to -13*. The matter was docketed as EDU 8099-93.

On August 23, 1993, the Board filed a petition for declaratory judgment with the DOE. The DOE transmitted that matter to the OAL on September 14, 1993 for determination as a contested case. It was docketed as EDU 8672-93 and consolidated with the matter previously transmitted.

During the course of the proceedings, petitioner filed a motion for summary decision. On April 25, 1995, this judge issued an initial decision granting the motion, concluding that Efferen had pled guilty to an offense which touched and involved his employment and that he therefore was subject to forfeiture. On June 24, 1995, the Commissioner of the DOE (Commissioner) issued a decision reversing the initial decision and remanding the matter to the OAL for a hearing. The matter on remand was transmitted to the OAL on July 6, 1994 for determination as a contested case and docketed as EDU 6487-94.

Telephone conferences were conducted, and a hearing was held on March 16, 1995. The parties filed post-hearing briefs on April 19, 1995, on which date the record was closed.

NATURE OF THE CASE

The tenure charges consisted of two counts of unbecoming conduct. Count One alleged that on July 29, 1992, respondent had criminal sexual contact with his 25-year-old stepdaughter, D.A., who was alleged to be mentally handicapped, and that on January 25, 1993, respondent pled guilty to a charge of criminal sexual conduct in violation of *N.J.S.A. 2C:14-3b*.

Count Two of the tenure charges alleged that Efferen misrepresented the status of the criminal action pending against him to the Assistant to the Superintendent of the district, Richard Cirelli (Cirelli), more specifically, that Efferen stated that the criminal charges had been dropped when they were still pending.

As noted hereinabove, in granting the Board's motion for summary decision in the prior proceeding, this judge determined that Efferen had forfeited his position because of the criminal plea. I therefore did not consider petitioner's motion for summary decision as it pertained to the tenure charges.

The Commissioner remanded the matter for a hearing wherein respondent would be permitted to present proofs relating to all relevant circumstances surrounding the offense in question. The Commissioner therefore remanded for further proceedings to determine whether respondent forfeited his public employment. The Commissioner further directed that in the event it is concluded that respondent did not forfeit his employment, the matter should proceed to hearing on the merits of the outstanding tenure charges.

For reasons of administrative efficiency, See, *N.J.A.C. 1:1-1.3(a)*, the hearing on remand addressed both forfeiture and the tenure charges. The burden of proof is on petitioner by a preponderance of the credible evidence. The issues, broadly, are whether the offense to which Efferen pled guilty touches and concerns his employment, resulting in a forfeiture, whether the Board has proven the tenure charges by a preponderance of the credible evidence, and, if so, what, if any, discipline should be imposed upon respondent.

FINDINGS OF FACT

Prior Findings

The Commissioner's decision did not reject nor modify the findings of fact set forth in the initial decision of April 25, 1994, and those findings are incorporated herein. For convenience, they are restated as follows.

Efferen commenced employment with petitioner in 1980 in the position of custodian at Bergenfield High School (High School). The duties of High School custodians in the district are set forth in Exhibit A to an affidavit of Cirelli filed in support of petitioner's motion for summary decision.

During each school year of his employment, respondent was generally assigned to an evening shift at the High School. His hours of employment were from 3:00 p.m. until 11:00 p.m. During the summer months, July 1 through August 30, respondent worked the day shift at the High School, from 7:00 a.m. until 3:00 p.m. There are usually five custodians at the High School during the evening shift. At that time, custodians generally perform their duties unaccompanied by other custodians and are not under constant supervision.

There were in excess of 900 students attending the High School during the 1992/93 and 1993/94 school years. A summary of events and activities which occurred at the High School after hours and during the shift on which respondent worked during the 1991 school year is as stated in Exhibit B to Cirelli's affidavit. A summary of events and activities which occurred at the High School during the 1992/93 school year, after school hours and during the evening shift on which respondent previously worked, is as stated in Exhibit C to Cirelli's affidavit. A summary of the events which occurred during the summer of 1993 during daytime hours during which respondent worked is as stated in Exhibit D to Cirelli's affidavit.

High School students, faculty members, students and staff from other schools, and numerous other visitors were present at the High School during the various events referenced in Exhibits B, C, and D to Cirelli's affidavit. High School students, staff, and visitors could, and did, proceed unaccompanied or unescorted to parts of the building

and grounds of the High School during the events and activities of the nature referenced in these exhibits. During the performance of his duties, respondent had continuing opportunity for contact with students, staff members, and visitors to the High School and its grounds.

On July 29, 1992, respondent's wife reported to the Borough police department that respondent had sexually assaulted her daughter, D.A., who was then 25 years of age, on July 29, 1992, at their home. In a statement given to a senior investigator with the Bergen County Prosecutor's Office, Sex Crime/Child Abuse Squad, on July 29, 1992, Mrs. Efferen described D.A. as being "slightly mental," noting that D.A. had attended "handicapped schools most of her life." A warrant was obtained for the arrest of respondent, charging him with aggravated sexual assault. Efferen was arrested on July 30, 1992.

During the summer of 1992, Mrs. Efferen advised the Board that respondent had been arrested and was incarcerated. The Board suspended respondent on approximately September 18, 1992.

Respondent was indicted on September 25, 1992. Count One averred that on July 29, 1992, Efferen committed sexual assault upon D.A. by performing an act of sexual penetration, i.e., inserting his finger into her vagina through the use of physical force or coercion, the victim not sustaining personal injury, in violation of *N.J.S.A. 2C:14-2c(1)*. Count Two alleged that on July 29, 1992, respondent committed sexual assault upon D.A. by performing an act of sexual penetration, i.e., anal intercourse with her through the use of physical force or coercion, the victim not sustaining severe personal injury, in violation of *N.J.S.A. 2C:14-2c(1)*. Count Three stated that on July 29, 1992, Efferen committed criminal sexual contact with D.A. by intentionally touching her breasts for the purpose of degrading or humiliating her or to sexually arouse or gratify himself, through the use of force or coercion, in violation, of *N.J.S.A. 2C:14-3b*.

On approximately January 8, 1993, Cirelli received a letter dated January 5, 1993 from respondent requesting his reinstatement. The content of this letter is as stated in Exhibit 1 to the statement of evidence supporting tenure charges.

On January 25, 1993, respondent pled guilty to Count Three of the indictment, fourth degree criminal sexual contact, in violation of *N.J.S.A. 2C:14-3b*. A judgment of conviction was entered on March 8, 1993. Efferen was sentenced to probation for three years. As a condition of probation, respondent was required to attend and complete Alcoholics Anonymous (AA) or any program deemed appropriate by the probation department and was required to continue psychological counseling.

Additional Findings

Cirelli testified on petitioner's behalf; and Efferen and his wife, Madeline Efferen, on respondent's behalf. Both parties moved several documents into evidence.

Based upon a review of the entire record, including credibility assessments of the witnesses, I **FIND** the following to be additional **FACTS**.

Efferen is 57 years old. He resides in the Borough with his wife; D.A., who is now 27 years old; and D.E., the natural daughter of Mr. and Mrs. Efferen, who is 17 years of age. Mrs. Efferen also has a 27-year-old daughter, M.E., who is in the Navy.

D.A. is currently employed by a Roy Rogers facility in the Borough, where she has worked for eight years. She is a crew manager, with supervisory duties. From the third grade on, D.A. was a special education student during her school years. She went to Paramus Vocational School.

Respondent has had problems with alcohol for years, having received treatment at Bergen Pines Hospital (Bergen Pines) during the 1960s and 1970s. At some point, he was employed for five years at Bergen Pines as an orderly. When respondent

drinks, he tends to become violent. He has exhibited a pattern of subsequently not recalling what has happened because of the effects of alcohol. On at least two to three occasions prior to July 29, 1992, he has exhibited aggression towards his family while he was under the influence of alcohol, physically striking Mrs. Efferen, M.E., and D.A. Mrs. Efferen has previously made complaints to the police regarding her husband, has taken her husband to court at least twice, and has obtained restraining orders. The most recent restraining order was issued in approximately April 1992. The restraining orders prohibited respondent from entering the home. Mrs. Efferen eventually let him return because she concluded he was not drinking. To Mrs. Efferen's observations, when he is drinking, respondent is "out of control," like a different person.

Efferen's mother died on June 20, 1992. Respondent was very upset as a result. Efferen went on vacation, during which he consumed alcoholic beverages. After his mother's death, Efferen consumed a substantial amount of alcohol.

As of July 29, 1992, Efferen was on a "binge." He was out late the night of July 28, 1992, during which time he consumed alcoholic beverages. When he returned home, Mrs. Efferen could tell that he was drunk. Respondent was due back at work from vacation the morning of July 29, 1992. Before she left for work, Mrs. Efferen reminded him to report to the High School. Efferen said that he would. The incident which occurred on July 29, 1992 involved Efferen pushing D.A. onto a bed.

Subsequently, a Borough police officer was called to the High School, where he met with Mrs. Efferen and D.A. The content of the officer's investigation report is as stated in Exhibit P-7. The officer stated in his report that he has known D.A. ". . . to be functionally retarded." (Ex. P-7, p. 2).

Mrs. Efferen went to the Borough police department on July 29, 1992, where she was interviewed and gave a sworn statement to investigators. Efferen gave a sworn statement to law enforcement personnel on July 30, 1992. The content of the statement provided by Efferen is as stated in Exhibit P-4; and that of Mrs. Efferen, as

stated in Exhibit P-1. The charge of aggravated sexual assault, *N.J.S.A. 2C:14-2(a)(5)(b)*, was signed against respondent because of D.A.'s "mental handicap." (Ex. P-9, p. 5). Efferen was arraigned, bail was set at \$10,000, and respondent was remanded to the Bergen County Jail.

Senior Investigator Edward A. Schiro (Schiro), of the Bergen County Prosecutor's Office, prepared a memorandum dated August 4, 1992 regarding the incident in question. The content of this document is as stated in Exhibit P-9. Schiro noted that Mrs. Efferen had reported in an interview that her husband had been on a "drinking binge" since the Sunday before July 29, 1992 and "had been acting very strangely" since his mother's death. (Ex. P-9, p. 3).

During the winter of 1992, Mrs. Efferen, accompanied by D.A., made efforts to have the charges dropped. She spoke in this respect with Wakeley Paul (Paul), the Public Defender assigned to Efferen. Paul advised Mrs. Efferen that she would have to contact the Prosecutor's office. In approximately December 1992, she went to the Prosecutor's office and was advised that the charges would not be dropped. Two days later, on a Friday, Mrs. Efferen spoke with Paul. She understood from this conversation that the charges would be dropped. Mrs. Efferen returned to Paul's office the following Monday and, again, several days thereafter. A plea was discussed at this time. It was Mrs. Efferen's understanding that Paul was negotiating with the High School to reinstate her husband.

Efferen's January 5, 1993 letter to Cirelli read as follows:

I Howard Efferen would like To be reinstated as soon as possible.

Charges against me have been dropped (Ex. P-3)

When he wrote this letter, respondent believed that the charges against him had been dropped.

By letter dated February 5, 1993, Paul advised John Galish (Galish), the Board's Superintendent, that Efferen had pled guilty to charges for which respondent would not receive jail time. Paul indicated that he was inquiring about reinstatement of Efferen.

Mrs. Efferen sent a letter dated April 25, 1993 to Galish. Mrs. Efferen expressed her dissatisfaction with the outcome of the criminal proceedings and her concerns regarding Efferen's employment situation, imploring Galish to reinstate her husband. She wrote this letter in efforts to help her husband regain employment with the district, an outcome which she views as important to her family and herself.

Efferen has completed two years of his three-years probation. Anne Byrnes (Byrnes) is a Senior Probation Officer assigned to Efferen's case. Respondent initially reported to Byrnes on a weekly basis; then, on a bi-weekly basis; and currently, on a monthly basis. In April 1994, Efferen completed a 12-month alcohol treatment program (Program) provided by the Bergen County Department of Health Services, Division of Alcohol and Drug Dependency, Office of Alcohol Recovery. Efferen attended the Program as a condition of probation. His counselor was Julie Shaw (Shaw), a Senior Alcoholism Counselor, with whom Efferen attended weekly sessions. Efferen currently attends AA meetings and has not consumed alcohol beverages since July 30, 1992. Since approximately April 1993, Efferen has attended therapy sessions with Eleanor Faulkner (Faulkner), a "certified sex therapist." (Ex. R-2). Respondent currently attends weekly group sessions, lasting one and one-half hours, with Faulkner.

Since 1993, Shaw has sent various letters to Efferen's counsel in the current matter and a report to Byrnes. Shaw sent a letter dated March 22, 1994 to Efferen's counsel regarding respondent's status. The content of this document is as stated in Exhibit R-5. Shaw sent a report dated April 22, 1994 to Byrnes regarding Efferen. The content of this document is as stated in Exhibit R-4. Shaw sent another letter to Efferen's counsel on April 22, 1994. The content of this letter is as stated in Exhibit R-3. She again communicated with Efferen's counsel by letter dated October 15, 1993.

The content of this letter is as stated in Exhibit R-6. Finally, Byrnes sent a letter dated February 16, 1995 concerning Efferen to his counsel. The content of this letter is dated February 16, 1995. In her April 22, 1994 memorandum to Byrnes, Shaw noted, in part, the following:

Mr. Efferen appears too (sic) have a reasonable attitude regarding employment and other life areas and should continue to work toward appropriate goals. Mr. Efferen has received group counseling with a sex therapist for a period of one year and appears to have gained more awareness regarding his drinking practices and consequences of his excessive alcohol use.

It is also this counselor's opinion that as long as Mr. Efferen continues to maintain sobriety, he should continue to behave in a responsible manner in all areas and life situations. (Ex. R-4).

For two years subsequent to the termination of his employment with the Board, respondent worked for Manpower, an agency which sent him on temporary jobs. Efferen currently is employed in warehouse work.

While employed as a custodian at the High School, respondent's duties included cleaning any areas used by students, such as hallways, classrooms, gymnasiums, locker rooms, and bathrooms, including bathrooms and locker rooms utilized by females. The Board does not employ female custodians assigned specifically to those tasks.

Subsequent to 3:00 p.m., the High School is very busy. It is not only used for school-related activities but also functions as a community center. Student activities occurring in the High School subsequent to 3:00 p.m. include clubs, sports, all practices, including color guard and cheerleading, and dances. The Borough has very active athletic activities, and the High School is used for girls' sports activities. Various organizations also rent the High School for activities, including recitals and parent teacher association events, for example. Activities occur at the High School well into

the evening hours. During the past five years, many such events continued until 11:00 p.m. during winter months, especially on Friday evenings, when dances are often held. For security reasons, certain doors at the High School are locked. During activities, some doors are left open. Custodians lock them after the activities are completed.

Students utilizing the High School for athletic events, as well as other events, include both students at the High School, as well as from other districts. These students use the gym, locker rooms, and bathrooms. Locker rooms and bathroom facilities are not locked during activities. During games, students may go to the locker rooms, which contain showers, and rest rooms to change, etc. These areas are not monitored at such times. Any group or individuals in the building, including students, at the direction of teachers, regularly seek out custodians to unlock doors and retrieve equipment. Students interact with janitors on a regular basis.

Cirelli is employed as the assistant to the Board's superintendent and deals with personnel matters. Although he makes efforts to assign janitors to specific areas of the High School, such is not generally the practice. In the past, respondent employed female custodians. Male custodians do not clean female locker rooms while they are in use. In general, custodians employed by the district are assigned to different buildings.

Approximately 90 to 95 students at the High School are classified as special education students. Their classifications include neurologically impaired, physically impaired, emotionally disturbed, and physically handicapped. There are a total of 930 students at the High School, divided approximately evenly between male and female students. The students range in age from 13 to 19 years. The High School contains grades 9 through 12.

There are five middle schools, containing grades 6 through 8, in the district. Not all schools in the Borough have the same janitorial shifts as those at the High School. There are two elementary schools in the district, having two shifts, 7:00 a.m. until 4:00 p.m. and 3:00 p.m. until 11:00 p.m. There are five custodians on the 11:00 p.m. to 7:00

a.m. shift at the High School. The other schools in the district do not have 11:00 p.m. - 7:00 a.m. shifts.

Cirelli was involved in the current matter. He was in contact with the police department and reviewed police records and documents supplied to the Board. The documents he reviewed and relied on included the pertinent arrest report and the police department's investigative report.

DISCUSSION

The Commissioner generally has jurisdiction to hear and determine controversies and disputes arising under the school laws. *N.J.S.A. 18A:6-9*. Every public school janitor of a school district shall, unless appointed for a fixed term, hold his/her office, position, or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as a result of a reduction of the number of janitors in the district or except for neglect, misbehavior, or other offense, pursuant to the manner prescribed in *N.J.S.A. 18A:6-9*. *Id.* at §17-3.

No individual shall be dismissed if he/she is under tenure of office, position or employment in a public school system, except for inefficiency, incapacity, unbecoming conduct, "or other just cause." Such action can only be taken after a hearing held pursuant to applicable statutory provisions, subsequent to written charges of the cause of complaint. *Id.* at §6-10. Upon certification of charges to the Commissioner, a local board may suspend the person against whom such charges are made, with or without pay. If a determination of the charges is not made by the Commissioner within 120 calendar days after certification thereof, then the full salary of the individual in question shall be paid beginning on the 121st day, until such determination is made. A dismissal of the charges shall result in reinstatement with full pay from the first day of any suspension. *Id.* at §6-14.

A person holding any public office, position or employment under State government, or any agency or political subdivision thereof, who is convicted of certain specified offenses shall forfeit his/her office or position. These are convictions of any offense involving dishonesty or a crime of the third degree, conviction of an offense "involving or touching such person's position or employment," or if the constitution or a statute so provides. *N.J.S.A. 2C:51-2(a)*.

Forfeiture shall take effect upon a finding of guilt by the trier of facts or a guilty plea, if the court so orders, upon sentencing, unless the court for good cause shown orders a stay of such forfeitures. *Id.* at §(b). Forfeiture takes effect at the time an employee pleads guilty to or is found guilty of an offense involving or touching his/her employment. *Moore v. Youth Correction Institute*, 119 N.J. 256 (1990) (*Moore*). The forfeiture statute reflects the belief that the circumstances of a criminal conviction relate to an employee's competency and capacity to continue his/her employment or to perform any other public job. *Moore* at 271.

The determination of whether a crime touches or involves employment requires ". . . an analysis of the nexus between the crime and the employment to determine if there is a sufficient relationship between the two to warrant the harsh penalty of forfeiture." *Moore* at 266. The initial determination should generally be made by the employer and administrative agencies subject to the individual's right to appeal to the Appellate Division. *Moore, supra*.

Moore involved a senior prison corrections officer convicted of harassing his supervisor, a petty-disorderly-persons offense. A determination by the Department of Corrections that he had forfeited his employment was upheld by the Merit System Board and the Appellate Division. In doing so, the court held that an offense may involve or touch employment even if it was not committed on the job premises or during work hours, noting that it is the substance of the crime which determines whether or not it involves or touches employment. *Moore* at 269-270. A crucial factor is the

relationship between the offense and the individual's capability to perform satisfactorily in the future. Moore at 270-271.

The determination of whether a crime touches or involves employment requires an assessment of the gravity of the offense as evidenced by its nature, context, and the identification of the victim. There must also be an assessment of the qualifications required by the employee's public employment. Moore at 269.

The Commissioner and the State Board of Education (State Board) have narrowly interpreted the requirement that the underlying circumstances of a plea or conviction touch or involve an individual's employment in an educational setting, essentially determining that the incident in question must either occur on educational premises, or directly affect the employee's duties. In *The Town of West Orange, Board of Education v. Martin Lieb*, 1985 S.L.D. 933 (*Lieb*), the Commissioner affirmed the findings of the presiding ALJ that Lieb should be reinstated as a school teacher following a lewdness conviction. Lieb was initially charged with violation of N.J.S.A. 2C:14-3(b), criminal sexual contact. The charge was subsequently downgraded to a violation of N.J.S.A. 2C:14-4, lewdness. *Lieb* at 934-935. The underlying offense was that Lieb had contact with an undercover police officer's genital area. Lieb was subsequently found guilty. In determining that the offense of which he was convicted did not involve or touch Lieb's employment as a teacher, the ALJ noted the following:

The plain language of N.J.S.A. 2C:51-2(a)(2) would apply if the offense of which respondent was convicted involved or touched his employment as a teacher. Significantly, the conduct underlying respondent's conviction occurred during the summertime when school was not in session; his conduct did not involve pupils; nor was respondent's employment as a public school teacher in any way involved with his conduct. Consequently, respondent's conviction of lewdness may not be seen to be an offense involving or touching his employment as a public school teacher. *Lieb* at 939.

In *School District of the City of Garfield v. Olek*, 92 N.J.A.R. 2d (EDU) 319 (*Olek*), a tenured teacher pled guilty to possession of a hypodermic syringe or needle, possession of a prescription legend drug, steroids, and unlawful use of a prescription legend drug, steroids, disorderly persons offenses. The ALJ's determination, on motion for summary decision, that the underlying offenses touched and involved Olek's employment and that he therefore forfeited his position were upheld by the Commissioner. The State Board reversed the Commissioner's decision, finding that there was insufficient information in the record to conclude that there was a sufficient nexus between the offenses committed by Olek and his employment to conclude that forfeiture applied.

The fact that the offense to which respondent pled guilty did not involve a controlled dangerous substance lends support to a conclusion that it does not touch or involve Efferen's employment, as construed by the State Board. See, *Olek* at 325. Petitioner argues that the State Board in *Olek* was unable to determine the exact parameters of Olek's employment duties. However, the State Board's analysis in this respect focussed on whether Olek was employed as a wrestling coach at the time of his arrest, the specific period of time in which he was employed in such capacity, his specific coaching assignments, the duties and responsibilities of such assignments, and the qualifications required thereof. *Olek* at 325. The Commissioner in *Olek* referenced the relationship between the fact that Olek had possessed steroids and his roles as a science teacher, mentor of students, and a former wrestling coach. *Id* at 323. It is reasonable to conclude that the State Board was persuaded by the fact that the underlying offenses did not occur on school property nor involve students.

Determinations of the Commissioner and the State Board in their areas of expertise must be given great weight, and I feel constrained to apply the narrow interpretation of the forfeiture statute as applicable in the education area articulated by the State Board and the Commissioner. Petitioner argues that it is incongruous that

another public employer would be precluded from hiring respondent in light of his guilty plea but that petitioner is required to continue his employment. However, this reasoning was implicitly rejected in the Commissioner's decision of June 24, 1995. Similarly, the Board's reliance on *Miller v. New Jersey Dept. of Education*, 91 N.J.A.R. 2d (EDU) 15 (1991) is misplaced in the context of the current matter. As discussed in my initial decision in the prior docket, it is reasonable to conclude that in that case the Commissioner applied the disqualification provision to Miller as if he were a new employee. The Board's reliance on *Borough of Haddonfield School District v. Wayne V. Wisdom*, 1986 SLD 656 (1986) is similarly misplaced. Wisdom was convicted of a crime of the second degree, resulting in automatic forfeiture.

Although respondent may not be deemed to automatically have forfeited its position, the Board has the authority to discipline Efferen if the facts underlying the offense in question constitute unbecoming conduct. The Board argues, alternatively, that the underlying facts establish unbecoming conduct warranting Efferen's dismissal. Although the Board argues in this respect that said dismissal should be effectuated pursuant to its initial motion for summary decision, I am persuaded that such is not appropriate in light of the fact that the plenary hearing is completed. While conceding that his conduct was unbecoming, respondent argues that a penalty less than dismissal should be imposed.

I am persuaded that respondent's conduct on the morning of July 29, 1992 constituted unbecoming conduct for which he may be disciplined. The facts indicate that Efferen pushed D.A. onto a bed in the family's residence and engaged in forced sexual contact with D.A. It is reasonable to infer from the facts, and the offense to which respondent pled, that Efferen used physical force, that D.A., at least to some extent, was incapacitated in her mental abilities, and that respondent was aware of

that.^{*} Forced sexual contact is a serious offense on its face. D.A.'s age and her relationship with Efferen heightened the seriousness of the offense. The question to be decided is what discipline, if any, should be imposed on Efferen.

In determining the discipline which should be imposed in cases involving unbecoming conduct, the Commissioner considers the nature and circumstance of the incident in question, the individual's prior record and current attitude, and the likelihood that the behavior in question will recur. *In the Matter of the Tenure Hearing of Frederick L. Ostergren, School District of Franklin Township, Somerset County, 1966 SLD 185* ". . . each such matter must be judged in the light of its particular circumstances. The kind and degree of penalty will necessarily vary according to the specific problem." *In the Matter of the Tenure Hearing of William H. Kittell, School District of the Borough of Little Silver, Monmouth County, 1972 SLD 531, 541.*

Discipline may be imposed upon a tenured employee for unbecoming conduct even if such conduct did not occur in the course of a teacher's employment. *In the Matter of the Tenure Hearing of Robert H. Beam, School District of the Borough of Sayreville, 1973, S.L.D. 157 (Beam)*. *Beam* involved the certification of charges of unbecoming conduct by the local school board on the basis of a parental complaint alleging that Beam had assaulted the parents' 13 year-old-daughter, who attended

^{*} At the time in question an individual was guilty of criminal sexual contact, a crime of the fourth degree, if he/she committed an act of sexual contact with the victim under certain specified circumstances. *N.J.S.A. 2C:14-3(b)*. These were:

1. He actually used physical force or coercion but the victim did not sustain severe personal injuries;
2. The victim was one who the actor knew or should have known was physically helpless and mentally incapacitated.
3. The victim was on probation or parole or was detained in a hospital, prison, or other institution or was mentally defective and the actor had supervisory or disciplinary power over the victim by virtue of his/her legal, professional, or occupational status;
4. The victim was at least 16 years but less than 18 years old, and the actor was a member of the victim's family with supervisory or disciplinary power over the victim; or
5. The victim was at least 13 years but less than 16 years old, and the actor was at least four years older than the victim. *Id.* at §2(c).

parochial school, not the public school system, during evening hours on a public street in Parlin, New Jersey. The Commissioner rejected Beam's argument that because the incident occurred in the evening away from school premises, the Commissioner lacked jurisdiction to discipline him. Although not disturbing the board's determination of unbecoming conduct, the Commissioner concluded that while such behavior could not be condoned, a "single, isolated incident" was not sufficient to warrant dismissal. *Beam* at 164.

Similarly, in *Lieb, supra*, the presiding ALJ found that Lieb's conduct constituted unbecoming conduct but that termination was too harsh in light of "one fleeting instance of bad judgment," the stress he was undergoing at the time in question, the findings and conclusions of the board's psychiatrist, and Lieb's long and successful career as a public school teacher, as well as his standing in the community and family. *Lieb* at 943. The Commissioner, upholding the ALJ's decision, noted:

Given respondent's outstanding teaching career, the factual circumstances underlying the tenure charges, the fact that action giving rise to the charges, was a single, isolated incident on an otherwise unblemished record and the findings of the Board's psychiatrist, the Commissioner believes that termination is not warranted. . . . *Lieb* at 945.

In *Dinkins v. Department of Health of Cape May County*, 6 N.J.A.R. 202 (1983) (*Dinkins*), the presiding ALJ held that a supervisor in the Division of Laboratories of the Department of Health had forfeited his employment due to his conviction of a violation of N.J.S.A. 2C:24-4A. The offense in question involved engaging in sexual contact with a five-year-old female. Sentencing included probation and a requirement that Dinkins, who was an alcoholic, continue participation in AA. *Dinkins* at 202-203. Although concluding that forfeiture was automatic because the crime in question was of the third degree, the ALJ also considered the appointing authority's action removing Dinkins on other grounds, including unbecoming conduct. Evidence before the ALJ demonstrated that Dinkins was an alcoholic as well as a user of various narcotic substances, that at the time in question, Dinkins was living with the child and her mother, that Dinkins had

been drinking during the day in question, that Dinkins received treatment from an alcoholic counselor subsequent to his conviction, and that he was thereafter actively involved with AA and had not consumed alcohol nor drugs for one and one-half years. A psychotherapist testified that, in her opinion, the incident would not have occurred if Dinkins had not been drinking and that the incident was an isolated one not likely to be repeated. *Id.* at 204-205.

In determining that Dinkins' conduct was unbecoming and that he should be removed from his position on that basis, the ALJ stated:

In connection with the discretionary grounds for removal, there is no question but that the conduct of Mr. Dinkins in connection with the five-year-old child was immoral and was clearly conduct unbecoming one who holds a public position. While the actions did not touch or concern the public employment and were undertaken in the context of Dinkins' private life, this does not change the fact that the conduct is shocking and that it is certainly something that should not be tolerated from one who holds the confidence of a public position. Mr. Dinkins' status as an alcoholic no doubt provides a strong clue as to how he fell into the conduct in which he engaged, but it does not excuse the fact that what he did was totally wrong. Given the circumstances, I do not believe it would be appropriate for the appointing authority to continue Dinkins as a public servant. There are few actions which are less tolerable to society than improper sexual contact with a child of tender years. Given Dinkins' position as a responsible supervisory individual in the Department of Health, it does not seem appropriate that his employment in that job be continued where he has violated the public trust by engaging in such immoral actions, even in his private life. Therefore, I believe that removal is necessary under *N.J.A.C. 4:1-16.9(a)7, 9 and 11. Dinkins* at 208-209.

As the Board argues, criminal sexual contact with an individual's mentally handicapped stepdaughter is similarly conduct unbecoming an individual who holds a

public position, especially one in which, as in this case, the individual in question has opportunity for unmonitored contact with adolescent females in a public school setting.

A single incident can be sufficient to support dismissal of a tenured employee. *South Orange-Maplewood Board of Education v. Simonic*, 1986 SLD 3117 (1986). The facts of this case strongly argue for imposition of substantial discipline even if the conduct in question can be viewed as an isolated incident. However, I am not persuaded by respondent's argument that it was an isolated incident. As the Board argues, the record demonstrates a pattern of aggressive action by respondent directed towards adolescent or otherwise vulnerable females in unprotected locations. This case is therefore distinguishable from *Lieb, supra*. The underlying offense in the current matter is strikingly similar to that in *Dinkins*.

Although raising issues pertaining to the disqualification statute, *N.J.S.A. 18a:6-7.1*, the facts of *Paul v. New Jersey State Department of Education*, 91 *N.J.A.R. 2nd* (EDU) 46 (*Paul*), are analogous to those of the current matter. In upholding action by the DOE disqualifying Paul from the position of custodian because of three drug-related offenses, the ALJ, whose decision was affirmed by the Commissioner, noted that:

Under its general police powers, the State has the right to impose reasonable restrictions on various occupations in order to protect the public health and safety Protection of the public is particularly vital in the school environment where a custodian has ready access to impressionable young children who are not under the watchful eye of their parents. *Paul* at 47(citation omitted).

The same rationale applies in the current matter. In addition, the fact that the incident in question occurred when Efferen was a mature adult, and the fact that the seriousness of his aggressive actions has apparently escalated over time, supports a conclusion that he should not be employed in a public school setting. See, *Paul* at 47.

Anticipating arguments on behalf of respondent, the Board argues in its brief that Efferen has not established rehabilitation pursuant to *N.J.S.A. 18A:6-7.1e*. Although this provision is applicable to applicants, not current employees, the principles reflected therein are relevant to consideration of whether Efferen's unbecoming conduct should result in termination or a lesser discipline.

The nature of the offense to which Efferen pled guilty and his relationship with D.A., as well as her age and status, argue for termination for the reasons discussed hereinabove. As respondent argues, the fact that the Board introduced no evidence pertaining to his employment record indicates he was previously not subject to discipline and must therefore be considered to have been a satisfactory employee. However, I am persuaded that this factor, in light of the nature of the offense and the identity and relationship of the individuals, does not mitigate a conclusion that termination is appropriate. Respondent was a mature individual at the time in question. Students at the High School are not much younger than D.A. There is ample opportunity for contact with unsupervised students, including female students and classified students. Efferen has exhibited a pattern of physical aggression towards women. Mrs. Efferen's testimony that he is a good father and husband when not under the influence of alcohol was self-serving. Similarly, Shaw's communications to respondent's counsel on their face were prepared relevant to the current matter and are not given substantial weight. The memorandum from Shaw to Byrnes states that Efferen should be able to function in an educational employment setting if he refrains from the consumption of alcohol beverages. Although Efferen completed the court-ordered alcohol rehabilitation program and has not recently consumed alcoholic beverages, the record establishes a long-standing problem with the consumption of alcoholic beverages and prior participation in a treatment program, apparently without continuing effect. The record also indicates that respondent is receiving counseling for the existence of issues related to sexual matters, reinforcing the Board's concerns regarding safety issues in light of the nature of a custodian's duties. Finally, as petitioner argues, the incident in question is not a distant historical event.

I am not persuaded by respondent's reliance, in support of his argument that termination is not warranted, on *In the Matter of the Tenure Hearing of Robert P. Valenti, School District of the Township of Monroe*, 1990 S.L.D. 410 (*Valenti*), *In the Matter of the Tenure Hearing of Jude Martin, School District of the Township of Union Beach*, 1987 S.L.D. 1929, *Board of Education of the Township of Old Bridge v. Richard M. Pappa*, 1988 S.L.D. 542 (*Pappa*), and *Parsippany-Troy Hills Board of Education v. Greg W. Molinaro*, 1989 S.L.D. 1996 (*Molinaro*). None of these cases involved instances of physical aggression. The Commissioner's concern, in considering the appropriate discipline for unbecoming conduct, that such incidents not be a "momentary aberration" is also clear. *Valenti* at 2. The fact that the incident in question in *Pappa* was a "single isolated incident," *Pappa* at 548, and that there was a "single incident of misconduct" in *Molinaro*, *Molinaro* at 2008, argued for lesser discipline. Such is not the case in the current matter.

Respondent relies, in part, on public policy that alcoholics and intoxicated persons not be subject to criminal prosecution because of their consumption of alcohol, but should be afforded treatment so that they may lead productive lives, *N.J.S.A. 26:2B-7*, and that no person who has received treatment shall be denied any right or privilege under the United States or State Constitutions for the reason that he/she has received such treatment or is an alcoholic. *Id.* at §21. However, any discipline imposed on respondent in the current matter is not because of his status nor his consumption of alcohol but because of his acts. In addition, Efferen is not precluded from employment, as evidenced by the fact that he has been employed since his suspension by the Board. The question presented in this case is whether or not he should be employed in an educational setting. I am persuaded that that question should be answered in the negative. The ALJ's reasoning in *Dinkins, supra*, is applicable in this respect in the current matter. I am persuaded that termination is appropriate.

The remaining question is whether the Board has proven Count Two of the tenure charges. As reflected in the above findings of fact, I am persuaded by Mr. and Mrs. Efferen's testimony regarding communications to Board personnel concerning

Efferen's status. I am therefore persuaded that the Board has not proven by a preponderance of the credible evidence that Efferen misrepresented to Cirelli the status of the criminal action pending against him.

CONCLUSIONS

I **CONCLUDE** that the offense to which respondent pled guilty does not involve and touch Efferen's employment and that he therefore did not forfeit his position pursuant to *N.J.S.A. 2C:51-2*. I also **CONCLUDE** that the circumstances underlying respondent's guilty plea constitute unbecoming conduct and that termination is an appropriate discipline. Finally, I **CONCLUDE** that the Board has not proven by a preponderance of the credible evidence Count Two of the charges certified by the Board on July 13, 1993.

ORDERS

It is hereby **ORDERED** that respondent not be deemed to have forfeited his position because of the offense to which he pled guilty on January 25, 1993; that Count One of the tenure charges certified by the Board against respondent be and is hereby **AFFIRMED**; that Count Two of the tenure charges be and is hereby **DISMISSED**; and that termination of employment be imposed on respondent as discipline pertinent to Count One.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 5, 1995
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

6/7/95
DATE

Receipt Acknowledged:
Hope R. Blackburn
DEPARTMENT OF EDUCATION

JUN 07 1995
DATE
le

Mailed to Parties: Jeff J. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

LIST OF WITNESSES

For Petitioner:

Richard Cirelli

For Respondent:

Madeline Efferen
Howard Efferen

LIST OF EXHIBITS IN EVIDENCE

- P-1 Statement of Madeline Efferen dated July 29, 1992
- P-3 Note dated January 5, 1993
- P-4 Statement of Howard Efferen dated July 30, 1992
- P-5 Waiver of Rights form dated July 30, 1992
- P-6 Arrest Report dated July 30, 1992
- P-7 Investigation Report dated July 29, 1992
- P-8 Indictment No. S-1359-92
- P-9 Memorandum dated August 4, 1992
- P-10 Letter dated February 5, 1993
- P-11 Certification dated May 20, 1993 and Judgment of Conviction dated March 8, 1993
- P-12 Affidavit of Cirelli dated February 7, 1994; Duties of High School Custodians; Schedule of Activities, 1991-1992 school year; Schedule of Activities, 1992-1993 school year; Schedule of Activities, summer of 1993

- R-1 Letter dated April 25, 1993
- R-2 Letter dated February 16, 1995
- R-3 Letter dated April 22, 1994
- R-4 Memorandum dated April 22, 1994
- R-5 Letter dated March 22, 1994
- R-6 Letter dated October 15, 1993

IN THE MATTER OF THE TENURE :
HEARING OF HOWARD EFFEREN, :
SCHOOL DISTRICT OF THE BOROUGH :
OF BERGENFIELD, BERGEN COUNTY. :
AND :
BOARD OF EDUCATION OF THE :
BOROUGH OF BERGENFIELD, : COMMISSIONER OF EDUCATION
BERGEN COUNTY, :
PETITIONER, : DECISION ON REMAND
V. :
HOWARD EFFEREN, :
RESPONDENT. :
_____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Respondent's exceptions and the Board's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Respondent excepts to the ALJ's reliance on Dinkins, supra, as justification for imposing the sanction of forfeiture of his employment, where, in contrast to the circumstances in the instant matter, Dinkins was convicted of a third degree offense, thus compelling automatic forfeiture of public employment subsequent to N.J.S.A. 2C:51-2. (Respondent's Exceptions at p.1) Respondent further argues:

The ALJ relied upon instances of domestic violence as evidence that respondent could commit acts of violence upon children.

However, all his prior acts of domestic violence were committed at home when he was highly intoxicated. There has never been any proof of any problems with the respondent's work effort at school in spite of his long-standing problem with consumption of alcoholic beverages and his prior participation in treatment programs. (Id. at p. 2)

Further, respondent argues that the record shows that while discipline was necessary, termination of public employment is not. Here, respondent contends that although the ALJ stated that Efferen has exhibited a pattern of physical aggression toward women, (Initial Decision at p. 20), the only evidence of such aggression is the "domestic disputes with his wife and stepdaughters on brief occasions when he was intoxicated." (Respondent's Exceptions at p. 2) Respondent further objects to the weight the ALJ assigned to the testimony of Mrs. Efferen and the evidence proffered by respondent's counselor, Julie Shaw.

In reply, the Board argues that the record shows the mere "domestic disputes" to which respondent refers were incidents which, on two or three occasions, actually resulted in the arrest of respondent, and the issuance of a restraining order preventing him from entering home. The Board continues, "Mrs. Efferen also advised the police that her husband had committed acts of domestic violence not only against her, but also against her daughter on multiple occasions prior to the July 29, 1992 incident." (Board's reply at p. 2) The Board asserts that to minimize respondent's actions as "mere 'domestic disputes with his wife and stepdaughters on brief occasions' is to ignore a history of violence uncontroverted in the record." (Id.) Thus, the Board concludes that termination of Efferen's employment is an appropriate remedy given the seriousness of his prior acts.

Upon careful and independent review of this matter, the Commissioner determines to reject the exceptions of respondent and affirm the decision of the ALJ for the

reasons articulated in the initial decision. Initially, the Commissioner concurs with the ALJ that the offense to which respondent pled guilty does not touch and involve his employment as a school custodian, and, consequently, he is not deemed to have forfeited that employment pursuant to N.J.S.A. 2C:51-2. Respondent's application of forfeiture language in his exceptions, therefore, is misplaced.

However, the Commissioner further agrees with the ALJ that the circumstances underlying respondent's guilty plea constitute unbecoming conduct, and termination is the appropriate penalty. Even assuming arguendo, that respondent's act of criminal sexual contact with his mentally handicapped daughter was a single act of aggression, the Commissioner concurs that "[t]he facts in this case strongly argue for imposition of substantial discipline***." (Initial Decision at p. 20) In so finding, the Commissioner is given no cause to reject the credibility determinations of the ALJ.

Accordingly, the respondent is hereby terminated from his employment as a tenured custodian as of the date of this decision.

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

258-95

IN THE MATTER OF THE TENURE :
 HEARING OF GLORIA JIMENEZ, : COMMISSIONER OF EDUCATION
 SCHOOL DISTRICT OF THE CITY OF : DECISION
 LONG BRANCH, MONMOUTH COUNTY. :
 _____ :

JULY 18, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5246-94

AGENCY DKT. NO. 141-5/94

**IN THE MATTER OF THE TENURE
HEARING OF GLORIA JIMENEZ,
SCHOOL DISTRICT OF THE CITY OF
LONG BRANCH, MONMOUTH COUNTY.**

J. Peter Sokol, Esq., for petitioner, Board of Education of the School District of Long Branch (McComber and McComber, attorneys)

Thomas W. Cavanagh, Jr., Esq., for respondent, Brenda Johnson (Chamlin, Rosen, Cavanagh & Uliano, attorneys)

Record Closed: May 2, 1995

Decided: June 5, 1995

BEFORE DANIEL B. MCKEOWN, ALJ, t/a:

INTRODUCTION

Gloria Jimenez (respondent) is a school matron with tenure in the employ of the Long Branch Board of Education (Board). On April 28, 1994, the Board determined to certify charges of excessive absenteeism, neglect, and misbehavior against respondent to the Commissioner of

Education for determination under the Tenure Employees Hearing Law *N.J.S.A. 18A:6-10 et seq.* Respondent was not suspended from her duties during the pendency of the charges. The charges were received May 3, 1994 at the Department of Education, after which the matter was transferred May 26, 1994, to the Office of Administrative Law as a contested case under the provisions of *N.J.S.A. 52:14B-1* through 15 and *N.J.S.A. 52:14F-1* through 13. A telephone conference call was initiated and held by this judge July 6 and continued, by agreement to August 8, 1994. This date was adjourned at the request of the parties, rescheduled, and adjourned again. The telephone conference call was finally continued on September 21 at which time the parties waived a formal prehearing conference and agreed that this case should be scheduled for hearing on the same day as a case regarding tenure charges filed against another matron and separate charges against a clerk, Desmond, in the Board's employ simultaneous to this case.¹ The request of the parties was honored and this case, with the *Johnson* case, was to commence December 12 while the remaining case, *Desmond*, was to begin the following week beginning December 19, 1994.

Prior to December 12 the parties advised that all three cases were settled and a Settlement Agreement would be submitted by the end of that month for submission to the Commissioner for approval. The scheduled hearings were canceled upon that representation. Not having received a proposed Settlement Agreement by the end of December the undersigned learned during a telephone call to Board counsel on January 17, 1995 that counsel for respondent was in possession of the Agreement and was adding language to avoid later rejection by the Commissioner. After a letter was sent the parties March 7, 1995 to determine the status of the proposed Settlement, both counsel advised that while the parties fully intended to settle all three cases the propriety of one or more settlement terms became subject to disagreement for various reasons. During an informal telephone conference call on or about April 19, 1995, a hearing was scheduled and conducted in the *Jimenez* and *Johnson* cases on May 1, 1995 at the Freehold Township Municipal Building Courtroom at which time counsel announced a Settlement

¹ See in the *Matter of the Tenure Hearing of Brenda Johnson*, OAL DKT. NO. 5244-96, AGENCY DKT. NO. 139-5/94 and *In the Matter of the Tenure Hearing of Ruth Desmond*, OAL DKT. NO. 5245-94, AGENCY DKT. NO. 140-5 94

Agreement, in this case - *Jimenez* -, had in fact been reached. They jointly entered the settlement terms on the record.

This initial decision recommends that the Commissioner of Education accept the Settlement Agreement as a full and final disposition of *In the Matter of the Tenure Hearing of Gloria Jimenez*, OAL DKT. NO. 5246-94, AGENCY DKT. No. 141-5/94², so that both sides may devote their full attention, energy, and Board resources to the significant public interest of providing their pupils the opportunity for a thorough and efficient program of education.

SETTLEMENT AGREEMENT STANDARDS

The State Board of Education standards for approving settlement agreements in tenure cases are stated in *In re Tenure Hearing of Frank Cardonick Brooklawn Borough Board of Education*, 1982 S.L.D. --- (Aug. 4, 1982). It is necessary to insure that the standards announced for the approval of tenure charge settlements by the State Board of Education are met. Therefore, it is appropriate to briefly discuss the tenure charges which allege respondent engaged in excessive absences. The charge of excessive absenteeism is a serious matter. It should not be made lightly by the charging party, nor taken lightly by the accused for it is not taken lightly by either the Commissioner or State Board of Education.

While the Board found probable cause to credit the evidence against respondent, it is well within its authority to assess, in good faith, the strength and/or weaknesses of its competent, credible evidence to prove the truth of the charges and to have entered negotiations with respondent for purposes of settlement. In *Cardonick supra*, the State Board of Education recognized that

² A separate initial decision is issued this day in the Johnson case which recommends the Commissioner approve the settlement agreement.

The New Jersey courts have looked with great favor upon the voluntary resolution of litigation through settlement. [Citations omitted.] As a general principle, and without considering the toll of human resources, the settlement of lawsuits in good faith can be said to save time, money and proof problems. School boards, in their efforts to conserve public funds, no less than private parties, have been encouraged by the state and federal courts to carefully consider equitable settlement possibilities.

[Slip opinion at p.---]

Nevertheless, the State Board also cautions that boards of education which settle litigation “must act in the public interest, lawfully, constitutionally, reasonably and in accordance with duly enacted rules and regulations of the Commissioner of Education and State Board of Education” (id.)

In *Passaic Board of Education v. James Viani*, 92 N.J.A.R. 2d (EDU) 76 the Passaic Board certified charges of excessive absences to the Commissioner for determination against janitor Viani. The evidence submitted convinced the Commissioner that Viani’s absences were shown to be ‘grossly excessive.’ The Commissioner noted that no evidence was presented regarding prior notice the Board gave Viani of “its concern for his excessive absences”, nor did it present evidence that Viani’s absences had an adverse impact on the educational process or [their] ramifications.” By way of direction to all boards of education, the Commissioner noted “... the Board’s burden in a case seeking dismissal of a tenured janitor due to alleged excessive absenteeism, is to demonstrate the extent of harm such performance of a custodial employee has on the provision of a thorough and efficient education in an “adequately equipped, sanitary and secure physical facilities . . . [citation omitted].” It is inferred that ‘such performance’ means that the affected employee must be shown to have aggregated sufficient absences from work, on a case-by-case basis, to constitute ‘excessive absenteeism’. Viani was not terminated from his employment. He received a warning that by having to go through the tenure charge process he was “apprised as to the impropriety of excessive absenteeism and the need to significantly improve his absenteeism or else be subject to future disciplinary action.”

In a subsequent case, *In the Matter of the Tenure Hearing of David Riddick, State-Operated School District of the City of Paterson Passaic County*, 93 N.J.A.R. 2d (EDU) 345, school custodian Riddick was found to have engaged in excessive absenteeism, among other kinds of misbehavior. The administrative law judge recommended termination of Riddick's employment for several reasons, including excessive absenteeism, after having determined:

Based on the facts found, Riddick has been excessively absent . . . I find that there have been efforts made by various district personnel . . . to get Riddick to correct the pattern of absenteeism. Specific periods of improvement were shown when Riddick was warned that negative action would be taken against him if improvement was not demonstrated during those periods. Nevertheless, despite the improvement, the absence pattern returned as well as the leaving work early and not attending to certain work directives.

In the recent decision of the Commissioner of Education [*Viani, supra*,] noted that excessive absenteeism by a custodian is not sufficient grounds for dismissal on its own, unless there is demonstration of the extent of harm the employee's performance has on the provision of a thorough and efficient education in having adequately equipped, sanitary and secure physical facilities. In the record in this matter, excessive absenteeism has been demonstrated to have had a negative impact on the condition of the building . . .

(*Viani*'s, 92 N.J.A.R. 2d, at p. 349)

CHARGES

The certified charges in this case allege respondent accumulated the following number of absences from her employment

- a) during the 1990-91 school year, a total of 17 absences;
- b) during the 1991-92 school year, a total of 20 absences;
- c) during the 1992-93 school year, a total of 20 absences;
- d) during the 1993-94 school year, a total of 19 absences, as of the date of the filing (April 28, 1994); and, respondent, has also been absent from her assignment without notification to her supervisors.

The certified charges regarding neglect and misbehavior allege respondent 'has not responded to corrective directions, requires excessive supervision to complete the assigned tasks, and in spite of continued warnings, has been absent without notification or approval.'

The Board in justifying a settlement of this case as a prudent business judgment on its part as was required by this judge, explained that its documentation to satisfy the requirements of the Commissioner's decisions in *Viani, supra*, and *Riddick, supra*, is "weak" because warnings it provided respondent were either absent or inadequate that her absences were having a negative impact on its mission of 'a thorough and efficient education [by] having adequately equipped, sanitary and secure physical facilities,' or that her absences were having 'a negative impact on the condition of the building' to which she was assigned. Furthermore, the Board notes that its supervisory evaluations of respondent's performance show her to be an "average" employee, that several anticipatory absences had been excused by her supervisors including absences for court appearances on family matters and/or asserted medical reasons.

In her Answer, respondent does not contest the number of absences alleged. Rather in the five separate defenses she asserts that termination of her employment is excessive and severe based on the nature and quantity of the absences; that the Board failed to use proper progressive discipline or correction with her; that she has evidence to justify many of the absences complained of; that none of her absences caused the Board harm in any manner; and, that the Board failed to give her appropriate warning and correction and it failed to provide her the opportunity to improve her record as is required under *Viani, supra*, and *Riddick, supra*.

PROPOSED SETTLEMENT AGREEMENT

The Board and respondent agree that in return for a dismissal of the present charges, respondent would have withheld from her any 1994-95 and 1995-96 salary and/or adjustment increment to which she would otherwise be entitled. Respondent would not be liable to the Board for salary received during 1994-95 even though it included salary increments and was thus higher than it will be considered to have been under this agreement. Her 1995-96 salary would be established as if her 1994-95 salary and adjustment increment, if any, had been withheld and her 1995-96 salary will be established absent any salary or adjustment increment to which she may otherwise be entitled.

The Board, after having considered the two cases cited above and its evidence in support of the charges against respondent, determined that while it may establish by a preponderance of the credible evidence respondent was absent from her duties on numerous occasions, supervisory evaluations of her performance make no mention of any negative impact her absences had on having adequately equipped, sanitary and secure physical facilities. Nor is the Board confident it will be able to show progressive discipline or prior warning to respondent that her attendance is poor and must improve. Finally, the Board is sensitive to the fact the prosecution of these charges will divert substantial financial and human resources from its pupils whom it is to serve. Consequently, it seeks to settle the case in a manner which will serve its purpose of impressing upon respondent the need for her attendance to significantly improve and for the benefit of its pupils and school district as a whole in using its scarce resources in support of its educational program.

Respondent says that many of her absences were approved before taken, many were health-related, that she never received a formal directive to improve her attendance, that she was not subjected to any prior discipline which could constitute progressive discipline, and that there is no evidence to show her absences resulted in any harm or negative impact upon the sanitary conditions of the school to which she was assigned. Indeed, respondent notes that included within the total numbers of absences are days she was subpoenaed to appear in court on a family matter, days missed because of deaths in her family, and a Board approved leave of absence among other days for which she had received prior approval.

CONCLUSION

Based on the record in this case including society's interest in the nature of the charges as well as the interests of the Board, the interests of respondent and of the school district as a whole, the likelihood of whether the charges may be supported by proofs reasonably anticipated by the Board to be offered at hearing, the terms of the proposed Agreement including the absence of an exchange of public funds for services not rendered, and the consistency of the Agreement with existing law, I **CONCLUDE** that the proposed Settlement Agreement, which is represented by counsel as having been freely entered into by the parties, with full knowledge of their rights and

each of whom are represented by competent counsel, is a full, fair, lawful and final disposition of the issues presented in this case.

ORDER

The parties are **ORDERED** to fully comply with the terms of the Settlement Agreement as set forth herein.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

June 5, 1995

June 6, 1995
DATE

JUN 13 1995
DATE

km

Daniel B. McKeown
DANIEL B. MCKEOWN, ALJ

Receipt Acknowledged:
Hope R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:
Jeff S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

IN THE MATTER OF THE TENURE :
 HEARING OF GLORIA JIMENEZ, : COMMISSIONER OF EDUCATION
 SCHOOL DISTRICT OF THE CITY OF : DECISION
 LONG BRANCH, MONMOUTH COUNTY. :

_____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.


 ACTING COMMISSIONER OF EDUCATION

JULY 18, 1995

DATE OF MAILING JULY 18, 1995

259-95

S.L., on behalf of minor child, R.L. :
 PETITIONER, : COMMISSIONER OF EDUCATION
 V. : DECISION
 BOARD OF EDUCATION OF THE CITY :
 OF CLIFTON, PASSAIC COUNTY, :
 RESPONDENT. :
 _____ :

SYNOPSIS

Petitioner S.L., guardian of R.L. since 1988, sought admission for R.L. in the Clifton school system pursuant to N.J.S.A. 18A:38-1. Board denied admission based upon its determination that S.L. had not established a family or economic hardship justifying admission into the school system.

ALJ concluded that petitioner satisfied statutory requirements. S.L. has looked after and supported R.L., gratis, continuously since 1988 and R.L.'s father in the Philippines provided an affidavit that he could not afford to support R.L. ALJ concluded that R.L. was eligible to attend the Clifton school system. Board's denial of entry was reversed.

Commissioner concurred with ALJ's findings and ordered the Board to admit R.L. into its public school system.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10610-94
AGENCY DKT. NO. 396-9/94

S.L. ON BEHALF OF MINOR R.L.,

Petitioner,

v.

**BOARD OF EDUCATION, CITY OF CLIFTON,
PASSAIC COUNTY,**

Respondent.

Lorane L. Posner, Esq., for petitioner
(Ernest G. Ianetti, Esq., attorney)

Vincent D'Elia, Esq., for respondent

Record Closed: May 4, 1995

Decided: June 7, 1995

BEFORE MARYLOUISE LUCCHI-McCLOUD, ALJ:

On September 26, 1994 S.L. filed a verified petition with the Commissioner of Education on behalf of R.L. On October 17, 1994 an answer to the verified petition was transmitted from respondent to the Commissioner of Education in this matter. On October 31, 1994 the matter was then transmitted to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

A prehearing was held in the matter on January 25, 1995 at which time S.L. appeared *pro se* for R.L. The hearing dates were set down for April 17 and April 27, 1995 and the prehearing order specified that no adjournments would be granted except in accordance with the requirements of *N.J.A.C. 1:1-9.6*.

As of April 17, 1995 an appearance had been entered for an attorney for petitioner and Lorane Posner, Esq., appeared on petitioner's behalf along with the attorney for respondent. On that date petitioner's representative failed to appear. Petitioner's representative was given the opportunity to have S.L. appear on the second hearing date of April 27, 1995 if it was still her intent to pursue the appeal.

On April 27, 1995 it was determined that the parties were able to agree as to the underlying facts and wished to submit them in writing with supplementary documentation as deemed appropriate by either side. These submissions were to occur on or before May 4, 1995 at which time the hearing record closed.

FACTS

Both parties signed a stipulation of facts (C-1) which reads as follows:

On or about September 9, 1994, S.L. residing at 712 G. Street in Clifton, New Jersey, filed an application for admission for one R.L. to Clifton High School. Said application was submitted in accordance with Title 18A of the New Jersey statutes and is attached hereto as Exhibit A. Said application consists of three separate parts including an application and two affidavits: one of S.L. and one of R.L.'s parent, E.L. Said documents specifically detail that R.L. was residing with S.L. because his parents were in the Philippines. S.L. specifically stated that she believed that R.L. could get a better education in Clifton and that his parents lived in a rural farm areas where no education was available. In addition, S.L. indicated that R.L. had been living with her since 1988.

In his affidavit in support of the application, E.L. indicated that he was not capable of supporting or providing care for R.L. because he had seven children and his family was financial incapable of giving proper care in this occasion.

The Board of Education reviewed said application and supporting affidavits and, on September 24, 1994, issued a letter to S.L. denying R.L. admission to the Clifton school system. In that letter the board specifically advised that the applicants had not established a family or economic hardship justifying admission to the Clifton school system, as required by *N.J.S.A. 18A:38-1*.

S.L., acting on behalf of R.L., filed a petition for appeal on September 26, 1994 and the board filed its answer to said petition on October 12, 1994. A prehearing was held in the matter and the matter was scheduled for trial on April 17 and April 27, 1995.

As these facts are stipulated to by the parties and the stipulation itself has been marked C-1 in evidence I **FIND** these to be the operational facts in this case. I also **FIND** the appended exhibits to form a part of the stipulation of facts.

LEGAL DISCUSSION

The petitioner seeks admission for R.L. in the Clifton school system pursuant to *N.J.S.A. 18A:38-1* which provides for attendance at school free of charge in certain circumstances. The Board of Education denied the request based upon their determination that the applicant had not established a family or economic hardship justifying admission into the school system as required by the statute.

Pursuant to the statute the burden is on the petitioner to show each and every element of the statute has been met. In this case we have a child who was certainly kept in the home of another person domiciled within the school district and it is not questioned that R.L. has been supported by S.L. continuously since 1988. In fact, in

the appended documents to the stipulation of facts which form that which was before the Board of Education is a copy of R.L.'s grade reports from third through eighth grades at the Saint Anthony of Padua School in Passaic, New Jersey. There is additionally a letter from Sister Mesalina Cloma stating that for the period of time since May 1988 until the date of the letter, September 13, 1994, S.L. had been taking care of R.L. and he had continuously attended school there until his graduation. That letter refers to S.L. as R.L.'s "guardian".

While there is no indication that S.L. is in fact a guardian for R.L. it is clear that she takes on a *parens patriae* relationship with R.L. whose father lives in the Philippines and has provided an affidavit that he cannot afford to support R.L. The facts are that the family has seven children and lives on a rural farm in the Philippines. Continuously since 1988 S.L. has looked after and supported R.L. gratis.

N.J.S.A. 18A:38-1 states that any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and copies of certain documents supporting domicile as well as the filing of an affidavit by the child's parent or guardian with the secretary of the board of education that the individual is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. In this case all of the appropriate documentation has been provided. The affidavit from R.L.'s father is rather basic. The facts surrounding this case make the picture all the clearer. S.L. has not recently received R.L. into her household. Instead she has had R.L. as a member of her household since 1988 and he has attended school nearby. During this entire period of time he was treated as a member

of the household and it is clear that his presence in the district is not for the purposes of obtaining a free public education.

In interpreting a statute one must look at the fundamental purpose for which the legislation was enacted, and where a literal reading will not accord with that purpose, the spirit of the law will control over its letter. *N.J. Builders, Owners and Managers Association v. Blair*, 60 N.J. 330, 332 (1972).

Amendments which were made to N.J.S.A. 18A:38-1 and effectuated by P.L. 1993, c. 380 had the intent of easing the burden on local schools and the boards of education of attempting to remove illegally enrolled students, whether those not domiciled within the district or those living with a person other than the parent or guardian, in order to obtain the benefit of a free public education in a district other than that of their entitlement by parental domicile. *Gunderson v. City of Brigantine Board of Ed.*, 95 N.J.A.R. 2d (EDU) 39, 42 (1994).

The intent of the affidavit student law is not now, and never has been, to deny an education to a child whose living arrangements may not be as contemplated by the statutory scheme when it is clear that the child has no home, or no possibility of school attendance, other than with the non-parent district resident and that such resident is, for all intents and purposes, the sole caretaker and supporter of the child. Neither is its parental affidavit provision meant to act as a bar to a child who, due to particular circumstances, cannot produce such an affidavit but provides evidence that the underlying requirements of the law are being met. To hold otherwise harms a party the Legislature never meant to penalize, unreasonably places form over substance, and overlooks the substantial state interest in ensuring the education of all its children. (Cite omitted.) *Gunderson, supra* at 42.

Under the facts and circumstances of this case it is clear that S.L. has continuously acted as the responsible party for R.L. since 1988. He has continuously attended school in this country and his family has demonstrated economic hardship.

Absent the surrounding facts and circumstances, the affidavit alone, might not have been sufficient to show the relationship and the situation. The surrounding facts and circumstances and the continuous nature of the quasi-familial relationship support that the petitioner has, in fact, shown evidence sufficient to support each and every portion required by *N.J.S.A. 18A:38-1(b)*.

In the subsequent submitted documents there is an additional affidavit of greater detail from R.L.'s father which elucidates the poverty to which this child would be subjected if he remained with the family in the Philippines. While the board of education did not have that information at the time of its original decision, the result remains the same. It is clear that R.L. is not and has not been supported by his father since the 1988 time when R.L. began to live with S.L.

CONCLUSION

Based upon the foregoing I **CONCLUDE** that the petitioner has satisfied each and every requirement of *N.J.S.A. 18A:38-1*. I further **CONCLUDE** that the Board's determination that a financial hardship did not exist did not take into account of the facts and circumstances presented to it at the time. As a result I further **CONCLUDE** that R.L. is eligible to attend the Clifton school system based upon the facts and circumstances in this case.

ORDER

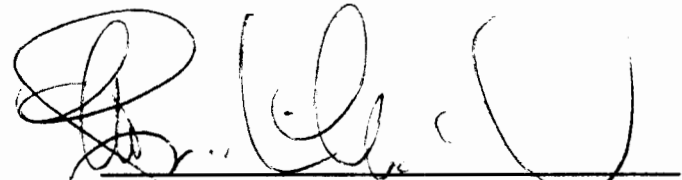
It is hereby **ORDERED** that the Board of Education's denial of entry into the public school system of R.L. be and hereby is **REVERSED**.

I hereby **FILE** my initial decision with the **MERIT SYSTEM BOARD** for consideration.

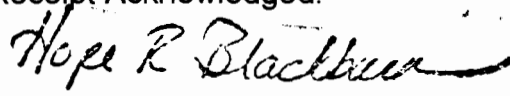
This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision on this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14b-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties the parties, any party may file exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, 8th Floor, CN 500, Trenton, NJ 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

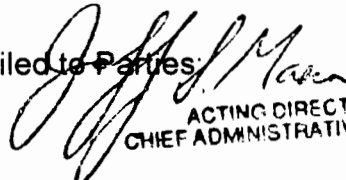
6/7/95
DATE


MARYLOUISE LUCCHI-McCLOUD, ALJ

6/9/95
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

JUN 13 1995
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

am(FV)mxl

APPENDIX

Witnesses

None

Evidence

C-1 Stipulation of facts with appended application and exhibits

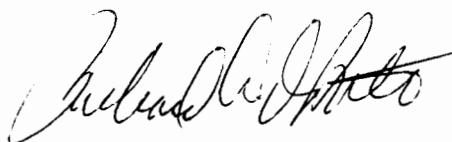
S.L., on behalf of minor child, R.L. :
PETITIONER, : COMMISSIONER OF EDUCATION
V. : DECISION
BOARD OF EDUCATION OF THE CITY :
OF CLIFTON, PASSAIC COUNTY, :
RESPONDENT. :
_____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review, the Commissioner concurs with the findings of the ALJ in the initial decision, and further agrees that petitioner, satisfying the requirements of N.J.S.A. 18A:38-1b(1), has established eligibility to attend the respondent school district.

Accordingly, the recommended decision of the Office of Administrative Law is adopted as the final decision in this matter, and the Board is hereby ordered to admit R.L. into its public school system.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

JULY 18, 1995

DATE OF MAILING JULY 18, 1995

260-95

JET ELECTRIC, INC., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION

MANALAPAN-ENGLISHTOWN :

REGIONAL SCHOOL DISTRICT, :

MONMOUTH COUNTY, :

RESPONDENT. :

_____ :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION DISMISSAL

OAL DKT. NO. EDU 7652-94

AGENCY REF. NO. 273-7/94

JET ELECTRIC, INC.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
MANALAPAN-ENGLISHTOWN
REGIONAL SCHOOL DISTRICT,
MONMOUTH COUNTY,**

Respondent.

Joseph Caruso, President, petitioner, pro se

John I. Dawes, Esq., for respondent, (Cerrato, Dawes, Collins, Saker & Brown,
attorneys)

Record Closed: May 19, 1995

Decided: June 7, 1995

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

Petitioner, Jet Electric, Inc., opened the herein matter before the Commissioner of Education on July 1, 1994, with an imperfect Petition of Appeal, seeking a declaratory judgment as to why petitioner's bid for certain work to be done by the Board of Education of the Manalapan-Englishtown Regional School District (Board) was rejected. The Board answered the

Petition asserting, among other things, that petitioner failed to state a cause of action; that its Petition of Appeal is not prepared in accordance with the New Jersey Administrative Code, Title 6; the relief requested cannot be granted because it does not properly conform with the requirements under N.J.A.C. Title 6; and, it fails to set forth a controversy or dispute arising under school laws.

The matter was transmitted to the Office of Administrative Law (OAL) on August 9, 1994, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On August 18, 1994, the OAL advised petitioner that his corporation must be represented by an attorney unless it qualifies under the provisions of N.J.A.C. 1:1-5.4(a)5, a close corporation.

A prehearing conference was held on November 10, 1994, at which Joseph Caruso appeared without an attorney. As a consequence, it was agreed to hold a second prehearing conference after December 1, 1994, with petitioner's attorney.

On December 5, 1994, the Board's attorney directed a letter to the undersigned, which states as follows:

This is to acknowledged the receipt of the Prehearing Order. I wish to bring to the Court's attention that I have not received from Mr. Caruso my answers to interrogatories that he stated were being mailed to me, nor have I received any phone call or name of any attorney representing Mr. Caruso.

I simply bring these two (2) facts to the Court's attention and look with great anticipation of the second Prehearing which I would assume would be scheduled by the Court on the telephone.

On February 13, 1995, the Board's attorney addressed a second letter to the undersigned after attempts to arrange the second prehearing conference had been unsuccessful. The February 13, 1995, letter reads as follows:

I want to report to the Court that I really question the prehearing conference. As you stated to Mr. Caruso, the owner of Jett (sic) Electric, he was to furnish to me the name of his attorney since it is a corporation, and he also stated he would be returning to me the interrogatories that I forwarded to him. I do not have either of said documents. I feel that the matter should be dismissed (sic) on the Court's own motion since he has failed to comply with your Honor's request.

On February 17, 1995, the undersigned responded to Mr. Dawes letter of February 13, 1995, asserting that a dismissal sua sponte was inappropriate at that time.

The second prehearing conference was then scheduled for March 24, 1995. However, it was adjourned due to the Board's counsel being out of the State on that date. The second prehearing conference was then scheduled for March 29, 1995.

At the March 29, 1995, prehearing conference, petitioner appeared without legal counsel and asserted that he would instruct his attorney to send a letter to the undersigned advising this tribunal of the attorney's appearance. Petitioner's attorney was to submit the letter on or before April 3, 1995. In addition, it was ordered that petitioner answer the Board's Interrogatories. It was further agreed, that a third prehearing conference would be established after petitioner's attorney made his appearance on or about April 3, 1995.

Neither petitioner nor his attorney advised the undersigned of the attorney's appearance for the record. On May 9, 1995, the undersigned addressed the following letter to petitioner:

Pursuant to the agreements reached at the second prehearing conference held on March 29, 1995, in the above entitled matter, your attorney was to advise the court of his/her appearance on your behalf on or before April 3, 1995. It is now May 9, 1995, and I have received no word from you or your attorney concerning his/her representation. It was also agreed that you were to answer the Board's Interrogatories.

In the event I do not hear from your or your attorney by May 19, 1995, I shall consider the Board's motion to dismiss the matter for lack of prosecution. I await your immediate response.

Neither petitioner nor his attorney responded to this tribunal's letter dated May 9, 1995, either by May 19, 1995 or thereafter.

I **CONCLUDE** that petitioner has failed to comply with the orders of this tribunal to supply the name of his corporate attorney.

I **CONCLUDE** that petitioner has failed to respond to discovery requests and refused to answer the Board's Interrogatories.

I **CONCLUDE**, therefore, that this matter should be dismissed for lack of prosecution on petitioner's behalf.

ORDER

Accordingly, it is **ORDERED** that the instant Petition of Appeal be and is hereby **DISMISSED with PREJUDICE** for lack of prosecution.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

7 June 1995
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

June 13, 1995
DATE

Receipt Acknowledged:
Hope R Blackburn

DEPARTMENT OF EDUCATION

JUN 16 1995
DATE

Mailed to Parties
Jeff J. Moran
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

JET ELECTRIC, INC., :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE : DECISION
 MANALAPAN-ENGLISHTOWN :
 REGIONAL SCHOOL DISTRICT, :
 MONMOUTH COUNTY, :
 RESPONDENT. :
 _____ :

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in the matter, the Commissioner agrees with the conclusions of the Administrative Law Judge that, as petitioner has failed to comply with orders of the court to supply the name of its corporate attorney and further failed to respond to discovery requests or answer interrogatories of the Board, this matter must be dismissed for lack of prosecution.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.


 ACTING COMMISSIONER OF EDUCATION

JULY 18, 1995

261-95E

E.D., on behalf of her minor child, M.F., :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN-
SHIP OF WAYNE, PASSAIC COUNTY, :

DECISION

RESPONDENT. :

_____ :

JULY 18, 1995

P. 2
8/8/95
7/25/95



95 JUN 22 PM 4:22

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF

OAL DKT. NO. EDU 6351-95
AGENCY DKT. NO. 216-6/95

**E.D. on behalf of her minor child,
M.F.,**

Petitioner,

v.

**WAYNE TOWNSHIP
BOARD OF EDUCATION,**

Respondent.

Raymond A. Reddin, Esq., for petitioner

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

BEFORE: SEBASTIAN GAETA, ALJ:

This application for emergency relief pursuant to N.J.A.C. 1:1-12.6 was forwarded to the Office of Administrative Law on June 20, 1995. Pursuant to that request, a hearing was conducted on June 21, 1995.

Petitioner applied to the Superior Court of New Jersey, Passaic County, Chancery Division for injunctive relief. By order dated June 20, 1995, the Honorable Amos C. Saunders transferred this matter to the New Jersey Department of Education for hearing and disposition upon the conditions that the case be heard and decided by

OAL DKT. NO. EDU 6351-95

the Office of Administrative Law no later than 4:00 p.m., Thursday June 22, 1995 and that the case be finally decided by the Commissioner of Education no later than 10:30 a.m. on Friday, June 23, 1995. Judge Saunders further ordered that should those conditions not be met, M.F. shall be allowed to participate in Wayne Valley High School's June 23, 1995 graduation ceremony without being awarded a diploma and shall be awarded a diploma upon her completion of all New Jersey state and local school district requirements for graduation from high school.

Matters Presented

In opposition to petitioner's application, respondent, *inter alia*, asserts that petitioner's opportunity to graduate with her own class does not meet the requirement of irreparable harm announced in *Crowe v. DeGioia*, 90 N.J. 126 (1982).

Considering the importance that families, students, friends and educators have in these ceremonies which mark an important step in young lives, that argument is rejected.

The issue to be decided is whether petitioner has met the attendance requirements of the Wayne Valley High School for the required course, Physical Education

Although warned several times for absences in subjects, including Physical Education, the attendance requirements which respondent board of education asserts were violated and resulted in petitioner receiving no credit for Physical Education relate to excessive cuts, not excessive absences.

This is clear from the affidavit of the Wayne Township Superintendent of Schools (Exhibit P-2) which indicates that M.F. was not permitted to graduate because she "exceeded the number of 'cuts' allowed a student in Wayne Valley High School". The motion for emergent relief recites that the policy regarding excessive cuts was the

OAL DKT NO EDU 6351-95

reason petitioner was dropped from Physical Education without credit. Respondent, in its response, alludes to purported excessive absences, however, the reason for the adverse action is that petitioner "was dropped from her physical education course without credit for cutting class three or more times."

This decision, therefore, addresses the question of cuts and not that of absences

Under the policy of the respondent school district a cut occurs when a student, without authority or excuse misses thirty or more minutes of a standard class period (Exhibit R-2). Under that policy and by practice a cut contemplates that a student has been or is present at school but not present for all or most of a class period. An absence occurs when the student is not present at school for all or most of a school day.

The district has prescribed penalties for cuts. For a first offense the student receives a grade of zero and a warning is issued to the parent or guardian. A second offense calls for the grade of zero and a conference with the parent or guardian. A third cut results in the student being dropped from the course and a referral to the child study team (CST).

Although these penalties are prescribed, the testimony established they are not mandatory. Therefore, extenuating and mitigating facts are considered in assessing the ultimate penalty.

The Physical Education teacher, Jayne Flattery testified and provided an affidavit (Exhibit R-1). She testified that petitioner frequently left the locker room after changing, but before the end of the period.

A cut slip was prepared for April 10, 1995 which she marked as the first cut. On that day the Physical Education class was to pick an activity for the next marking period. Ms. Bishop took attendance and reported her absence which prompted the cut

slip. On April 17, 1995, petitioner was present until ten minutes before the end of the period. Although this did not constitute an actual cut, she prepared the cut slip, marked second cut, and submitted it to emphasize to petitioner the seriousness of not spending the entire period in class. This "second cut" slip resulted in Vice Principal Mary Jane Tierney sending an April 20, 1995 letter to petitioner's mother that on April 17, 1995 petitioner had a second cut and "after the third cut . . . no credit will be given" (Exhibit R-1, attachment L). There were cuts on April 18 and 19, 1995 for which cut slips were submitted. Because the notification to the parent was subsequent to those cuts, Ms. Flattery did not consider them to be second and third cuts but only a second, with the first having been April 10, 1995.

When petitioner approached her about her situation, they agreed she could make up her leaving the locker room early on the several occasions. Petitioner used her third period study hall to make up that time over a three-week period.

On May 9, 1995, a substitute teacher taught the Physical Education class. It was reported to her that petitioner missed the class and she was charged with a cut, marked three, on the cut slip. Mr. Lyons a teacher who was supervising a television production project told her petitioner was present in his space for five or ten minutes. Regardless of being in school, she cut her assigned class and the cut slip was submitted.

Had she given petitioner a grade it would be an "A" or "B. "

Petitioner testified. She explained the circumstances regarding the cuts. The cut on April 10, 1995 was not a cut because the class period was devoted entirely to choosing a new activity for the next grading period. She chose paddle ball. When she finished, she and friends spent a few minutes at the school store.

On April 18, 1995, she did cut the class. The following day, April 19, 1995, the gymnasium was being used for a school-wide event, no one changed and she went home with cramps. She did not consider she cut that class.

OAL DKT. NO. EDU 6351-95

When Ms. Tierney told her she had three cuts and should speak with Ms. Flattery, she went to her to see if they could be made up. They agreed that they would be made up in her third period study hall. She knew her graduation was in jeopardy and she made up nine classes which she understood erased the three outstanding cuts.

On May 9, 1995 a substitute teacher was there when she arrived. Another student asked for her help in a television project. Mr. Lyons knew she was there and never told her she should be elsewhere. After watching a video for ten minutes, she and the other student went to film interviews in the school. She did not believe she cut that class.

Discussion

The purported cut on April 10, 1995 was based on the report to Ms. Flattery by Ms. Bishop, who did not testify. Petitioner testified that the period was only for signing up for the next grading period activity, which she did, and she spent a few minutes with friends at the school store. The testimony of petitioner is plausible and in view of the activity which was not a regular class I **FIND** she did not cut that day.

There is a cut recorded for June 15, 1995 related to discussions with her counsel as to this matter before the Superior Court. Under all the circumstances and in view of the policy regarding excused absences, I **FIND** that absence not to be a cut.

There is a significant disparity between the respective understandings of petitioner and Ms. Flattery as to the purpose and scope of the make up classes. To Ms. Flattery, an experienced teacher, that petitioner should make up the several days she left ten minutes or so early, makes sense. To petitioner, who has just realized she has committed three cuts putting her chance to graduate with her class at risk, it does not.

OAL DKT. NO. EDU 6351-95

There was confusion as to the number of cuts when Ms. Tierney sent her warning letter to the mother (Exhibit R-1, attachment L). When petitioner met with her she was told she had three cuts. If the cuts of April 17, 18 and 19, 1995 are all counted, she did. However, as explained by Ms. Flattery, her leaving class early in April 17, 1995 was not the second cut and, because the parents had not been notified, that the cuts for April 18 and 19, 1995 were considered as the second cut. However, when petitioner spoke with Ms. Tierney she was informed she had three cuts and that she should confer with Ms. Flattery. At the time Ms. Tierney did not inform her she was dropped from the course. Certainly as the official in charge of discipline, Ms. Tierney was empowered to impose a penalty less than that prescribed for a third offense.

Because she knew she was subject to being dropped from the class, unless petitioner was motivated by an uncommon sense of principle, it is not likely she would have agreed to make up the several days of leaving early. It is more realistic to conclude that she understood that she could absolve herself of those cuts by the nine make up classes.

That this was her understanding is borne out by her missing class on May 9, 1995. Although petitioner testified she did not consider that a cut, in view of her situation and threat that she would not graduate her decision to leave the class showed exceedingly poor and immature judgment. To leave that class knowing what the actual stakes were would have been almost reckless on her part.

It is more consistent that she understood that her make up classes erased her cuts and that she simply and imprudently indulged herself in cutting that period in favor of something more interesting.

The reasonable rules of a school system are indispensable to the maintenance of good order and discipline. Additionally, the uniform enforcement of those rules inculcates within students a sense of personal responsibility and self discipline.

OAL DKT. NO. EDU 6351-95

To impose serious sanctions for unwitting violation of rules does not serve that purpose. In view of the matters presented I **FIND** that at the time of the cut class on May 9, 1995 petitioner had a reasonable and honest belief that she had no record of cuts for that class.

I **FIND** that petitioner did not violate the excessive cut policy of the Wayne Hills High School as to Physical Education.

Order

It is **ORDERED** that petitioner's record be amended to reflect she remains in good standing in her Physical Education class and that the teacher, Jayne Flattery assign a grade based upon the standards for grades pertaining to all students.

it is further **ORDERED** that should petitioner be otherwise qualified she shall graduate with the 1995 Senior Class, Wayne Hills High School at its graduation exercise.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

OAL DKT. NO. EDU 6351-95

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 22, 1995
DATE

Sebastian Gaeta, Jr.
SEBASTIAN GAETA, JR., ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

al

E.D., on behalf of her minor child, M.F., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN- : DECISION
SHIP OF WAYNE, PASSAIC COUNTY, :
RESPONDENT. :
_____ :

This matter was received on an emergent relief basis and transmitted to the Office of Administrative Law for a hearing. The ALJ rendered a decision and transmitted the case to the Commissioner of Education for a final determination on the emergent relief aspect to be issued within forty-five (45) days. Prior to the Commissioner's issuance of a determination on the ALJ's findings, petitioner and respondent each notified the Department of Education of their intent to withdraw this petition by separate letter rendering the matter moot.

The Commissioner therefore, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

JULY 18, 1995

DATE OF MAILING JULY 18, 1995

262-95

ANDREW CARL KULAT, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF HILLSBOROUGH, SOMERSET :
COUNTY, :

DECISION

RESPONDENT. :

OAL DKT. NO. EDU 1054-93

ANDREW CARL KULAT, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE TOWN- : DECISION
 SHIP OF HILLSBOROUGH, SOMERSET :
 COUNTY, :
 :
 RESPONDENT. :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

JULY 19, 1995

DATE OF MAILING JULY 19, 1995

263-95

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE :
 SCHOOL DISTRICT OF SCOTCH PLAINS- :
 FANWOOD, UNION COUNTY. :

COMMISSIONER OF EDUCATION
 DECISION

JULY 19, 1995

OAL DKT. NO. EDU 4834-95

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE :
SCHOOL DISTRICT OF SCOTCH PLAINS- : COMMISSIONER OF EDUCATION
FANWOOD, UNION COUNTY. :
: DECISION
: _____:

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

JULY 19, 1995

DATE OF MAILING JULY 19, 1995

264-95

PHILIP AND MAUREEN ROBINSON, on :
behalf of their minor child, P.R. :

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE LENAPE :
REGIONAL HIGH SCHOOL DISTRICT :
ET AL., BURLINGTON COUNTY, :

DECISION

RESPONDENTS. :

JULY 19, 1995

PHILIP AND MAUREEN ROBINSON, on
behalf of their minor child, P.R.

PETITIONERS,

V.

BOARD OF EDUCATION OF THE LENAPE
REGIONAL HIGH SCHOOL DISTRICT
ET AL., BURLINGTON COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

JULY 19, 1995

DATE OF MAILING JULY 19, 1995

265-95

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE :
 SCHOOL DISTRICT OF THE TOWNSHIP :
 OF MANCHESTER, OCEAN COUNTY. :


COMMISSIONER OF EDUCATION
 DECISION

OAL DKT. NO. EDU 4702-95

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE :
SCHOOL DISTRICT OF THE TOWNSHIP : COMMISSIONER OF EDUCATION
OF MANCHESTER, OCEAN COUNTY. : DECISION
_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

JULY 19, 1995

DATE OF MAILING JULY 19 1995

266-95

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE :
SCHOOL DISTRICT OF MANCHESTER :
TOWNSHIP, OCEAN COUNTY. :

COMMISSIONER OF EDUCATION
DECISION

_____ :

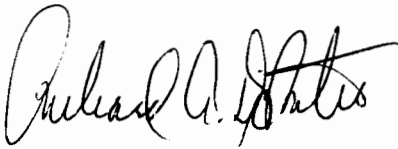
JULY 19, 1995

OAL DKT. NO. EDU 4703-95

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE :
SCHOOL DISTRICT OF MANCHESTER : COMMISSIONER OF EDUCATION
TOWNSHIP, OCEAN COUNTY. : DECISION
_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

JULY 19, 1995

267-95E

H.M.O.,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	
GREATER EGG HARBOR REGIONAL	:	DECISION
HIGH SCHOOL DISTRICT, ATLANTIC	:	
COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

July 19, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING MOTION

FOR EMERGENT RELIEF

OAL DKT. NO. EDU 5893-95

AGENCY DKT. NO. 196-6/95

H.M.O.,

Petitioner

v.

**BOARD OF EDUCATION OF GREATER
EGG HARBOR REGIONAL HIGH SCHOOL
DISTRICT, ATLANTIC COUNTY,**

Respondent.

Lauren P. Alterman, Esq., for petitioner

Louis Grecco, Esq., for respondent

BEFORE KATHRYN A. CLARK, ALJ:

This is the matter of H.M.O. v. The Board of Education. This matter was brought before the OAL by way of application for emergent relief, under N.J.A.C. 1:61A-12.1.

Petitioner has been suspended for 7 days, including graduation day, and is not being allowed to participate in senior week activities, senior awards night, or participate in any graduation activity, including project graduation and walking with her class in procession on June 12.

(Petitioner's individual teachers have the discretion of deciding whether or not she must or can take final examinations, which, if necessary, she may do on June 14, after her period of suspension. Petitioner will receive a diploma, if she completes all requirements.)

The issue here is simple, was there an altercation and was a teacher struck? I **FIND and CONCLUDE** that there was, and that a teacher was struck.

Specifically, I **FIND** that on June 1, 1995, a teacher, Alicia Jones, said that she heard noises and looked up to see H. in the room (Ms. Jones' classroom), yelling at A., who was in the room and was heading toward her seat. H. came forward into the classroom towards A.. Ms. Jones told A, to sit down and be quiet. Ms. Jones then turned toward H. who was heading towards A. Ms. Jones told H. to get out of "her room" (Ms. Jones' classroom). H. kept coming. H. did not comply with Ms. Jones' direction. Ms. Jones stepped towards H. to get H. to turn around and leave. H. swung her arms to get at A. Ms. Jones' arms were extended, and H. "chopped away" at Ms. Jones' arms 4 or 5 times, trying to get at A.. H. was still yelling at H.. It was then that 2 other teachers arrived, and H. left. Ms. Jones was shaken by the incident, her heart was pounding, and she realized that her arms were hurting.

The granting of emergent relief is an extraordinary remedy which can only be awarded based upon a showing that irreparable harm will result if it is not granted, and a further showing that there is a likelihood of success on the merits. See, N.J.A.C. 1:1-12.6.

The expanded criteria for determination of an application for emergent relief have been set forth in Crowe v. Degioia, 90 N.J. 126, 132-34 (1982). Four standards are articulated:

1. The relief should not be granted unless it is necessary to prevent irreparable harm. Harm is generally considered irreparable if it cannot be adequately redressed by monetary damages.
2. Such relief should not be granted when the legal rights underlying the claim are unsettled.

3. In order to prevail on an application for temporary relief, a party must make a preliminary showing of a reasonable probability of ultimate success on the merits.
4. The relative hardship of the parties in granting or denying the relief sought should be considered.

Irreparable injury has been defined as “substantial injury to a material degree coupled with the inadequacy of money damages.” Judice’s Sunshine Pontiac, Inc. V. General Motors, Inc., 418 F. Supp. 1212 (D. N.J. 1976); John Tully v. Mott Supermarkets, Inc., 337 418 F. Supp. 834 (D. N.J. 1972). I **CONCLUDE** that money damages would not benefit petitioner, but there has been no showing of “substantial injury to a material degree.” The petitioner will simply not be allowed to participate in a ceremonial function. She may, if she completes the requirements, still graduate (a second graduation ceremony is held by the school district in August, for those who did not qualify for graduation, for whatever reason, on June 12). Petitioner may still be granted a high school diploma. The harm is not irreparable. Not going to a ceremony, especially when one is not entitled to go, is not a substantial injury to a material degree.

Participation in the ceremonial function of graduation is a privilege granted to those who are certified, eligible and entitled to graduate at the time of the graduation ceremony. I **FIND** that petitioner did disobey a direct instruction from a teacher to leave a classroom in which she was not scheduled to have a class, did strike that teacher, and is subject therefore to appropriate discipline. Petitioner was previously cited for striking a teacher (accidentally) in October, 1994. Her record also lists eight other incidents of disruptive behavior, including hitting. She knew she could not strike a teacher. She was also warned, by letter of November 18, 1994, that such conduct could lead to progressively more severe discipline. West New York v Bock, 38 N.J. 500 (1962).

The punishment imposed by the school board is, I **FIND**, appropriate, justifiable and reasonable, and consequently, I **CONCLUDE** that petitioner is not entitled to participate in the commencement ceremonies.

This Order on an application for emergent relief may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

June 9, 1995
DATE

Kathryn A. Clark
KATHRYN A. CLARK, ALJ

H.M.O.,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	
GREATER EGG HARBOR REGIONAL	:	DECISION
HIGH SCHOOL DISTRICT, ATLANTIC	:	
COUNTY,	:	
	:	
RESPONDENT.	:	
<hr/>		

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge denying emergent relief as petitioner failed to establish the standards for emergent relief as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982).

Moreover, because the petition is limited to challenging only petitioner's participation in graduation ceremonies, which date has since passed, the matter is now moot. Accordingly, the recommended decision of the Office of Administrative Law is adopted as the final decision in this matter and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.


 ACTING COMMISSIONER OF EDUCATION

268-95

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE :
SCHOOL DISTRICT OF WOODCLIFF :
LAKE, BERGEN COUNTY. :
_____ :

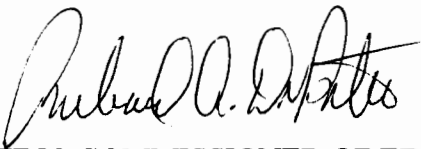
COMMISSIONER OF EDUCATION
DECISION

OAL DKT. NO. EDU 4685-95

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE :
SCHOOL DISTRICT OF WOODCLIFF : COMMISSIONER OF EDUCATION
LAKE, BERGEN COUNTY. : DECISION
_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE :
SCHOOL DISTRICT OF WOODCLIFF :
LAKE, BERGEN COUNTY. :
_____ :

COMMISSIONER OF EDUCATION

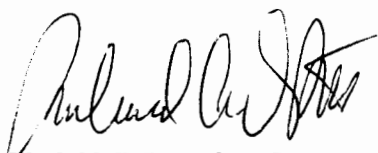
DECISION

OAL DKT. NO. EDU 4684-95

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE :
SCHOOL DISTRICT OF WOODCLIFF : COMMISSIONER OF EDUCATION
LAKE, BERGEN COUNTY. : DECISION
_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

July 19, 1995
Date of Mailing July 20, 1995

WYNFIELD KORNREICH, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 STATE-OPERATED SCHOOL DISTRICT : DECISION
 OF PATERSON, PASSAIC COUNTY, :
 :
 RESPONDENT. :
 _____ :

WYNFIELD KORNREICH, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 STATE-OPERATED SCHOOL DISTRICT : DECISION
 OF PATERSON, PASSAIC COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

273-95

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE :
SCHOOL DISTRICT OF FREEHOLD :
TOWNSHIP, MONMOUTH COUNTY. :
_____ :

COMMISSIONER OF EDUCATION
DECISION

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE :
 SCHOOL DISTRICT OF FREEHOLD : COMMISSIONER OF EDUCATION
 TOWNSHIP, MONMOUTH COUNTY. :
 _____ :
 :

DECISION

The announced results of the balloting for three members for full terms of three years each on the Board of Education of Freehold Township at the annual school election held on April 18, 1995 were as follows:

THREE-YEAR TERM

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Scott Jamison	467	62	529
Stephen Buffett	443	62	505
Robert Hoppes	425	59	484
Mindy Wille	426	57	483
Jeff Brown (write-in)		2	2
Robin Lemesevski (write-in)		1	1
Robert Cascaes (write-in)		1	1
A No Name (write-in)		1	1

Pursuant to a letter application from Mindy Wille, a defeated candidate, filed on April 23, 1995, the Commissioner of Education directed his representative from the Office of the Monmouth County Superintendent of Schools to conduct a recheck of the votes cast on the voting machines pursuant to N.J.S.A. 18A:14-63.2. This recheck was conducted on May 15, 1995 at the

Voting Machine Warehouse, 300 Halls Mills Road, Freehold. At the conclusion of the recheck of the votes cast on the voting machines, the tally stood unchanged, remaining as follows:

THREE-YEAR TERM

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Scott Jamison	467	62	529
Stephen Buffett	443	62	505
Robert Hoppes	425	59	484
Mindy Wille	426	57	483
Jeff Brown (write-in)		2	2
Robin Lemesevski (write-in)		1	1
Robert Cascaes (write-in)		1	1
A No Name (write-in)		1	1

Absentee tallies on recount are as reported by the Monmouth County Board of Elections. No application for a recount of absentee ballots had been made to Superior Court as of the date of the Commissioner's recheck for the voting machines.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions set forth therein.

Accordingly, the Commissioner determines that, as originally announced, Scott Jamison, Robert Hoppes, and Stephen Buffett were elected to full terms of three years each on the Freehold Township Board of Education.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

273-95

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE :
 SCHOOL DISTRICT OF FREEHOLD :
 TOWNSHIP, MONMOUTH COUNTY. :

COMMISSIONER OF EDUCATION
 DECISION

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE :
 SCHOOL DISTRICT OF FREEHOLD : COMMISSIONER OF EDUCATION
 TOWNSHIP, MONMOUTH COUNTY. :
 _____ : DECISION

The announced results of the balloting for three members for full terms of three years each on the Board of Education of Freehold Township at the annual school election held on April 18, 1995 were as follows:

THREE-YEAR TERM

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
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Robert Cascaes (write-in)		1	1
A No Name (write-in)		1	1

Absentee tallies on recount are as reported by the Monmouth County Board of Elections. No application for a recount of absentee ballots had been made to Superior Court as of the date of the Commissioner's recheck for the voting machines.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions set forth therein.

Accordingly, the Commissioner determines that, as originally announced, Scott Jamison, Robert Hoppes, and Stephen Buffett were elected to full terms of three years each on the Freehold Township Board of Education.

IT IS SO ORDERED.



ACTING COMMISSIGNER OF EDUCATION

274-95

IN THE MATTER OF THE TENURE :
 HEARING OF WILLIAM MOORE, STATE- :
 OPERATED SCHOOL DISTRICT OF :
 JERSEY CITY, HUDSON COUNTY. :
 _____ :

COMMISSIONER OF EDUCATION
 DECISION

IN THE MATTER OF THE TENURE :
HEARING OF WILLIAM MOORE, STATE- :
OPERATED SCHOOL DISTRICT OF : COMMISSIONER OF EDUCATION
JERSEY CITY, HUDSON COUNTY. :
: DECISION
_____ :

For the Board, Patricia Taylor, Esq.

For the Respondent, William Moore, Pro Se


This matter having been opened before the Commissioner of Education on February 27, 1995, through certification of tenure charges of conduct unbecoming a teacher and other just cause against respondent, a tenured teaching staff member of the State-operated School District of Jersey City; and

The Commissioner having directed respondent on March 1, 1995 and April 20, 1995 and, again, by letter sent both regular and certified mail on June 12, 1995 and received by respondent on June 17, 1995, to file an answer to the tenure charges against him; and

Respondent having failed as of this date to comply with the directive of the Commissioner, so that each count of the charges against him is deemed to be admitted pursuant to N.J.A.C. 6:24-1.4(e); now therefore

IT IS ORDERED this 21st day of July, 1995 that summary judgment shall be granted to the Board and that William Moore shall be dismissed from his tenured position as a teaching staff member in the district's employ as of the date of this order.

IT IS FURTHER ORDERED that, pursuant to N.J.A.C. 6:11-3.7, this matter shall be referred to the State Board of Examiners for review and action as it deems appropriate.


ACTING COMMISSIONER OF EDUCATION

July 24, 1995
Date of Mailing July 24, 1995

276-95

IN THE MATTER OF THE TENURE :
HEARING OF DONALD GROSS, BOARD :
OF EDUCATION OF THE BOROUGH OF : COMMISSIONER OF EDUCATION
MEDFORD LAKES, BURLINGTON :
COUNTY. :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5212-95

AGENCY DKT. NO. #83-4/95

**IN THE MATTER OF THE TENURE
HEARING OF DONALD GROSS,
BOARD OF EDUCATION OF THE
BOROUGH OF MEDFORD LAKES,
BURLINGTON COUNTY**

Steven Mushinski, Esq., appearing on behalf of the Board of Education of the Borough
of Medford Lakes

Jerry N. Driban, Esq., appearing on behalf of Donald Gross

Record Closed: June 1, 1995

Decided: June 13, 1995

BEFORE BEATRICE S. TYLUTKI, ALJ:

This matter concerns the tenure charges filed against Donald Gross, the superintendent of schools, for allegedly engaging in unbecoming conduct. The matter was transmitted to the Office of Administrative Law on May 19, 1995 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Prior to the scheduling of a conference in this matter, I received a stipulation which sets forth the terms of the settlement. The signed stipulation is attached and fully incorporated herein.

I have reviewed the record and the settlement terms, and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1, and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

June 13, 1995
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

6/13/95
DATE

Receipt Acknowledged:

Hope R. Blackburn
DEPARTMENT OF EDUCATION

JUN 20 1995
DATE

Mailed to Parties:

Jeff S. Main
ACTING DIRECTOR AND
OFFICE OF ADMINISTRATIVE LAW JUDGE

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

None

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

JERRY N. DRIBAN, ESQ.
920 West State Street
Trenton, New Jersey 08618
(609) 599-2900 (office)
(609) 599-1893 (fax)
Attorney for Respondent,
Donald Gross

RECEIVED
STATE OF N.J.
OFFICE OF THE ATTORNEY GENERAL
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**IN THE MATTER OF THE TENURE
HEARING OF DONALD GROSS,
BOARD OF EDUCATION OF THE
BOROUGH OF MEDFORD LAKES,
BURLINGTON COUNTY**

:
: BEFORE THE COMMISSIONER
: OF EDUCATION OF THE
: STATE OF NEW JERSEY
:
: Agency Ref. No. 83-4/95
:
: **SETTLEMENT AGREEMENT**
:

BACKGROUND

1. The Medford Lakes Board of Education ("Board") filed tenure charges against Dr. Donald Gross on April 6, 1995. Said charges are currently pending before the Commissioner of Education.
2. On April 6, 1995, the Board also took action to suspend Dr. Gross, without pay, from his employment as Superintendent of Schools in Medford Lakes.
3. On April 26, 1995, Dr. Gross filed an Answer and Affirmative Defenses in response to the tenure charges.

4. Subsequent to the filing of the tenure charges, the Board and Dr. Gross have met and have held discussions concerning the matters alleged in the tenure charges, and upon the Board's further investigation and review of the facts and the administrative needs of the District as of the date of this agreement, and in an effort to remediate any negative publicity that would affect Dr. Gross's future employment in education, the parties believe it is in their best interest to terminate their employment relationship prior to the expiration of the contractually agreed upon term.

5. Based upon the circumstances described in the preceding paragraph, and the Board's belief that the prosecution of these tenure charges will divert substantial amounts of money, time and key staff resources from the true mission of the district, the parties have agreed to resolve this matter under and subject to the terms of the following Settlement Agreement.

AGREEMENT

THE PARTIES TO THIS AGREEMENT, intending to be legally bound, agree as follows:

1. The Board and Dr. Gross shall make application to the Commissioner of Education to withdraw and dismiss the tenure charges filed by the Board on April 6, 1995, and the Answer and Affirmative Defenses filed by Dr. Gross on April 26, 1995, with prejudice.

2. Upon the Commissioner's approval of the Settlement Agreement, Dr. Gross shall be placed in the position of Assistant Superintendent in Medford Lakes, but shall be removed from any duties in that position.

3. Dr. Gross agrees to assist the Board to facilitate the transition of leadership in the district.

4. Dr. Gross shall resign from all positions in the district effective the end of the day on February 1, 1996.

5. Upon the Commissioner's approval of this Settlement Agreement, Dr. Gross shall receive all back pay and emoluments withheld as a result of his suspension on April 6, 1995. In addition, until February 1, 1996, he shall receive, *pro rata*, all salary, benefits, and emoluments, (excluding payment for vacation and sick time except as noted herein at paragraph 9), that he would have received had he continued to be employed by the Board as Superintendent of Schools in the district, as per the terms of the employment contract executed by the parties on July 15, 1992, and all subsequent addenda thereto.

6. In addition, the Board shall continue to provide health benefits to Dr. Gross until June 30, 1996, or, at Dr. Gross's discretion, it shall provide a cash payment of \$2,200 in lieu of benefits on February 1, 1996.

7. In the event that Dr. Gross secures a comparable position before February 1, 1996, the Board shall no longer be required to pay Dr. Gross his full salary and benefits, as described in the preceding paragraphs, as of the date he begins other employment; however, it shall continue to pay Dr. Gross the difference, if any, between the salary and benefits that he is to earn in the new position and the salary and benefits that Dr. Gross would have been paid by the Board until February 1, 1996, under this Settlement Agreement, if he had not procured such employment.

8. The terms and conditions of the Employment Contract between Dr. Gross and the Board, executed July 15, 1992, and all subsequent addenda thereto, shall remain in full force and effect through February 1, 1996, except as specifically modified or contradicted by the terms of this Agreement.

9. On February 1, 1996, Dr. Gross shall be paid for five days vacation at his per diem rate calculated at 1/240th of his salary.

10. Pursuant to the federal COBRA statute, Dr. Gross shall be entitled to exercise his rights to continue to receive all of the medical insurance benefits under the Board's plans at his own expense.

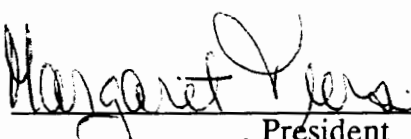
11. This resolves any and all claims between the parties with respect to Dr. Gross's employment contract and employment in the District.

WHEREAS, the parties acknowledge that each has received satisfactory independent legal advice of his or its own selection, that each fully understands the terms and conditions of this Agreement, that each has been fully informed as to his or its legal rights and obligations, and that each is signing this Agreement freely and voluntarily; and

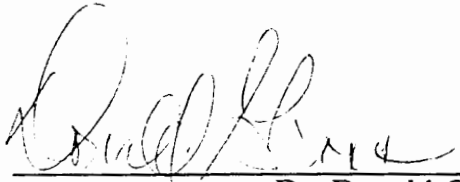
WHEREAS, the Dr. Gross has approved of the terms and conditions of this Agreement; and

WHEREAS, this Agreement has been approved by a vote of the Medford Lakes Board of Education at its meeting of *May 17* 1995, and has been made a part of the minutes of that meeting;

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

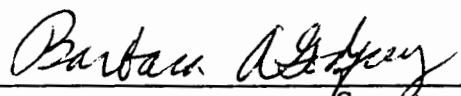


, President
Medford Lakes Board of Education



Dr. Donald Gross

ATTEST:



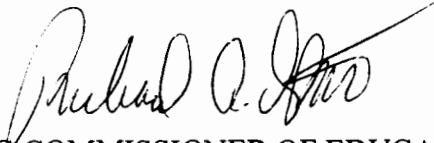
, Secretary
Medford Lakes Board of Education

Dated: *May 17, 1995*
BARBARA A. GREGORY
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Jan. 14, 1999

IN THE MATTER OF THE TENURE :
HEARING OF DONALD GROSS, BOARD :
OF EDUCATION OF THE BOROUGH OF : COMMISSIONER OF EDUCATION
MEDFORD LAKES, BURLINGTON : DECISION
COUNTY. :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.


ACTING COMMISSIONER OF EDUCATION

JULY 26, 1995

DATE OF MAILING JULY 26, 1995

277-95

IN THE MATTER OF THE TENURE :
HEARING OF CAROL TRAPP, SCHOOL :
DISTRICT OF THE CITY OF HACKEN- :
SACK, BERGEN COUNTY. :
_____ :

COMMISSIONER OF EDUCATION
DECISION

JULY 26, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3070-94

AGENCY DKT. NO. 46-3/94

HACKENSACK BOARD OF EDUCATION,

Petitioner,

v.

CAROL TRAPP,

Respondent.

Cherie L. Maxwell, Esq., for petitioner
(Sill, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Nancy I. Oxfeld, Esq., for respondent
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: May 25, 1995

Decided: June 14, 1995

BEFORE ELINOR R. REINER, ALJ:

On March 10 1994, petitioner, the Hackensack Board of Education, certified charges of inefficiency against respondent, Carol Trapp. On March 23, 1994, respondent filed an answer denying the charges and requesting that they be dismissed and she be reinstated to her position of employment with petitioner. Thereafter, on March 31, 1994, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The matter was assigned to the undersigned judge on April 15, 1994, and a telephone prehearing scheduled for July 14, 1994. The telephone prehearing conference was held on July 14, 1994, at which time the issues were isolated, and a hearing scheduled for January 17, 18, 19, 20, 23 and 24, 1995, at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey. Prior to the scheduled hearing, the parties advised the undersigned that a settlement had been reached and the hearing was adjourned. The parties have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

June 14, 1995
DATE

6/16/95
DATE

JUN 21 1995
DATE
dgi/e

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

[Signature]
DEPARTMENT OF EDUCATION

Mailed to Parties
[Signature]
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

MAY 25 2 26 PM '95

BALK, OXFELD, MANDELL & COHEN
50 Commerce Street
Newark, New Jersey 07102
(201) 642-0161
Attorneys for Respondent

IN THE MATTER OF THE TENURE	:	BEFORE THE COMMISSIONER
	:	OF EDUCATION OF THE
HEARING OF CAROL TRAPP, SCHOOL	:	STATE OF NEW JERSEY
DISTRICT OF THE CITY OF	:	OAL DOCKET NO. EDU 03070-94N
	:	AGENCY DOCKET NO. 46-3/94
HACKENSACK, BERGEN COUNTY	:	STIPULATION OF SETTLEMENT
	:	

The parties to the above matter have agreed to an amicable resolution of this litigation. This resolution is based upon agreement as to the following facts:

1. The Respondent, Carol Trapp, is a tenured teacher of English employed by the Petitioner, School District of the City of Hackensack at Hackensack High School since 1971.

2. Commencing with the 1989-90 school year, a series of disagreements arose between the Respondent and her supervisors and administrators concerning issues of classroom control, the structure and coherence of lessons, the development of learning objectives, the monitoring of instruction and her willingness to work with supervisors and administrators concerning these actions. These allegations over a period of the school years 1989-90, 1990-91, 1991-92 and 1992-93 led, in September of 1993 to the filing of tenure charges of inefficiency against the Respondent pursuant to N.J.S.A. 18A:6-11 et. seq. and subsequently, in March 1994 to a vote by the Petitioner to certify said tenure charges against the

Respondent to the Commissioner of Education.

3. During the entire time that the disputes set forth in paragraph 2 have taken place between the Respondent's supervisors and administrators and the Respondent, the Respondent has steadfastly maintained the position that she does not agree philosophically with the Petitioner's supervisors and administrators as to pedagogical theory, that the goals of the supervisors and administrators would stifle flexibility in the learning process and the creativity of her students, and that her conduct during the period of time at issue does not show inefficiency, but rather a more flexible and less rigid approach to teaching than that required by the supervisors and administrators. During the same period of time, Petitioner's representatives have continuously maintained the position that in fact the Responder has inefficiencies in her performance.

4. A settlement in this matter would avoid the burden, expense, delay and uncertainty of litigation. The parties agree that the six days originally scheduled for hearing in this matter appear, after a review of all of the information produced by both sides in discovery, to not be nearly sufficient for all of the information which both parties desire to present to the Administrative Law Judge. This would require the scheduling of additional days of hearing of an unknown date in the future. Thus carrying this matter through to conclusion would require a large expenditure of time not only on the part of Respondent, but on the part of the Petitioner, supervisors and administrators involved in this matter, the cost to both parties of counsel to appear at th

hearing, review transcripts and prepare both factual and legal arguments to the Administrative Law Judge, and the purchase of expensive transcripts.

5. While this settlement leaves certain factual allegations on the part of both parties unresolved, it does not cause any potential problems for the public in that the tenure charges do not involve allegations of criminal or immoral conduct or conduct which would cause danger to students.

6. Both the Petitioner and Respondent agree that the settlement of the pending tenure charges as set forth herein is consistent with the criteria set forth in In Re Cardonick, and is otherwise in the public interest.

Based upon the above the above factual agreement, the parties hereby agree to resolve this matter on the following basis:

1. Carol Trapp will resign her position of employment as teacher with the Hackensack Board of Education effective November 1, 1996;

2. The Board of Education will withdraw the tenure charges in this matter;

3. The Respondent will receive her current rate of pay through the day of her resignation less mitigation by alternate earning. This payment of salary shall constitute the total financial obligation of the Petitioner to the Respondent and the Respondent hereby waives any claims she may have for unused sick leave days or for any other payments upon her resignation of employment;

4. The Respondent understands and agrees that her resignation and the entering into of this Stipulation of Settlement extinguishes, terminates, waives and/or revokes any and all tenure, employment and re-employment rights she may have as a teaching staff member with the Petitioner other than those set forth in this Stipulation of Settlement.

5. The Petitioner and the Respondent hereby release, remise and forever discharge each other from any and all claims, demands, rights, actions, damages or liabilities of any description arising out of or related to the Respondent's employment with the Petitioner including but not limited to the aforementioned tenure charges, claims for additional compensation or wrongful termination of employment.

6. This Stipulation of Settlement is not and shall not be construed to be an admission of liability or wrong doing by either party. Rather, the parties have entered into the Stipulation of Settlement for the sole purpose of resolving the aforementioned tenure charges and all other issues arising from the Respondent's employment without the burden, expense, delay and uncertainties of litigation.

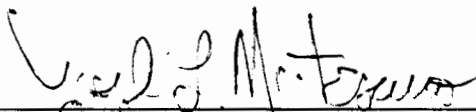
7. It is expressly agreed that this Stipulation of Settlement is contingent upon the Commissioner's approval of the parties agreement to withdraw the tenure charges. Should the Commissioner fail to approve the parties' application for withdrawal of the tenure charges and approval of the Stipulation of Settlement, the Stipulation of Settlement shall be null and void, and the parties shall attempt to restructure the settlement t

obtain the Commissioner's approval pursuant to any direction of the Commissioner. If the parties are unable to obtain the approval of the Commissioner of Education to the settlement, the Stipulation of Settlement shall not be used as evidence in any subsequent tenure hearings.

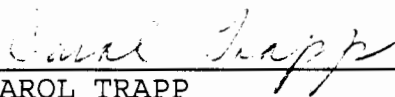
8. The Stipulation of Settlement is freely and voluntarily executed by each party hereto. Both parties have had the terms of this Stipulation of Settlement thoroughly explained by their respective legal counsel and understand such terms and the legal implications arising therefrom.

9. The Respondent understands upon approval of this Stipulation of Settlement by the Commissioner of Education, the matter may be forwarded to the State Board of Examiners for consideration of Revocation of the Respondent's teaching certification.

HACKENSACK BOARD OF EDUCATION



DATED: 5/2/95



CAROL TRAPP

DATED: April 27, 1995


SILLS, CUMMIS, ZUCKERMAN,
RADIN, TISCHMAN, EPSTEIN &
GROSS
Attorneys for Petitioner
By:



CHERIE L. MAXWELL, ESQ.

DATED: May 15, 1995

BALK, OXFELD, MANDELL & COHEN
DATED:
Attorney for Respondent
By:



NANCY I. OXFELD, ESQ.

DATED: 9/27/95

OAL DKT. NO. EDU 3070-94

IN THE MATTER OF THE TENURE :
HEARING OF CAROL TRAPP, SCHOOL :
DISTRICT OF THE CITY OF HACKEN- : COMMISSIONER OF EDUCATION
SACK, BERGEN COUNTY. : DECISION
_____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.


ACTING COMMISSIONER OF EDUCATION

JULY 26, 1995

DATE OF MAILING JULY 26, 1995

MICHAEL CAPIZOLA, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION

BOROUGH OF SOUTH PLAINFIELD, :

MIDDLESEX COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioning tenured special education teacher contended Board's withholding of his salary increment for the 1994-95 school year for allegedly using an inappropriate video in his classroom was arbitrary, capricious and unreasonable.

ALJ found that permitting middle school students to watch an R-rated movie during school time provided a reasonable basis for the Board's withholding. Thus, the Commissioner may not substitute his judgment for the Board's. Petition was dismissed.

After review of the record, including transcripts of the hearings and the video tape of the movie, the Commissioner determined that petitioner did not meet his burden of establishing that the Board's action in withholding his increment was arbitrary, capricious or unreasonable and, therefore, the Commissioner would not substitute his judgment for that of the Board.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8802-94

AGENCY DKT. NO. 349-8/94

MICHAEL CAPIZOLA,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
BOROUGH OF SOUTH PLAINFIELD,
MIDDLESEX COUNTY,**

Respondent.

Nancy I. Oxfeld, Esq., for petitioner (Balk, Oxfeld, Mandell & Cohen, attorneys)

Nicholas Celso, III, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: May 3, 1995

Decided: June 19, 1995

BEFORE M. KATHLEEN DUNCAN, ALJ:

This matter concerns the appeal of Michael Capizola (hereinafter petitioner) from the determination of the Board of Education of the Borough of South Plainfield (hereinafter respondent) withholding his salary increment for the 1994-95 school year. The petition of appeal was filed on August 25, 1994. An answer on behalf of respondent was filed on September 8,

1994 and on September 13, 1994, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13.

A prehearing conference was conducted on January 18, 1995, at which time the following was identified as the issue for determination at hearing: "Did respondent have a reasonable basis for its action withholding petitioner's increment for the 1994-95 school year?" The hearing was ~~scheduled~~ for May 2, 3 and 5, 1995, at the Trenton office of the Office of Administrative Law and ~~commenced~~ as scheduled. On May 3, 1995, ~~after~~ petitioner had completed presentation of his case and after the movie Commando, ~~Exhibit C-1 in evidence~~, had been viewed in its entirety, respondent moved to dismiss the petition of appeal. Both parties presented oral argument on the motion and following a brief recess wherein the exhibits which had been marked into evidence on behalf of petitioner were reviewed, the ~~motion~~ was granted, whereupon the record closed.

FINDINGS OF FACT

Prior to the commencement of testimony, the parties entered into the following stipulation of facts:

1. The South Plainfield Board of Education ("Board") is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1, and entrusted with maintaining and conducting the schools of the South Plainfield School District.
2. On or about September 1, 1980, Michael Capizola was employed by the Board as a special education teacher for the high school.
3. On June 24, 1985, the Board transferred Mr. Capizola from his position as a special education teacher at the High School to a special education teacher position at the Middle School, effective for the 1985-86 school year.
4. Mr. Capizola holds the following certifications, issued by the State Board of Examiners: Teacher of Mathematics and Teacher of the Handicapped.

5. Mr. Capizola is a tenured employee of the South Plainfield Board of Education.
6. During 1993-94 school year, Mr. Capizola was assigned to the Middle School as a special education teacher.
7. On June 9, 1994, Mr. Capizola was assigned to teach a first period special education class of three perceptually impaired students and one neurologically impaired student. Also on June 9, 1994, Mr. Capizola was assigned to teach a second period special education class of four perceptually impaired students and one neurologically impaired student. Only four students, however, were present during Mr. Capizola's second period class on June 9, 1994.
8. On June 9, 1994, Mr. Capizola showed some portion (the amount remains in dispute) of the film, Commando, to his first period special education class.
9. On June 9, 1994, Mr. Capizola showed some portion (the amount remains in dispute) of the film, Commando, to his second period special education class.
10. The film Commando is rated "R" by the Motion Picture Association of America.
11. The South Plainfield School District does not possess any records which document the use of audio-visual equipment by teaching staff members in the Middle School during the 1993-94 school year.
12. On June 23, 1994, Mr. Capizola was notified that the Board would discuss possible disciplinary action regarding him in Executive Session on June 30, 1994. (Exhibit J-1)
13. On June 30, 1994, Mr. Guy C. Ferri, Superintendent, recommended that Mr. Capizola's salary adjustment increment be withheld for the 1994-95 school year. (Exhibit J-2)
14. At its regularly scheduled Board meeting, the Board approved the denial of Mr. Capizola's salary adjustment increment for the 1994-95 school year. (Exhibit J-3)

15. By correspondence dated July 12, 1994, Mr. Capizola was notified of the Board's decision to withhold his salary adjustment increment for the 1994-95 school year. (Exhibit J-4)
16. On July 20, 1994, Mr. Capizola filed a grievance, claiming that the Board's decision to deny his increment was without just cause. (Exhibit J-5)
17. By letter dated August 10, 1994, Mr. Capizola's grievance was denied by Guy C. Ferri, Superintendent of Schools. (Exhibit J-6)
18. On or about August 23, 1994, Mr. Capizola filed a Petition of Appeal with the Commissioner of Education. The issue was joined on September 8, 1994 when the Board filed its Answer.
19. ~~The~~ matter was ~~thereby~~ transferred to the Office of ~~Administrative~~ Law, where it was assigned to ~~Administrative~~ Law Judge M. Kathleen Duncan. The matter was set for hearing on May 2, 3 and 5, 1995.

Exhibit J-4 in evidence, a letter dated July 12, 1994 from Guy C. Ferri, Superintendent of Schools, to petitioner, advised petitioner of the Board's action and the Board's reasons therefor:

This is to advise you that the Board of Education at its Special Board Meeting held on June 30, 1994, approved the Superintendent's recommendation to withhold your 1994/95 salary adjustment increment, thereby freezing your 1994/95 salary at the 1993/94 rate. This action was taken as a result of an assessment of your performance arising out of the incident whereby you used an inappropriate video in your classroom on June 9, 1994. The specific criteria are as follows:

- . Use of a material clearly inappropriate for instructional purposes.
- . Failure to plan for specific learning objective.
- . Failure to preview the material in question to ensure educational and moral appropriateness.

- . Inappropriate and undocumented use of allocated instruction time resources.
- . Failure to teach acceptable standards of student conduct by example.
- . Poor judgment.

Should you have any questions or need further clarification, feel free to contact me **during the hours** of 8:30 a.m. until 4:30 p.m., **Monday through** Friday, at (908) ~~754-4620~~, extension 226.

During his testimony, petitioner offered the following **additional facts, which** for purposes of determining the within motion, are accepted as true **and are viewed** in the light, most favorable to petitioner. During the 1993-94 school year, petitioner prepared individual lesson plans for each of his forty classified students; the ~~goals and objectives in~~ each lesson plan were individual to the particular student. On a weekly basis he would select one lesson plan to submit to the administration as an example. For those students who were in his first period special education class on June 9, 1994, the individual lesson plans did indicate that a movie (but not which movie) would be shown as a reward for the students having done very well in their math course that year. Petitioner could not say, however, that the one lesson plan which was submitted to the administration for that week involved one of those students and therefore he could not say that the movie as a reward had been in the lesson plan submitted.

Petitioner allowed the four students to choose which movie they wished to view as their reward, and one student had lobbied hard for the movie Commando starring Arnold Schwarzenegger. That child brought in his own copy of the movie approximately one week before the date that they expected to view it, and petitioner took the movie and put it in his desk. Petitioner further indicated that he had not intended to show the R-rated* version of the movie

* The MPAA rating symbol R indicates "Restricted: Children under 17 require accompanying parent or adult guardian." The World Book Encyclopedia, Volume 13, 1994, p.861. N.J.A.C. 1:1-15.2 (official notice).

which the student had brought into class but rather had intended to show the version of the movie which he had taped at home when the movie had been on commercial television. Because petitioner had seen the movie himself in the movie theaters, he realized that it contained explicit violence and strong language, but when a movie is shown on commercial television those portions which cause the R rating are edited out, and accordingly, he intended to show the students the version he had taped from T.V. However, petitioner had moved to a new residence in April 1994 and many of his belongings were still in boxes and he was unable to locate his copy of the movie. Accordingly, on June 9, 1994, he allowed his first period class to view the commercial, R-rated version of the movie notwithstanding the fact that he knew it had strong language and explicit violence. He did not request parental permission before doing so.

Prior to showing the movie, petitioner had indicated to the class members, who were either 12 or 13 years old, that anyone who preferred not to see the movie or might be offended by the language or violence could go to the classroom of Ms. Holtz, another special education teacher, and play with her computer games. None of the students left his classroom. Thereafter the class watched approximately the first forty-five minutes of the movie to the end of the class period. At the conclusion of the class, petitioner announced that there was too much cursing in the movie and that they would not be able to see the end of it the next day as they had planned to do. One student who had been in the first period class, however, was also in the second period class and that student started a campaign among the second period students, who were also 12 or 13 years old, to be permitted to watch the end of the movie. Every Friday the students in the second period class participated in an activity which petitioner called 20/20 wherein the first 20 minutes of the class period were spent in class work and the last 20 minutes were spent in activities, games, puzzles, computer games, etc. When the second period students continued in their request to watch the rest of the Commando movie, petitioner told them if they wanted they could do 20/20 that day, which was a Thursday, instead of the next day and the movie would be permitted to run with the T.V. screen turned off for the first 20 minutes of the period and they would be permitted to watch the last 20 minutes of the movie. Accordingly, the second period class on June 9, 1994, watched the last 20 minutes of Commando.

After the school principal, Mr. Doggett, received parental complaints about children having watched Commando in class, he spoke to petitioner who acknowledged that he had shown the movie on June 9, 1994 but falsely stated to Mr. Doggett he had shown the edited version. That Friday evening petitioner called the parents who had complained and tried to smooth things over; after his efforts were unsuccessful, however, on Monday he went back to Mr. Doggett's office and admitted that he had shown the unedited version. He did not mention to Mr. Doggett that he had also shown the film to his second period class. This information first came to the board's attention in April 1995 when petitioner answered the respondent's second set of interrogatories.

Petitioner acknowledges that he exercised poor judgment in permitting his twelve and thirteen-year-old students to view an R-rated film. He also acknowledges that the movie was without educational value, but he indicates that he is personally aware that other teachers have shown films unrelated to curriculum goals for purposes of rewarding children for good behavior. There are no disputes between petitioner and respondent concerning the facts; petitioner simply feels that the sanction, a salary increment withholding, is too severe in light of his many years of outstanding evaluations (P-1 to P-13 in evidence).

APPLICABLE LAW AND DISCUSSION

The classic statement of the test for determining a motion for dismissal at the end of an opponents case is articulated in Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969).

In the case of motions for involuntary dismissal, the test is, as set forth in R. 4:37-2(b) and equally applicable to motions for judgment, whether "the evidence, together with the legitimate inferences therefrom, could sustain a judgment in ***favor" of the party opposing the motion, i.e., if, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied. . . . The point is that the judicial function here is quite a mechanical one. The trial court is

not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion. (Citations omitted)

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

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

The standard for review of a local board's action pursuant to the statute is set forth in Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 296 (App. Div. 1960) wherein the court said that "the scope of the Commissioner's review is . . . not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions."

Pursuant to Kopera, supra, there are only two determinations to be made herein: 1) whether the underlying facts were as those who made the evaluations claimed, and 2) whether it was unreasonable for them to conclude as they did based upon those facts. The burden of proving unreasonableness is upon petitioner. Id. at 296-297.

Petitioner has acknowledged all of the relevant facts. He has also acknowledged that almost all of the itemized conclusions set forth in J-4 in evidence, respondent's articulated reasons

for the increment withholding, are legitimate conclusions (he questions the meaning of “moral appropriateness”). He argues, however, that for the Board to withhold his increment because of one incident of poor judgment is too harsh. A review of the applicable legal standards quoted hereinabove in conjunction with the undisputed facts and the Board’s articulated reasons can lead only to one conclusion, however. Reasonable minds could not differ on whether permitting twelve and thirteen year old students to watch an R-rated movie during school time provides a reasonable basis for respondent’s actions. The Commissioner may not substitute his judgment for respondent’s, and therefore the motion to dismiss at the end of petitioner’s case must be granted.

For all of the foregoing reasons, it is **ORDERED** that the ~~petition~~ of appeal is hereby **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this ~~initial~~ decision ~~with~~ the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for ~~consideration~~.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, 225 East State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 19, 1995
DATE

M. Kathleen Duncan
M. ~~KATHLEEN DUNCAN~~ ALJ

Receipt Acknowledged:

6/19/95
DATE

Hope R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 23 1995
DATE

Jeff S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

EXHIBITS IN EVIDENCE

Joint:

- J-1 Letter from Lillian A. DeSimon, Ed. D., Assistant Superintendent, to petitioner, dated June 23, 1994
- J-2 Memorandum from Guy C. Ferri to Board of Education members, Re: Recommendation for ~~Increment~~ Withholding - Special Education ~~Teacher Michael Capizola~~, dated June 30, 1994 (2 pages)
- J-3 Addendum to ~~Agenda~~ Special Public Meeting Thursday, June 30, 1994 - 8 p.m.
- J-4 ~~Letter~~ from respondent to petitioner, dated July 12, 1994 (2 pages)
- J-5 Grievance, signed by petitioner July 20, 1994
- J-6 Letter from respondent to petitioner, dated August 10, 1994
- J-7 Stipulation of Facts, signed by both counsel May 2, 1995 (4 pages)

For petitioner:

- P-1 Performance Evaluation/Professional Improvement Plan for petitioner, March 1989 (3 pages)
- P-2 Teacher Observation 2/6/90
- P-3 Performance Evaluation/Professional Improvement Plan, March 1990 (3 pages)
- P-4 Classroom Observation 11/26/90
- P-5 Performance Evaluation/Professional Improvement Plan, March 1991 (4 pages)

- P-6 Classroom Observation 11/5/91
- P-7 Staff Evaluation/Professional Improvement Plan, March 1992 (2 pages)
- P-8 Performance Evaluation/Professional Improvement Plan, March 1992 (3 pages)
- P-9 Classroom Observation 3/25/93 (2 pages)
- ~~P-10~~ Performance Evaluation/Professional ~~Improvement~~ Plan, ~~March~~ 1993 (3 pages)
- P-11 ~~Teacher~~ Observation 12/7/93 (2 ~~pages~~)
- P-12 Teacher ~~Observation~~ 2/28/94 (~~2 pages~~)
- P-13 Performance Evaluation/~~Professional~~ Improvement Plan, March 1994 (4 ~~pages~~)

For respondent:

Although a number of respondent's exhibits were marked into evidence prior to the commencement of testimony without objection from petitioner, those exhibits were not reviewed in determining the motion to dismiss at the end of petitioner's case and are not considered as part of the record on the motion to dismiss.

For the court:

- C-1 Commando, starring Arnold Schwarzenegger (video tape and jacket)

WITNESSES

For petitioner:

Michael Capizola

For respondent:

None

MICHAEL CAPIZOLA, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : **DECISION**
 BOROUGH OF SOUTH PLAINFIELD, :
 MIDDLESEX COUNTY, :
 :
 RESPONDENT. :

The record of this matter and ~~the initial~~ decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioner's exceptions essentially recast and reiterate his arguments advanced before the Administrative Law Judge (ALJ), once more contending that it is unreasonable for a board to withhold the increment of an otherwise fine teacher based on one error in judgment. Petitioner again argues that while he has no quarrel with the factual findings of the ALJ on pp. 2-7 of the initial decision, additional considerations must be noted. Specifically, he asserts that his overall performance for the five years preceding the increment withholding was exemplary. He, therefore, questions "[w]hy should such a teacher, who is obviously contributing well to the school in every area, and helping his students to learn, be penalized for one small error, showing a movie with some inappropriate language." (Petitioner's Exceptions at p. 7)

In reply, the Board argues that petitioner has not and cannot cite any case law in support of his position that the withholding of an increment of a teaching staff member based on one incident of misconduct is an unreasonably harsh penalty. Rather, citing Forman v. Scotch Plains-Fanwood Regional School District, February 25, 1982 and Gallagher v. Nutley Bd. of Ed., 1984 S.L.D. 229, it urges that the Commissioner has sustained such board action.

Upon a careful and independent review of the record, including transcripts of the two ~~days~~ of hearings in this matter and the ~~video tape of the~~ movie herein ~~at issue~~, the Commissioner finds petitioner's exceptions ~~without~~ merit. As aptly noted by the ALJ, "[p]ursuant to Kopera, supra, there are ~~only two~~ determinations to be made herein: 1) whether the underlying facts ~~were~~ as those who made the evaluations claimed, and 2) whether it was unreasonable for them to ~~conclude~~ as they did based upon those facts. The burden of proving unreasonableness is upon petitioner.***" (Initial Decision at p. 8) The Commissioner determines that, based upon the record before him, petitioner has not met his burden of establishing that the Board's action in withholding his increment was arbitrary, capricious or unreasonable and, therefore, the Commissioner will not substitute his judgment for that of the Board.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons clearly articulated therein, and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

JULY 27, 1995

DATE OF MAILING JULY 27, 1995 15

EDU # 8802-94
C # 278-95
SB # 92-95

MICHAEL CAPIZOLA,	:	
	:	
PETITIONER-APPELLANT,	:	
	:	
V.	:	STATE BOARD OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
BOROUGH OF SOUTH PLAINFIELD,	:	
MIDDLESEX COUNTY,	:	
	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, July 27, 1995

For the Petitioner-Appellant, Balk, Oxfeld, Mandell & Cohen (Nancy I. Oxfeld, Esq., of Counsel)

For the Respondent-Respondent, Schwartz, Simon, Edelstein, Celso & Kessler (Nicholas Celso, III, Esq., of Counsel)

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

Donald C. Addison, Jr., Wendel E. Daniels and Thomas P. McGough abstained.

Corinne M. Mullen opposed.

February 7, 1996

Date of mailing FEB 09 1996

279-95

M.D., on behalf of her minor niece, E.L.A., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN :
OF WEST ORANGE, ESSEX COUNTY, :

DECISION

RESPONDENT. :

_____ :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 12072-94

AGENCY DKT. NO. 351-8/94

**M. D. ON BEHALF OF HER
MINOR NIECE, E.L.A.**

Petitioner,

v.

**BOARD OF EDUCATION OF
WEST ORANGE**

Respondent

M. D. Petitioner, *pro se*

Stephen J. Christiano, Esq. for respondent
(Christiano & Christiano, attorneys)

Record Closed: May 19, 1995

Decided: June 12, 1995

BEFORE **IRENE JONES, ALJ**

Petitioner, M.D. on behalf of her minor niece, E.L.A., appeals the April 1994 decision of the West Orange Board of Education that denied E.L.A. admission to its school district. By Order dated August 31, 1994 the Commissioner of Education granted E.L.A. immediate admittance to the respondent's school district.

Pursuant to that Order, respondent timely filed an appeal and the matter was transmitted to the Office of Administrative Law for hearing on December 15, 1994.

A hearing was scheduled for April 3, 1995. At that hearing, the respondent appeared but the petitioner did not. Pursuant to my directive, respondent by certified mail sent the petitioner a letter advising her that this matter would be dismissed for failure to prosecute (Exh. A). Thereafter, on April 5, 1995 by regular and certified mail respondent again sent petitioner a proposed Order dismissing the petition with prejudice. (Exh. B)

By letter dated May 19, 1995 the undersigned advised petitioner that this matter would be dismissed with prejudice unless she contacted this office. (Exh. C) This letter was not returned to by the U.S. Post Office and therefore it is presumed that it was received.

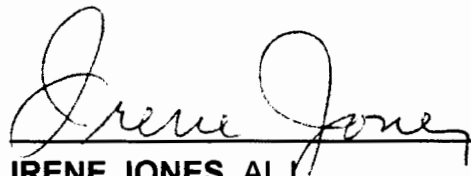
After a review of the this matter, I **FIND** that petitioner failed to appear for hearing or otherwise prosecute this matter. I further **FIND** that petitioner has been duly notified. It is therefore Ordered that E.L.A. is no longer eligible to attend school in the respondent's school district and she shall be removed pursuant to terms of the Order attached hereto. (Exh. D) It is therefore **ORDERED** that this matter be and is hereby **DISMISSED** with prejudice.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.


Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6/12/95
Date

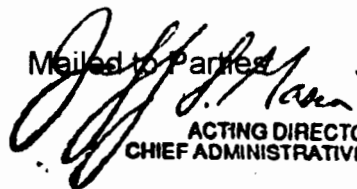

IRENE JONES, ALJ

Receipt Acknowledged:

6/19/95
Date


DEPARTMENT OF EDUCATION

JUN 22 1995

Mailed to Parties

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date

OFFICE OF ADMINISTRATIVE LAW

sej

OAL DKT. NO. EDU 12072-94

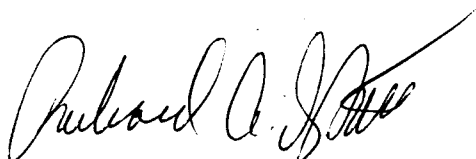
M.D., on behalf of her minor niece, E.L.A., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN : DECISION
OF WEST ORANGE, ESSEX COUNTY, :
RESPONDENT. :
_____ :

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in the matter, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that, as petitioner failed to appear for hearing or otherwise prosecute this matter, the within Petition of Appeal must be dismissed.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter and the Petition of Appeal is hereby dismissed with prejudice.

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

JULY 27, 1995

DATE OF MAILING JULY 27, 1995

280-95

THERESA SANTAMARIA,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF TRENTON, MERCER COUNTY,	:	
	:	
RESPONDENT.	:	
	:	
_____	:	



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11723-94S

AGENCY DKT. NO. 462-11/94

THERESA SANTAMARIA,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
CITY OF TRENTON, MERCER
COUNTY,**

Respondent.

Kathleen A. Naprstek, Esq., for petitioner (Zazzali, Zazzali, Fagella and Nowak,
attorneys)

Thomas W. Sumners, Jr., Esq., for respondent (Sumners, Council, George and Dortch,
attorneys)

Record Closed: June 7, 1995

Decided: June 16, 1995

BEFORE **JEFF S. MASIN, ALJ:**

This matter was transmitted to the Office of Administrative Law from the Department of Education, Bureau of Controversies and Disputes, on December 5, 1994, for a hearing, pursuant to *N.J.S.A. 52:14B-1 to -21* and *N.J.S.A. 52:14F-1 to -13*.

This matter arises from a Petition of Appeal filed with the Commissioner of the Department of Education by Theresa Santamaria (“petitioner”), dated November 14, 1994, alleging that the Board of Education of the City of Trenton, Mercer County, (“respondent”) improperly reduced her salary in violation of *N.J.S.A. 18A:6-10 et seq.*, thereby violating her contractual, tenure and vested rights.

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement (“Stipulation”) indicating the terms of settlement. Pursuant to that Stipulation, the parties have agreed that respondent shall reimburse the petitioner the amount of \$382.80. Additional terms and conditions of the AACO are contained therein and incorporated within this Decision Approving Settlement.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

6/16/95
DATE

Jeff S. Masin
JEFF S. MASIN, ALJ
Receipt Acknowledged:

6/23/95
DATE

Hope R. Boardman
DEPARTMENT OF EDUCATION

JUN 28 1995

DATE
mjm
Attachment

Mailed to Parties:
Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

Jan 12 1995

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioner

THERESA SANTAMARIA,	:	BEFORE THE COMMISSIONER
	:	OF EDUCATION/OFFICE OF
Petitioner,	:	ADMINISTRATIVE LAW
	:	
v.	:	AGENCY REF. NO. 462-11/94
	:	OAL DOCKET NO. EDU-11723-94S
BOARD OF EDUCATION OF THE	:	
CITY OF TRENTON, MERCER	:	
COUNTY,	:	STIPULATION OF SETTLEMENT
	:	
Respondent.	:	

The parties, by and through their attorneys, hereby agree to settle this matter in accordance with the following terms:

1. Petitioner will withdraw her appeal filed with the Commissioner of Education on or about November 17, 1994.
2. Respondent will reimburse Petitioner the sum of \$382.80 heretofore deducted from Petitioner's payroll checks in increments of \$34.80 beginning on or about October 7, 1994. Said reimbursement shall be made to Petitioner in a separate check, not as part of Petitioner's regular payroll check.
3. Respondent shall cease all further deductions of \$34.80 from Petitioner's payroll checks made in connection with this matter.
4. The parties hereto stipulate that this agreement shall fully dispose of all issues in controversy between them with

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

regard to this matter.

Kathleen A. Naprstek
Kathleen A. Naprstek, Esq.
ZAZZALI, ZAZZALI, FAGELLA
& NOWAK, P.C.
For Petitioner,
Theresa Santamaria

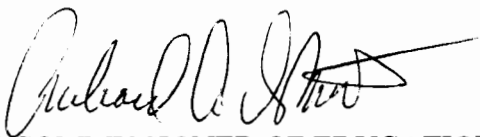
Thomas W. Sumners, Jr.
Thomas W. Sumners, Jr., Esq.
SUMNERS, COUNCIL, GEORGE
& DORTCH, P.C.
For Respondent, Board of
Education of the City of
Trenton, Mercer County

OAL DKT. NO. EDU 11723-94S

THERESA SANTAMARIA, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE CITY : DECISION
 OF TRENTON, MERCER COUNTY, :
 :
 RESPONDENT. :
 :
 _____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


ACTING COMMISSIONER OF EDUCATION

JULY 27, 1995

DATE OF MAILING JULY 27, 1995

281-95R

PHILIP O. SHERIDAN,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY	:	DECISION ON REMAND
OF ORANGE TOWNSHIP, ESSEX	:	
COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

In 1991, petitioner contended that the Board had violated his tenure rights in failing to appoint him as Department Chairperson of Math and Natural Science. Commissioner dismissed petition as moot on February 18, 1992 since petitioner was dismissed on tenure charges on February 6, 1992. State Board reversed Commissioner's decision and remanded matter to Commissioner for further proceedings in order to provide petitioner the opportunity to demonstrate that the Board violated his tenure rights as a result of the reorganization in 1991.

On remand, citing Bednar and Capodilupo, the ALJ concluded that petitioner had greater entitlement to the position of Department Chairperson than individual assigned. Petitioner was entitled to mitigated compensation for period from July 24, 1991 through February 6, 1992.

Commissioner adopted findings and determination in initial decision as his own and ordered payment of mitigated compensation.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9750-94

AGENCY DKT. NO. 408-11/91

PHILIP O. SHERIDAN,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF ORANGE,**

Respondent.

Robert M. Schwartz, Esq., for petitioner
(Lake and Schwartz, attorneys)

Raymond L. Hamlin, Esq., for respondent
(Ashley and Charles, attorneys)

Record Closed: May 3, 1995

Decided: June 15, 1995

BEFORE **DIANA C. SUKOVICH.,** ALJ:

PROCEDURAL HISTORY

On November 20, 1991, Philip O. Sheridan (Sheridan or petitioner) filed a petition with the Department of Education (DOE) seeking relief from the Board of Education of the Township of Orange (Board or respondent). The DOE transmitted the matter to the Office of Administrative Law on October 6, 1994 for determination as a contested case pursuant to *N.J.S.A. 52:14F-1 to -13*.

* On the transmittal sheet, the DOE indicated that the current matter was a remand of a prior docket involving petitioner. OAL DKT. NO. EDU 6146-93. However, a review of case records at the Office of the Administrative Law indicates that Mr. Sheridan withdrew his petition in the prior docket on February 14, 1994.

Telephone conferences were conducted throughout the proceedings. The parties agreed that the matter would be considered on the basis of stipulations of facts and documentary evidence, without the necessity of a hearing. Subsequent to further communications regarding stipulations and documentary evidence, the record was closed on May 3, 1995.

NATURE OF THE CASE

Petitioner asserts that respondent violated his tenure rights by not appointing him to a newly created position of Chairperson of the Department of Math and Natural Science. Sheridan was involved in other contested proceedings with the Board, and a summary of these will be helpful in providing the context of the current matter.

On November 13, 1990, the Board certified tenure charges against Sheridan and suspended him. At the time, petitioner was the Chairperson of the Science Department, a position he had held since 1972. While the tenure charges were pending, the Board implemented a reorganization, pursuant to which petitioner's position was eliminated. Sheridan was reassigned to a teaching position, although, as a practical matter, he remained suspended as a result of the tenure charges. The Board subsequently employed a nontenured individual as Chairperson of a newly created Department of Math and Natural Science.

On November 20, 1991, Sheridan filed a petition with the Commissioner of the DOE (Commissioner) claiming that respondent had violated his tenure rights by failing to appoint him as Chairperson of the Math and Natural Science Department. Petitioner sought reinstatement to that position, in addition to back pay and emoluments.

On February 6, 1992, the Commissioner issued a decision upholding the tenure charges and dismissing Sheridan from his tenured employment as of that date. On June 3, 1992, the State Board of Education (State Board) affirmed the Commissioner's decision.

By letter decision dated February 18, 1992, the Commissioner dismissed Sheridan's November 20, 1991 petition, concluding that the matter had been rendered moot by the Commissioner's decision of February 6, 1992. Petitioner thereafter moved for reconsideration, which motion was denied by the Commissioner on March 27, 1992. Petitioner appealed to the State Board. By decision issued September 9, 1994, the State Board held that the Commissioner had erred in dismissing Sheridan's petition.

The State Board reasoned that petitioner was under tenure at the time his position was abolished and was therefore entitled to all the rights and protections attending such status. The State Board remanded the matter to the Commissioner for further proceedings to provide Sheridan with an opportunity to demonstrate that the Board violated his tenure rights as a result of the 1991 reorganization. The State Board agreed with petitioner's argument that if his tenure rights had been violated, he would be entitled to back pay and emoluments for the period from July 24, 1991, when his position was abolished, through February 6, 1992, when he was dismissed from his employment because of the tenure charges. *Philip O. Sheridan v. Board of Education of the Township of Orange, State Board of Education* (Sept. 9, 1992).

The issues to be addressed in the current matter, broadly formulated, are whether respondent violated petitioner's tenure rights in failing to appoint Sheridan as Chairperson of the Math and Natural Science Department and, if so, whether petitioner is entitled to back pay and emoluments from the period from July 24, 1991 until February 6, 1992.

STIPULATIONS

The Board did not respond to repeated communications from petitioner regarding proposed stipulations drafted by Sheridan's counsel, nor to a deadline established by this judge for respondent to file any objections to proposed stipulations filed by petitioner on April 7, 1995. Consistent with prior communications to the parties,

this judge therefore advised the Board's counsel, by letter dated May 3, 1995, that respondent was deemed to have agreed to the stipulations filed by petitioner, that the documents referenced and incorporated therein were deemed admitted into evidence, and that the record was closed as of May 3, 1995. Although filing positions in the various proceedings before the Commissioner and the State Board, respondent did not file a reply in the current matter to a legal argument filed on behalf of petitioner in its filing of April 7, 1995.

The parties are deemed to have stipulated to the following facts:

1. Petitioner began his employment with respondent in or about July 1972, when he was appointed to the title of Science Department Chairperson.
2. The position of Science Department Chairperson required a supervisor endorsement.
3. On or about July 24, 1991, the Board adopted a new organizational structure affecting the title of Department Chairperson.
4. As a result of the reorganization of July 24, 1991, petitioner's position of Science Department Chairperson was abolished.
5. In its place, respondent created the title of Department Chairperson for Science and Math, representing a combination of the former Department Chairperson for Science and Department Chairperson for Math positions.
6. As a result of tenure charges brought against petitioner, he was on suspension with pay from his employment with the Board commencing September 1991.
7. Effective September 11, 1991, respondent appointed Mary Mitchell (Mitchell) to the title of Department Chairperson for Mathematics and Science.
8. Mitchell had begun her employment with the Board during the 1990-91 school term as a classroom teacher of mathematics. Prior to the 1990-91 school term, Mitchell had been employed in the East Orange School District.

9. Between the period of September 11, 1991 and February 6, 1992, Mitchell served as the nontenured Department Chairperson for Mathematics and Science.
10. The endorsement required for the title of Department Chairperson for Mathematics and Science had a supervisor endorsement.

FINDINGS OF FACT

Based upon a review of the documentary evidence, I **FIND** the following to be **FACTS**.

On July 23, 1991, the Board adopted a resolution declaring vacant all department chairperson positions at Orange High School (High School) and posting, under the new organizational structure, vacancies. The resolution noted that the High School had to undergo major restructuring to improve instruction and learning; that the new organizational structure for the High School consolidated several departments and improved the "articulation" and collaboration necessary between departments; that to effectuate restructuring, it was necessary to declare vacant all department chairperson positions, post the vacancies, and interview and hire appropriate personnel to fill the new positions; and that the restructuring at the High School could result in cost efficiencies. (Ex. P -1, p. 1). The resolution declared vacant all department chairperson positions at the High School effective July 24, 1991.

On August 27, 1991, the Board approved a resolution abolishing the then existing organizational departments for the High School, approving the restructuring of the organizational departments at the High School from eleven to seven, and approving renaming the organizational departments at the High School to the Humanities, Linguistics, Athletics, Student Services, Applied Math and Natural Science, Careers and Development, and Arts Departments and approving the reappointment of new department chairpersons no later than September 30, 1991.

Respondent posted, from July 25, 1991 through August 5, 1991, the positions of chairpersons for four departments, including Applied and Natural Science (Mathematics/Science). The effective dates of the positions were September 1, 1991, the locations were at the High School, and the salaries were contractual. Each chairperson position required a school administrator's certificate with a principal or supervisor endorsement.

On July 30, 1990, Mitchell executed an application for the position of department chairperson. She stated therein that her then current position was that of mathematics teacher and that she was certified as "PERMANENT SUPERVISOR, PRINCIPAL/SUPERVISOR," as of August 1981, and "MATHEMATICS," as of April 1973, in New Jersey. (Ex. P-4, p. 1)

On approximately August 27, 1991, the Board appointed Mitchell to the position of Chairperson for the Department of Mathematics and Natural Science, for the period from September 11, 1991 until June 30, 1992, at a pro-rated contractual salary.

DISCUSSION

The Commissioner generally has jurisdiction to hear and determine all controversies and disputes arising under the school laws. *N.J.S.A. 18A:6-9.*

The services of teaching staff members, including principals, assistant principals, vice-principals, superintendents, and assistant superintendents, as well as any other employees in positions requiring appropriate certificates issued by the Board of Examiners, shall be under tenure during good behavior and efficiency, and such individuals shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such staff member or other good cause. *N.J.S.A. 18A:28-5 (Supp. 1995).* Tenure attaches after employment in a district by a local board for three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose, three consecutive academic years, together with

employment at the beginning of the next succeeding academic year, or the equivalent of more than three academic years within a period of any four consecutive years. *Ibid.*

However, a local board of education can reduce the number of teaching staff members employed in the district whenever, in the board's judgment, it is advisable to abolish such positions for reasons of economy, because of a reduction in the number of pupils, because of a change in the administrative or supervisory organization of the district, or for other good cause. *Id.* at § 9. Any such reduction in force (RIF) shall be made on the basis of seniority, *Id.* at §10, which shall be determined by the local board of education. *Id.* at §11.

A person dismissed as a result of a RIF shall remain on a preferred eligibility list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person is qualified. He/she shall be reemployed if and when such vacancy occurs. In determining seniority, and computing length of service for reemployment, full recognition shall be given to previous years of service. *Id.* at §12 (Supp. 1995). The obligation of a board of education to recall an employee from a preferred eligibility list occurs whenever a vacancy comes into existence. Seniority cannot limit a tenured employee's rights over nontenured individuals. *Mueller v. Hunterdon Central Regional High School District Board of Education*, 93 N.J.A.R. 2d (Vol. 4A) 419 (Dept. of Ed.) (*Mueller*).

A tenured individual has the ultimate burden when contesting an action by a board of education of demonstrating that his/her seniority rights were violated and that he/she suffered harm so as to entitle him/her to redress. *James Parker and Joseph Pellegrino v. Board of Education of the Matawan-Aberdeen Regional School District*, 1990 S.L.D. 1778. Tenured school board employees improperly denied reemployment are entitled to such reemployment in addition to back pay and emoluments. A person holding employment in a public system of the State who is illegally dismissed or suspended is entitled to compensation for the period covered by the illegal dismissal or suspension if such is finally determined to have been without good cause. N.J.S.A.

18A:6-30. A prevailing individual contesting local board action is entitled to appointment to an available position, back pay, and other economic emoluments of employment, including appropriate pension fund adjustments. *Mueller, supra*. Any actual pay that an individual subject to dismissal or suspension earns must be set off from an award of back pay. *West Orange Supplemental Instructors' Assoc. v. Board of Education of the Township of West Orange*, 1991 S.L.D. 1, *aff'd* 1991 S.L.D. 32, *appeal den.*, State Board of Education (July 13, 1992), *appeal dismissed* No. A-6033-90T1 (App. Div., Oct. 1991).

It is reasonable to conclude, based on the stipulations, that Mitchell did not have tenure with respondent pursuant to N.J.S.A. 18A:28-5. As Sheridan argues, he had the required supervisor endorsement for the newly created position of Chairperson of the Department of Mathematics and Science, and he therefore had a greater entitlement to that position than did Mitchell. Tenure provisions should be liberally construed to further the purpose of affording security to staff who meet the required standard of length of service. *Bednar v. Westwood Bd. of Educ.*, 221 N.J. Super. 239 (App. Div. 1987), *certif. den.*, 110 N.J. 512 (1988). Seniority does not create employment rights for non-tenured employees and cannot justify retaining a nontenured teacher in a position within the certificate of a dismissed tenured teacher. *Ibid.* See also, *Capodilupo v. W. Orange Tp. Ed. Bd.*, 218 N.J. Super. 510 (App. Div. 1987), *certif. den.* 109 N.J. 514 (1987).

CONCLUSIONS

I **CONCLUDE** that petitioner had a greater entitlement to the position of Department Chairperson of Mathematics and Natural Science than did Mitchell from the period from July 24, 1991 through February 6, 1992 and he is therefore entitled to compensation, mitigated by the salary he was paid as a teacher during the same time period, as well as related emoluments.

ORDERS

It is hereby **ORDERED** that Sheridan be deemed to have entitlement to the position of Chairperson of the Department of Mathematics and Natural Science from July 24, 1991 through February 6, 1992, that he be awarded compensation for that time period, mitigated by the salary he was paid as a teacher during that time period, and that he be awarded associated emoluments for the period in question.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 15, 1995
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

6/19/95
DATE

Receipt Acknowledged:

Hope R. Blackburn

DEPARTMENT OF EDUCATION

JUN 22 1995

DATE

le

Mailed to Parties.
Jeff J. Marin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

LIST OF EXHIBITS IN EVIDENCE

- P-1 Resolution dated July 23, 1991 and Resolution dated August 27, 1991
- P-2 Posting No. 306
- P-3 Board agenda for August 27, 1991
- P-4 Application dated July 30, 1990

PHILIP O. SHERIDAN, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE CITY : DECISION ON REMAND
 OF ORANGE TOWNSHIP, ESSEX :
 COUNTY, :
 :
 RESPONDENT. :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions submitted by respondent were untimely pursuant to N.J.A.C. 1:1-18.4 inasmuch as the initial decision was mailed to the parties on June 22, 1995, and respondent's exceptions were filed with the Commissioner on July 14, 1995. Therefore, the exceptions were not considered.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge that petitioner had superior entitlement rights to the position of Department Chairperson of Math and Natural Science in question.

Accordingly, the initial decision of the Office of Administrative Law is affirmed for the reasons clearly expressed therein.

IT IS hereby ORDERED that respondent be awarded compensation, mitigated by the salary he was paid as a teacher during the same time period, as well as associated emoluments, for the time period between July 24, 1991 and February 6, 1992, his period of entitlement to the above position.



ACTING COMMISSIONER OF EDUCATION

JULY 27, 1995

DATE OF MAILING JULY 27, 1995 13

ROBERT SEYFARTH, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN-
SHIP OF CRANFORD, UNION COUNTY, :

DECISION ON MOTION

RESPONDENT. :

_____ :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

DENYING EMERGENT RELIEF

OAL DKT. NO. EDU 5970-95

AGENCY DKT. NO. 175-5/95

ROBERT SEYFARTH

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF CRANFORD, UNION
COUNTY,**

Respondent.

Richard J. Kaplow, Esq., attorney for petitioner

David B. Rubin, Esq., attorney for respondent (Rubin, Kuhn, Kaplan, Cahn & Goldstein, attorneys)

Record Closed: June 13, 1995

Decided: June 13, 1995

BEFORE MARIE P. SIMONELLI, A.L.J.

THIS MATTER having been opened to the Office of Administrative Law on petitioner's application for emergent relief pursuant to *N.J.A.C.* 1:1-12.6; and the Administrative Law Judge

having read and considered the moving papers and having heard the arguments of counsel; and the Administrative Law Judge having found that petitioner has not met the requirements for the granting of emergent relief, and for other good cause shown

IT IS on this 13th day of June 1995

ORDERED that petitioner's request for emergent relief be and hereby is **DENIED**; and it is further

ORDERED that a hearing in this matter shall be held on July 10 and 11, 1995.

This Order Denying Emergent Relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this Order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this Order within forty-five days, this recommended Order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A. 52:14B-10*.

June 13, 1995
DATE



MARIE P. SIMONELLI, A.L.J.

6/13/95

Marie P. Simonelli


ROBERT SEYFARTH, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE TOWN- : DECISION ON MOTION
 SHIP OF CRANFORD, UNION COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge denying emergent relief as petitioner failed to establish the standards for emergent relief as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), which entitle him to be reinstated as high school principal pending a hearing on this matter.

Accordingly, the recommended decision of the Office of Administrative Law is adopted on this motion.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

283-95

IN THE MATTER OF THE TENURE :
HEARING OF BRAD DI RUPO, SCHOOL :
DISTRICT OF THE TOWNSHIP OF : COMMISSIONER OF EDUCATION
ROXBURY, MORRIS COUNTY. :
_____ :

DECISION

JULY 27, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

OAL DKT. NO. EDU 11489-94
AGENCY REF. NO. 426-10/94

**IN THE MATTER OF THE TENURE
HEARING OF BRAD DIRUPO, SCHOOL
DISTRICT OF THE TOWNSHIP OF
ROXBURY, MORRIS COUNTY.**

Russel Schumacher, Esq., for petitioner
(Rand, Algeier, Tosti & Woodruff, attorneys)

Sheldon H. Pincus, Esq., for respondent
(Bucceri & Pincus, attorneys)

Record Closed: June 13, 1995

Decided: June 19, 1995

BEFORE MARYLOUISE LUCCHI-McCLOUD, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on November 29, 1994 as a contested case pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*. The parties agreed to settle the matter and prepared the attached Stipulation of Settlement. Having reviewed the terms of the settlement, I

FIND:

1. The parties have agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the settlement be approved, and it is further **ORDERED** that the parties comply with the settlement terms and that the proceedings in this matter be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision on this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6/19/95
DATE



MARYLOUISE LUCCHI-McCLOUD, ALJ

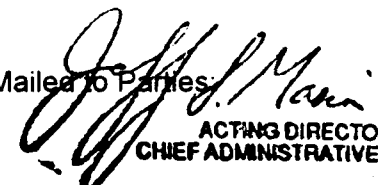
Receipt Acknowledged:

6/21/95
DATE

HCB

DEPARTMENT OF EDUCATION

JUN 22 1995
DATE

Mailed to Parties: 

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

am

REC'D
OFFICE
JUN 13 2 52 PM '95

BUCCHERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(201) 773-5665
Counsel for Respondent

-----		BEFORE THE COMMISSIONER
IN THE MATTER OF THE TENURE :		OF EDUCATION/OFFICE OF
		ADMINISTRATIVE LAW
HEARING OF BRAD DiRUPO, :		
		AGENCY REF. NO. 426-10/94
ROXBURY TOWNSHIP BOARD :		DOCKET NO. EDU 11489-94
OF EDUCATION, MORRIS COUNTY.:		

BRAD DiRUPO, :		BEFORE THE COMMISSIONER
		OF EDUCATION/OFFICE OF
Petitioner, :		ADMINISTRATIVE LAW
v. :		AGENCY REF. NO. 417-10/94
		DOCKET NO. EDU 10967-94
ROXBURY TOWNSHIP BOARD :		
OF EDUCATION, :		
Respondent. :		STIPULATION OF SETTLEMENT

WHEREAS, an administrative action was instituted by the Roxbury Township Board of Education, pursuant to N.J.S.A. 18A:6-10 et seq., certifying to the Commissioner of Education six (6) charges of conduct unbecoming a teaching staff member (inappropriate physical contacts with students, inappropriate remarks to students, failure to properly supervise students) against Brad DiRupo; and


WHEREAS, DiRupo filed an Answer denying the charges and raising affirmative defenses thereto; and

WHEREAS, DiRupo separately filed an administrative action, pursuant to N.J.S.A. 18A:29-14, alleging that the Roxbury Township Board of Education's determination to withhold his

IN THE MATTER OF THE TENURE :
HEARING OF BRAD DI RUPO, SCHOOL :
DISTRICT OF THE TOWNSHIP OF : COMMISSIONER OF EDUCATION
ROXBURY, MORRIS COUNTY. :
: DECISION
: _____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.


ACTING COMMISSIONER OF EDUCATION

JULY 27, 1995

DATE OF MAILING JULY 27, 1995

IN THE MATTER OF THE ANNUAL SCHOOL :
ELECTION HELD IN THE SCHOOL DISTRICT :
OF THE TOWNSHIP OF LAKEWOOD, :
OCEAN COUNTY. :

COMMISSIONER OF EDUCATION
DECISION

_____ :

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

The announced results of the balloting for three (3) members of the Board of Education for full terms of three (3) years each at the annual school election held on April 18, 1995 in the School District of the Township of Lakewood were as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Thomas F. Hampton	1,209	1,929	3,138
Warren Deutsch	1,037	1,909	2,946
David Yeger	929	1,875	2,804
Evelyn Feigin	2,606	177	2,783
Robert L. Ellis	2,212	118	2,330
Warren A. Sherard	1,475	52	1,527
Lawrence J. Lazzaro	499	60	559
David Marc Drukaroff	329	23	352

Pursuant to a letter request from Evelyn Feigin dated April 22, 1995 and perfected on April 25, 1995, the Commissioner directed his representative from the Office of the Ocean County Superintendent of Schools to conduct a recount of machine ballots cast for members of the Board pursuant to N.J.S.A. 18A:14-63.2. The machine recount was conducted on May 9, 1995 at the Ocean County Voting Machine Warehouse in Dover Township. A request was made to Superior Court for a recount of absentee ballots pursuant to N.J.S.A. 19:57-24, the results of which were three times challenged by petitioner, with a fourth recount scheduled to be held in mid-August.

At the conclusion of the machine recount and after the third recount of absentee ballots, the tally stood as follows:

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Thomas F. Hampton	1,216	1,934	3,150
Warren Deutsch	1,037	1,913	2,950
David Yeger	929	1,880	2,809
Evelyn Feigin	2,596	177	2,773
Robert L. Ellis	2,212	118	2,330
Warren A. Sherard	1,533	52	1,585
Lawrence J. Lazzaro	499	61	560
David Marc Drukaroff	329	23	352

As indicated, although there were changes in both the machine and absentee tallies on recount, the outcome of the election remained unaltered as of the date of this report.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions therein.

Accordingly, the Commissioner finds and determines that, as originally announced and subject to the outcome of the pending absentee ballot recount pursuant to N.J.S.A. 19:57-24, Thomas F. Hampton, Warren Deutsch, and David Yeger were elected to full terms of three years each on the Board of Education of the Township of Lakewood.

The Commissioner further directs that a copy of this decision be forwarded to the Office of Administrative Law for inclusion in the record of the inquiry presently pending into the conduct of the above-captioned election.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

July 28, 1995
 Date of Mailing, July 31, 1995

IN THE MATTER OF THE TENURE	:	
HEARING OF ALAN MORTON, SCHOOL	:	
DISTRICT OF THE CITY OF TRENTON,	:	
MERCER COUNTY.	:	
AND	:	
ALAN MORTON, PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY	:	COMMISSIONER OF EDUCATION
OF TRENTON, MERCER COUNTY,	:	
RESPONDENT.	:	DECISION
AND	:	
ALAN MORTON, PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY	:	
OF TRENTON, MERCER COUNTY,	:	
RESPONDENT.	:	
_____	:	

SYNOPSIS

In consolidated matter, Board certified tenure charges of unbecoming conduct, incompetence, insubordination and other just cause against respondent Assistant Secretary/Business Services; respondent also challenged abolishment of his position, alleging that the abolishment was tainted by the Board's perception that it was required to comply with the Fiscal Monitor's plan. Respondent further challenged the withholding of his increment for the 1992-93 school year.

ALJ found respondent was guilty of unbecoming conduct as he arranged to have no federal withholding income taxes taken from his salary payments and he gave himself a refund of prior withheld federal income tax moneys (negative withholding incidents). These actions were violations of Internal Revenue Code and State statutes and warranted removal from his position. Moreover, he failed to comply with directives of his superiors to improve his work performance, thus, constituting incompetence, neglect of duty and insubordination. For basically the same reasons as given for the tenure charges, the ALJ concluded that the withholding of respondent's 1992-93 school year salary increment was justified. ALJ found that respondent presented no proof to support his allegation that the Board's resolution abolishing his position was tainted.

Commissioner adopted findings and determination in initial decision and ordered respondent removed from his position, his increment for 1992-93 withheld and the abolishment of his position affirmed.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. EDU 1957-93,
EDU 9331-92 and EDU 10944-93
AGENCY DKT. NOS. 524-12/92,
453-9/92 and 361-10/93

**IN THE MATTER OF TENURE CHARGES
AGAINST ALAN MORTON, SCHOOL
DISTRICT OF THE CITY OF TRENTON,**

and

ALAN MORTON,

Petitioner,

v.

TRENTON BOARD OF EDUCATION,

Respondent,

and

ALAN MORTON,

Petitioner,

v.

TRENTON BOARD OF EDUCATION,

Respondent.

Paul H. Green, Esq., and Jacob Green, Esq., for the Trenton Board of Education (Green and Dzwilewski, attorneys)

Robert M. Schwartz, Esq., for Alan Morton (Lake and Schwartz, attorneys)

Record Closed: March 16, 1995

Decided: June 15, 1995

BEFORE BEATRICE S. TYLUTKI, ALJ:

This consolidated matter concerns the tenure charges filed against Alan Morton (hereinafter referred to as the respondent) (EDU 1957-93), the withholding of Mr. Morton's 1992-93 salary increment (EDU 9331-92), and the abolishment of Mr. Morton's position with the Trenton Board of Education (EDU 10944-93).

I - PROCEDURAL HISTORY

Tenure charges were filed by the Trenton Board of Education (hereinafter referred to as the Board) with the Commissioner of Education (Commissioner), on December 23, 1992, against Mr. Morton, who was employed as the assistant secretary/business services (assistant secretary). The tenure charges allege incompetency, neglect of duties, insubordination, misbehavior, official misconduct and unbecoming conduct. Robert M. Schwartz, Esq., on behalf of the respondent, filed an answer to the tenure charges on January 7, 1993. The matter was referred to the Office of Administrative Law (OAL) on March 5, 1993, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 (EDU 1957-93). In transmitting the matter to the OAL, the Commissioner suggested that the tenure matter be consolidated with the case involving the withholding of Mr. Morton's 1992-93 salary increment (EDU 9331-92).

The petition objecting to the withholding of Mr. Morton's 1992-93 salary increment was filed with the Commissioner on September 23, 1992. The petition alleges that this action was arbitrary, capricious and unreasonable, and the Board filed an answer denying the allegations on November 16, 1992. The matter was transmitted to the OAL on November 30, 1992, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

I had telephone conferences with the parties regarding EDU 1957-93 and EDU 9331-92 on February 16, 1993, and May 3, 1993, and it was decided that the matters should be consolidated. I issued a consolidation order on May 7, 1993, and a prehearing order on May 10, 1993.

5. James Bartolemei is the treasurer of school monies for the Trenton School District. Mr. Bartolemei also served as interim comptroller of the Trenton School District during the months of August and September 1991.
6. Miller's responsibilities as comptroller included supervision of Morton. An evaluation of Morton dated March 20, 1989, done by Miller's predecessor, David Shafter, is annexed to the tenure charges as Exhibit "D" and is submitted herewith as Exhibit J-5. Miller's first evaluation of Morton, dated March 6, 1990 (Exhibit "E" to the tenure charges), is submitted herewith as Exhibit J-6.
7. The parties consent to the entry of the following documents, which with the exception of J-39 were annexed to the tenure charges as lettered exhibits, into evidence as joint exhibits, provided that, where noted, the documents have been admitted into evidence as petitioner's (Board's) exhibits:

Charge

Exh. Joint Exh.

- | | | |
|---|-------|--|
| F | J-7: | Memorandum from Miller to Morton dated June 26, 1990 regarding his job performance; |
| G | J-8: | Memorandum from Miller to Morton regarding notification before taking any leaves; |
| H | J-9: | Memorandum from Miller to Morton dated September 28, 1990, re: payroll office; |
| I | | |
| J | J-11: | Memos, Miller to Morton, 2/27/90-10/1/90 re: telephone charges; |
| K | J-12: | Memo, Miller to Morton, dated 3/13/91 re: telephone bills; |
| L | J-13: | Memo, Miller to Morton, dated 5/16/91, with response by Morton dated 5/20/91; |
| M | J-14: | Memo, Miller to Morton and Mary Beth Graziano, re: A-148 Report; |
| N | J-15: | Memorandum, Miller to Morton dated February 11, 1991, re: FICA reimbursement; |
| O | J-16: | Memorandum, Miller to Morton dated February 11, 1991, re: payroll status report, with monthly report status; |
| P | J-17: | Memorandum, Miller to Morton dated February 11, 1991, re: January Status Report; |
| Q | J-18: | Payroll account printout, Alan Morton's salary, 1/5/90-11/22/91; |

- R J-19: Check dated 6/28/91, City of Trenton to Trenton Board of Education, in the amount of \$405,245.00;
- S
- T J-21: Letter dated October 28, 1991, from Board auditor Manuel S. Newman & Company to Thomas Morgan;
- U J-22: Morton's Withholding Allowance Certificate (Form W-4) dated 6/1/87, agreed to be the only Form W-4 filed with the District by Morton prior to his suspension;
- V
- X J-24: Extract from Board's October 30, 1991 agenda re: Morton's suspension;
- Z J-25: Bank Account Reconciliation Statements, 10/31/90-12/31/90, with memos from J. Bartolemei to I. Miller;
- AA J-27: Memorandum, J. Bartolomei to I. Miller Re: Bank Account Reconciliation, with 3/31/91 Reconciliation Statement and annotated memorandum;
- AC
- AD
- AE J-30: Memorandum, Miller to A. George dated 12/10/90 re: Treasurer;
J-39: Copy of Alan Morton's paycheck dated August 3, 1990.

8. A copy of Miller's second annual performance evaluation of Morton, dated June 25, 1991, is submitted herewith as Exhibit J-31.
9. By letter dated October 28, 1991, submitted herewith as Exhibit J-32, Thomas Morgan wrote to superintendent of schools Bernice Venable, recommending Morton's termination.
10. On October 28, 1991, Superintendent Venable wrote to the Trenton Board of Education president, recommending Morton's immediate suspension with pay. A copy of that letter is submitted herewith as Exhibit J-33. On October 30, 1991, the Board voted to suspend Morton with pay (See, Exhibit J-24).
11. The Negative Federal Withholding of Alan Morton on June 8, 1990, June 22, 1990, and July 20, 1990, came to the attention of the Board and the superintendent, Dr. Venable, only in October 1991 through information supplied at that time by the District's auditors to the assistant superintendent for business, Thomas Morgan, in connection with the 1990-91 audit, first verbally and then in an October 28, 1991 letter (Exhibit J-21).

12. On or about June 25, 1992, the Board voted to withhold Morton's employment and adjustment salary increments which would otherwise have become effective July 1, 1992. The reasons for the action were set forth in a letter to Morton from Thomas Morgan dated June 22, 1992, annexed to the tenure charges as Exhibit "Y" and submitted herewith as Exhibit J-34.
13. Tenure charges against Alan Morton were filed with the Board on or about November 25, 1992. Morton filed a written response on or about December 10, 1992, and on December 21, 1992, the Board voted to certify the charges to the Commissioner of Education and to suspend Morton without pay. Morton was paid through December 25, 1992, and his pay resumed, pursuant to N.J.S.A. 18A:6-14, on or about April 26, 1993.
14. As a result of its past failures to meet State standards for provision of a thorough and efficient education, the Trenton School District is at Level II in the monitoring system established under N.J.S.A. 18A:7A-14.
15. On or about February 1, 1993, the Commissioner of Education of New Jersey appointed Edward Kent as a State external auditor to review the respondent's fiscal operations.
16. On or about April 7, 1993, the Trenton Board of Education was served with an Order to Show Cause and Verified Petition issued by the office of the Attorney General of New Jersey on behalf of Robert W. Davis, Assistant Commissioner, Division of Finance, New Jersey Department of Education, and Elena Scambio, Assistant Commissioner for Urban and Field Services, New Jersey Department of Education. A copy of the Order to Show Cause and Verified Petition is submitted herewith as Exhibit J-35.
17. The aforesaid Petition cited multiple deficiencies in the fiscal management of the Trenton School District and sought the appointment by the Commissioner of

Education of a fiscal monitor “to oversee and control the fiscal operations” of the Trenton Board of Education.

18. On or about April 7, 1993, the Trenton Board of Education entered into a Stipulation of Consent to Entry of Administrative Order, in which the Board consented to the entry of an Administrative Order granting the relief sought in the Petition. A copy of the Stipulation of Consent is submitted herewith as Exhibit J-36. A copy of a Resolution adopted by the Trenton Board of Education on April 7, 1993, with respect to the appointment of a fiscal monitor is submitted herewith as Exhibit J-37.
19. On or about May 7, 1993, the Commissioner of Education issued an Administrative Order establishing the Office of Fiscal Monitor to oversee and control the respondent’s fiscal operations. A copy of the Administrative Order is submitted herewith as Exhibit J-38.
20. On or about May 7, 1993, the Commissioner of Education appointed Elizabeth DeMatteo as the fiscal monitor to oversee respondent’s fiscal operations. Ms. DeMatteo officially commenced service as fiscal monitor on or about May 10, 1993.
21. In May 1993, the Board, upon the recommendation of the fiscal monitor, retained the accounting firm of Deloitte & Touche to review the District’s business operations, to identify areas of deficiencies and to make recommendations to assist the Board and the fiscal monitor in correcting such deficiencies.
22. Morton received a *Rice* notice from the Trenton School District on or about May 26, 1993, advising him that the Board would be considering the abolition of his position at its May 27, 1993 meeting.
23. At a public meeting of the Board held on May 27, 1993, Fiscal Monitor DeMatteo read into the record her recommendation to abolish four business office positions:

assistant secretary/business services (Morton's position), assistant purchasing agent/operations, assistant purchasing agent/stock and inventory control, and business services assistant/payroll. The Board president requested a vote on the recommendation, whereupon the Board approved the fiscal monitor's recommendations.

24. At a meeting held on June 7, 1993, the Board adopted a resolution approving the newly created job positions of payroll supervisor, purchasing agent, senior accountant and junior accountant. A copy of the minutes of that meeting, including job descriptions for the new positions, is submitted herewith as Exhibit J-40.
25. Morton's position was abolished effective June 30, 1993, together with the other positions mentioned in paragraph 23, and that is the last date through which Morton has received compensation from the Board.

III - TENURE CHARGES

Six tenure charges were filed against Mr. Morton. I will consider these charges grouped together in two subsections, namely (A) unbecoming conduct and (B) the other charges. Each of the subsections will contain the pertinent findings of fact and conclusions of law.

A - Unbecoming Conduct

The prime basis for the tenure charges alleging misbehavior, official misconduct and unbecoming conduct is the fact that Mr. Morton arranged to have no federal withholding income taxes taken from his salary payments for June 8, June 22, July 20 and August 3, 1990, and on one occasion gave himself a refund of prior withheld federal income tax monies (negative withholding incidents) (J-18). Mr. Morton did this without seeking approval from his superior and without filing a new federal W-4 form. After the August 3, 1990 check was generated for the respondent (J-39), Isabel Miller, the then comptroller, was informed by the payroll section, and she voided the check and informed Andrew George, the then superintendent for business. Ms. Miller and Mr.

George met with the respondent, told him that he was wrong, and told him that he should not provide for negative withholdings in the future. Mr. Morton complied with this directive. Right after this meeting, the matter was reported to the Board's attorney, Thomas Summer, Esq., who checked with the Internal Revenue Service (IRS). Apparently, the IRS decided that the amount of money involved, \$3,002.00, did not warrant any action.

At the time of the negative withholding incidents, neither Ms. Miller nor Mr. George recommended any formal action be taken against Mr. Morton. No mention of the negative withholding incident was made in Ms. Miller's evaluation of Mr. Morton. David Shafter, the respondent's former supervisor, testified that he considered it wrong for the respondent to change the amount withheld from his checks for federal income tax purposes. He stated that negative withholdings had been done previously within the Trenton School District; however, such refunds were only given to correct prior errors as to the amount to be withheld.

Ms. Miller advised the Board's auditors about the negative withholding incidents, and the Board itself became aware of the respondent's action in October 1991, following receipt of the audit report. Mr. Morton was suspended with pay on October 30, 1991 (J-24). However, it was not until November 5, 1992, that formal tenure charges were initiated against Mr. Morton. Thereafter, the Board suspended Mr. Morton without pay on December 25, 1992, and his salary payments resumed on April 26, 1993, pursuant to N.J.S.A. 18A:6-14.

During the hearing, Mr. Morton claimed he did nothing wrong; however, he admitted that there was no procedure for negative withholdings and that if another employee had requested that this be done, he would have denied the request.

On behalf of the respondent, Mr. Schwartz argued that the negative withholding incidents were not misappropriations or manipulations, but rather reimbursements of excess withholdings which the respondent would have received after he filed his federal income tax return. Mr. Schwartz questioned whether the respondent's action violated the Internal Revenue Code. He argued that even if the incidents were a lapse of good judgment, they did not constitute unbecoming conduct.

On behalf of the Board, Mr. Green argued that the negative withholding incidents were improper misappropriations of trust funds and that the respondent's action is equivalent to a second degree crime of official misconduct, N.J.S.A. 2C:30-2, and/or theft by failure to make the required disposition of property, N.J.S.A. 2C:20-9. Mr. Green stated that if Mr. Morton had been convicted of violations of N.J.S.A. 2C:30-2 and/or N.J.S.A. 2C:20-9, he would have automatically forfeited his position pursuant to N.J.S.A. 2C:51-2. See, Trenton Bd. of Educ. v. Hall, 1986 S.L.D. 2213; In re the Tenure Hearing of Emil J. Guasconi, 1977 S.L.D. 513.

Mr. Green stated that the Internal Revenue Code requires employers to deduct and withhold an income tax payment determined in accordance with tables and procedures prescribed in 26 U.S.C.A. §3402(a). The amount of the withholding is in part based on the number of exemptions claimed by the employee on the Form W-4, which the employer must furnish to the employee, 26 U.S.C.A. §3402(f). The appropriate method for adjusting the amount of federal tax withheld from a paycheck is to file a revised W-4 form, assuming the employee is eligible to claim a revised number of withholding allowances. Also, by law, such a withholding adjustment is prospective only and there is no provision allowing a retroactive adjustment. Mr. Green argued that because of his position, Mr. Morton should have been familiar with the federal income tax withholding requirements.

Mr. Green argued that the respondent could have filed a revised W-4 form, and that he did not do so since he found it preferable to give himself lump sum reimbursements. As a result of the negative withholding incidents, payments were made to the respondent from funds that had been earmarked for the IRS, and there was a shortfall in the amount the Board paid to the IRS. The funds earmarked for payment to the IRS have been clearly identified as funds in trust, 26 U.S.C.A. §7501(a); Slodov v. United States, 436 U.S. 238, 243, 56 L. Ed. 2d 251, 259, 98 S. Ct. 1778, ____ (1978). Mr. Green stated that the Internal Revenue Code provides for both criminal and civil penalties for the type of impropriety committed by Mr. Morton, 26 U.S.C.A. §§ 6672(a) and 7202, and the fact that the IRS elected not to pursue the matter does not mean that there was no violation of the law.

Mr. Green argued that the appropriate penalty for negative withholding incidents is removal. He noted that the Commissioner has repeatedly affirmed the importance of holding school district personnel to a high standard of honesty, In re the Tenure Hearing of Louis Cirangle, 1980 S.L.D. 82, aff'd, No. A-3967-79A (App. Div. Jan. 30, 1981), certif. denied, 87 N.J. 347 (1981), and that the Commissioner has consistently required the dismissal of staff members who have misappropriated funds for their own use, In re the Tenure Hearing of Martin Groppi, 1970 S.L.D. 159, In re the Tenure Hearing of Abraham Altschuler, 1978 S.L.D. 419, aff'd, State Bd. of Educ., 1978 S.L.D. 427. Mr. Green noted that Mr. Morton occupied a supervisory position relating to payroll and other financial matters and that his deliberate and willful violations warrant the termination of his employment. Mr. Green argued that the important element here is the improper conversion of monies for his own use and not the amount of money involved or the number of times he did it. See, In re the Tenure Hearing of Gerald DePasquale, 92 N.J.A.R. 2d (Vol. 4A) 537 (Education), aff'd, No. A-4236-92 (App. Div. March 31, 1994). The courts have recognized that a single incident of unbecoming conduct, if sufficiently flagrant, can be sufficient grounds for removal. Redcay v. State Bd. of Educ., 130 N.J.L. 369, 371 (Sup. Ct. 1943), aff'd, 131 N.J.L. 326 (E. & A. 1944); In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967). Mr. Green argued that the respondent on four occasions willfully misappropriated trust funds, and that this action along with his failure to see that he did anything wrong clearly demonstrates his unfitness for his position.

Having considered the arguments of the parties, I agree with Mr. Green's arguments and I **CONCLUDE** that the respondent's negative withholding actions constituted unbecoming conduct as well as violations of the Internal Revenue Code and the State statutes, and that his action warrants removal from his position.

As part of the unbecoming conduct charges, the Board included allegations regarding late federal withholding deposits, late check deposits, and failure to make prompt adjustment entries. These allegations will be considered in the next subsection.

B - Other Charges

In this subsection I will consider the charges of incompetency, neglect of duty, and insubordination. As to these charges, the Board relies on the stipulated facts and exhibits, and the testimony of Ms. Miller and James A. Bartolomei.

As part of the stipulation of facts, as supplemented by the testimony during the hearing, it was established that Mr. Morton started to work for the Board on January 6, 1986, in the position of business services assistant/payroll (payroll supervisor) (J-1), and his immediate supervisor was Mr. Shafter, who at that time held the position of assistant secretary (J-2, J-3). When Mr. Shafter was promoted to the comptroller position (J-4), Mr. Morton served temporarily in the position of assistant secretary, while still holding the full-time position of payroll supervisor. On January 4, 1988, Mr. Morton was promoted to assistant secretary; however, he continued to have both jobs until July 25, 1988, when Ms. Miller was hired as the payroll supervisor. Mr. Morton trained Ms. Miller, and from July 25, 1988, through November 1989, Ms. Miller worked under Mr. Morton.

From January 1986 through December 1, 1989, Mr. Morton was supervised by Mr. Shafter and he performed the specific duties assigned to him by Mr. Shafter. Mr. Shafter testified that the respondent was not specifically trained for all the job responsibilities of the assistant secretary position. The respondent was evaluated by Mr. Shafter, who testified that Mr. Morton did his job very well and that in his written evaluations he rated Mr. Morton as an excellent employee (J-5).

On December 1, 1989, Ms. Miller was promoted to the position of comptroller after Mr. Shafter left to take a position with another school district. Ms. Miller became Mr. Morton's supervisor, and she admitted that the transition was awkward since she went from being his subordinate to being his supervisor. In her first written evaluation of the respondent she gave him a generally satisfactory rating. In this evaluation (J-6), Ms. Miller stated, "Alan is a very intelligent and capable employee. His work reflects a high degree of accuracy, but he needs to develop a higher regard of deadlines and organizational skills." Also in this evaluation she stated, "Alan has valuable input as to goals and improvements in the business services area. Now he needs to concentrate his efforts on his interpersonal skills to be able to communicate his

expectations to staff members.” Ibid. Ms. Miller testified that in preparing Mr. Morton’s evaluation she looked at his prior evaluations (J-5), and was surprised that they were so favorable; she felt that they did not reflect his actual work performance. Rather than being completely negative in her evaluation, Ms. Miller decided to stress the two most important areas needing improvement and she gave Mr. Morton unsatisfactory ratings in those areas. Ms. Miller gave the respondent satisfactory ratings in all other areas, even though she felt that there were other areas that needed improvement and that his performance was poorer than reflected on her evaluation.

Ms. Miller stated that the respondent’s work performance did not improve even after she had numerous discussions with him. In a memorandum to the respondent dated June 26, 1990 (J-7), Ms. Miller listed the following major areas of concern regarding the respondent’s performance:

1. Refusal to supervise or work with payroll staff for whom you are responsible.
2. Attitude towards: (1) employees’ payroll and pension concerns; (2) staff members and (3) supervisor.
3. Disregard for deadlines and for planning work efficiently.
4. Manner in which personal absence days are taken.

Also by this memorandum, Ms. Miller warned Mr. Morton that if there was no improvement she would put a letter of reprimand into his personnel file. According to Ms. Miller, the respondent did not dispute that work was not being done, but insisted that he did not have enough time to do everything. In addition, Ms. Miller sent the respondent memoranda criticizing him for failing to give advance notice prior to taking a day off (J-8); criticizing his failure to perform some year-end payroll duties (J-9); and criticizing his failure to review telephone charges (J-11, J-12, J-13, P-1).

On February 11, 1991, Ms. Miller sent Mr. Morton a memorandum criticizing the fact that the last three FICA reimbursements had not yet been submitted (J-15), and memoranda noting that the respondent was late submitting status reports (J-16, J-17). Ms. Miller stated that the 1990-91 school year audit (J-21) revealed a number of payroll errors which were directly attributable to the respondent.

Both Mr. Bartolomei, the then treasurer of school monies, and Ms. Miller testified that the respondent failed to make timely adjustments to the warrant accounts (J-25, J-26, J-27). As the assistant secretary, the respondent was responsible for the warrant accounts. Mr. Bartolomei stated that he spoke to Ms. Miller about the respondent's failure to make timely adjustments, and that both of them would talk to the respondent every time there was a long delay. The importance of checking the accounts promptly was stressed by Mr. Bartolomei. According to Mr. Bartolomei, the respondent did not catch up until just before the auditors came in for the 1990-91 school year audit.

Also, Ms. Miller stated that the respondent was continuously late in depositing checks sent to the Board, which raised concerns regarding the safeguarding of the checks and loss of interest. In the summer of 1991, Mr. Bartolomei became concerned when he found a stack of undeposited checks. Mr. Bartolomei wanted the checks deposited daily, but agreed to having the deposits made bi-weekly (J-30). According to Mr. Morton, the delay was due to the fact that he was too busy and there was a need to code the checks for budget allocation before depositing them. It was suggested to the respondent that the checks could be coded after the deposits were made. Ms. Miller stated that the respondent still failed to make timely deposits, and as an example cited the fact that a check dated June 28, 1991, from the City of Trenton for \$405,245 was not deposited until an inquiry was made about it around July 25, 1991 (J-19). Mr. Morton stated that the check had been misplaced and when he found out about it, the check was found and deposited.

During the hearing, Ms. Miller testified that Mr. Morton spent too much time personally doing payroll tasks which should have been performed by his subordinates, and because of this he was late fulfilling his own responsibilities and he failed to devote enough time to his supervisory duties. According to Ms. Miller, the respondent could not or would not act as a supervisor; he had a negative approach to his subordinates and seemed unable to give them orders.

In answer to these charges, Mr. Morton testified that for most of the time that Ms. Miller was his supervisor he was performing two jobs and he was having difficulty doing both jobs. A replacement for Ms. Miller for the payroll supervisor title was not hired until March 1990, and it

took him several months to train the replacement, Mr. Amari. According to the respondent, Mr. Amari did not do a good job and the respondent had to personally perform many of the responsibilities of the payroll supervisor's position. Mr. Amari was terminated in October 1990. Several months later, Belinda Pinkney was hired for the payroll supervisor position and the respondent had to train her. The respondent said he felt that he was being asked to do too many things.

Ms. Miller testified that she recognized that the respondent was having problems, and she told the respondent what tasks he was to accomplish and the priority to be given to the tasks. According to Ms. Miller, the respondent continued to spend too much time on tasks that he should have delegated and not enough time on tasks that were critical to the proper administration of the office, *i.e.*, making sure that federal withholding deposits were made on a timely basis, making sure that checks received by the Board were deposited timely, and making prompt adjustments to the Board's accounts.

In Ms. Miller's second formal evaluation of the respondent she rated his performance as basically satisfactory and indicated that there were improvements (J-31). However, according to Ms. Miller, she was still not satisfied with the respondent's performance and the evaluation did not accurately reflect her opinion of the respondent's job performance. She said that when she prepared the evaluation she knew she was leaving, and she decided it was not worthwhile to give the respondent a bad performance rating. Ms. Miller left her position as comptroller in late July 1991, to take a position with another school board.

After Ms. Miller left, Mr. Bartolomei was the acting comptroller in August and September 1991. Mr. Bartolomei stated that as comptroller he had to do a lot of the work which normally would have been performed by the person in the respondent's title. Mr. Bartolomei spoke to the respondent about his work performance and the fact that he spent too much time doing payroll work rather than delegating the work to a subordinate.

On behalf of the respondent, Mr. Schwartz argued that Ms. Miller gave the respondent two satisfactory evaluations, and in the second evaluation she stated that the respondent's performance had improved (J-31). Mr. Schwartz questioned Ms. Miller's credibility and argued

that during her testimony Ms. Miller discounted the written evaluations by Mr. Shafter and herself and indicated that the respondent's performance was poor and that there had been no improvement.

Mr. Schwartz argued that the Board had not proven incompetency. The courts have recognized that in order to prove incompetency, a Board must show that the employee was not physically and/or mentally capable of performing his duties or that he was so incompetent that he was incapable of improving his performance. See, In re the Tenure Hearing of Nancy Bacon, 1978 S.L.D. 776; In re the Tenure Hearing of Blanche Sheets, 1979 S.L.D. 790, rev'd, Comm'r of Educ., 1979 S.L.D. 800, rev'd, State Bd. of Educ., 1980 S.L.D. 1536.

Mr. Schwartz argued that the Board really wanted to charge Mr. Morton with inefficiency; however, such a charge by law requires giving the employee a ninety-day period for improvement prior to filing the tenure charges, N.J.S.A. 18A:6-11, and Mr. Morton was not given the ninety-day period for improvement before he was suspended.

Mr. Schwartz asserted that the charges of neglect of duty and insubordination are really part of the Board's allegation of inefficiency and were included as separate charges since the Board had not given the respondent the ninety-day period for improvement. As to these charges, Mr. Schwartz argued that both Mr. George and Mr. Shafter testified that they considered the respondent's performance to be acceptable and that the respondent was never put on notice by Ms. Miller that she found his performance to be substantially unacceptable. Mr. Schwartz argued that an employee has the right to know that the employer is substantially unhappy with his or her performance prior to the initiation of tenure charges, and Ms. Miller admitted that she never expressed the extent of her dissatisfaction in either of her written evaluations of the respondent.

Mr. Green disagreed and argued that the respondent's deficiencies as shown by the testimony and exhibits clearly constitute incompetency. Mr. Green argued that case law has established that a school district can establish incompetency by showing that an employee has failed to carry out his or her job responsibilities over a period of time notwithstanding corrective action recommended by supervisors, In re the Tenure Hearing of Laura Frazier, 1980 S.L.D. 234; In re the Tenure Hearing of David Herbst, 1980 S.L.D. 930, aff'd, State Bd. of Educ., 1981

S.L.D. 1438; In re the Tenure Hearing of Inez McRae, 1977 S.L.D. 572, aff'd, State Bd. of Educ., 1977 S.L.D. 584. Mr. Green argued that the respondent was unable to perform many important job functions even after Ms. Miller had discussions with him regarding these responsibilities, and that Mr. Morton's incompetency warrants his removal.

Mr. Green further argued that the respondent's conduct also constituted neglect of duty since he did not perform the work responsibilities assigned to him, and that the respondent's overall conduct constituted insubordination since he not only did not perform his work responsibilities, he failed to comply with suggestions and directives issued to him both by Ms. Miller and Mr. Bartolomei. In support of his position, Mr. Green cited Board of Educ. of Boro of Edgewater v. Scarpignato, 1983 S.L.D. 311, aff'd as modified, State Bd. of Educ., 1983 S.L.D. 338, aff'd, App. Div., 1984 S.L.D. 2013; In re the Tenure Hearing of Joseph A. Maratea, 1966 S.L.D. 77, aff'd, State Bd. of Educ., 1966 S.L.D. 106, aff'd, App. Div., 1967 S.L.D. 351.

Having reviewed the testimony of the witnesses, I **FIND** the testimony of Ms. Miller and Mr. Bartolomei to be credible. It is clear from their testimony that the respondent was comfortable with his responsibilities as payroll supervisor, and was reluctant to delegate these responsibilities to subordinates so that he could fulfill the responsibilities of the assistant secretary position. Although Mr. Morton received two generally favorable evaluations from Ms. Miller, the facts show that Ms. Miller clearly conveyed to the respondent her dissatisfaction with his work performance by memoranda and oral communications.

I **FIND** that the respondent failed to comply with the directives given to him by Ms. Miller and Mr. Bartolomei, and that he could have completed the tasks assigned to him in a timely manner if he had correctly allocated his time. I **CONCLUDE** that the respondent's failure to comply with the numerous suggestions of his superiors and his failure to respond to criticisms of his work performance constitute incompetency, neglect of duty and insubordination and that removal of the respondent from his position as assistant secretary is warranted.

IV- LATCHES

Mr. Schwartz argued that the tenure charges should be dismissed on the basis of latches. All of the tenure charges are based on the respondent's conduct in 1990-91, and the Board did not file tenure charges with the Commissioner until December 1992. Mr. Schwartz acknowledged that the Board may not have been informed of the negative withholding incidents immediately following their occurrence; however, the Board knew about the incidents when it suspended the respondent on October 30, 1991, and Mr. Schwartz argued that there is no justification for the Board to have waited until the end of 1992 to file the tenure charges.

Mr. Schwartz argued that the doctrine of latches is intended to discourage the filing of stale charges, in part because of the recognition that with the passage of time there may be changes of circumstances and a stale charge could result in an injustice to the individual against whom the charge is filed. See, Clark v. Judge, 84 N.J. Super. 35 (Ch. Div. 1964), aff'd, 44 N.J. 550 (1965). According to Mr. Schwartz, Mr. Morton was prejudiced by the delay since he was out of work for a substantial period of time, thereby preventing him from showing the Board that he could perform his job in a satisfactory manner.

In response, the Board argued that the respondent has not proven that latches is applicable in this matter. Mr. Green stated that the respondent did not introduce any evidence during the hearing to show that the Board unreasonably delayed the filing of the tenure charges. Also, latches requires more than a showing of mere passage of time; it is also necessary for the respondent to show that he has been prejudiced as a result of any such delay, Fischer v. Woodbridge Bd. of Educ., 1965 S.L.D. 40; Allstate Ins. Co. v. Howard Sav. Inst., 127 N.J. Super. 479 (Ch. Div. 1974). Mr. Green noted that the only argument presented by the respondent regarding prejudice was his allegation that if he had not been suspended he would have continued to work and perhaps would have been able to show that he could adequately perform the duties of his title. Mr. Green argued that this is pure speculation, and based on the respondent's performance before his suspension, it was reasonable to infer that there would have been little or no improvement in the respondent's work performance.

Although I agree that substantial time elapsed between Mr. Morton's suspension and the filing of tenure charges, I agree with Mr. Green's argument that the respondent has failed to show any prejudice. Therefore, I **CONCLUDE** that the defense of laches is not applicable.

V - WITHHOLDING OF SALARY INCREMENT

By letter dated June 22, 1992, Mr. Morton was informed by Thomas J. Morgan, assistant superintendent/business administration/board secretary, that a recommendation would be made to the Board to withhold his salary increment due to unsatisfactory performance. Specifically, Mr. Morgan stated that the respondent had failed to perform many important duties of his position, had failed to make timely federal payroll tax deposits resulting in assessments of penalties totaling \$271,652.42, had failed to make timely deposits of checks received by the Board, had submitted an inaccurate and misleading report which was given to the Board, had failed to supervise staff, and had exhibited an uncaring and lackadaisical attitude toward his job responsibilities (J-34). On or about June 25, 1992, the Board voted to withhold the respondent's salary increment for the 1992-93 school year.

The respondent's salary increment was withheld for basically the same reasons as given for the tenure charges, and since I have concluded that the tenure charges have been sustained, I **CONCLUDE** that the withholding of the respondent's 1992-93 school year salary increment is also justified.

VI - ABOLISHMENT OF RESPONDENT'S POSITION

On or about May 7, 1993, the Commissioner issued an administrative order establishing the Office of Fiscal Monitor to oversee and control the Board's fiscal operations (J-35, J-36, J-37). Prior to taking this action, the Commissioner had appointed Edward Kent to audit the Board's fiscal operations and he issued a report finding a number of deficiencies.

Elizabeth DeMatteo was appointed fiscal monitor on May 7, 1993 (J-38). Mr. Kent told Ms. DeMatteo that there were numerous financial problems in the business office. Based on her

own inquiries, Ms. DeMatteo concurred with Mr. Kent's evaluation of the business office, especially the need for a separate accounting section. Ms. DeMatteo determined that there was a need to reorganize the Board's business office (J-41, J-42, J-45), and, as part of this reorganization, Ms. DeMatteo recommended the abolishment of several positions, including the respondent's position. On May 27, 1993, the Board abolished the positions recommended by Ms. DeMatteo (J-43, J-44), and on June 7, 1993, the Board created the positions recommended by Ms. DeMatteo (J-40, J-44).

At the time the Board abolished the respondent's position, he was suspended with pay pursuant to N.J.S.A. 18A:6-11, pending the outcome of his appeal regarding the tenure charges. The respondent's position was abolished as of June 30, 1993, and his salary payments ceased as of July 1, 1993.

In support of his position that the abolishment of the respondent's position was tainted, Mr. Schwartz noted that Ms. DeMatteo took the position that she had the authority to reorganize, including the right to abolish positions (see, J-43, J-35). He argued that the administrative order creating her position (J-38) did not give her this authority and that the law clearly places that responsibility in the hands of the Board, N.J.S.A. 18A:7A-15. According to Mr. Schwartz, it is reasonable to assume that the Board also thought that Ms. DeMatteo had the authority since it adopted Ms. DeMatteo's reorganization plan on the same day that it was submitted to the Board. In support of his position, the respondent cited Dearden v. Trenton Bd. of Educ., 1990 S.L.D. 1391, aff'd, State Bd. of Educ., 1991 S.L.D. 2536. In that case, the Commissioner ordered the Board to recreate Mr. Dearden's position after the Commissioner concluded that the superintendent had recommended that the position be abolished under the mistaken impression that the mayor wanted him to abolish the position. Mr. Schwartz argued that Mr. Morton is likewise entitled to have his position recreated.

Mr. Green argued that the respondent has failed to show that the abolition of his position was arbitrary, capricious or unreasonable. The courts have recognized that when a board has abolished a position and terminated the person holding it, such a decision is presumed correct and will not be set aside unless it is shown to be arbitrary, capricious or unreasonable, Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288 (App. Div. 1960); Thomas v. Morris Tp. Bd. of Educ.,

89 N.J. Super. 327 (App. Div. 1965), aff'd, 46 N.J. 581 (1966); Quinlan v. North Bergen Tp. Bd. of Educ., 73 N.J. Super. 40 (App. Div. 1962). Mr. Green argued that Ms. DeMatteo's recommendations were based on her observations and business judgment and were solely a good faith effort to correct and improve the efficiency of the business office. According to Mr. Green, there was no evidence of any intent to single out the respondent's position for abolishment and no evidence that the respondent's responsibilities, en masse, were transferred to another position. Also, Mr. Green argued that there was no proof that the Board thought that Ms. DeMatteo had the right to abolish positions without Board action.

I **FIND** that the respondent has not presented any persuasive proof to support his position that the Board's adoption of Ms. DeMatteo's reorganization plan, including the abolishment of the respondent's position, was tainted by a perception that the Board had to comply with Ms. DeMatteo's plan. None of the members of the Board testified and the respondent's argument is based solely on the fact that the Board acted quickly to adopt Ms. DeMatteo's plan. The facts in this matter are clearly distinguishable from those in Dearden. In that case, the superintendent and members of the Board testified and based on their testimony a decision was made as to what motivated the Board's action. No such testimony was presented in this case and an equally persuasive argument can be made that the Board would not have voted on the plan if the members thought that Ms. DeMatteo had the authority to reorganize without their approval.

Also, I agree with Mr. Green's argument that there was no proof presented that there was any attempt to single out the respondent's position in the reorganization plan or that the plan was arbitrary, capricious or unreasonable.

Therefore, I **CONCLUDE** that the Board legally adopted a resolution which included the abolishment of the respondent's position.

VII - ORDER

Based on my conclusions herein stated, I **ORDER** that:

- (1) The respondent be removed from his position as assistant secretary based on the tenure charges filed against him;
- (2) The respondent's salary increment for the 1992-93 school year be withheld; and
- (3) The abolishment of the respondent's position be affirmed.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 15, 1995
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

6/15/95
DATE

Hope R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 21 1995
DATE

Jeff S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

Joint Exhibits:

- J-1 Job description for the position of business services assistant/payroll
- J-2 Job description for the position of assistant secretary/business services
- J-3 Job responsibilities for the position of assistant secretary/business services
- J-4 Job description for the position of comptroller
- J-5 Performance evaluation of the respondent, dated March 17, 1989, prepared by David Shafter
- J-6 Performance evaluation of the respondent, dated March 6, 1990, prepared by Isabel Miller
- J-7 Memorandum from Isabel Miller to the respondent, dated June 26, 1990
- J-8 Memorandum from Isabel Miller to the respondent, dated June 26, 1990
- J-9 Memorandum from Isabel Miller to the respondent, dated September 28, 1990
- J-10 Marked for identification only
- J-11 Memoranda from Isabel Miller to the respondent
- J-12 Memorandum from Isabel Miller to the respondent, dated March 13, 1991
- J-13 Memorandum from Isabel Miller to the respondent, dated May 16, 1991, and the response by the respondent, dated May 20, 1991
- J-14 Memorandum from Isabel Miller to the respondent and Mary Beth Graziano, dated October 18, 1990
- J-15 Memorandum from Isabel Miller to the respondent, dated February 11, 1991
- J-16 Memorandum from Isabel Miller to the respondent, dated February 11, 1991
- J-17 Memorandum from Isabel Miller to the respondent, dated February 11, 1991
- J-18 Payroll account printout regarding the respondent's salary for the period January 5, 1990, through November 22, 1991
- J-19 Check, dated June 28, 1991, from the City of Trenton to the Trenton Board of Education
- J-20 Marked for identification only
- J-21 Letter from Manuel S. Newman & Company to Thomas Morgan, dated October 28, 1991

- J-22 Respondent's Withholding Allowance Certificate (Form W-4), dated June 1, 1987
- J-23 Marked for identification only
- J-24 Part of the agenda of the October 30, 1991 meeting of the Trenton Board of Education
- J-25 Bank account reconciliation statements dated October 31, 1990, November 30, 1990, and December 31, 1990, with memoranda from James Bartolomei to Isabel Miller
- J-26 Bank account reconciliation statement dated January 31, 1991
- J-27 Memorandum from James Bartolomei to Isabel Miller, dated June 6, 1991, with attachments
- J-28 Marked for identification only
- J-29 Marked for identification only
- J-30 Memorandum from Isabel Miller to Andrew George, dated December 10, 1990
- J-31 Performance Evaluation of the respondent, dated June 25, 1991, prepared by Isabel Miller
- J-32 Letter to Dr. Bernice Venable from Thomas Morgan, dated October 28, 1991
- J-33 Letter to Juanita Joyner from Dr. Bernice Venable, dated October 28, 1991
- J-34 Letter to the respondent from Thomas Morgan, dated June 22, 1992
- J-35 Order to Show Cause and Verified Petition issued by the Office of the Attorney General of New Jersey, on behalf of Robert W. Davis, Assistant Commissioner, Division of Finance, New Jersey Department of Education, and Elena Scambio, Assistant Commissioner for Urban and Field Services, New Jersey Department of Education
- J-36 Signed Stipulation of Consent to Entry of Administrative Order
- J-37 Resolution adopted by the Trenton Board of Education on April 7, 1993, with respect to the appointment of a fiscal monitor
- J-38 Administrative order issued by the Commissioner of Education establishing an Office of Fiscal Monitor to oversee and control the Board's fiscal operations
- J-39 A copy of the respondent's paycheck dated August 3, 1990
- J-40 Resolution adopted by the Trenton Board of Education on June 7, 1993, approving the creation of the positions of payroll supervisor, purchasing agent, senior accountant and junior accountant

- J-41 Table of Organization, dated September 18, 1995
- J-42 Letter from Elizabeth E. DeMatteo to Dr. Bernice P. Venable and Trenton Board of Education members, dated May 17, 1993
- J-43 Agenda for discussion with the Board, dated May 24, 1993
- J-44 Memorandum from Elizabeth E. DeMatteo to Dr. Bernice P. Venable and the Trenton Board of Education members, dated May 27, 1993
- J-45 Memorandum from Elizabeth DeMatteo to Dr. Barbara Anderson, dated May 27, 1993, with attachment

For the Petitioner, Trenton Board of Education:

- P-1 Letter from Donald Wollman to all principals and directors, dated January 16, 1990
- P-2 Marked for identification only
- P-3 Bank statement of the Trenton Board of Education with the United Jersey Bank, dated October 31, 1989
- P-4 Bank statement of the Trenton Board of Education with the United Jersey Bank, dated June 29, 1990
- P-5 Bank deposit slips

For the Respondent, Alan Morton:

- R-1 Marked for identification only

OAL DKT. NOS. EDU 1957-93, EDU 9331-92 and EDU 10944-93

WITNESSES:

For the Petitioner, Trenton Board of Education:

Isabel Miller

Andrew George

James A. Bartolomei

For the Respondent, Alan Morton:

Andrew George

David Shafter

Alan Morton

Elizabeth E. DeMatteo

OAL DKT. NOS. EDU 1957-93, 9331-92, 10944-93 (CONSOLIDATED)

IN THE MATTER OF THE TENURE	:	
HEARING OF ALAN MORTON, SCHOOL	:	
DISTRICT OF THE CITY OF TRENTON,	:	
MERCER COUNTY.	:	
	:	
AND	:	
	:	
ALAN MORTON,	:	
	:	
PETITIONER,	:	
	:	
V.	:	
	:	
BOARD OF EDUCATION OF THE CITY	:	
OF TRENTON, MERCER COUNTY,	:	COMMISSIONER OF EDUCATION
	:	
RESPONDENT.	:	DECISION
	:	
AND	:	
	:	
ALAN MORTON,	:	
	:	
PETITIONER,	:	
	:	
V.	:	
	:	
BOARD OF EDUCATION OF THE CITY	:	
OF TRENTON, MERCER COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent Morton requested and was granted an extension,

until noon on Friday, July 7, 1995, for the filing of exceptions in this matter. These and the Board's reply thereto were timely filed.

Respondent Morton's exceptions essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ). The Commissioner determines that each of these issues was fully and fairly considered and addressed by the ALJ in her initial decision and need not be herein reiterated.

Upon a careful and independent review of the record, including transcripts of the five days of hearings in this matter at OAL, the Commissioner concurs with the findings and conclusions of the ALJ for the reasons clearly articulated by her in the initial decision.

Accordingly, the recommended decision is adopted as the final decision in this matter. It is hereby ordered that respondent be removed from his position as Assistant Secretary based on the tenure charges proven against him; respondent's salary increment for the 1992-93 school year shall be withheld; and the Board's abolishment of respondent's position is affirmed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

July 28, 1995

Date of Mailing, July 31, 1995

EDU #9331-92, #1957-93 and #10944-93 (consolidated)
C# 286-95
SB # 91-95

IN THE MATTER OF THE TENURE :
HEARING OF ALAN MORTON, SCHOOL :
DISTRICT OF THE CITY OF TRENTON, :
MERCER COUNTY, :

AND :

ALAN MORTON, :
 :
 PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION
CITY OF TRENTON, MERCER COUNTY, :

RESPONDENT-RESPONDENT, :

AND :

ALAN MORTON, :
 :
 PETITIONER-APPELLANT, :

V. :

BOARD OF EDUCATION OF THE :
CITY OF TRENTON, MERCER COUNTY, :

RESPONDENT-APPELLANT. :

Decided by the Commissioner of Education, July 28, 1995

For the Petitioner/Respondent-Respondent, Green & Dzwilewski (Paul H.
Green, Esq. and Jacob Green, Esq., of Counsel)

For the Respondent/Petitioner-Appellant, Lake & Schwartz (Robert M.
Schwartz, Esq., of Counsel)

2/7/96

The decision of the Commissioner of Education is affirmed substantially for the reasons expressed therein, with the following modification regarding the tenure charges certified by the district Board. While we agree with the Commissioner's ultimate determination dismissing respondent from his tenured employment, we reject the Commissioner's conclusion that the tenure charge alleging respondent's incompetency was also demonstrated by the Board in this instance.

Respondent was appointed to the position of business services assistant/payroll in January 1986. He was promoted to the position of assistant secretary/business services in January 1988. In tenure charges certified to the Commissioner on December 21, 1992, the Board charged respondent with unbecoming conduct, neglect of duties, insubordination, official misconduct and incompetency, alleging that "[d]uring the period from at least December, 1989," respondent had demonstrated that he was incapable of performing the duties of his position.

Incompetency requires proof that the employee, regardless of assistance offered by supervisors, lacks "the ability or capacity" to perform his or her duties in an effective manner. In the Matter of the Tenure Hearing of Renee Sokolow, decided by the Commissioner, 1982 S.L.D. 1358, 1362, aff'd by the State Board, 1983 S.L.D. 1645.

In In the Matter of the Tenure Hearing of Edna Booth, decided by the Commissioner, May 31, 1985, aff'd by the State Board, April 1, 1987, aff'd, Docket #A-3985-86T8 (App. Div. 1987), incompetency charges were dismissed against a tenured teacher where the deficiencies relating to the charges of incompetency in respondent's job performance were restricted to the 1982-83 and 1983-84 school

years. Prior thereto, the respondent had received favorable evaluations related to her job performance. Consequently, it was concluded that the record did not demonstrate that she was so lacking in competency that the 90-day improvement period would have been a useless exercise. See also In the Matter of the Tenure Hearing of Frank J. Napoli, decided by the Commissioner, February 16, 1988, aff'd by the State Board, December 1, 1988, aff'd, Docket #A-2301-88T3 (App. Div. 1990); In the Matter of the Tenure Hearing of Millicent Smith, decided by the State Board, April 15, 1994, appeal dismissed, Docket #A-5301-93T3 (App. Div. 1995); In the Matter of the Tenure Hearing of April Renee Bradley, decided by the State Board, February 6, 1991.

In view of respondent's previous service, we cannot conclude that the Board has demonstrated that he lacked the ability or capacity to be an effective employee. Respondent's performance evaluation from March 1989 rated his performance as outstanding in virtually all categories, and an evaluation from March 1990, while noting respondent's unsatisfactory performance in meeting reporting deadlines and record maintenance, praised him as a "very intelligent and capable employee" whose "work reflects a high degree of accuracy." Exhibit J-6, in evidence. Nor is there any evidence indicating the existence of some underlying condition which changed the situation by undermining respondent's abilities and rendering him incapable of effectively performing his duties.

Consequently, we find that the Board has failed to satisfy its burden of proof in demonstrating incompetency, and we dismiss that particular charge. In this regard, we stress that while the record herein may well support a charge of inefficiency, such a

charge could not be sustained since respondent was not afforded the written notice and a 90-day correction period required by N.J.S.A. 18A:6-11. See, e.g., Booth, supra. The rationale underlying that rule is that an employee whose effectiveness is called into question after meritorious service in a school district should, in recognition of that contribution, be afforded an opportunity to demonstrate that he or she is still capable of effective performance. In the Matter of the Tenure Hearing of Donald Rowley, decided by the State Board, 1984 S.L.D. 2006, 2007, rev'd on other grounds, Docket #A-4666-83T7 (App. Div. 1985).

However, we fully concur with the Commissioner's adoption of the Administrative Law Judge's ("ALJ") conclusion that the Board demonstrated respondent's unbecoming conduct by a preponderance of the credible evidence. Further, we find that dismissal of respondent from his tenured position is the appropriate penalty under the circumstances. See In the Matter of the Tenure Hearing of David Fulcomer, 93 N.J. Super. 404 (App. Div. 1967). Like the ALJ, whose findings and conclusions were adopted by the Commissioner, we conclude that respondent's conduct in arranging, through his position as assistant secretary/business services, to have no federal withholding income taxes withheld from his salary payments on several occasions and in providing himself with a refund of prior withheld federal income tax moneys warrants his dismissal. See Initial Decision, slip op. at 12. Respondent neither sought approval for such action nor filed a new federal W-4 form.

Consequently, as modified herein, we affirm the decision of the Commissioner dismissing respondent from his tenured employment, withholding his salary increments

for the 1992-93 school year and sustaining the abolishment of his position by the Board effective June 30, 1993.

Donald C. Addison, Jr., Wendel E. Daniels and Thomas P. McGough abstained.

February 7, 1996

Date of mailing FEB 09 1996

IN THE MATTER OF THE TENURE :
 HEARING OF LUCY DICKSON, SCHOOL :
 DISTRICT OF THE TOWNSHIP OF :
 MIDDLETOWN, MONMOUTH COUNTY. :
 _____ :

COMMISSIONER OF EDUCATION
 DECISION



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7647-94

AGENCY DKT. NO. 275-7/94

**IN THE MATTER OF THE
TENURE HEARING OF
LUCY DICKSON, BOARD OF
EDUCATION OF THE
TOWNSHIP OF MIDDLETOWN**

Howard M. Newman, Esq., for petitioner (Kalac, Newman, Lavender & Campbell, attorneys)

Kenneth I. Nowak, Esq., for respondent (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Record Closed: June 9, 1995

Decided: June 22, 1995

BEFORE BRUCE R. CAMPBELL, ALJ:

The Middletown Township of Education filed tenure charges of inefficiency with the Commissioner of Education and against Lucy Dickson.

This matter was transmitted to the Office of Administrative Law on August 9, 1994 for determination as a contested case, pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

After notice, a conference of counsel was held by telephone. After one delay occasioned by surgery undergone by one attorney, the matter was reported resolved.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.
3. There is no question of moral turpitude herein.
4. The public policy of the State of New Jersey favors settlement of controversies and disputes.
5. Moneys rendered to this respondent do not exceed salary and other entitlements.
6. Nothing herein restricts the Middletown Township Board of Education from offering candid evaluations upon the request of proper persons or parties.
7. This settlement also accomplishes the withdrawal of two matters in arbitration which could keep the parties in costly litigation for some time to come. Avoidance of this is in the public interest.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

22 JUNE 1995
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

6/27/95
DATE

Hope R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 30 1995
DATE

Jeff S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cae

RECEIVED
STATE OF N.J.
ADM. LAW
JUN 9 10 05 AM '95

KALAC, NEWMAN, LAVENDER & CAMPBELL
A Professional Corporation
934 Highway 35
Middletown, New Jersey 07748
(908) 671-6100
Attorneys for the Middletown Township
Board of Education

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL Docket No. EDU 7647-94
Agency Ref. No. 275-7/94

IN THE MATTER OF THE TENURE :
HEARING OF LUCY DICKSON, :
BOARD OF EDUCATION OF THE : **STIPULATION OF SETTLEMENT**
TOWNSHIP OF MIDDLETOWN, :
Monmouth County :

The matter in controversy in the above entitled action having been amicably adjusted, the parties hereto, through their respective counsel, proposes the following settlement terms:

(1) Upon approval of these settlement terms, the Middletown Township Board of Education will pay Lucy Dickson for the entire 1994-95 school year based on a salary of \$64,755.00.

(2) Upon approval of these settlement terms, Lucy Dickson will execute and deliver to the Board a written resignation effective June 30, 1995.

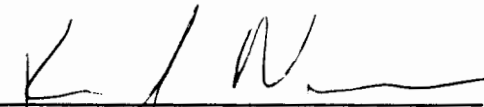
(3) Upon approval of these settlement terms, this matter will be dismissed with prejudice and counsel for Lucy Dickson, also being counsel for the Middletown Township

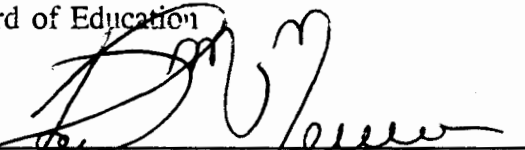
Education Association, will withdraw with prejudice arbitration matters bearing docket nos. AR-94-222 and AR-94-308.

(4) Upon approval of these settlement terms, the Board and the Superintendent will acknowledge Lucy Dickson's resignation and recognize her long years of service and dedication to the Middletown Township School District.

Zazzali, Zazzali, Fagella & Nowak
Attorneys for Lucy Dickson

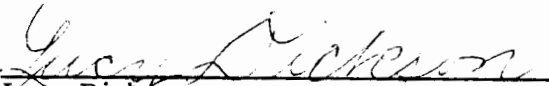
Kalac, Newman, Lavender & Campbell
Attorneys for the Middletown Township
Board of Education

By: 
Kenneth I. Nowak

By: 
Howard M. Newman

Dated: 5/9/95

Dated: 5-15-95



Lucy Dickson

Dated: 5/2/95

IN THE MATTER OF THE TENURE :
HEARING OF LUCY DICKSON, SCHOOL :
DISTRICT OF THE TOWNSHIP OF : COMMISSIONER OF EDUCATION
MIDDLETOWN, MONMOUTH COUNTY. :
_____ :
DECISION

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

EDU #9050-94
C #287-95R
SB # 97-95

PHILIP O. SHERIDAN, :

PETITIONER-RESPONDENT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE CITY : DECISION
OF ORANGE TOWNSHIP, ESSEX :
COUNTY, :

RESPONDENT-APPELLANT. :

Decided by the Commissioner of Education, February 18, 1992 (SKE # 20-92)

Decision on motion by the Commissioner of Education, March 27, 1992

Remanded by the State Board of Education, September 7, 1994

Decided by the Commissioner of Education, July 27, 1995

For the Petitioner-Respondent, Lake & Schwartz (Robert M. Schwartz, Esq.,
of Counsel)

For the Respondent-Appellant, Ashley & Charles (Connie Bentley
McGhee, Esq., of Counsel)

On August 31, 1995, the Board of Education of the City of Orange Township (hereinafter "Board") filed a notice of appeal by fax to the State Board of Education from a decision of the Commissioner of Education dated July 27, 1995 concluding that the Board had violated the petitioner's tenure rights. By letter dated September 18, 1995, the Board was notified that its appeal was deficient in that, while a faxed notice of appeal may be used for the purpose of establishing a filing date, an original notice,

Dec. 6, 1995

signed by the attorney of record, was required to open the appeal. The Board was also advised that its appeal had been due within 30 days of the decision from which it was appealing, and that this matter was being referred to our Legal Committee for consideration of the effect of its failure to file timely notice. The Board was given until September 29 to file an affidavit setting forth the circumstances of its late filing.

On October 2, the Board filed an original notice of appeal, along with an affidavit explaining its late filing. Counsel for the Board avers therein that the Board's former attorney of record in this matter, Raymond L. Hamlin, was no longer associated with the firm, and that the July 27 decision of the Commissioner had been forwarded by the postal service to his new address. She indicates that Mr. Hamlin had immediately faxed a copy of the Commissioner's decision to the firm on August 1. Counsel for the Board explains that "[g]iven that Mr. Hamlin was no longer employed by this firm and the fact that the facsimile copy was received on August 1, 1995, it was believed that we had 30 days or until August 31, 1995 to respond to the Commissioner's decision."

Pursuant to N.J.S.A. 18A:6-28, appeals to the State Board must be taken "within 30 days after the decision appealed from is filed." (Emphasis added.) The State Board may not grant extensions to enlarge the time specified for appeal. N.J.A.C. 6:2-1.5(a). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6:24-1.2; N.J.A.C. 6:24-1.15, the time limit within which an appeal must be taken to the State Board is statutory, and, given the jurisdictional nature of the statutory time limit, the State Board lacks the authority to extend it. Mount Pleasant-Blythedale

Union Free School District v. New Jersey Department of Education, Docket #A-2180-89T1, slip op. at 5 (App. Div. 1990).

We conclude that the statutory filing requirement with which the Board failed to comply is of such significance that we dismiss the appeal. In Yorke v. Board of Education of the Township of Piscataway, decided by the State Board of Education, July 6, 1988, aff'd, Docket #A-5912-87T1 (App. Div. 1989), the Court upheld the dismissal of an appeal by the State Board where it found that the notice of appeal had been filed one day late by appellant's counsel, who alleged that he had misread or misunderstood the applicable regulations and believed that he had 30 days from receipt of the Commissioner's decision to file a notice of appeal. The Court added that even if the statute could be construed to permit enlargement of the time for filing an appeal, the appellant therein had failed to establish good cause.

In this case, the Commissioner's decision was rendered on July 27, 1995 and mailed to the parties on that date. Accordingly, pursuant to N.J.A.C. 6:2-1.4, the decision appealed from was deemed filed on July 30, three days after it was mailed to the parties. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6:2-1.3(a); N.J.A.C. 6:2-1.4(a), as computed under N.J.A.C. 6:2-1.4(b), the Board was required to file its notice of appeal to the State Board on or before August 29, 1995. The Board's notice of appeal was dated August 31, 1995 and filed by fax on that date.

Even if N.J.S.A. 18A:6-28 can be construed to provide us with the authority to enlarge the time limit for filing an appeal, we find no substantive basis to warrant doing so in this particular instance. Notwithstanding the stated belief of the Board's current

counsel that she had 30 days to file an appeal from the date of her receipt of the Commissioner's decision from Mr. Hamlin, the statute is clear and unambiguous in requiring that an appeal to the State Board must be taken within 30 days after the decision appealed from is filed. N.J.A.C. 6:2-1.4(a) provides that a decision of the Commissioner is deemed filed three days after the date of mailing to the parties. In this instance, the Commissioner's decision was mailed on July 27 to the Board's attorney of record, who faxed a copy to his former firm on August 1.¹ The Board's current counsel also acknowledges that the firm received the original copy from Mr. Hamlin on August 2. Yet the Board failed to file its notice of appeal until August 31. Such circumstances do not excuse compliance with the statutory requirement.

Accordingly, we dismiss the appeal in this matter for failure to file notice thereof within the statutory time limit as computed under the applicable regulations.

S. David Brandt opposed.

December 6, 1995

Date of mailing DEC 08 1995

¹ We note that a substitution of attorney was filed on October 2, 1995, after the Board filed its appeal to the State Board.

IN THE MATTER OF THE TENURE :
HEARING OF CALPERNIA NIXON, :
STATE-OPERATED SCHOOL DISTRICT : COMMISSIONER OF EDUCATION
OF THE CITY OF PATERSON, PASSAIC : DECISION
COUNTY. :
_____ :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO EDU 10743-94
AGENCY NO. 416-10/94

**IN THE MATTER OF THE TENURE HEARING
OF CALPERNIA NIXON, STATE-OPERATED
SCHOOL DISTRICT OF THE CITY OF
PATERSON, PASSAIC COUNTY**

Gregory G. Johnson, Esq., for petitioner, State-Operated School District
of the City of Paterson

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

Record Closed: June 12, 1995

Decided: June 27, 1995

BEFORE MUMTAZ BARI-BROWN, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The State-Operated School District of the City of Paterson, Passaic County (District) certified tenure charges against respondent Calpernia Nixon under *N.J.S.A. 18a:6-10*. The specific charges are incapacity/excessive absenteeism, unbecoming conduct, and abandonment of position/insubordination.

Nixon is a tenured teacher employed by the District. By resolution adopted on October 3, 1994, the District found probable cause to certify tenure charges of conduct unbecoming a teacher, abandonment of position, excessive absenteeism/incapacity and insubordination which, if true, were sufficient to warrant Nixon's dismissal. Thereafter, the District filed written tenure charges with the Commissioner of Education (Commissioner), and Nixon filed an answer denying the charges. The Commissioner transmitted the matter to the Office of Administrative Law (OAL) on November 3, 1994 for a determination as a contested case pursuant to *N.J.S.A. 52:14b-1 to -15* and *N.J.S.A. 52:14f -1 to -13*.

The parties have agreed to a settlement of the matter, subject to the approval by the Commissioner. In accordance with the decision of the State Board of Education in *Cardonick v. Brookline Board of Education*, 1990 S.L.D. 842, the record of any proposed settlement must include:

[T]he nature of the charges, circumstances justifying the settlement, consent or authorization by the board of education and the teacher to the proposed agreement, the Administrative Law Judge's findings that the teacher entered into the agreement with a full understanding of his rights and that the agreement is consistent with the public interest.
Cardonick at 850-51

On June 12, 1995, the OAL held a public hearing on whether the proposed settlement was in the public interest and therefore should be accepted. Counsel for the parties set forth on the record the reasons why settlement would be in the public interest. Also, the parties submitted a written stipulation dated April 13, 1995 setting forth the terms of the agreement.

Based on my review of the record, I **FIND** that the proposed settlement is consistent with the public interest because it will save significant legal expenses and costs as well as time expended by administrators and witnesses. I further **FIND** that Nixon had full opportunity to consult with legal counsel to explain the meaning of the settlement to her prior to entering into the agreement. Nixon is aware that pursuant to

N.J.A.C. 6:11-3.6 the Commissioner may refer this matter to the State Board of Examiners for any action which it may deem appropriate. Further, Nixon was informed by counsel that, notwithstanding, the parties agreement to settle this matter, the Commissioner must approve the agreement. Thus, any execution of the settlement prior to the approval by the Commissioner is done at the peril of the parties.

I **CONCLUDE** that the proposed settlement fully disposes of all issues and controversies. I further **CONCLUDE** that the terms of this settlement are in the public interest.

ORDER

It is therefore **ORDERED** that upon approval by the Commissioner that the parties comply with the settlement terms and that the proceedings are hereby **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 27, 1995
DATE

6/29/95
DATE

JUN 30 1995
DATE

Mumtaz Bari Brown
MUMTAZ BARI, BROWN, ALJ

Receipt Acknowledged:

Hope R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:
Jeff S. Mann
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

GREGORY G. JOHNSON, ESQ.
P.O. Box 6492
2 Sherman Place
Lawrenceville, New Jersey 08648-0492
(609) 392-0044
Attorney for Paterson Public Schools

In the matter of the tenure hearing of CALPERNIA NIXON	:	NEW JERSEY COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
State Operated School District of THE CITY OF PATERSON	:	DKT NO. EDUTH 10743-94N AGY REF. NO. 416-10/94
	:	
	:	SETTLEMENT AGREEMENT

The State-Operated School District of the City of Paterson (hereinafter the "District"), and Calpernia Nixon, hereby enter into this Agreement to resolve the differences between them.

1. The District instituted tenure dismissal charges against the respondent in the above matter which has been transmitted to the Office of Administrative Law for a plenary hearing. The respondent has filed an Answer denying the charges. This agreement shall not constitute an admission or denial of the tenure charges. The parties hereby mutually agree to settle this matter according to the terms contained herein.

2. In return for compliance with this Agreement, Ms. Nixon agrees to permanently resign from her position as a teaching staff member in the District effective June 30, 1995. The letter of resignation signed by Ms. Nixon is hereby appended to this agreement as Exhibit "A". By doing so, Ms. Nixon waives any and all rights to tenure, seniority, recall or reinstatement, as well as any of the benefits or emoluments of her employment as of that date, except her pension rights.

3. Ms. Nixon intends to file for disability retirement on July 1, 1995. The District shall process any application for retirement benefits filed by Ms. Nixon in the normal manner for such processing.

4. As of January 31, 1995, the respondent's 120 day unpaid suspension expired and she was restored to the payroll. The District will continue to pay Ms. Nixon until June 30, 1995. During this period, Ms. Nixon will be paid in the normal course as is any other teacher, and the District shall continue to provide the medical, dental and prescription coverages it now provides to Ms. Nixon pursuant to the collective bargaining agreement in effect between the District and the Paterson Education Association. However, no other benefits shall accrue to Ms. Nixon during this period, such as sick days, personal days, and bereavement days that would otherwise accrue during the life of this Agreement.

Pension contributions shall be deducted from Ms. Nixon's salary during this period in an amount equivalent to what her normal contribution would be during a period when she was receiving full salary, at the rate of her 1994-95 salary. The District makes no representation as to the amount of pension benefits, if any, Ms. Nixon shall receive. This Agreement shall in no way be contingent upon Ms. Nixon's receiving a disability pension or other retirement benefits.

5. It is understood and agreed by the parties that the Commissioner of Education may refer this matter to the State Board of Examiners for review and action, if it is deemed appropriate.

6. Ms. Nixon acknowledges that she has hereby been advised in writing that she has the right to consult with an attorney or a representative of her own choosing prior to signing this Agreement and that she signs this Agreement as her own voluntary act and deed, and that she fully understands the duties and obligations enumerated herein.

7. The undersigned representatives of the District hereby acknowledge that they have been duly authorized by the District to sign this Agreement and bind the District to its terms.

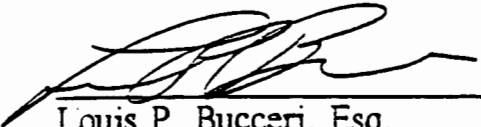
8. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

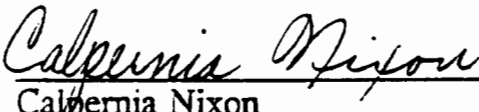
9. In the event that the District is prevented from, unable, or unwilling to fulfill the terms of this Agreement, for any reasons, Ms. Nixon resignation shall be rendered null and void and of no force or effect, regardless of whether or not it has been accepted by District resolution.

In that event, the rights of the parties shall return to the status quo prevailing prior to the signing of this Agreement. The District will not pursue tenure charges against Ms. Nixon as long as this settlement remains in effect and is not voided by any court of competent jurisdiction or agency with jurisdiction over this matter. However, if the settlement is voided, the District retains the right to file and consider for certification tenure charges against Ms. Nixon, including such charges which have previously been filed by the District against Ms. Nixon.

10. Nothing in this Agreement shall be deemed to constitute precedent, past practice or policy as to the rights of any employee, now or in the future, other than Ms. Nixon.

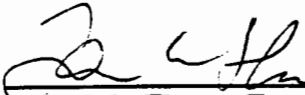
IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.


Louis P. Bucceri, Esq.


Calpernia Nixon

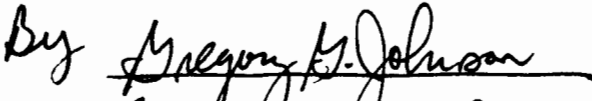
Dated: 4/3/95

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF PATERSON


Louis M. Flora, Esq.
General Counsel

By: 

Dated:

By: 
Special Counsel

CALPERNIA NIXON
12 AUBREY ROAD
MONTCLAIR, NEW JERSEY 07042

APRIL 3, 1995

Laval S. Wilson, State Superintendent of Schools
Paterson Public Schools
33-35 Church Street
Paterson, NJ 07505-1306

Re: Letter of Resignation

Dear Dr. Wilson:

Pursuant to the terms of the Agreement between the State-Operated School District of Paterson and myself, I hereby resign my position as a teaching staff member effective June 30, 1995. This resignation is expressly conditioned upon the District's full compliance with the aforesaid Agreement between it and me.

Very truly yours,


Calpernia Nixon
Calpernia Nixon

/lg

IN THE MATTER OF THE TENURE :
HEARING OF CALPERNIA NIXON, :
STATE-OPERATED SCHOOL DISTRICT : COMMISSIONER OF EDUCATION
OF THE CITY OF PATERSON, PASSAIC : DECISION
COUNTY. :
_____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

NORMA FISCH, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN- : DECISION
SHIP OF FRANKLIN, SOMERSET COUNTY, :

RESPONDENT. :


_____ :

OAL DKT. NO. EDU 3726-95

NORMA FISCH, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE TOWN- : DECISION
 SHIP OF FRANKLIN, SOMERSET COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

July 31, 1995
Date of Mailing July 31, 1995

290-95

SABBATH J. GIORDANO, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

JEAN C. McKEOWN AND BOARD OF : DECISION

EDUCATION OF THE TOWN OF, :

KEARNY, HUDSON COUNTY, :


RESPONDENTS. :

OAL DKT. NO. EDU 6574-94

SABBATH J. GIORDANO, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 JEAN C. McKEOWN AND BOARD OF : DECISION
 EDUCATION OF THE TOWN OF, :
 KEARNY, HUDSON COUNTY, :
 :
 RESPONDENTS. :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

August 2, 1995
Date of Mailing August 2, 1995

291-95

JOSEPH DiFALCO,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION ON REMAND
BOROUGH OF KINNELON, MORRIS	:	
COUNTY,	:	
	:	
RESPONDENT.	:	

OAL DKT. NO. EDU 3133-95 (EDU 9335-92 ON REMAND)

JOSEPH DiFALCO, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION ON REMAND
BOROUGH OF KINNELON, MORRIS :
COUNTY, :
RESPONDENT. :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

August 2, 1995
Date of Mailing August 2, 1995

ERNEST WILLIAMS, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF :
ORANGE TOWNSHIP, ESSEX COUNTY, :

DECISION

RESPONDENT. :


_____ :

OAL DKT. NO. EDU 9097-89

ERNEST WILLIAMS, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE CITY OF : DECISION
 ORANGE TOWNSHIP, ESSEX COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed accordingly.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

RUTH L. BASKERVILLE,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF ASBURY PARK, MONMOUTH	:	
COUNTY,	:	
	:	
RESPONDENT.	:	

OAL DKT. NO. EDU 8805-94

RUTH L. BASKERVILLE, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE CITY : DECISION
 OF ASBURY PARK, MONMOUTH :
 COUNTY, :
 :
 RESPONDENT. :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

August 2, 1995
Date of Mailing, August 2, 1995

HARRY DEARDEN, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY : DECISION

OF TRENTON, MERCER COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner alleged that the abolishment of his tenured position of assistant purchasing agent/stock and inventory control was arbitrary, capricious and in bad faith. Moreover, petitioner argued that the Fiscal Monitor was without authority to terminate him.

ALJ concluded that petitioner failed to demonstrate by a preponderance of relevant, credible evidence that the abolition of his position was undertaken in bad faith or was arbitrary, capricious or contrary to N.J.S.A. 18A:28-9. ALJ also concluded that the Commissioner's authority is sufficiently broad to encompass the appointment of a Fiscal Monitor with the power to abolish a position and terminate an employee and the Board herein expressly approved the Fiscal Monitor's plan through formal resolution. Board's determination to abolish petitioner's position was sustained.

Commissioner adopted findings and determination in initial decision with modification. Commissioner found given that petitioner's position was abolished pursuant to Board resolution, it was not necessary to pass judgment on the ALJ's discussion regarding the Fiscal Monitor's authority. Petition was dismissed.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO EDU 8670-93

AGENCY DKT. NO. 301-8/93

HARRY DEARDEN,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
CITY OF TRENTON, MERCER COUNTY,**

Respondent.

Robert M. Schwartz, Esq., on behalf of petitioner (Lake and Schwartz, attorneys)

Thomas W. Sumners, Jr., Esq. on behalf of respondent (Sumners Council George &
Dortch, attorneys)

Record Closed: May 26, 1995

Decided: June 14, 1995

BEFORE STEVEN C. REBACK, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is an appeal by the petitioner, Harry Dearden, which was initiated by the filing of a petition of appeal before the Commissioner of Education (Commissioner) on August 16, 1993. Mr. Dearden alleges that the abolition of his tenured position, assistant purchasing agent/stock and inventory control, which was effected pursuant to resolution of the Trenton Board of

Education ("Trenton" or "Board") passed on May 27, 1993, and terminating him effective June 30, 1993 was unlawful and in violation of N.J.S.A. 18A:28-9 and N.J.S.A. 38:16-3 of the Veteran's Tenure Act, N.J.S.A. 38:16-1 -16.6. More specifically it is the petitioner's position that the abolition of this position was effected by respondent arbitrarily, capriciously and in bad faith.

On September 7, 1993, Trenton filed its answer to the petition essentially denying that the action undertaken by Trenton directly or indirectly, was improper or contravened any of the applicable statutory or decisional law upon which the petitioner relies.

Thereafter, on September 14, 1993, the Commissioner transmitted the appeal to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 to N.J.S.A. 52:14F-1 to 13. On November 15, 1993, Mr. Dearden filed an amended petition with the Office of Administrative Law which essentially addresses purported procedural irregularities undertaken by the Board pursuant to the provisions of the Veteran's Tenure Act, N.J.S.A. 38:16-1-16-6. On January 13, 1994, the Board submitted its amended answer addressing the assertions contained in the supplementary petition. Following numerous prehearing conferences directed to issues of discovery, potential settlement, and an articulation of the issues, the matter proceeded to hearing on June 2, October 18 and October 19, 1994 at the Office of Administrative Law, Mercerville, New Jersey. Following the June 2, 1994 proceedings the matter was scheduled to continue in mid-July; however, because of witness unavailability the matter was required to be rescheduled on the October dates.

At the conclusion of the testimonial phase of these proceedings counsel requested the opportunity to submit post-hearing argument and also requested that these be made after transcripts were ordered and received by the parties. That request was granted. Thereafter, on April 3 and April 4 respectively, Trenton and Mr. Dearden submitted their post-hearing arguments. After several requests for delays the parties submitted, at their request, reply briefs, which were concurrently received by my office on May 2, 1995.

After preliminary reviewing the moving papers thus far received, I noted that Mr. Sumners had not addressed the issue raised by Mr. Schwartz in respect to a potential violation of petitioner's rights under the Veteran's Tenure Act, N.J.S.A. 38:16-1-16-6. As a consequence, on May 10, 1995, I telephoned Mr. Sumners's office and brought this omission to his attention. He thereafter telephoned my office, indicating that he would like to supplement his brief. I advised that he would be able to do so with the consent of Mr. Schwartz. On the following day I received a fax from Mr. Sumners, pursuant to my request, indicating that Mr. Schwartz had consented to the additional submission, reserving the opportunity to submit a reply if appropriate. Thereafter, on May 15, 1995 I received Mr. Sumners's supplemental brief on the issue of the alleged violation under the Veteran's Tenure Act. On May 26th, Mr. Schwartz submitted his rebuttal argument. The record accordingly closed on the latter date, May 26, 1995.

ISSUES AND BURDEN OF PROOF

The fundamental issue to be addressed in these proceedings is whether the abolition of Mr. Dearden's tenured position with respondent, assistant purchasing agent/stock and inventory control, which was effected by Board resolution enacted by Trenton on May 27, 1993, comported with the requirements set forth at N.J.S.A. 18A:28-9, and N.J.S.A. 38:16-3 of the Veteran's Tenure Act. In respect to this issue the burden rests exclusively with the petitioner: Mr. Dearden must demonstrate by a preponderance of the relevant credible evidence that the abolition of his position was in contravention of law. More specifically he must demonstrate that the action undertaken by Trenton, which was in conjunction with the appointment of and actions taken by the State Fiscal Monitor, was authorized under statute. As a corollary proposition petitioner must also establish that the abolition of his position was arbitrary and capricious and not undertaken for reasons of economy, efficiency, or for other good cause and that it contravened the relevant provisions of the Veteran's Tenure Act.

As a further corollary, subsidiary issue, Mr. Schwartz argues that the Fiscal Monitor was without authority to recommend to the Trenton Board of Education that Mr. Dearden's position be abolished.

THE FACTS

Unless otherwise noted, the following is a substantially uncontradicted narrative of the operative facts in this matter. Where a factual dispute does present itself, I shall set forth its adversarial basis, and arrive at an explicit finding of fact, given reasons to support it. **I FIND:**

The petitioner, Harry Dearden, was employed with respondent Board since January 1979. He began his employment in the position, assistant to the assistant secretary/purchasing agent. In that capacity, Mr. Dearden's primary responsibilities concerned the submission of bids by outside contractors for services and/or property to be purchased by the Board. Once the bids were submitted Dearden would see to it that the contracts were awarded to the lowest bidder with the best quality product and oversee the administration and execution of these contracts in the purchasing office. In addition, while serving in this position Dearden indicated that he would purchase various items over the telephone on an as-needed basis and assist the purchasing agent in carrying out the latter's responsibilities.

In the period 1985-86 there was a reorganization of Dearden's department and as a consequence his title was changed to his current title, assistant purchasing agent/stock and inventory control. With the change in title, it was Dearden's testimony that his duties and responsibilities changed as well. He was responsible for stock and inventory supplies and equipment that took on greater value, such as computers, copiers, movie projectors. He was also responsible for receiving the equipment ordered, "tagging" it and making a data entry into a computer to maintain an ongoing inventory of the equipment owned by the Board. Throughout the period of his tenure in both titles, it was Dearden's recollection that professional staff in his department remained at three - the purchasing agent, and two assistants.

On two previous occasions, the Board attempted to abolish Mr. Dearden's position. The first occasion resulted in action taken in July of 1981, which resulted in an out-of-court settlement and his reinstatement. He apparently had been out of work for approximately six months, and he was reinstated to the position of assistant to the assistant secretary, purchases and supplies.

In July 1989, his position of assistant purchasing agent/stock and inventory control was abolished by the Board. Following adjudication before the Commissioner of Education a decision was rendered in or about October 1, 1990 which reinstated Mr. Dearden to his position.

Upon his return to employment and through to his termination, Dearden's job responsibilities remained the same. They are set forth in exhibit P-1, which is a job description for the position assistant purchasing agent/stock and inventory control. As noted in P-1, the major function of the position is to adequately maintain inventory and records of all district assets and to assist the secretary/purchasing agent in purchasing operations as is necessary and required. The other assistant purchasing agent during the relevant time period prior to the abolition of Dearden's position, was assistant purchasing agent/operations and it was occupied by Alfred Misiakowski. Dearden testified that his responsibilities were carried out in the warehouse where he supervised and ran the receiving, distribution, and ordering of stock and tagging equipment from that facility. The position occupied by Mr. Misiakowski, assistant purchasing agent/operations was run from the main building complex in the office and as Mr. Dearden summarized it the former was responsible for processing the purchase orders that were made by the Board.

For several months preceding and up to the abolition of his position, Dearden was out on sick leave. While there was some question in respect to providing proper medical documentation for that leave, there was no evidence to suggest that the leave, in any way effected the decision by the Board to abolish his position. Following the Board decision and resolution to abolish the position occupied by Mr. Dearden on May 27, 1993, which made the abolition effective on June 30, 1993, Mr. Misiakowski filled the new position of purchasing agent.

Dr. Bernice Venable has been the Superintendent of Schools for the Trenton Board of Education since 1991. She previously served in the same capacity for the Irvington, New Jersey school district and has had an extensive career as an administrator, educator and teacher. Dr. Venable testified in respect to the abolition of Mr. Dearden's position and related matters.

She indicated that for some time she was concerned with the operations of the business office and believed that reorganization was required. It was her intention to privatize the

purchasing and warehousing aspects of the office; however, because of the subsequent intervention of the Commissioner of Education into the Board's operations, Dr. Venable's plan was never effectuated. On May 7, 1993, the Commissioner of Education issued an administrative order designating Elizabeth De Matteo as Fiscal Monitor for the school district. The order (P-2)(b) confers upon the Office of Fiscal Monitor the responsibility to "oversee and control the fiscal operations of respondent, Board of Education of the City of Trenton." Among the powers conferred upon the Fiscal Monitor in effectuating her mandate was the authority to compel the Board and its various agents and representatives to make budgetary changes as deemed necessary; to order the modification, development, and implementation of any changes in the procedures and operations of the fiscal affairs of the district which she deemed necessary to create an efficient fiscal administration and record keeping system; to order the appointment and reassignment of permanent and temporary personnel in order to assist in the modification, development, and implementation of an efficient administration; to contract with or engage outside auditors or accountants to assist her in her mandates; to order the appointment or reassignment of Board employees under the supervision of either the Board secretary or the business administrator. The Fiscal Monitor was also conferred with the authority to terminate any Board employee under the supervision of the Board secretary or business administrator even absent approval of the Board but pursuant to all appropriate contractual or statutory procedures. There are numerous other broad plenary powers conferred upon the Fiscal Monitor which are set forth in the administrative order and which are incorporated by reference into this opinion. They may be found at exhibit (P-2)(b).

Once the Fiscal Monitor was appointed and commenced to execute upon her responsibilities, Dr. Venable and Ms. DeMatteo conducted discussions in respect to the district offices operations. One of the first actions undertaken by Ms. De Matteo was to terminate the assistant superintendent in charge of business. Thereafter, in or about January 1993, a state external auditor was brought into the district to run the business department.

Superintendent Venable testified that prior to the Fiscal Monitor coming on board it was the former's understanding that there would be a full-scale reorganization of the business department. Dr. Venable discussed this with the monitor and discussed her own proposal for the business office reorganization and her view that privatization would be the appropriate direction

to go, especially in respect to the purchasing and warehousing operations of the office. Thus, essentially the ultimate decision to reorganize the business office, the manner in which such reorganization would take place and the decision to abolish Mr. Dearden's position was the Fiscal Monitor's, Ms. De Matteo.

Ms. De Matteo began serving as Fiscal Monitor in Trenton on March 10, 1993. She has had extensive experience in school business administration and in the reorganization of business offices in other New Jersey school districts. Her tenure in Trenton was full-time for the first six months on the job and then part-time for the remaining six months of a one year term.

When she first commenced fulfilling her responsibilities, the Fiscal Monitor met with a variety of high level officials of the business administration staff, including the assistant purchasing agent/operations, the director of buildings and grounds, the director of computer services, the controller, and various other key members within the district. She also reviewed the audit done of the Trenton Board of Education, an external review team report, the Board's corrective action plan and educational improvement plan and various other policies governing the operation of the business affairs of respondent.

The Fiscal Monitor focused her efforts on restructuring of the business office, following various staff meetings and further assessment of the fiscal circumstances within the district and within the business office itself. It was after this extensive review that Ms. De Matteo formulated the reorganization scheme which was summarized in a memorandum issued to the Board and to the Superintendent dated May 27, 1993.

Ms. De Matteo recommended the entire reorganization of the business office. She concluded that Trenton needed additional accountants. It was her assessment that after reviewing the way in which the business office and the district in general operated, one accountant could not reasonably determine whether the district had a deficit and/or what its cash flow was. She concluded that there were no accurate records maintained. Consequently she determined to hire two full-time accountants but to do so without the District having to incur any additional costs.

In respect to the particulars of the case at bar, Ms. De Matteo's plan was memorialized in a memorandum dated May 27, 1993, which was introduced into evidence in this matter as petitioner's exhibit 5. The Fiscal Monitor addressed the Trenton Board and Dr. Venable and indicated that a plan for the reorganization of the business office called for eliminating four positions and replacing them with two new positions in the areas of purchasing and payroll. She also indicated that "there are two levels of management plus an additional position of non-management status which can be eliminated." (P-5). In addition Ms. De Matteo determined that there would be a realignment of job responsibilities which would be initiated with the creation of the two new positions and that the two new accountant positions referred to earlier would be created to complement fiscal operations. The two new accountant positions would be responsible to the comptroller relative to the accounting of all funds under "GAAP." Dr. Venable indicated that when she learned of the particulars of Ms. De Matteo's plan she fully supported them in that she shared the latter's concern about the lack of soundness of the purchasing department's organizational structure.

In respect to the reduction of four positions, Ms. De Matteo determined to consolidate positions in the purchasing and payroll departments of the business office. She did this notwithstanding that the various reports which she had read concerning the operations of the district's business office did not directly touch upon the purchasing department. Her past experience as a business administrator taught her that consolidation within the purchasing department was reasonable and appropriate given the circumstances of the fiscal problems she perceived in Trenton. She indicated that based upon her experience she concluded that in the interest of efficiency and expeditiousness the purchasing department within a school district should be run by one, not by two individuals.

When the Fiscal Monitor came on board, as will be recalled, the purchasing department in Trenton was run by the assistant purchasing agent/stock and inventory control - Mr. Dearden's position, and the assistant purchasing agent/operations. Ms. De Matteo also concluded that the two accounting positions which she created would be designated as senior and junior accountant, respectively. She also recommended the abolition of the position, assistant secretary - business services and business services assistant/payroll. As an incident to the abolition of these positions, Ms. De Matteo recommended the creation of the positions, purchasing agent and payroll

supervisor. Ms. De Matteo's determination to abolish Mr. Dearden's title, she noted in her testimony, was arrived at when she was fully familiar with his title, job responsibilities and the physical location out of which he executed those responsibilities. Ms. De Matteo also, prior to her issuing her May 27, 1993 memo, and prior to finalizing her determination in respect to reorganization, issued a memorandum on May 17, 1993 (R-1), also to the Board and to Superintendent Venable, expressing her concern in respect to the accountability of funds running through the district and what she perceived to be deficiencies in the accounting function within the district. The memorandum includes Ms. De Matteo's recommendation to create two accounting positions in an effort to resolve the fiscal concerns that she saw and expressed. The Fiscal Monitor's recommendation and decision to abolish Mr. Dearden's position and her entire reorganizational plan were approved by the Board of Education, by the Assistant Commissioner of Education and the County Superintendent of Schools for Mercer County.

As a result of the implementation of her plan, the Fiscal Monitor created the position of Purchasing Agent to assume the responsibilities of both Mr. Dearden's former position of Assistant Purchasing Agent/Stock and Inventory Control and the position Assistant Purchasing Agent/Operations. It should be noted as well that eventually the position of Purchasing Agent was filled by the individual who had previously served as Assistant Purchasing Agent/Operations, Mr. Alfred Misiakowski. Mr. Dearden did not apply for the position of Purchasing Agent so, as Ms. De Matteo testified, he was never a part of the interviewing or screening process. Further, as part of the consolidation of the two assistant purchasing agent positions, some ministerial duties were delegated outside of that new title to warehouse staff personnel.

As indicated earlier in this decision, Mr. Dearden had been on medical leave at the time the Fiscal Monitor made her decision in respect to reorganization. Thus he was not working at the time. Ms. De Matteo testified that her decision to abolish the petitioner's position was not in anyway based upon the fact that he was out on medical leave at the time that the decision was made. I accept this representation as fact and since it was in no way undercut by petitioner's case. In addition, Ms. De Matteo testified that her determination to reorganize the business office and, as part of it, to abolish Dearden's position was not related in any fashion to the petitioner's competence on the job; indeed, she indicated that she was ignorant of his competency and the quality of performance when she made the decision to consolidate the positions.

By letter of May 25, 1993, addressed to him by the Assistant Superintendent of the district, Mr. Dearden was advised that at its meeting of May 27, 1993, the Trenton Board of Education would take under advisement the recommendation that his position be abolished effective June 30, 1993. Once Dearden received this letter he apparently barged into the Fiscal Monitor's office where an angry confrontation ensued in the presence of Superintendent Venable. Ms. De Matteo testified that this confrontation had no bearing whatever in respect to her recommendation to abolish the position he occupied. I also accept this representation as true. Lastly, in respect to the previous and unsuccessful efforts undertaken by Trenton to abolish Mr. Dearden's position, which eventually resulted in his reinstatement, Ms. De Matteo testified that she was not even aware of these undertakings prior to her decision to reorganize the business office and to abolish Dearden's title. I accept this representation by Ms. De Matteo as well.

Mr. Dearden's position was officially abolished at a meeting conducted by the Board of Education on May 27, 1993. Effective June 30, 1993, the position Assistant Purchasing Agent, Stock and Inventory Control was no more. Dearden was formally advised of this action by a letter addressed to him by Superintendent Venable, dated June 1, 1993 (P-8). In addition to her determination to abolish Dearden's position, the Fiscal Monitor also recommended the abolition of an assistant secretary position at the time that the person occupying that position had already been suspended. Another position was also abolished which at the time was occupied by an employee who was terminated for cause.

In respect to the consequence on the District of Mr. Dearden's position, the Fiscal Monitor indicated that her primary concern in respect to restructuring the business office was not to save money. She indicated that essentially the determination to create one position, purchasing agent, paying the stock clerks some additional money for the additional obligations that they had as a result of restructuring, and hiring two accountants may have resulted in a small savings to the district but essentially, to use the Fiscal Monitor's phrase, the financial consequence on the district was "a wash." She did indicate, however, that the cost of employing two accountants was less than the cost of employing two assistant purchasing agents. The purpose behind the decision to abolish the positions was, as the Fiscal Monitor emphasized, to reorganize the district and bring it greater fiscal integrity in respect to the management and accountability of its operations.

Reinforcing, in my judgment, the philosophy adopted by the Fiscal Monitor in respect to her reorganization of the Board's fiscal operations was the testimony of Mr. Edward Kent. Mr. Kent, who is currently a liaison between the Commissioner of Education and the 27 local school districts within Middlesex County in respect to seeing the finances of these districts, served for some 15 months, beginning on February 1, 1993, as the State's external auditor of the Trenton Board of Education. His mandate was to facilitate and remediate the fiscal problems experienced within the district. Mr. Kent is a certified business administrator and has been employed by the State in that and related capacities for approximately 23 years. In late April 1993, he assumed the position of Acting Board Secretary for Trenton but concomitantly continued on as the State auditor. Since Kent was in the district before Ms. De Matteo assumed the position of Fiscal Monitor he provided input to her in respect to her formulation of a reorganization plan; once that plan was formulated by the Fiscal Monitor she also sought out Mr. Kent's assessment. Kent reviewed it and determined that the plan was a good one.

Mr. Kent addressed himself to Ms. De Matteo's determination to create an accounting department within the District comprised of a senior and junior accountant. He indicated that he fully agreed with the Fiscal Monitor's proposal in this regard. He believed that Trenton needed an accounting department, that the district "needed to get someone in there to do the work that was not being done." He also agreed with the manner of funding of the two accounting positions: the abolishment of the four positions previously described in this opinion and the creation of the new additional positions, purchasing agent, payroll supervisor, and junior and senior accountants.

Mr. Kent embellished in his testimony his understanding of the reorganization, particularly as it related to Mr. Dearden's position. Kent was familiar with the job responsibilities of both assistant purchasing agents, Mr. Dearden and Mr. Misiakowski respectively. Kent recalled that when he returned to the district as the State's external auditor and at the time the Fiscal Monitor arrived, Dearden was on sick leave and that while Dearden was out the responsibilities which he had in respect to tagging and inventorying various items in the warehouse were being carried out by warehouse staff. This responsibility, Kent recollected, did not require utilization of warehouse staff more than once or twice monthly, for which they received \$50 in overtime pay per day. Two warehouse personnel were involved in the inventorying process. Kent also recalls visiting the

warehouse where Dearden was employed while the petitioner was on sick leave and entering his office. Kent's recollection was that there was no unattended work on his desk and that indeed Kent saw nothing any where that seemed to require action. He saw nothing "other than dust on the desk." Kent testified that following Dearden's position being abolished, he returned to the warehouse and again found nothing on his desk that was unattended. He indicated that he went to the warehouse at least once a month following the abolition of Mr. Dearden's position.

Assistant Superintendent for Business Administration/Human Resources, Ann Murphy testified in respect to the district's obvious needs for an accounting department. Ms. Murphy has been employed by the Board since November 1993, several months after Mr. Dearden's position had been abolished and the Fiscal Monitor's reorganization of the Business Office became effective. She commenced her employment as controller in which position she served until March 1994 when she commenced employment in her current title. Prior to that she had served in the capacity of school treasurer for approximately six years in various other school districts. She holds a B.A. degree in accounting and a M.B.A. degree.

Ms. Murphy focused in on the needs of the district in light of the implementation of an early retirement program which involved a significant number of district employees. She indicated that with more sophisticated computer financial technology coming into the district and the generation of more sophisticated reports, personnel responsible for the various fiscal operations of the district would have to be more technologically oriented and trained. An accountant position was created specifically to analyze account codes and to review the procedure for monitoring various accountants. Murphy testified that before accountants were in place, problems persisted in respect to the review of financial reports. The position, senior accountant purchasing, was based upon the job description of the other senior accountant positions in the district.

As was noted previously, once the purchasing agent position was created as an incident to the abolition of the two assistant purchasing agents positions, Mr. Alfred Misiakowski applied for and was accepted in that title. Misiakowski had been an assistant purchasing agent in Trenton for more than 27 years. Once he assumed the position, purchasing agent, Mr. Misiakowski testified, he assumed most of Mr. Dearden's duties; as was noted previously, however, tagging of various inventory equipment in the warehouse was done by two warehouse personnel. In respect to

Board equipment which had value in excess of \$500, an independent appraiser was brought in to inventory and tag this property. It was also Mr. Misiakowski's opinion that when both assistant purchasing agent positions were abolished, the only back-up of work was in the area of data entry and that there was no negative effect at all on the purchasing department. Mr. Misiakowski de facto performed the responsibilities of purchasing agent through the fall of 1994 when the position itself was formerly vacant and he was nominally still performing the responsibilities of assistant purchasing agent for stock and inventory control. Mr. Misiakowski also performed all of the responsibilities of purchasing agent during the course of time that the petitioner was out on sick leave. Mr. Misiakowski retired from employment with the Board on July 1, 1994, having himself taken advantage of the early retirement program about which Ms. Murphy testified.

Petitioner seeks factual support for the position that the decision to abolish his position was arbitrary and capricious by contended that the result of the reorganization was actually to increase the Board's costs of running its fiscal operations. He seeks to demonstrate this by citing to the testimony of Superintendent Venable in respect to \$90,000 expended by the Board in seeking the services of an outside consultant, EdData. EdData performed the functions of the purchasing department which was related to the Superintendent's proposal, which was never presented to the Board for its approval, to privatize that department. Factually therefore, the expenditure of \$90,000 for the privatization of the purchasing department through EdData was unrelated to the Fiscal Monitor's plan, which was eventually adopted and implemented by the Board, to reorganize the business office, and as part of that reorganization to abolish Mr. Dearden's position.

Mr. Dearden also seeks factual support for his position by citing to the responsibilities of Mr. Bendel, in his capacity as storekeeper. The suggestion is that when Bendel performed some of Dearden's job responsibilities additional costs were again incurred by the Board. The factual record in this matter indicated that Bendel, had been employed by the Board for more than a quarter of a century and while he did perform some of Dearden's responsibilities during the 1993-94 school year, there was no indication that he received extra compensation for that. As was previously noted several clerks in the warehouse did perform certain tagging of inventory - part of Dearden's responsibilities - perhaps once or twice monthly for which they were paid an additional

\$50 per day for that work. It was also the testimony of Mr. Kent that Bendel did not receive additional compensation as a consequence of the abolition of Mr. Dearden's position.

Tangentially, petitioner also asserts that because Bendel apparently was the brother-in-law of the external auditor, Mr. Kent, he somehow benefited from the Fiscal Monitor's reorganization. The evidence does not support that assertion.

Mr. Dearden also contends that following Mr. Misiakowski's announced retirement as of July 1, 1994, respondent Board created the position of Senior Accountant in charge of the Purchasing Department. The position required, among other qualifications, that the person occupying it hold a degree in accounting. It was the Business Administrator, Ms. Ann Murphy, who recommended the creation of the senior accounting position which title was purchasing agent and senior accountant, and it was also Ms. Murphy who rejected Mr. Dearden's application for that position because he did not hold an accounting degree. The argument offered by Mr. Dearden is that because Mr. Robert Lawrence, the Director of Information Systems, did not possess an accounting degree and because he performed some of the duties for the purchasing agent position from early July to mid-September 1994, the decision to deny Dearden even an interview for the senior accounting purchasing position factually is demonstrative of capricious and arbitrary action against him.

While it may be true that Lawrence did not possess an accounting degree (the evidence was unclear as to what degrees, if any, Mr. Lawrence possessed) the comparison between Lawrence's status and Dearden's is inapposite. Lawrence testified unequivocally that for the short period that he occupied the position at issue, he did no financial record-keeping of any kind; rather, analysis of financial records was a major component of the senior accountant position which was created by Ms. Murphy. In addition, it was Lawrence's testimony that the performance of the responsibilities about which Dearden alludes took place over three days a week for only two months and in most instances, if not all, no accounting background was necessary. Thus, there is no factual basis for comparison of Lawrence's position and his credentials and the Board's decision not to accept Dearden for the position of senior accountant/purchasing agent given that he lacked any accounting degree. It should also be noted that once the purchasing agent position was abolished after Mr. Misiakowski's retirement, all of

the responsibilities were then incorporated into the Board' secretary job duties. When the Board's secretary position was filled, Mr. Lawrence discontinued performing any purchasing duties.

ANALYSIS

The Board does not dispute Mr. Dearden's position that he acquired tenure, both under the education law, N.J.S.A. 18A:17-1 et seq., as well as under the Veteran's Tenure Statute, N.J.S.A. 38:16-1-1 , N.J.S.A. 38:16-6. Petitioner argues that the abolition of his position was in violation of law in that it was arbitrary, capricious and did not result in any cost savings to the Trenton Board of Education.

Pursuant to N.J.S.A. 18A:28-9 a board of education may reduce the number of its employees if it can be demonstrated that in its judgment it is "advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the District or for good cause" See *Klinger v. Board of Education of Cranbury Township*, 190 *N.J. Super.* 354 (App. Div. 1982), cert. denied 93 N.J. 277 (1982); *In re Maywood Board of Education*, 168 *N.J. Super.* 45, 51-52 (App. Div. 1979). The courts, as Mr. Sumners notes in his post-hearing brief, have also acknowledged a presumption of correctness and propriety of the action of a local board in respect to decisions reducing staff. Thus, in order for an aggrieved party to prevail where there has been a reduction in force, it is necessary that he or she demonstrate that the decision is clearly improper, arbitrary and capricious and he will be generally not prevail in situations where there exists any reasonable justification for the reduction of force absent such proof of bad faith. See *Klig v. Board of Education of the Borough of Palisades Park, Bergen County*, 1975 *S.L.D.* 168, 173-174. *In re Maywood Board of Education, Supra.*

In the current matter, in my view, no demonstrable proof has been elicited from Mr. Dearden, upon whom the burden rests, to demonstrate that the actions of either the Fiscal Monitor, the Superintendent of Schools, or the Trenton Board of Education, the latter of which relied upon the recommendations of the Fiscal Monitor, in respect to the abolition of Mr.

Dearden's position, was anything but reasonable, couched in expertise and ostensibly directed towards making the purchasing department and the fiscal operations of the district efficient and sound. Notwithstanding that Mr. Dearden in fact called as his witnesses in this matter, key members of the Trenton School district, including its Superintendent and including the Fiscal Monitor herself, it was clear that these witnesses provided proof that the decision by the Board to abolish Mr. Dearden's position was based on good cause and, contrary to his assertion, prompted by a legitimate bona fide efforts to reorganize the district and place it on sound financial footing.

Most prominent in terms of proofs offered by the district in respect to the legitimacy of abolishing Mr. Dearden's position and the lack of any bad faith or arbitrariness underlying it was the presence, expertise, and authority of the Fiscal Monitor. Elizabeth De Matteo was selected to serve as Fiscal Monitor in Trenton by the Commissioner of Education because palpable deficiencies in the fiscal operations of the school system were perceived and remedies were required which presumably were not available through the "business as usual" approach that had been taken over the most recent past. The Commissioner selected Ms. De Matteo because of her extensive experience in reorganizing business offices and fiscal operations in a variety of other school districts in New Jersey. Her mandate was sweeping, but at the same time she was accountable to the Assistant Commissioner of Education as well as the Mercer County Superintendent of Schools in respect to the actions that she sought to undertake. I set forth in the factual narrative of this decision the broad plenary powers which the Fiscal Monitor had as well as the various dialogues with which she engaged before she formulated her plan to reorganize the business office. She also relied upon the input of Mr. Edward Kent, the State appointed external auditor who preceded her in the district by several months and reflected upon all the information that she received before formulating her reorganization plan.

Given what she saw as a fiscally unstable environment within the district which lacked professional accountability, it was Ms. De Matteo's primary objective to remedy this problem by creating two accounting positions, senior and junior accountant. In order to maintain fiscal stability within the district and not to overly burden it by increasing its overall costs, she determined to eliminate what she perceived as redundancy in the purchasing department. By consolidating the two assistant purchasing agents positions and merging their responsibilities into one position with various ministerial duties being distributed among lower ranking personnel, Ms. De Matteo

concluded that the Board would be relieved of any significant increase in costs by hiring two accountants and at the same time, based upon her experience in other districts, believed that the purchasing department would run more efficiently rather than less by placing all of the major responsibilities under the umbrella of one purchasing agent.

In addition to abolishing the positions of the two assistant purchasing agents, she also recommended the abolition of the position of assistant secretary/business services and business services assistant/payroll. The plan as proposed was formally approved by the Trenton Board of Education and also had the full support of the Assistant Commissioner of Education, the Mercer County Superintendent of Schools, the Superintendent of the Trenton Board of Education, and the State External Auditor. The result, in theory at least, is that the presence of two accountants in the district with appropriate expertise, should make the system more responsible.

In addition, the reorganization of the purchasing department should also in theory, based upon Ms. De Matteo's expertise and prior experience, make it more efficient. This latter conclusion was reinforced by the testimony of Mr. Misiakowski, who indicated that there was no negative or adverse effect on the operations of the department once the two assistant purchasing agent positions were abolished and managerial control was centralized in one purchasing agent. What is significant is not what the ultimate results of the reorganization will have in the district - a result which will and can only be measured by the passage of time - but rather whether the formulation and implementation of the reorganization plan was grounded in reasonableness and good faith. Clearly, and ostensibly it was.

Contrary to the suggestion of the petitioner even if the consequence of the reorganization plan was not to save the Board significant sums of money, that is not relevant to the propriety of plan. If the reorganization and the concomitant abolition of his position or other positions is done for reasons of efficiency, then even if the consequence is not to directly save the school district money, that does not mean that the decision is arbitrary. While there was some questions as to whether any loss was incurred by the district as a result the reorganization, it is my view of the facts that, to paraphrase Ms. De Matteo, the result of the reorganization was a "financial wash." In the long run however the Fiscal Monitor's plan is designed to make the Trenton School District

more fiscally sound and responsible. Clearly, if that is an objective which will be achieved, then in the long term indeed the district will have saved not lost money.

The petitioner's argument that bad faith undercut the abolition of this position based upon his history in the district, is also unacceptable. The petitioner, at least by inference, seeks to suggest that the Trenton Board of Education has been out to "get him" over the past decade or so as demonstrated by the two previous instances of terminating him and his eventual reinstatement. The abolition of his position which is currently under consideration, he suggests, as yet another attempt by the Board to remove him because as he noted in his testimony as an incident to one of his earlier removals he was referred to as a "political hack."

While certainly the past history of a relationship between a local school board and an employee is relevant on the issue of the propriety and reasonableness of its decision to abolish his position and terminate the employee, the relevance in the matter sub judice is entirely undercut by the presence of the Fiscal Monitor. It was she who made the decision to reorganize the business office in the fashion articulated and it was she who, as part of that reorganization, with the ratification of the Assistant Commissioner of Education and the Mercer County Superintendent of Schools, determined to eliminate Mr. Dearden's position. Ms. De Matteo had no history or involvement with the district before she became Fiscal Monitor and certainly no involvement of any kind in respect to Mr. Dearden and the earlier albeit unsuccessful efforts by the Board of Education to abolish his positions. Moreover, and perhaps most significantly, the testimony indicated that Ms. De Matteo was not even aware of who Mr. Dearden was, much less was she aware of his employment history with the district. Therefore, in my view, the prior history that Mr. Dearden had with the Trenton School District has no material connection to the issue of the abolition of his position currently under consideration nor, does it in any fashion impinge upon the good faith efforts by the Board at reorganization.

Further, it was through the Fiscal Monitor's efforts that Mr. Dearden's sick leave time was extended by the Board. As Mr. Sumners notes in his post-hearing submission, the Fiscal Monitor had neither motivation to treat Dearden unfairly, nor any reason to treat him differently from any other district employee.

Accordingly, and based upon the foregoing, I **CONCLUDE** that the petitioner has failed to demonstrate by a preponderance of the relevant, credible evidence that the abolition of his position, assistant purchasing agent/stock and inventory control and/or his termination from employment with Trenton was undertaken in bad faith or was arbitrary and capricious or was in any other fashion contrary to the dictates of N.J.S.A. 18A:28-9.

I shall now address the other legal issues raised by petitioner by way of post-hearing argument. Mr. Dearden asserts that the Fiscal Monitor was without legal authority to recommend the abolition of the petitioner's position to the Trenton Board of Education. The same argument was essentially raised in another matter before me, also involving a Trenton employee, *Donald Wollman v. Board of Education of the City of Trenton, Mercer County, OAL Docket number EDU 11871-93, Agency Docket number 366-11/93* which I decided on March 24, 1995. As of the date of the issuance of this decision, I am unaware of the action by the Commissioner of Education in respect to Wollman. In any event, the legal rationale articulated by the petitioner in this matter, concerning the purported lack of the authority of Ms. De Matteo to recommend the abolition of Mr. Dearden, is the same argument raised in *Wollman* and my analysis of it is identical.

The Commissioner's authority to appoint a Fiscal Monitor.

Petitioner's argument in respect to this issues is somewhat ambiguous. In his post-hearing reply brief, petitioner notes that "[n]othing in N.J.S.A. 18A:7A-1 et seq. . . . authorizes the creation of the title of the Fiscal Monitor" but also acknowledges that the statute creates an implied authority in the Commissioner to create a Fiscal Monitor. Petitioner's central point appears to be that a Fiscal Monitor may not act in the place of a board of education.

Nevertheless, the reply brief gives some indication that petitioner is challenging the very appointment of a Fiscal Monitor. To the extent that petitioner argues that the appointment of a Fiscal Monitor is in and of itself impermissible, he is incorrect. The appellate division and Supreme Court have decided that the appointment of a monitor with general supervisory powers

is valid under Title 18A. *In the Matter of the Board of Education of Trenton*, 176 N.J. Super. 553 (App. Div. 1980), aff'd per curiam 86 N.J. 327 (1981). The ALJ relied in part on that case when he ordered that the Commissioner recommend to the State Board the appointment of a Fiscal Monitor. *McCarroll v. Bd. of Education of E. Orange*, OAL Dkt. No. 7777-84 (Oct. 31, 1984), adopted Commissioner of Education (Nov. 7, 1984).

If petitioner is arguing that the appointment of a Fiscal Monitor must conform to the procedural requirements necessary to establish a state-operated school system, those procedural requirements were followed insofar as the Commissioner issued an order to show cause and gave the Trenton Board of Education an opportunity for a hearing at OAL (the hearing never took place because the Commissioner and the Board entered into the consent agreement). The procedural requirement for establishment of a state-operated school system that was not followed was approval by the State Board. Here, the State Board apparently did not approve the administrative order establishing the Fiscal Monitor. The question thus is whether the requirement that the State Board approve a state takeover of a school system applies to the appointment of a Fiscal Monitor.

Petitioner asserts that, given the authority of a Fiscal Monitor to control the school system's financial affairs, the appointment of a Fiscal Monitor is tantamount to a state takeover. This argument is also rejected. Respondent correctly notes that the appointment of a monitor differs from a state takeover in a variety of ways. For example, when the Fiscal Monitor is appointed, the board and administration remain in their positions and the board retains control over non-fiscal matters. See N.J.S.A. 18A:7A-15.1; N.J.S.A. 18A:7A-34.

Furthermore, the terms of N.J.S.A. 18A:7A-15 preclude petitioner from arguing that orders of the Commissioner that do not establish a state-operated school system must be approved by the State Board. N.J.S.A. 18A:7A-15 provides that:

If, after a plenary hearing, the commissioner determines that it is necessary to take corrective action, the commissioner shall have the power to order necessary budgetary changes within the district or other measures the commissioner deems appropriate to establish a thorough and efficient system of education with the exception of

the creation of a state-operated school district. . . . If the commissioner determines that the district has failed to take or is unable to take the corrective actions necessary to establish a thorough and efficient system of education, the commissioner shall recommend to the State board that it issue an administrative order creating a State-operated school district.

[Emphasis added.]

The statute sets up two scenarios. In an order to effectuate a state takeover of a school system, the State Board must issue the order. In all other cases, the Commissioner has the power to act on his or her own initiative.¹

(B)

The Fiscal Monitor's authority to abolish Mr. Dearden's position and to terminate him.

- a. Authority under the administrative order.

Petitioner grounds his argument that the Fiscal Monitor is acting beyond the scope of the order on the following language in the order:

The Fiscal Monitor's powers shall include the authority to

- i. terminate or promote any of those Board of Education employees under the supervision of the Board Secretary or School Business Administrator without approval of the Board of Education but in accordance with applicable contractual or statutory procedures. [Administrative Order at 4.]

¹ In *In the Matter of the Board of Education of Trenton*, supra, the corrective action plan, which included appointment of a monitor, was approved by the State Board. Likewise, in *McConnell*, supra, the Commissioner's decision merely recommended to the State Board the appointment of a Fiscal Monitor. This may be because, prior to 1988, the language of N.J.S.A. 18A:7A-15 provided the Commissioner with less latitude. ("If, after a plenary hearing, the commissioner determines that it is necessary to take corrective action, he shall have the power to order necessary budgetary changes within the school district, to order in-service training programs for teachers and other school personnel, or both. If he determines that such corrective actions are insufficient, he shall have the power to recommend to the State board that it take appropriate action [including issuance of] an administrative order specifying a remedial plan to the local board of education, which plan may include budgetary changes or other measures the State board determines to be appropriate.")

Petitioner argues that the Fiscal Monitor did not act in accordance with applicable statutory procedures because N.J.S.A. 18A:28-9 allows only the local board to terminate employees for reasons of economy or efficiency.²

The difficulty with this interpretation is manifest. It disregards the language of the order stating that termination may occur “without the approval of the Board of Education.”³ Further, the intent of N.J.S.A. 18A:28-9 is not to exclude a Fiscal Monitor from making decisions a board would ordinarily make. The statute likely does not even contemplate a Fiscal Monitor acting in lieu of a board because Fiscal Monitors are rare and because the statute was adopted in 1967, long before the appointment of any monitor. A more reasonable interpretation of the language of the order is to infer that a Fiscal Monitor, like a board, cannot disregard the tenure laws if he or she wishes to terminate an employee (e.g., she cannot fire a tenured employee without a reason).

Pursuant to this analysis, the administrative order clearly authorized the Fiscal Monitor to terminate Dearden. The order, however, does not specifically confer the power to abolish positions. Given the scope of powers conferred by the order and the existence of the power to terminate, it must reasonably be inferred that such power exists. See, e.g., Administrative Order at 2 (“The Fiscal Monitor . . . is to assume control and supervision over all fiscal operations” Fiscal operations include supervision of buildings and grounds. Id. at 5). The list of powers includes the authority to order the Board to make budgetary changes, to veto any expenditure of funds or any personnel action, to order changes in the operations of the fiscal affairs of the district, and to appoint auditors (pursuant to whose recommendation Dearden’s position was abolished). All of these provisions provide support for the Monitor’s authority to abolish a position for efficiency reasons.

² None of petitioner’s written submissions advances the argument that Mr. Dearden’s dismissal would have been illegitimate had the Board acted rather than the monitor, with the exception of the Veterans’ Tenure Act claim. “[R]education in force is entirely within the authority of the board if done for reasons of economy.” *Klinger v. Bd. of Education of Cranbury*, 190 N.J. Super. 354 (App. Div. 1982).

³ Contrast this provision with subsection 1, which governs employees not under the supervision of the Board Secretary or the School Business Administrator. The Fiscal Monitor may only recommend the termination or promotion of such employees.

b. Authority under the statute

Petitioner also appears to be arguing that the order itself is defective insofar as the Commissioner lacks the authority to appoint a Fiscal Monitor who can terminate employees. This is distinct from the argument discussed, *supra*, which considered whether the Commissioner could appoint a Fiscal Monitor at all.

No legal authority was discovered that squarely addresses the issue of whether a Fiscal Monitor can or cannot terminate an employee. There is however, considerable authority affirming the Commissioner's authority to insure a thorough and efficient education by whatever means he or she deems appropriate.

The Commissioner has broad remedial powers. *See, e.g., Bd. of Education of Elizabeth v. City Council of Elizabeth*, 55 N.J. 501 (1970); *In the Matter of the Application of the Bd. of Education of Upper Freehold Regional School Dist.*, 86 N.J. 265, 274-275 (1981) (Commissioner and State Board have the authority to direct a local board to issue bonds for a capital project, even though the local voters had rejected referenda to finance the project.) The Commissioner also has a responsibility to effectuate a thorough and efficient system of education. *Robinson v. Cahill*, 69 N.J. 449, 459-60 (1976).

The need for the Commissioner to exercise broad authority increases when a monitor is appointed. The appointment of a monitor occurs only under extraordinary circumstances. *In the Matter of the Bd. of Education of Trenton, supra*, 86 N.J. at 329; *McCarroll v. Bd. of Education of E. Orange*, OAL Dkt. No. 7777-84 at 5 (ALJ approves appointment of a Fiscal Monitor based on the existence of "fundamental problems and irregularities regarding . . . fiscal operation and management.") Presumably, the greater the plight of the school system, the greater the discretion needed by the Commissioner to implement solutions to the problems. This explains the broad discretion conferred by N.J.S.A. 18A:7A-15:

If, after a plenary hearing, the commissioner determines that it is necessary to take corrective action, the commissioner shall have the power to order necessary budgetary changes within the district or

other measures the commissioner deems appropriate to establish a thorough and efficient system of education with the exception of the creation of a State-operated school district. [Emphasis added.]

It is compelling therefore to conclude that the Commissioner's authority is sufficiently broad to encompass the appointment of a Fiscal Monitor with the power to abolish a position and terminate an employee. Moreover here, unlike in *Wollman*, the Trenton Board expressly approved of the Fiscal Monitor plan through formal resolution.

Lastly, petitioner argues that, Mr. Dearden, a veteran, was denied a hearing prior to his termination in violation of N.J.S.A. 38:16-1 - N.J.S.A. 38:16-1 - and (2) that the abolition of Mr. Dearden's position was made for the express purpose of terminating him in violation of N.J.S.A. 38:16-3 of the Veteran's Tenure Act.

The issue posed by petitioner is whether N.J.S.A. 38:16-1 requires a hearing prior to termination, even if termination occurs pursuant to the abolition of petitioner's position. N.J.S.A. 38:16-1 provides that a veteran employed by the government (including a board of education) shall not "be removed from such employment . . . except for good cause shown after a fair and impartial hearing, but such person shall hold his employment . . . during good behavior, and shall not be removed for political reasons." The statute does not protect the employment of veterans when their positions are abolished, *Dobbs v. Pierce*, 76 *N.J. Super.* 64 (Law Div. 1962), but abolition may not be used as a pretext for terminating a veteran. N.J.S.A. 38:16-3.

There are two arguments militating against petitioner's conclusion that although abolition does not trigger the protections of the Act, the statute still requires a hearing prior to termination. First, N.J.S.A. 38:16-2 provides that prior to dismissal of a veteran covered by N.J.S.A. 38:16-1, "charges shall be preferred against him, a copy of which shall be served upon him and a time set for the hearing of same." If a veteran's position is abolished, there is obviously no need for charges to be preferred. The statute, in my view, contemplates a hearing only when the employee's conduct is at issue.

Second, long-standing precedent holds that a hearing is not required prior to the abolition of a veteran's position. *See Burney v. Paterson*, 3 *N.J. Misc.* 1197 (S. Ct. 1925) (answering yes

to the question of whether a position held by a veteran can be abolished by a municipality, acting in good faith and for the purpose of economy, without notice and hearing to the occupant thereof); *Ziegler v. City Council of Hackensack*, 113 *N.J.L.* 215 (S. Ct. 1934), *aff'd* 114 *N.J.L.* 186 (Ct. Err. 1935). (Fire chief's position abolished without a hearing and pursuant to reorganization. Dismissal upheld). For cases in which abolition of a veteran's position occurred and the procedural history makes no mention of a hearing having taken place prior to abolition, *see Dobbs v. Pierce*, 76 *N.J. Super.* 64 (Law Div. 1962) (Camden board of assessors abolished); *Moresh v. Bd. of Education of Bayonne*, 52 *N.J. Super.* 105 (App. Div. 1958) (elimination of vice-principalships by reason of the Board); *Barringer v. Miele*, 6 *N.J.* 139 (1951) (veterans who were employees of the Superintendent of Elections and the Commissioner of Registration terminated after the offices were combined); *Greco v. Smith*, 40 *N.J. Super.* 182 (App. Div. 1956) (Belleville building inspector proved that bad faith rather than economy motivated his termination. The court did not criticize or even mention the absence of a hearing prior to Greco's termination.). Of course, an unauthorized termination can take place in the guise of abolition of a position, and a pre-termination hearing could presumably prevent that. Nevertheless, the precedent indicates that a municipality's right to control the structure and size of its government enables it to abolish positions without a preliminary hearing. I have, of course, concluded that Dearden's termination and the abolition of his position were not undertaken in bad faith. The legal arguments raised by petitioner post-hearing are without merit.

Accordingly, and based upon the foregoing, I **CONCLUDE** that the Fiscal Monitor was possessed with the legal authority and jurisdiction to recommend to the Trenton Board of Education the abolition of the petitioner's position.⁴

Accordingly, and based upon the foregoing, it is **ORDERED** that the determination of the respondent, Trenton Board of Education, which abolished the petitioner's position as assistant purchasing agent/stock and inventory control undertaken at its meeting of May 27, 1993, and his termination effective June 30, 1993, be and are hereby **SUSTAINED**.

⁴ Petitioner's argument in respect to Mr. Dearden's prior history with the Trenton School system has already been addressed in this decision as part of my analysis of whether the abolition of his position was arbitrary and capricious.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

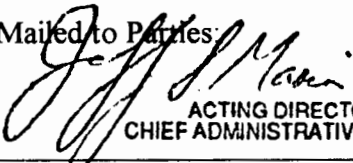
6/14/95
DATE


STEVEN C. REBACK, ALJ

6/19/95
DATE

Receipt Acknowledged:
Hope R Blackburn
DEPARTMENT OF EDUCATION

JUN 22 1995
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

tmp

WITNESSES

On Behalf of Petitioner:

Dr. Bernice Venable
Harry Dearden
Elizabeth De Matteo
Robert Lawrence
Ann Murphy

On Behalf of Respondent:

Jack Bendel
Edward Kent
Alfred Misiakowski
Ann Murphy
Elizabeth DeMatteo

EXHIBITS

On Behalf of Petitioner:

- P-1 Job Description, Assistant Purchasing Agent/Stock and Inventory Control (2 pages)
- P-2(a)(b) Administrative Order creating Fiscal Monitor
- P-3 Letter from John N.Fox to petitioner, May 25, 1993 (2 pages)
- P-4 Letter from Elizabeth De Matteo to petitioner, May 27, 1993
- P-5 Memorandum from Elizabeth De Matteo to Trenton Board members and Trenton Superintendent of Schools
- P-6 Organizational Chart of Trenton Board of Education
- P-7 Vacancy Announcement for the position Senior Accountant

- P-8 Letter from Dr. Bernice Venable to petitioner, June 1, 1993
- P-9 Vacancy Announcement for the position Senior Accountant - Purchasing
Department
- P-10 Letter from Ann Murphy to petitioner, June 10, 1994

On Behalf of Respondent:

- R-1 Memorandum from Fiscal Monitor to Trenton Board members and Trenton
Superintendent
- R-2 Letter from petitioner to Ann Murphy, June 9, 1994
- R-3 Job Description for the position Senior Accountant
- R-5 Job Description for the position Purchasing Agent

HARRY DEARDEN, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE CITY : DECISION
 OF TRENTON, MERCER COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner requested and was granted an extension, until noon on Friday, July 7, 1995, for the filing of exceptions in this matter. These and the Board's reply thereto were timely filed.


Petitioner's exceptions essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ), which the Commissioner finds were fully and fairly considered and addressed in the initial decision and, therefore, need not be revisited herein.

Upon a careful and independent review of the record, including transcripts of the three days of hearing in this matter at the OAL, the Commissioner concurs with the findings and conclusion of the ALJ that petitioner has failed to satisfy his burden of establishing, by a preponderance of the relevant, credible evidence, that the abolishment of his position by the Board was arbitrary, capricious, motivated by bad faith, or in contravention of law. The Commissioner passes no judgment, however, with respect to the ALJ's discussion on

pages 21-24 of the initial decision regarding the authority of the Fiscal Monitor. Given that petitioner's position was abolished pursuant to Board resolution of May 27, 1993, such is not necessary to his determination herein.

Accordingly, except as noted above, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons clearly articulated therein. It is ordered that the determination of the Trenton Board of Education abolishing petitioner's position, and his termination effective June 30, 1993, undertaken by Board resolution on May 27, 1993, be sustained. The within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

August 2, 1995
Date of Mailing, August 2, 1995

EDU #8670-95
C # 294-95
SB # 94-95

HARRY DEARDEN,	:	
	:	
PETITIONER-APPELLANT,	:	
	:	
V.	:	STATE BOARD OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF TRENTON, MERCER	:	
COUNTY,	:	
	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, August 2, 1995

For the Petitioner-Appellant, Lake & Schwartz, (Robert M. Schwartz,
Esq., of Counsel)

For the Respondent-Respondent, Sumners, Council, George & Dortch
(Thomas M. Sumners, Jr., Esq., of Counsel)

The State Board of Education affirms the decision of the Commissioner substantially for the reasons set forth in the Administrative Law Judge's Initial Decision. In so doing, we concur with the Commissioner that it is unnecessary to pass upon the questions raised relating to the Fiscal Monitor's authority in this case given that the Trenton Board acted by resolution to abolish petitioner's position. Hence it was the action of the Board rather than that of the Fiscal Monitor which petitioner challenged by his petition to the Commissioner. As detailed in the Administrative Law Judge's Initial

2/7/96

Decision, we find that petitioner has not demonstrated that the Board's action was in bad faith or otherwise in contravention of N.J.S.A. 18A:28-9.

Donald C. Addison, Jr., Wendel E. Daniels and Thomas P. McGough abstained.

February 7, 1996

Date of mailing _____

IN THE MATTER OF THE TENURE :
 HEARING OF EDWARD KOZIC, SCHOOL :
 DISTRICT OF THE TOWNSHIP OF WEST : COMMISSIONER OF EDUCATION
 DEPTFORD, GLOUCESTER COUNTY. :
 _____ :
 :

DECISION

SYNOPSIS

Board certified tenure charges of unbecoming conduct against respondent, high school Industrial Arts teacher, for his arrest for possession of marijuana. Respondent sought reinstatement to his position grounded upon the New Jersey Law Against Discrimination (LAD) as he contended his cultivation and possession of more than 400 marijuana plants resulted from his cross-addiction to marijuana, which he developed as a substitute for his previous alcohol addiction.

Having considered the testimony of witnesses and the record, the ALJ concluded that the Board's action seeking respondent's dismissal was proper and respondent's defense of a handicap under the LAD was without merit given his engagement in criminal activity. ALJ ordered dismissal from his tenured position.

Commissioner concurred with the determination of the ALJ that respondent's cultivation and possession of marijuana constituted unbecoming conduct by a teacher pursuant to N.J.S.A. 18A:6-10. Commissioner further concurred with the ALJ that respondent was not entitled to statutory protection of the LAD as the Board had made reasonable accommodation to treat his alcohol addiction, of which respondent did not avail himself. Rather, he engaged in the criminal activity of growing and cultivating marijuana. Commissioner ordered respondent dismissed from his tenured position as of the date of the Commissioner's decision and the matter referred to the State Board of Examiners for further appropriate action.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1045-92

AGENCY REF. NO. 17-1/92

**IN THE MATTER OF THE TENURE HEARING OF
EDWARD KOZIC, SCHOOL DISTRICT OF THE
TOWNSHIP OF WEST DEPTFORD, GLOUCESTER
COUNTY**

Raymond T. Page, Esq., for the complainant Board of Education

Michael C. Damm, Esq., for the respondent (Selikoff & Cohen, attorneys)

Record Closed: May 9, 1995

Decided: June 21, 1995

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Board of Education of the School District of West Deptford Township (Board) certified tenure charges against respondent, Edward Kozic, a teaching staff member in its employ, and seeks his dismissal on the grounds that he engaged in conduct unbecoming a teaching staff member, N.J.A.C. 18A:6-10 to -25. Respondent seeks reinstatement to his position grounded upon the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42.

The matter was transmitted from the Commissioner of Education (Commissioner) to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The hearing was held on October 3, 4 and 7, 1994, at the Woodbury, New Jersey, Municipal Court. The parties requested, and were granted, leave to submit post hearing briefs and memoranda. The hearing record closed on May 9, 1995.

STATEMENT OF CHARGES

A Special Meeting of the Board was held on December 19, 1991, where the Board adjourned into closed session pursuant to the Open Public Meetings Act (OPMA) N.J.S.A. 10:4-6 to -21, and certified the following statement against respondent by a recorded roll call vote:

Charges of tenure: A position within the employment of the Board of Education of the Township of West Deptford, has exhibited conduct unbecoming a professional school teacher outside of a classroom. The following is a list of specific allegations which the Board of Education for the Township of West Deptford will rely upon to demonstrate unbecoming conduct which would prevent Edward Kozic from continuing in his position as a tenure teacher.

1. On or about November 6, 1991, Edward Kozic was found in possession of Marijuana, substance classified as a Controlled Dangerous Substance pursuant to the laws of the State of New Jersey. The possession of the substance was in violation of New Jersey State Laws and demonstrates conduct which is inconsistent with the conduct to be exhibited by a professional teacher of the State of New Jersey.
2. On or about November 6, 1991, there was found to be in excess of one hundred plants of Cannabis Sativa (also known as marijuana) growing at the residence of Mr. Edward Kozic, said residence being located at V-429 Park Crest Village, Glassboro, New Jersey. The cultivation and/or possession of this Controlled Dangerous Substance constitutes unbecoming a professional tenure teacher in the State of New Jersey.

BACKGROUND FACTS

Respondent commenced his employment with the Board in or about 1977 as a Graphic Arts teacher at the West Deptford Middle School. In 1984, respondent was transferred from the Middle School to the Board's high school and was assigned to teach Industrial Arts, where he taught drafting, woodshop, metal shop, among other things.

At the end of the 1984-85 school year, William Stubbs, West Deptford High School Principal, discussed his concerns about respondent's absences during the school year. The absences were frequent on Mondays and days after holidays. Principal Stubbs noted that this observation had been brought to respondent's attention on two occasions when respondent was assigned to the Board's middle school. These observations appeared on respondent's evaluations.

Respondent stated to Principal Stubbs that respondent had an ulcer and was under a physician's care. It was clear to Principal Stubbs that respondent had a problem with alcohol. Principal Stubbs did not claim that respondent used alcohol while on school grounds or that respondent exhibited any symptoms of alcohol use while on duty. Principal Stubbs advised respondent that his behavior would be monitored and that respondent would be required to improve his attendance. Respondent's attendance improved during the 1985-86 school year.

Respondent began to abuse alcohol while in his teens. He testified that his father and other members in his father's family were alcoholics. As a consequence of respondent's abuse of alcohol he commenced to exhibit health problems in or about 1982. In 1982, respondent was hospitalized for a period of nine days with alcohol induced pancreatitis. Respondent was advised by his physician that his continued consumption of alcohol would result in additional attacks of pancreatitis with the possibility of it contributing to his death. Despite his physician's warnings, respondent continued to consume alcohol excessively which caused him to suffer more attacks of pancreatitis.

In or about April 1988, subsequent to respondent's hospitalization as the result of a severe pancreatitis attack, respondent refrained from the consumption of alcohol. He was without alcohol for approximately one month when he substituted alcohol with marijuana.

Due to the high cost of purchasing marijuana on the street, respondent commenced to grow the intoxicant in his apartment. He arranged elaborate and sophisticated nurturing and growing areas in his apartment with high sodium lights (grow lights), timers, fluorescent lighting, soil, water, fertilizer, scales, fans, drying pans, rolling paper for cigarettes, hemostat, among other things.

In September 1991, the New Jersey State Police (NJSP) received information from the United States Department of Justice, Drug Enforcement Administration (DEA) that respondent had accepted delivery of 13 orders of lighting equipment used in the growing of marijuana between January and June 1989. Subsequently, the NJSP commenced a surveillance of respondent's apartment and determined, among other things, that his electric bill was five and one-half to eight times higher than his neighbors, although respondent lived alone.

On November 6, 1991, the NJSP arrested respondent as he was exiting his automobile in front of his apartment. The NJSP executed a search warrant and entered respondent's apartment where it located 113 marijuana plants one foot to three and one-half feet tall behind a false wall in respondent's apartment which concealed the plants from view. The NJSP also discovered 296 smaller marijuana plants in the living room closet for a total of 409 marijuana plants. It completed an inventory (Exhibit P-4 in evidence) of the apartment's contents and also made a video tape of the apartment and its contents. (Exhibit P-3 in evidence).

Subsequent to respondent's arrest, he was charged with manufacturing for sale a Controlled Dangerous Substance (CDS), in violation of N.J.S.A. 2C:35-5a.(1) and N.J.S.A. 2C:35-5b.(11); possession with intent to distribute a CDS, in violation of N.J.S.A. 2C:35-5a.(1) and N.J.S.A. 2C:35-5b.(11); and possession of a CDS, in violation of N.J.S.A. 2C:35-10a.(3). After a full jury trial, respondent was found guilty of possession of marijuana (N.J.S.A. 2C:35-10a.(3)) and not guilty of the other charges brought against him.

Respondent had spent two days in jail subsequent to his arrest. As a consequence of the Judgment of Conviction, dated October 20, 1993, respondent was sentenced to one year probation with the condition that he continue psychiatric counseling. He was ordered to pay \$859 in fines and other costs. His driving privileges were suspended for six months. Respondent has refrained from the use of marijuana since November 6, 1991, and alcohol since in or about April 1988.

Subsequent to respondent's arrest, the Board held a special meeting on December 19, 1991, at which it adopted a resolution to certify charges of conduct unbecoming a teaching staff member with the Commissioner.

Beginning September 1994, respondent was employed by the Gloucester County Special Services School District as a temporary Industrial Arts teacher to replace the regular classroom teacher who was on a leave of absence. Prior thereto, respondent was employed as a vocational instructor for the Bancroft Organization in Haddonfield, New Jersey, for individuals with brain injuries.

I hereby adopt the above Background Facts as **FINDINGS OF FACT** in this matter.

FACTS IN DISPUTE

Respondent does not deny he cultivated marijuana in his apartment. Moreover, he asserts that he grew the substance solely for his own use. He testified that at first, he smoked about one ounce of marijuana per month. At the end of the summer of 1988, he had increased his consumption to between two and four ounces per month. Subsequently, he smoked as much of the substance as he could grow; *i.e.*, he was chain smoking marijuana. At the time of his arrest on November 6, 1991, respondent testified he smoked between eight to ten cigarettes or "joints" per week night. On weekends, he would consume up to 18 joints per day.

Detective John Silver of the NJSP was qualified as an expert in the growth and manufacture of marijuana and testified, among other things, that respondent's growing operation

was highly sophisticated. Detective Silver has had experience with other indoor growing operations; some larger than respondent's. However, he had never observed an operation as large as respondent's for just one individual's use.

Detective Silver examined respondent's records and by observing the layout and contents of the apartment, concluded that respondent could raise five crops per year with a yield of 85 ounces or in excess of five pounds of marijuana per year. Detective Silver brought the criminal charge against respondent of possession of CDS with intent to distribute because he was of the opinion that the amount of marijuana raised by respondent was more than the amount that could reasonably be consumed by one individual.

Jeffrey Clayton, industrial consultant for alcohol abuse with Services to Overcome Drug Abuse Among Teenagers (SODAT) has been qualified by the New Jersey Superior Court as an expert in family dynamics and the treatment for addiction and testified on the Board's behalf. Mr. Clayton testified, among other things, that it was not common for an addict to move from alcohol to marijuana if the addict had not been using marijuana. He asserted that the record disclosed that respondent used three to six joints per day when he started with marijuana after giving up alcohol. Clayton stated that the use of an ounce per week, the amount used by respondent, was an unusual amount of use. He asserted that it takes between one-half gram to one-full gram of marijuana to make one joint.

Mr. Clayton asserted that the use of marijuana caused the individual to be in a relaxed, tranquil, state. The substance is stored in the fat tissue which affects the brain function with a significant impact. It effects memory and motor coordination, among other things. Marijuana provides a sedated type effect, where alcohol has a more anesthetized effect and which causes the user to go to sleep.

Mr. Clayton stated that a heavy user of marijuana would need between two and three joints to achieve a "high." He asserted that one dose of the substance would last between two and four hours. He testified that he had never encountered any addict who smoked 18 joints in one day. The most he ever encountered was an addict who smoked between eight and ten joints

per day. He contended that it would take a full day, 12 hours, to smoke three to four joints in one day.

Mr. Clayton testified that it was his experience that individuals who smoked between three and four joints per day did not work because they could not function. He asserted that the effects of the marijuana use made the individual lethargic, with a lack of motivation, poor motor coordination, poor work performance with high accident rates. Heavy users of marijuana generally dropped out of the mainstream of life.

Mr. Clayton asserted that he could not believe that respondent smoked as much marijuana a day as respondent claimed he had smoked. Nor could Clayton believe that respondent could operate machinery or power tools safely after using as much marijuana as respondent said he had used. Clayton opined that respondent's testimony was inconsistent with known facts. Clayton asserted that it would take between five and ten years of drug use before an individual could smoke five to ten joints per day. Clayton observed that respondent testified it took only three to four months to reach that level of consumption.

FINDINGS OF FACT

Based upon the testimony and documents offered into evidence, and having given fair weight thereto; I **FIND** the following **FACTS** in this matter:

Respondent is an alcoholic and suffered approximately twelve attacks of alcohol induced pancreatitis while a teaching staff member with the Board.

At the conclusion of the 1984-85 school year, West Deptford High School Principal, William Stubbs, conducted a year end evaluation of respondent and discussed respondent's absence from duty during the school year. Principal Stubbs noted that respondent's absences were more frequent on Mondays and days following a holiday. Principal Stubbs further noted that this frequency of respondent's absences had occurred in prior years when respondent was assigned to the Board's Middle School. Subsequent to Principal Stubb's discussion, respondent improved his attendance record.

It was clear to Principal Stubbs that respondent had a problem with alcohol. Respondent, however, did not request any accommodation for his problem with alcohol.

There was no indication that respondent used alcohol while on school grounds. Nor was there any indicia of alcohol use while respondent performed in the classroom. In fact, respondent's performance evaluations were generally favorable.

Respondent's treating physician's Dr. Peter A. Plumeri, advised respondent that his continued use of alcohol would exacerbate his pancreatitis condition. Dr. Plumeri recommended that respondent enroll in an alcohol in-patient rehabilitation program. Respondent failed to follow his physician's recommendation and did not seek rehabilitative help.

In or about April 1988, respondent gave up alcohol on his own accord. Subsequently, in or about May 1988, respondent commenced to purchase marijuana in local bars for his consumption. Respondent engaged in self-help or self-medication by substituting marijuana for alcohol.

In the early fall of 1988, respondent commenced to purchase equipment for the cultivation of marijuana. As a consequence of these equipment purchases, respondent was able to grow and use his own marijuana, in violation of state and federal statutes.

On November 6, 1991, respondent was arrested by the NJSP and his apartment was subjected to a valid search warrant. Respondent was charged with a variety of criminal offenses as a consequence of his arrest and the search of his apartment.

On December 19, 1991, the Board certified tenure charges against respondent with the Commissioner, alleging that respondent engaged in conduct unbecoming a professional school teacher outside of a classroom, and sought his termination.

On October 20, 1993, respondent was convicted of the possession of more than 50 grams of marijuana, in violation of N.J.S.A. 2C:35-10a.(3).

The Board's tenure charge is true, in fact, that respondent committed conduct unbecoming a teaching staff member pursuant to the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 to -18.1.

**SUMMARY OF THE PARTIES
LEGAL ARGUMENTS**

THE BOARD'S POSITION

POINT I

The Board argues that the Americans with Disabilities Act (ADA), 42 U.S.C.A. §12101 to §12213, does not require the Board to return respondent to employment because of respondent's use of a CDS. There is no dispute that respondent was in violation of the law and was using marijuana, a CDS. Respondent not only admits he used marijuana but, moreover, he admits to cultivating large quantities of the substance at the time of his arrest and the execution of a search warrant of his apartment.

Respondent requests that he is entitled to a reasonable accommodation alleging he is an individual with a disability stemming from his alcohol and subsequent drug use. Respondent, however, is not recognized as a disabled person or an individual with a disability pursuant to the ADA. 42 U.S.C.A. §12114(a) states that an individual is not entitled to a reasonable accommodation if that person is currently engaged in the illegal use of drugs. The statute reads, in part, as follows:

For the purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

42 U.S.C.A. §12114(a)

The Board observes that respondent was clearly in possession of and using marijuana at the time of his arrest on November 6, 1991. At the time of his arrest, respondent was "currently

engaged in the illegal use of drugs,” and, therefore, he was not a “qualified individual” under ADA. The Board argues that respondent, therefore, is not entitled to a reasonable accommodation and should not be returned to its employ.

POINT II

The Board argues that pursuant to N.J.S.A. 18A:6-7.1, respondent would be precluded from employment with the Board in the event respondent would now apply for a teaching staff position. The statute, N.J.S.A. 18A:6-7.1, provides in part, that a local board of education shall not employ any teacher, among other persons serving in a position which involves regular contact with pupils, unless the board of education has first determined that the individual has no criminal record on file with the Federal Bureau of Investigation, Identification Division, or the State Bureau of Identification. The respondent would be disqualified from employment with the Board because he has a criminal history which demonstrates that he committed:

- b. A crime or offense involving the manufacture possession, or habitual use of a “controlled dangerous substance” N.J.S.A. 18A:6-7.1b.

Consequently, respondent would not be eligible for employment with the Board under the statute. The Board recognizes that respondent, under subsection (e) of the statute, may seek employment but only after respondent affirmatively demonstrates to the Commissioner, by clear and convincing evidence, he has been completely rehabilitated. However, because of his criminal record, respondent should not be permitted to return to his former position. Such an act would send the wrong message to the children of West Deptford High School. It would create confusion and demonstrate a lack of respect for the law.

POINT III

The Board argues that its filing of charges against respondent with the Commissioner for respondent's use of marijuana does not constitute discrimination under LAD. The Board concedes it was familiar with the fact that respondent had a problem with alcohol and/or abuse during the 1980's. Immediately after respondent stopped using alcohol, he began to substitute marijuana for alcohol. Respondent now takes the position, based upon his testimony, that he was a disabled person as a result of both his alcohol and marijuana use and, therefore, is entitled to a reasonable accommodation pursuant to LAD.

The Board admits that an individual suffering from alcoholism is handicapped under LAD. Clowes v. Terminex International, Inc. 109 N.J. 575 (1988). The Board, however, was not able to locate any case that an individual who was addicted to a CDS is "disabled" pursuant to LAD. The Attorney General of New Jersey, however, has provided an opinion with regard to whether a disability exists when an individual is allegedly addicted to a CDS and opined that one cannot claim a disability caused by a substance the Legislature has deemed to be inappropriate for. (Attorney General Formal Opinion No. _____, October 6, 1989).

The Board argues that respondent was not physically addicted to marijuana. It notes that every one of the experts who testified in this matter, on behalf of the Board and on behalf of respondent, indicated that there is no physical addiction to marijuana. While two of the four expert witnesses testified that respondent was addicted to marijuana, they both testified that there was no physical symptoms of "withdrawal" when a person stops using marijuana.

Two of the expert witnesses testified that if anyone is addicted to marijuana, the only type of addiction which could occur is a psychological one. It is the Board's position that if a person is not physically dependent on a substance, then one is not addicted to that substance.

The Board argues that if an individual is not addicted to a substance, then the individual cannot be cross-addicted to a substance pursuant to the determination made by the Appellate Division of Superior Court in In the Matter of Daniel Cahill, 245 N.J. Super. 397 (App. Div. 1991). The Board posits that a cross-addiction did not exist in accordance with Cahill and,

therefore, respondent is not entitled to a reasonable accommodation for the use of an illegal substance, *i.e.*, marijuana.

The Board is in agreement with the State Board of Education's decision in In the Matter of the Tenure Hearing of Dorothy Howard, State-Operated School District of the City of Jersey City, 93 N.J.A.R. 2d. (EDU) 788, which found that Ms. Howard was an alcoholic and held that pursuant to LAD and the court's holding in Clowes, supra, she was entitled to reasonable accommodation by the school district. The Board argues, however, that the Howard matter is distinguishable from the instant matter. In the instant matter, respondent was not using a legal substance; *i.e.*, alcohol but, rather, he was using an illegal CDS. Although respondent did make agents of the Board aware of his problems with alcohol, he was allowed to address those problems without intervention by the Board or without any disciplinary action against him. This matter is not at all analogous to the Howard decision and the Board requests that no presidential value be placed on it.

The Board argues at length as to respondents credibility, particularly with regard to the amount of marijuana respondent testified he smoked. The Board observes, among other things, that the expert witnesses all testified that they had never encountered anyone who had smoked as much marijuana as respondent indicated he smoked. It contends that for respondent to have consumed the amount of marijuana he purportedly consumed would be wasteful and inconsistent with one who is an "addict." All of the experts testified that a certain amount of marijuana use would cause the desired effect of a "high." Any continued consumption thereafter would not enhance the effect and, therefore, waste the substance unnecessarily. Such use was also inconsistent with respondent's testimony that on a number of occasions he had to harvest the marijuana sooner than he wished because he had exhausted his supply of the substance.

The Board raises other questions about respondent's credibility; *i.e.*, why did respondent have scales in his apartment if he was growing the marijuana only for his personal use? How was respondent able to obtain good teaching performance evaluations after smoking six to twelve marijuana cigarettes the night before? How was respondent able to operate model airplanes on weekends while smoking between ten and eighteen marijuana cigarettes per weekend? Why would respondent calculate the cost to grow the marijuana?

The Board contends that one who is addicted to the levels of marijuana use respondent indicated he was addicted would find it difficult to stop smoking marijuana, especially since this is a “psychological addiction.” How then, was respondent able to withdraw “cold turkey” after November 6, 1994?

POINT IV

Notwithstanding respondent’s reliance on the Cahill decision that he is entitled to a reasonable accommodation, the Board argues that he should not be entitled to such accommodation because the effect it will have on the pupils in the Board’s schools. Such an accommodation should not be afforded respondent in the position he has as role model but, also, because such an accommodation may be hazardous to the pupils. N.J.A.C. 13:13-2.5(b) states that a handicapped person is not required to be entitled to a reasonable accommodation where employment in a particular position would be hazardous to that individual or others. Respondent’s testimony before the Superior Court at this criminal trial and his testimony before the OAL indicates that respondent had been teaching children while using heavy quantities of marijuana. His use of marijuana had gone on for a period in excess of three to three and one-half years. The harm that he may have caused children who have already been taught by him is unknown at this time and will be unknown in the future if he is permitted to continue to teach pupils in the Board’s schools. It would be inappropriate for respondent to be allowed to again teach in a classroom setting because of the potential harm it may cause to children who are under his direct control and supervision. The Board argues that respondent has failed as a role model to pupils of West Deptford and should not be permitted to resume his teaching duties.

The Board argues that respondent’s use of marijuana, even though it was not on school grounds, constitute unbecoming conduct. Prior Commissioner decisions clearly demonstrate the public policy regarding drugs and education. It is imperative that a teacher exercise self-restraint and not use any substance which are controlled dangerous substances. This is not only to act as a role model for pupils but, to allow pupils to be properly educated by a person who is able to think clearly and properly instruct the pupils that come into contact with the teacher. Respondent’s conviction before the Superior Court and his testimony before this tribunal clearly demonstrates

that his conduct was unbecoming. The Board observes that respondent was well aware of the consequences of his actions.

RESPONDENT'S POSITION

POINT I

RESPONDENT IS A HANDICAPPED INDIVIDUAL AS DEFINED IN N.J.S.A. 10:5-5(q) AND IS ENTITLED TO REASONABLE ACCOMMODATION

In recent years, the state of the law has advanced to reflect the modern attitude of society that discrimination in whatever form, be it based upon race, sex, age, religion, handicap, etc. be outlawed. Laws such as the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1, et seq. have been passed which effectuate this policy and now protect an individual from this.

In the past, school boards have been permitted to discriminate against an individual based upon sexual orientation. See In the Matter of the Tenure Hearing of Paula M. Grossman, 1972 S.L.D. 144, affirmed by the State Board of Education 1973 S.L.D. 769, affirmed 127 N.J. Super. 13 (App. Div. 1974) and In the Matter of the Tenure Hearing of John Gish, 1974 S.L.D. 1150, affirmed by the State Board of Education 1975 S.L.D. 1085, affirmed N.J. Super. 96 (App. Div. 1976), cert. denied 74 N.J. 251 cert. denied 434 U.S. 879 (1977).

The elimination of discrimination against the handicapped has been the focus of particular attention. N.J.S.A. 10:5-4.1 now prohibits discrimination against a handicapped person. N.J.S.A. 10:5-5(q) defines a handicapped person as:

Suffering from any mental, psychological or developmental disability resulting from anatomical psychological, physiological or neurological conditions which prevents normal exercise of any bodily or mental functions or is demonstrable, medically or psychological, by acceptable clinical or laboratory diagnostic techniques (Emphasis added).

The antidiscriminatory provisions of the LAD as they pertain to the "handicapped" have been applied to include alcoholism and individuals cross addicted to alcohol and drugs, in the

definition of that term. Antiquated attitudes which once prevailed in these areas, just as in traditional areas of sex, age, race, etc. have likewise been rejected. In Clowes v. Terminex Intern. Inc., 109 N.J. 575, 590-595, (1988) the New Jersey Supreme Court for the first time recognized alcoholism as a handicap. As such, it was found to be protected under the LAD. This of course has been held to apply in an education employment context. See In the Matter of the Tenure Hearing of Dorothy Howard, State Board of Education Decision, 93 N.J.A.R. 2d. (EDU) 788, where the State Board of Education recognized the applicability of the LAD to an alcoholic teacher. Previously, one's tenure could be terminated were an alcohol problem even uncovered.

An individual cross addicted to alcohol and drugs has also been recognized as handicapped. Matter of Daniel Cahill, 245 N.J. Super. 397, 400 (1991). There, Daniel Cahill was employed as fire fighter by the Newark Fire Department. Cahill was suspended for violating a fire department regulation prohibiting the use of or addiction to narcotics or a controlled dangerous substance. An administrative law judge, based on medical testimony, found him to be not just an alcoholic, but also a drug addict. The New Jersey Superior Court Appellate Division found both of these conditions to come within the definition of "handicapped" under the LAD. Id. at 400. The Court, recognizing that alcoholism was a handicap under Clowes, supra., stated with respect to Cahill's drug problem:

Addiction, habituation or dependency which results from use of one drug or another, or as in this case a combination of drugs, renders a person handicapped. (emphasis added) Id. at 400.

The Court went on to state with regard to Cahill's contention that he was entitled to reasonable accommodation under the LAD as a handicapped person, that:

[Cahill] contends that the mandate of reasonable accommodation requires the employer to give another chance to an alcoholic or other drug user. There is merit to his position, that where feasible, an employer should afford an opportunity for rehabilitation to an employee handicapped by substance abuse. Id. at 401.

Significantly, the Cahill case was cited with approval by the State Board of Education in the Dorothy Howard matter, supra.

Respondent is an alcoholic who is cross addicted to marijuana. By the year 1988, respondent's alcoholism affected his physical health to such a serious degree, because of pancreatitis, that it became life threatening. Unable to control his addiction, and recognizing that if he continued drinking he would die, he began to use marijuana to satisfy his compulsion to drink and the need to become intoxicated. Respondent, in fulfilling this need, became addicted to marijuana. Respondent's treating psychiatrist, Dr. Francene Black, who devotes a large portion of her practice to treating individuals with drug and alcohol problems, testified that it was respondent's compulsion for a mood altering substance which would help him to stop drinking, that led him to begin using marijuana. (See Exhibit A) Dr. Lance Gooberman, a medical doctor and also an addiction specialist, testified similarly that it was respondent's addictive personality and his compulsion for a mood altering substance which led him to begin using marijuana when alcohol was no longer available to him. Dr. Black initially diagnosed respondent in the following manner: "alcohol dependence and adjustment disorder with anxiety and depression." (See Exhibit A) Both Dr. Black and Dr. Gooberman recognized that respondent was an alcoholic who was also psychologically addicted to marijuana. Dr. John P. Morgan, a renowned pharmacologist from City University of New York Medical School confirmed that marijuana can be psychologically addicting. All of this expert testimony went unrefuted.

As an alcoholic, respondent is handicapped under Clowes, supra. The fact that he also became addicted to marijuana, does not disqualify him, but reaffirms his handicap under the Cahill decision. Respondent is entitled to reasonable accommodation.

The Board, incredibly, refers to respondent's marijuana use and claims that the LAD does not apply because respondent has a psychological addiction and not a physical addiction, and that only physical addictions qualify under the LAD. No authority whatsoever is cited for this narrow interpretation of the law, nor is there any basis for such a hypothesis. Moreover, the premise of this argument is invalid in that the evidence established respondent to be, without a doubt, an alcoholic. Alcohol is physically addictive. It was this addiction which compelled him to use marijuana. The Board continues with this argument going on to assert that there are "no physical symptoms of withdrawal when a person stops using marijuana." The evidence in this case did not support even this assertion. Dr. Black found that respondent did exhibit physical symptoms of

withdrawal when a person stops using marijuana.” Dr. Black testified he suffered from anxiety, a sleep disorder and depression. (See Exhibit A) She treated these symptoms with antidepressants and psychotherapy.

Ignoring these facts, the Board’s argument that psychological addiction does not qualify as a handicap is without merit for a more important and fundamental reason, the statutory definition of the word “handicapped” expressly includes a psychological condition under the statute. See N.J.S.A. 10:5-5(q). Whether respondent’s addiction was physical or psychological therefore is irrelevant. The fact that the Board admits his psychological addiction and does not dispute the fact that respondent was an alcoholic, is actually an admission that he is qualified under the statute. Importantly, in harmony with the statute, the Appellate Division in Cahill, *supra* made no distinction between a physical condition and a psychological one. In fact it used the words “addiction,” “habitation,” or “dependency in describing a “handicapped” condition which qualifies under the statute. Respondent’s condition without a doubt, fits within this description.

Moreover, the distinction which the Board suggests is senseless since clearly it is the psychological aspects of an addiction which must be overcome for such a person to continue to refrain from using alcohol or drugs once the physically addictive symptoms subside. Expert testimony confirmed respondent’s physical and psychological addictions. The Board did not refute this expert testimony. Accordingly, respondent’s addiction to alcohol and cross addiction to marijuana does qualify as a handicap under the LAD.

The Board argues that marijuana is a controlled dangerous substance, illegal and thus its use cannot form the basis for a handicap claim under the LAD. Had the Legislature sought to adopt this viewpoint it clearly would have placed some provision for this in the statute as for example exists to some degree in the Americans with Disabilities Act. 42 U.S.C. 12101 et seq. No such provisions are contained in the LAD and it is not for the Board to attempt to limit the applicability of the law, when in fact it is the mandate of the statute that it “shall be liberally construed.” See N.J.S.A. 10:5-3. See also Passaic Daily News v. Blair, 63 N.J. 474 (1973); 474 (1973); Zahorian v. Russell Fitt Real Estate Agency 62 N.J. 399 (1973); Jackson v. Concord, 54 N.J. 113 (1969); Clover Hill Swimming Club v. Goldsboro, 47 N.J. 25 (1966); Fraser v. Robin

Dee Camp, 44 N.J. 480 (1965); Jones v. Haridor Realty Corp., 37 N.J. 384 (1962); Levitt and Sons, Inc. v. Div. Against Discrimination, 31 N.J. 514 (1960); National Org. for Women v. Little League Baseball, 127 N.J. Super. 522 (1974), aff'd 67 N.J. 320 (1974). Furthermore, it is of particular significance, that the Appellate Division in Cahill, supra, which also involved the use of a controlled dangerous substance, made no distinction between a legal and illegal drug as the Board now asserts should be the case. The Board cites the non-binding Attorney General opinion in an attempt to bolster its position in this regard, however, this opinion was issued in 1989, two years prior to the appellate decision in Cahill. The Cahill decision is indicative of a clear rejection of this viewpoint. Moreover, what the Board also fails to address in its arguments is that it was respondent's addiction to alcohol and the resultant compulsive need for another mood altering substance to satisfy that addiction, which caused him to become addicted to marijuana. It was the underlying alcoholism and the self medication of that condition with marijuana, which constitutes the handicap. Evidence of respondent's addiction was shown not just by his excessive use of mood altering substances but also by his behavior. Except for his teaching, prior to 1988, his life (from high school on) centered around his use of alcohol. Similarly, when he changed to using marijuana, his life focused on the marijuana use, the growing and cultivating of it, to the exclusion of social activities. He completely isolated himself from the rest of society.

The Board claims that respondent made a voluntary choice to use marijuana. This is directly refuted not just by respondent, but also by his treating psychiatrist, Dr. Black , who devotes much of her practice to treating addicted patients and who testified that he acted under a compulsion. Dr. Goberman, a medical doctor and also an addiction specialist, testified similarly. The fact is, that respondent when he began to use marijuana, believed he was faced with either satisfying his addiction by continuing the use of alcohol and risking extreme pain and possible death or satisfying that addiction with some other mood altering substance. Unfortunately, he found marijuana. Obviously, and as the testimony confirms, the decision to marijuana was not the voluntary determination of a recreational user to violate the law as the Board suggests, but an act of a desperate addict with no choice.

The Board cites a number of cases which involved the use of marijuana on a casual basis for recreational purposes and describes the various penalties imposed upon individuals who have been found guilty of, or admitted to possession. See for example, The Tenure Hearing of Robert

Valenti, School District of the Township of Monroe, Gloucester County, 1990 (OAL Dkt. No. EDU 4296-89). Valenti was temporarily suspended from his employment as a teacher upon being found in possession of marijuana. These cases are inapplicable to the case at bar. None involved an individual who was an addict suffering from a long history of severe alcoholism and who became cross-addicted as did respondent due to a compulsion to satisfy that addiction. See also Cahill, supra. These casual recreation user cases are clearly distinguishable. What is also important about the Valenti case is the penalty imposed. In the instant case, the Board does not seek to punish respondent with the severe penalty of suspension, as was the case in Valenti, supra, but to terminate his teaching career, which is the ultimate penalty.

The Board attempts to refute the application of Cahill, supra, speculating that respondent's testimony about his marijuana use was not credible. The implication of this somehow being that respondent was not using the marijuana for himself by engaged in the sale of it for profit. No proof was presented to support such an assertion. Moreover, respondent had a full jury trial and was found not guilty of any charge of having to do with the distribution or sale of marijuana. Respondent's testimony as to the amounts of marijuana he smoked was admittedly based upon estimates. He smoked whatever marijuana he had available for him to smoke. While it is true that his consumption was great, this was consistent with his excessive use of alcohol and affirmatively demonstrates that he was unquestionably an addict.

The Board argues that none of the experts testified that they have ever encountered anyone smoking as much marijuana as respondent. This is simply not true. Dr. Morgan, a renowned pharmacologist from City University of New York, testified that he had encountered many others who smoked just as much marijuana or more than respondent did and were able to function in important jobs, not just adequately, but successfully. The Court can take judicial notice that frequently substantial drug/alcohol abusers are found not only in the business world but in professional sports, acting, politics and other fields. Many of these individuals are in fact high achievers. Dr. Morgan further testified that respondent could easily have functioned adequately on the job, and engaged in jogging and other types of activities despite smoking marijuana. The Board's claims to the contrary are mere speculation and should not be considered. Even the expert presented to the Court by the Board did not deny that it was possible for respondent to smoke the amount which he estimated.

Importantly, what the Board fails to mention in its argument concerning respondent's credibility is that the State Police conducted an in depth investigation of respondent, both prior to his arrest and after. Prior to his arrest, respondent was placed under surveillance and followed and observed on numerous occasions. Sophisticated technology such as a heat sensing thermal imaging device was used to detect marijuana. After his arrest, his vehicle and apartment were thoroughly searched. The State police went to the trouble of taking an extensive inventory, seizing evidence, taking multiple photographs and even preparing a video tape. Despite all this, no direct evidence could be found linking respondent to the distribution of any marijuana. There were no large amounts of money found, no telephone numbers of customers or phone books. Even though respondent kept extensive records, not one single document was found indicating that marijuana was ever sold or even given away. Moreover, there was no evidence that respondent ever had visitors so as to be able to distribute the marijuana. All of the evidence was consistent with his personal use.

The Board claims that respondent had an elaborate system for growing marijuana and that this is evidence of intent to distribute. Again, however, this is based upon mere speculation and simply not true. Furthermore, when one considers the fact that respondent was growing marijuana in his bedroom and in a living room closet, and as the photographs presented in court show, much of his marijuana growing materials were located around and under his bed, this certainly was not an elaborate operation which you might expect from someone who was distributing marijuana. What respondent's growing methods do show as that he was a pathetic addict consumed with providing himself with an adequate supply of the substance he needed to maintain his addiction.

The Board also argues that respondent never appeared in school intoxicated and this is evidence that he could not have smoked what he says he smoked. Again, however, when one considers respondent's excessive use of alcohol, and the fact that he never appeared in school drunk or intoxicated, the fact that he never appeared intoxicated in school while using marijuana is entirely consistent with his behavior in the past. Moreover, obviously the intoxicating effect of marijuana depends on the individual and varying factors, including potency and individual

tolerance. No evidence was presented by the Board in this regard to indicate respondent was anything but truthful.

Respondent is entitled to the protection of the LAD. His addiction to alcohol and marijuana is a handicap, which prevented him from the normal exercise of bodily and mental functions and was demonstrable both medically and psychologically.

POINT II
EDWARD KOZIC HAS BEEN REHABILITATED AND
THEREFORE IS ENTITLED TO REASONABLE
ACCOMMODATION AS A HANDICAPPED PERSON
UNDER THE NEW JERSEY LAW AGAINST
DISCRIMINATION.

N.J.A.C. 13:13-2.5(b) requires that an individual who has a handicap is entitled to be reasonably accommodated by his/her employer for that particular handicap. This provision requires an employer to give another chance to an employee should he/she be an alcoholic and/or drug addict. In the Matter of Daniel Cahill, supra. The evidence has established without question that respondent has been rehabilitated. Since he was arrested, some three and a half years ago, he has not used alcohol or marijuana. He has presented proof of this in the form of negative random drug screening tests which have been conducted by both Dr. Black and Dr. Goberman. Dr. Black, who is respondent's treating psychiatrist, and who treats many addicts, testified that respondent now recognizes the nature of his illness and has learned to cope with the anxiety associated with that illness in ways other than drinking alcohol and smoking marijuana. She found that respondent is now capable of acting responsibly as a role model and teacher without the use of illegal drugs and alcohol. She testified respondent has been rehabilitated. Dr. Goberman a medical doctor and also an addiction specialist, echoed Dr. Black's findings. He testified that based upon his experience and the in depth interviews conducted with respondent, that he has been rehabilitated and that the treatment undergone by respondent under the direction of Dr. Black has been successful.

As the record shows, respondent has had extensive psychotherapy. He has attended over 150 AA meetings. As shown by the report of his probation officer, his conduct has been "exemplary". Witnesses who were neighbors of respondent, Donna Van Sant and Albert

Giberson testified that since respondent was arrested they have noticed a change in his personality, that he is more open, and that he recognizes his problem and is dealing with it. Each valued highly respondent's integrity and trustworthiness, and instances were cited occurring after his conviction, where this had actually been put to the test.

Lee Sutton a fellow teacher, and who also was respondent's department chairman/boss while respondent was actively employed with the Board, testified that based upon his recent contacts with respondent, he believes respondent now recognizes his problem, and is able to control his addictions. George Kull, another teacher for whom respondent had performed his student teaching many years ago testified likewise. Both Mr. Sutton and Mr. Kull also testified they had observed a change in his personality, that he was more open and that he has indicated to them that his use of alcohol and marijuana was totally wrong. Each felt that respondent should be allowed to return to teaching. They felt respondent would make a good role model to students, in that he had himself suffered from addictions and would be able to tell students who are faced with those choices on a daily basis, about the evils of what alcohol and drugs such as marijuana, can do to an individual.

The Board cites N.J.S.A. 18A:6-7.1 claiming that under this statute respondent is prohibited from being employed by the Board as a result of his conviction for possession of marijuana. However, as admitted by the Board, Section (e) of the statute specifically allows for continued employment under circumstances where there is a drug related criminal conviction and where the individual involved affirmatively demonstrates by clear and convincing evidence that he/she has been rehabilitated. Based on this statute alone, ignoring the applicability of LAD, respondent has made that affirmative demonstration. There has been absolutely no evidence presented by the Board whatsoever to indicate to the contrary. Clearly respondent has been punished enough and should be given a second chance.

The Board also questions respondent's ability to be a role model, citing his alleged conduct in the past in telling students of the dangers of drug use. This evidence actually supports respondent's position in that it establishes that despite his addictions, respondent never let that interfere with his duties and responsibilities as a teacher. The fact that he cautioned against drug use is indicative of his unhappiness with his own addictions. Obviously, he did not want his

students to follow in his footsteps. By giving respondent a second chance this would demonstrate to students that there is a place in society for those who are rehabilitated. If students are using drugs and see respondent terminated, what incentive would they have to be up front about their problems.

The Board also makes the unfounded claim that for respondent to become employed it would be a hazard to individuals or others under N.J.A.C. 13:13-2.5(b). In fact, respondent has never been a hazard and his school record is direct evidence of this. There has never even been an allegation that respondent's use of marijuana or alcohol involved students or even took place on school property. His record shows that he never failed to fulfill his duties and responsibilities as a teacher. The evidence presented by the Board's own witnesses, as well as Lee Sutton and George Kull was that respondent was always a professional, did a good job, and was well respected by students and faculty. His integrity was never questioned.

The Board speaks of the "unknown" harm which may have been caused to students whom respondent taught or who he might teach in the future. This allegation is pure speculation. In fact it directly contradicts the testimony developed at trial that respondent always performed admirably and was well respected by everyone. No evidence was introduced to the contrary as a basis for the Board to even hint at such an assertion. This argument simply has no merit.

Even were there to be future concerns about rehabilitation, this can be easily alleviated by requiring as a condition of employment that respondent submit to periodic random drug screening tests at the request of the Board. Respondent would gladly submit to this and welcomes such an opportunity. This would be a reasonable accommodation. In fact, this manner of proceeding was recognized by the Appellate Division in Cahill supra at 401.

In the Howard case, supra, the petitioner Board there, raised an argument similar to that which the Board raises herein concerning respondent's ability to be rehabilitated because of his addictions. In Howard, it was argued that because Dorothy Howard was an alcoholic, this in and of itself would not make her a good role model to students. The Board claimed that students would be negatively affected by her alcoholism and that a relapse was predictable and that this would translate into the tolerance of substandard classroom performance. The State Board flatly

rejected this argument finding that the record had demonstrated that Howard had successfully addressed the underlying cause of her problems, and that she was able to return to work. It further went on to find that inasmuch as nothing had been presented to warrant a conclusion to the contrary, Howard was entitled to continue her career as a teacher. The State Board found that to retroactively punish Howard based upon mere archaic stereo-typical assumptions expressed with respect to alcoholism and how it would affect an individual must be rejected. Id. at pg. 6. In the instant case, there is no reason why respondent's addictions and subsequent rehabilitation should be treated any differently.

The Board argues that inasmuch as marijuana is illegal, this interferes with respondent's ability to be able to teach. Again, no evidence is presented to substantiate this, and therefore the argument must be rejected. Moreover, by analogy such a distinction is faulty. Alcoholism has been recognized as a handicap. Alcohol is illegal for students to use. In fact, alcohol itself was an illegal substance during prohibition and it was only after public outcry that it be legalized, and a constitutional amendment passed, that it was in fact legalized. Clearly, the State Board has found that an alcoholic should be given an opportunity to be rehabilitated and return to public employment as a teacher. There is no reason why respondent, an alcoholic who is cross addicted to marijuana should not be treated similarly since he has now likewise shown he has been rehabilitated.

The evidence presented is such that respondent has been rehabilitated. Important further evidence of rehabilitation is the fact that respondent was employed as a vocational instructor for individuals with brain injuries for approximately 18 months and has been employed part time as a teacher since September 1994, with the Gloucester County Special Services with no adverse consequences. Respondent would represent a positive influence and good role model for students. As indicated through respondent's testimony and also the testimony of Dr. Black, teaching represented one of the most important aspects of respondent's life. There is no question, based on his employment record and the testimony of not just the witnesses proffered by respondent, but also the Board's own witnesses, that he was totally dedicated to his profession. Dr. Black testified that teaching was probably the only source of joy that respondent had in his life. In fact it was the suspension from his teaching job which drove him into therapy. He should

be allowed a second chance to return to teaching, his only career, now that he has been rehabilitated.

The parties submitted additional arguments which are not considered here. Nor are their arguments submitted subsequent to the close of the record considered.

DISCUSSION AND CONCLUSIONS

There is no doubt nor question that respondent is an alcoholic who is presently recovering from the disorder. Alcoholism has been classified as a handicapping condition, Clowes, supra, and, therefore, susceptible to the antidiscriminatory LAD provisions, which defines a handicapped person. N.J.S.A. 10:5-5(g). During the period respondent was employed by the Board, respondent suffered under the handicap. It did not, however, impede his ability to perform in the classroom. There is no allegation or evidence that petitioner was ever under the influence of alcohol while performing his teaching and related duties. The evidence does show that respondent was frequently absent from duty on Mondays, following a weekend of drinking, and days following a holiday for the same reason. Certain members of the Board's administration suspected that respondent was having a problem with alcohol when his pattern of absence was brought to respondent's attention. Once the pattern of absenteeism was brought to respondent's attention, he immediately remedied the faulty behavior and ceased to be absent from his school duties on days following weekends and holidays.

The record clearly demonstrates that as a consequence of respondent's heavy consumption of alcohol, he suffered frequent and painful attacks of pancreatitis. These attacks caused respondent to be hospitalized on several occasions. As a result of respondent's continued attacks of pancreatitis, his physician recommended that respondent enter an alcohol detoxification and rehabilitation program. Respondent failed and/or refused to follow his physician's advice. Nor did he make a request of the Board to accommodate him by allowing him to engage in an alcohol detoxification and rehabilitation program. Rather, respondent ceased drinking alcoholic beverages on his own.

Subsequently, respondent commenced to use marijuana as a substitute for the alcohol which he had given up. Because of the expense and high cost of purchasing marijuana from street dealers of the illegal substance, respondent made a considered decision to grow his own marijuana. Respondent purchased sophisticated lighting equipment and timers, among other things, and converted his apartment into a nursery for the growing and nurturing of marijuana in its various growing cycles. Respondent also carried out a plan to conceal his illicit conduct by placing tar paper over windows of his apartment so that his activity could not be detected from outside of his apartment. He also devised a sliding door, or false wall, in his apartment to separate the growing plants from his sleeping area. He incorporated fans and timers to control the growth of the plants. In addition, he used scales to weigh the harvests and used other devices to prepare for its consumption.

Respondent engaged in the illegal and clandestine operation of growing marijuana from about August 1988 until November 6, 1991, a period of more than three years. During that period of three and a quarter years, respondent did not seek the aid of any of the Board's employees or agents for the purpose of detoxification, rehabilitation or counseling for his alleged cross addiction to marijuana. Rather, he continued his consumption of the CDS while performing his teaching duties during the three academic years, without admitting to any addictive behavior or conduct. In fact, respondent ignored his physician's advice and neglected to seek aid and assistance from anyone for his problem.

The record demonstrates that at the time of his arrest on November 6, 1991, respondent had 409 marijuana plants in his possession. It was on the basis of respondent's arrest and criminal charges against him, for the possession of marijuana, that the Board brought the tenure charges of conduct unbecoming a teaching staff member. Respondent was not charged by the Board for any alcoholic related offenses. Nor did the Board charge respondent with the use of marijuana. Rather the Board's charges against respondent are for his violation of the laws of the State of New Jersey.

On October 20, 1993, respondent was found guilty by the Superior Court of New Jersey of violating the New Jersey Code of Criminal Justice, pursuant to N.J.S.A. 2C:35-10.a(3), for the "Possession of more than 50 grams of marijuana. . ." On December 10, 1993, the Court ordered

respondent to one (1) year probation with the condition that he continue psychiatric counseling. The Court further ordered respondent to pay fines and fees in the amount of \$850 and his driver license was suspended for a term of six months. Respondent received credit for the two days he spent in jail subsequent to his arrest on November 6, 1991.

The Law of LAD was enacted to protect all classes of citizens against the evils of discriminatory acts. Evans v. Ross, 57 N.J Super 223 (App.Div. 1959), cert. den. 31 N.J.292 (1960). Specifically, at N.J.S.A. 10:5-4.1 and N.J.S.A.10:5-5(a), it defines and protects handicapped persons against discriminatory acts. The LAD was not, however, designed to promote, foster or encourage criminal activity. In fact, the statute explicitly prohibits such activity where, at N.J.S.A. 10:5-21, it states:

Nothing contained in this act or P.L. 1945, c. 169 (C. 10:5-1 et seq.) shall be construed to require or authorize any act prohibited by law, . . .

The Board herein brought tenure charges of unbecoming conduct against respondent for his criminal activity, not for any handicap he is alleged to have suffered. Respondent clearly engaged in an act prohibited by law.

He was subsequently convicted of the criminal offense of possession of more than 50 grams of marijuana, N.J.S.A. 2C:35-10.a.(3), a serious crime for anyone, but especially a teaching staff member. The Commissioner addressed such conduct in In the Matter of the Tenure Hearing of David Earl Humphreys, School District of the Township of Pennsville, Salem County, 1978 S.L.D. 689, where he incorporated the language of the Honorable Norman Telsey, JSC upon Humphrey's conviction of the possession of CDS. Judge Telsey said:

We are in the midst of a sociological crisis. We have an unusual amount of crimes committed today. It has been increased dramatically just over the past few years and among the many crimes being committed are crimes involving drugs, particularly among the younger generation. Many crimes have been committed either as a result of drug usage or have been motivated by the need for funds to make drug purchases. I believe that one of the reasons that the younger people are flaunting laws today is because they do look to their elders for an example and when their elders or people

in authority don't set the proper example, in my judgment, this does create a serious and sometimes deleterious effect upon the minds of the younger people. I believe that one who is vested with a public trust to teach has an opportunity and does mold the minds of his pupils, not only through the teaching of the academic curriculum but for the example he sets in his lifestyle. It appears to me that it is the duty of everyone, particularly those who set examples, to uphold the laws while they presently exist. I find that you did not--not only failed to uphold it but you openly flaunted it. I believe that this can be a very serious effect upon the pupils whose minds you help mold and who look to you to set an example. It could encourage your pupils to do likewise.

1978 S.L.D. 693

The Commissioner continued to say in Humphreys that:

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

1978 S.L.D. 693, 694.

The Commissioner determined that Humphreys had not continued to serve and exhibit "good behavior" as described in N.J.S.A. 18A:25.5 which reads in part as follows:

The services of all teaching staff members including all teachers. . . shall be under tenure during good behavior. . . and shall not be dismissed. . . except for. . . conduct unbecoming such a teaching staff member or other just cause. . .

The Commissioner, in Humphreys, also relied upon the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10, which states, in part, that:

No person shall be dismissed or reduced in compensation,

(a) if he is or shall be under tenure of office, position of employment during good behavior. . . in the public school system of the state. . . except for. . . unbecoming conduct, or other just cause

The Commissioner determined that Humphreys had forfeited his teaching position and upheld his dismissal 1977 S.L.D. 696. See also In the Matter of the Tenure Hearing of Wesley L. Meyers, School District of Gloucester City, 1976 S.L.D. 1024; In the Matter of the Tenure hearing of Emil J. Guasconi, School District of the Town of West New York, Hudson County, 1977 S.L.D. 517.

Thus, it was on the basis of respondent's criminal activity which the Board properly certified tenure charges before the Commissioner against respondent. The tenure charges were not as a consequence of respondent's alleged "handicap."

The record clearly demonstrates that respondent "cured" his addiction to the legal substance of alcohol. Respondent admits that he ceased to consume alcohol in or about April 1988. While he was addicted to alcohol, respondent's handicap was protected under the LAD and the Board, when so advised, was required to accommodate him by offering him counseling, providing approved time off from duty to attend detoxification and rehabilitation programs, among other things. Respondent, however, did not avail himself to such accommodation. Rather, he engaged in a serious criminal activity and, thus, lost his protection for a handicap under the LAD. N.J.S.A. 10:5-2.1.

I CONCLUDE, therefore, that the action by the Board to seek respondent's dismissal from his tenured position was proper and in accordance with the law.

I CONCLUDE that respondent's defense of a handicap under the LAD is without merit given his engagement in criminal activity.

I CONCLUDE that the Board's action should be sustained and that respondent be dismissed from his tenured teaching position.

ORDER

Accordingly, it is **ORDERED** that respondent be and is hereby **DISMISSED** from his tenured teaching position as of the date of the Board's action to suspend him from duty in its employ.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 21, 1995

DATE

Lillard E. Law

LILLARD E. LAW, ALJ

Receipt Acknowledged:

Hoppe R. Blackman

DEPARTMENT OF EDUCATION

6/22/95

DATE

Mailed to Parties:

Jeff S. Mason

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

JUN 28 1995

DATE

psa

DOCUMENTS IN EVIDENCE

FOR PETITIONER:

- P-1 ANNUAL EVALUATION, OCT. 1, 1985
- P-2 CERTIFIED CRIMINAL CONVICTIONS
- P-3 VIDEO TAPE
- P-4 INVENTORY OF SEARCH
- P-5 18 FILE FOLDERS AND SINGLE SHEETS OF
- P-6 AFFIDAVIT (I.D. ONLY)
- P-7 UNDATED REPORT BY DR. BLACK (I.D. ONLY)

FOR RESPONDENT:

- R-1 LETTER (CONSIDER ONLY THAT WHICH WAS QUOTED ON THE RECORD)
- R-2 PHOTOGRAPH - WINDOW FAN
- R-3 PHOTOGRAPH - DRYING TRAYS
- R-4 PHOTOGRAPH - DRYING TRAYS W/ROLLING PAPER
- R-5 PHOTOGRAPH - 4 PACKS OF CIGARETTE ROLLING PAPERS
- R-6 PHOTOGRAPH - ASHTRAY W/ASHES
- R-7 PHOTOGRAPH - HEMOSTAT
- R-8 YIELD OF HARVEST
- R-9 1991 CALENDAR
- R-10 DIAGRAM
- R-11 CURRICULUM VITAE - FRANCINE W. BLACK, M.D.
- R-12 REPORT BY DR. BLACK, AUG. 9, 1994 (I.D. ONLY)
- R-13 DIAGRAM OF PARK CREST VILLAGE
- R-14 DRUG LABORATORY REPORTS (3) DATED 12/10/91/ 7/2/93; 8/13/84
- R-15 HOSPITAL REPORTS DATED 8/27/81; 12/20/83; 4/26/84; 11/13/84; 4/3/85; 8/12/85; 12/23/85; 7/7/86; 12/30/86; 7/8/87; 8/27/87; 4/2/88

- R-16 CURRICULUM VITAE - JOHN H. MORGAN, M.D.
- R-17 RESUME LANCE GOOBERMAN
- R-18 SEPT. 13, 1994 - REPORT OF DR. GOOBERMAN
- R-19 CLINICAL LABORATORY TEST, AUG. 19, 1994
- R-20 REPORT FROM DONALD WHITAKER, AUG. 25, 1994
- R-21 LETTER, NOV. 4, 1994, RITA FELDHAUS, PRINCIPAL GLOUCESTER COUNTY SPECIAL SERVICES (I.D. ONLY)
- R-22 LETTER, NOV. 21, 1994, HARRY WALLS, JR.

WITNESSES

FOR PETITIONER:

WILLIAM STUBBS
RICHARD MAYAN
JOHN SILVER

The Commissioner further concurs with the ALJ that respondent is not entitled to the statutory protection of the LAD, since the Board, when made aware that respondent had a previous addiction to alcohol, made reasonable accommodations to treat his dependency, of which respondent did not avail himself. Rather, respondent engaged in the serious criminal activity of cultivating and possessing a controlled dangerous substance in violation of the law.

Accordingly, for the reasons well-expressed therein, the Commissioner affirms the initial decision of the Office of Administrative Law and hereby orders that respondent be dismissed from his tenured position with the Board as of the date of this decision. This matter will be forwarded to the State Board of Examiners for action as it deems appropriate pursuant to N.J.A.C. 6:11-3.6.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

EDU #1045-92
C # 295-95
SB # 96-95

IN THE MATTER OF THE TENURE :
HEARING OF EDWARD KOZIC, SCHOOL: STATE BOARD OF EDUCATION
DISTRICT OF THE TOWNSHIP OF WEST : DECISION
DEPTFORD, GLOUCESTER COUNTY. :

Decided by the Commissioner of Education, August 7, 1995

For the Petitioner-Respondent, Raymond T. Page, Esq.

For the Respondent-Appellant, Selikoff & Cohen (Michael C. Damm, Esq.,
of Counsel)

This is an appeal from a Commissioner's decision which sustained tenure charges of unbecoming conduct against a tenured teacher of industrial arts (hereinafter "respondent") and directed his dismissal from his position with the West Deptford Township Board of Education. On appeal to the State Board, respondent claims that New Jersey's Law Against Discrimination prohibits this result. After reviewing the record in this case and the arguments of counsel, we reject respondent's argument and, as follows, we affirm the Commissioner's decision with modification.

The tenure charges against respondent were based on his conduct in possessing marijuana and in cultivating marijuana in his apartment for which he was arrested on November 6, 1991 and subsequently convicted in October 1993.

2/7/96


ANTHONY LUCIANO,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
BOROUGH OF WEST PATERSON,	:	
PASSAIC COUNTY,	:	
	:	
RESPONDENT.	:	

OAL DKT. NO. EDU 3543-94

ANTHONY LUCIANO, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 BOROUGH OF WEST PATERSON, :
 PASSAIC COUNTY, :
 :
 RESPONDENT. :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

August 7, 1995
Date of Mailing, August 8, 1995

300-95

BOARD OF EDUCATION OF THE :
NORTHERN VALLEY REGIONAL HIGH :
SCHOOL DISTRICT, BERGEN COUNTY, :

PETITIONER, :

COMMISSIONER OF EDUCATION

V. :

DECISION

CLEMENT "ANTHONY" BATTIFARANO, :

RESPONDENT. :

BOARD OF EDUCATION OF THE :
NORTHERN VALLEY REGIONAL HIGH :
SCHOOL DISTRICT, BERGEN COUNTY, :
PETITIONER, : COMMISSIONER OF EDUCATION
V. : DECISION
CLEMENT "ANTHONY" BATTIFARANO, :
RESPONDENT. :

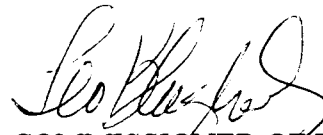
For the Board, Cherie L. Maxwell, Esq.

This matter having been opened before the Commissioner of Education on February 8, 1995, by way of Petition of Appeal alleging respondent failed to meet the terms of an agreement to pay the district outstanding tuition for his minor child's illegal attendance at petitioning school district; and

The Commissioner having directed respondent to file an answer by notice on February 16, 1995, and March 21, 1995, and by regular and certified mail on April 12, 1995, and, again, on June 7, 1995, and no answer having been filed, notwithstanding that regular mailings were not returned as undeliverable and the June 7, 1995 certified mailing was received by respondent, as indicated by signed receipt; and

Respondent having failed as of this date to comply with the directive of the Commissioner, so that each count of the charges against him is deemed to be admitted pursuant to N.J.A.C. 6:24-1.4(e); now therefore

IT IS ORDERED this 8 day of August, 1995, that summary judgment shall be granted to the Board and that Clement "Anthony" Battifarano is hereby assessed tuition in the amount of \$32,300, covering the four years of his son's illegal attendance in the Northern Valley Regional High School District.



COMMISSIONER OF EDUCATION

AUGUST 8, 1995

DATE OF MAILING AUGUST 8, 1995

301-95

LEONARD KANTOR, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

RICHARD J. MALANOWSKI, SUPER-
INTENDENT OF BAYONNE SCHOOLS
AND BOARD OF EDUCATION OF THE
CITY OF BAYONNE, HUDSON COUNTY,

DECISION


RESPONDENTS. :

_____ :

LEONARD KANTOR, :
 :
 PETITIONER, :
 :
 V. :
 : COMMISSIONER OF EDUCATION
 RICHARD J. MALANOWSKI, SUPER- :
 INTENDENT OF BAYONNE SCHOOLS : DECISION
 AND BOARD OF EDUCATION OF THE :
 CITY OF BAYONNE, HUDSON COUNTY, :
 :
 RESPONDENTS. :
 _____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

AUGUST 8, 1995

DATE OF MAILING AUGUST 9, 1995

302-95

JANET CICHEWICZ, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE RIVER : DECISION
DELL REGIONAL HIGH SCHOOL
DISTRICT, BERGEN COUNTY, :

RESPONDENT. :

OAL DKT. NO. EDU 8080-94

JANET CICHEWICZ, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE RIVER : DECISION
 DELL REGIONAL HIGH SCHOOL :
 DISTRICT, BERGEN COUNTY, :
 :
 RESPONDENT. :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

AUGUST 9, 1995

DATE OF MAILING AUGUST 9, 1995

DENNIS SMITH, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION

BOROUGH OF ROSELLE, UNION :

COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner, a security officer who was charged with a disorderly person's offense of simple assault on the person of a student and was found not guilty by a municipal court judge, contested Board's refusal to pay his legal fees.

ALJ found that petitioner was entitled to indemnification by the Board, pursuant to N.J.S.A. 18A:16-6.1, for legal expenses incurred in the successful defense of the municipal court action. ALJ, however, found that petitioner was not entitled to reimbursement for subsequent legal expenses derived from the prosecution of the appeal to the Commissioner. (Cilento) ALJ also denied petitioner's claim for pre-judgment interest, stating the awarding of such interest was beyond the Commissioner's statutory jurisdictional power to entertain or ordain.

Commissioner concurred with the findings and conclusion of the ALJ that petitioner was entitled to indemnification from the Board in the amount of \$6,312.43 for legal expenses incurred in the successful defense of the disorderly person's charge against him. Commissioner further agreed that petitioner could not recover legal expense reimbursement for prosecution of the instant petition as there is no express statutory authorization for the award of counsel fees in actions brought before the Commissioner under education laws. (Balsley) Commissioner, however, corrected the ALJ's statement with respect to the issue of pre-judgment interest, noting that pursuant to N.J.A.C. 6:24-1.16, the Commissioner clearly has the discretion to award such interest where he has concluded that the denial of monetary claim was an action taken in bad faith and/or had been determined to have been taken in deliberate violation of statute or rule. After review of the record, the Commissioner found no evidence that Board's refusal to compensate petitioner could be attributed to any malevolent motive or was otherwise tainted with any element of bad faith. As such, Commissioner found petitioner was not entitled to pre-judgment interest. Board was directed to pay petitioner \$6,312.43.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5730-94

AGENCY DKT. NO. 156-5/94

DENNIS SMITH,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
BOROUGH OF ROSELLE, UNION COUNTY,**

Respondent.

Brian M. Cige, Esq., for petitioner

Jeffrey A. Bennett, Esq., for respondent

(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: June 26, 1995

Decided: June 27, 1995

BEFORE JAMES A. OSPENSON, ALJ:

Dennis Smith, a security officer employed by the Board of Education of the Borough of Roselle, Union County, was charged with the disorderly person's offense of simple assault on the person of a student on May 6, 1992, in violation of *N.J.S.A. 2C:12-1a(1)*. He successfully defended that action through his attorney and was found not guilty by a municipal court judge on December 2, 1993 after trial. In a petition of

appeal filed with the Commissioner of the Department of Education on May 16, 1994, he alleged the Board improperly denied his claim for indemnification and reimbursement of legal expenses in successful defense of the charge against him, thus contravening his rights under *N.J.S.A. 18A:16-6.1*, which provides:

Should any criminal action be instituted against any [person holding any office, position or employment under the jurisdiction of any board of education] and should such proceeding be dismissed or result in a final disposition in favor of such person, the Board of Education shall reimburse him for the cost of defending such proceeding, including reasonable counsel fees and expenses of the original hearing or trial and all appeals.

The Board filed an answer on May 26, 1994 admitting sequence of events generally but denying liability or accountability for petitioner's cost of legal defense, alleging that petitioner's conduct did not constitute an act or omission arising out of or occurring in the course of performance of duties of his position as security officer, as required by *N.J.S.A. 18A:16-6.1*, and that the not-guilty verdict and judgment was not *per se* a finding petitioner had not committed corporal punishment on the student prohibited by *N.J.S.A. 18A:6-1*. Accordingly, the Commissioner transmitted the matter to the Office of Administrative Law on June 10, 1994 for hearing and determination as a contested case in accordance with *N.J.S.A. 52:14F-1 et seq.*

On notice to the parties, it came on for hearing on June 26, 1995 and was concluded. The parties stipulated to all relevant and material propositions of fact, together with documentation, all of which were admitted into evidence. J-1; and see Exhibits A through O.

CONCLUSION

Based upon the stipulated record, I **CONCLUDE** petitioner is entitled to judgment in his favor in the amount of \$63,012.43, representing legal expenses incurred in successful defense of the municipal court disorderly person's charge

against him, a sum stipulated by the parties as reasonable and consequentially derived and incurred therefrom. *Cf., Powers v. Board of Ed., Union City, 124 N.J. Super. 590, 592-98 (Law Div. 1973); and Cilento v. Board of Ed., Township of Hillside, 1985 S.L.D. 1523.* Though entitled to indemnification by the Board for legal expenses before, during and through successful defense of the municipal court action, petitioner is not entitled to reimbursement for subsequent legal expenses derived from prosecution of the instant appeal to the Commissioner. *Cilento, supra*, at 1522. Petitioner's claim for "prejudgment interest" on the indemnificatory sum is **DENIED** for the period from Board's denial of claim to date of final judgment herein as beyond statutory jurisdictional power of the Commissioner to entertain or ordain. As to the Board, there is no competent or material evidence of record that the conduct generating the disorderly person's charge did not arise from or occur during the course of petitioner's educational employment; in fact, the converse has been stipulated. The Board's proffer of evidence and argument petitioner's alleged acts were so grave as to constitute conduct *beyond* scope of his employment is **REJECTED** as immaterial and speculative in view of acquittal on the charge and in view of the circumstance the Board instituted or prosecuted no employment action against petitioner as prohibited corporal punishment.

Findings and conclusions made part of the record at hearing are adopted and included herein by reference.

Judgment is **ENTERED** accordingly.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 27, 1995
DATE

James A. O'Spenson
JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

6/29/95
DATE

Hope R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 30 1995
DATE

Jeff S. Marin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

amr

EXHIBIT LIST

- J-1 Stipulation of facts by parties, dated June 26, 1995

- A Letter of petitioner's attorney to Board of Education, dated May 12, 1993
- B Letter of Board attorney to petitioner's attorney, dated May 28, 1993
- C Letter of petitioner's attorney to Board attorney, dated June 1, 1993
- D Letter of Board attorney to petitioner's attorney, dated June 30, 1993
- E Letter of petitioner's attorney to Board attorney, dated July 23, 1993
- F Letter of petitioner's attorney to Board attorney, dated December 7, 1993
- G Bill for professional services rendered by petitioner's attorney in successful defense of municipal court matter, dated December 7, 1993
- H Letter of Board attorney to petitioner's attorney, dated January 31, 1994
- I Letter of petitioner's attorney to Board attorney, dated February 4, 1994
- J Petitioner's attorney's affidavit of professional services rendered in successful defense of municipal court matter, in total amount including disbursements of \$6,312.43, which has been stipulated by the parties as reasonable

Supplemental exhibit J

Petitioner's attorney's affidavit of professional services rendered subsequent to successful defense of municipal court matter in connection with prosecution of instant matter, for additional charges of \$4,748.08, which has been stipulated as reasonable by the parties but not stipulated as recoverable by Board

K Letter of petitioner's attorney to Board attorney, dated February 24, 1994

L Letter of Board attorney to petitioner's attorney, dated February 28, 1994

M Letter of petitioner's attorney to Board attorney, dated April 27, 1994

N Certification of municipal court clerk of Borough of Roselle as to record of municipal court matter and successful defense thereof in case of *State v. Dennis Smith*, Dkt. No. S584755

O Letter of Board attorney to petitioner's attorney, dated May 5, 1994, denying petitioner's claim for reimbursement of legal services in successful defense of municipal court matter

DENNIS SMITH, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 BOROUGH OF ROSELLE, UNION :
 COUNTY, :
 :
 RESPONDENT. :

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions and replies of both petitioner and respondent Board were timely filed in accordance with N.J.A.C. 1:1-18.4.*

The Board's exceptions assert that the Administrative Law Judge (ALJ) failed to adequately consider whether petitioner's acts actually arose out of and in the course of his employment as is required by N.J.S.A. 18A:16-6.1 to entitle him to indemnification for legal fees. Rather, it contends, the ALJ erroneously found that "because the actions for which the Petitioner was charged took place on school property and during working hours, the course of employment requirement was satisfied." (Board's Exceptions at p. 3) The Board avers that this interpretation of the statute is unsupported. It further avers that the ALJ denied it the

* Exceptions of petitioner and respondent note that the amount of legal fees at issue herein is mistakenly referred to as \$63,012.43 on Page 2 of the initial decision. The parties advise that the correct amount in question is actually \$6,312.43.

opportunity to call witnesses who would have demonstrated that petitioner was acting outside the scope of his employment when he injured a student, i.e., the head of security who would have testified with respect to petitioner's job duties and the school nurse who would have testified regarding the nature of the student's injury.

Lastly, the Board maintains that certain acts are not subject to indemnification at all, regardless of when or where the conduct took place. It points to Scirrotto v. Warren Hills Bd. of Ed., 272 N.J.Super. 391 (App. Div. 1994), where in denying a teacher reimbursement of legal fees incurred in the successful defense against charges of bribery and threats, the court held

The facts underlying the criminal charge should be "analyzed strictly rather than liberally, so that reimbursement of legal fees and expenses should only ensue when the circumstances are such as to fit clearly within legislative limitations." (citations omitted) As a matter of policy, a public employee should not be "encouraged to engage in acts which may constitute crimes by the assurance that an acquittal on the charge will permit him to saddle defense costs upon the taxpayers of the community." (citations omitted) (Board's Exceptions at pp. 3-4)

The Board asserts that in light of this Appellate Division decision, it is clear that inquiry into the course of performance requirement must be more extensive than that performed by the ALJ herein. It, therefore, urges the Commissioner to remand this matter for further proceedings with respect to this threshold issue pursuant to N.J.S.A. 18A:16-6.1.

In reply, petitioner asserts a contention that the ALJ's determination with respect to petitioner's actions herein arising out of and in the course of his employment was flawed requiring further proceedings is outrageous. Petitioner avers that the ALJ's decision in this regard was clearly founded on the Stipulation of Facts entered into by the parties and the Board's offer of proof as to the witnesses it would have testify to support its assertion. Petitioner proffers

that the ALJ correctly determined that any testimony along the lines offered would either be irrelevant or unpersuasive as to the issue of whether petitioner acted in the due course of his employment. Petitioner posits that, based on the Board's offer of proof on the record, "no factual issue existed as to the reason for [petitioner's] action or motives at the time he came to the assistance of Joanna Rauch, a teacher at Abraham Clark High School, because she thought there were students in her homeroom in possession of explosives." (Petitioner's Exceptions at p. 1)

Petitioner excepts to the ALJ's denial, pursuant to Cilento, supra, of his claim for indemnification for the additional expenses incurred in the prosecution of this appeal to the Commissioner. He urges the Commissioner to reconsider Cilento, and permit an opportunity for a petitioner to be made fully whole for legal fees necessary to enforce his statutory entitlement when, as is the case here, a board's denial of the claim is without merit and the equivalent of a frivolous pleading. Petitioner asserts that it has cost him \$4,748.08 over and above the \$6,312.43 expended below, for a total at the time of the hearing of \$11,060.51, to compel payment from respondent in this matter. He asserts that his rising collection costs "defeat the spirit and benefit of eventual award of indemnification for attorneys fees given the amount of time and work necessary to effect actual payment by Respondent." (Petitioner's Exceptions at p. 3) Petitioner also excepts to the ALJ's determination that the awarding of pre-judgment interest was beyond the jurisdictional power of the Commissioner to entertain or ordain. Petitioner asks the Commissioner to clarify his authority in this regard and to award him pre-judgment interest, as such would serve as a deterrent to boards, who clearly recognize their responsibility, delaying payment without any legitimate basis.

In response, the Board asserts that the ALJ was entirely correct in determining that petitioner was not entitled to reimbursement for legal expenses derived from prosecution of this appeal to the Commissioner, as no legal basis exists for a contention to the contrary. The Board observes that not only is such claim precluded by Cilento, supra which is directly on point with respect to this issue, it is also clear that “the Commissioner’s ‘statutory authority has not been construed or exercised to include the power to award counsel fees.’ Balsley v. N. Hunterdon Bd. of Ed., 117 N.J. 434, 442 (1990).” (Board’s Reply Exceptions at p. 2) The Board argues that petitioner, likewise, has presented no legal support for his claim for pre-judgment interest. It posits that pursuant to N.J.A.C. 6:24-1.16 such interest may be awarded by the Commissioner only if the actions taken by the Board were taken in bad faith and/or taken in deliberate violation of statute or code. In that petitioner has presented no evidence that the position of the Board, i.e., that petitioner’s actions in this matter did not arise out of or in the course of his employment, was not taken in good faith, he cannot qualify for the award of pre-judgment interest.

Upon a careful and independent review of the record in this matter, and after full consideration of the exception and reply exception arguments of the parties, the Commissioner concurs with the findings and conclusion of the ALJ that, based upon the stipulated record, petitioner is entitled to judgment in his favor in the amount of \$6,312.43, for legal expenses incurred in the successful defense of the disorderly person’s charge against him. Notwithstanding the Board’s arguments to the contrary, the Commissioner does not find this result altered by Scirrotto, supra, or the Board’s offer of proof with respect to testimony of the head of security or the school nurse.


The Commissioner further agrees that petitioner cannot recover legal expense reimbursement for prosecution of the instant Petition of Appeal, as there is no express statutory authorization for the award of counsel fees in actions brought before the Commissioner under education laws. (See Balsley supra; Cilento, supra.)

With regard to the ALJ's determination on petitioner's claim for pre-judgment interest, the Commissioner is compelled to correct the ALJ's statement, on page 3 of his decision, asserting that the awarding of pre-judgment interest is "beyond statutory jurisdictional power of the Commissioner to entertain or ordain." Pursuant to N.J.A.C. 6:24-1.16, the Commissioner clearly has the discretion to award pre-judgment interest in any circumstance in which a petitioner has sought such relief and has successfully established a claim to a monetary award. But, as the Board accurately notes in its reply exceptions, pre-judgment interest will only be awarded by the Commissioner in cases where he has concluded that the denial of the monetary claim was an action taken in bad faith and/or has been determined to have been taken in deliberate violation of statute or rule. After reviewing the within record, the Commissioner does not find any evidence that the Board's refusal to compensate petitioner can be attributed to any malevolent motive or is otherwise tainted with any element of bad faith. It appears that the Board advanced what it believed to be a meritorious defense to the reimbursement claim and is entitled to the benefit of any doubt concerning the sincerity of its conviction about that claim. As such, the Commissioner finds and determines that petitioner has no entitlement to pre-judgment interest in this matter.

Accordingly, the recommended decision of OAL, as modified above, is adopted as the final decision in this matter for the reasons clearly articulated therein. The Board is hereby

directed to pay petitioner \$6,312.43, representing the legal expenses incurred in the successful defense of the municipal court disorderly person's charge against him.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

AUGUST 9, 1995

DATE OF MAILING AUGUST 9, 1995

304-95

D.E. AND D.E., on behalf of minor child,	:	
M.P.,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
GREATER EGG HARBOR REGIONAL	:	
SCHOOL DISTRICT, ATLANTIC COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

SYNOPSIS

Petitioning aunt and uncle contested Board's determination that their nephew M.P., whom they adopted, was ineligible for a free public education at Oakcrest High School. Board sought tuition for three semesters commencing in August 1993 .

ALJ found that M.P. had been a resident of the school district since August 1993 as he came to reside with petitioners not motivated solely by the desire to obtain a free education, but due to his mother's inability to provide him financial support and guidance. ALJ found that petitioners met their burden of proof that M.P. was entitled to a free education pursuant to N.J.S.A. 18A:38-1 et seq.

Commissioner adopted findings and determination in initial decision as his own.

AUGUST 9, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 12071-94

AGENCY DKT. NO. 470-11/94

**D.E. AND D.E. ON BEHALF OF MINOR
CHILD, M.P.,**

Petitioner,

v.

**BOARD OF EDUCATION OF GREATER
EGG HARBOR REGIONAL SCHOOL DISTRICT,
ATLANTIC COUNTY,**

Respondent.

Charles T. Eckel, Esquire, for petitioner

Louis J. Greco, Esquire for respondent

Record Closed: June 1, 1995

Decided: June 28, 1995

BEFORE **JOSEPH E. KANE, ALJ:**

STATEMENT OF THE CASE
AND PROCEDURAL HISTORY

By letter dated August 9, 1994, respondent notified the petitioners that their minor adopted son, M.P. was not eligible to receive a free education at the Oakcrest High School. Petitioners' disagreed with the school board's decision and on December 15, 1994, the matter

was transmitted to the Office of Administrative Law (OAL) to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A hearing was conducted at the Atlantic City, OAL, 1201 Bacharach Boulevard, Atlantic City, New Jersey on June 1, 1995. The record was closed on June 1, 1995, with an Initial Decision being rendered on June 28, 1995.

ISSUE

WHETHER M.P. IS ENTITLED TO A FREE AND APPROPRIATE EDUCATION PURSUANT TO THE CRITERIA SET FORTH IN N.J.S.A. 18A:38-1 et seq.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent contends that M.P. is not eligible to receive a free education at the Oakcrest High School pursuant to N.J.S.A. 18A:38-1. The respondent contends that M.P.'s adoption and relocation to the school district constitutes a unilateral self-serving placement of a child by his family for the purpose of acquiring an education within the respondent's district rather than as a result of a hardship beyond the control of the petitioners.

Petitioners, who bear the burden of proof in this matter, contend that M.P. was financially unable to remain with his natural mother and that he came to live with them in order to obtain a more stable family environment as well as to receive an education.

The applicable statute is N.J.S.A. 18A:38-1. This statute affords individuals over 5 and under 20 years old a free education provided that several criteria are met. The respondent stipulated that the petitioners, as well as M.P., are residents of the school district. Accordingly, the petitioners meet the provisions of N.J.S.A. 18A:38-1(a). The respondent contends, however, that the provisions of subsection (b)1 of the statute have not been met because M.P. did not come to reside with the petitioners, his aunt and uncle, because of any hardship. This section reads:

Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and

will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. . .

Since August 1993, M.P. has lived with his aunt and uncle, petitioners in this matter. He formerly resided in St. Cruix, Virgin Islands. At the age of four his father died and at the time he came to live with the petitioners, his mother had 12 children. M.P.'s natural mother never worked outside of the home, and in August 1993, there were approximately five brothers and sisters residing in the home.

M.P.'s aunt, Mrs. D.E., testified that M.P.'s mother, H.P., asked them if M.P. could reside in their home. Mrs. D.E. testified that H.P. stated that M.P. was becoming a man and beginning to associate with the wrong crowd. She was seeking a more stable family environment that H.P. felt the petitioners could provide.

This information was also contained in the affidavit that H.P. filed with the respondent. In this affidavit she also indicated that she was financially unable to assist M.P. with any support other than the social security survivor's check that he receives each month. She further averred that it was not her sole purpose just to send M.P. to the petitioners in order to receive a free public school education since this was also available to him in St. Cruix, Virgin Islands.

Mrs. D.E. testified that M.P. has resided with them ever since arriving in August 1993, and that he has only returned home to visit his mother once for a one month period. In August 1993, H.P. gave the petitioners a Power of Attorney wherein she relinquished all rights as M.P.'s mother. M.P.'s social security checks were also turned over to the petitioners as guardians for M.P.

On August 6, 1994, the Superior Court, Chancery Division, Atlantic County, granted permanent custody of M.P. to the petitioners. Petitioners testified that since arriving at their home they have provided all financial support and guidance to M.P. They further indicated that he is a part of their family which consists of two other children. The petitioners testified that when coming to live with them in August 1993, M.P. understood that the arrangement was permanent and has remained so to this date.

M.P. turned 18 years old on January 30, 1995. As a result, the respondent stipulated that the period of ineligibility is for the 1993-94 school year and only the 1994 fall semester, in sum, three semesters.

Respondent submitted an affidavit of amount due of Ralph Martin in support of the costs per student for the relevant time period. The costs are as follows:

School Year 1993-94.	\$ 8,000.00
School Year 1994-95 through 6/95.	\$ 8,500.00
Total Due as of June 1, 1995.	\$16,500.00

I **FIND** that M.P. has been a resident of the school district since August 1993. During this time period up until the present, he has been supported financially by receiving social security survivor's benefits as well as receiving the financial support of the petitioners. Based upon the testimony of the petitioners as well as the affidavit of H.P., I **FIND** that M.P. came to reside with the petitioners due to his mother's inability to provide for him financially and because she wanted him to receive the guidance of the petitioners and to be part of a more stable family environment than what H.P. was able to provide. I **FIND** that the petitioners at all times intended to have M.P. reside permanently in their home and that M.P. has done so since August 1993.

Accordingly, I herein **CONCLUDE** that the petitioners have met their burden to demonstrate that M.P. is entitled to a free education pursuant to the provisions of N.J.S.A. 18A:38-1 et seq. I make this conclusion despite the lack of any involvement by a social service agency or the New Jersey Division of Youth and Family Services to be involved with the

placement of M.P. from the Virgin Islands to the petitioners. Instead, I **CONCLUDE** that M.P.'s move to the school district was not motivated solely by a desire to obtain a free education, but instead was motivated by his mother's desire to provide him with a more stable life. Accordingly, I herein **FIND** that M.P. has met the criteria set forth at N.J.S.A. 18A:38-1 et seq. and is thus entitled to a free and appropriate education.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 28, 1995
DATE


JOSEPH E. KANE, ALJ

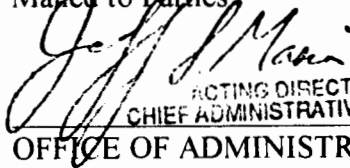
Receipt Acknowledged:

July 6, 1995
DATE


DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 10 1995
DATE
psa


ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

DOCUMENTS IN EVIDENCE

FOR PETITIONER:

- P-1 DEED
- P-2 PRELIMINARY TAX BILL
- P-3 MARRIAGE CERTIFICATE
- P-4 CERTIFICATE OF BIRTH
- P-5 SPECIAL POWER OF ATTORNEY
- P-6 ORDER FOR CUSTODY
- P-7 STUDENT REGISTRATION FORM
- P-8 LETTER DATED AUGUST 30, 1993
- P-9A STATEMENT OF ACCOUNT
- P-9B STATEMENT OF ACCOUNT
- P-10 CANCELED CHECKS
- P-11 AFFIDAVIT OF HAYDEE PICHARDO
- P-12 AFFIDAVIT OF HAYDEE PICHARDO
- P-13 COPY OF CHECK
- P-14 LETTER DATED AUGUST 9, 1994
- P-1

FOR RESPONDENT:

WITNESSES

FOR PETITIONER:

D.E.
D.E.

FOR RESPONDENT:

NONE


D.E. AND D.E., on behalf of minor child,	:	
M.P.,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
GREATER EGG HARBOR REGIONAL	:	
SCHOOL DISTRICT, ATLANTIC COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review, the Commissioner concurs with the findings of the Administrative Law Judge in the initial decision, and further agrees that petitioners, satisfying the criteria of N.J.S.A. 18A:38-1 et seq., have established M.P.'s entitlement to attend the respondent school district.

Accordingly, the recommended decision of the Office of Administrative Law is affirmed for the reasons expressed herein.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

AUGUST 9, 1995

DATE OF MAILING AUGUST 9, 1995 8

IN THE MATTER OF THE ANNUAL SCHOOL :
 ELECTION HELD IN THE SCHOOL DISTRICT : COMMISSIONER OF EDUCATION
 OF THE BOROUGH OF SPRING LAKE : DECISION
 HEIGHTS, MONMOUTH COUNTY. :
 _____ :

IN THE MATTER OF THE ANNUAL SCHOOL :
 ELECTION HELD IN THE SCHOOL DISTRICT : COMMISSIONER OF EDUCATION
 OF THE BOROUGH OF SPRING LAKE : DECISION
 HEIGHTS, MONMOUTH COUNTY. :
 _____ :

The announced results of the balloting for two (2) members of the Board of Education for full terms of three (3) years each at the annual school election held on April 18, 1995 in the School District of the Borough of Spring Lake Heights were as follows:

Three-Year Term

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Theresa Styslinger Casagrande	398	62	460
Susan Ciallella	338	56	392*
Raoul C. Cordeaux	341	49	390
Annette Kohler-Smith	320	51	371

*This tally is given as reported on the Combined Statement of Result, and may be attributed to either an error in recording the at-poll tally or an error in addition; in either case, the outcome of the election was not affected by the error.

The announced results of the balloting for one (1) member of the Board of Education for an unexpired term of two (2) years at the annual school election held on April 18, 1995 in the School District of the Borough of Spring Lake Heights were as follows:

Two-Year Term

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Colette Hayes-Labruto	276	53	329
Vernon L. Henderson	227	25	252
Eileen Eilenberger	169	34	203

Pursuant to a letter request from Raoul C. Cordeaux dated April 19, 1995, the Commissioner directed his representative from the Office of the Monmouth County Superintendent of Schools to conduct a recount of machine ballots cast for members of the Board for three-year terms pursuant to N.J.S.A. 18A:14-63.2. The machine recount was conducted on May 15, 1995 at the Monmouth County Voting Machine Warehouse in Freehold. A request for a recount of absentee ballots was made to Superior Court pursuant to N.J.S.A. 19:57-24, and the recount was eventually conducted on August 3, 1995.

On recount, the results of the election were as follows:

Three-Year Term

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Theresa Styslinger Casagrande	398	62	460
Susan Ciallella	336	56	392
Raoul C. Cordeaux	341	49	390
Annette Kohler-Smith	320	51	371

*Two-Year Term**

<u>CANDIDATE</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Colette Hayes-Labruto	276	53	329
Vernon L. Henderson	227	25	252
Eileen Eilenberger	169	34	203

*No separate request was made for a recount of ballots cast for the two-year seat. However, these ballots were recounted as part of the proceedings initiated by Mr. Cordeaux and are accordingly reported herein.

This concludes the report of the Commissioner's representative.

* * * * *


The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions therein.

Accordingly, the Commissioner finds and determines that, as originally announced, Theresa Styslinger Casagrande and Susan Ciallella were elected to full terms of three

years each, and Colette Hayes-Labruto to an unexpired term of two years, on the Board of Education of the Borough of Spring Lake Heights.

The Commissioner further directs that a copy of this decision be forwarded to the Office of Administrative Law for inclusion in the record of the inquiry presently pending into the conduct of the above-captioned election.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

S.K., on behalf of her minor child, T.T., :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY
OF CLIFTON, PASSAIC COUNTY, :

DECISION

RESPONDENT. :

S.K., on behalf of her minor child, T.T.,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF CLIFTON, PASSAIC COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

MICHAEL GUARINI, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

OCEAN COUNTY VOCATIONAL- : DECISION

TECHNICAL SCHOOL DISTRICT, :

OCEAN COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner, tenured Teacher of Interior Design who was rified, contended he was terminated due to age discrimination and his exercise of free speech. Petitioner sought reemployment with compensation.

ALJ found that petitioner failed to prove that the Board acted in bad faith and in violation of the law in its RIF determination and the abolition of his position. ALJ found that Board exercised its discretionary authority to eliminate a program with low and declining enrollment, low rate of student retention and lack of job placement. Thus, it had good cause for its determination to abolish the program and petitioner's position. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8803-94

AGENCY DKT. NO. 308-7/94

MICHAEL GUARINI,

Petitioner,

v.

**OCEAN COUNTY VOCATIONAL-
TECHNICAL SCHOOL DISTRICT,**

Respondent.

Stephen B. Hunter, Esq., for petitioner (Klausner Hunter & Seid, attorneys)

Michael Paxton, Esq., for respondent (Shea & Novy, attorneys)

Record Closed: June 8, 1995

Decided: July 11, 1995

BEFORE JOHN R. TASSINI, ALJ:

STATEMENT OF THE CASE

Petitioner Michael Guarini was a tenured teacher of courses in the Ocean County Vocational-Technical School's interior design program. The school's board of education, citing (1) declining enrollment for the program for the past five years, (2) the rate of retention of students for the program, and (3) the lack of job placement for the students attending the

program, eliminated the interior design program and, as a reduction in force (RIF), abolished the petitioner's position. N.J.S.A. 18A:28-9; N.J.S.A. 18A:54-20, -22.

The petitioner alleges the following: He is "almost sixty (60) years of age and was one of the older [tenured members of the school's] teaching staff." The school "resisted every effort [he] made . . . to properly market the Interior Design Program in order to increase the number of students enrolled within said program." He "clashed" with school administrators regarding "the direction of the Interior Design Program" and his criticisms of the "[a]dministration's failure to consider the interests of the students in contemplating the possible elimination of the . . . [p]rogram." The school "continues to maintain other programs . . . with similar low enrollments in specialized programs." The school implemented the RIF "without good cause," "to punish . . . [him for] his exercise of his constitutionally protected freedom of speech rights that he had exercised in attempting to support his students and the . . . Interior Design Program," and "because of [his] age," and, therefore, in violation of N.J.S.A. 18A:28-5, -10. Based upon these allegations and claims the petitioner demands that the school "re-employ" him with back pay and benefits. Petition; R-C.

The school denies the petitioner's allegations, submits that the petitioner has failed to present evidence sufficient to prove his allegations or even create a genuine issue of material fact, and moves for summary decision, dismissing his case.

PROCEDURAL HISTORY

On July 22, 1994, the petitioner's petition was filed with the Department of Education and, on August 30, 1994, the school's answer was so filed. The Department transmitted the matter to the Office of Administrative Law (OAL) where, on September 13, 1994, it was received and filed as a contested case. N.J.S.A. 18A:6-9; N.J.S.A. 52:14B-2(b). By my letter dated November 3, 1994, I set forth a schedule for discovery, etc. Thereafter, the case was the subject of a conference. On May 8, 1995, the school's papers in support of this motion were filed; on May 31, 1995, the petitioner's papers in opposition to the motion were filed; and, on June 8, 1995, the school's letter memorandum in response to the petitioner's brief was filed.

FINDINGS OF FACT

Beginning in 1987, the petitioner was employed as a teacher in the Ocean County Vocational-Technical School's interior design program.

The school's records show that enrollment in the interior design program was as follows:

<u>As of:</u>	<u>A.M. Session</u>	<u>P.M. Session</u>	<u>Total Students</u>
September 1988	13	9	22
June 1989	10	6	16
September 1989	6	11	17
June 1990	6	8	14
September 1990	8	13	21
June 1991	8	11	19
September 1991	11	6	17
June 1992	8	6	14
September 1992	4	10	14
June 1993	5	6	11
September 1993	4	8	12
June 1994	3	5	8

[R-A1]

On May 12, 1993, the school contacted high school principals, asking them to encourage students to enroll in vocational programs with low and declining enrollment,, including the interior design program. R-F1. Also, in advertisements appearing in several newspapers circulated in Ocean County and elsewhere on May 31 and June 1, 1993, the school invited prospective students to "Come to the Interior Design & Decorative Services **OPEN HOUSE**," "contact the school or [the petitioner] at **908-920-0050**," and "[r]egister **now**." R-C1; R-D1. Also, on a billboard placed in front of the school, the school invited prospective students to "ENROLL

NOW” in the interior design and decorative services program and advertised “SCHOLARSHIPS [and] FINANCIAL AID” in that regard. R-E1. Also, an “Interior Design and Decorative Services” handbill was printed and distributed describing the program; representing that “after completing the Interior Design program” “[t]here are many employment opportunities to choose from”; representing that the school would “also provide . . . planning for an effective job search”; and requesting that prospective students “fill out . . . and mail back” the post office card made part of the handbill. R-I. Also, in the Asbury Park Press column written by the petitioner and in other newspaper articles, he publicized his program. R-C.

Despite the above-described efforts, enrollment in the interior design course declined. The school surveyed its interior design graduates and summarized the survey results as follows:

1989 GRADUATES

- 3 - Working full-time in the field.
- 2 - Attending full-time post secondary education in area trained.
- 3 - No responses.

1990 GRADUATES

- 1 - Working full-time in non-trade related area.
- 1 - Unemployed - actively looking for employment.
- 2 - Attending full-time post secondary education in area trained.
- 2 - Attending full-time post secondary education in non-related area.
- 1 - No response.

1991 GRADUATES

- 2 - Working full-time in non-trade related area; one continuing education.
- 1 - Unemployed - actively looking for employment.
- 1 - Unemployed - not seeking employment.
- 1 - Attending full-time post secondary education in area trained.
- 0 - No response.

1992 GRADUATES

- 1 - Working full-time in non-trade related area.
- 1 - Attending full-time post secondary education in related area.

1 - Attending full-time post secondary education in non-related area.

2 - No response.

1993 GRADUATES

2 - No responses - one no phone; one phone disconnected.

[R-B1]

In a memorandum dated March 8, 1994, Ann Grace, the assistant superintendent of the Ocean County Vocational-Technical Schools, notified the petitioner of the following:

You recently submitted a proposal to Dr. Felice indicating that you would like to divide your program into an AM & PM session. You recommend that the AM session would be devoted to Decorating & Design Services which will include drapery making, picture framing, wall and window treatments, upholstery and accessories.

A review of your Com Link guide indicates that each of these areas are now included in your program. By separating the curriculum elements as you recommend, you would only limit your enrollment further. Students wanting Interior Design could sign up for the PM session only. I suggest, as part of your present program, you identify students who have an interest in a design service and work with that student to perhaps locate an entry level job shadowing experience or part-time job which would provide the student with related experience.

Attached you will find a course description for Interior Design at a local high school. Note that two areas covered in Interior Design II are college portfolio preparation and computer assisted design. These are two elements essential to the success of a modern interior design program. Minutes from your advisory board meetings all refer to computer drafting as occupationally relevant. Are you making any effort to introduce this new technology into your program? I suggest the following:

1. Take an evening computer course at OCVTS.
2. Ask Mr. Sharkey if you and your students could take field trips to the Toms River Center where the class could obtain some initial instruction in the use of CADD.
3. Initiate a relationship with Brookdale Community College where the Interior Design Program is linked to architecture.

While I can sympathize with your enrollment situation, you must realize all teachers must adopt [sic] their teaching techniques to keep pace with today's technology. I also suggest you take a serious look at the type of project you do each year and your job placement record.

I appreciate your sending me the minutes of your advisory committee meetings; however, I do not consider a telephone conversation held from home to constitute a meeting.

An active advisory board is imperative to strong job placement and keeping pace with your industry.

If you have immediate plans to address these suggestions, please let me know.

[R-G]

By letter dated April 21, 1994, Frederick W. Felice, Ed. D., the superintendent of the Ocean County Vocational-Technical Schools, notified the petitioner of the following:

It is with great reluctance that I must advise you that effective June 30, 1994, your employment in this District will be terminated. The reasons for this termination are as follows:

1. *Declining enrollment* for the Interior Design Program for the past five years.
2. *The rate of retention of students* for this Program.
3. *The lack of job placement for the students* attending said Program.

As a result of the above conditions, I have decided to recommend the elimination of the Interior Design Program. Please be assured that this consideration and conclusion was reached only after much anguish and deliberations on behalf of the Board of Education and myself.

Please understand that the Board of Education will be discussing this matter in private Executive Session since it involves personnel issues. However, under the provisions of the Open Public Meetings Act, you have the right to request the Board to discuss the matter in a public session of the Board meeting that has

been scheduled for Tuesday, April 26, 1994 at 8:00 a.m. You also have the right to have representation of your choice present with you. If you wish the matter to be discussed in Open Session, please notify Board Secretary, Mrs. Carolann Bonnell, at 349-8385 by noon on Monday, April 25, 1994.

If you wish to attend the Board meeting on the above-mentioned date either in private session or public session, please be assured that we will provide a substitute teacher for you if need be to allow you to attend said meeting. In the event that this is needed, please contact Mrs. Carolann Bonnell again at the above-mentioned number to request the same.

[R-A, italics added.]

By letter dated May 3, 1994, Dr. Felice notified the petitioner of the following:

As I am sure you are aware, and pursuant to the Rice letter that was sent to you on April 21, 1994, on Tuesday, April 26, 1994, the Board of Education of the Ocean County Vocational-Technical Schools conducted an Executive Session to discuss the terms and conditions of your future employment with the Ocean County Vocational-Technical Schools.

It should be noted that you had the opportunity to be represented by Mr. Charles Walker who accompanied you to the Executive Session. You had also requested that this hearing be conducted in Closed Session.

It is with great reluctance that I must advise you that at the aforementioned Executive Session, *the Board determined that the position you currently hold as an Interior Design Instructor will not be available for the 1994-1995 school year.* As a result, the Board cannot offer you employment in this capacity for the forthcoming year. *The reasons for said determination of the Board are as follows:*

1. *Declining enrollment* for the Interior Design Program for the past five years.
2. *The rate of retention of students* for this Program.
3. *The lack of job placement for the students* attending said Program.

4. As a result of the above, the Board has determined that it would be in the best interests of the District to abolish your full-time day program for Interior Design, effective June 30, 1994.

As I am sure you are aware, the above decision was determined as a result of the current enrollment factor as set forth above.

If, in the event, however, enrollment increases, the Board has indicated that it would have no objection to reinstating the Interior Design Program, in a Post-Secondary Evening Program. Naturally, the enrollment will have to sufficiently increase to warrant the reinstatement of this particular Program. In the event enrollment does increase and the Program is added, as set forth above, the Board will notify you and offer you the opportunity to once again teach said Program.

I want to take this opportunity to thank you for the service you have provided to the Ocean County Vocational-Technical Schools over the past years.

Naturally, if you have any questions, please feel free to contact me.

[R-B, italics added.]

The petitioner alleges the following: He is "almost sixty (60) years of age and was one of the older [tenured members of the school's] teaching staff." The school "resisted every effort [he] made . . . to properly market the Interior Design Program [he taught] in order to increase the number of students enrolled within said program." For example, "during the 1989 school year [he] compiled a package of . . . information for . . . a brochure for [the] Interior Design Program"; however, the brochure was not prepared and disseminated by the school until the program's last year. For example also, during the "1992-93 school year" he was "required . . . to utilize all of his students . . . in a project referred to as the Good Cents House Project," which forced him to "put [his] Room Display project largely on hold" and the "room display newspaper article did not come out until the first week in June, 1992 which was too late to use for recruiting the following year." For example also, Dr. Felice "repeatedly cancelled meetings [the petitioner had] scheduled with him to discuss [his] proposal for improving enrollment." The petitioner "clashed" with school administrators regarding "the direction of the Interior Design Program [program]" and his

criticisms of the “[a]dministration’s failure to consider the interests of the students in contemplating the possible elimination of the . . . [p]rogram.” Following the petitioner’s receipt of Dr. Felice’s April 21, 1994 letter, during the open house on June 1, 1994, the petitioner obtained “one solid enrollment application” and “there were at least 8 other students who took applications with the intent to enroll in the Interior Design class for 1994-95.” The school “continues to maintain other programs . . . with similar low enrollments in specialized programs.” The school abolished the interior design program and subjected the petitioner to the RIF “without good cause,” “to punish [him] . . . because of his exercise of his constitutionally protected freedom of speech rights that he had exercised in attempting to support his students and the . . . Interior Design Program,” and “because of [his] age.” Petition; R-C.

CONCLUSIONS OF LAW

N.J.S.A. 18A:54-1 to -4 and N.J.S.A. 18A:54-11 to -41 govern county vocational schools. N.J.S.A. 18A:54-20(d) states that the board of education of a county vocational school, such as the respondent, may, *inter alia*, “[e]mploy and dismiss . . . teachers”; N.J.S.A. 18A:54-22 states that a vocational school teacher “shall have all rights and privileges of teachers . . . in school districts.”

N.J.S.A. 18A:28-9, which governs the rights and privileges of teachers in school districts, states:

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

A board of education has broad discretionary authority and its actions are entitled to a presumption of lawfulness and good faith. Schinck v. Westwood Bd. of Educ., 60 N.J. Super. 448 (App. Div. 1960); Quinlan v. North Bergen Tp. Bd. of Educ., 73 N.J. Super. 40, 46 (App.

Div. 1962). This presumption extends to a board's determination that, for reasons of economy, a tenured employee may be subject to an RIF. Jamison v. Morris Sch. Dist. Bd. of Educ., 198 N.J. Super. 411, 415 (App. Div. 1985); Old Bridge Bd. of Educ. v. Old Bridge Educ. Ass'n, 193 N.J. Super. 182, 186-87 (App. Div. 1984), aff'd as modified, 98 N.J. 523 (1985); In re Maywood Bd. of Educ., 168 N.J. Super. 45, 55 (App. Div.), certif. denied, 81 N.J. 292 (1979); Charles Arangio v. Clifton Bd. of Educ., 1978 S.L.D. 207.

Consistent with the above, the petitioner bears the burden of proof that the school acted in bad faith and in violation of the law in its RIF determination and the abolition of his position.

The motion for summary decision is an efficient means of resolving administrative litigation; however, the movant bears the burden of proof that there is no genuine issue of material fact and, in this regard, the papers of the objector to the motion are indulgently treated. N.J.A.C. 1:1-12.5; R. 4:46-1; Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954).

There is no dispute that, by way of newspaper advertisements, handbills, a billboard, etc., the school invited prospective students to enroll in the petitioner's program. There is also no dispute that (1) the petitioner's program had low and declining student enrollment, (2) the petitioner's program had a low rate of student retention, and (3) there was low job placement for the students attending the program. A school board's finite resources must be prudently used; reasonably, a vocational and technical school board should determine that a program with low and declining enrollment, etc., should be eliminated so that the school board's resources can be concentrated on more practical programs; and, consequently, any of the above-noted three factors appears to constitute good cause for the determination to abolish the program and the petitioner's position.

The petitioner alleges that the school resisted his efforts to "properly market" his program (implying that, had the program been "properly marketed," enrollment may have risen) and alludes generally to other programs that also had low enrollment which were not abolished. However, the board had discretion to make these choices. Finally, the petitioner has not offered evidence sufficient to create a factual issue relative to his contentions that the board abolished his program

and position because of his age and exercise of free speech. Given these circumstances, the motion for summary decision must be granted.

ORDER

I ORDER the petition **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 11, 1995
DATE

John R. Tassini
JOHN R. TASSINI, ALJ

7/11/95
DATE

Receipt Acknowledged:

[Signature]
DEPARTMENT OF EDUCATION

JUL 18 1995
DATE

Mailed to Parties:
Jeff S. Mabin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

Petitioner's Exhibits:

- P-A School's Memorandum, dated March 8, 1994
- P-B Petitioner's résumé

Respondent's Exhibits:

- R-A School's letter, dated April 21, 1994
- R-B School's letter, dated May 3, 1994
- R-C Petitioner's answers to interrogatories 17, 18, 19, 20, 21
- R-D Petitioner's answers to interrogatories 22, 23, 24
- R-E Petitioner's answers to interrogatories 22, 23, 24
- R-F Petitioner's answers to interrogatories 22, 23, 24, 25, 26, 27, 28, 29
- R-G School's Memorandum, dated March 8, 1994
- R-H Petitioner's answers to interrogatories 25, 26, 27, 28, 29
- R-I "Interior Design and Decorative Services" handbill
- R-A1 Lists of classes' enrollment
- R-B1 "Summary of Interior Design Graduates," 1989-1993
- R-C1 Newspaper (classified) advertisements, May 31, 1993
- R-D1 Newspaper advertisement, June 1, 1993
- R-E1 Copy of "billboard in front of [school] building"
- R-F1 InterOffice Memo, dated May 12, 1993

MICHAEL GUARINI, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 OCEAN COUNTY VOCATIONAL- : DECISION
 TECHNICAL SCHOOL DISTRICT, :
 OCEAN COUNTY, :
 :
 RESPONDENT. :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed in accordance with N.J.A.C. 1:1-18.4.

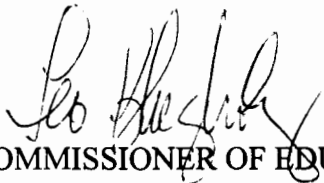
Petitioner's exceptions essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ), again contending, inter alia, that petitioner was wrongfully terminated from his position as a Teacher of Interior Design, and that the elimination of his position was based on age discrimination in violation of N.J.S.A. 18A:28-10.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that the Board acted within its authority in abolishing petitioner's position. The Board's determination to eliminate the Interior Design Program, and petitioner's position, was well-grounded on 1) declining enrollment, 2) a low rate of student retention, and 3) low job placement for students attending the program. The Commissioner

concur that these factors may reasonably constitute good cause for the Board's determination. Moreover, the Commissioner agrees with the ALJ that the record does not substantiate petitioner's allegation that his position was eliminated due to his age, or any other wrongful motive on the part of the Board.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision of the Office of Administrative Law and finds that the within Petition of Appeal must be dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

August 14, 1995
Date of Mailing, August 15, 1995

EDU #8803-94

C # 308-95

SB # 99-95

MICHAEL GUARINI, :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

OCEAN COUNTY VOCATIONAL- : DECISION

TECHNICAL SCHOOL DISTRICT, :

OCEAN COUNTY, :

RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, August 14, 1995

For the Petitioner-Appellant, Klausner & Hunter (Stephen B. Hunter, Esq., of Counsel)

For the Respondent-Respondent, Shea & Novy (Michael Paxton, Esq., of Counsel)

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

Donald C. Addison, Jr., Wendel E. Daniels and Thomas P. McGough abstained.

February 7, 1996

Date of mailing FEB 09 1996

C #310-95L
SB #101-95

CITY COUNCIL OF THE CITY OF
PATERSON,

PETITIONER-APPELLANT,

V.

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF PATERSON, PASSAIC
COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 14, 1995

For the Petitioner-Appellant, Allen Zaks, Esq.

For the Respondent-Respondent, Louis M. Flora, Esq.

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

Donald C. Addison, Jr., Wendel E. Daniels and Thomas P. McGough abstained.

February 7, 1996

Date of mailing FEB 09 1996

311-95

LINDA CIABATTARI, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN- : DECISION

SHIP OF OCEAN, MONMOUTH COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioning parent sought waiver of tuition charged for period during which she and her two children resided outside of the district but her children continued to attend school in the district. Board contended petition was untimely filed.

Petitioner did file untimely as she had read N.J.A.C. 6:24-1.2(c), which does not set forth any exception to the 90-day filing period, and the Board's letter of November 1994 did not notify the petitioner of the 21-day limitation for filing an appeal of a domicile determination. ALJ, however, found that under the unique circumstances of this case and in the interest of justice, the petition should not be dismissed as untimely. ALJ found that petitioner was liable for tuition for all school days from October 1 up to and including November 18, 1994, when her children were attending the Board's schools while living in Tinton Falls. Petitioner was ordered to pay the Board the tuition owed.

Commissioner concurred with ALJ's conclusion that petitioner had to be held accountable for tuition to the Board for the period in question as petitioner did not bring sufficient objective indicia to the record to establish domicile in the district pursuant to Unanue. Commissioner directed Board to review petitioner's claim with regard to half-day sessions in light of its policies and procedures for the collection of tuition from non-resident students and to make appropriate adjustments to the tuition assessment.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 878-95

AGENCY DKT. NO. 485-12/94

LINDA CIABATTARI,

Petitioner,

v.

OCEAN TOWNSHIP

BOARD OF EDUCATION,

Respondent.

Linda Ciabattari, petitioner, pro se

Honora O'Brien Kilgallen, Esq., for respondent (Shebell & Schibell, attorneys)

Record Closed: June 9, 1995

Decided: July 5, 1995

BEFORE JOHN R. TASSINI, ALJ:

STATEMENT OF THE CASE

Respondent Ocean Township Board of Education (BOE) determined that, during part of the 1994-95 school year, although the children of petitioner Linda Ciabattari attended the BOE's schools, they were not domiciled in the Ocean Township school district and the BOE claims that the petitioner should pay tuition for the children's attendance during that period. The petitioner

appeals from the BOE's determination, alleging that for part of the relevant period she and the children were domiciled in the district and that she is therefore liable for only part of the tuition demanded by the BOE. N.J.S.A. 18A:38-1b(2).

PROCEDURAL HISTORY

On December 29, 1994, the petitioner's petition and its accompanying exhibits were filed with the Department of Education and, on January 19, 1995, the BOE's answer and defenses were so filed. N.J.S.A. 18A:6-9. The Department transmitted the matter to the Office of Administrative Law (OAL) where, on January 26, 1995, it was received and filed as a contested case. N.J.S.A. 52:14B-2(b). By my letter dated February 24, 1995, I set forth a schedule for discovery, etc.

By letter dated March 7, 1995, the petitioner notified me that she had worked part-time for the BOE's attorney's firm from November 1993 through February 1994; she submitted that the firm's representation of the BOE constituted a "conflict of interest"; and she requested (moved for) an order that the firm withdraw from the case. By my letter order dated March 10, 1995, I concluded that, because, inter alia, the petitioner had not worked on any BOE matter for the firm, the petitioner had not worked for the firm during the period in issue in this case, and the petitioner had not worked for the attorney appearing for the BOE in this case, there was no conflict or other reason for the firm to withdraw and I denied the petitioner's motion.

On March 24, 1995, the BOE filed papers in support of its motion for an order of summary decision, dismissing the petition as out-of-time under N.J.S.A. 18A:38-1b(2), and a decision on the motion was delayed to allow settlement negotiations, which were ultimately unsuccessful. On June 9, 1995, the case was heard. The BOE's motion is addressed below.

FINDINGS OF FACT

Prior to August 1994, the petitioner, her husband, her daughter and her son were domiciled in a single-family residence at 11 Okros Road, in the borough of Tinton Falls, and the

petitioner's children attended the Tinton Falls public schools. During this period, the petitioner's daughter experienced emotional problems and the petitioner believed that she would benefit from a change of schools. The petitioner also believed that her son, who suffers from cerebral palsy, would benefit from a change of schools, because she was dissatisfied with the education services the Tinton Falls schools were providing him and because he was teased by other Tinton Falls students. The petitioner decided that the Ocean Township (Monmouth County) school system would provide better education services to her son.

During or about August 1994, the petitioner and her husband separated. The petitioner and her children left the family home and moved into a nearby residence at 1060 Hope Road, Ocean Township, which they shared with petitioner's friend Susie Raczkiwicz. The petitioner intended her children to be domiciled in this home. R-2. The children were registered in the BOE's schools and there they began the 1994-95 school year.

By late September/early October 1994, conflicts were occurring between the petitioner's children and Ms. Raczkiwicz's children and the petitioner and her children returned to the Tinton Falls home (where her husband still resided). However, the petitioner's children continued to attend the BOE's schools. Meanwhile, the petitioner began to look for another residence in Ocean Township.

Ocean Township property-tax payers, like those of most municipalities, are concerned about rising education costs and taxes related thereto and the BOE regularly received anonymous telephone tips that students attending the BOE's schools were not domiciled in the township. Robert J. Mahon, the BOE's superintendent of schools, received such a tip about the petitioner's children and, in early October 1994, he directed Rose Hlatkey, the BOE's attendance officer, to investigate. Based upon Ms. Hlatkey's findings, Mr. Mahon forwarded a letter, dated October 6, 1994, to the petitioner at the Tinton Falls address, wherein he notified her of the following: On the basis of the BOE's investigation, he had determined that the petitioner's children resided at the Tinton Falls address and were not domiciled in Ocean Township; pursuant to N.J.S.A. 18A:38-1, because the children were not domiciled in the BOE's district, they were ineligible to

attend the BOE's schools; and after Friday, October 21, 1994, the children would no longer be allowed to attend the BOE's schools. J-1.

In a letter to Mr. Mahon dated October 14, 1994, which showed a return address of "11 Okros Road," the petitioner stated the following: She was "searching for a suitable apartment or home for [her]self and [her] children in Ocean Township." Due to her daughter's "emotional problems" and the evaluation of her son by the BOE's child study team, she wanted to avoid uprooting the children. Given these circumstances, she was requesting "an extension of time from the October 21, 1994 date." J-2.

On October 25, 1994, the petitioner appeared before the BOE and represented the following: At the start of the school year, she and the children were domiciled in the district. Although she was not then (at the time of the BOE meeting) domiciled in the district, she and Sharon Anderson, a friend, had put down a \$100 deposit for the lease of a residence located at 242 R Overbrook Avenue in the Oakhurst section of the district. By November 15, 1994, she and the children would be domiciled there. However, the petitioner presented to the BOE no deposit receipt, lease or other tangible evidence of the agreement to lease.

In the BOE's letter dated October 26, 1994, and received by the petitioner about a week later, the BOE notified the petitioner of the following: The BOE had determined that the children were not domiciled in the district and it rejected the petitioner's assertion that she would be domiciled in the district by November 15, 1994. Within twenty-one days of her receipt of the letter/notification, she could contest the BOE's determination by way of "an expedited hearing" before the Commissioner of Education. "Unless otherwise ordered by the Commissioner," she would be liable for tuition for the period that her children were not domiciled in the district but attended the BOE's schools. The relevant tuition rate for grades 6-8 was \$43.42 per day (for her daughter) and the rate for grades 1-5 was \$42.28 per day (for her son); for the period up to and including October 26, 1994, a total of \$2,828.10 was owed. J-3; N.J.S.A. 18A:38-1. (The petitioner does not challenge the BOE's per diem tuition rate.)

By letter dated November 9, 1994, the petitioner notified the BOE that, on November 19, 1994, she and her children would begin to reside at the 242 R Overbrook Avenue address and, as of that date, they did begin to reside there, i.e., they were domiciled in the district, and they continue to be domiciled there. P-3. (However, during the month of October 1994 and until November 19, 1994, the children were not domiciled in the district.)

On November 16, 1994, which the petitioner believed to be the twenty-first day after she received the BOE's October 26, 1994 letter, she telephoned the office of the Monmouth County superintendent of schools; she asked about the time limitation for an appeal from a BOE determination to the Commissioner of Education; and the superintendent's secretary faxed to the petitioner a copy of N.J.A.C. 6:24-1.1 to -1.16 (but not a copy of N.J.S.A. 18A:38-1b(2)). P-2. Thereafter, despite Mr. Mahon's letters' references to N.J.S.A. 18A:38-1 and the statutory twenty-one-day period (specifically provided for filing an appeal from notice of a board of education's domicile determination), the petitioner believed that her time for appeal from such notice was governed by the aforementioned regulations. More particularly, based upon N.J.A.C. 6:24-1.2(c), which governs time periods for appeals from board of education actions generally, the petitioner believed that she had ninety days from notice of the BOE's domicile determination to file an appeal.

In Mr. Mahon's letter dated November 22, 1994, he notified the petitioner of the following: He had no indication from the petitioner relative to whether she would appeal to the commissioner from the BOE's letter/notification dated October 26, 1994. Relative to her letter dated November 9, 1994, and her stated intention to reside in the district, he needed a "certification of residency at [her] new address." Assuming that she did begin to reside at the 242 R Overbrook Avenue address (in the district) on November 19, 1994, she was responsible for \$4,113.60 in tuition for the period up to and including November 18, 1994. R-1.

In the petitioner's letter dated November 29, 1994, she notified the BOE of her position that she had until the "90th day from the date of receipt" of notification of the BOE's October 26, 1994 domicile determination to file an appeal and she chastised the BOE for its "attempts to

mislead" her into believing that the twenty-one-day period (of N.J.S.A. 18A:38-1b(2)) was applicable. J-4.

As noted in the "Procedural History" above, on December 29, 1994, i.e., more than twenty-one days after the petitioner's receipt of the BOE's October 26, 1994 domicile determination, she filed her petition with the Department of Education.

CONCLUSIONS OF LAW

N.J.S.A. 18A:38-1b(2) states, in pertinent part:

If the superintendent . . . of a school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district and the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the superintendent or administrative principal may apply to the board of education for the removal of the child. The parent or guardian shall be entitled to a hearing before the board and if in the judgment of the board the parent or guardian is not domiciled within the district or the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the board may order the transfer or removal of the child from school. The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the parent or guardian in writing of his right to contest the decision within 21 days. No child shall be removed from school during the 21-day period in which the parent may contest the board's decision or during the pendency of the proceedings before the commissioner. If in the judgment of the commissioner the evidence does not support the claim of the parent or guardian, the commissioner shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number

of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced. Nothing shall preclude a board from collecting tuition from the parent or guardian for a student's period of ineligible attendance in the schools of the district where the issue is not appealed to the commissioner.

[Emphasis added.]

Pursuant to N.J.S.A. 18A:38-1b(2), in the BOE's letter dated October 26, 1994, it duly notified the petitioner of its domicile determination; of the claim of \$2,828.10 for tuition (up to and including October 26, 1994); and of the (statutory) twenty-one-day limitation for the filing of an appeal from that determination. J-3.

N.J.A.C. 6:24-1.2(c) states:

The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

When the petitioner telephoned the county superintendent's office, she did not advise the superintendent's secretary that the BOE had notified her by letter of the (statutory) twenty-one-day period for filing an appeal from a domicile determination; consequently, the secretary faxed to the petitioner only the regulations relating to appeals generally; and, based upon her reading of N.J.A.C. 6:24-1.2(c) (which does not set forth any exception to its ninety-day period), the petitioner filed her appeal well beyond the twenty-one-day period. The petitioner's filing out-of-time occurred through no fault of the BOE.

A statute's legal effect is superior to that of a regulation or rule and "any regulation or rule which contravenes a statute is of no force, and the statute will control." Terry v. Harris, 175 N.J. Super. 482, 496 (Law Div. 1980). Further, if there is a conflict between N.J.S.A. 18A:38-1b(2) and N.J.A.C. 6:24-1.2(c), because the statute is more specific to the case and more recently enacted, there is a "preference" for the statute as "an intrinsic aid in the search for legislative intent." State v. One 1976 Pontiac Firebird, 168 N.J. Super. 168, 176 (App. Div. 1979). A

statutory time limitation for requesting an administrative adjudicatory hearing is mandatory and jurisdictional. Schaible Oil v. Department of Env'tl. Prot., 246 N.J. Super. 29 (App. Div.), certif. denied, 126 N.J. 387 (1991).

Generally, the BOE's written notification of the petitioner of the twenty-one-day limitation for the filing of an appeal would make the twenty-one-day period of N.J.S.A. 18A:38-1b(2), and not the ninety-day period of N.J.A.C. 6:24-1.2(c), applicable to the domicile determination; the petition would be deemed out-of-time under N.J.S.A. 18A:38-1b(2); and the petition would be dismissed, leaving the petitioner liable for the tuition claimed (as of October 26, 1994).

However, statutes of limitations are essentially equitable in nature. They are intended to stimulate a litigant to pursue a claim within a reasonable period of time; to punish for the negligent (late) bringing of a claim; and to promote repose, security and stability in the parties' relationships with one another and with others. O'Keeffe v. Snyder, 83 N.J. 478, 490-91 (1980); Fidelity & Deposit Co. of Md. v. Abagnale, 97 N.J. Super. 132, 139 (Law Div. 1967).

The petitioner contacted the county superintendent's office on what she perceived to be the twenty-first day after she received the BOE's letter dated October 26, 1994; she asked about the time limitation for filing an appeal and she received and read N.J.A.C. 6:24-1.2(c), which does not set forth any exception to its ninety-day period. The petitioner's mistake is excusable; that day, had she been informed of the twenty-one-day filing requirement of N.J.S.A. 18A:38-1b(2), she would have timely filed her petition. Further, the BOE's November 22, 1994 letter (R-1) notified the petitioner of its claim for \$4,113.60 in tuition (through November 18, 1994, by which time the petitioner's children were again domiciled in the district), but did not notify the petitioner of the twenty-one-day limitation and, therefore, did not trigger the statutory twenty-one-day filing requirement. Under the unique circumstances of this case, and in the interest of justice, the petition should not be dismissed as out-of-time and should be heard on its merits.

The petitioner credibly testified that from the start of the 1994-95 school year until late September 1994, the children were domiciled in the district and, from October 1, 1994, through November 18, 1994, thirty-two school days, the children were domiciled in Tinton Falls, but were

attending the BOE's schools. Consequently, for all school days from October 1 up to and including November 18, 1994, the petitioner is liable for tuition for the children. For the petitioner's daughter, the daily tuition rate (not challenged by the petitioner) is \$43.42 and the tuition due is \$1,389.44 ($\$43.42 \times 32 = \$1,389.44$). For the petitioner's son, the daily tuition rate (not challenged by the petitioner) is \$42.28 and the tuition due is \$1,352.96 ($\$42.28 \times 32 = \$1,352.96$). Therefore, the petitioner owes the BOE a total of \$2,742.40.

ORDER

I **ORDER** the petitioner to pay \$2,742.40 to the BOE.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 5, 1995
DATE

John R. Tassini
JOHN R. TASSINI, ALJ

July 6, 1995
DATE

Receipt Acknowledged:

John P. Blunk
DEPARTMENT OF EDUCATION

JUL 10 1995
DATE

Mailed to Parties:

Jeff S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

Joint Exhibits:

- J-1 BOE's letter dated October 6, 1994 (BOE's motion exhibit "A")
- J-2 Petitioner's letter dated October 14, 1994 (BOE's motion exhibit "B")
- J-3 BOE's letter dated October 26, 1994 (BOE's motion exhibit "C")
- J-4 Petitioner's letter dated November 29, 1994 (BOE's motion exhibit "F")

Petitioner's Exhibits:

- P-1 House Lease, dated November 30, 1994 (Petition exhibit "C")
- P-2 Department of Education/County Superintendent's Office Fax Transmission Cover Sheet dated November 16, 1994, and copy of N.J.A.C. 6:24-1.1 et seq. (Petition exhibit "G")
- P-3 Petitioner's letter dated November 9, 1994 (Petition exhibit "E")

Respondent's Exhibits:

- R-1 BOE's letter dated November 22, 1994 (BOE's motion exhibit "E")
- R-2 Letter of David Raczkiewicz dated August 6, 1994
- R-3 BOE's attorney's letter dated December 13, 1994 (ID only; BOE's motion exhibit "G")

LINDA CIABATTARI, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE TOWN- : DECISION
 SHIP OF OCEAN, MONMOUTH COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of petitioner and the Board’s reply thereto were timely filed pursuant to the provisions of N.J.A.C. 1:1-18.4.

It is noted that petitioner’s exceptions do not dispute the Administrative Law Judge’s (ALJ) findings of fact or conclusions of law in the instant matter. Rather, petitioner requests a reduction in the amount the ALJ determined she owed the Board for tuition, asserting “I agree that my children were out of the district for 32 days, however, it was due to extenuating circumstances.” (Petitioner’s Exceptions at p. 1) Additionally, petitioner asserts that on four of the days for which she was charged, the school her son attends had clerical half-days for grades K through 5 and she, therefore, requests that the assessed rate be reduced accordingly.

In reply, the Board objects to petitioner’s raising “half-days” as an issue contending that this topic was not raised at the hearing and, as such, should be ignored at this time.

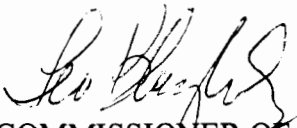
Upon review of the record of this matter, which it is noted did not include transcripts of the June 9, 1995 hearing, the Commissioner adopts the conclusions of the ALJ in his initial decision. Initially, the Commissioner concurs with the ALJ that, under the unique circumstances existing in this matter, and in the interest of justice, the within petition should not be dismissed as out-of-time. The Commissioner, likewise agrees, for the reasons stated in the decision, that there was no conflict of interest with respect to the Board's legal representation in this matter as a consequence of petitioner's part-time employment with the Board attorney's law firm from November 1993 through February 1994.

The Commissioner is also obliged to concur with the ALJ's conclusion that petitioner must be held accountable for tuition to the Board for her children's' attendance in the Ocean school district for the period at issue in this matter, i.e., October 1, 1994 through November 18, 1994. Such determination is compelled in that petitioner did not bring sufficient objective indicia to the record to establish domicile in the district pursuant to In the Matter of Unanue, 255 N.J. Super. 362, 376 (Law Div. 1991).

Finally, notwithstanding that the issue of half-days with respect to petitioner's son was not raised at the hearing, the Commissioner finds that such issue was included in this pro se petitioner's Petition of Appeal filed with the Commissioner. As such, the Commissioner directs the Board to review petitioner's claim with regard to the four half-day sessions in light of its policies and procedures for the collection of tuition from non-resident students and make any adjustments to the assessment recommended by the ALJ as may be required by such policies and procedures.

Accordingly, the initial decision of the OAL is affirmed and petitioner is hereby ordered to compensate the Board for tuition due and owing for her children's education in the Ocean school district for the period October 1, 1994 through November 18, 1994.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

AUGUST 16, 1995

DATE OF MAILING AUGUST 16, 1995

BOROUGH OF NORTH HALEDON,
PASSAIC COUNTY,

:

PETITIONER,

:

V.

:

COMMISSIONER OF EDUCATION

MANCHESTER REGIONAL HIGH SCHOOL :
DISTRICT, PASSAIC COUNTY,

DECISION

:

RESPONDENT.

:

BOROUGH OF NORTH HALEDON,
PASSAIC COUNTY,

PETITIONER,

V.

MANCHESTER REGIONAL HIGH SCHOOL :
DISTRICT, PASSAIC COUNTY,


RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

AUGUST 16, 1995

DATE OF MAILING AUGUST 16, 1995

314-95

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF ASBURY PARK, : DECISION
MONMOUTH COUNTY. :

OAL DKT. NO. EDU 4707-95

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF ASBURY PARK, : DECISION
MONMOUTH COUNTY. :
_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

AUGUST 16, 1995

DATE OF MAILING AUGUST 16, 1995

IN THE MATTER OF THE TENURE HEAR- :
 ING OF PHYLLIS STANLEY, SCHOOL :
 DISTRICT OF FREEHOLD REGIONAL : COMMISSIONER OF EDUCATION
 HIGH SCHOOL, MONMOUTH COUNTY. : DECISION
 _____ :

SYNOPSIS

Board certified charges of incapacity and abandonment of position against respondent "B" clerk.

ALJ found that Board complied with all procedural requirements prescribed by the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. ALJ found that the Board failed to sustain its tenure charge of abandonment against respondent as she maintained contact, informing the Board that she was unable medically to return to work. That charge was dismissed. ALJ, however, did find that the Board met its burden and established by a preponderance of credible evidence that respondent was incapacitated from performing her position as a "B" clerk. Thus, the charge of incapacity was sustained. ALJ found the appropriate penalty was dismissal of respondent from her position, and noted that the Board could have invoked N.J.S.A. 18A:16-2, 3 and 4, rather than file the instant tenure charges, inasmuch as these statutes provide a district with the opportunity to require a psychiatric examination and mandate dismissal for absence due to a "mental abnormality" that exceeds a "period of two years."

Commissioner concurred with the findings and determination in initial decision and ordered respondent dismissed from her tenured position as of the date of this decision. In affirming, however, the Commissioner issued no judgment as to the Board's motivation for bringing the tenure charges against respondent, nor did he find that the Board's actions were tainted by the ALJ's suggestion that an alternative course of action under N.J.S.A. 18A:16-2 et seq. was possible or preferable.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9904-94

AGENCY DKT. NO. 354-8/94

**IN THE MATTER OF THE TENURE
HEARING OF PHYLLIS STANLEY,
BOARD OF EDUCATION OF THE
FREEHOLD REGIONAL HIGH
SCHOOL DISTRICT, MONMOUTH
COUNTY**

Michael Gross, Esq., for petitioner (Kennedy, Gross & McDonough, attorneys)

Stephen B. Hunter, Esq., for respondent (Klausner, Hunter, Cige & Seid, attorneys)

Record Closed: May 25, 1995

Decided: July 7, 1995

BEFORE CAROL LASKIN, ALJ t/a:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This a tenure hearing proceeding pursuant to N.J.S.A. 18A:6-10, et seq. involving Phyllis Stanley (hereinafter Ms. Stanley or respondent) a tenured "B" clerk, employed, since January 1989, by the Freehold Regional High School District Board of Education (hereinafter Board or

petitioner). On August 22, 1994, the Board met, considered and determined to certify to the Commissioner of Education (hereinafter Commissioner) that sufficient evidence existed to support the charges of abandonment and inability to perform (incapacity). The tenure charges and supporting evidence were filed with the Commissioner on August 26, 1994. Ms. Stanley filed her answer on September 23, 1994. Subsequently, on October 12, 1994, the Commissioner transferred the matter to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The prehearing order was issued on January 31, 1995. Therein a motion schedule and dates for hearing on the merits of the tenure charges were delineated. On May 15, 1995, pursuant to schedule, a decision and order was issued denying Ms. Stanley's motion for resumption of salary payments pursuant to N.J.S.A. 18A:6-14. The hearing on the merits of the tenure charges scheduled for April 17, 1995 was canceled as the parties determined to present a stipulated record pursuant to N.J.A.C. 1:1-15.11. The stipulation of facts was submitted on April 27, 1995. Initial briefs and reply briefs of the parties were filed by May 25, 1995. Therein the record closed.

FINDINGS OF FACTS

The parties by stipulation, pursuant to N.J.A.C. 1:1-15.11, submitted as evidence facts (J-1) with attachments (exhibit 1 through 26) and acknowledged that they are hereinafter proscribed from challenging these facts agreed upon. Accordingly, J-1 and supporting exhibits are incorporated by reference and constitute this tribunal's findings of facts. The undisputed facts are as follows:

STIPULATION OF FACTS

1. Phyllis Stanley is a tenured "B" clerk employed by the Freehold Regional High School District Board of Education (hereinafter "Board"). Ms. Stanley's employment began with the district on January 12, 1987.

2. On May 14, 1993, Ms. Stanley filed an injury report, stating that on May 4, 1993, she suffered a job-related stress to such an extent that she could not function properly and describing the injury as “severe depression.” (Exhibit 1.)
3. On May 28, 1993, the New Jersey School Boards Association Insurance Group notified the Board that Ms. Stanley had filed a claim based on the alleged injury. (Exhibit 2.)
4. However, this claim was resolved on April 18, 1994, at which time Ms. Stanley was notified that her workers’ compensation claim had been denied due to insufficient evidence that her stress was a sole and direct cause of her employment duties. (Exhibit 3.)
5. An Employee’s Claim Petition on behalf of Phyllis Stanley was filed with the Division of Worker’s Compensation on June 2, 1994 and said Petition is still pending. (Exhibit 4.)
6. Between May 4, 1993, and June 2, 1993, Ms. Stanley exhausted her remaining sick time, vacation days and holiday time. (Exhibit 5.) Between June 3, 1993, and June 30, 1993, she was on an unpaid medical leave of absence under the provisions of the Family Leave Act. (Exhibit 6.)
7. On May 27, 1993, Ms. Stanley submitted a note from her psychiatrist, Moustafa H. Shafey, M.D., stating that “she can’t go back to work because it will aggravate her illness.” (Exhibit 7.)
8. Subsequently, Ms. Stanley requested an extended leave of absence without pay under the Family Leave Act. This request was authorized by the Board, effective July 1, 1993, through September 30, 1993. The Board also authorized a leave of absence without pay, in accordance with the Family Leave Act provisions, for Ms.

Stanley's husband Cornelius Stanley, July 1, 1993 through September 30, 1993. (Exhibit 8.)

9. On July 7, 1993, Dr. Shafey submitted two (2) notes to the Board; one on behalf of Phyllis Stanley, stating that she had been under his care since May 20, 1993 and that she could not "go back to the same work environment" (Exhibit 9) and one on behalf of Cornelius Stanley, stating that he (Stanley) had likewise been under his care since May 20, 1993 and that he could not "go back to the same work environment." (Exhibit 10.)
10. In a letter dated July 22, 1993, Dr. Shafey informed the New Jersey School Boards Association Insurance Group that Ms. Stanley had developed panic disorder with numerous phobic behaviors which were triggered "when she gets in contact with her work, i.e. either at the building or even phone calls from her work and that "she can't go back to her work environment due to the severe stress at work which will make her vulnerable for severe disabling depression disorder and Panic disorder." (Exhibit 11.) Similarly, on July 23, 1993, Dr. Shafey informed that Cornelius Stanley exhibited suicidal tendencies and that "I don't believe that he can go back to that work environment due to the severe stress which will always make him vulnerable for severe depression and suicide tendency." (Exhibit 12.)
11. In a letter dated August 26, 1993, from Michael J. Gross, Esq., attorney for the Board, to Dr. Shafey, information was requested regarding the prognosis for Ms. Stanley's return to work. No response was received. (Exhibit 13.)
12. By letter dated September 23, 1993, Dr. Joan Nesenkar-Saylor, Board Secretary/Assistant Superintendent for Business Administration, informed Ms. Stanley that her leave of absence would expire on September 30, 1993, and required her to notify the district if she intended to return to work as a full-time employee on October 1, 1993. (Exhibit 14.)

13. On September 28, 1993, Ms. Stanley requested an additional extension of leave from October 2, 1993, through December 31, 1993. (Exhibit 15.) This request was denied and Ms. Stanley was notified by Dr. Nesenkar-Saylor in a letter dated September 29, 1993, that a failure to return to work on October 1, 1993 would constitute an abandonment of her position and/or insubordination. (Exhibit 16.)
14. Ms. Stanley failed to return to work on October 1, 1993, stating, through a letter from Dr. Shafey, dated September 30, 1993, that she was unable to work due to a depressive illness and panic disorder. (Exhibit 17.)
15. On May 4, 1994, Ms. Stanley was informed that a meeting would be held to discuss her ability and desire to perform in her position. (Exhibit 18.) Ms. Stanley did not attend this meeting; however, she submitted a doctor's note attesting to her inability to work or to attend a meeting with her employers. (Exhibit 19.) Ms. Stanley provided the Board with no indication that she intended to return to her position during the remainder of the 1993-1994 school year.
16. Subsequently, on July 18, 1994, William J. Boehm, Director of Buildings and Grounds, forwarded a letter to Dr. Saylor, enclosing the Tenure Charges, along with a supporting Statement of Evidence, which he sought to bring against Ms. Stanley. (Exhibit 20.)
17. On July 19, 1994, Dr. Saylor forwarded a letter to Ms. Stanley, enclosing a copy of the Tenure Charges and the supporting Statement of Evidence filed by Mr. Boehm and advising Ms. Stanley of her statutory rights and obligations. (Exhibit 21.)
18. On August 4, 1994, the Board received Ms. Stanley's Affidavit in response to the Tenure Charges. (Exhibit 22.)

19. On August 22, 1994, the Board met to consider the Tenure Charges and Supporting Statement of Evidence involving Ms. Stanley's inability to perform in and abandonment of her position as a Tenured "B" Clerk. Pursuant to a majority vote of the Board members, the Board determined to certify the charges to the Commissioner of Education. (Exhibit 23.)
20. On August 23, 1994, Dr. Saylor forwarded to Dr. Leo Klagholz, Commissioner of Education, State of New Jersey, an original and two copies of Tenure Charges, written Statement of Evidence, Certificate of Determination and Proof of Service, in accordance with N.J.A.C. 6:24-5. (Exhibit 24.)
21. In accordance with N.J.S.A. 18A:6-11, on August 23, 1994, Dr. Saylor mailed, via certified mail, an envelope addressed to Ms. Stanley at her last known address, containing notification to the Commissioner of Education of the Tenure Charges, which included the Statement of Evidence, Certificate of Determination and Proof of Service. Dr. Saylor followed the same procedure with regard to Ms. Stanley's counsel, Stephen Hunter, Esq. (Exhibit 25).
22. On September 23, 1994, Ms. Stanley filed her Answer to Tenure Charges, stating two Affirmative Defenses. (Exhibit 26.)
23. To date, Ms. Stanley has not returned to work. Neither Ms. Stanley nor her doctor has indicated that the situation will improve or change at any time in the near future.
24. To date, Ms. Stanley is absent without Board approval; she is not being paid a salary and she is not receiving any benefits.

DISCUSSION AND DETERMINATION

A. Procedural Issue

Respondent, in her answer to the tenure charges, as an affirmative defense, alleged that the Board “failed to comply with procedural and substantive prescriptions of N.J.S.A. 18A:6-10 et seq.” (J-1, exhibit 26). Respondent, however, has not presented the undersigned with any facts or legal arguments to support her affirmative defense. The facts (J-1) reveal that the Board has indeed complied with the procedural requirements of N.J.S.A. 18A:6-11. Significantly, the Board provided Ms. Stanley with notice of the tenure charges, advised her of her statutory rights, provided her an opportunity to respond to the Board, and expeditiously notified her of its determination (J-1, pars. 14-21; exhibits 18, 21, 23, 25).

Based upon review of all the stipulated facts and supporting exhibits, I **FIND** that the Board complied with all the procedural requirements prescribed by the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. Accordingly, respondent has failed to prove her affirmative defense.

B. Tenure Charge No. 1 - Abandonment of Position

The Board asserts that Ms. Stanley “abandoned” her position when she failed to return to work as a “B” clerk on October 1, 1993, after the expiration of her approved leaves of absences (J-1, pars. 6, 8, 12-14; exhibits 6, 8, 14-17). Relying upon the Commissioner’s decisions In the Matter of the Tenure Hearing of Lucille Pedecine, School District of the Township of Millburn, Essex County, 1978 S.L.D. 551 and In the Matter of the Tenure Hearing of Virginia Caputo, School District of the City of Clifton, Passaic County, 1975 S.L.D. 616, the Board claims that Ms. Stanley’s “abandonment” is “voluntary and intentional” requiring her dismissal (petitioner’s initial brief at 18). The facts herein, however, are clearly distinguishable from those in the authority cited.

The school board in Clifton, unlike the instant Board, invoked the mandates of N.J.S.A. 18A:16-2, and 18A:16-3, requiring Virginia Caputo to submit to a medical examination as a prerequisite to a grant of a medical leave of absence. Ms. Caputo refused to do so. Moreover, Ms. Caputo also failed to respond to numerous communications of the Board. Ms. Pedecine, a secretarial employee, was found by her physician, unlike Ms. Stanley herein, to be medically able to work with minor accommodations to her “allergic sensitivities” (Pedecine, 1978 S.L.D. at 552). Ms. Pedecine refused reassignment and likewise failed to respond to numerous communications of the Board.

The instant record establishes that Ms. Stanley (herself or through her counsel or physician) responded to each and every communication from the Board (see J-1, pars. 7, 9-10, 13-15, 18; and exhibits cited therein). Thus, while she did not attend the May 14, 1994 meeting “to discuss her ability and desire to perform in her position,” Ms. Stanley clearly “submitted a doctor’s note attesting to her inability to work or to attend a meeting with her employers” (J-1, par. 15; exhibits 18-19). Consequently, unlike the staff members in the authority cited by petitioners, Ms. Stanley never refused any order from the Board. Rather, Ms. Stanley maintained contact informing the Board that she is unable, medically, to return to work. And, as stipulated, “neither Ms. Stanley nor her doctor has indicated the situation will improve or change at any time in the near future” (J-1, par. 23). Thus, while Ms. Stanley is indeed, “absent without Board approval” due to her asserted medical illness, I **FIND**, based on review of the record in its entirety, that Ms. Stanley never “abandoned” her position within the meaning of the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. Accordingly, I **FIND** that the Board has failed to sustain its tenure charge of abandonment against Ms. Stanley; said charge is hereby **DISMISSED**.

C. Tenure Charge No. 2, Inability to Perform (Incapacity)

The evidence reveals that Ms. Stanley, initially employed by the Board as a clerk in early 1987, has not performed in her position since May 4, 1993 (J-1, par. 2). Since that date, Ms. Stanley consistently has claimed that she is unable to work due to a psychiatric condition identified as “severe depression” and “panic disorder with numerous phobic behaviors” (see J-1,

pars. 2, 10; exhibits 1, 9, 11). This panic disorder, Ms. Stanley's physician informed, is triggered whenever she has any contact, even by telephone, with the Board (J-1, par. 10). Consistent with her position, Ms. Stanley has filed an Employees Claim Petition with the Department of Labor, Division of Worker's Compensation, describing her injury as "neuropsychiatric other depression; panic disorder; chest pains and heart palpitations; difficulty breathing; phobic behavior; suicidal tendencies" (J-1; exhibit 4). As the stipulated record discloses, "to date, Ms. Stanley has not returned to work. Neither Ms. Stanley nor her doctor has indicated that the situation will improve or change at any time in the near future" (J-1, par. 13). Thus, the Board opines, as Ms. Stanley is incapacitated from performing her job duties, the tenure charge must be sustained. In the Matter of the Tenure Hearing of Margaret McCoy, 93 N.J.A.R. 2d (EDU) 297.

Ms. Stanley does not dispute that she is "unable to work." Indeed, in her answer to tenure charge no. 2 she so admitted:

2. Respondent Phyllis Stanley admits that she has been unable to perform her job duties since April, 1993 but denies that this fact provides any basis for the certification of tenure charges against her.

(J-1; exhibit 26)

Moreover, other than pressing this tribunal to hold the matter in abeyance pending the outcome of the Worker's Compensation Petition, respondent has provided no evidence nor relevant authority for its claim that her inability to perform does not provide a basis for the tenure charge (J-1, par. 18; exhibit 22). Whether or not Ms. Stanley is ultimately determined to have sustained an injury arising out of her employment with the petitioner, as alleged on her Employee Claim Petition (J-4), is irrelevant to the determination of the certified tenure charge of incapacity. "Incapacity" as identified in N.J.S.A. 18A:6-10 relates to the inability to perform a position; irrespective of the cause of the inability to work. Accordingly, based upon a review of the record in its entirety, I **FIND** the Board has met its burden and has established by a preponderance of the credible evidence that Ms. Stanley is incapacitated from performing her position as a "B" clerk; Charge No. 2, Incapacity is hereby **SUSTAINED**. In re McCoy, supra.

In determining the proper penalty to impose, the undersigned is required to consider the nature and gravity of the offense, mitigating and extenuating circumstances, and any injurious effect the conduct may have on the maintenance of discipline and the proper administration of the school district. In re Fulcomer, 93 N.J. Super. 404, 422 (App. Div. 1967), (cited with approval In the Matter of the Tenure Hearing of Margaret McCoy, *supra*).

Imputing improper motives on both Mr. and Ms. Stanley for their claim of psychiatric illness, the Board argues that Ms. Stanley is responsible for her incapacity. Congratulating itself for its patience in not filing tenure charges until nine (9) months after petitioner's approved leave of absences expired, the Board insists that it was forced to file the instant charges. Anything less than dismissal, the Board expressed, would confer "lifetime employment of any cost" upon Ms. Stanley (petitioner's reply brief at 2).

Ms. Stanley insists that the most equitable solution would be to place this matter on an inactive status pending the outcome of her worker's compensation action; claiming that only if her petition is denied should the instant tenure matter proceed on its merits. Respondent claims that this position is inconsistent with the Commissioner's decision in The Matter of the Tenure Hearing of Mary Tonnarello, School District of the Town of West New York, Hudson County, 1985 S.L.D. __ (May 13, 1985). Finally, petitioner expresses (contrary to the Board) that a clerk's absence, unlike that of a teaching-staff member, has no negative effect on the administration of a school district.

This tribunal's view of the appropriate penalty in this matter differs from that of both the Board and Ms. Stanley. With regard to the petitioner's argument, In re Mary Tonnarello, *supra*, is inapposite to the instant matter. There, Ms. Tonnarello, a secretary, was reinstated and required to forfeit all back pay received because she, unlike Ms. Stanley, had recovered from her illness (cataract surgery) and was able to work. And, while I **FIND** that the Board's analysis that the petitioner is at fault for her illness and should be punished fails, so do I **FIND** that the cause of Ms. Stanley's illness and ultimate outcome of her Worker's Compensation Petition has no relevancy in determining the appropriate penalty due to a finding of incapacity pursuant to N.J.S.A. 18A:6-10 et seq. Nevertheless, the undersigned does concur with the Board's vision of

the importance of secretarial support staff to the effective operation of a school district and the significant negative effect of an absence of such a support staff member for a period exceeding two years.

In consideration of all the circumstances surrounding Ms. Stanley's incapacity, the undersigned reading the educational statutes, Title 18A, in para materia finds support for a determination to dismiss Ms. Stanley. N.J.S.A. 18A:16-2; 3 and 4 provides a school district with the opportunity to require a psychiatric examination and mandates dismissal of an employee if an absence, due to a "mental abnormality" exceeds "a period of two years." N.J.S.A. 18A:16-4. Arguably, if the Board had invoked these statutes, the instant charges need not have been filed. Imputing the intent of the Legislature in enacting these statutes, I **FIND** that dismissal of Ms. Stanley is the appropriate penalty herein.

ORDER

It is **ORDERED** that the tenure charge of abandonment is **DISMISSED**.

It is **ORDERED** that the tenure charge of incapacity is **SUSTAINED**. And, it is further **ORDERED** that Phyllis Stanley is **DISMISSED** from the position of clerk for the Freehold Regional High School Board of Education.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 7, 1995
DATE

Carol O Laskin
CAROL LASKIN, ALJ t/a

7/14/95
DATE

Receipt Acknowledged:
[Signature]
DEPARTMENT OF EDUCATION

JUL 13 1995
DATE

Mailed to Parties:
Jeff J. Moran
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jz

EXHIBITS

Joint Exhibits:

J-1 with exhibits 1-26 Stipulation of Facts with accompanying exhibits

IN THE MATTER OF THE TENURE HEAR- :
ING OF PHYLLIS STANLEY, SCHOOL :
DISTRICT OF FREEHOLD REGIONAL : COMMISSIONER OF EDUCATION
HIGH SCHOOL, MONMOUTH COUNTY. : DECISION
_____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Both respondent's and the Board's exceptions were timely filed in accordance with N.J.A.C. 1:1-18.4.

Respondent initially excepts to the Administrative Law Judge's (ALJ) interlocutory decision that the Board was not obligated to resume salary payments to respondent pursuant to N.J.S.A. 18A:6-14. In support of its position, respondent refers to her position papers as previously submitted to the ALJ.

Respondent further asserts that the ALJ's decision to dismiss her from her tenured position because of her present physical incapacity is both premature and unnecessarily punitive and, again, directs the Commissioner to her prior submissions to the ALJ in support of her position. Respondent maintains,

assuming arguendo that one could conclude that the Board of Education had sustained the physical incapacity charges at issue, the appropriate remedy would have been to continueinactive employment status during the pendency of the pending workers' compensation proceedings***. (Respondent's Exceptions at p. 4)

Respondent argues that maintaining such inactive status would not be to the detriment of the Board. Were she to prevail in her worker's compensation suit, respondent reasons, the instant charges would be rendered moot, or, in the alternative, respondent "****may be certified by her physicians as being capable of resuming her work as a clerk****." (Id.)

While the Board concurs with the ALJ's determination to sustain its charge of incapacity and to thereby dismiss respondent from her tenured position, it takes exception to the analysis employed by the ALJ in reaching her conclusion. Specifically, the Board contends that the ALJ's reference to N.J.S.A. 18A:16-2, 3 and 4 undermines the correctness of her overall decision, in that those statutes are clearly inapplicable to the instant matter. (Board's Exceptions at p. 2) The Board argues such statutory reference implies that a different mechanism could have been utilized to have respondent dismissed, but claims that, under the circumstances, another course of action would have been inappropriate. To advance its argument, the Board cites Kochman v. Keansburg Bd. of Education., 124 N.J. Super. 203, 212 (Ch. Div. 1973) and further avers:

****before a board of education proceeds with directing an employee to submit to a psychiatric evaluation, it must first ascertain whether that particular employee has shown evidence of harmful, significant deviation from normal mental health affecting the employee's ability to safely perform his or her duties, especially if those duties are performed in the presence of others.**** (Id. at p. 4)

The Board concludes that it never had the necessary evidence which would have permitted it to use its discretionary authority under N.J.S.A. 18A:16-2 et seq.

The Board next faults the ALJ's analysis insofar as it suggests that the district maintained that respondent should be "punished" for her actions and that she was responsible for

her mental illness. (*Id.* at p. 5) Rather, the Board asserts that its position all along was not whether respondent intentionally wronged, but whether she was able to perform her job, and it “had no choice” when respondent failed to return to work but to certify tenure charges against her. The Board maintains it holds “no opinion regarding Ms. Stanley’s mental state.” (*Id.* at pp. 5, 6)

Moreover, the Board takes exception to the ALJ’s implication that its filing of tenure charges was either unnecessary or premature. That the ALJ apparently rejects the Board’s contention that it was left with no alternative but to certify tenure charges against respondent is, the Board argues, contrary to her own findings. Here, the Board maintains that the ALJ’s factual findings demonstrate that “***the Board was indeed patient with the Respondent, and afforded her ample time to communicate to the Board whether she could or intended to return to work.***” (*Id.* at p. 8) Under the circumstances, the Board argues that to hold respondent’s position open indefinitely “***represents both unsound public policy and ill-conceived economic philosophy.***” (*Id.*)

Upon careful and independent review, the Commissioner initially finds no cause to disturb the ALJ’s interlocutory decision and order on respondent’s motion for resumption of salary payments pursuant to N.J.S.A. 18A:6-14. Further, the Commissioner concurs with the ALJ’s findings that the Board, while complying with all procedural requirements prescribed by the Tenure Employees Hearing Law, failed to sustain its tenure charge of abandonment against respondent. (Initial Decision at pp. 7, 8) In addition, the Commissioner agrees that the Board has shown by a preponderance of credible evidence that respondent is incapacitated from performing her job duties, and that dismissal is the proper course of action in this case. In so

affirming, the Commissioner issues no judgment as to the Board's motivation for bringing tenure charges against respondent. Neither does he find that the Board's actions are tainted by the ALJ's suggestion, to the extent that one may be intended, that an alternative course of action under N.J.S.A. 18A:16-2 et seq. was possible or preferable.

Accordingly, the findings and conclusions of the initial decision of the Office of Administrative Law are adopted as set forth above, and respondent is hereby dismissed from her tenured position as a "B" clerk with the Board as of the date of this decision.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

AUGUST 22, 1995
DATE OF MAILING AUGUST 23, 1995

WEST ORANGE SUPPLEMENTAL	:	
INSTRUCTORS ASSOCIATION ET AL.,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWN-	:	DECISION ON REMAND
SHIP OF WEST ORANGE, ESSEX	:	
COUNTY,	:	
	:	
RESPONDENTS.	:	
<hr/>		

SYNOPSIS

This matter was initiated in 1983 and remanded by the State Board in May 1994 to determine the amount of damages (back pay minus mitigation) due petitioners, reinstated supplemental instructors whose positions had been eliminated during reductions in force in 1983 and who had had greater seniority than teachers retained.

State Board determined that the Commissioner utilized the improper measure in reducing petitioners' damages, using salaries they would have earned based on their initial placement on the first step of the salary schedules in Newark and East Orange. State Board's decision directed that initial placement on a district salary guide is predicated upon the terms of the districts' collective negotiations agreements. Upon review of such documents by the State Board, it was determined that the petitioners would have been entitled to credit in both of those districts for their prior teaching experience. ALJ recalculated back salary awards taking into account all of petitioners' prior teaching experience.

Commissioner found that there was insufficient factual information in the file to allow him to make a determination with respect to the correctness of petitioners' contention, raised both on exception and before the ALJ, but not addressed in the initial decision, that the awards granted must not assume the existence of a valid contract at the time of their supplemental teaching experience in West Orange as, in fact, no such contract existed. Petitioners contend this error grossly understates the awards to which they were entitled as their service under the purportedly "void" contract would not have been credited by Newark or East Orange under the collective bargaining agreements in place in those districts during the time periods at issue. Commissioner remanded matter to OAL for fact finding and argument on this issue and recalculation of award figures as necessary.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7291-94
AGENCY DKT. NO. 4693 (State Board)
AGENCY DKT. NO. 357-11/89
(On Remand from OAL Dkt. No. 9597-89)

**WEST ORANGE SUPPLEMENTAL
INSTRUCTORS ASSOCIATION, et al.,**

Petitioners

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF WEST ORANGE,
ESSEX COUNTY,**

Respondent.

Bernard Star, Esq., appearing for petitioners

Stephen J. Christiano, Esq., appearing for respondent
(Christiano & Christiano, attorneys)

Record Closed: January 10, 1995¹

Decided: July 7, 1995

BEFORE MARYLOUISE LUCCHI-McCLOUD, ALJ:

This matter was brought as the result of a decision of the State Board of Education dated May 6, 1994. It was transmitted to the Office of Administrative Law

¹ An initial decision was to be filed by February 24, 1995 however an extension was granted for good cause. A second extension was granted at the request of the administrative law judge until May 25, 1995 to complete the initial decision in the instant matter as well as to the complexity of the case and her voluminous caseload. Unfortunately, a third extension of the time limit to complete the initial decision in the instant matter was requested and granted for good cause, due to the voluminous caseload as well as the complexity of the case and the double-booking schedule of the undersigned. This made the new time for the filing of the initial decision July 9, 1995.

(OAL) on July 28, 1994 for determination as a contested case pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

PROCEDURAL HISTORY

The State Board of Education decision begins its own procedural history by saying "Once again, we are confronted with a dispute in this case involving the amount of the damages to which the petitioning supplemental instructors are entitled." See *West Orange Supplemental Instructors et al. v. Board of Education of the Township of West Orange* decided by the Commissioner of Education, January 9, 1991, rev'd and remanded by the State Board of Education April 1, 1992, appeals dismissed, Dkt. No. A-4383-91T2 and No. A-4497-91T2 (App. Div. 1992).

Before getting into the detailed history of the case one must point out that the State Board's observation that we are once again confronted with this dispute is very much like an old song from the Beatles which had a most apropos line "The long and winding road which leads me back to you."

The matter was initiated in 1983 following the New Jersey Supreme Court's decision in *Spiewak v. Rutherford Bd. of Ed.*, 90 N.J. 62 (1982) that supplemental and remedial teachers were teaching staff members within the meaning of *N.J.S.A. 18A:1-1* and were, therefore, supplemental instructors whose positions had been eliminated by the Board of Education of the Township of West Orange (hereinafter "Board") during reductions in force ("RIF"). These individuals sought reinstatement along with all compensation and emoluments afforded other teaching staff members. The State Board subsequently directed the Board to reinstate the petitioners "with back pay minus mitigation" in the event that they had greater seniority than any of the staff members who had been retained by the Board. *West Orange Supplemental Instructors Association v. Board of Education of the Township of West Orange, Essex County*,

decided by the State Board, 1987 S.L.D. 2758, aff'd, Dkt. No. A-5792-86T8 (App. Div. 1988), cert. denied, 114 N.J. 487 (1989).

Thereafter, on December 14, 1989, thirteen of those supplemental teachers filed the instant petition, alleging that, while the Board had reinstated them for the 1989-90 school year as directed, it had not made any back salary payments since the parties had been unable to agree on the specific amounts by which their damages should have been reduced under mitigation principles.

On January 9, 1991, the Commissioner determined that five of the petitioners had fully mitigated their damages and were entitled to back pay minus mitigation from the date of the RIF's through 1989 when they were reinstated. He found that the remaining eight petitioners had made adequate efforts to secure other employment only during a limited period immediately following their RIF's. He awarded the latter group damages only for those periods of time in which he found that they had exercised proper diligence.

On April 1, 1992, the State Board affirmed in part and reversed in part the decision of the Commissioner. The State Board found that the Commissioner had misapplied the legal principle of mitigation in limiting the petitioners' damages only to those periods in which they had made reasonable efforts to mitigate. The State Board stressed that the failure of any of the petitioners to exercise reasonable diligence to mitigate their damages during a portion of the period following their RIF's did not vitiate their entitlement to be made whole during such periods for their wrongful discharge. Rather, the State Board explained, mitigation principles would apply to those period in which the petitioners had not exercised the required diligence so as to reduce, rather than eliminate, the back pay awards for such period by any amount which petitioners should have been earning in other employment had they made reasonable efforts to secure other employment.

The State Board also modified the Commissioner's determination as to the period of time following the RIF during which petitioner Shirley Blank had properly mitigated her damages. State Board concluded that, under the circumstances, Blank had reasonably lowered her sights in November 1985 when she accepted a part time position in Montclair. They therefore concluded that she had adequately mitigated her damages through June 1987 when such employment terminated rather than November 1985 as found by the Commissioner. The State Board further modified the Commissioner's decision so as to reduce the petitioner Constance Afromsky's damages for the period from August 1987 through September 1, 1989 by that amount which she would have earned had she not voluntarily accepted a reduction by leaving her teaching position in Newark and accepting a position in Florida, rather than by her actual lower earnings in Florida. In all other respects, the Board affirmed the Commissioner's determination of the award entitlements of the petitioners. In accordance with their decision the Board directed that the West Orange Board of Education pay petitioners their salaries which would have been earned in West Orange less the actual earnings during the specific periods following their RIF's in which they had found that the individuals had exercised reasonable diligence in seeking other suitable positions. In addition the State Board remanded to the Commissioner for (1), a determination of the salary petitioner Afromsky would have earned from August 1987 through September 1, 1989 had she not voluntarily accepted a reduction in salary by relocating to Florida, and (2) for a determination of the salaries petitioners Berk, Blank, Davis, Ratner, Passner, Peretz, Kolin and Shifman reasonably should have earned in other employment during those specific periods in which the Board had determined that they had not made reasonable efforts to mitigate, and for a resultant computation of their back pay awards for such periods. The Board's remand was thus strictly limited to the amount of the damage entitlements of nine of the petitioners during those specified periods in which they had found that those individuals had not taken reasonable steps to mitigate their damages. In essence, their awards were to be computed by deducting the amounts it was determined they should have been earning in other positions, had

they made reasonable efforts to secure such employment, from the salaries they would have earned in West Orange had they not been improperly dismissed.

On July 1, 1992, the State Board denied the West Orange Board of Education's motion for a stay of their decision of April 1, 1992 pending determination of the parties' motions for leave to appeal to the Appellate Division, finding that the board of education had failed to meet standards that would entitle it to relief under *Crowe v. Degioia*, 90 N.J. 126 (1982).

On August 13, 1992 the Appellate Division denied the Board's motion for a stay of the State Board's decision. The court also denied the parties' cross motions for leave to appeal.

On May 19, 1993 the undersigned computed petitioner Afromsky's damage entitlement for 1987-88 and 1988-89 by reducing her damages by the amount of her actual earnings in Florida. The undersigned computed the awards of the remaining eight petitioners for the periods affected by the remand by reducing their damages by \$13,000 per year. In doing so, the undersigned noted that the State Board "seems to have accepted \$13,000 as adequate to show due diligence in mitigating damages." Initial Decision on remand, slip op. at 26.

On July 21, 1993 the Commissioner rejected the ALJ's salary computation for all nine of the petitioners affected by the State Board's remand. Citing the express language of that remand, Commissioner found that the undersigned had "erred in applying petitioner Afromsky's Florida earnings as her measure of mitigation for 1987-88 and 1988-89 rather than utilizing the salary she would have earned in Newark had she continued to remain employed there during this period." Commissioner's decision on remand, slip op. at 35. Applying the salary she would have earned in Newark, the Commissioner determined that Afromsky was entitled to back pay in the amount of \$10,765 rather than \$22,421 determined by the undersigned.

The Commissioner also rejected the undersigned's across the board application of a \$13,000 mitigation figure for the remaining eight petitioners. The Commissioner thereupon determined that it was reasonable for one additional petitioner, Florence Berk, to have lowered her sights and had accepted less than comparable employment in March 1985 as a substitute teacher in West Orange. Consequently, the Commissioner determined that Berk had adequately mitigated her damages through September 1, 1989, rather than April 1, 1985 as previously determined by the State Board.

Acknowledging that there was "no 'single perfect' way, in retrospect to establish salaries that individuals should have been earning." *Id.* at 39, the Commissioner determined that the most equitable method of computing back salaries in this instance would be to utilize an average of the salaries of the petitioners which they would have earned in East Orange and Newark, which were large districts close to West Orange and which had a large number of available teaching positions during the relevant periods. The Commissioner also concluded that each of the petitioners would initially have place on the first step of those districts salary scales, reasoning that "it would be absurd to make the assumption that Newark and East Orange would have granted the petitioners' for prior service in establishing their salary levels." *Id.* at 41.

The Commissioner thereupon made the necessary computations and determined that the petitioners herein were entitled to back salary awards for the time periods at issue on remand in the amounts found on page eight of the State Board of Education decision.

On September 21, 1993, the Commissioner granted the Board's motion for a stay of the decision. The Commissioner found that she could not, in good conscience place the Board in jeopardy by ordering payment of back salaries at that time given that such payments would have reduced the district's surplus account to a precarious level.

She directed the Board to take immediate steps to assure that sufficient funds were available to pay any forthcoming judgment ordered by the State Board on appeal.

The State Board filed the instant appeal from the decision of the Commissioner. The Board argues that the Commissioner went beyond the scope of the remand in concluding that petitioner Berk had adequately mitigated her damages and that the Commissioner erred in computing damages based on the assumption that petitioners initially would have been placed on the applicable first step of the salary guides in Newark and East Orange, resulting in a lesser reduction from their damages. The West Orange Board further contends that, rather than averaging the salaries petitioners could have earned in Newark and East Orange, the petitioners' damage awards should have been reduced by the greater of the salary they would have earned in Newark or East Orange. The West Orange Board also maintained that errors were made by the Commissioner in specific computations of several of the petitioners, including placing petitioner Blank on the bachelors degree level of the Newark and East Orange salary guides when she actually held a bachelors degree plus 32 credits.

Petitioners filed a cross-appeal, arguing, *inter alia*, that the Commissioner erred in rejecting the undersigned's use of the \$13,000 as a yearly mitigation figure. In response to the Board's contention that the Commissioner incorrectly placed petitioner Blank on the bachelors degree of the Newark and East Orange salary guides, petitioners point out that the parties had also erroneously stipulated as to the specific salary Blank would have earned in West Orange. Petitioners have also filed a motion for leave to appeal from that portion of the Commissioner's decision of December 21, 1993 denying post judgment interest and a motion to dissolve the stay ordered by the Commissioner in that decision. In addition, they have moved to supplement their motion to dissolve this stay, and have also filed a motion for leave to supplement their appendix on appeal.

Petitioners specifically request supplementation in response to the Board's argument regarding petitioner Blank, contending that the proposed exhibits indicate the correct salary Blank would have earned in West Orange in 1987-88 and 1988-89, as well as the Board's acceptance of such figures. The Commissioner's decision noted that the petitioners improperly appended documents to their supporting brief which were not part of the record in this matter and subsequently requested supplementation. See page 10, State Board decision dated May 6, 1994. The petitioners also sought to supplement the record that the document they claim rebuts the Board's example that one of the petitioners was given credit for her prior teaching experience when she accepted a teaching position in Newark.

As in the State Board's prior decision of April 1, 1992 in this matter, the sole issue before them remained the amount of damages which the petitioners are entitled to receive. The State Board determined after a review of the record that the record was sufficient to permit resolution of the issues involved in this appeal on which petitioners seek supplementation. Therefore, the State Board denied the petitioners' motion to supplement the record on appeal.

Ultimately, the State Board affirmed in part and reversed in part the decision of the Commissioner.

The State Board affirmed the Commissioner's determination as to petitioner Afromsky's damage award. The State Board's remand specifically provided that her damages were to be reduced for the period from August 1987 through September 1, 1989 "by that amount which she would have earned had she not voluntarily accepted a reduction in salary [by leaving her teaching position in Newark and accepting a lower paying position in Florida], rather than by her actual lower earnings in Florida." State Board's decision, slip op. at 11. Thus, the Commissioner was correct in rejecting the undersigned's use of Afromsky's salary in Florida during that period and the State

Board also found the Commissioner's computation of Afromsky's damage entitlement in the amount of \$10,755 to be accurate.

The State Board's also concurred that the Commissioner's rejection of the undersigned's across the board application of a \$13,000 figure for the remaining petitioners in the case. Noting that the computation for petitioner Blank had properly taken into account her lowered sights by accepting a position that paid her approximately \$13,000 in 1986 and expressly predicated on the specific facts and circumstances in the record applicable to petitioner Blank only, and, consequently, cannot be used as a general representation of adequate mitigation. The applicability of the lowered sights principle is dependent upon "the circumstances peculiar to the individual involved." The State Board's determination regarding Blank was not intended in any way as a general endorsement of \$13,000 as adequate to show the other petitioners' due diligence in mitigating damages.

In that regard, however, the State Board rejected the Commissioner's belated analysis of the applicability of the lowered sights principle to the petitioners in the case and the Commissioner's resultant determination that petitioner Berk had properly mitigated her damages through September 1, 1989, rather than through April 1, 1985 as determined by the State Board's decision of April 1, 1992. The State Board's decision fully determined the periods following their RIF's during which each of the petitioners had made reasonable efforts to mitigate. According to the State Board what the Commissioner failed to recognize is that mitigation includes the lowered sights principle and that the State Board's final determination on mitigation necessarily included analysis of the lowered sights principle. The State Board found that only petitioner Blank had reasonably lowered her sights and that petitioner Berk had made reasonable efforts to mitigate her damages only for the period from her RIF through April 1, 1985. As a result the State Board directed her damages to be reduced for the period from her RIF through April 1, 1985 by her actual earnings and for the period from April 1, 1985 through September 1, 1989 by the amount she should have been

earning during that time had she made reasonable efforts to mitigate. The State Board's remand was expressly limited to a determination of the salary Berk should have earned during that period and for a resultant computation of her damage award. By addressing the applicability of the lowered sight doctrine to the petitioners herein, the Commissioner exceeded the scope of the State Board's remand and, in doing so, determined issues which were finally decided in the State Board's decision of April 1, 1992 and, in the case of petitioner Berk, reached a determination in direct contradiction to the State Board's decision.

As to the amounts that the individuals should have been earning elsewhere, petitioners challenge the Commissioner's utilization of the average of the salaries they would have earned in Newark and East Orange in transitory fashion only, captioning a point heading of their supporting brief: "Although the petitioners disagree with the Commissioner of Education in using the salary steps and guides in East Orange and Newark in determining the awards of the petitioners ..., the petitioners herein agree with the Commissioner's placement of the petitioners on the steps set forth by the petitioners in East Orange and Newark, if East Orange and Newark are to be used ...". Brief in support of cross-appeal, at 9. Thereunder, petitioners respond to the Board's argument that the Commissioner incorrectly placed them on the first step of the Newark and East Orange guidelines. Petitioners do not otherwise dispute the Commissioner's use of the average of the salaries they would have earned in Newark and East Orange, offer any justification or further explanation for their "disagreement" for such method, or propose a measure of their earnings that would be more appropriate.

The specific positions the petitioners would have obtained had they taken reasonable steps to secure comparable employment elsewhere cannot be determined with certainty. The Board has, however shown that ample employment opportunities for the petitioners had been available nearby in Newark and East Orange, and petitioners have neither indicated nor demonstrated how the method used by the Commissioner for determining their salaries, i.e., averaging the salaries they would

have earned in Newark and East Orange, was improper or inequitable. Consequently, under the circumstances, while the State Board recognized that the averaging methods employed by the Commissioner did not result in an existing salary figure, the State Board rejected the petitioners' cursory challenge to such a measure of their earnings.

The State Board also rejected the Board's proposal to reduce the petitioners' damages by the greater of the salaries each of the petitioners would have earned in Newark or East Orange. The Board has not demonstrated in which of these two districts the individual petitioners were more likely to obtain jobs had reasonable efforts been made to do so. Thus, perfunctory application of a higher salary would be unjustified based on the record.

The State Board did however agree with the Board that the Commissioner utilized the improper measure in reducing petitioners' damages using salaries they would have earned based on their initial placement on the first step of the salary schedules in Newark and East Orange. Initial placement on a district salary guide is, as pointed out by the State Board's decision, predicated upon the terms of the district's collective negotiations agreement. The Commissioner's reliance upon her conclusion that the West Orange Board did not credit petitioner Segler for prior teaching experience when it subsequently employed her as a resource room teacher is therefore, according to the State Board, misplaced. For purposes of determining salaries would have earned in Newark and East Orange, the express terms of the collective negotiations agreement in those districts are controlling. Upon review of such documents by the State Board they have determined that the petitioners would have been entitled to credit in both of those districts for their prior teaching experience. As a result, the State Board rejected the commissioner's conclusion that petitioners initially would have been placed step of the salary schedules in Newark and East Orange. The State Board therefore reversed her ultimate determination of their damages based upon such placement and the State Board remanded for determination of the steps on which they would have been placed in Newark and East Orange in light

of their prior teaching experience and for a resultant computation of their damages in accordance with the State Board decision.

The parties also have disagreed on the proper placement of petitioner Blank on the salary guides of West Orange, East Orange and Newark during the period at issue. The Board argues that, in light of the parties' stipulation on remand that Blank held a "bachelors degree plus 32 credits," see, stipulation of facts, at 2, the Commissioner incorrectly placed Blank on the bachelors degree level of the Newark and East Orange salary guides for the 1987-88 and 1988-89 school years rather than on the appropriate bachelors degree plus graduate 32 credits level. Petitioner Blank, in turn, asserts that if that particular modification is to be made then it must also be recognized that the stipulation of facts incorrectly established the salary she would have earned in West Orange during those years, basing her specific salary on the bachelors degree level of that district schedule rather than on the district's "B.A. +32" level. The Board does not dispute the existence of such an error in the stipulation but argues that petitioner should be bound by the figures agreed upon therein.

Upon the State Board's review of the record they have found that petitioner Blank is correct in her contention that the stipulation credits her with a bachelors degree plus 32 graduate credits but establishes the specific salary she would have earned in West Orange in 1987-88 and 1988-89 at the amount shown on the bachelors degree level of that district's guide rather than at the higher "B.A. +32" level. Under the circumstances and given such inconsistency in the stipulation of facts that the Board does not dispute that Blank holds a bachelors degree plus 32 credits the State Board has modified, in the interest of justice, the amount Blank would have earned in West Orange to reflect the correct figures; \$39,200 in 1987-88 and \$41,515 in 1988-89. Exhibit P-3 in evidence. Accordingly in computing petitioner Blank's damage entitlement for 1987-88 and 1988-89, and has directed the use of these figures, in addition to the appropriate salary figures on the Newark and East Orange guides which properly recognize that Blank held a bachelors degree plus 32 credits.

In light of the State Board's determination that the Commissioner incorrectly placed petitioners on the first step if the Newark and East Orange guides, it is unnecessary for the State Board to address the Board's remaining allegations regarding the Commissioner's computations of the specific salaries several other petitioner would have earned in those districts.

The State Board concludes, in summary, that they affirm the Commissioner's determination on the remand as to petitioner Afromsky only and direct payment to her in the amount of \$10,765. As to the remaining eight petitioners, the State Board reverses the Commissioner's determination of their damage entitlements and remands to the Commissioner for determination of their awards in accordance with the Board's decision of May 6, 1994.

Lastly the State Board has affirmed the Commissioner's determination to deny the petitioners' request for post-judgment interest for the reasons expressed therein. Beyond that, given the State Board's determination of this matter, they have denied as moot the petitioners' motion to dissolve the stay granted by the Commissioner pending a decision by the State Board.

Subsequently this case was remanded on July 28, 1994 to the OAL. It should be noted that in light of the State Board's decision and attempts to appeal by the parties' this matter was sent to the OAL prior to the July 28, 1994 date. That case was returned to the agency at the request of the Department of Education by way of computer-generated notice of July 11, 1994. The case was returned to the OAL on July 28, 1994 for disposition based upon the remand by the Department of Education and was therefore granted a new docket number and proceeded in the normal course.

After several conferences with the attorneys for both sides no solution was able to be reached as to the amount due each of the petitioners and the parties were

directed on November 14, 1994 to file simultaneous submissions of their calculations by January 10, 1995.

Additionally on December 29, 1994 a letter was received for counsel for one of the petitioners, Constance Afromsky, indicating that she had accepted the West Orange Board of Education's figure of \$9,148 and was no longer participating in the case. Accompanying that letter was a computation by counsel for the remaining petitioners.

LEGAL DISCUSSION

In the State Board decision it was necessary to look at the contract language (State Board decision pages 14 and 15) for both Newark and East Orange.

The 1983-85 Newark contract (Exhibit R-2) for teachers relating to credit for previous teaching experience read as follows:

"Credit on the salary schedule for prior service will be given to all teachers for years of accredited teaching, military, or accredited substitute experience in the Newark public schools according to the following formula:

1. For credit on a year for year basis for four years of prior service;
2. Five years credit for six years of prior service;
3. Six years credit for eight years or more of prior service

In crediting previous teaching experience for salary purposes, completion if the full academic year is required for recognition."

For the 1985-88 as well as the 1988-91 Newark contracts (Exhibit R-1), the language on credit for prior teaching experience was amended as follows:

1. For credit on a year for year basis for up to ten (10) years of prior service;

Credit pursuant to this agreement shall not be retroactive but rather entitle each teacher to the right to receive credit commencing with the effective date of this agreement.

In dealing with the East Orange teachers contract (Exhibit R-4), on credit for prior teaching, which remained unchanged from 1983 through and including 1989 it states as follows:

1. For credit on the current teachers salary guide it shall be given to all new teachers for all verified contracted previous satisfactory teaching experience in a duly accredit public and/or private elementary or secondary school.
2. Each teacher shall be placed on his proper step on the current teacher salary guides upon verification of all contracted previous satisfactory teaching experience in a duly accredited public and/or private elementary or secondary school by the chief school administrator, or his/her designated representative, of the school(s) or school district(s) in which he/she was previously employed.
3. To receive edit for one year of teaching experience, the teacher shall have been under contract for at least four months of the school year."

While the petitioners were employed as supplemental teachers by respondent, the petitioners worked under a contract. (See No. 37 of stipulation of facts) which stated that during their employment as supplemental teachers with respondent, petitioners worked under a group contract, not individually. This fact was stipulated to by both parties.

As for the individual supplemental instructors and based upon the remand decision I come to the following conclusions.

1. Teacher Constance Afromsky.

Both parties agree that Afromsky is due \$9,148 in back salary. The remaining estimated back salary awards are as follows:

ESTIMATED BACK SALARY AWARDS

Afromsky (B.A.)	87-88	88-89	Total
West Orange	\$34,650	\$36,660	\$71,310
Newark	<u>28,678</u>	<u>31,867</u>	<u>60,545</u>
			\$10,765
			1,616 (unemployment benefits-1983)

Blank (B.A. +32)			
West Orange	39,200	41,515	80,715
Newark (Step 11-10 yrs. experience)	31,115	34,983	66,098
East Orange (20 yrs exp.)	35,416	37,756	73,172
		Newark/EO avg.	69,635
		Balance due	11,080

Berk (B.A. +32)						
	<u>84-85</u>	<u>85-86</u>	<u>86-87</u>	<u>87-88</u>	<u>88-89</u>	<u>Total</u>
West Orange	9,613	34,555	37,320	39,200	41,515	162,203
Newark (Step 7- 6 yrs. credit)	6,567	26,925	30,825	38,132	40,832	143,281
	(21,890 div. by 10 x 3)	(convert to Step 11-10 yrs. exp. as per contract)				

East Orange (Step. 17- 18 yrs. exp.)	8,661	31,000	33,175	35,416	37,756	146,008
	(28,871 div. by 10 x 3)			Newark/EO avg. =		144,645
				Balance due		17,588

Davis (M.A.)

	83-84	84-85	85-86	86-87	87-88	88-89	Total
West Orange	18,195	32,395	34,930	37,725	39,600	41,915	204,760
Newark (Step 7-6 yrs. credit)	12,161	22,545	26,925	30,825	38,132	40,832	171,420
	(20,268 div. by 10 x 6)		(convert to Step 11-10 yrs. exp. as per Contract)				

East Orange (10 yrs. exp. - Step 11)	12,524	23,786	23,950	25,754	27,690	30,757	144,461
	(20,874 div. by 10 x 6)						
					Newark/EO avg. =		157,941
					Balance due		46,819

Peretz

West Orange	15,900	28,320	30,560	33,000	34,650	---	142,430
Newark (Step 7-6 yrs. credit)	11,608	21,594	25,845	29,658	36,820	---	125,525
	(19,346 div. by 10 x 6)		(convert to Step 11-10 yrs. exp.)				

East Orange (Step 18-18 yrs. exp.)	16,343	28,871	31,000	33,175	35,416	---	144,805
	(27,239 div. by 10 x 6)				Newark/EO avg. =		135,165
					Balance due		7,265

Kolin (M.A.)

West Orange		19,437	34,930	37,725	39,600	41,915	173,607
Newark (Step 7-6 yrs. credit)		13,133	26,925	30,825	38,132	40,832	149,847
		(21,889 div. by 10 x 6)	(convert to Step 11)				

East Orange (Step 18 - 19.5 yrs. exp.)		18,796	33,700	36,050	38,017	41,000	167,663
		(31,326 div. by 10 x 6)					
					Newark/EO avg. =		158,755
					Balance due		14,857

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Shifman (B.A.)

	84-85	85-86	86-87	87-88	88-89	Total
West Orange	16,992	30,560	33,000	34,650	36,660	151,862
Newark (Step 7-6 yrs. credit)	12,536	25,845	29,658	36,820	39,320	144,179
	(20,894 div. by 10 x 6)	(convert to Step 11)				

East Orange
(Step 15-14 yrs. exp.)

15,400	25,550	27,474	29,435	33,900	131,759
			Newark/EO avg.		137,893
			Balance due		13,893

Ratner (B.A.)

West Orange	19,824	30,560	33,000	34,650	36,660	154,694
Newark (Step 7-6 yrs.)	14,626	25,845	29,658	36,820	39,320	146,269
	(20,894 div. by 10 x 7)	(convert to Step 11)				

East Orange
(Step 16-15 yrs. exp.)

18,955	26,700	28,710	31,810	37,756	143,931
(27,078 div. by 10 x 7)					
			Newark/EO avg.		145,100
			Balance due		9,594

Passner (B.A.)

West Orange	11,328	30,560	33,000	34,650	36,660	146,198
Newark (Step 7-6 yrs.)	8,358	25,845	29,658	36,820	39,320	140,001
	(20,894 div. by 10 x 4)	(Step 11)				

East Orange
(Step 17-18 yrs. exp.)

11,548	31,000	33,175	35,416	37,756	148,895
(28,871 div. by 10 x 4)					
			Newark/EO avg.		144,448
			Balance due		1,750

Having concluded the following to be the total amount for each of the named petitioners in this case I hereby **ORDER** that the amounts listed above be paid to those teachers.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision on this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14b-10*.

Within thirteen (13) days from the date on which this recommended decision is mailed to the parties, any party may file exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, 8th Floor, CN 500, Trenton, NJ 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

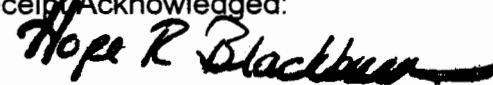
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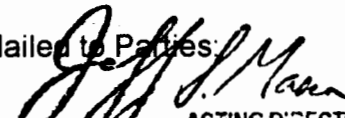
JUL 13 1995
DATE



MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:


DEPARTMENT OF EDUCATION

Mailed to Parties:


ACTING DIRECTOR AND
OFFICE OF ADMINISTRATIVE LAW JUDGE

am

APPENDIX

Witnesses

None

Evidence

None (with the exception of evidence in the case below)

WEST ORANGE SUPPLEMENTAL	:	
INSTRUCTORS ASSOCIATION <u>ET AL.</u> ,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWN-	:	DECISION ON REMAND
SHIP OF WEST ORANGE, ESSEX	:	
COUNTY,	:	
	:	
RESPONDENTS.	:	
_____	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of petitioners and those of the Board were timely filed pursuant to the provisions of N.J.A.C. 1:1-18.4. Such exceptions are presented, in relevant part below and are incorporated herein.

The Board's submission supports the determination of the Administrative Law Judge (ALJ) with two minor exceptions. It urges that the balance due Florence Berk, outlined on page 16 of the initial decision, should read \$17,558 rather than the \$17,588 noted therein. Likewise, the Board asserts that the Newark/East Orange average shown for Florence Shifman on page 18 should read \$137,969 rather than the \$137,893 indicated.

Petitioners' exceptions assert, inter alia, that the back salary awards made by the ALJ in her decision, and the basis on which these were developed, were fatally flawed and the decision must, therefore, be overturned. Petitioners urge that in reaching her conclusions with

respect to the credit they would have received for prior teaching service in either East Orange or Newark, the ALJ failed to take into consideration prior legal decisions of the Commissioner, State Board, and the Appellate Division, which declared the group contract, under which petitioners were employed while serving as supplementary teachers in West Orange, null and void. They urge that the awards granted by the ALJ were based on the existence of a valid contract when, in fact, no such contract existed and assert that this error grossly understated the awards to which they are entitled.

Petitioners observe that the bargaining contracts in place for teachers in both Newark and East Orange with respect to the granting of credit for previous teaching experience, awarded such credit only for prior “accredited” or “contracted” teaching experience. Petitioners argue that since the agreement under which they were working as supplemental teachers in West Orange was declared void, neither Newark nor East Orange would have given them any credit for teaching which was supplemental in nature. “***[A]ccredited teaching experience*** means contractual teaching experience being teaching experience which the bargaining unit would accept as accredited teaching experience.***” (Petitioners’ Exceptions at p. 7) Petitioners urge that the ALJ’s decision ignored this argument and the correct computations which they submitted taking this situation into consideration.

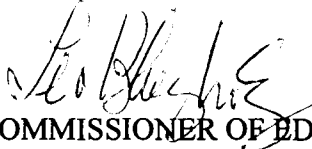
Petitioners state that this position is not inconsistent with the State Board’s decision on remand wherein it was determined that the within petitioners would have been entitled to credit for prior teaching experience in both of these districts. They point out “[t]he State Board did not say that the petitioners would have received any kind of credit whatsoever

for supplemental teaching, but***merely ruled they were entitled to 'credit.'" (Petitioner's Exceptions at p. 8)

Upon review of the record in this matter, the Commissioner determines that given the nature of the arguments advanced in petitioners' exceptions, which he finds were raised in materials previously submitted to the ALJ but left unaddressed in the initial decision, there is insufficient factual information in the file to allow him to make a determination with respect to the correctness of petitioners' contention that their service under the purportedly "void" contract would not have been credited by Newark or East Orange under the collective bargaining agreements in place in those districts during the time periods at issue herein. Therefore, this matter is being remanded for further fact finding and argument on this question and revision of the back pay calculations as appropriate.

Accordingly, this matter is hereby remanded to OAL for further proceedings in accordance with the above decision.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

August 22, 1995
Date of Mailing, August 23, 1995

T.J.F. AND J.W.F., on behalf of their minor children, J.F. and M.F., :
 :
 PETITIONERS, :
 : COMMISSIONER OF EDUCATION
 V. :
 : DECISION
 BOARD OF EDUCATION OF WILDWOOD CREST, CAPE MAY COUNTY, :
 :
 RESPONDENT. :

SYNOPSIS

Petitioning parents sought transportation for their daughters who attend nonpublic schools in the district as they reside outside the 2.5 mile distance requirement set forth in N.J.S.A. 18A:39-1. Board contended it provided transportation for its special needs students not for its public school students.

ALJ found that the plain language of N.J.S.A. 18A:39-1 does not require the Board to provide transportation for students attending a non-profit private school, where the only transportation presently provided is for students transported pursuant to Chapter 46 of Title 18A. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 5211-95

AGENCY DKT. NO. 432-11/94

**T.J.F. AND J.W.F., ON BEHALF
OF J.F. AND M.F.,**

Petitioner,

v.

**BOARD OF EDUCATION OF
WILDWOOD CREST, CAPE MAY COUNTY,**

Respondent.

T.J.F., petitioner, pro se

**Russell L. Lichtenstein, Esquire, for respondent (Cooper, Perskie, April, Niedelman,
Wagenheim & Levenson, attorneys)**

Record Closed: July 5, 1995

Decided: July 7, 1995

BEFORE JOSEPH E. KANE, ALJ.

STATEMENT OF THE CASE
AND PROCEDURAL HISTORY

The petitioners requested that the respondent, Wildwood Crest Board of Education, (the Board) provide transportation from home to a parochial school for the petitioners' two children. The Board denied this request and petitioners requested that the matter be transmitted to the Office of Administrative Law (OAL) to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A hearing was scheduled at the Atlantic City OAL, 1201 Bacharach Boulevard, Atlantic City, New Jersey on July 12, 1995. On June 20, 1995, the Board filed a motion for summary decision requesting that the within matter be dismissed. Briefs were received by both parties and a decision was rendered on July 7, 1995.

ISSUES

WHETHER THE BOARD IS OBLIGATED TO PROVIDE
TRANSPORTATION TO THE PETITIONERS PURSUANT TO
THE PROVISIONS OF N.J.S.A. 18A:39-1, WHEN THE BOARD
DOES NOT PROVIDE TRANSPORTATION TO ITS OWN
STUDENTS.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Complaint filed by the petitioners in sum allege two causes of action. The first is that pursuant to N.J.S.A. 18A:39-1, the Board is obligated to provided transportation to petitioners' two daughters. The second is whether the mileage requirement of 2.5 miles has been met as set forth in the above captioned statute. This initial decision addresses only the first issue.

For the purposes of the within motion, the **FACTS** of this matter are not in dispute. Both petitioners and respondent agree that the Board does not provide transportation for its students. Petitioners' two daughters attend a parochial school and reside within the school district of the Board.

The Board has filed a motion for summary decision requesting that the within matter be dismissed. The Board argues that pursuant to N.J.S.A. 18A:39-1, because it does not provide transportation to its own students, it is not under a legal obligation to provide transportation to petitioners. Petitioners disagree with the Board's interpretation of the aforementioned statute and also argues that because petitioners are outside the 2.5 mile distance requirement set forth in N.J.S.A. 18A:39-1, the Board's obligation to provide transportation is therein triggered.

I **FIND** that based upon the language of N.J.S.A. 18A:39-1, the within matter is herein **DISMISSED**. The operative portion of the cited statute is contained within the second paragraph and states:

When any school district provides any transportation for public school pupils to and from school pursuant to this section, transportation shall be supplied to pupils residing in the school district attending non-profit private schools.

Petitioners argue that this section should be construed as though it read: "when any school district is required to provide any transportation for public school pupils. . ." Petitioners' argument in this respect is one properly addressed to the New Jersey Legislature, and not to a Court.

Additionally, the interpretation of the statute proposed by the petitioners would also require that the Court rewrite the subsequent, exceedingly clear language of the statute which provides that:

This section shall not require school districts to provide any transportation for pupils attending a school other than a public school, where the only transportation presently provided by said district is for school children transported pursuant to Chapter 46 of Title 18A of the New Jersey statutes or for pupils transported to a vocational, technical or other public school offering a specialized program.

This section of the statute would have to be thoroughly reworked or more likely, eliminated entirely, in order to achieve the result which the petitioners seek in this case. Again, action by the Legislature could accomplish this; the principles of statutory construction utilized by the judiciary cannot.

Moreover, the fact that the last section of the statute quoted above uses the term "transportation presently provided" is of particular significance. This reference to "transportation presently provided" plainly refers to what transportation is actually and presently being provided in the school district, not what transportation may theoretically be available. The language actually employed by the Legislature expressly precludes the strained interpretation which is advocated by petitioners in the case at bar.

Accordingly, I **FIND** that under the plain meaning of the above cited statute, petitioners are not entitled to transportation services from the Board and accordingly, the within matter is herein **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 7, 1995
DATE

Joseph E. Kane, ALJ
JOSEPH E. KANE, ALJ

Receipt Acknowledged:

7/15/95
DATE

Helen R. Blackman
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 17 1995
DATE
psa

Jeff S. Marin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

T.J.F. AND J.W.F., on behalf of their minor :
children, J.F. and M.F., :
 :
PETITIONERS, :
 :
V. :
 :
BOARD OF EDUCATION OF WILDWOOD :
CREST, CAPE MAY COUNTY, :
 :
RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioners' exceptions and respondent's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4. A further submission by petitioners in response to the Board's filing is not considered herein, as regulation makes no provision for such submissions.


Petitioners' exceptions essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ), again contending, *inter alia*, that N.J.S.A. 18A:39-1 requires that the Wildwood Crest school district provide transportation to their children, who are attending a non-profit private school, since the district provides transportation to its special needs students, although it does not provide transportation to other students.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that the plain language of the statute does not require the

Board to provide transportation for students attending a non-profit private school, where the only transportation presently provided by said district is for school children transported pursuant to Chapter 46 of Title 18A of the New Jersey statutes. Therefore, petitioners are not entitled to receive transportation services from the Board.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision of the Office of Administrative Law and finds that the within Petition of Appeal must be dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

August 23, 1995
Date of Mailing, August 24, 1995

EDU # 5211-95
C # 317-95
SB # 98-95

T.J.F. AND J.W.F., on behalf of their minor :
children, J.F. AND M.F.,

PETITIONERS-APPELLANTS,

V.

STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF WILDWOOD
CREST, CAPE MAY COUNTY,

DECISION ON MOTION

RESPONDENT-RESPONDENT.

Decided by the Commissioner of Education, August 23, 1995

For the Petitioners-Appellants, T.J.F. and J.W.F., pro se

For the Respondent-Respondent, Cooper, Perskie, April, Niedelman,
Wagenheim & Levenson (Russell L. Lichtenstein, Esq., of Counsel)

Petitioners, who reside in Wildwood Crest, filed a petition with the Commissioner
of Education alleging that the district Board was required by N.J.S.A. 18A:39-1¹ to

¹ N.J.S.A. 18A:39-1 provides, in pertinent part:

Whenever in any district there are elementary school pupils who live more than two miles from their public school of attendance or secondary school pupils who live more than 2 1/2 miles from their public school of attendance, the district shall provide transportation to and from school for these pupils.

When any school district provides any transportation for public school pupils to and from school pursuant to this section, transportation shall be supplied to school pupils residing in such school district in going to and from any remote school other than a public school, not operated for profit in whole or in part, located within the State not more than 20 miles from the residence of the pupil...

This section shall not require school districts to provide any transportation for pupils attending a school other than a public school, where the only transportation presently provided by said district is for school children transported pursuant to chapter 46 of Title 18A

Nov. 1, 1995

provide transportation for their children attending a not-for-profit private school. The Board countered that since it did not provide transportation for any public school students in the district, other than as required by Chapter 46 of Title 18A, it was not obligated to provide transportation for nonpublic students. Petitioners, however, maintained that the Board had failed to fulfill its obligation under the statute to provide transportation for B.M., a public school student in the district attending Wildwood High School, who allegedly lived more than 2.5 miles from that school. Petitioners argued that the existence of a public school student who qualified for transportation pursuant to N.J.S.A. 18A:39-1 obligated the Board to provide transportation for their children to a not-for-profit private school.

The Commissioner rejected petitioners' interpretation of the statute and dismissed the petition, concurring with the Administrative Law Judge that "the plain language of the statute does not require the Board to provide transportation for students attending a non-profit private school, where the only transportation presently provided by said district is for school children transported pursuant to Chapter 46 of Title 18A of the New Jersey statutes." Commissioner's Decision, slip op. at 6-7.

Petitioners, acting pro se, filed an appeal to the State Board of Education. They also filed a motion for an order directing the Board to produce a written report prepared by a licensed surveyor indicating the route and measurement between B.M.'s home

of the New Jersey Statutes or for pupils transported to a vocational, technical or other public school offering a specialized program.

and Wildwood High School. In addition, they subsequently filed a motion to supplement the record on appeal with a copy of that report.

While New Jersey has a broad and liberal discovery process, materials sought to be discovered must be relevant. See Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 216 (App. Div. 1987). In this particular case, the relevancy of the surveyor's report requested by petitioners is contingent upon our ultimate rejection of the Commissioner's interpretation of N.J.S.A. 18A:39-1 as requiring a district board to provide transportation for nonpublic students only if it actually provided transportation for public school students, other than as required by Chapter 46 of Title 18A. In that the merits of this matter are not yet before us, we find that it would be premature to compel the Board to produce the requested document at this time. Consequently, we deny without prejudice petitioners' motion to compel production of that report. Similarly, we also deny without prejudice petitioners' motion to supplement the record with a copy of such document. N.J.A.C. 6:2-1.9.

We stress in so doing that in the event we subsequently find the surveyor's report sought by petitioners to be relevant to a determination of the issues on appeal, we reserve the right to direct the Board to produce that document and also to direct supplementation of the record therewith.

November 1, 1995

Date of mailing NOV 03 1995

EDU # 5211-95
C # 317-95
SB # 98-95

T.J.F. AND J.W.F., on behalf of their minor :
children, J.F. AND M.F.,

PETITIONERS-APPELLANTS,

V.

STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF WILDWOOD
CREST, CAPE MAY COUNTY,

DECISION

RESPONDENT-RESPONDENT.

Decided by the Commissioner of Education, August 23, 1995

Decision on motions by the State Board of Education, November 1, 1995

For the Petitioners-Appellants, T.J.F. and J.W.F., pro se

For the Respondent-Respondent, Cooper, Perskie, April, Niedelman,
Wagenheim & Levenson (Russell L. Lichtenstein, Esq., of Counsel)

T.J.F. and J.W.F. (hereinafter "petitioners"), residents of Wildwood Crest, filed a petition with the Commissioner of Education alleging that the Board of Education of Wildwood Crest (hereinafter "Board") was required by N.J.S.A. 18A:39-1 to provide transportation for their children, J.F. and M.F., who were attending a non-profit private school.¹ The Board responded that since it did not transport any of its public school

¹ N.J.S.A. 18A:39-1 provides, in pertinent part:

Whenever in any district there are elementary school pupils who live more than two miles from their public school of attendance or secondary school pupils who live more than 2½ miles from their public school of attendance, the district shall provide transportation to and from school for these pupils.

When any school district provides any transportation for public school pupils to and from school pursuant to this section, transportation shall be supplied to school pupils residing in such school district in going to and from any remote school other than a public

8/7/96

students, it had no obligation to students residing in the District who attended nonpublic schools.

Petitioners countered that at least one public school student attending Wildwood High School, B.M., lived more than 2½ miles from school, and that the Board was therefore under a legal obligation pursuant to N.J.S.A. 18A:39-1 to provide transportation to that student. As a result, petitioners argued, the Board was also obligated under the statute to provide transportation for their children regardless of the fact that it was not fulfilling its obligation to B.M.

On July 7, 1995, an Administrative Law Judge ("ALJ") recommended dismissing the petition. The ALJ rejected petitioners' interpretation of N.J.S.A. 18A:39-1, finding that the plain language of that statute required a district board to transport nonpublic school students only if it was actually transporting any public school students. The ALJ observed that petitioners' contention was more properly directed at the Legislature.

On August 23, 1995, the Commissioner dismissed the petition, concurring with the ALJ that "the plain language of the statute does not require the Board to provide transportation for students attending a non-profit private school, where the only transportation presently provided by said district is for school children transported

school, not operated for profit in whole or in part, located within the State not more than 20 miles from the residence of the pupil....This section shall not require school districts to provide any transportation for pupils attending a school other than a public school, where the only transportation presently provided by said district is for school children transported pursuant to chapter 46 of Title 18A of the New Jersey Statutes or for pupils transported to a vocational, technical or other public school offering a specialized program.

N.J.S.A. 18A:39-1 further provides that a district board may make payment in an amount determined by statute in lieu of transportation to nonpublic school students who qualify for transportation.

pursuant to Chapter 46 of Title 18A of the New Jersey statutes.” Commissioner’s Decision, slip op. at 6-7.

Petitioners, acting pro se, filed an appeal to the State Board of Education. Petitioners also filed a motion for an order compelling the Board to produce a written report that had been prepared for it by a licensed surveyor showing the route and measurement between B.M.’s home and Wildwood High School. In addition, petitioners moved to supplement the record on appeal with a copy of that report, contending that the report was material because it established the fact that B.M. lived beyond the statutory distance from school.

On November 1, 1995, the State Board denied petitioners’ motions without prejudice, finding that the surveyor’s report was relevant only if we ultimately rejected the Commissioner’s interpretation of N.J.S.A. 18A:39-1 and, as a result, reached the issue of whether B.M. lived beyond the statutory distance from Wildwood High School. In so doing, however, we reserved the right to direct production of that document and supplementation of the record therewith in the event we subsequently found that the surveyor’s report was relevant to a determination of this matter.

Thereafter, our Legal Committee found that it was necessary for the Board to clarify its position as to whether it had any legal obligation to B.M. in order for the State Board to properly resolve this appeal. By letter dated January 3, 1996, the Board was directed to submit such a clarification.

The Board thereupon filed a letter brief in which it reiterated its previously stated position that B.M. did not live more than 2½ miles from school. More significantly, the Board contended that the precise measurement between B.M.’s home and Wildwood

High School was irrelevant because of the fact that it was not transporting B.M. or any other public school students to school.

In their response to the Board's submission, petitioners argued that the Board had provided no evidence to refute their contention that B.M. lived "remote" from school and was therefore entitled to the benefit of N.J.S.A. 18A:39-1.

Our Legal Committee then issued a written report, recommending that this matter be remanded to the Commissioner. Along with its exceptions to that report, the Board filed a certification executed by B.M.'s parents, in which they averred that:

Regardless of whether our home is within or without a 2.5 mile radius from the Wildwood High School, we do not wish to participate in this matter and are not interested in having B.M. participate in any district provided transportation.

Certification of Carolyn and William Morey, dated April 23, 1996.

Petitioners represented in their exceptions in response thereto that B.M.'s mother is a member of the Wildwood Crest Board of Education and represents that Board on the Board of Education of the City of Wildwood, in which Wildwood High School is located.

Under these circumstances, our Legal Committee found it necessary to issue a revised report in this matter.

After a thorough review of the record, including the supplemental briefs filed by the parties and their exceptions to the Legal Committee's reports, we reverse the Commissioner's determination and remand for further proceedings in accordance with our decision herein.

Initially, we disagree with the Commissioner's view that N.J.S.A. 18A:39-1 requires a district board to provide transportation for nonpublic students only if it actually transports its public school students to school. Given the statutory framework, it is evident that a district's obligation to its public school students arises by virtue of the fact that such students reside "remote" from school and is not dependent on whether the district decides to transport them. In this regard, we stress that a district board cannot insulate itself from its statutory obligations by refusing to acknowledge its responsibilities or by simply denying that any of its public school students live "remote" from school. Hence, a district board cannot avoid its obligation to nonpublic students simply by failing to fulfill its statutory obligation to its public school students.

We therefore conclude that whenever a district board is under an obligation to provide transportation or payment in lieu of transportation to any public school students in the district pursuant to N.J.S.A. 18A:39-1,² that board is also required to provide transportation or payment in lieu thereof to students meeting the statute's distance criteria who attend non-profit private schools. Our conclusion in this regard is based upon our consideration of the terms of the statute. In 1990, the Legislature amended the first paragraph of N.J.S.A. 18A:39-1 to expressly mandate that district boards "shall provide transportation" for elementary school students who live more than two miles from their public school of attendance and secondary students who live more than 2½ miles from their public school.³ Such action codified the obligation of district boards to

² We note that a district may discharge its statutory obligation to public school students by reimbursing them for their transportation costs. Cf. Everson v. Bd. of Ed. of Ewing Twp., 133 N.J.L. 350 (E & A 1945), aff'd, 330 U.S. 1.

³ Prior to amendment in 1990, the first paragraph of N.J.S.A. 18A:39-1 had provided that district boards "may make rules and contracts" for the transportation of public students "residing remote" from school.

provide “remote” transportation under the New Jersey Supreme Court’s decision in West Morris Reg. Bd. of Ed., et al. v. Sills, et al., 58 N.J. 464 (1971), cert. denied, 404 U.S. 986 (1971) (school districts have a duty under N.J.S.A. 18A:33-1 to provide “convenience of access” to public schools). See also Board of Education of West Amwell, etc. v. State Board of Education, 5 N.J. Misc. 152 (Sup. Ct. 1927).

In so acting, the Legislature did not alter in pertinent part the second paragraph of N.J.S.A. 18A:39-1. This paragraph requires a district board to provide transportation to students attending non-profit private schools who meet the statute’s distance criteria “when [the] school district provides any transportation for public school pupils to and from school pursuant to this section.” As previously stated, the obligation on district boards to provide transportation to any public school pupils who meet the distance criteria is now embodied in the express language of the first paragraph of the statute. In this context, the second paragraph must be read to require a district board to provide either transportation or payment in lieu of transportation to nonpublic school students who meet the statute’s distance requirements whenever the district is obligated by the statute to provide transportation to its public school students.

In this case, petitioners allege that B.M., a secondary school student in the district, lives more than 2½ miles from his public school of attendance. If petitioners’ contention is correct, the Board would have a legal obligation to provide transportation or payment in lieu of transportation to B.M. pursuant to the terms of N.J.S.A. 18A:39-1.⁴ However, since the ALJ and Commissioner never reached the issue of B.M.’s distance

⁴ We note that the record does not reflect the circumstances surrounding the Board’s failure to provide transportation for B.M., except for the Board’s contention that B.M. does not live more than 2½ miles from school.

from school, the record before us is not sufficiently developed to determine petitioners' claim that B.M. lives more than 2½ miles from Wildwood High School.

Moreover, as set forth above, the Board submitted a certification executed by B.M.'s parents when it filed its exceptions to the Legal Committee's initial report in this matter. Although the Board continues to maintain that it has no obligation to B.M., it appears that the Board would like us to accept this certification as a waiver of such obligation in the event we determine that B.M. lives more than 2½ miles from school. Quite simply, it would be impossible for us to do so on the basis of the record as it has been developed thus far. As previously indicated herein, the Board would have an obligation to B.M. if he resides more than 2½ miles from school. Although the Board has continued to deny that it has any obligation under the statute to B.M. or to any other public school student residing in the District, there is nothing in the record to demonstrate that the Board has notified the District's residents of their rights under N.J.S.A. 18A:39-1. Thus, even if we were to assume that the entitlements conferred by N.J.S.A. 18A:39-1 could properly be waived, we could not on the basis of the record before us consider the certification submitted to us by the Board to constitute such a waiver. Nor could we properly determine the effect, if any, of such a waiver on petitioners' claim.

Given these circumstances, we remand this matter to the Commissioner for further proceedings consistent with our decision herein to determine petitioners' claim for transportation. Such proceedings should settle the issue of whether B.M. or any other public school students in the District satisfy the distance requirements of N.J.S.A. 18A:39-1 and the implementing regulations. See N.J.A.C. 6:21-1.3(b). If so, the

proceedings should also resolve whether the Board has fulfilled its obligation to those students, including whether such students were adequately notified of their rights under the statute and the validity and effect of any voluntary waiver of those rights relevant to this case.

We stress in arriving at this decision that we have neither considered nor determined whether or under what circumstances public school students who live "remote" from school may validly waive their rights under N.J.S.A. 18A:39-1 to transportation or payment in lieu of transportation. Nor, consequently, do we express any opinion regarding the effect of such a waiver by all of a district's public school students residing remote from school on the district's nonpublic students.

Given our determination herein, we also now grant petitioners' motion to compel the Board to produce the surveyor's report indicating the route and measurement between B.M.'s home and Wildwood High School. We find such report to be material to a determination of whether B.M. lives the required distance from his public school of attendance within the meaning of the regulatory structure. We therefore direct the Board to produce such report immediately in accordance with petitioners' request.

We do not retain jurisdiction.

Attorney exceptions are noted.

August 7, 1996

Date of mailing **AUG 09 1996**

T.J.F. AND J.W.F., on behalf of their minor children, J.F. AND M.F.,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE BOROUGH OF WILDWOOD CREST, CAPE MAY COUNTY,	:	DECISION
	:	
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning parents sought transportation for their daughters who attend nonpublic schools in the District, alleging they reside outside the 2.5 mile distance requirement set forth in *N.J.S.A. 18A:39-1*. Board contended it provided transportation for its special needs students not for its public school students. Commissioner adopted the initial decision of the ALJ finding that the plain language of *N.J.S.A. 18A:39-1* does not require the Board to provide transportation for students attending a non-profit private school, where the only transportation presently provided is for students transported pursuant to Chapter 46 of Title 18A. Petition was dismissed.

On appeal, State Board reversed the Commissioner's decision and remanded the matter for development of a record to determine petitioners' claim that another pupil, B.M., lives more than 2.5 miles from the public high school he is required to attend. State Board ordered the Board to produce the surveyor's report indicating the route and measurement between B.M.'s home and the high school he attends.

On remand, ALJ concluded that petitioners failed to carry their burden of proof by a preponderance of credible evidence that the residence of B.M. is beyond 2.5 miles for high school pupils. ALJ noted that the electronic device measurement (EDM) used by the Board was an appropriate measurement method. Matter was dismissed.

Commissioner adopted findings and determination in initial decision as his own with modification. Commissioner concurred that petitioners failed to establish that the residence of B.M. was beyond 2.5 miles, so as to require the Board to provide transportation to him and to petitioners' minor children, in accordance with applicable statutes. Commissioner agreed that EDM is an appropriate method for measuring distances over 400 feet and found that the Board's EDM is the appropriate measurement under these circumstances. Commissioner found it was not necessary to reach a final measure by subtracting the "discrepancies" between the Board's EDM and petitioners' EDM. Petition was dismissed.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6880-96

ON REMAND EDU 5211-95

AGENCY REF. NO. 432-11/94

**T.J.F. AND J.W.F. ON BEHALF OF THEIR
MINOR CHILDREN, J.F AND M.F.,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE BOROUGH
OF WILDWOOD CREST, CAPE MAY COUNTY,**

Respondent.

T.J.F., petitioner, *pro se*

Russell L. Lichtenstein, Esquire, for respondent, (Cooper, Perskie, April, Niedelman
Wagenheim & Levenson, attorneys)

Record Closed: April 23, 1997

Decided: May 6, 1997

BEFORE LILLARD E. LAW, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Commissioner of Education (Commissioner) adopted the findings and determination by the Honorable Joseph Kane, Administrative Law Judge (ALJ), on a Motion for Summary Decision in the above captioned matter where petitioners sought transportation for their minor children who attend nonpublic schools. In his Initial Decision, Judge Kane found that the plain language of *N.J.S.A.* 18A:39-1 does not require the Wildwood Crest Board of Education (Board) to provide transportation for pupils attending a non-profit private school, where the only transportation presently provided is for pupils pursuant to Chapter 46 of Title 18A. The Commissioner dismissed the Petition of Appeal.

On appeal before the State Board of Education (State Board), petitioners contended, among other things, that another pupil within the Board's jurisdiction lived "remote" from the schoolhouse and, therefore, the Board is required to provide pupil transportation to that pupil and, thus, to petitioners. The State Board reversed the Commissioner's determination and remanded the matter for further proceedings. It held, among other things, that:

... whenever a district board is under an obligation to provide transportation or payment in lieu of transportation to any public school students in the district pursuant to *N.J.S.A.* 18A:39-1, that the board is also required to provide transportation or payment in lieu thereof to students meeting the statute's distance criteria who attend non-profit private schools.

(State Board slip opinion at 5.)

The State Board remanded the matter for the development of a record to determine petitioners' claim that the other pupil, B.M., lives more than 2½ miles from the public high school he is required to attend. It also ordered the Board to produce the surveyor's report indicating the route and measurement between B. M.'s home and the high school he attends.

The Commissioner, therefore, remanded the matter to the Office of Administrative Law (OAL) and it was assigned to the undersigned. Subsequent to the remand to the OAL, petitioner

requested to amend his pleadings to include matters in issue which were not before the State Board or included in its Order of Remand. This tribunal, therefore, denied petitioner's application to amend. Thereafter, petitioner brought an interlocutory appeal before the Commissioner. The Deputy Commissioner granted petitioner's request to amend his petition :

Specifically, the issue of whether the sidewalk constructed subsequent to petitioner's appeal should be included in the distance measurements to be made a threshold determination in this matter will be material to the conclusion finally reached as to petitioner's entitlement to transportation.

(Letter, November 18, 1996)

This issue was added to those two issues agreed upon at the telephone Prehearing Conference held on October 24, 1996, which are: (1) Whether there are any pupils within the Board's school district who are eligible for pupil transportation pursuant to Statute and Administrative Code?, and, (2) If so, whether the Board has adequately notified such pupils of their rights to pupil transportation under the Statute and Administrative Code?

The hearing was held on April 21, 22 and 23, 1997, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey. The hearing record closed on April 23, 1997.

UNDISPUTED FACTS

The parties agree and do not dispute the fact that the Wildwood Crest Board operates and maintains an elementary school district. It is in a sending-receiving relationship with the Board of Education of the City of Wildwood, which operates and maintains a high school. The Board's pupils attend the Wildwood City High School in the sending-receiving relationship.

It is further undisputed that 13,200 feet equals 2½ miles.

BURDEN OF PROOF

Petitioner carries the burden of proof by the preponderance of the credible and reliable evidence standard.

SUMMARY OF THE EVIDENCE

A measurement taken on behalf of the Board on January 12, 1996, by William M. Kemp, professional land surveyor and professional planner, demonstrates that the distance from a Wildwood High School door to B.M.'s residence is 13,194.47 feet or 2.49895 miles. This will be dealt with in more detail *post*.

Petitioners contests the Board's measurement and alleges that the distance between the two points, pursuant to *N.J.A.C.* 6:21-1.3 and certain Motor Vehicle statutes, to be greater than 2½ miles.

Petitioner offered William Bertino, a licensed professional engineer, who was qualified as such and testified that he conducted the measurements between the Wildwood High School and B.M.'s place of residence, which is located on the southeast corner of Jefferson Avenue and Bayview Drive. He asserted that the distance between the two points totaled more than 2½ miles. He asserted he used two methods of measurement; *i.e.*, a steel tape and an electronic devise measurement (EDM).

Mr. Bertino explained that the EDM measurement is achieved by an electronic beam of light which shoots a straight line-of-site. He asserted that the EDM is inappropriate for use in the measurement of curves in the path to be measured. It was his opinion that the use of the steel tape was the more accurate method of measurement.

Mr. Kemp, who has qualified as an expert in the areas of land surveyor and planner by the New Jersey Superior Court in Atlantic and Cape May counties and was appointed by a Superior Court Judge to settle land disputes, testified that measurements under 400 feet are usually taken

by steel tape (the tape measure is 200 feet in length) and that measurements exceeding 400 feet are done with the EDM. The EDM decreases the incident of error where the use of the steel tape increases the incident of error every 200 feet. The laying down and picking up the tape multiplies the error.

Mr. Bertino testified that he used two different routes from the High School to B.M.'s residence. These are indicated by red and blue lines drawn on the map by petitioner and identified as Exhibit P-1. The Board's measurement is identified as the "red route" and petitioners' as the "blue route."

The Board commenced its measurement at the High School gymnasium (gym) door while petitioner began at the "Boy's" door of the facility. Mr. Bertino's measurements along the Board's route shows two different measurements (P-4, P-5). Using the steel tape method, he shows a total distance of 13,410 feet from the High School "Boy's" door to the B.M. residence and 13,267.70 feet from the gym door to the B.M. residence, a difference of 142.3 feet. He testified that the distance between the "Boy's" door and the gym entrance was six (6) feet shorter in total when measured by the EDM method as compared with the steel tape method.

Following the route suggested by petitioner (Blue), Mr. Bertino measured the distance from the "Boy's" door to the B.M. residence as 13,714.53 feet, while he measured the distance from the gym door to the residence as 13,572.23 feet, a difference of 142.3 feet (P-7).

Mr. Bertino testified that petitioner drew the red line as it appears on Exhibit P-8 which shows, among other things, the intersection of Bayview Drive and Monterey Avenue. He testified further, that petitioner placed the circled letters "A," "B" and "C" on P-8, and instructed Bertino how the intersection was to be measured. Bertino asserted that he measured along the north-west side of Bayview Drive to the end of the sidewalk or, point "A." From there, he measured across Bayview Drive to the north-east corner of Monterey Avenue to point "B," then across Monterey Avenue to point "C." Mr. Bertino did not measure diagonally from point "A" to point "C." On cross examination, Bertino did not know the distance from point "A" to point "C," but admitted that the distance between point "A" to point "B" was greater than the distance between point "A" and point "C." Mr. Kemp testified that his measurement was from point "A" to point "C." Mr.

Kemp asserts that petitioners' measurement from point "A" to point "B" is really backtracking (walking away from point "A") and did not follow the shortest route. Mr. Kemp asserted that there is a difference of 8.29 feet between his measurement and petitioner's at the intersection of Bayview Drive and Monterey Avenue. Mr. Bertino admitted that his measurements would require the pupil walking the route to cross two streets (Bayview Drive and Monterey Avenue) while the Board's route would require the crossing of only one street (Bayview Drive).

Mr. Bertino testified that he performed his measurements on two different days and admitted that petitioner was present at all times he performed the measurements. He also admitted the petitioner indicated to Bertino the route to be measured and the intersections to be involved. Bertino conducted his measurements on weekdays while pupils were in school. Therefore, he did not observe pupils using any routes from school to their respective places of residence. Mr. Bertino used 90 degree turns in the middle of the walkway to arrive at his measurements.

Mr. Bertino testified on cross examination that it was petitioner's decision to backtrack 40 feet on Aster Road from New Jersey Avenue in a southeasterly direction, continue to cross Cardinal Road to Sweet Briar Road and then proceed 40 feet back to New Jersey Avenue, in a northwesterly direction, as shown on the blue route (P-1). New Jersey Avenue is a four lane roadway. The Board's route crosses New Jersey Avenue at the intersection of Aster Road and proceeds in a southwesterly direction to Bayview Drive, away from New Jersey Avenue.

Mr. Kemp testified and the record shows a discrepancy of 55.55 feet between his measurements and Bertino's measurements from Monterey Avenue to Toledo Avenue. When this discrepancy of 55.55 feet is added to the 8.29 foot difference at the Monterey Avenue and Bayview Drive intersection, Kemp asserts there is a difference of 63.84 feet. Subtract the 63.84 feet from Bertino's total measurement of 13,263.34 feet, results in a total measurement now of 13,199.50 feet, or a distance of less than 2½ miles.

On cross examination, Kemp testified that the Board selected the route he was to measure and advised him of the direction in which to cross streets, where there was a question. He was given no instruction with respect to the laws of New Jersey. He asserted that the EDM line-of-

On cross examination, Kemp testified that the Board selected the route he was to measure and advised him of the direction in which to cross streets, where there was a question. He was given no instruction with respect to the laws of New Jersey. He asserted that the EDM line-of-sight measurement does not consider vertical measurements; *i.e.*, walking up and down curbs. The EDM is measured approximately 4½ feet above the ground level. He admitted that a distance of over 2½ miles could result in a difference of more than 2½ feet.

Mr. Kemp testified that the Board's route was the most logical route between the High School and B.M.'s residence. It is the most logical route for children who might be crossing streets.

Petitioner claims that the new sidewalk along Bayview Drive, the site of the former walkway, passes through undeveloped land where no houses exists. In addition, there is the contention that the entrance to the B.M. residence was measured wrong by the Board. The sidewalk entrance to the B.M. entrance is bell-shaped or flared. Petitioner measured the center line of the sidewalk on Jefferson Avenue and then a right angle (90 degrees) of the center line of the sidewalk entrance to the B.M. residence. Logic would dictate that a pupil would follow the shortest line from the Jefferson Avenue sidewalk on to the entrance to the residence.

Dennis Anderson, Superintendent of Schools, testified that at least since 1991, since he has been on the scene, there has been a walkway between Newark Avenue and Jefferson Avenue, the last street within the southwest border of the Borough of Wildwood Crest. The distance of the walkway was two short blocks in length. He asserted that it was paved in June 1996. This is the sidewalk installed which is the subject of petitioners' amended pleadings approved by the Deputy Commissioner. The walkway was used by the Board in its measurement prior to the installation of the paved sidewalk.

FINDINGS OF FACT

Having carefully considered the testimony and other evidence adduced at the hearing and having given fair weight thereto, and having assessed the credibility of the witnesses, I **FIND** the following **FACTS**.

1. A measurement of 2½ miles equals 13,200 feet.
2. The Board's point to point measurement from the gym door of Wildwood High School to B.M.'s place of residence along the route known as the blue route is a total of 13, 194.47 feet.
3. The Board's method of measurement was by the EDM method.
4. Petitioner used both the EDM and the steel tape measurement methods.
5. The EDM method is the more accurate method of measurement for distances which exceed 400 feet.
6. For distances of less than 400 feet, the steel tape method is acceptable. However, beyond 400 feet the incident of error increases as the tape is laid down , picked up and carried to the next point of measurement.
7. Petitioner's shortest measurement from the High School gym door to the B.M. residence on Jefferson Avenue was 13,263.34 feet.
8. The Board's shortest measurement from the High School gym door to the B.M. residence is 13,194.47 feet, or 2.49895 miles.
9. There are two discrepancies in petitioner's and the Board's measurements as follows:

The intersection of Bayside Drive and Monterey Avenue of 8.29 feet and, the distance between Monterey Avenue and Toledo Avenue of 55.55 feet for a total of -63.84 feet from petitioners' measurement.

10. Thus, when the 63.84 feet is subtracted from petitioners' measurement of 13,263.34 feet petitioners' distance now measures 13,199.50 feet, less than 2½ miles.
11. B.M. is ineligible for pupil transportation from his place of residence on Jefferson Avenue to the Wildwood High School in the City of Wildwood.

DISCUSSION AND CONCLUSION

The statute, *N.J.S.A.* 18A:39-1 provides, among other things, transportation to pupils who live remote from the schoolhouse. Remote is defined at *N.J.A.C.* 6:21-1.3 as follows:

(a) The words "remote from the schoolhouse" shall mean beyond 2½ miles for high school pupils (grades 9 through 12) and beyond two miles for elementary pupils (grades kindergarten through eight), except for educationally handicapped pupils.

(b) For the purpose of determining remoteness in connection with pupil transportation, measurement shall be made by the shortest route along public roadways or public walkways from

the entrance of the pupil's residence nearest such public roadway or public walkway to the nearest public entrance of the assigned school.

Petitioner's claim, among other things, that the former walkway , now a sidewalk, was inappropriate for the Board to use as a part of its measurement because it was not safe and located in an isolated area. Our Supreme Court, however, said in the matter of *Board of Educ. of Tp. of Wayne V. Kraft*, 139 N.J. 579 (1995), at 602, that [a walkway] . . ." does not compel the conclusion that merely because some part of a pathway is isolated, the pathway is unsafe as a matter of law" I **CONCLUDE**, therefore, that the walkway between Newark Avenue and Jefferson Avenue is an appropriate pathway for pupils to travel to and from the schoolhouse and, consequently, comports with *N.J.S.A.* 18A:39-1 and *N.J.A.C.* 6:21-1.3. (b).

I **CONCLUDE** that petitioners have failed to carry their burden of proof, by a preponderance of the reliable and credible evidence, that the residence of B.M. is "beyond 2½ miles for high school pupils . . ." *N.J.A.C.* 6:21-1.3 (b).

I **CONCLUDE**, therefore, that the instant matter should be dismissed.

ORDER

Accordingly, it is **ORDERED** that the herein Petition of Appeal, on Remand from the State Board of Education be and is hereby **DISMISSED** for the reasons expressed in the Findings of Fact and the Conclusions of Law.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6 May 1997
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

5/9/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 13 1997
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

FOR PETITIONER:

WILLIAM BERTINO

FOR RESPONDENT:

WILLIAM KEMP

DENNIS ANDERSON

DOCUMENTS IN EVIDENCE

FOR PETITIONER:

- P-1 MAP OF WILDWOOD CREST & WILDWOOD
- P-2 POINT DESCRIPTION
- P-3 SCHOOL BOARD ROUTE W/EDM
- P-4 SCHOOL BOARD ROUTE W/STEEL TAPE
- P-5 SCHOOL BOARD ROUTE
- P-6 SCHOOL BOARD ROUTE
- P-7 T.J.F. ROUTE W/STEEL TAPE
- P-8 MAP - BAYVIEW DRIVE
- P-9 B.M. RESIDENCE - JEFFERSON AVE., WILDWOOD CREST, NJ
SITE PLAN, SPECIFICATIONS, BUILDING DATA
- P-10 REALTY ATLAS - PARK BLVD & NEW JERSEY AVE.
- P-11 REALTY ATLAS - NEW JERSEY AVE. & ASTER (p. 363)
- P-12 REALTY ATLAS - CITY OF WILDWOOD
- P-13 LETTER, DATED 11/8/94, FROM KEMP TO DENNIS ANDERSON
- P-14 PHOTOGRAPH - INTERSECTION - NEW JERSEY AVE. & PARK BLVD. (1987)
- P-15 PHOTOGRAPH - INTERSECTION - NEW JERSEY AVE. & PARK BLVD. (1987)

- P-16 PHOTOGRAPH - ASTER & NEW JERSEY AVE.
- P-17 LETTER, DATED 9/6/96 FROM KEMP TO ANDERSON
- P-18 PHOTOGRAPHS - INTERSECTION OF BAYVIEW & NEWARK AVE.
- P-19 PHOTOGRAPHS
- P-20 PHOTOGRAPHS
- P-21 PHOTOGRAPHS
- P-22 PHOTOGRAPHS
- P-23 MAY SHOWING B.M.'s RESIDENCE, NEW JERSEY AVE. & BAYVIEW DRIVE

FOR RESPONDENT:

- R-1 ID ONLY
- R-2 ID ONLY
- R-3 ID ONLY
- R--4 ID ONLY
- R-5 PHOTOGRAPH - B.M.'s RESIDENCE
- R-6 PHOTOGRAPH OF INTERSECTION OF BAYVIEW MONTEREY (P-8)
- R-7 PHOTOGRAPH
- R-8 PHOTOGRAPH
- R-9 PHOTOGRAPH - INTERSECTION OF NEW JERSEY AVE. & PARK BLVD.
- R-10 PHOTOGRAPH
- R-11 PHOTOGRAPHS
- R-12 PHOTOGRAPHS - CROSSWALKS AT ASTER & NEW JERSEY
- R-13 LETTER, DATED 2/13/95; ATTN: DENNIS ANDERSON FROM KEMP
- R-14 LETTER, DATED 1/9/97; ATTN: LICHTENSTEIN FROM KEMP
- R-15 MAP OF BAYVIEW DRIVE & MONTEREY AVE.
- R-16 MAP SHOWING BAYVIEW DRIVE & MONTEREY AVE.
- R-17 DIAGRAM - B.M.'s FRONT ENTRANCE
- R-18 CALCULATIONS OF KEMP - BERTINO MEASUREMENTS
- R-19 TOTAL CALCULATIONS OF KEMP - BERTINO MEASUREMENTS

OAL DKT. NO. EDU 6880-96
AGENCY DKT. NO. 432-11/94

T.J.F. AND J.W.F., on behalf of their minor children, J.F. AND M.F.,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE BOROUGH OF WILDWOOD CREST, CAPE MAY COUNTY,	:	DECISION
	:	
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioners' exceptions and the replies thereto were timely filed in accordance with *N.J.A.C. 1:1-18.4*.

Petitioners renew their objection to the use of an electronic device measurement (EDM) as the method for establishing the distances at issue herein. Petitioners maintain that the steel tape provides a more accurate measurement of the distance which a student must traverse from one point to another, as "****children do not walk at some distance above the ground." (Petitioners' Exceptions at p. 7) Petitioners further note that Mr. Kemp, the Board's surveyor, acknowledged in his testimony that use of the EDM, inasmuch as it does not consider vertical measurements, when measuring a distance of over two and a half miles, could result in a difference of more than two and half feet. (*Id.*)

Petitioners further maintain that their route is the only valid route. (*Id.* at p. 2)

Petitioners again challenge that portion of the Board's measurements which provide that a student will cross Bayview Drive at point A on Exhibit P-8 and proceed to point C, rather than to point B, the northeast corner of Monterey Avenue. Petitioners cite *Nichols v. Wayne Township Board of Education*, 95 N.J.A.R. 2d (EDU) 157 at 158, for the proposition that measurements must be made by the shortest route along public roadways or public walkways and, although the regulations themselves do not expressly specify, the route must be drawn in compliance with applicable motor vehicle laws. (*Id.* at p. 3) That the Board would have a child cross Bayview Drive from point A to point C, rather than to point B, argues petitioners, is a violation of New Jersey traffic law, found at N.J.S.A. 39:4-34. This statute requires that

Where traffic is not controlled and directed either by a police officer or a traffic control signal, pedestrians shall cross the roadway within the crosswalk or, in the absence of a crosswalk, and where not otherwise prohibited, *at right angles to the roadway.*
(N.J.S.A. 39:4-34, emphasis in petitioners' text)
(Petitioner's Exceptions at p. 4)

Thus, petitioners reason that although the Board's route may be the shorter route, it is "****at variance with the parameters set forth in the regulations and state statutes." (*Id.*) Petitioners claim that their route, although it requires the student to cross an additional street, is in accord with requisite mandates.

Petitioners next challenge the ALJ's calculations which account for 63.84 feet of discrepancy between their calculations and the Board's calculations. Petitioners refer to P-2 in evidence and show that, contrary to the ALJ's finding, there is actually a discrepancy of 68.87 feet between petitioners' measurement of the Board's route using EDM, totaling 13,263.34 feet, and the Board's EDM measurement, totaling 13,194.47. (*Id.* at pp. 5-6) Petitioners note, "[o]f

the total difference of 68.87 feet between the two experts' EDM measurements of the 'Red' route, 63.84 feet is attributable [to] what the Court refers it as 'discrepancies.'" (*Id.* at p. 6) Petitioners question why the ALJ has failed to account for the remaining 5.03 feet which differ in the parties' calculations.

Additionally, petitioners renew their contention that the Board's route wrongly includes a recently-constructed sidewalk on Bayview Drive between Newark and Jefferson Avenues. (*Id.* at p. 8) Petitioners challenge the Board's alleged involvement in the construction of said sidewalk, concluding that the Board's actions were illegal. (*Id.*)

Finally, petitioners assert that the Board has provided no evidence to indicate that it has adequately notified pupils of their rights to transportation, in accordance with the State Board of Education's direction on remand in this matter. Petitioners affirm that

[t]he written record of the hearing fails to make a finding regarding the Board's obligation to notify qualified students of their rights to student transportation or the Board's failure to address this issue at any time during the hearing. (*Id.* at p. 9)

Thus, petitioners reason that they have "met their burden of proof in establishing the existence of a qualified route which exceeds the 2 1/2 mile distance as required to qualify 'B.M' as a public high school student entitled to the benefits of student transportation ***." (*Id.* at p. 10)

In its reply, the Board initially notes that although its route will be considered determinative, petitioners, in fact,

***chose public school student B.M. as the end point (or beginning point) of the measurement of distance between the Wildwood High School and the B.M. residence. The uncontroverted testimony on the record is that the B.M. residence is located on the last lot of the last block of the last street in Wildwood Crest. (Board's Reply at p. 2)

As to the method of measurement, the Board underscores that the ALJ's finding that the EDM is the more accurate method of measurement for distances which exceed 400 feet was properly based on two days of testimony, including the testimony of experts concerning the use of EDM. Thus, the Board contends there is substantial evidence in the record to support the ALJ's finding, and argues that petitioners have not presented "****any compelling, credible or reliable evidence to dispute the fact that the use of an EDM produces a more accurate measurement of distances which exceed 400 feet." (*Id.*)

With respect to the Bayview Drive crossing dispute, *supra*, the Board argues that

it is an unassailable geometric fact that Petitioner's measurement of the crossing of this street, resulting in a distance greater than that of Respondent means that Petitioner measured the crossing of Bayview Drive at an angle which was further from a right angle than the crossing measured by Respondent -- a fact admitted by Bertino on *** cross-examination ***. (*Id.* at p. 3)

The Board further notes that since Mr. Bertino, petitioners' expert, did not measure from point A to point C, which is "the most direct manner of crossing Bayview Avenue" (*id.* at p. 3), then the only evidence which the ALJ had to calculate the divergence came from Mr. Kemp. Moreover, the Board asserts that the ALJ fairly and accurately accounted for the discrepancy. That is, the ALJ considered that, as noted *supra*, when measuring across Bayview Drive, the measurement of petitioners' expert was 8.29 feet greater than the measurement of the Board's expert.

The Board further finds that petitioners' reliance on *Nichols, supra*, is misplaced, in that the narrow issue in *Nichols* was "****based upon a factual predicate which is not at issue here." In *Nichols*, the route selected by the Board contained both existing sidewalks and marked crosswalks. The Appellate Division determined, in a narrow holding, that when such a route contains existing sidewalks and marked crosswalks, the measurement should be based upon the

assumption that children use the marked crosswalks and existing sidewalks. In the instant matter, the Board warrants that there is no dispute that its entire route as mapped out for a student would be on a sidewalk, and that route eliminates the need to cross nine additional intersecting streets which a student using petitioners' route would be required to cross. (*Id.* at p. 4)

With respect to petitioners' assertion that the Board's actions regarding the construction of the sidewalk, noted *supra*, are illegal or in some manner unethical, the Board replies that petitioners' comments are "defamatory and outrageous" and "****are not based on any evidence presented at the Plenary Hearing before Judge Law and, for that reason, and pursuant to N.J.A.C. 1:1-18.4(c) are prohibited from being incorporated in or referred to in the Exceptions." (*Id.* at p. 5)

The Board concludes that petitioner's exceptions are "entirely devoid of any merit" (*id.* at p. 5), and the Commissioner should, therefore, affirm the ALJ's conclusion that petitioners have failed to meet their burden of establishing a distance in excess of 2.5 miles, as required by *N.J.S.A.* 18A:39-1.

Upon careful and independent review of the record in this matter, the Commissioner determines that petitioners have failed to establish that the residence of B.M. is beyond two and a half miles, so as to require the Board to provide transportation to B.M., and to petitioners' minor children, in accordance with applicable statutes. Having so determined, the Commissioner does not herein reach to the question of whether the Board adequately notified qualified pupils of their rights to pupil transportation under relevant statute and code.

Initially, the Commissioner notes that

***remoteness in connection with pupil transportation *** shall be made by the shortest route along public roadways or public walkways from the entrance of the pupils' residence nearest such

public roadway or public walkway to the nearest public entrance of the assigned school. *N.J.A.C. 6:21-1.3(b)*.

The Commissioner finds that the Board's "red" route (Exhibit P-1) is an appropriate path for students to walk, and shall be used for the purpose of determining "remoteness" from school. Contrary to petitioners' assertion, this path is not proven to be violative of New Jersey traffic laws, as alleged with respect to the crossing at Bayview Drive and Monterey Avenue; indeed, neither crossing is precisely perpendicular, and petitioners' proposed route would have children in the street for a greater distance than the Board's route. Neither do petitioners establish that the new sidewalk offers students a path which, prior to construction, could not be traversed as a public walkway, and that said sidewalk constitutes, therefore, an improper attempt by the Board to create a route that will intentionally subvert petitioners' case.


The Commissioner further finds that petitioners have failed to prove the EDM is an inappropriate method of measuring the qualified route, given the Board's expert testimony as to the accuracy of the EDM for distances over 400 feet, and given that petitioners' own exhibit (P-2) demonstrates that the Board's expert has reasonably accounted for the arcs and bends in the course. Moreover, while petitioners claim that the EDM generally fails to account for "the natural rises and declines of the ground****" (Petitioners' Exceptions at p. 7), they do not point to any portion of the designated route which, by its uneven topography, is prejudiced by the EDM.

The Commissioner, therefore, modifies the initial decision of the ALJ to the extent that, having determined that the Board's EDM of 13,194.47 feet is, in all respects, an appropriate measurement of an acceptable pupil walking route, he finds it is unnecessary to reach

a final measure by subtracting the "discrepancies" between the Board's EDM and petitioners' EDM.

Accordingly, the initial decision of the ALJ is adopted, with modification, as noted. The Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

EDU #5211-95
C # 317-95
SB # 98-95
EDU #6880-96
C # 329-97
SB # 63-97

T.J.F. AND J.W.F., on behalf of their minor :
children, J.F. AND M.F.,

PETITIONERS-APPELLANTS,

V.

STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF WILDWOOD
CREST, CAPE MAY COUNTY,

DECISION

RESPONDENT-RESPONDENT.

Decided by the Commissioner of Education, August 23, 1995

Decision on motions by the State Board of Education, November 1, 1995

Remanded by the State Board of Education, August 7, 1996

Decision on remand by the Commissioner of Education, June 20, 1997

For the Petitioners-Appellants, T.J.F. and J.W.F., pro se

For the Respondent-Respondent, Cooper, Perskie, April, Niedelman,
Wagenheim & Levenson (Russell L. Lichtenstein, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. In so doing, we have granted petitioners' request to supplement the record on appeal and, after careful review of the supplemented record, find that petitioners have failed to demonstrate that either the route measured by the Board or the method of measurement utilized were improper.

Daniel J.P. Moroney opposed.

December 3, 1997

Date of mailing DEC 05 1997

NEW JERSEY BASKETBALL	:	
OFFICIALS ASSOCIATION,	:	COMMISSIONER OF EDUCATION
	:	
PETITIONER,	:	DECISION
	:	
V.	:	
	:	
NEW JERSEY STATE	:	
INTERSCHOLASTIC ATHLETIC	:	
ASSOCIATION,	:	
	:	
RESPONDENT.	:	
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SYNOPSIS

Petitioning New Jersey Basketball Officials Association (NJBOA) challenged the decision of the New Jersey State Interscholastic Athletic Association's (NJSIAA) Executive Committee denying the NJBOA recognition as an approved officials' association.

Commissioner found that the NJSIAA's determination was reasonably based on the belief that the NJSIAA should not permit officials, disciplined by an affiliate organization, to fail to exhaust procedural remedies articulated in the pertinent Affiliation Agreement before seeking to be recognized as a separate entity. Also, insufficient evidence was presented to establish the need for an additional officials' association. Citing Koh, Commissioner found no basis to overturn the NJSIAA's determination. Petition was dismissed.

NEW JERSEY BASKETBALL	:	
OFFICIALS ASSOCIATION,	:	COMMISSIONER OF EDUCATION
	:	
PETITIONER,	:	DECISION
	:	
V.	:	
	:	
NEW JERSEY STATE	:	
INTERSCHOLASTIC ATHLETIC	:	
ASSOCIATION,	:	
	:	
RESPONDENT.	:	
_____	:	

For Petitioner, Fuhrman & Edelman (Ronald B. Edelman, Esq.)
For Respondent, Picco Mack Herbert (Steven P. Goodell, Esq.)

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed on May 5, 1994 by the New Jersey Basketball Officials Association (NJBOA), challenging the decision of the Executive Committee of the New Jersey State Interscholastic Athletic Association (NJSIAA) to deny the NJBOA recognition as an approved officials' association. NJBOA consists of twenty-one officials, seven of whom had been suspended or expelled from another recognized officials' association, District Board Local 34. The Executive Committee denied recognition to the petitioner because of the failure of the disciplined former members of District Board Local 34 to follow its internal appeal procedures set forth in Section Five of the Standard Affiliation Agreement between the NJSIAA and the officials' chapter.

Section Five (B) and (C) provide:

(B) All complaints against officials who are members of the Officials' Association, including disciplinary matters, shall be handled through the internal processes of the Officials' Association.

(C) Any party to a complaint involving an official who is a member of the Officials' Association, may appeal to the NJSIAA by filing an appeal with the Executive Director of the NJSIAA, pursuant to Article XIII of the NJSIAA Bylaws. However, no such appeal will be entertained

by the NJSIAA until all internal processes of the Officials' Association have been fully exhausted by the appellant.
(NJSIAA Standard Affiliation Agreement, Section Five, Paragraphs B and C)

Petitioner asserts that its application meets all of the requirements for recognition as an officials' chapter in accordance with the NJSIAA Constitution, By-laws, Rules and Regulations, which provide:

1. The chapter must provide evidence of officiating experience of its membership noting league, conference, or levels of competition and years of service.
2. The chapter must provide a list of their duly elected offices and membership.
3. The chapter must provide a copy of their Constitution and Bylaws for approval by the NJSIAA.
4. The chapter must agree to grant the NJSIAA the final authority for testing, training, and evaluating procedures adopted by the chapter.
5. The chapter must provide an outline of their testing, training, and evaluating procedures for certification of prospective and present members.
6. The chapter must agree to comply with all provisions of the Constitution, Bylaws, and Rules and Regulations of the NJSIAA; decisions of the Executive Committee of the NJSIAA; and the tenets of agreements effected by the Officials' Councils and the NJSIAA.
7. The Executive Committee may approve the certification of officials and/or officials' chapters in all sports; and the minimum requirements for testing, training and evaluating all officials.

Petitioner asserts that its members have irreconcilable differences with District Board Local 34 and that it has unsuccessfully attempted to address all of its concerns with the Board. It, therefore, seeks recognition as an independent officials' council.


Upon review of the record, including the transcript of NJSIAA Executive Committee proceedings, the Commissioner finds that petitioner has not established its

entitlement to overturn the decision of the NJSIAA Executive Committee. The standard of review for NJSIAA determinations as articulated in Dam Jin Koh and Hong Jun Kim v. NJSIAA, decided February 3, 1987, prohibits the Commissioner of Education from overturning a decision of the NJSIAA unless it is arbitrary, capricious or an abuse of discretion. If due process has been afforded and there is a reasonable basis for the NJSIAA's decision, the determination must stand.

In this instance, NJSIAA's determination is reasonably based on the belief that the NJSIAA should not permit officials, disciplined by an affiliate organization, to fail to exhaust procedural remedies articulated in the pertinent Affiliation Agreement before seeking to be recognized as a separate entity. In addition, NJSIAA reasonably determined that insufficient evidence was presented at the Executive Committee hearing to establish a need for an additional officials' association in order to service the affected region.

Accordingly, there being no basis on which the Commissioner may act to overturn the lawful determination of the NJSIAA in this matter, the Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

August 23, 1995
Date of Mailing, August 24, 1995

MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION, :

PETITIONER, :

V. :

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

RESPONDENT, :

AND :

CONNECTICUT GENERAL LIFE INSURANCE COMPANY (CIGNA), :

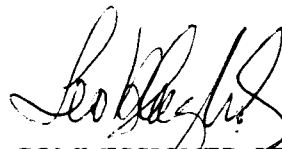
INTERVENOR. :

COMMISSIONER OF EDUCATION
DECISION ON REMAND

MIDDLETOWN TOWNSHIP EDUCATION :
ASSOCIATION, :
 :
PETITIONER, :
 :
V. :
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BOARD OF EDUCATION OF THE TOWNSHIP :
OF MIDDLETOWN, MONMOUTH COUNTY, :
 :
RESPONDENT, :
 :
AND :
 :
CONNECTICUT GENERAL LIFE INSURANCE : COMMISSIONER OF EDUCATION
COMPANY (CIGNA), : DECISION ON REMAND
 :
INTERVENOR. :
 :
_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

G.Y., SR., on behalf of minor child, G.Y., JR., :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE :
MORRIS HILLS REGIONAL SCHOOL :
DISTRICT, MORRIS COUNTY, :

DECISION

RESPONDENT. :

OAL DKT. NO. EDU 9738-94

G.Y., SR., on behalf of minor child, G.Y., JR., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
MORRIS HILLS REGIONAL SCHOOL :
DISTRICT, MORRIS COUNTY, :
RESPONDENT. :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

August 28, 1995
Date of Mailing, August 28, 1995

ELLEN M. BROCKMANN, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION

BOROUGH OF TOTOWA, PASSAIC :

COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner, tenured teaching staff member, alleged Board failed to pay her five months of accumulated sick-leave benefits to which she was entitled under N.J.S.A. 18A:30-1 to -6.

In light of evidence and applicable law, the ALJ concluded that petitioner was eligible for sick-leave benefits for February to June 1995. ALJ found that there was overwhelming proof that petitioner was absent from her duty "due to illness or injury" so that she was fully justified in utilizing her accumulated sick leave during her time of recuperation. Moreover, ALJ found she was entitled to payment of pre-judgment interest since the Board wrongfully withheld petitioner's sick leave after the Division of Pensions denied her pension request.

Commissioner adopted findings and determination in initial decision and ordered Board to pay petitioner sick-leave benefits for February through June of 1995, together with a pre-judgment interest of 3.5% per annum until payment was made.



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2075-95

AGENCY DKT. NO. 7-1/95

ELLEN M. BROCKMANN,

Petitioner,

v.

TOTOWA BOARD OF EDUCATION,

Respondent.

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

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

Record Closed: July 12, 1995

Decided: July 18, 1995

BEFORE: KEN R. SPRINGER, ALJ:

Statement of the Case

This is a suit by a teacher who alleges that the Totowa Board of Education ("Totowa" or "Board") failed to pay her five months of sick leave benefits to which she is

entitled under *N.J.S.A.* 18A:30-1 to -6. Originally, the petition raised several additional issues, including whether the Board excessively delayed payment of earlier sick leave benefits and whether the Board acted improperly when it made application for an involuntary disability pension. Since the filing of the petition, the Board has paid petitioner's sick leave benefits through January 1995 and the Division of Pensions has denied the Board's application for involuntary disability retirement. Consequently, the parties agree that the other issues are moot and that the only remaining question is whether petitioner is eligible for sick leave payments for February to June 1995. Petitioner contends that, in reliance on her doctor's advice, she will not be ready to return to work until September 1995. But the Board insists that petitioner's medical condition had improved to the point where she should have returned to work last April. For the reasons which follow, petitioner's illness is genuine and she is entitled to utilize her accumulated sick leave for the last five months of the 1994-95 academic year.

Procedural History

On January 9, 1995, petitioner Ellen M. Brockmann ("Brockmann") filed a verified petition with the Commissioner of Education. Respondent Board filed its answer on January 31, 1995. Subsequently, on February 24, 1995, the Commissioner forwarded the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held a hearing on July 12, 1995. Witnesses and exhibits are listed in the exhibits.

Findings of Fact

I **FIND** the following facts:

Ellen Brockmann has been employed as an elementary school teacher in the Totowa school district since November 1955. Over a career spanning nearly forty years, she has held a variety of teaching assignments. Most recently, in 1993-94, she was assigned to teach fourth grade. Paralyzed from the waist down as the result of

polio in early childhood, she is confined to a wheelchair. Her dedication to the teaching profession is truly inspiring. Despite her serious handicap, she has an outstanding attendance record and, as of July 1, 1994, had managed to accumulate 281 days in unused sick time.¹

On or about March 4, 1994, Brockmann suffered a serious medical episode at school, which triggered a series of severe complications to her pre-existing disability. Allen Schultz, M.D., a specialist in orthopedics who practices medicine in Wayne, New Jersey, has been Brockmann's treating physician since 1986. Dr. Schultz is board-certified in orthopedics and is a clinical instructor at the University of Medicine & Dentistry of New Jersey in Newark. Shortly after the event, he had an opportunity to examine his patient and evaluate her condition.

At the hearing, Dr. Schultz testified regarding her various symptoms, including a dramatic difficulty with respiration and major loss of neurological function. Of particular concern to Dr. Schultz was Brockman's breathing difficulty, which he regarded as "life threatening." In the course of his examination, he noted various objective manifestations of illness, such as "peripheral edema," or swelling, and "cyanosis," or the presence of a bluish tint. In light of her past history and her compromised respiration, Brockmann was worried that she might be put in an iron lung. Ultimately, however, Dr. Schultz determined that the polio virus was not the likely source of her acute changes and that the most appropriate diagnosis was "Reynaud's Phenomenon," an acute slowdown of the circulatory system, complicated by a secondary viral infection.

At the onset of the condition, Dr. Schultz could not be sure how long, if ever, it might take for Brockmann to regain her prior level of functioning. Initially, he referred

¹ By statute, a local school district must give its tenured teaching staff "a minimum of 10 sick days in any school year." *N.J.S.A. 18A:30-2*. Unused sick days may be accumulated and carried over to be used "for additional sick leave as needed in subsequent years." *N.J.S.A. 18A:30-3*. Petitioner's counsel represented that the current contract in the district calls for fourteen sick days per year. At that rate, it would have taken more than fifteen years to accumulate 281 sick days.

his patient for consultation to various other specialists, including a neurologist and experts in respiratory diseases. Essentially, Dr. Schultz served as the primary physician, coordinating the activities and recommendations of a team of specialists. Dr. Schultz prescribed steroids to stabilize her condition and carefully monitored his patient's progress. He saw her twice in March, once again in April, June and September, and thereafter on a regular monthly basis continuing to the present.

As early as November 1994, Dr. Schultz furnished written certification to the Board that Brockmann would remain "disabled through June 1995." During cross-examination, Dr. Schultz explained that he based this estimate on his knowledge of how long it takes to recuperate and recondition. Although uncertain whether Brockmann would ever fully recover, he was able to project that it would take no less than six months.

Additionally, Brockmann submitted to a medical examination performed by a physician of the Board's own choice, Dr. Anthony M. Ventimiglia. By letter dated September 19, 1994, Dr. Ventimiglia reported to the Board that he was "comfortable that [Brockman] is not malingering, and is anxious to return to her teaching vocation." He cautioned, however, that "it is very difficult to predict if she will ever recover to the extent that she may return." Meanwhile, the Board voted on December 26, 1994 to take all necessary steps to apply for an involuntary disability retirement on Brockmann's behalf.

Fortunately, Brockmann has made slow but steady progress in recovering her health. Starting in December 1994, she began physical therapy to rebuild the muscle tissue which had been weakened by her illness. Her physical therapist comes to her home twice each week and Brockmann spends at least two hours every day doing prescribed exercises.

Brockmann has been virtually housebound since the deterioration of her physical condition in March 1994. Recently, her one "big trip" was to the supermarket, where she got "to hold a basket." Afterwards, she was "exhausted" and "took two days

to recover.” She still has trouble swallowing, can’t cough and is unable to breathe correctly. Her left arm is atrophied and the muscle tissue remains paper thin.

On the critical issue of whether Brockmann was capable of performing her duties in February to June 1995, Dr. Schultz’s testimony was clear and unequivocal. In his professional judgment, his patient will not be ready to resume her teaching duties until September 1995. If she tries to come back earlier, Dr. Schultz warned that it could lead “to severe respiratory failure.”

Dr. Schultz gave several cogent reasons in support of his opinion. Damage to muscle tissue requires an extended period of time to recuperate. Premature return to work might risk further injury of the muscles, which would mean that rehabilitation must “start all over again.” Even if Brockmann were capable of working on an isolated basis, she “lacks the endurance to perform a full day’s work” without frequent breaks for relaxation. Prior to her injury, Brockmann had worked a full eight-hour day, with little time off other than lunch period. Children in elementary school are prone to various types of colds and contagious diseases. Exposure to such viruses before she had completely recovered could provoke a respiratory reaction which might be fatal. Moreover, a successful return to work is contingent upon the availability of various rehabilitative equipment. One such device, a machine to monitor respiratory infection, had to be pre-approved by her health insurer and is currently on back order. Another important piece of equipment, an electric wheelchair to increase Brockmann’s mobility, must be specially designed to fit her particular needs. Brockmann will have to be trained in the use of these devices before she can come back to work.

Significantly, the Board failed to offer any medical testimony to contradict Dr. Schultz’s well-supported analysis. Instead, the Board sought to rely on a report prepared for the Division of Pensions by one Dr. Paul Glicksman. This report cannot be given much weight for several reasons. In the first place, the report itself is mere hearsay. Nothing on the record discloses Dr. Glicksman’s qualifications, the nature and duration of his examination, or what medical records he reviewed. Dr. Glickman’s ultimate findings are phrased largely in conclusory language, with inadequate

explanation of how the conclusion was reached. Second, the report was made in the context of a pension application, which involved the issue of whether Brockman is "totally and permanently incapacitated" for the performance of her duties. This is a different standard from whether Brockmann was ready to return to work before September. Indeed, an accompanying letter from the Division of Pensions cautions that the report was only obtained as medical evidence in the pension case and is "not intended to be used as the basis for any other claim in any other program." Third, the report was not made available to the Board until May 1995 and, therefore, could not possibly have formed the basis for the Board's denial of sick leave benefits for February, March and April 1995. Fourth, the report's recommendation that Brockmann "is able to continue her occupation as a teacher" was qualified by the proviso, "if the proper equipment for her mobility is made available." Unrefuted evidence establishes that the necessary medical equipment has not yet been furnished to her and, therefore, that the condition precedent was not fulfilled.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Brockmann is eligible for sick-leave benefits for February to June 1995.

State statutes require that local boards of education grant teachers a minimum of ten days of sick leave in any school year. *N.J.S.A. 18A:30-2*. Pursuant to *N.J.S.A. 18A:30-1*, sick leave is defined to mean "the absence from his or her post of duty, of any person because of personal disability due to illness or injury[.]" Sick leave cannot be used for any purpose other than that for which it was intended; thus, it may not be used for child-rearing purposes by a non-disabled teacher. *Hackensack Bd. of Educ. v. Hackensack Educ. Ass'n*, 184 *N.J. Super.* 311, 317 (App. Div. 1982), certif. den. 91 *N.J.* 217 (1982). Allowance of sick leave is not merely for the personal benefit of teachers, but is intended to promote the greater public good:

There is a public interest in allowing a teacher sick leave with pay and, indeed, in allowing her to accumulate unused sick leave. A sick teacher might, in the absence of available paid-leave time,

continue to teach in order to obtain her salary. We think that such a person should not be encouraged to continue to work in those conditions and come into close dealing with school children." *Hackensack*, 184 N.J. Super. at 318.

Proofs overwhelmingly show that Brockmann was absent from her duty "due to illness or injury," and that she was fully justified in utilizing her accumulated sick leave during her time of recuperation. Indeed, Brockmann's extended illness is exactly the type of situation that the Legislature contemplated when it mandated statutory sick-leave benefits.

When fashioning the remedy, consideration should be given to an award of interest. Where the debtor is a governmental agency, pre-judgment interest may be awarded only upon "a showing of overriding and compelling equitable considerations." *Newark Bd. of Educ. v. Levitt*, 197 N.J. Super. 239, 244 (App. Div. 1984). Here a review of the surrounding circumstances compels the conclusion that pre-judgment interest is appropriate. The record reflects that the Board previously delayed payment of sick leave payable to Brockmann for October, November and December 1994. Information available to the Board, including the report of its own doctor, substantiated the validity of Brockmann's complaint that she was too ill to return to work. While the application for an involuntary disability retirement was pending, the Board could at least say that it was awaiting the outcome of that case. After the Division of Pensions denied the pension request, however, the Board continued to withhold Brockmann's sick leave for February, March and April. In the present litigation, the Board presented no medical testimony and its defense is totally frivolous. Under these extraordinary circumstances, Brockmann is entitled to payment of pre-judgment interest on the amounts which have been wrongfully denied to her.²

Order

² Interest rates fixed by court rule are not automatically applicable to judgments and orders entered by non-judicial agencies. *Levitt*, 197 N.J. Super. at 249, n. 4. Absent a more appropriate standard, however, the Commissioner should look to the court rule for guidance on what rate is appropriate. R. 4:42-11(a) fixes the current interest rate at 3.5%.

It is **ORDERED** that the Totowa Board of Education forthwith pay to Ellen M. Brockmann sick-leave benefits for February, March, April, May and June, 1995, together with pre-judgment interest of 3.5% per annum until payment is made.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 18, 1995
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

7/20/95
DATE

Receipt Acknowledged:
Hope R. Blackburn
DEPARTMENT OF EDUCATION

JUL 21 1995
DATE
al

Jeff J. Mason
Mailed to Parties:
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

APPENDIX

List of Witnesses

1. Allan E. Schultz, M.D.
2. Dr. Ellen M. Brockmann
3. Dr. Viktor J. Jagano, chief school administrator, Totowa public school district

List of Exhibits

- | No. | Description |
|------------|--|
| J-1 | Copy of memorandum to Ellen Brockmann from Ruthann Quinn, undated |
| J-2 | Copy of letter to Ellen Brockman from Viktor J. Jagano, dated August 18, 1994 |
| J-3 | Copy of a letter to Viktor J. Jagano from Anthony M. Ventimiglia, M.D., dated September 19, 1994 |
| J-4 | Copy of handwritten letter to Dr. Jagano from Ellen Brockmann, dated August 11, 1994 |
| (a) | Copy of doctor's note from Alan E. Schultz, M.D., dated August 11, 1994 |
| J-5 | Copy of letter addressed to To Whom it may Concern, from Alan E. Schultz, M.D., dated November 3, 1994 |

- J-6 Copy of letter to Dr. Ellen Brockmann from Ruthann Quinn, dated December 26, 1994
- J-7 Copy of letter to Ellen Brockmann from Robin Locker, dated March 1, 1995
- J-8 Copy of letter to Totowa Board of Education from Regina M. Trauner, dated June 6, 1995
- J-9 Copy of memorandum to Ellen Brockmann from Viktor J. Jagano, dated April 29, 1994
- J-10 Copy of letter to Dr. Ellen Brockmann from Viktor J. Jagano, dated July 5, 1994
- J-11 Copy of letter to Dr. Ellen Brockmann from Viktor J. Jagano, dated August 23, 1994
- J-12 Copy of medical report by Alan E. Schultz, M.D., dated June 22, 1995
- P-1 Copy of letter to Bucceri & Pincus from Robin Locker, dated May 3, 1995
- R-1 Copy of medical report by Paul Glicksman, M.D., dated April 13, 1995

ELLEN M. BROCKMANN, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 BOROUGH OF TOTOWA, PASSAIC :
 COUNTY, :
 :
 RESPONDENT. :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondent's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Respondent's exceptions essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ), again contending, inter alia, that petitioner could have performed her duties with the aid of a powered wheelchair, at least from April 12, 1995, and, thus, was not entitled to use her accumulated sick time. Further, the Board contends that the ALJ did not afford sufficient weight to the testimony of Dr. Paul Glicksman, whose report the ALJ incorrectly classified as hearsay. Lastly, the Board excepts that the ALJ's determination to award pre-judgment interest to petitioner was inappropriate as petitioner did not make claim for such relief. The Board also asserts that such award, which it characterized as punitive, is not warranted since the Board was not required to pay petitioner her back pay while her application for involuntary disability pension was pending.

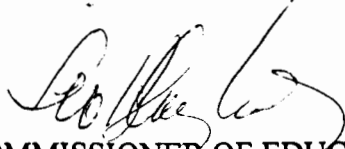
Petitioner's reply exceptions support the conclusions of the ALJ's decision, rejecting the Board's assertion that petitioner was able to return to work in April 1995, while her application for disability pension was pending. Petitioner further asserts that denial of her back pay at the time of her pending disability application was "final evidence of the Board's bad faith and [willful] mistreatment of the petitioner.***" (Petitioner's Reply Exceptions at p.7)

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that petitioner is entitled to utilize her accumulated sick leave for the last five months of the 1994-95 academic year under N.J.S.A. 18A:30-1 to -6. The Commissioner accepts the ALJ's findings that petitioner was absent from her duty due to illness or injury, and was, thus, fully justified in using her accumulated sick leave during her time of recuperation. In so finding, the Commissioner further accepts that the ALJ gave appropriate weight to the report by Dr. Paul Glicksman for the reasons well expressed in the initial decision.

The Commissioner further concurs that the award of pre-judgment interest is appropriate in this case, in accordance with Newark Bd. of Educ. v. Levitt, 197 N.J. Super. 239, 244 (App. Div. 1984), since the Board wrongfully withheld petitioner's sick leave after the Division of Pensions denied petitioner's pension request.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision of the Office of Administrative Law and orders that the Totowa Board of Education pay to Ellen M. Brockmann sick-leave benefits for February, March, April, May and June, 1995, together with a pre-judgment interest of 3.5% per annum, until payment is made.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

ARTHUR TOTE, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE MERCER :

DECISION

COUNTY VOCATIONAL-TECHNICAL :

SCHOOL DISTRICT, MERCER COUNTY, :

RESPONDENT. :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2369-95

AGENCY DKT. NO. 439-11/94

ARTHUR TOTE,

Petitioner,

v.

**MERCER COUNTY AREA VOCATIONAL-
TECHNICAL SCHOOL DISTRICT,**

Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak,
attorneys)

Dennis M. DeSantis, Esq., for respondent (Destribats, Campbell, DeSantis & Magee,
attorneys)

Record Closed: July 6, 1995

Decided: July 14, 1995

BEFORE STEVEN C. REBACK, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on March 6, 1995, for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a stipulation of settlement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

7/14/95
DATE


STEVEN C. REBACK, ALJ


Receipt Acknowledged:

7/20/95
DATE


DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 24 1995
DATE


ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

tmp

MCV16918.S01

Destribats, Campbell, DeSantis & Magee
247 White Horse Avenue
Trenton, N.J. 08610
(609) 585-2443
Attorneys for Respondent

ARTHUR TOTE	: BEFORE THE COMMISSIONER
	: OF EDUCATION
Petitioner	:
	:
VS.	: Docket No. EDUOR 02369-95S
	:
MERCER COUNTY AREA VOCATIONAL- TECHNICAL SCHOOL DISTRICT	:
	:
Respondent	: STIPULATION OF SETTLEMENT
	: AND DISMISSAL WITH PREJUDICE
	:
	:

This matter being opened before the Commissioner of Education by Zazzali, Zazzali, Fagella and Nowak, Richard A. Friedman, Esquire, appearing, attorneys for Petitioner, Arthur Tote, and Respondent, Mercer County Area Vocational-Technical School District, being represented by Destribats, Campbell, DeSantis and Magee, Dennis M. DeSantis, Esquire, appearing, and the parties having entered into an agreement hereto;

IT IS on this _____ day of _____, 1995, ORDERED as follows:

1. Petitioner, Arthur Tote, shall be placed on step 13 of the Salary Guide for teachers for the Respondent retroactive to July 1, 1994, with appropriate back pay and emoluments as if paid on that step for the entire 1994/95 school year;

DESTTRIBATS, CAMPBELL,
DESANTIS & MAGEE
COUNSELLORS AT LAW
247 WHITE HORSE AVENUE
TRENTON, NEW JERSEY 08610

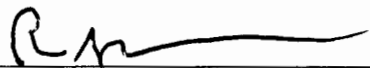
2. Effective July 1, 1995, Petitioner shall be advanced to the maximum step of the Salary Guide for teachers with the Respondent, which shall be effective for the full 1995/96 school year;

3 The within matter shall be dismissed with prejudice.

~~STEVEN REBACK, J.A.L.~~

Consent is hereby given to the form and entry of the foregoing Order.

Zazzali, Zazzali, Fagella & Nowak
Attorneys for Petitioner

By: 
Richard A. Friedman, Esquire

Destribats, Campbell, DeSantis & Magee
Attorneys for Respondent

By: 
Dennis M. DeSantis, Esquire

ARTHUR TOTE, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE MERCER : DECISION
 COUNTY VOCATIONAL-TECHNICAL :
 SCHOOL DISTRICT, MERCER COUNTY, :
 :
 RESPONDENT. :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

AUGUST 29, 1995
DATE OF MAILING AUGUST 30, 1995

BOARD OF EDUCATION OF THE CITY	:	
OF SUMMIT, UNION COUNTY,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWN-	:	DECISION
SHIP OF MILLBURN, ESSEX COUNTY	:	
AND M.F. AND J.F., on behalf of their child,	:	
C.F.,	:	
	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioning Summit Board of Education sought determination that C.F., a special needs child whose parents were divorced and lived in different cities, was not domiciled in the City of Summit but rather in the Township of Millburn.

ALJ found there was no ambiguity as to C.F.'s true domicile -- overwhelming weight of the evidence established that Summit had been and continued to be C.F.'s home and domicile for thirteen years. Judgment of Divorce in 1982 did not order that custody be with the father, it had merely acknowledged that he had temporary physical custody at that time. Thus, ALJ concluded that C.F. was a domiciliary of the City of Summit and ordered that Board to provide for C.F.'s educational and related services.

Commissioner concurred with the findings and conclusions in the initial decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO EDU 2076-95

AGENCY NO. 5-1/95

BOARD OF EDUCATION CITY OF SUMMIT,

Petitioner,

vs.

BOARD OF EDUCATION OF TOWNSHIP OF

MILLBURN, AND M.F. AND J.F., PARENTS OF

C.F.

Respondents.

Peter P. Kalac, Esq., for petitioner

(Kalac, Newman, Lavender and Campbell, attorneys)

Rodney T. Hara, Esq., for respondent, Board of Education of Township
of Millburn

(Fogarty and Hara, attorneys)

Theodore A. Sussan, Esq., for respondent, father of C.F.

(Sussan and Greenwald, attorneys)

Record Closed: June 2, 1995

Decided: July 17, 1995

BEFORE **SEBASTIAN GAETA, JR., ALJ**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner, Board of Education of the City of Summit (Summit) seeks a determination that C.F., a special needs child, is not domiciled in the City of Summit but rather in the Township of Millburn.

This matter was transmitted to the Office of Administrative Law by the New Jersey Department of Education as a contested matter pursuant to *N.J.S.A. 52:14B-1 to - 15* and *N.J.S.A. 52:14F-1 to - 13*. The matter was heard on April 13, 1995 and May 4, 1995. At the conclusion of the evidentiary hearing, the parties were granted leave to file post-hearing submissions. Counsel for petitioner and counsel for respondent, Board of Education of the Township of Millburn, filed post-hearing briefs whereupon the record was closed.

MATTERS PRESENTED

C.F., a fifteen year old child, was classified as emotionally disturbed by the child study team (CST) of petitioner, Board of Education of the City of Summit.

Her mother, M.F. and father, J.F. were married in 1969. C.F., their only child was born on January 18, 1979, when the parents resided in Summit. Later that year the parents separated. On February 5, 1982, the marriage was dissolved by a Judgment of Divorce entered in Superior Court, Chancery Division, Union County. At the time the decree was entered, C.F. lived with her father. The decree provided for joint custody with the issue of actual physical custody to be later determined:

The parties shall jointly exercise custody over the infant daughter born of this marriage: physical custody, however, shall be determined by the opinion of Martin Buxton, M.D., a child psychologist appointed by this court as an expert to advise in this cause. The opinion of this expert, or of any successor expert appointed by this court with the consent of the parties, shall be dispositive of the issues of physical custody and

visitation; and the said expert shall continue to monitor the interests of the said infant by such means as shall, in the opinion of this said expert, be deemed necessary, and including but not limited to personal interviews with the parties and the infant; and the expert shall file reports with this court, providing copies of said reports with the parties at intervals no less frequent than quarter-annually, with the first such report to be filed on April 15, 1982.

(Exhibit P-1, pp 6,7)

The judgment notes that, "the husband, at the present, has physical custody of the child." (Exhibit P-1, p. 5)

Dr. Buxton did not determine the question of custody and neither he nor any other expert rendered any opinion regarding the actual physical custody. Notwithstanding, within several months the mother received the actual physical custody of C.F. This was without seeking approval of the court or a modification of any part of the custody provision. C.F. lived with her mother in Summit at one address until the mother moved to her present residence in Summit. C.F. has never attended public schools. Until June 1994, she attended Kent Place, a private school in Summit. The mother has suffered with a mental condition whose onset was 1982 or earlier. This has resulted in various inpatient hospitalizations for periods of several days to over two months.

The father, who remarried, lives in Short Hills which is part of the respondent's school district. He and his current wife have four children who attend school in that district. During the periods of time that the mother required hospitalization, C.F. stayed with her father or he made arrangements for her care with a housekeeper or with a relative.

In May 1994, the mother entered a hospital for her condition and, except for a week when she left contrary to her physician's advice, she remained an inpatient until discharged in August 1994. During the time that school was in session, C.F. lived in the mother's house in Summit with a relative who came to take care of her. At the end of the school year, C.F. went to her father's house in Short Hills. In July 1994 C.F.

went to a summer camp in Massachusetts. She left that camp and returned to her father's residence where she stayed until he placed her in another camp in New York. After leaving that camp in August, with her mother still hospitalized C.F. lived with her father. In August, C.F. was admitted to Morristown Memorial Hospital psychiatric unit.

Upon discharge she returned to her father's house and she also saw her mother. On September 3, 1994, C.F. was again admitted to the psychiatric unit at Morristown Memorial Hospital and the next day she was admitted to Charter Behavioral Health System (Charter) where she was treated until September 28, 1994. Following her stay at Charter, C.F. was then taken by her father, to Kids Peace National Centers for Kids in Crisis, located at Bethlehem, Pennsylvania.

On September 12, 1994, the parents enrolled C.F. in the Summit Public School system and requested that she be evaluated by the CST. The evaluation was conducted and C.F. was interviewed while she was a patient at Charter. A Social Case History was prepared which observed:

At this time, [C.F.'s] mental health issues are of primary concern to her parents. She is not yet stable enough to be out of a psychiatric setting. [The mother] stated that she hopes that [C.F.] will be well enough to return home and enter Summit High School. [The father] doesn't think that "Summit High School is a viable alternative." He is pursuing different boarding schools with the help of an educational consultant, Helene Reynolds. (P-1, dated October 27, 1994)

Based on the recommendation of the educational counselor C.F. was enrolled in Grove School in Connecticut during November 1994. For the December 1994 year end school holidays, C.F. traveled home by train to Metro Park. She stayed the two weeks at her mother's house and went on day trips with her father. C.F. also returned home by train for spring break, spent the first week with her mother and the second week with her father in Puerto Rico. At her mother's house, she has her own separate bedroom for her exclusive use. When at her father's house, C.F. stays in a guest room which is

used by others when she is not there. The mother testified that she has physical custody of her daughter.

The parties agree that for an unemancipated child, the question of domicile is resolved by determining the domicile of the custodial parent. *Mansfield Township Board of Education v. State Board of Education*, 101 N.J.L. 474 (Sup. Ct. 1925). In asserting that C.F. is now domiciled in Millburn the petitioner, Summit, looks to the judgment of divorce which acknowledged that at that time the father had physical custody of C.F. and that future physical custody would be determined by Dr. Buxton or another court appointed expert. That determination never occurred nor was this custody provision modified or amended in any way. Instead, by mutual consent C.F. began living with her mother in Summit.

Summit believes that the mother's inability to care for C.F. has required the father to assume responsibility for C.F.'s care including those decisions as to medical care, living arrangements and educational needs. These assumptions of parental responsibility by the father are viewed by Summit as having restored the actual physical custody of C.F. to the father as was the legally acknowledged status when the Judgment of Divorce was entered.

DISCUSSION

Except when she was in the actual custody of her father, as an infant, C.F. has lived in Summit, at two addresses, with her mother. Although she has stayed at her father's home in Short Hills, these were visits and she was a guest in the house and not part of the household. Her best friends are in Summit, she attended her private school in Summit, and she and her mother consider that she lives in Summit. Although the mother could not care for her during a prolonged hospitalization during 1994, C.F.'s living arrangements were divided between the mother's house with a relative, two summer camps and her father's house.

There is no showing that the father decided that C.F. would live in his house on a more regular and permanent basis. The evidence established that the mother expected and wants C.F. to live with her. During her short vacations from Grove School, C.F. went to Summit indicating this was home for her. In December she lived with her mother and shared day time activities with her father. In March she spent the first week of her vacation in Summit with her mother, the second week in Puerto Rico with her father.

The Judgment of Divorce did not order that custody be with the father. It merely acknowledged that he currently had physical custody, until such time that Dr. Buxton or other court appointed expert would determine where actual custody would be placed. Apparently, when the mother and father agreed between themselves that C.F. would actually live with the mother, they effectuated that agreement without seeking modification of the decree. That mutual agreement between the parents has been in effect for over thirteen (13) years.

In order to conclude that C.F. is domiciled in Millburn and not Summit it would necessitate finding that the mother's intermittent incapacity to care for C.F. shifted the major parental responsibility to the father and that his exercise of parental authority in decisions regarding his daughter's welfare has returned her custody to him as was the acknowledged status at the time of the 1982 Judgment of Divorce.

The facts do not support such a finding. Except for isolated indicia that C.F. had assumed her father's residence and domicile, such as giving that address to the Morristown Memorial Hospital (Exhibit P-2), the overwhelming weight of the evidence established that Summit has been and continues to be C.F.'s home and domicile.

The acknowledgment in the Judgment of Divorce of her then custody with her father and the provision that would only change pursuant to the procedures set forth

has weight but the inchoative nature of the provision does not overcome the thirteen years of reality. If there was any ambiguity as to C.F.'s true domicile, the Judgment of Divorce might be determinative. There is no ambiguity and the Judgment of Divorce is not controlling.

CONCLUSION

Considering all of the evidence, I **CONCLUDE** that C. F. is a domiciliary of the City of Summit.

ORDER

It is **ORDERED** that the petitioner, Board of Education of the City of Summit, shall provide to C.F., the child of respondents M.F. and J.F., those educational and related services to which she is entitled.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

[Handwritten signature]
DATE

7/20/95
DATE

JUL 21 1995
DATE

cb

[Handwritten signature]
SEBASTIAN GAETA, JR., ALJ

Receipt Acknowledged:
Hope R Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties
Jeff J. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Witnesses:

For Petitioner:

J.F.
M.F.
Nancy Stoddard

Exhibits:

Petitioner

- P-1 Book of Documents (219) pages.
- P-2 Morristown Memorial Hospital Records

Respondents

- R-1 Letter of Dale M. Jacobs, M.D. dated November 29, 1994.
- R-2 Letter of Elizabeth Goldberg, Ph.D. dated November 29, 1994.
- R-3 Handwritten Letter of J.F. dated November 29, 1994.
- R-4 Residency Verification Information, New Student Registration.
- R-5 Health History and Appraisal.
- R-6 Referral to Child Study Team.
- R-7 Review of Initial Referral.
- R-8 Classification Conference Report.
- R-9 Mail Covers.
- I-1 Kent Place School Transcript.
- I-2 CST Contact Log

BOARD OF EDUCATION OF THE CITY :
OF SUMMIT, UNION COUNTY, :
 :
PETITIONER, :
 :
V. : COMMISSIONER OF EDUCATION
 :
BOARD OF EDUCATION OF THE TOWN- : DECISION
SHIP OF MILLBURN, ESSEX COUNTY :
AND M.F. AND J.F., on behalf of their child, :
C.F., :
 :
RESPONDENTS. :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondent Board's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioner's exceptions essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ), again contending, inter alia, that the material facts establish that physical custody of C.F. was re-assumed by her father in May 1994 and C.F. is, therefore, not domiciled in the City of Summit.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that C.F. is a domiciliary of the City of Summit and is entitled to receive an education in Summit. The Commissioner concurs with the ALJ's

conclusion that the fact that C.F. temporarily resided with her father does not equate to being domiciled in the Township of Millburn.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision of the Office of Administrative Law and orders that the Board of Education of the City of Summit provide to C.F., the child of respondents M.F. and J.F., those educational and related services to which she is entitled.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

326-95

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION :
OF THE BOROUGH OF PALISADES PARK, :
BERGEN COUNTY. :

AND

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH :
OF PALISADES PARK, BERGEN COUNTY, :

DECISION

PETITIONER, :

V. :

DR. ANTHONY SCALZO, BERGEN COUNTY :
SUPERINTENDENT OF SCHOOLS, NEW :
JERSEY STATE DEPARTMENT OF :
EDUCATION, :

RESPONDENT. :

SYNOPSIS

Board appealed General Fund cap waiver in the amount of \$892,137 rejected by the voters at the annual school election. \$643,887 of this amount had been found necessary for provision of a thorough and efficient system of education (T & E) by the County Superintendent prior to the election, while \$248,250 had not.

Upon review of the record, which included documentation not provided to the County Superintendent at the time of initial review, Commissioner determined that full amount of request was necessary for T & E and ordered an increase of \$892,137 in cap waiver monies for a total General Fund tax levy of \$10,312,185 for the 1995-96 school year. However, based on evidence of haphazard, inefficient fiscal practices and procedures, Commissioner also directed Board to make, in consultation with the County Superintendent and Office of Finance, such reformatations as were necessary to properly carry out its constitutional and statutory mandates and avert the need for more formal intervention by the Commissioner.

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION :
OF THE BOROUGH OF PALISADES PARK, :
BERGEN COUNTY. :

AND

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH :
OF PALISADES PARK, BERGEN COUNTY, :

DECISION

PETITIONER, :

V. :

DR. ANTHONY SCALZO, BERGEN COUNTY :
SUPERINTENDENT OF SCHOOLS, NEW :
JERSEY STATE DEPARTMENT OF :
EDUCATION, :

RESPONDENT. :

For the Board of Education, Smith, Don, Alampi & D'Argenio (Peter J. Scandariato, Esq.)

For the Borough of Palisades Park, Marie D. Russo, Borough Clerk

For the State, Deborah T. Poritz, Attorney General (Geraldine Callahan, DAG)

This consolidated matter was initially opened before the Commissioner of Education on April 3, 1995, through the filing of a Petition of Appeal by the Palisades Park Board of Education (Board), seeking to appeal the County Superintendent's determination that certain line items submitted to him as part of a proposed voter cap waiver were not necessary for the District to provide a thorough and efficient system of education (T & E). Subsequently, on May 18, 1995, in the wake of the Board's cap waiver proposal having been defeated by the voters at the annual school election, the Board filed an appeal of that portion of the cap waiver proposal which had been approved by the County Superintendent as necessary for T & E.

PROCEDURAL HISTORY

In March 1995, the Board advised the County Superintendent that, in addition to a need to exceed the maximum permissible expenditure level in its general fund budget through the granting of a "Commissioner cap waiver" pursuant to N.J.S.A. 18A:7D-28(e), the Board would also need a "voter cap waiver" pursuant to N.J.S.A. 18A:7D-28(f) in order to be able to provide for T & E in the District. Following a series of meetings and discussions to correct technical and other problems with the Board's submissions, the County Superintendent ultimately determined, by way of letter dated March 21, 1995, and more specifically by letter dated March 27, 1995, that \$643,887 of the Board's proposed \$892,137 voter cap waiver was necessary for T & E, and therefore appealable in the event of voter defeat, but that the remaining \$248,250 was not. Accordingly, on April 3, 1995, the Board filed the within appeal of the non-T & E determination, which appeal was held in abeyance pending the outcome of the annual school election, as such outcome might have rendered the appeal moot if the voters had approved the Board's cap waiver question in its entirety as presented on the ballot.

At the annual school election on April 18, 1995, the Board submitted a proposed General Fund tax levy question of \$9,420,048, as well as its proposed cap waiver question of \$892,137 (representing the total of both T & E and non-T & E amounts), to the voters of Palisades Park; both questions were defeated by the voters. Pursuant to N.J.S.A. 18A:22-37, the Mayor and Council reviewed the defeated budget, but determined to certify the full amount of tax levy proposed by the Board. Accordingly, there being no governing body reductions at issue, on May 18, 1995, the Board filed the within appeal of the voters' action on the T & E portion of its cap waiver question.

On May 23, 1995, the Mayor and Council of the Borough of Palisades Park filed a response to the Board's T & E petition, contending that the cap waiver requested by the Board should be reduced by a total of \$205,694 in three specified line items. On July 7, 1995, the Deputy Attorney General (DAG) filed an answer on behalf of the County Superintendent, contending that his determination with respect to non-T & E line items was correct and proper in all respects.

On June 5, 1995, the County Superintendent submitted his affidavit and supporting documents attesting to the process that led to his conclusion, and that of the

Department of Education's Cap Waiver Review Panel, that the cap waiver funds finally approved were both necessary for T & E and unable to be reallocated from within the base budget. These funds included both a Commissioner cap waiver in the amount of \$227,568 pursuant to N.J.S.A.18A:7D-28(e), which represented a reduction of the Board's original request of \$285,568, and \$643,887 of the Board's requested voter cap waiver as described above. Also included was an explanation of the Department's determination that \$248,250 of the Board's cap waiver request was not necessary for T & E. No replies to this filing were made by the parties.

In addition, as the parties had previously been advised by letter from the Assistant Commissioner, dated April 7, 1995, and distributed through the County Superintendent to boards and municipalities experiencing budget defeats, as part of the record of the within appeal, the Commissioner took official notice of the Board's revised budget and its June 30 financial report, the latter for the purpose of identifying whether the Board underestimated in its 1995-96 budget the amount of anticipated undesignated surplus.

On July 24, 1995, the Acting Director of the Bureau of Controversies and Disputes wrote to the parties, indicating that the two within appeals would be consolidated for decision and establishing a schedule for submission of position statements and replies, so that the record of the consolidated appeal would close upon receipt of such submissions or expiration of the time for their filing. The Board's position statement was duly submitted on August 10, 1995, and the period for responses expired on August 18, 1995.

On that same date, the County Superintendent submitted an amendment to his prior affidavit, setting forth changed circumstances with respect to his rejection of one line item (special education transportation) as not necessary for T & E. No replies to this affidavit were filed by the parties, and upon expiration of the period for such filing, the record of this matter was deemed closed.

The amounts in dispute in this appeal are thus as follows:

<u>Tax Levy Proposed by Board</u>		<u>Tax Levy Certified by Township</u>	
General Fund	\$9,420,048	General Fund	\$9,420,048
<u>Amount of Reduction by Township</u>		<u>Amount of Reduction in Dispute</u>	
General Fund	\$ -0-	General Fund	\$ -0-

Amount of Cap Waiver Approved as T & E and Appealed Herein

\$ 643,887

Amount of Cap Waiver Not Approved as T & E and Appealed Herein

\$ 248,250

TOTAL AMOUNT ON APPEAL: \$ 892,137

The cap waiver requested by the Board included the following line items, which were determined by the County Superintendent to be necessary, or not necessary, for T & E as set forth below:

Necessary for T & E

<u>Account Title</u>	<u>Account Number</u>	<u>Dollar Amount</u>
Textbooks	11-190-100-640	\$ 143,490
School Sponsored Co.Curr. Instr. Salary	11-401-100-100	180,962
School Sponsored Co.Curr. Instr. Supplies	11-401-100-600	22,340
General Supplies	11-190-100-610	157,000
Undistr. Exp.- Ed. Media/Lib. Salary	11-000-222-100	113,741
Undistr. Exp.- Ed. Media/Lib. Supplies	11-000-222-600	<u>26,354</u>
		\$ 643,887

Not Necessary for T & E

Contracted Services-Between Home/Sch.	11-000-270-511	\$ 217,250
Salaries of Principals/Asst. Principals	11-000-240-103	<u>31,000</u>
		\$ 248,250
TOTAL WAIVER REQUEST:		\$ 892,137

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line-item reduction imposed by the governing

body is necessary for the provision of a thorough and efficient system of education. Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989). In addition, with respect to appeals involving cap waivers, before the Commissioner can direct restoration of any amount of a waiver defeated by the voters, the Commissioner must determine that such amount is both fully necessary for purposes of T & E and unable to be derived from further reallocation within the base budget. Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, Bergen County, State Board decision July 7, 1993; Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater, Bergen County, and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, Bergen County, State Board Decision July 6, 1994.

Mindful, then, of the standards to be applied, the Commissioner makes the specific determinations set forth below.

COMMISSIONER'S DETERMINATION

By way of introduction, the Commissioner notes the Board's contention that, even with all requested cap monies, its budget is a bare-bones, no-frills plan which will admit of no reduction whatsoever without risk of deficit or loss of T & E. The Board further comments on the District's fiscal and programmatic status for the past few years, noting a three-year history of underfunding, a deficit in the operating budget during 1994-95 (remedied only by sale of real property which allowed it to realize a one-time infusion of revenue), the complete absence of any surplus, the fact that programs and staffing are essentially at maintenance level, notwithstanding significant increases in student population and levels of special need, and the fact that per pupil expenditures are well below state averages. These comments appear to be borne out by the Board's supporting documentation and the papers filed by the County Superintendent regarding the cap waiver review process. Moreover, nothing in the Mayor and Council's submission would suggest that the Borough disagrees with the Board's overall characterization of the District's fiscal and programmatic situation, notwithstanding that it has contested the need for three of the Board's proposed cap waiver line items herein.

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount</u>
2690	11-190-100-640	Textbooks	\$143,490

The Board notes that this amount represents the District's entire appropriation for textbooks, covering the cost of replacing damaged and obsolete books, increased publishers' charges and needs resulting from increased enrollments. Without approval of the requested waiver, the Board contends, students will be forced to share or use inappropriate books. The Board further argues that the amount requested represents an increase of only \$500 [sic] over 1994-95 levels. The Mayor and Council raise no objection to this appropriation, which was approved by the County Superintendent.

Upon review of the record, the Commissioner finds that this amount has been proven necessary for T & E, but notes for purposes of accuracy that it represents an increase of \$5,000 (not \$500) over 1994-95 levels.

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount</u>
6030	11-401-100-100	Cocurricular Instructional Salaries	\$180,962
6050	11-401-100-600	Cocurricular Instructional Supplies	\$ 22,340

The Board argues that these funds are needed to avoid cancellation of all existing cocurricular programs such as sports, clubs and special organizations. These activities are particularly important to Palisades Park, which is a multicultural community with a very high proportion of disaffected, ESL and at-risk students, and are a vital part of the District's inclusion program. Participation in cocurricular activities, which are carefully supervised by advisors and coaches for maximum educational benefit, has dramatically reduced violence and vandalism and has presented opportunities for scholarships based on athletics, forensics and the like.

While the County Superintendent approved these amounts in full, the Mayor and Council argue that at least some of the items in the supplies account can be deferred, so that the Board's waiver request in this area should not be granted.

Upon review, the Commissioner finds that the Board has demonstrated the need for maintenance of its cocurricular programming in order to adequately meet the needs of its student population. The Commissioner notes that the cap waiver salary amount represents the District's entire appropriation for this area and is level with 1994-95 expenditures, while the supplies account, funded by \$70,622 in the base budget, is held at 1994-95 levels even with the

addition of the requested cap monies. Therefore, the Commissioner approves these appropriations as necessary for maintenance of T & E.

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount</u>
2680	11-190-100-610	General Supplies	\$157,000

While acknowledging that this amount represents an increase of \$23,707 over 1994-95 expenditures, the Board argues that it is both a small increase in the context of the overall budget and merely reflects a return to 1993-94 levels after a year of severe underfunding. The Board further contends that these amounts are fully necessary to maintain existing service levels, due to increased costs for at-risk, ESL and special education students, and to increased costs from suppliers. The account also includes monies to cover projected enrollment increases, an increased need for HSPT and EWT remediation materials, and items such as student workbooks. The Board notes that its costs in the area of remediation have nearly doubled over the past 4-5 years, and that its student population has risen by almost 400 pupils in the same period.

The Mayor and Council object to granting of this appropriation, which was approved in full by the County Superintendent, as they contend that the account includes numerous items which are not necessary for T & E, and that elimination of some purchases and deferral of others will not compromise the District's ability to meet its constitutional mandate.

Upon review, the Commissioner notes that the requested cap waiver amount represents the district's entire general supplies budget, that the amount at issue is not unreasonable for a district of Palisades Park's size and configuration, and that the Mayor and Council have recommended elimination of the entire account without specifying what items therein are not necessary for T & E or how the remaining items are to be funded should the Commissioner not grant the Board's request for waiver. Under the circumstances, and in view of the County Superintendent's endorsement of the amount needed, the Commissioner finds that these monies are necessary for T & E and approves their inclusion within the Board's budget. However, the Commissioner also notes that the Board appears to be budgeting all instructional supplies in this single account, rather than budgeting supply appropriations by program (i.e., regular, at-risk, bilingual, etc.), and directs that it conform future budgets to proper coding requirements.

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount</u>
6850	11-000-222-100	Undistr. Expend. - Ed. Media/Library Salary	\$113,741
6880	11-000-222-600	Undistr. Expend. - Ed. Media/Library Supplies	\$ 26,354

The Board notes that all monies for operation of its elementary and high school libraries are contained in these cap waiver accounts, with salaries representing the cost of only one certified specialist in each school and supplies being the bare minimum for maintenance of services. If monies are not provided as requested, the Board argues, it will be forced to close its libraries/media centers, as well as reassign tenured staff, notwithstanding that prior budget limitations have already resulted in rified library/media staff displacing four highly valued, but nontenured, classroom teachers.

The Mayor and Council contend that items in the supplies account can be eliminated or deferred without impairing the District's ability to provide T & E, so that the Commissioner should not include them in any waiver granted, notwithstanding the County Superintendent's approval.

Upon review, the Commissioner finds that the services funded by these accounts are necessary for T & E, and that the Board has kept expenditures at maintenance of already modest levels. As with general supplies, the Mayor and Council have recommended elimination of the entire supplies account without specifying what items therein are not necessary for T & E. Similarly, under the circumstances and in view of the County Superintendent's endorsement of the amount needed, the Commissioner finds that the monies in both accounts are necessary for T & E and accordingly approves their inclusion within the Board's budget.

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount</u>
7260	11-000-270-511	Contracted Serv.-Between Home/School	\$217,250

The Board argues that this area was substantially underfunded in the 1994-95 budget, based on an anticipated decrease in the number of special education students requiring transportation which did not materialize as expected. To the contrary, due to the arrival of new students with severe handicaps, the actual amount expended in 1994-95 was in excess of \$300,000, notwithstanding that only \$146,128 had been budgeted. In 1995-96, the Board will be required to transport 53 special education students for 183 days at a daily cost of \$37, for a total cost of \$363,303, including \$4,440 in summer costs due to 6 IEP mandates. The Board

contends that these costs will have to be paid regardless of the outcome of the instant appeal, and that doing so in the absence of the requested additional funds will result in cuts to other programs which are already at bare-bones levels.

The County Superintendent had initially found that this amount was not necessary for T & E, based on the documentation submitted by the Board at the time of review. There is also evidence in the record that the review panel, in rejecting the Board's request, may have erroneously believed that these monies duplicated funds found elsewhere in the budget. However, in his amended affidavit, the County Superintendent reviewed documentation newly presented to him by the Board, essentially the documentation brought to the record in this appeal, and found that the monies in this line item were indeed necessary for T & E and could not be reallocated from elsewhere in the budget.

Upon review, the Commissioner finds that, notwithstanding the Board's initial failure to properly document the need for this item, the Board has now fully demonstrated its necessity in order to provide for T & E. Accordingly, the Board's request for waiver is granted.

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount</u>
7010	11-000-240-103	Salaries of Principals/Asst. Principals	\$ 31,000

The Board states that administrative salaries were frozen in 1994-95, with a contractual promise of two years' increase in 1995-96. The monies in this account are thus needed to pay these contractual obligations, and failure to obtain them on waiver will result in other accounts being reduced to accommodate payment.

The County Superintendent and Cap Waiver Review Panel recommended that this amount be reallocated from within the base budget based on what appeared to be a rather large proposed increase over 1994-95 expenditures in line 7030 (salaries of secretarial and clerical assistants).

Upon review, the Commissioner notes a 1% increase in comparing 1994-95 expenditures in the two administrative salary accounts to 1993-94 expenditures, while proposed 1995-96 appropriations (base plus cap) reflect an increase of 5.4%, an amount which appears to be reasonable given that it covers a two-year period. Thus, the Commissioner cannot agree that the Board will be able to reallocate monies from other administrative accounts, notably line 7030, and still meet the contractual raise obligations required to be funded from line 7010.

Accordingly, the Commissioner grants the requested waiver. In making this determination, however, the Commissioner also notes that, once again, the arguments and documentation submitted to the County Superintendent and Cap Waiver Review panel during the initial T & E assessment were not sufficient to have warranted a different result at that time.

APPLICATION OF SURPLUS

In its advertised annual school district budget statement, the Board projected no unreserved surplus and, consequently, allocated no surplus as revenue. The Board's annual financial report filed pursuant to N.J.S.A. 18A:17-10 (June 30 Board Secretary's report) reveals that there is, in fact, no meaningful fund balance available as of that date; indeed, the District appears close to deficit status.

Based on the above, subject to verification through the Board's 1994-95 annual year-end audit report, the Commissioner determines that no allocation from surplus is possible to fund any of the line-item appropriations approved herein as necessary for T & E.

SUMMARY

In summary, the Commissioner finds that the full \$892,137 appealed by the Board herein has now been shown to be necessary for provision of a thorough and efficient system of education in the District, and further, that the monies in question cannot be derived from reallocation within the General Fund budget. The Commissioner additionally notes that all line-item waivers to expenditure limitations granted herein, as summarized below, represent restricted appropriations in accordance with N.J.A.C. 6:20-2A.11(b)3.

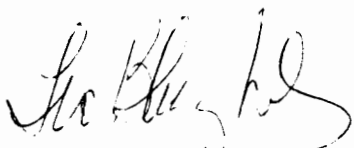
<u>Account Title</u>	<u>Account Number</u>	<u>Amount Necessary</u>	<u>Not Necessary</u>
Textbooks	11-190-100-640	\$ 143,490	\$ -0-
Co. Curr. Instr. Salary	11-401-100-100	180,962	-0-
Co. Curr. Instr. Supplies	11-401-100-600	22,340	-0-
General Supplies	11-190-100-610	157,000	-0-
Ed. Media/Lib. Salary	11-000-222-100	113,741	-0-
Ed. Media/Lib. Supplies	11-000-222-600	26,354	-0-
Contr. Serv.- Home/Sch.	11-000-270-511	217,250	-0-
Principals/Asst. Princ. Sal.	11-000-240-103	<u>31,000</u>	<u>-0-</u>
Total Line-Item Determinations:		\$ 892,137	\$ -0-

Tax Levy Certified by Governing Body:	\$ 9,420,048
Line Items Approved for Cap Waiver:	892,137
Amount of Cap Waiver to be Funded by Surplus:	<u>(-0-)</u>
Total Tax Levy for 1995-96:	\$10,312,185

In so ruling, however, the Commissioner must observe that the Board has brought to the record of this appeal much information that was not supplied to the County Superintendent at the time of his initial review, even though such information was available and should have been presented at that time. In addition, the record overall is replete with indications, much of it from the Board's own submissions, that the District's budgeting and fiscal practices are haphazard and inefficient at best, a circumstance which contributed materially to the difficulty experienced by the County Superintendent and Review Panel in their attempts to carry out the State's budgetary review obligations, and one which cannot be tolerated if the District is to meet the constitutional and statutory mandates with which it has been entrusted. The Board must, therefore, promptly take whatever steps are necessary to ensure that its practices and procedures are reformed to this end.

Accordingly, the Bergen County Board of Taxation is directed to make the necessary adjustment as set forth above, subject to verification of surplus amounts through the year-end audit, to reflect a total of \$10,312,185 to be raised in tax levy for General Fund purposes of the Palisades Park Board of Education for the 1995-96 school year. The Board of Education is, in turn, directed to confer with the County Superintendent and the Department of Education's Office of Finance, and, in accordance with their instructions, to reform its fiscal practices and procedures, so that it will henceforth be able to properly meet its governmental and educational obligations and avert the need for more formal intervention by the Commissioner.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

SEPTEMBER 1, 1995

DATE OF MAILING SEPTEMBER 1, 1995

327-95

DONALD S. MC CORD, JR., :

PETITIONER, :

:

V. :

COMMISSIONER OF EDUCATION

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

DECISION

RESPONDENT. :

:

:

:

OAL DKT. NO. EDU 10161-94

DONALD S. MC CORD, JR., :
PETITIONER, :
 :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP : DECISION
OF RANDOLPH, MORRIS COUNTY, :
RESPONDENT. :
 :
 :
_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

SEPTEMBER 7, 1995
DATE OF MAILING SEPTEMBER 7, 1995

328-95

ROBERT J. DARIA,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
SOUTHERN REGIONAL HIGH SCHOOL	:	
DISTRICT, OCEAN COUNTY,	:	
	:	
RESPONDENT.	:	

SEPTEMBER 7, 1995

OAL DKT. NO. EDU 879-95

ROBERT J. DARIA, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
SOUTHERN REGIONAL HIGH SCHOOL
DISTRICT, OCEAN COUNTY, :
RESPONDENT. :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

SEPTEMBER 7, 1995

DATE OF MAILING SEPTEMBER 7, 1995

329-95

VALERIE EDWARDS, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP
OF NEPTUNE, MONMOUTH COUNTY, :

DECISION

RESPONDENT. :

_____ :

September 7, 1995

OAL DKT. NO. EDU 7650-94

VALERIE EDWARDS, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP :
OF NEPTUNE, MONMOUTH COUNTY, : DECISION
RESPONDENT. :
_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

SEPTEMBER 7, 1995

DATE OF MAILING SEPTEMBER 7, 1995

330-95

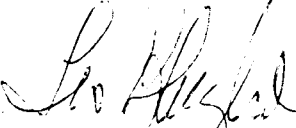
IN THE MATTER OF THE TENURE	:	
HEARING OF RUTH DESMOND,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
LONG BRANCH, MONMOUTH COUNTY.	:	

OAL DKT. NO. EDU 5245-94

IN THE MATTER OF THE TENURE :
HEARING OF RUTH DESMOND, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
LONG BRANCH, MONMOUTH COUNTY. :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
 SCHOOL DISTRICT OF MONROE : DECISION
 TOWNSHIP, GLOUCESTER COUNTY. :
 _____ :

SYNOPSIS

Petitioner, defeated candidate for Board membership, alleged there were improprieties and violations of law in the conduct of the school election.

ALJ found that some of the ballots used in the election in question were printed in a manner where a candidate's name did not line up exactly with the line on the punch machine used in voting on these ballots. ALJ found, however, that voters who punched position four on the ballot for petitioner had their vote counted for petitioner when the ballot was run through the computer, even if the punch mark did not line up exactly with line four. ALJ concluded petitioner did not receive sufficient number of votes to be elected to the Board. ALJ noted that better quality control was necessary in the printing of the ballots. Petition was dismissed.

Commissioner adopted findings and determination in the initial decision, but admonished the Board to accomplish better quality control in the printing of its ballots in future school board elections.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION DISMISSAL

OAL DKT. NO. EDU 4704-95

AGENCY DKT. NO. 132-4/95

W. LARRY COOPER, SR.,

Petitioner,

v.

MONROE TOWNSHIP

BOARD OF EDUCATION,

Respondent,

or

**AN INQUIRY INTO THE ANNUAL
SCHOOL ELECTION MONROE
TOWNSHIP, GLOUCESTER COUNTY.**

W. Larry Cooper, Sr., petitioner, *pro se*

Walter Marshall, Jr., Solicitor, for respondent

Record closed: July 10, 1995

Decided: August 2, 1995

BEFORE ROBERT W. SCOTT, ALJ:

An annual school board election was held in Monroe Township, Gloucester County, on April 18, 1995. W. Larry Cooper, Sr., the petitioner, was a candidate for the School Board during this election. There were eight candidates running for three positions on the school Board. The petitioner and another candidate were tied for the fourth highest number of votes. Therefore, the petitioner was not elected to office as a member of the school board. On April 24, 1995, the petitioner filed a petition with the Commissioner of Education challenging the election. On May 10, 1995, the matter was transmitted to the Office of Administrative Law for determination as a contested case. A hearing was held on July 10, 1995, in the Office of the Gloucester County Board of Elections in Woodbury, New Jersey.

In addition to the petitioner and counsel, also present at the hearing were Robert W. LaPorta, Superintendent of Schools, Monroe Township; Daniel V. Bevilacqua, Business Administrator, Gloucester County Superintendent's Office; Elizabeth Rennebauh, Secretary, Monroe Township Board of Education; Bernard V. Hines and Loretta Remert, election challengers for the petitioner.

During the course of the hearing, the petitioner recited his concerns about the April 18, 1995, school election in Monroe Township. His complaint concerned the voting at the Oak Knoll gymnasium polling place. According to the petitioner, his challengers informed him that ballots were being punched and it was difficult to determine who the voters had voted for. There were also complaints that many voters were having difficulty aliening their ballots on one of the voting punch machine and that one of the punch machines fell on the floor. The petitioner also represented that outside the gymnasium many voters told him that when they voted for him, the punch mark on the ballot showed up on the line between the petitioner's name and another candidate's name. Further, other voters told him that they used more than one ballot in trying to line up the punch mark with the petitioner's name. Some voters, after attempting to use two ballots, gave up without voting. Further, challengers for the petitioner stated that possibly as many as fifty voided ballots were lying on the table or in boxes in the polling area, and these ballots had been voided because voters could not align them properly on the punch machine.

During the course of the hearing, the petitioner and the school board solicitor had an opportunity to examine all ballots from District Two, the district voting at the Oak Knoll gymnasium and they identified ballots where the punch mark fell below the area on the ballot where one voted for the petitioner. The undersigned also heard the testimony of Mark A. Harris, a computer specialist in electronic data processing for the Gloucester County Board of Elections. It is was Mr. Harris's testimony that voters in Gloucester County vote on what I describe as an IBM punch card. These cards are placed in punch machines where the voter pushes a lever punching a square hole in the ballot. Mr. Harris acknowledged that in the 1995 school election in Gloucester County, some ballots, when placed in punch machines, the names of candidates did not line up with the positions on the punch machines. However, when the cards, or votes, were counted by the computer at the Board of Elections, votes would register according to the candidate's position on the ballot. It was agreed by the petitioner that his position on the ballot was number four. Mr. Harris testified that even if the punch mark was not entirely in the petitioner's area on the ballot, it would still be counted by the computer as a vote for position four, the petitioner's position on the ballot.

Based upon the evidence before me, I **FIND** that some of the ballots used in the election in question were printed in a manner where a candidate's name did not line up exactly with the line on the punch machine used in voting on these ballots. However, any voter wishing to vote for the petitioner would have had to punch position four on the ballot to vote for the petitioner and no matter where that punch mark showed up on the ballot, it was counted as a vote for the petitioner when the ballot was run through the computer. I further **FIND** that the petitioner received 625 votes. Three other candidates for the school board received more than 625 votes.

I **CONCLUDE** that the petitioner did not receive a sufficient number of votes to be elected to the Monroe Township Board of Education. However, all parties involved in this hearing agreed that better quality control was necessary in the printing of the ballots for the school board election. Hopefully, this will be accomplished in future elections. Further, it is unfortunate that some of the voters, especially those who voted for or wished to vote for the petitioner, may have believed that their vote was not counted because the punch mark did not line

up with the petitioner's name on the ballot. It is also unfortunate that some of these voters may have had to use more than one ballot and may have given up on voting after their second attempt.

The undersigned would also be amiss in not commenting on the graciousness of the petitioner in accepting a somewhat informal manner in which the above proceeding was conducted. He assured the undersigned, as well as those present, that his purpose in this proceeding was not to overturn the results of the election, but was to insure that the complaints which he had received about the voting received attention and could be corrected in the future.

It is, therefore, **ORDERED** that the petitioner's petition challenging the above election be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Aug 2, 1995
DATE

Robert W. Scott
ROBERT W. SCOTT, ALJ

Receipt Acknowledged:

8/4/95
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 10 1995
DATE

Jeff S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sf

WITNESSES

Mark A. Harris, Computer Specialist, Gloucester County Board of Elections

EXHIBITS:

- C-1 Petition
- C-2 Results 1995 Gloucester County School Board election
- C-3 Ballots District Two for Monroe Township Board of Education


IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF MONROE : DECISION
TOWNSHIP, GLOUCESTER COUNTY. :
_____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner agrees with the findings and conclusions of the Administrative Law Judge (ALJ) that the within record does not substantiate that the irregularities found to have occurred in this matter affected the outcome of the election within the meaning of that standard as long interpreted by the courts.

Accordingly, for the reasons expressed therein, the Commissioner affirms the initial decision of the Office of Administrative Law dismissing the instant Petition of Appeal, but admonishes the Board to accomplish better quality control in the printing of its ballots in future school board elections.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

SEPTEMBER 7, 1995

DATE OF MAILING SEPTEMBER 11, 1995

IN THE MATTER OF THE :
TENURE HEARING OF ALICE SMITH, :
STATE-OPERATED SCHOOL DISTRICT : COMMISSIONER OF EDUCATION
OF THE CITY OF PATERSON, PASSAIC : DECISION
COUNTY. :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11975-94

AGENCY DKT. NO. 455-11/94

**IN THE MATTER OF THE
TENURE HEARING OF ALICE SMITH,
STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF PATERSON**

Gregory G. Johnson, Esq., for petitioner Paterson School District

Louis P. Bucceri, Esq., for respondent Alice Smith (Bucceri & Pincus, attorneys)

Record Closed: July 26, 1995

Decided: August 9, 1995

BEFORE EDITH KLINGER, ALJ:

On December 13, 1994, this matter was transmitted to the Office of Administrative Law as a contested case pursuant to *N.J.S.A. 52:14F-1 to -15* and *N.J.S.A. 52:14F-1 to -13*. A prehearing conference held on March 8, 1995 and a hearing was scheduled on June 27, 1995.

Prior to the hearing date, the parties advised the undersigned that this matter had been resolved. On July 26, 1995, the parties submitted the attached Settlement Agreement indicating the terms of settlement which are incorporated herein by reference.

I have reviewed the record and the settlement terms and I **FIND**:

1. The parties have voluntarily agreed to the settlement, as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 9, 1995
DATE:

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

8 / 11 / 95
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 16 1995
DATE

Jeff S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

md

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
Jul 26 11 27 AM '95

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(201) 773-5665
Counsel for Respondent

IN THE MATTER OF THE TENURE :	BEFORE THE COMMISSIONER
HEARING OF ALICE SMITH, :	OF EDUCATION/OFFICE OF
STATE-OPERATED SCHOOL :	ADMINISTRATIVE LAW
DISTRICT OF THE CITY :	AGENCY REF. NO. 455-11/94
OF PATERSON. :	O.A.L. DOCKET NO. EDU 11975-94N
-----	SETTLEMENT AGREEMENT

The parties hereby stipulate and agree as follows:

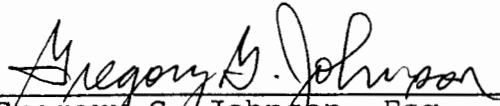
1. Alice Smith, after being afforded the advice of counsel, agrees to withdraw her answer, defense, and denial of the charge of excessive absenteeism. She understands that the result of this is:

- a) The charge of excessive absenteeism is sustained;
- b) She is dismissed from the position of secretary in the State-Operated School District of the City of Paterson; and
- c) Her tenure rights are terminated.

2. The District agrees to withdraw and dismiss all charges against Alice Smith except for the charge of excessive absence.

3. The District agrees to pay Alice Smith her regular salary through August 31, 1995.

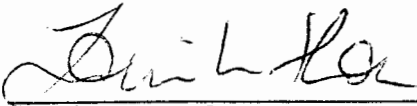
4. This settlement does not constitute an admission by Alice Smith as to any charge except the charge of excessive absenteeism.



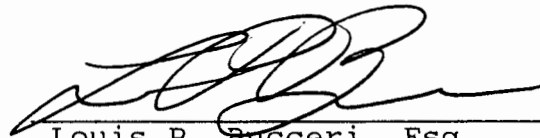
Gregory G. Johnson, Esq.
Attorney for Petitioner,
State-Operated School
District of the City
of Paterson



Alice Smith, Respondent



Louis M. Flora, Esq.
General Counsel, State-
Operated School District
of the City of Paterson



Louis P. Bucceri, Esq.
Attorney for Respondent
6/26/95

IN THE MATTER OF THE :
 TENURE HEARING OF ALICE SMITH, :
 STATE-OPERATED SCHOOL DISTRICT : COMMISSIONER OF EDUCATION
 OF THE CITY OF PATERSON, PASSAIC : DECISION
 COUNTY. :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.


 COMMISSIONER OF EDUCATION

SEPTEMBER 7, 1995

DATE OF MAILING SEPTEMBER 11, 1995

326-95

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION :
OF THE BOROUGH OF PALISADES PARK. :
BERGEN COUNTY. :

AND

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH :
OF PALISADES PARK, BERGEN COUNTY, :

DECISION

PETITIONER, :

V. :

DR. ANTHONY SCALZO, BERGEN COUNTY :
SUPERINTENDENT OF SCHOOLS, NEW :
JERSEY STATE DEPARTMENT OF :
EDUCATION. :

RESPONDENT. :

_____ :

SYNOPSIS

Board appealed General Fund cap waiver in the amount of \$892,137 rejected by the voters at the annual school election. \$643,887 of this amount had been found necessary for provision of a thorough and efficient system of education (T & E) by the County Superintendent prior to the election, while \$248,250 had not.

Upon review of the record, which included documentation not provided to the County Superintendent at the time of initial review, Commissioner determined that full amount of request was necessary for T & E and ordered an increase of \$892,137 in cap waiver monies for a total General Fund tax levy of \$10,312,185 for the 1995-96 school year. However, based on evidence of haphazard, inefficient fiscal practices and procedures, Commissioner also directed Board to make, in consultation with the County Superintendent and Office of Finance, such reformations as were necessary to properly carry out its constitutional and statutory mandates and avert the need for more formal intervention by the Commissioner.

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION :
OF THE BOROUGH OF PALISADES PARK, :
BERGEN COUNTY. :

AND

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH :
OF PALISADES PARK, BERGEN COUNTY, :

DECISION

PETITIONER, :

V. :

DR. ANTHONY SCALZO, BERGEN COUNTY :
SUPERINTENDENT OF SCHOOLS. NEW :
JERSEY STATE DEPARTMENT OF :
EDUCATION. :

RESPONDENT. :

For the Board of Education, Smith, Don, Alampi & D'Argenio (Peter J. Scandariato, Esq.)

For the Borough of Palisades Park, Marie D. Russo, Borough Clerk

For the State, Deborah T. Poritz, Attorney General (Geraldine Callahan, DAG)

This consolidated matter was initially opened before the Commissioner of Education on April 3, 1995, through the filing of a Petition of Appeal by the Palisades Park Board of Education (Board), seeking to appeal the County Superintendent's determination that certain line items submitted to him as part of a proposed voter cap waiver were not necessary for the District to provide a thorough and efficient system of education (T & E). Subsequently, on May 18, 1995, in the wake of the Board's cap waiver proposal having been defeated by the voters at the annual school election, the Board filed an appeal of that portion of the cap waiver proposal which had been approved by the County Superintendent as necessary for T & E.

PROCEDURAL HISTORY

In March 1995, the Board advised the County Superintendent that, in addition to a need to exceed the maximum permissible expenditure level in its general fund budget through the granting of a "Commissioner cap waiver" pursuant to N.J.S.A. 18A:7D-28(e), the Board would also need a "voter cap waiver" pursuant to N.J.S.A. 18A:7D-28(f) in order to be able to provide for T & E in the District. Following a series of meetings and discussions to correct technical and other problems with the Board's submissions, the County Superintendent ultimately determined, by way of letter dated March 21, 1995, and more specifically by letter dated March 27, 1995, that \$643,887 of the Board's proposed \$892,137 voter cap waiver was necessary for T & E, and therefore appealable in the event of voter defeat, but that the remaining \$248,250 was not. Accordingly, on April 3, 1995, the Board filed the within appeal of the non-T & E determination, which appeal was held in abeyance pending the outcome of the annual school election, as such outcome might have rendered the appeal moot if the voters had approved the Board's cap waiver question in its entirety as presented on the ballot.

At the annual school election on April 18, 1995, the Board submitted a proposed General Fund tax levy question of \$9,420,048, as well as its proposed cap waiver question of \$892,137 (representing the total of both T & E and non-T & E amounts), to the voters of Palisades Park: both questions were defeated by the voters. Pursuant to N.J.S.A. 18A:22-37, the Mayor and Council reviewed the defeated budget, but determined to certify the full amount of tax levy proposed by the Board. Accordingly, there being no governing body reductions at issue, on May 18, 1995, the Board filed the within appeal of the voters' action on the T & E portion of its cap waiver question.

On May 23, 1995, the Mayor and Council of the Borough of Palisades Park filed a response to the Board's T & E petition, contending that the cap waiver requested by the Board should be reduced by a total of \$205,694 in three specified line items. On July 7, 1995, the Deputy Attorney General (DAG) filed an answer on behalf of the County Superintendent, contending that his determination with respect to non-T & E line items was correct and proper in all respects.

On June 5, 1995, the County Superintendent submitted his affidavit and supporting documents attesting to the process that led to his conclusion, and that of the

Department of Education's Cap Waiver Review Panel, that the cap waiver funds finally approved were both necessary for T & E and unable to be reallocated from within the base budget. These funds included both a Commissioner cap waiver in the amount of \$227,568 pursuant to N.J.S.A.18A:7D-28(e), which represented a reduction of the Board's original request of \$285,568, and \$643,887 of the Board's requested voter cap waiver as described above. Also included was an explanation of the Department's determination that \$248,250 of the Board's cap waiver request was not necessary for T & E. No replies to this filing were made by the parties.

In addition, as the parties had previously been advised by letter from the Assistant Commissioner, dated April 7, 1995, and distributed through the County Superintendent to boards and municipalities experiencing budget defeats, as part of the record of the within appeal, the Commissioner took official notice of the Board's revised budget and its June 30 financial report, the latter for the purpose of identifying whether the Board underestimated in its 1995-96 budget the amount of anticipated undesignated surplus.

On July 24, 1995, the Acting Director of the Bureau of Controversies and Disputes wrote to the parties, indicating that the two within appeals would be consolidated for decision and establishing a schedule for submission of position statements and replies, so that the record of the consolidated appeal would close upon receipt of such submissions or expiration of the time for their filing. The Board's position statement was duly submitted on August 10, 1995, and the period for responses expired on August 18, 1995.

On that same date, the County Superintendent submitted an amendment to his prior affidavit, setting forth changed circumstances with respect to his rejection of one line item (special education transportation) as not necessary for T & E. No replies to this affidavit were filed by the parties, and upon expiration of the period for such filing, the record of this matter was deemed closed.

The amounts in dispute in this appeal are thus as follows:

<u>Tax Levy Proposed by Board</u>		<u>Tax Levy Certified by Township</u>	
General Fund	\$9,420,048	General Fund	\$9,420,048
<u>Amount of Reduction by Township</u>		<u>Amount of Reduction in Dispute</u>	
General Fund	\$ -0-	General Fund	\$ -0-

Amount of Cap Waiver Approved as T & E and Appealed Herein

\$ 643,887

Amount of Cap Waiver Not Approved as T & E and Appealed Herein

\$ 248,250

TOTAL AMOUNT ON APPEAL: \$ 892,137

The cap waiver requested by the Board included the following line items, which were determined by the County Superintendent to be necessary, or not necessary, for T & E as set forth below:

Necessary for T & E

<u>Account Title</u>	<u>Account Number</u>	<u>Dollar Amount</u>
Textbooks	11-190-100-640	\$ 143,490
School Sponsored Co.Curr. Instr. Salary	11-401-100-100	180,962
School Sponsored Co.Curr. Instr. Supplies	11-401-100-600	22,340
General Supplies	11-190-100-610	157,000
Undistr. Exp.- Ed. Media/Lib. Salary	11-000-222-100	113,741
Undistr. Exp.- Ed. Media/Lib. Supplies	11-000-222-600	<u>26,354</u>
		\$ 643,887

Not Necessary for T & E

Contracted Services-Between Home/Sch.	11-000-270-511	\$ 217,250
Salaries of Principals/Asst. Principals	11-000-240-103	<u>31,000</u>
		\$ 248,250
TOTAL WAIVER REQUEST:		\$ 892,137

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line-item reduction imposed by the governing

body is necessary for the provision of a thorough and efficient system of education. Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989). In addition, with respect to appeals involving cap waivers, before the Commissioner can direct restoration of any amount of a waiver defeated by the voters, the Commissioner must determine that such amount is both fully necessary for purposes of T & E and unable to be derived from further reallocation within the base budget. Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, Bergen County, State Board decision July 7, 1993; Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater, Bergen County, and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, Bergen County, State Board Decision July 6, 1994.

Mindful, then, of the standards to be applied, the Commissioner makes the specific determinations set forth below.

COMMISSIONER'S DETERMINATION

By way of introduction, the Commissioner notes the Board's contention that, even with all requested cap monies, its budget is a bare-bones, no-frills plan which will admit of no reduction whatsoever without risk of deficit or loss of T & E. The Board further comments on the District's fiscal and programmatic status for the past few years, noting a three-year history of underfunding, a deficit in the operating budget during 1994-95 (remedied only by sale of real property which allowed it to realize a one-time infusion of revenue), the complete absence of any surplus, the fact that programs and staffing are essentially at maintenance level, notwithstanding significant increases in student population and levels of special need, and the fact that per pupil expenditures are well below state averages. These comments appear to be borne out by the Board's supporting documentation and the papers filed by the County Superintendent regarding the cap waiver review process. Moreover, nothing in the Mayor and Council's submission would suggest that the Borough disagrees with the Board's overall characterization of the District's fiscal and programmatic situation, notwithstanding that it has contested the need for three of the Board's proposed cap waiver line items herein.

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount</u>
2690	11-190-100-640	Textbooks	\$143,490

The Board notes that this amount represents the District's entire appropriation for textbooks, covering the cost of replacing damaged and obsolete books, increased publishers' charges and needs resulting from increased enrollments. Without approval of the requested waiver, the Board contends, students will be forced to share or use inappropriate books. The Board further argues that the amount requested represents an increase of only \$500 [sic] over 1994-95 levels. The Mayor and Council raise no objection to this appropriation, which was approved by the County Superintendent.

Upon review of the record, the Commissioner finds that this amount has been proven necessary for T & E, but notes for purposes of accuracy that it represents an increase of \$5,000 (not \$500) over 1994-95 levels.

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount</u>
6030	11-401-100-100	Cocurricular Instructional Salaries	\$180,962
6050	11-401-100-600	Cocurricular Instructional Supplies	\$ 22,340

The Board argues that these funds are needed to avoid cancellation of all existing cocurricular programs such as sports, clubs and special organizations. These activities are particularly important to Palisades Park, which is a multicultural community with a very high proportion of disaffected, ESL and at-risk students, and are a vital part of the District's inclusion program. Participation in cocurricular activities, which are carefully supervised by advisors and coaches for maximum educational benefit, has dramatically reduced violence and vandalism and has presented opportunities for scholarships based on athletics, forensics and the like.

While the County Superintendent approved these amounts in full, the Mayor and Council argue that at least some of the items in the supplies account can be deferred, so that the Board's waiver request in this area should not be granted.

Upon review, the Commissioner finds that the Board has demonstrated the need for maintenance of its cocurricular programming in order to adequately meet the needs of its student population. The Commissioner notes that the cap waiver salary amount represents the District's entire appropriation for this area and is level with 1994-95 expenditures, while the supplies account, funded by \$70,622 in the base budget, is held at 1994-95 levels even with the

addition of the requested cap monies. Therefore, the Commissioner approves these appropriations as necessary for maintenance of T & E.

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount</u>
2680	11-190-100-610	General Supplies	\$157,000

While acknowledging that this amount represents an increase of \$23,707 over 1994-95 expenditures, the Board argues that it is both a small increase in the context of the overall budget and merely reflects a return to 1993-94 levels after a year of severe underfunding. The Board further contends that these amounts are fully necessary to maintain existing service levels, due to increased costs for at-risk, ESL and special education students, and to increased costs from suppliers. The account also includes monies to cover projected enrollment increases, an increased need for HSPT and EWT remediation materials, and items such as student workbooks. The Board notes that its costs in the area of remediation have nearly doubled over the past 4-5 years, and that its student population has risen by almost 400 pupils in the same period.

The Mayor and Council object to granting of this appropriation, which was approved in full by the County Superintendent, as they contend that the account includes numerous items which are not necessary for T & E, and that elimination of some purchases and deferral of others will not compromise the District's ability to meet its constitutional mandate.

Upon review, the Commissioner notes that the requested cap waiver amount represents the district's entire general supplies budget, that the amount at issue is not unreasonable for a district of Palisades Park's size and configuration, and that the Mayor and Council have recommended elimination of the entire account without specifying what items therein are not necessary for T & E or how the remaining items are to be funded should the Commissioner not grant the Board's request for waiver. Under the circumstances, and in view of the County Superintendent's endorsement of the amount needed, the Commissioner finds that these monies are necessary for T & E and approves their inclusion within the Board's budget. However, the Commissioner also notes that the Board appears to be budgeting all instructional supplies in this single account, rather than budgeting supply appropriations by program (i.e., regular, at-risk, bilingual, etc.), and directs that it conform future budgets to proper coding requirements.

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount</u>
6850	11-000-222-100	Undistr. Expend. - Ed. Media/Library Salary	\$113,741
6880	11-000-222-600	Undistr. Expend. - Ed. Media/Library Supplies	\$ 26,354

The Board notes that all monies for operation of its elementary and high school libraries are contained in these cap waiver accounts, with salaries representing the cost of only one certified specialist in each school and supplies being the bare minimum for maintenance of services. If monies are not provided as requested, the Board argues, it will be forced to close its libraries/media centers, as well as reassign tenured staff, notwithstanding that prior budget limitations have already resulted in rified library/media staff displacing four highly valued, but nontenured, classroom teachers.

The Mayor and Council contend that items in the supplies account can be eliminated or deferred without impairing the District's ability to provide T & E, so that the Commissioner should not include them in any waiver granted, notwithstanding the County Superintendent's approval.

Upon review, the Commissioner finds that the services funded by these accounts are necessary for T & E, and that the Board has kept expenditures at maintenance of already modest levels. As with general supplies, the Mayor and Council have recommended elimination of the entire supplies account without specifying what items therein are not necessary for T & E. Similarly, under the circumstances and in view of the County Superintendent's endorsement of the amount needed, the Commissioner finds that the monies in both accounts are necessary for T & E and accordingly approves their inclusion within the Board's budget.

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount</u>
7260	11-000-270-511	Contracted Serv.-Between Home/School	\$217,250

The Board argues that this area was substantially underfunded in the 1994-95 budget, based on an anticipated decrease in the number of special education students requiring transportation which did not materialize as expected. To the contrary, due to the arrival of new students with severe handicaps, the actual amount expended in 1994-95 was in excess of \$300,000, notwithstanding that only \$146,128 had been budgeted. In 1995-96, the Board will be required to transport 53 special education students for 183 days at a daily cost of \$37, for a total cost of \$363,303, including \$4,440 in summer costs due to 6 IEP mandates. The Board

contends that these costs will have to be paid regardless of the outcome of the instant appeal, and that doing so in the absence of the requested additional funds will result in cuts to other programs which are already at bare-bones levels.

The County Superintendent had initially found that this amount was not necessary for T & E, based on the documentation submitted by the Board at the time of review. There is also evidence in the record that the review panel, in rejecting the Board's request, may have erroneously believed that these monies duplicated funds found elsewhere in the budget. However, in his amended affidavit, the County Superintendent reviewed documentation newly presented to him by the Board, essentially the documentation brought to the record in this appeal, and found that the monies in this line item were indeed necessary for T & E and could not be reallocated from elsewhere in the budget.

Upon review, the Commissioner finds that, notwithstanding the Board's initial failure to properly document the need for this item, the Board has now fully demonstrated its necessity in order to provide for T & E. Accordingly, the Board's request for waiver is granted.

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount</u>
7010	11-000-240-103	Salaries of Principals/Asst. Principals	\$ 31,000

The Board states that administrative salaries were frozen in 1994-95, with a contractual promise of two years' increase in 1995-96. The monies in this account are thus needed to pay these contractual obligations, and failure to obtain them on waiver will result in other accounts being reduced to accommodate payment.

The County Superintendent and Cap Waiver Review Panel recommended that this amount be reallocated from within the base budget based on what appeared to be a rather large proposed increase over 1994-95 expenditures in line 7030 (salaries of secretarial and clerical assistants).

Upon review, the Commissioner notes a 1% increase in comparing 1994-95 expenditures in the two administrative salary accounts to 1993-94 expenditures, while proposed 1995-96 appropriations (base plus cap) reflect an increase of 5.4%, an amount which appears to be reasonable given that it covers a two-year period. Thus, the Commissioner cannot agree that the Board will be able to reallocate monies from other administrative accounts, notably line 7030, and still meet the contractual raise obligations required to be funded from line 7010.

Accordingly, the Commissioner grants the requested waiver. In making this determination, however, the Commissioner also notes that, once again, the arguments and documentation submitted to the County Superintendent and Cap Waiver Review panel during the initial T & E assessment were not sufficient to have warranted a different result at that time.

APPLICATION OF SURPLUS

In its advertised annual school district budget statement, the Board projected no unreserved surplus and, consequently, allocated no surplus as revenue. The Board's annual financial report filed pursuant to N.J.S.A. 18A:17-10 (June 30 Board Secretary's report) reveals that there is, in fact, no meaningful fund balance available as of that date; indeed, the District appears close to deficit status.

Based on the above, subject to verification through the Board's 1994-95 annual year-end audit report, the Commissioner determines that no allocation from surplus is possible to fund any of the line-item appropriations approved herein as necessary for T & E.

SUMMARY

In summary, the Commissioner finds that the full \$892,137 appealed by the Board herein has now been shown to be necessary for provision of a thorough and efficient system of education in the District, and further, that the monies in question cannot be derived from reallocation within the General Fund budget. The Commissioner additionally notes that all line-item waivers to expenditure limitations granted herein, as summarized below, represent restricted appropriations in accordance with N.J.A.C. 6:20-2A.11(b)3.

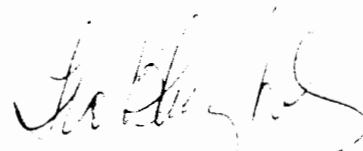
<u>Account Title</u>	<u>Account Number</u>	<u>Amount Necessary</u>	<u>Not Necessary</u>
Textbooks	11-190-100-640	\$ 143,490	\$ -0-
Co. Curr. Instr. Salary	11-401-100-100	180,962	-0-
Co. Curr. Instr. Supplies	11-401-100-600	22,340	-0-
General Supplies	11-190-100-610	157,000	-0-
Ed. Media/Lib. Salary	11-000-222-100	113,741	-0-
Ed. Media/Lib. Supplies	11-000-222-600	26,354	-0-
Contr. Serv.- Home/Sch.	11-000-270-511	217,250	-0-
Principals/Asst. Princ. Sal.	11-000-240-103	<u>31,000</u>	<u>-0-</u>
Total Line-Item Determinations:		\$ 892,137	\$ -0-

Tax Levy Certified by Governing Body:	\$ 9,420,048
Line Items Approved for Cap Waiver:	892,137
Amount of Cap Waiver to be Funded by Surplus:	<u>(-0-)</u>
Total Tax Levy for 1995-96:	\$10,312,185

In so ruling, however, the Commissioner must observe that the Board has brought to the record of this appeal much information that was not supplied to the County Superintendent at the time of his initial review, even though such information was available and should have been presented at that time. In addition, the record overall is replete with indications, much of it from the Board's own submissions, that the District's budgeting and fiscal practices are haphazard and inefficient at best, a circumstance which contributed materially to the difficulty experienced by the County Superintendent and Review Panel in their attempts to carry out the State's budgetary review obligations, and one which cannot be tolerated if the District is to meet the constitutional and statutory mandates with which it has been entrusted. The Board must, therefore, promptly take whatever steps are necessary to ensure that its practices and procedures are reformed to this end.

Accordingly, the Bergen County Board of Taxation is directed to make the necessary adjustment as set forth above, subject to verification of surplus amounts through the year-end audit, to reflect a total of \$10,312,185 to be raised in tax levy for General Fund purposes of the Palisades Park Board of Education for the 1995-96 school year. The Board of Education is, in turn, directed to confer with the County Superintendent and the Department of Education's Office of Finance, and, in accordance with their instructions, to reform its fiscal practices and procedures, so that it will henceforth be able to properly meet its governmental and educational obligations and avert the need for more formal intervention by the Commissioner.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

SEPTEMBER 1, 1995

DATE OF MAILING SEPTEMBER 1, 1995

RONALD R. GRAHAM, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN : DECISION ON REMAND

OF KEARNY, HUDSON COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioning Board member contended that Board's action in 1993 of renegotiating a five-year term for superintendent after he served only one year of his initial three-year contract violated N.J.S.A. 18A:17-15. Petitioner contended that Board lacked the authority to alter the superintendent's term of appointment until the end of his initial term.

On initial review, ALJ found initial unwritten agreement did not comply with N.J.S.A. 18A:17-15 and no enforceable contract existed that could be rescinded. Thus, ALJ concluded the Board could by majority vote appoint the superintendent by written contract for a term of five years under N.J.S.A. 18A:17-15. ALJ concluded N.J.S.A. 25:1-5(e) was applicable to contracts between boards of education and superintendents of schools entered into pursuant to N.J.S.A. 18A:17-15. Commissioner rejected this analysis and remanded matter to OAL for additional factual and legal findings.

On remand, ALJ concluded that 1) a board of education, under N.J.S.A. 18A:17-15 to 20.5, may not appoint a superintendent for a three-year term and then, one year later, act to appoint the superintendent to a five-year term; 2) the Board should be admonished for its failure to execute a written contract in 1992 showing the terms and conditions of the superintendent's employment and; 3) the Board's decision to approve a five-year contract was not arbitrary and capricious or made in bad faith. ALJ concluded that rather than rescinding the initial contract, the Board's 1993 contract was a modification of the 1992 agreement and effectively provided the superintendent a six-year term of employment in violation of school laws. ALJ ordered the Board to reform its 1993 contract modification so as to comply with the parameters established by N.J.S.A. 18A:17-15.

Commissioner concurred with the ALJ's resolution of the second and third issues as defined on remand. Commissioner found, however, that N.J.S.A. 18A:17-20.1 does not preclude a board from rescinding an initial contract prior to its conclusion and contracting to reappoint a superintendent for a different term, provided that term is not less than three years or more than five years.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

9/11/95
8/25/95

INITIAL DECISION

OAL DKT. NO EDU 10723-94
(OAL DKT. NO EDU 10557-93
ON REMAND)
AGENCY NO. #338-9/93

RONALD R. GRAHAM,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWN OF KEARNY, HUDSON COUNTY.**

Gregory G. Johnson, Esq., for petitioner

Kenneth P. Davie, Esq., for respondent¹
(Cifelli & Davie, attorneys)

Melissa Vance Kirsch, Esq., for participant New Jersey
Association of School Administrators

Record Closed: June 12, 1995

Decided: July 24, 1995

BEFORE **MUMTAZ BARI-BROWN, ALJ**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Ronald R. Graham, a board member of respondent, Board of Education of the Township of Kearny (Board) alleges that the Board acted illegally when it negotiated a five-year term contract in August 1993 with the Superintendent of Schools who had completed only one year of his initial three-

¹ On June 12, 1995, respondent filed a substitution of attorney for Frederick R. Dunne, Jr. , withdrawing attorney and Kenneth P. Davie, superseding attorney.

year appointment. Petitioner asserts that under *N.J.S.A. 18A:17-15*, the Board lacked the authority to alter the superintendent's term of appointment until the end of his initial term.

The Board argues that the superintendent's three-year appointment, effective July 1, 1992 to June 30, 1995, was mutually rescinded in August 1993. Then, in September 1993, the Board approved a new five-year contract for the superintendent, effective July 1, 1993 to June 30, 1998. The Board submits that its action did not violate *N.J.S.A. 18A:17-15*.

The matter was transmitted to the Office of Administrative Law (OAL) on November 3, 1993, as a contested case pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13* and assigned Docket No. EDU 10557-93. Hearings were held on February 24, March 16, 17, and April 18, 1994. The parties and the participant, New Jersey Association of School Administrators (NJASA) submitted post-hearing briefs and the record closed on June 6, 1994.

The administrative law judge (ALJ) concluded that the initial agreement did not comply with *N.J.S.A. 18A:17-15* because the superintendent's appointment was not reduced to writing. *N.J.S.A. 25:1-5(e)*. Therefore, no enforceable contract existed that could be rescinded. Consequently, the Board could appoint the superintendent by written contract for a term of five years under *N.J.S.A. 18A:17-15*. (OAL DKT. NO EDU 10557-934).

On October 27, 1994, the Commissioner found that the issues could not be resolved under *N.J.S.A. 25:1-5(e)* and remanded the matter to the OAL on November 3, 1994, for further findings regarding the action of a board of education on a superintendent's contract.

The issues on remand are as follows:

1. "May a board of education, under *N.J.S.A. 18A:17-15 et seq.*, appoint a superintendent for a three-year term and then, one year into the appointment, act to appoint the superintendent to a five-year term?"
2. "What effect does the absence of a written initial contract have under the circumstances of this matter in light of *N.J.S.A. 18A:17-15 et seq.* and other applicable school law such as *N.J.S.A. 18A:27-5.4*."
3. "If mutual recessions followed by new contracts are permissible in general, was the Board's action in this instance taken in bad faith and is it voidable on those grounds?"

The parties did not present testimony on remand, but relied on the testimony presented in the initial proceeding. However, the parties and participant filed supplemental briefs on remand and the record closed on April 17, 1995. A request for an extension of time to issue the initial decision was granted pursuant to *N.J.S.A. 52:14B-10(c)*.

On June 6, 1995, I reopened the record to consider whether the resignation of the superintendent, John McGeehan, effective June 30, 1995, rendered this matter moot. Having reviewed the statements submitted by the parties and the participant, I conclude that the issues address a board's action on a superintendent's contract under the new school laws and thus the matter is not moot. The record closed on June 12, 1995.

STIPULATED FACTS

On remand, the parties presented the same stipulated facts and joint exhibits which they presented in the first proceeding. I **FIND** the following as **FACT**:

1. On May 19, 1992, the past Board appointed John J. McGeehan as the new Superintendent of Schools, effective July 1, 1992.
2. The Board appointed McGeehan to a three year term from July 1, 1992 to June 30, 1995, pursuant to *N.J.S.A. 18A:17-15*. McGeehan's annually salary was \$96,000.
3. As of August 1993, McGeehan had completed 14 months of the three year appointment.
4. During the period July 1, 1992 to August 17, 1993, no written contract was executed between the Board and McGeehan; Frederick R. Dunne Jr. was the Board attorney.
5. On April 20, 1993, Ronald R. Graham, David Stevenson and William Campbell were elected to the Board for three year terms.
6. The Board reorganized in April 1993, and presently consists of the following persons: Howard Zimmerman, President; Mary S. Torres, Vice President; Judith A. Hyde; Richard Weber; Sebastian J. Viscuso; and Stephen A. Stewart.
7. In June/July 1993, Board attorney Mr. Dunne requested the Board members to provide suggestions, if any, for inclusion in the superintendent's employment contract.
8. By memo dated July 6, 1993, Board member Graham, submitted job performance goals for the superintendent's contract.
9. The published agenda for the August 17, 1993 Board meeting did not specifically state formal action was contemplated on a proposal to grant Superintendent McGeehan a five year contract.

10. Dunne and McGeehan had numerous meetings from July 1993 to August 1993 to discuss the terms and conditions for inclusion in the superintendent's contract.
11. At the August 17, 1993 Board meeting, Dunne stated that the superintendent's contract was nearly complete except for the starting date and term.
12. At the August 17, 1993 Board meeting, McGeehan stated that he and Dunne had been negotiating the terms of the contract for approximately two months.
13. During the August 17, 1993 Board meeting, Board member Campbell requested that Dunne first provide a written contract including all pertinent terms before the Board voted to rescind McGeehan's existing three-year appointment. In response to a motion to rescind the balance of McGeehan's three year term, Campbell stated, "It just doesn't make sense to me to be voting on a term of service when we haven't really seen the make-up of what the contract says. You know, I don't know." (J-1).
14. No written legal opinion was rendered by Board attorney Dunne concerning the legal basis under *N.J.S.A. 18A:17-15* for the Board to rescind the superintendent's uncompleted three-year term and granting a five-year appointment.
15. On August 17, 1993, the majority of the Board voted to rescind McGeehan's three-year appointment. There was a vote concerning a five-year term.
16. On September 20, 1993, the Board by majority vote approved the superintendent's contract, containing a five-year term from July 1, 1993 to June 30, 1998, and set a salary of \$103,733 for the 1993-94 school year.

DISCUSSION AND CONCLUSIONS

I

I have considered the positions of the parties and participant on the issue of whether a board of education may, under *N.J.S.A. 18A:17-15 to -20.5* appoint

a superintendent for a three-year term and then, one year later, act to appoint the superintendent to a five-year term.

Petitioner asserts that the Board's action granting the superintendent a five-year contract is *ultra vires* because there was already an enforceable three-year contract between the Board and the superintendent. Therefore, *N.J.S.A. 18A:17-15* prohibits the Board from renegotiating "a new contract, after one year into the original contract, unless the superintendent is terminated and paid the balance of his contract." Petitioner's Brief at 6, May 11, 1994.

The Board argues that under basic contract principles and *N.J.S.A. 18A:17-15* it had authority to modify or rescind the first contract after the superintendent completed one year of a three-year term and then enter into a new five-year contract with the superintendent. Here, the Board's five-year contract with Superintendent McGeehan followed the rescission of his prior contract and created a new and separate contract with its own terms and duration. Unlike a modification to an existing three or five-year contract which effectively extends the terms beyond five years, the new five-year contract "clearly falls within the legal parameters of *N.J.S.A. 18A:17-15*." Thus, the Board submits that the second contract is valid. Respondent's Brief at 13.

Participant, NJASA asserts that the new school laws governing the appointments and reappointments of superintendents, *N.J.S.A. 18A:17-15* and *N.J.S.A. 18A:17-20.1* permit the board and the superintendent to negotiate a new contract before the expiration of the existing contract. Further, participant posits that the Board could have given McGeehan a new five-year contract under several options. For example, instead of rescinding the oral agreement after one year and entering into a new one, the Board could have given him a new five-year contract at the expiration of his three year contract or the Board could have noticed McGeehan in September 1993, that it intended to renew his

superintendent's contract at the expiration of the three-year agreement in June 30, 1995, and then issue "a new five-year contract, starting July 1, 1995, and ending on June 30, 2000." NJASA's Brief at 3, May 11, 1994. Thus, participant submits that the school laws did not prohibit the Board from taking the action that was done. The Board acted properly when it rescinded the three-year contract and awarded the superintendent a five-year contract.

Participant also claims that "[n]umerous boards of education around this state have either engaged in such conduct, or they have extended an initial contract from . . . three years to five years." NJASA's Brief at 1, May 11, 1994. Thus, participant also submits that a narrow application of the new school laws will severely limit the flexibility and the protection the amendments are intended to give to boards of education and superintendents of schools. Furthermore, a narrow reading of the statutes "will jeopardize numerous contractual relationships around the State of New Jersey." *Id* at 4. Therefore, the five-year contract should stand.

I **CONCLUDE** that *N.J.S.A.* 18A:17-15 to -20.5 does not permit a board of education to appoint a superintendent for a three-year term, then one year later, act to modify or rescind the first appointment and appoint the superintendent to a five-year term.

The Legislature has made extensive revisions to the school laws. For example, the 1991 amendments to the school laws explicitly prescribe a minimum period of three years and a maximum period of five years for the superintendent's term of appointment. *N.J.S.A.* 18A:17-15 states in part:

The board of education of a Type I district and any Type II district, now having or hereafter authorized to have a superintendent of schools, may, by contract appoint, for a term of not less than three more ore than five years and expiring July

1, a superintendent of schools by the recorded roll call majority vote of the full membership of the board.

Thus, local boards of education are empowered to appoint superintendents and have been granted specific contractual power to effectuate that appointment.

Further, the amendments to *N.J.S.A. 18A:17-15*, together with *N.J.S.A. 18A:28-5*, and the addition of *N.J.S.A. 18A:17-20(b)* through *N.J.S.A. 18A:17-20.5* removed lifetime tenure for superintendents appointed after August 24, 1991, the effective date of the amendments. Instead of lifetime tenure, superintendents have a contractual relationship with the board "for a term of not less than three nor more than five years." *N.J.S.A. 18A:17-15*. After they have served their full term of appointment, superintendents are automatically reappointed for the same duration as the existing term unless they are notified, in writing, at least one year prior to the expiration of the existing term that they will not be reappointed. *N.J.S.A. 18A:17-20.1* provides in part:

At the conclusion of the term of the initial contract or of any subsequent contract as hereinafter provided, the superintendent shall be deemed reappointed for another contracted term of the same duration as the previous contract unless either: . . . b. at least one year prior to the expiration of the first or any subsequent contract the board shall notify the superintendent in writing that he will not be reappointed at the end of the current term, in which event his employment shall cease at the expiration of that term.

Consequently, the school laws require that the superintendent's contract must state a term of appointment for three, four, or five years. Additionally, the contract shall include the nonreappointment notification which must be given at least one year prior to the expiration of the current contract. Clearly, the crucial provisions of the new school laws that affect the superintendent's employment tenure are the length of time in the appointed position and at least one year advance notice to the superintendent that he will not be reappointed.

Also, the 1991 amendments to the school laws balanced the interests of boards of education and superintendents of schools by creating a "hybrid position" combined with elements of contract and tenure employment. On one hand, the revised school laws offer boards of education more flexibility "which had been effectively forced by the previous lifetime tenure system to either live with, or 'buy out,' often at enormous expense, superintendents with whom they were dissatisfied for any reason not rising to the level of warranting tenure charges." *Robert M. Harrington, v. Bd. of Ed of the Township of Clinton, Hunterdon County*, OAL DKT. NO. EDU 10750-93 (Nov. 17, 1994), *Comm'r Decision* (Feb. 16, 1995) at 19-20. On the other hand, the amendments also ensure superintendents "a reasonable degree of security . . . so that their employment status and professional integrity would not be subject to the whims of ever-changing boards which could summarily dismiss them for any reason." *Id.* at 20. Consequently, under the new school laws, the superintendent's term of employment continues for the duration of the contract period, absent dismissal for cause, resignation, or separation by mutual agreement.

Moreover, the Commissioner has unequivocally rejected a statutory interpretation that *N.J.S.A. 18A:17-15* permits the board to unilaterally terminate the superintendent's employment upon notice and payment of the remaining contractual salary. In *Harrington, supra.*, the Commissioner stated his view of the school laws:

[T]he scheme established by the *N.J.S.A. 18A:17-15 et seq.* does not permit this result. Rather the statute provides for a superintendent to be employed through one or more three-to-five year contracts, with employment following the initial contract to either continue via a succession of subsequent contract(s), or cease upon expiration of the current contract following due notice of nonrenewal, or alternatively, upon dismissal through tenure proceedings. . . . [t]he law as it was ultimately enacted expressly provides for employment for the duration of a superintendent's contract, thus conferring a status beyond mere entitlement to money.

[Harrington at 21]

A board's authority to rescind a contract executed under *N.J.S.A. 18A:17-15* before the expiration of that contract and then execute a second employment contract for a term of three to five years has not been addressed by the Commissioner. However, in *West Village Civic Club, Inc. and Arthur Silverstein v. Bd of Ed. of the Township of Manchester and Joel P. Oppenheim, Superintendent of Schools*, 95 *N.J.A.R. 2d.* (Vol. 4B) 115 (Dept. Of Education) the petitioners challenged that board's authority to negotiate a new contract with the superintendent for a term of five years during the life of an existing five-year contract. The Commissioner concluded that the board did not rescind the first contract nor did the board insert language in the second contract that would render the first agreement void.

Instead, the Commissioner concluded that the board modified the first contract when it entered into the second agreement. Further, the Commissioner concluded that the modified agreement which effectively provided for a six-year term for the superintendent violated *N.J.S.A. 18A:17-15*. Therefore, the Commissioner directed the board to reform its second "contract modification" to comply with the parameters established by *N.J.S.A. 18A:17-15. Id.* at 122.

Here, the Board of Education of the Town of Kearny and Superintendent McGeehan agreed to rescind the existing three year appointment and then agreed to a five-year term of appointment "beginning after the rescission of his [McGeehan's] prior contract." Respondent's Initial Brief at 13, Feb. 15, 1995. Respondent argues that the Board acted properly when it mutually rescinded, not modified, the existing contract. Respondent asserts that "[t]he basic difference is simply that when a contract is modified, either by changing its length or other terms, you are still dealing with the same contract, and based upon that theory the Commissioner ruled that the Manchester matter resulted in

a contract that ran for more than the five-year maximum as allowed by the statute.” The major difference in the Kearny matter is that a “mutual rescission of the existing contract by the Board of Education and Superintendent McGeehan ended or terminated said contract.” *Id.* at 12-13.

Thus, respondent submits that the Board’s five-year contract with Superintendent McGeehan following the rescission of his prior contract created a new and separate contract with its own terms and duration. Unlike a modification to an existing three or five-year contract which effectively extends the terms beyond five years, the new five-year contract “clearly falls within the legal parameters of *N.J.S.A. 18A:17-15*”. *Id.* at 13. The Board surmised that “[a]lthough the Commissioner never takes the final step, so as to absolutely state that if there were, in fact, a rescission of the initial contract, a new contract would have been legal, it appears clear that this is stated by innuendo.” *Id.* at 12.

I reject the Board’s notion that a mutual rescission after one year into a three-year contract followed by a new five-year contract is permitted under *N.J.S.A. 18A:17-15*. Respondent’s broad application of contract principles and *N.J.S.A. 18A:17-15* would allow the Kearny Board to slip through the back door to effectuate what the Manchester Board was not allowed to do under the identical school law. Nowhere does the Commissioner insinuate that on one hand *N.J.S.A. 18A:17-15* prohibits a board of education from appointing a superintendent to a three-year term and then, one year later, act to appoint the superintendent to a five-year term by modifying the first contract; but on the other hand *N.J.S.A. 18A:17-15* permits a board of education to appoint a superintendent for a three-year term and then, one year later, act to appoint the superintendent to a five-year term by rescinding the first contract. The pivotal question is, however, did the change in contract terms effectively give the superintendent a six-year term of appointment in violation of school laws. If so, the 1991 amendments dictate that the new terms of the contract yield to the new

school laws. Indeed, to accomplish the purpose of the 1991 amendments to the school laws, the same educational policies which underlie the limitations set forth in *N.J.S.A. 18A:17-15* and which the Commissioner applied to the modified agreement in *Manchester* must also be applied to a rescinded agreement.

The purpose of the 1991 school law amendments is to eliminate lifetime tenure and to limit the initial and any subsequent terms of appointments to a period of tenure “not less than three years nor more than five years.” Further, the new school laws explicitly outline when and how the Board can change the length of the superintendent’s term of appointment. Indeed, in *Harrington*, the Commissioner confirmed that superintendents are “employed through one or more three-to-five year contracts” pursuant to *N.J.S.A. 18A:17-15*, and that continued employment following the initial or subsequent contracts is also controlled by the school laws. *Harrington* at 21. *N.J.S.A. 18A:17-20.1* provides that:

At the conclusion of the term of the initial contract or any subsequent contract as hereinafter provided, the superintendent shall be deemed reappointed for another contracted term of the same duration as the previous contract unless either: a. the board by contract reappoints him for a different term which term shall not be less than three nor more than five years, in which event reappointments thereafter shall be deemed for the new term unless a different term is again specified;

Therefore, I **CONCLUDE** that the a board’s authority to “rescind,” “modify” or “terminate” a superintendent’s term of appointment prior to the conclusion of the contract must conform to the new education laws that prescribe the duration of the superintendent’s employment.

The 1991 amendments to the school laws granted legal authority to a board of education to enter into a contract for the services of a superintendent and to deal with the contract in the same manner as any person or entity empowered to contract. However, the contractual rights of the board to change

the terms of the contract are subject to statutory limitations. See *Manchester and Harrington*. Essentially, any contractual changes made before the completion of a current appointment which effectively extends the superintendent's "existing term" of appointment beyond five years violates the school laws. Therefore, if a change occurs before the expiration of a superintendent's contract and it is inconsistent with the statutory term allowed, the contractual terms must be brought into compliance with the parameters established by *N.J.S.A. 18A:17-15*.

Therefore, I **CONCLUDE** that after McGeehan completed one year of employment under the initial three-year appointment, the new five-year contract effectively extended his appointment from July 1, 1992 to June 30, 1998, a term of six years. Thus, I also **CONCLUDE** that the Board's act to rescind the first agreement and then act to reappoint McGeehan to a five-year term violated *N.J.S.A. 18A:17-15*. *Ibid. West Village Civic Club, Inc v Manchester, supra, 95 N.J.A.R. 2d. (Vol. 4B) at 115*. Consequently, I **CONCLUDE** that a board of education, under *N.J.S.A. 18A:17-15 to-20.5* may not appoint a superintendent for a three-year term and then, one year later, act to appoint the superintendent to a five-year term.

II

I also reject respondent's argument that the facts in this matter are "clearly distinguishable" from those in *Manchester* because the Board and McGeehan intended to rescind, not modify, the first appointment and then agreed to a new five-year term of appointment. Respondent's Brief at 2, April 3, 1995. Generally, "a modification of a contract is a change which introduces new elements into the details of the contract, but leaves the general purpose and effect undisturbed." *17A C.J.S. Contracts § 373 (1963)*. In contrast, to rescind a

contract is to cancel, annul or undo the contract from the beginning, and not merely a termination abrogating much of it as remains unperformed. Mutual rescission or rescission by agreement is “the discharge of both parties from the obligations of the contract assumed to be in existence and to be legally binding, . . . [I]n order to constitute a mutual rescission, there must be a mutual release of further obligations under the contract, and a restoration of the status quo.” 17A *C.J.S. Contracts* § 386. Thus, a mutual rescission restores the parties to the relative positions which they would have occupied if no such contact had been made.

A mutual rescission did not occur between the Board and McGeehan because their agreement did not restore them to their relative positions which they would have occupied if no such contact had been made. Instead, McGeehan continued to provide the Board the same services under a new five-year agreement as he had previously provided under a three-year agreement. Thus, the contractual interests between the parties did not create a new and separate relationship or purpose. Essentially, McGeehan continued to function as the Superintendent of Schools without interruption between the “rescission” of the first appointment and the agreement of a new five-year appointment.

Therefore, I have also considered whether a modification, rather than a rescission, of the first appointment may be inferred from the conduct of the parties and the attendant circumstances. “The determination of whether parties to a contract intend a rescission need not be made solely from express words; it may be inferred from all the circumstances.” *Mossberg v. Standard Oil. Co. of N.J.*, 98 *N.J. Super.*, 393, 406 (Law Div. 1967). Conversely, if the evidence indicates that the parties’ conduct and the circumstances effect a modification, then the remedy applied in *Manchester*, reformation of the second contract, may be applicable to the facts here.

In *Manchester*, the board of education and the superintendent had an initial five-year contract from July 1, 1992 through June 30, 1997. Then, in July 1993, they negotiated a new five-year contract for a term from July 1, 1993 until June 30, 1998. Respondent superintendent, Joel Oppenheim contended that the terms of the second written contract were almost identical to the terms in the first contract. The substantial changes involved the superintendent's compensation package. Specifically, under the new contract, contributions to the annuity increased and but the salary increments decreased. The terms of both contracts remained the same, five years. But, if the additional year was illegal, then respondent urged the ALJ to modify the agreement to reflect the initial term, while retaining the other terms and conditions of the new contract. See *Manchester, supra*. 1995 N.J.A.R. 2d. (Vol. 4B) at 120. The Commissioner agreed. He concluded that the 1993 contract modified the 1992 contract. However, the second contract effectively provided the superintendent with a six year term, in violation of school laws. Therefore, the Commissioner directed the board to reform its 1993 contract modification "so as to comply with the parameters established by N.J.S.A. 18A:17-15." *Id.* at 122.

In contrast, the Kearny Board claimed that it voted to "rescind" McGeehan's three-year appointment and then acted to grant him a five-year term. Petitioner, respondent, and participant acknowledge that the parties did not agree to a five-year term in 1992. The record discloses why the Board initially agreed to offer McGeehan a three year appointment. During the negotiations of the first contract in 1992, the Board was misinformed about the statutory employment period for a superintendent of schools. On March 14, 1994, the Board's former attorney, Mr. Dunne testified in this matter that at the time he advised the Board on McGeehan's first appointment in 1992, he was not aware of the 1991 amendment to N.J.S.A. 18A:17-15 which limited the superintendent's appointment to a term of three to five years. Thus, Dunne

advised the Board that a three-year term of appointment for the superintendent was the only contract available. Consequently, in 1992 the Board relied upon the advice of counsel and believed that the only employment option it could offer to McGeehan for the position of superintendent was a three-year term of appointment.

At the Board meeting on August 17, 1993, Dunne again advised the Board on matters concerning the superintendent's term of appointment:

DUNNE: And lastly, the Superintendent's contract. Mr. McGeehan and I have had numerous meetings now, and I think we have hammered out 99% of everything that is going into the contract. It's now at the point that, if the Board wishes to take any action, they can. I need some information. I need you to decide the starting date and the term. Those are about the last things that we haven't resolved..

But now you can either, you have a number of choices. Number one, when we hired Mr. McGeehan, he was originally hired on a three year term, which was the only contract available. You can go back to that and make that a three year term from that date....

You have the option of picking either of those dates as a starting date. You have the option, if it is...if you went back to last year as a starting date, you would have to go with a three year contract. If you pick this year as a starting date, you can go with three years from now or five years from now as your option.

STUART: Do we have to rescind the old contract?

DUNNE: By mutual agreement...

McGEEHAN: The contract doesn't exist

DUNNE: No, but there was an appointment for three years so...What Mr. McGeehan would have to do, if the Board wants to do that, he would have to say "I voluntarily give up two years of my first three year appointment".

HYDE: Fred, I have a question.

McGEEHAN: You know how I feel about a contract. Shake my hand and I'm happy.

HYDE: What would happen if we gave him a contract as of July 1, 1993, and for some unknown reason something down the road happens in '95 or '96, referring to something that would have happened between July 1, 1992 to July 1, 1993, legally...

DUNNE: Oh, he's been appointed...

HYDE: I know he's been appointed. But could something be, you know with that year, could something come up legally that he really didn't have a contract. He was appointed, but he didn't have a contract.

McGEEHAN: Under that, until a new contract is executed, you work under your previous contract.

DUNNE: So he's always had a contract of sorts.

McGEEHAN: The one thing with me is you can't get rid of me because I have tenure. Despite the new laws, you see.

DUNNE: Right.

McGEEHAN: So really, that's why I take a handshake. I'm not concerned.

DUNNE: I mean, the worst thing you could ever do to him is move him back to principal and pay him the superintendent's salary.

[J-1 at F]

The debate among Board members, McGeehan and Dunne revealed that they all believed that McGeehan's initial appointment in 1992 was limited to three years; that during his three-year appointment, the Board could reassign McGeehan to his tenured position of principal and continue to pay him the superintendent's salary; that the Board could offer McGeehan a new three year or five-year contract effective July 1, 1992, or a new three year or five-year contract effective July 1, 1993. Also, the Board and McGeehan acknowledged that they would continue to negotiate the terms of a new contract, and that "some of the terms may be dependent upon the length of the contract." *Ibid.* Further, the Board and McGeehan conceded that the question before the Board involved a new contract because no contract existed for McGeehan's three-year appointment. Indeed, Board member Campbell stated:

And this is the contract that you should have had to begin with. This is what we're talking about.

DUNNE: That's one possibility, you're right, Bill. That's one of the options I gave the Board tonight. If the Board as a whole wanted to vote and to do exactly what you said, that's a proper...

CAMPBELL: I don't mind doing it. I just want to make sure it's done the right way.

DUNNE: As I told you, you can vote to simply have a written version of the Board's contract with John for the three years going back a year to July 1, 1992. That's one option. Option number two is to have him end his appointment now, voluntarily, which is on the table at this point, and then vote to establish a new contractual relation beginning July 1, 1993 for either three years or, third option, for five years. Any one of those three options is proper...

[*Ibid.*]

During the discussion on the issues, the Board was informed that the written contract would be presented, hopefully, "by the next meeting." The Board then voted to accept McGeehan's resignation of his three-year appointment and "for a five year contract starting July 1, 1993." *Ibid.* At the following meeting on September 20, 1993, the Board voted to approve the "Superintendent of Schools contract for the period beginning July 1, 1993 and ending June 30, 1998." J-1 at G.

The 1993 contract between the Board and McGeehan contained several important changes from the three-year appointment --an expanded term of employment from three to five years and an annual increase in salary from \$96,000 to \$103,733. Additionally, McGeehan agreed to carry over a limited number of vacation days, rather than an unlimited amount; and to refrain from outside part-time employment. It also appears that on September 20, 1993, prior to the Board's vote to accept the five-year contract, McGeehan believed that under his initial three-year appointment he would have acquired tenure in several months. While discussing the five year contract McGeehan remarked:

In another several months, I would have been up for tenure, which would have then been a lifetime job. Being a district employee, I would have come under the old tenure laws where only two years would have been required to gain tenure.

GRAHAM: If you had been Superintendent prior to that.

McGEEHAN: Yeah. In other words, if I had started work a day sooner, I would have come under the old laws, which would have meant two years, which means

in another six or seven months, I'd be up for tenure and very well would, if granted, have a lifetime position...
[J-2]

Thus, I **CONCLUDE** that in 1993 the Board and superintendent acted to change the initial three-year agreement prior to its expiration and then enter into a new agreement based, in large part, on wrong information it received in 1992 about the school laws. Indeed, in this proceeding several Board members

testified that they would have offered McGeehan a five-year term of appointment in 1992 if they had then known about the new school laws. Thus, the most substantial change between the 1992 agreement and the 1993 contract is the term of appointment from three to five years. However, the general purpose and effect of the contractual relationship remained unchanged-- McGeehan continued to function as the Superintendent of Schools. Therefore, I also **CONCLUDE** that by their actions, the Board modified its 1992 agreement with Superintendent McGeehan when it entered into the 1993 agreement.

I am also persuaded by the evidence that the Board offered McGeehan the changed contract to ensure that he would stay for a period of five years from either the date of initial appointment or the date of the second contract. And simultaneously, the assurance McGeehan sought from the changed agreement was that he would not have to negotiate an employment contract with the current Board or any future Board for a period of at least five years. The outcome of their negotiations allowed the Board and McGeehan to attain the flexibility and security over the employer-employee relationship that the new school laws intended to convey to boards of education and superintendents of schools. "In seeking to ascertain the purpose and reason for the legislation, a court must consider 'not only the particular statute in question, but also the entire legislative scheme of which it is a part.'" *Reisman v. Great Amer. Recreation*, 266 N.J.

Super. 87, 96 (App. Div. 1993). Therefore, I direct the Board to reform its 1993 contract modification to comply with the time period allowed under *N.J.S.A.* 18A:17-15. This result is consistent with the intent of legislation and does not frustrate the policy of the 1991 amendments to the school laws.

IV

Petitioner contends that the Board's action on September 20, 1993, to approve a five-year contract was arbitrary. Petitioner claims that the Board appointed McGeehan for the minimum three-year term in 1992 because he had no prior experience. Thus, in 1993 when the Board voted to give him a five-year term, McGeehan "was serving a probationary period, he had just completed one year of a three-year contract." Petitioner's Brief at 7. Consequently, there was no necessity to grant McGeehan a five-year contract on top of a three-year appointment. Moreover, the Board violated *N.J.S.A. 18A:17-20.3* and *N.J.A.C. 6:3-2.1* because it failed to properly evaluate McGeehan before it moved to grant him a five-year contract.

Further, petitioner asserts that the Board failed to give notice to petitioner and two other board members that formal action would be taken at the August 17, 1993 meeting to rescind the superintendent's three-year term. Consequently, no meaningful discussion took place at the meeting because the majority members refused to disclose critical information. Moreover, petitioner contends that the Board's failure to notify the public and the Board members that action would be taken to vote on a five-year appointment is "an abuse of power and a limitless opportunity for mischief." Petitioner's Brief at 2, March 6, 1995.

Petitioner believes that the facts here are similar to the facts in *Thomas v. Bd. of Morris Tp.*, 89 *N.J. Super.* 327 (App Div. 1965) where the State Board found the action by the former majority board canceling the superintendent's two-year contract and issuing a three-year contract was arbitrary and capricious. Thus, petitioner submits that the Kearny Board acted in an arbitrary and capricious manner when it voted to rescind the superintendent's agreement after he served one year and then approved a five-year contract.

Respondent argues that sometime in June 1993, the Board began to discuss a five-year contract for McGeehan in closed sessions. The Board concedes, however, that prior to the August 17, 1993 meeting, it did not give notice that action would be taken on McGeehan's contract because no action was contemplated. However, the Board did vote to rescind the three-year agreement and to enter into negotiations for a new five-year contract. Then at the September meeting, in closed session, the Board discussed McGeehan's appointments. Thereafter, the Board by majority vote approved the superintendent's contract, containing a five-year term from July 1, 1993 to June 30, 1998, and set a salary of \$103,733 for the 1993-94 school year

Participant argues that the Board's action was not arbitrary and capricious. Participant accurately describes the distinction between the factual circumstances in *Thomas, supra*, and the circumstances surrounding the negotiations between the Kearny Board and McGeehan on his new contract. See Participant's Brief at 3-4, May 11, 1994. Also, participant correctly notes that the time the Board approved McGeehan's initial three-year appointment, it mistakenly believed that it could only offer him a three-year contract. Then, several months before the Board voted to give McGeehan a five-year contract, it solicited individual Board members for input. Further, the parties engaged in good faith negotiations on the terms and condition of the contract. There was not a close split among the Board members when they voted to approve the five-year contract. And, the board election was over six months away.

A local school board's action is entitled to a presumption of correctness, and its decision will not be set aside unless there is a clear showing of abuse of discretion or error. *Kopera v. West Orange Board of Education*, 60 N.J. Super. 288, (App. Div. 1960). Accordingly, the scope of review is whether a preponderance of the evidence establishes that the Board exercised its discretion in a manner that is

“patently arbitrary, without rational basis or induced by improper motives.” *Id.* at 294. Also, a school board’s decision cannot be capricious or made in bad faith. “Courts cannot compel governing officials to act wisely, but it can and does compel them to act in good faith. And to say that governing officials must act in good faith is merely equivalent to saying that they must act honestly.” *Peter’s Garage, Inc. v. Burlington*, 121 N.J.L. 523, 527 (Sup. Ct. 1939).

I have considered petitioner’s allegation that the Board failed to provide petitioner with notice that action would be taken at the August 17, 1993 meeting on McGeehan’s contract. I reject petitioner’s assertion as a matter of law. The Open Public Meetings Act (OPMA), N.J.S.A. 10:4-1 to -21 provides that where annual notice or revisions thereof in compliance with N.J.A.S. 10:4-18 set forth the location of any meeting, no further notice shall be required of such meeting. See *Crifasi v. Governing Board of Oakland*, 156 N.J. Super. 182, 186 (App. Div. 1978); *LaFronz v. Weehawken Board of Ed.*, 164 N.J. Super. 5, 7 (App. Div. 1978), certif. den. 79 N.J. 491 (1979). Thus, it is not a prerequisite that any agenda be published for a regularly scheduled meeting. *LaFronz, supra*, 164 N.J. Super. at 7. However, the Board did publish an agenda for the August 17, 1993 board meeting. The absence of the superintendent’s contract on the agenda is not indicative of the Board’s bad faith or a deliberate failure to disclose critical information. The minutes of the August 17 meeting reveal that Dunne apprised the Board members of the negotiations on McGeehan’s new contract. After they received the status report, each Board member present had the opportunity to question, discuss and consider several options on the terms of the appointment. Although there was a vote concerning a five year term, the Board did not to act on the five-year contract until the September meeting. Therefore, I **CONCLUDE** that petitioner’s claim that the Board members had no opportunity to meaningfully discuss the superintendent’s contract is not supported by the evidence.

I have carefully reviewed and previously discussed the circumstances under which the Board agreed to change McGeehan's three-year appointment to a five-year contract. Moreover, the minutes of the September 20, 1993 meeting disclose that the Board members had full discussion on the contracts negotiated between McGeehan and the Board's counsel, Mr. Dunne. Also, petitioner raised for discussion the superintendent's annual evaluation as required by the school law. *N.J.S.A. 18A:17-20.3*. J-2. Thereafter, the Board voted to approve a five-year contract for McGeehan as the Superintendent of Schools. J-1, J-2.

I also agree with participant that if the Board members disagreed with the terms and conditions negotiated between Dunne and McGeehan, they could have voted in the negative on the motion to give McGeehan a five-year contract. Instead, the vote to approve the five-year contract carried, five aye, three no, and one absent.

Based on the whole of the evidence, I **CONCLUDE** that there was a reasonable basis for the Board's action. And, I **CONCLUDE** that the Board's decision was not arbitrary and capricious or made in bad faith.

V

What effect does the absence of a written "initial" contract have on this matter considering the amendments to the school laws, *N.J.S.A. 18A:17-15 to -20.5* and *N.J.S.A. 18A:27-5*?

Teachers and superintendents employed by any school district in this State have statutory tenure pursuant to *N.J.S.A. 18A:17-15 to -20.5* and *N.J.S.A. 18A:27-5*. The superintendent's tenure status has been revised by the amendments to *N.J.S.A. 18A:17-15*. The inclusion of the term "contract" in the new school law

established that career or lifetime tenure for a superintendent of schools has been replaced by a contract term of three to five years. However, the revised laws do not disturb the superintendent's tenure rights for the contract period. Indeed, the Legislature intended that "a superintendent shall hold tenure during the term of the contract with the board and during the contract period shall not be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct, or other just cause." *Assembly Education Committee Statement, Assembly No. 1131-L.1991, c. 267, N.J.S.A. 18A:17-15.* Like the protection afforded to teaching staff members under *N.J.S.A. 18A:28-5*, and previously to superintendents, the new school laws, *N.J.S.A. 18A:17-15 to -20.5*, protect superintendents from unwarranted dismissal or reduction in salary during their three to five-year terms of employment.

The school laws expressly require a written contract between the board and the superintendent. The employment contract between the board and the superintendent carries with it all the benefits and burdens concomitant with a lawful and enforceable contractual relationship. Thus, a board's failure to execute a written contract in compliance with the school laws exposes it to potential and unnecessary legal action. We need not speculate on legal claims that may be filed against a board to enforce conditions and terms of an oral agreement not reduced to writing. It suffices that the Legislature intended that agreements made pursuant *N.J.S.A. 18A:17-15* be lawful and enforceable.

Nevertheless, a board cannot avoid the dictates of the statute by failing to enter into a written contract. And, a board cannot circumvent the requirements of the law by failing to set forth the terms and conditions in a written contract. Nor can it attempt to terminate a superintendent because he has never been given a written contract. The school laws should not be interpreted in a manner leading to an absurd or unreasonable result. "[W]hen construing a statute,

'every effort should be exerted to avoid ...an anomalous result.'" *Reisman v. Great Amer. Recreation, supra*, 266 N.J. Super. at 96.

The Kearny Board of Education should be admonished for its failure to execute a written contract showing the terms and conditions of the superintendent's employment. Indeed, boards of education are entrusted with the duty of overseeing the education of youth within its district. Concomitant with this obligation is the orderly and efficient administration of school affairs. Compliance with the school laws furthers effective fiscal management practices by school districts. The Kearny School Board is directly responsible for the operation of the school district and ensuring that its students receive a thorough and efficient system of education. It is appropriate that the Commissioner require that the Board comply with the requirements of the school laws.

ORDER

Consistent with my conclusions that the Board's 1993 contract modified the 1992 agreement and effectively provided the superintendent a six year term of employment in violation of school laws, the Board is **ORDERED** to reform its 1993 contract modification so as to comply with the parameters established by N.J.S.A. 18A:17-15.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the

Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 24, 1995
DATE

7/26/95
DATE

AUG 01 1995
DATE

Mumtaz Bari-Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

DWA
DEPARTMENT OF EDUCATION

Mailed to Parties:
Jeff S. Main
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE
LAW

cb

APPENDIX

Exhibits:

- J-1 Stipulation of Facts dated February 24, 1994.
- J-2 Minutes of Board Meeting dated September 20, 1993 (closed session).

- P-1 Written Evaluation of McGeehan

- R-1 Transcript of Closed Board Meeting dated April 26, 1993.
- R-2 Motion dated April 26, 1993.
- R-3 Motion, Recorded on Evaluation, dated April 26, 1992.
- R-4 Sample Policy.
- R-5 Certified Copy of Board Meeting dated June 21, 1992.
- R-6 Certified Copy of Board Meeting dated July 20, 1993.
- R-7 Letter dated January 25, 1994.

RONALD R. GRAHAM, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE TOWN : DECISION ON REMAND
 OF KEARNY, HUDSON COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Although no exceptions were filed by either party, participant New Jersey Association of School Administrators (NJASA) filed timely exceptions pursuant to N.J.A.C. 1:1-16.6 and 1:1-18.4.

Initially, NJASA sets forth the issues on remand, as identified by the Commissioner by decision issued on October 27, 1994, Ronald R. Graham v. Board of Education of the Town of Kearny, Hudson County, OAL Dkt. No. EDU 10557-93:

1. May a board of education, under N.J.S.A. 18A:17-15 et seq., appoint a superintendent for a three-year term and then, one year into the appointment, act to appoint the superintendent to a five-year term?
2. What effect does the absence of a written initial contract have under the circumstances of this matter in light of N.J.S.A. 18A:17-15 et seq. and other applicable school law such as N.J.S.A. 18A:27-5.4? and
3. If mutual rescissions followed by new contracts are permissible in general, was the Board's action in this instance taken in bad faith and is it voidable on those grounds?

NJASA concurs with the ALJ's analysis as to the second and third issues, but excepts to her conclusions concerning the first issue.

NJASA argues that boards and superintendents should be permitted to mutually rescind contracts and enter into new contracts, both under the statute in question and in accordance with general contract principles. In the instant matter, the NJASA maintains that the Board and the superintendent had the lawful right to rescind their first contract, and the ALJ erred in finding that the parties had intended to modify, rather than rescind, that contract. Here, participant warrants that the findings of fact on pages 4 and 5 of the initial decision, together with the additional consideration offered by the superintendent in this matter, belie the conclusion that the initial contract was not rescinded to make way for a new contract. Moreover, NJASA argues that the parties, by their rescission and establishment of a new contract, not only effected a new purpose and relationship (i.e., to work for the Board for a longer period of time), but changed the terms and conditions of the superintendent's service under the new agreement. (NJASA's Exceptions at p. 4)

The test of whether a contract is rescinded, NJASA continues, is “***whether there is any contractual right to further performance under the (initial) contract, or if any right to damages for a breach of contract continues to exist.” (*Id.* at p. 5) NJASA contends that, when the motion to rescind the initial contract took place, the parties were placed at the status quo; “***the Board was no longer obligated to employ McGeehan, and he was under no obligation to work.” (*Id.*) Moreover, NJASA avers it was inappropriate for the ALJ to impute to the Board an intent to modify the initial contract based on its receipt of “wrong” legal advice; NJASA

maintains that the legal advice to which the ALJ refers was rendered in 1992, and it was a new Board which voted to rescind the contract in 1993. (*Id.* at p. 6)

NJASA further excepts to the ALJ's reasoning that the Commissioner's decision in West Village, *supra*, prohibits a finding that rescissions may take place. Here, NJASA argues that the Commissioner expressly states in that decision that he did not reach the question of whether a board may establish a contract under N.J.S.A. 18:17-15 et seq., rescind that contract well before its expiration and enter into a second employment contract for a term of three to five years.

The statutory scheme, NJASA continues, "clearly contemplates" that contracts will be entered into prior to the expiration of the initial contract:

***When this statute is read, in *pari materia* with N.J.S.A. 18A:17-15, it becomes clear that a new contract could be entered into before the expiration of an initial contract. The language of the statute contemplates the authority of a board to make a decision on a superintendent's contract at any time prior to the expiration of the contract; indeed it must act "at least one year in advance" to either terminate the contract, appoint the superintendent to [a] new term, or allow the contract to automatically roll over. The use of the words "at least" indicates that the Legislature was not concerned with the impact on future boards, since one board would be deciding the future of the superintendent's contract for others. (emphasis in text) (*Id.* at p. 8)

In support of its position, NJASA presents a number of possible scenarios which might evolve from the statutory scheme arguing that, in some instances, adherence to the ALJ's interpretation would promote form over substance. (*Id.* at p. 10)

NJASA next asserts that N.J.S.A. 18A:17-15 et seq. should be interpreted to permit contractual flexibility in order to protect both the board and the superintendent. For example, NJASA argues, a board may seek administrative stability by entering into a new

contract, prior to the expiration of the initial contract, to ensure the completion of projects and programs. Moreover, NJASA maintains “[t]he statute should be read to permit the parties to plan a mutually beneficial relationship, not only in terms of the length of the contract, but also regarding other terms and conditions including economic terms.” (*Id.* at p. 11)

Finally, NJASA agrees with the ALJ’s conclusion that no bad faith occurred in this situation, and urges that this standard be used as a threshold issue in determining whether a contract was appropriately entered. Thus, NJASA argues that the Commissioner should find that “mutual modifications and/or rescissions are permissible, unless the parties acted arbitrarily or in bad faith.” (*Id.* at p. 13) Such a standard, NJASA reasons, would allow the flexibility which the statutes intended, while offering the public protection from arbitrary and improper acts.


Upon careful and independent review, the Commissioner concurs with the ALJ’s resolution of the second and third issues as defined on remand; specifically that in the instant matter, the Kearny Board of Education was remiss in failing to execute a written contract in 1992 in accordance with school laws, and while said failure exposed it to potential legal action, further speculation as to the enforceability of the contract, under the particular circumstances herein, is not necessary (*Id.* at pp. 25, 26) and the Board’s action in this matter was not arbitrary and capricious or made in bad faith. (*Id.* at p. 24)

On the first issue, however, the Commissioner does not concur with the ALJ’s conclusion that N.J.S.A. 18A:17-15 *et seq.* precludes a board of education from appointing a superintendent for a three-year term, then one year into the appointment period, rescinding the initial contract and reappointing the superintendent to a five-year term. Rather, the Commissioner finds nothing in the statutory scheme found at N.J.S.A. 18A:17-20.1 which would

prevent the board from rescinding an initial or prevailing agreement and voting to reappoint a superintendent, prior to the conclusion of the agreement, for a different contractual term, provided that term is not less than three years or more than five years. To hold otherwise would needlessly limit both the board's and the superintendent's flexibility to enter into agreements which may be both mutually beneficial and educationally sound. For example, as NJASA proposes, a board, seeking administrative stability, may wish to enter into a new contract with its superintendent to ensure that special programs or projects are completed; alternatively, reappointment of a superintendent may be driven by a mutual desire for renegotiation of terms and conditions. Neither is this finding counter to the Legislative purpose of the statute. To the contrary, it enhances the balance intended by the Legislature by providing needed flexibility, while limiting the employment obligation to any given superintendent to a maximum term of five years. Robert M. Harrington v. Board of Education of the Township of Clinton, Hunterdon County, decided by the Commissioner of Education February 16, 1995; Thomas G. Dunn, Jr. v. Board of Education of the City of Elizabeth, Union County, decided by the Commissioner of Education July 10, 1995.

Accordingly, the initial decision of the ALJ is adopted in part and modified as set forth above, and the petition is hereby dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

September 8, 1995
Date of Mailing September 11, 1995

WILLIAM MAGARA AND JUNE HERBERT, :

PETITIONERS, : COMMISSIONER OF EDUCATION

V. : DECISION

BOARD OF EDUCATION OF THE TOWNSHIP :
OF WALL, MONMOUTH COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioners sought retraction of allegedly misleading and inaccurate information promulgated by the Board prior to upcoming referendum vote. Additionally, petitioners sought injunctive relief in the prevention of the transmittal of such information by either the Board or the Administration to the Citizens' Referendum Committee, and that school personnel working for this group during school hours be stopped from this activity. Lastly, petitioners sought order that the "Back-to-School" nights be rescheduled back to their regular times rather than on the date of the election.

ALJ did grant petitioners' request in part as to the first issue, ordering correction of one sentence in a particular newsletter. As to the other issues, ALJ found no improprieties after examination of circumstances presented. Also, no rationale was found for directing the rescheduling of the "Back-to-School" night. Other than the one correction granted, the remainder of the petition was denied.

Commissioner adopted findings and determination in initial decision as his own. Citing Lindenwold Election, however, Commissioner cautioned Board of potential for appearance of impropriety in its scheduling of parents' events on the date of a bond referendum.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT

ORAL INITIAL DECISION

OAL DKT. NO. EDU 8168-95

AGENCY DKT. NO. 331-8/95

WILLIAM MAGARA AND JUNE HERBERT,

Petitioners,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP
OF WALL, MONMOUTH COUNTY,**

Respondent.

William Magara and June Herbert, petitioners, pro se.

Elizabeth Farley, Esq., for respondent

Record Closed: August 28, 1995

Decided: August 29, 1995

BEFORE KATHRYN A. CLARK, ALJ:

BEGINNING OF TRANSCRIPT

This is the matter of Magara v. Wall Township Board of Education. This matter was brought before the Office of Administrative Law (OAL) by way of application for emergent relief under N.J.A.C 1-1:61A-12.1.

Petitioners claim that the Board of Education (BOE) and the Citizens' Referendum Committee (CRC) had disseminated misleading and inaccurate information by means of a newsletter entitled "Referendum Focus." Petitioners seeks a retraction prior to the referendum vote on September 19, 1995.

Additionally, petitioners seeks injunctive relief in the prevention of the transmittal by either the BOE or the Administration to the CRC of misleading or inaccurate information and further that the school personnel working for this group during school hours be stopped from this activity.

Lastly, petitioners seek an order that the "Back to School" open house nights be re-scheduled back to their regular times.

The granting of emergent relief is an extraordinary remedy which can only be awarded based upon a showing that irreparable harm will result if it is not granted, and a further showing that there is a likelihood of success on the merits. See, N.J.A.C. 1:1-12.6

The expanded criteria for determination of an application for emergent relief have been set forth in Crowe v. Degioia, 90 N.J. 126, 132 - 34 (1982). Four standards are articulated:

1. The relief should not be granted unless it is necessary to prevent irreparable harm. Harm is generally considered irreparable if it cannot be adequately redressed by monetary damages.
2. Such relief should not be granted when the legal rights underlying the claim are unsettled.
3. In order to prevail on an application for temporary relief, a party must make a preliminary showing of a reasonable probability of ultimate success on the merits.
4. The relative hardship of the parties in granting or denying the relief sought should be considered.

We have gone through all the elements of the case and I have come to the following determination:

1. The petitioners' request for a retraction of misleading or inaccurate information in the "Referendum Focus" be **GRANTED IN PART** in that the Board of Education has consented to and **ORDERED** to make a correction to the last sentence of the first paragraph of page two of the July 19, 1995 newsletter. That sentence lends itself to misinterpretation and although I do not **FIND** any intent on the part of the Board to mislead or to provide inaccurate information, I feel that it would be beneficial if a correction was made, because that last sentence in that paragraph can be misleading. There are two more issues of "Referendum Focus" to be published.

I **DIRECT** the Board to publish a correction of that one sentence. Publication of the correction may take place in either issue of the "Referendum Focus."

2. Petitioner's second request is that the Board and the Administration be prevented from supplying the CRC with misleading or inaccurate information and the school personnel working for this group during school hours be stopped from this activity. I have heard credible evidence and nothing to the contrary to lead me to believe that Mrs. D'Elia is functioning in the capacity of an information and referral person, and that as such it is her duty, her job, to refer members of the public who call in to organizations that they might be interested in. Therefore, there is nothing improper with putting her name and her telephone number in any publication of the Board that may be published. As to the CRC utilizing her name and number, if that is the name and number that is generally in use for the provision of information regarding membership in such groups (and I have heard nothing to the contrary), that is the one to use. There is nothing inaccurate or improper in doing that.

Further as to Mr. Goldblatt's involvement, the gentleman who was said to be seated in front of the computer, we don't know what he was doing on the computer except that he was working on a final draft of the "Referendum Focus." It seems more likely to me that Mr. Goldblatt was working in a volunteer capacity. The newsletter is still the product of the Board of Education, and whatever Mr. Goldblatt was doing was something that would still be under the editorial direction of the Board of Education. I **FIND** no impropriety in Mr. Goldblatt's volunteer activities.

3. The third request is that the "Back-to-School" open house nights be rescheduled back to their regular times, I **FIND** nothing improper about scheduling "Back-to-School" night on the night when the referendum is also to be held because that seems likely to increase the participation in the referendum, which is a public goal. Voter participation is something that should be enhanced, and doubling it up with "Back-to-School" night sounds like it may achieve that end. The claim that scheduling the two events for the same night makes it difficult or impossible for older people to vote is again something that has not really been proven. The voting hours last from four to nine and the open house (the "Back-to-School" night) doesn't start until seven, so three out of the five hours that the polls are open are hours that will not involve "Back-to-School" night. The polls will be available and accessible to people who might otherwise find it difficult to get to them. I don't find any rationale for directing the rescheduling of the "Back-to-School" night.

As to the one correction that I have directed the Board of Education to make regarding that one sentence in the newsletter which is misleading and which I really do believe is a drafting error your petition is **GRANTED**. The remainder of your petition is **DENIED**.

END OF TRANSCRIPT

I, Eileen Jarosz, certify that the foregoing is a true and accurate transcript to the best of my ability, of Judge Kathryn A. Clark's oral order rendered in the above matter on August 28, 1995.

Dated:

August 29, 1995

Eileen Jarosz
Eileen Jarosz

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/29/15
DATE

Kathryn A. Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

8/31/15
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

ej

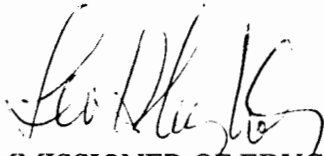
WILLIAM MAGARA AND JUNE HERBERT, :
PETITIONERS, : COMMISSIONER OF EDUCATION
V. : DECISION
BOARD OF EDUCATION OF THE TOWNSHIP :
OF WALL, MONMOUTH COUNTY, :
RESPONDENT. :
_____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the ALJ that no improprieties were demonstrated so as to warrant the relief requested, other than the one correction ordered by the ALJ. The Commissioner would, however, caution the Board that, while there is no statutory prohibition against holding activities, such as "Back-to-School" nights, at the same time as a school election, and while such scheduling may, as stated by the ALJ, encourage voter participation, care must be taken to ensure that no suspicion or appearance of impropriety is created, so as to undermine public confidence in the integrity of the electoral process. In the Matter of the Annual School Election Held in the School District of the Borough of Lindenwold, Camden County, 1972 S.L.D. 241.

Accordingly, for the reasons expressed therein as amplified above, the initial decision of the Office of Administrative Law is adopted as the final decision in this matter.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

SEPTEMBER 12, 1995
DATE OF MAILING SEPTEMBER 12, 1995

DAVID GERITY, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION

TOWNSHIP OF WOODBRIDGE, :

MIDDLESEX COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioning janitor alleged the Board unilaterally and improperly reduced his salary for the 1994-95 school year.

ALJ found that petitioner's nontenured position was abolished as Assistant Buildings and Grounds Supervisor in good faith and the salary paid him thereafter was a mistake. The Board's vote on September 22, 1994 to correct the error was proper because the Board did not attempt to recover any of the difference between the monies paid and the monies actually due petitioner and because it gave notice and took formal action to correct the error. Petition was dismissed.

Commissioner concurred with ALJ that petitioner's salary following good-faith abolition of his position was a mistake and that the Board's action was an attempt to correct said error. Commissioner found, however, that petitioner should not have been subject to such corrective action during the course of the school year since he had been appointed on June 16, 1994 for the 1994-95 school year at the incorrect salary. (Stockton) Thus, the Board's corrective action could not take effect until after June 30, 1995. Commissioner adopted initial decision with modification that Board compensate petitioner for the time period October 1, 1994 through June 30, 1995 in an amount which represents the difference between the salary at which he was appointed for the 1994-95 school year and the salary which he was actually paid.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 880-95

AGENCY DKT. NO. 459-11/94

DAVID GERITY,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF WOODBRIDGE,**

Respondent.

Deborah J. Venezia, Esq., for petitioner (Venezia & Nolan, attorneys)

Carl J. Palmisano, Esq., for respondent (Palmisano & Goodman, attorneys)

Record Closed: June 22, 1995

Decided: July 28, 1995

BEFORE BRUCE R. CAMPBELL, ALJ:

David Gerity, petitioner, alleges the Woodbridge Board of Education, respondent, improperly reduced his salary and demands retroactive adjustment. The Board denies the allegation and argues estoppel, waiver, statute of limitations and mutual mistake.

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A. 52:14B-1*

through -15 and *N.J.S.A.* 52:14F-1 through -13. After notice, a prehearing conference was held by telephone on April 6, 1995. Among other things, it was agreed that the parties would submit a joint stipulation of facts, the petitioner would move for summary judgment and the Board would cross-move for summary judgment. A schedule was established. All papers were received by the judge and the matter now proceeds to summary judgment.

The parties have stipulated the following facts:

1. Petitioner has been in the employ of respondent, Woodbridge Township Board of Education since August 19, 1974 as a janitor.

2. At all times during his employment as a tenured janitor, Petitioner was a member of a collective bargaining unit and was paid according to the negotiated agreement.

3. Petitioner acquired tenure in his position as janitor.

4. On July 1, 1989 and through June 30, 1992 Petitioner was employed as Assistant Buildings and Grounds Supervisor with an annual salary of \$49,809.00.

5. The position of Assistant Buildings and Grounds Supervisor was a non-tenurable administrative position outside of any collective bargaining unit.

6. The Petitioner was paid a salary of \$49,809.00 during his last year of employment by agreement with the Respondent and not as a result of any collective bargaining agreement.

7. On or before April 30, 1992, the Respondent was served with a Reduction in Force Notice effective June 30, 1992.

8. The Reduction in Force was necessary for reasons of economy, with the position having been abolished effective July 1, 1992.

9. The funds necessary for this position were part of a defeated Cap Waiver placed before the voters at the annual School Board Election on or about April 7, 1992.

10. On or about June 26, 1992 Petitioner received Notice of Transfer to the position of Head Janitor at JFK High School by virtue of his tenure entitlement to this position.

11. Petitioner was advised by the Respondent's Office of Personnel that his salary for the 1992 - 1993 school year would remain frozen at the 1991 - 1992 salary level.

12. Petitioner continued in the employ of the district for the 1993 - 1994 school year and the 1994- 1995 school year in the position of Head Janitor at JFK High School .

13. Petitioner in the notice of his appointment by the respondent on September 15, 1993 was notified that his salary would continue to be frozen at the 1991 - 1992 rate of \$49,809.00 although he served in the position of Head Janitor.

14. The collectively bargained salary rate (see attached) for Head Janitor was as follows:

1992 - 1993	-	\$38,310.00
1993 - 1994	-	\$39,766.00
1994 - 1995	-	\$41,456.00

15. As a result Petitioner was paid \$29,895.00 in excess of the negotiated salary for the tenured position as follows:

1992 - 1993	-	\$11,499.00
1993 - 1994	-	\$10,043.00
1994 - 1995	-	\$ 8,353.00

16. On or about September 22, 1994, the Respondent having been apprised of the excess payments made to Petitioner voted to reduce Petitioner's salary to the collectively bargained amount of \$41,456.00 effective October 1, 1994.

17. In compliance with the Open Public Meetings Act, the action took place in a regularly held Public Meeting of the Board on September 22, 1994, by a vote of 9 to 0 with no abstention.

18. In compliance with the Open Public Meetings Act, the action was discussed in the closed portion of the aforesaid meeting with the Petitioner having been given proper legal notice of his right to attend session and to participate either with or without representation.

19. The Petitioner appeared in closed session without representation and participated in discussions with the Board and Administration.

Petitioner's Arguments

The petitioner asserts his salary of \$49,800, should be reinstated, including back pay, effective October 1, 1994 through and to the end of the contract year June 30, 1995. He has been employed by the Board as a janitor with tenure. The only time during his employment that he was not a janitor was the period July 1, 1989 - June 30, 1992. In that period he was employed as Assistant Buildings and Grounds Supervisor, receiving an annual salary of \$49,809.

On or about April 30, 1992, the petitioner learned his position was to be eliminated as part of a Reduction in Force (RIF) effective June 30, 1992. In late June 1992 he received notice of

transfer to his position as head janitor at John F. Kennedy High School. He was advised by the Board that his salary for the 1992-93 contract year would remain at the 1991-92 level; that is, \$49,809 annually.

Petitioner was reappointed by the Board to continue in his position for the 1993-94 contract year at the same salary. This was repeated when petitioner was reappointed for the 1994-95 school year. Throughout the entire period of his second service in the janitorial position, the petitioner continued to receive \$49,809 per year. On October 1, 1994, his salary was reduced pursuant to a resolution unanimously adopted by the Board on September 22. At that meeting, the Board voted to reduce his salary to the amount set forth in the collective bargaining agreement of \$41,456 effective October 1. Thereafter, the petitioner filed this petition.

Summary judgment should be granted in favor of the petitioner because the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material facts and that the moving party is entitled to judgment as a matter of law. *R. 4:46-2*. In making the determination that summary judgment is appropriate, the tribunal must scrutinize all papers before it in the light most favorable to the opposing party. Courts have held consistently that vague and conclusory proofs are insufficient to defeat an application for summary judgment. Applying these principles to the present case, the petitioner is entitled to summary judgment for the relief requested.

The joint stipulation of facts creates no issues for the trier of fact. Through the application of law, the petitioner is entitled to the salary of \$49,809 for the full contract year 1994-95. He maintains that he accepted employment for the 1993-94 and 1994-95 contract years for the salary of \$49,809. The Board reappointed him on September 15, 1993 and June 16, 1994 at that salary. The petitioner is a tenured janitor and the amounts he was paid were not the amounts contained within the salary step guide of the collective bargaining agreement between the Board and the Woodbridge Township Education Association (the contract).

On September 22, 1994, without the petitioner's consent, the Board voted to reduce his compensation for the remainder of the contract year to \$41,456 effective October 1. The reduced salary reflects the amount contained within the salary scheduled for a category VII Janitor in

charge pursuant to the contract. There is no dispute that the reduction in compensation was not the result of a reduction in the number of janitors in the district nor was the reduction in compensation brought about after written charges and a hearing by the Commissioner of Education or the Office of Administrative Law.

Applying the appropriate law, summary judgment in favor of the petitioner must follow. The petitioner maintains that the Board failed to comply with *N.J.S.A.* 18A:17-3 and the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 through -29.

N.J.S.A. 18A:17-3 provides an exception to the requirements within the tenure employees hearing law that removes any requirements for adherence to a submission of written charges and a hearing when the reduction in compensation is the result of a reduction in the number of janitors in the district. In this case, it is uncontroverted that the reduction in the petitioner's compensation did not take place as a result of the reduction in the number of janitors in the district nor were written charges and a notice had before the Commissioner or the Office of Administrative Law.

There are no issues of material fact relative to this matter and, as a matter of law, summary judgment should be entered for the petitioner, even assuming *arguendo* that the Board's claim is that the petitioner's salary was inadvertently or mistakenly paid. Case law is clear that even in such a case, a reduction in compensation requires compliance by the Board with the statutory provisions mentioned above.

The Board's action in reducing the petitioner's compensation violated the tenured employees hearing law. The facts above are clear. The petitioner maintains that the Board was obligated to maintain the petitioner at \$49,809 for the entire 1994-95 contract year. The Board's action reducing his compensation violated *N.J.S.A.* 18A:6-10 through -29.

The Board's actions in passing the resolutions concerning the petitioner at the higher rate of compensation for the contract years 1993-94 and 1994-95 ratified any excess payments. The ratifications could have taken place only with knowledge of the material facts. The petitioner maintains that the Board passed upon the reappointment and salary at the rate of \$49,809 on two separate occasions. Any claim of mistake or inadvertence was ratified by those votes. Any action

taken by the Board with knowledge of the material facts ratified what the Board now considers excess payments.

Board's Arguments

The Board agrees with the petitioner that there are no essential facts in dispute. Not unexpectedly, it interprets those facts differently.

The petitioner incorrectly relies on *N.J.S.A.* 18A:17-4 and *N.J.S.A.* 18A:6-10 through -29. The petitioner was, indeed, paid a salary of \$49,809 as the Assistant Supervisor of Buildings and Grounds. His position was supervisory and not tenurable under *N.J.S.A.* 18A:17-4. Upon defeat of the district's application for a cap waiver, the petitioner's position was abolished. He was entitled to claim his current position as janitor through tenure rights acquired from his prior service as a janitor. Had the petitioner only held the position of Assistant Supervisor of Buildings and Grounds, he simply would have been terminated upon the defeat of the cap waiver application. These facts do not constitute a reduction in compensation as contemplated by *N.J.S.A.* 18A:17-4. That statute would apply if the Board had attempted to reduce the petitioner's salary below the appropriate salary level set forth in the contract. It has been stipulated that this is not the case. When the Board voted to reduce the petitioner's salary, it placed him at the appropriate level on the janitor salary guide based on his position and years of service.

The petitioner also mistakenly relies on *N.J.S.A.* 18A:28-5 because it exclusively addresses the entitlements of tenured teachers. In the present, while the error that maintained the petitioner at the higher salary was an administrative error, when it was brought to the attention of the Board, the Board by formal resolution corrected the error. It placed the petitioner on the proper step in accordance with the contract then in effect. The Board did not reduce the petitioner's salary to that of janitor pursuant to the contract. The reduction in salary that the petitioner complains of was for the position which had been abolished. The Assistant Supervisor of Buildings and Grounds was not within the employee's tenured position. Therefore, the Board did not reduce his salary within the contemplation of the statutes.

DETERMINATION

Preliminary, it is noted that the good faith of abolishing the Assistant Supervisor of Buildings and Grounds position is not in contention. *Werlock v. Woodbridge Twp. Bd. of Educ.*, 5 *N.J. Super.* 140 (App. Div. 1949). Second, although the petitioner clearly was not a tenured teaching staff member, there are some parallels in how the two classes of employees are treated when an RIF occurs. The petitioner was placed in a head janitor position. If thought of in terms of rank, he simply reverted to the next lower title. Third, there is no violation of tenure laws if a reduction in salary is based on a demotion or transfer resulting from good faith abolition of a position or based on a transfer from a twelve-month to a ten-month position. An adjustment of salary to accurately reflect an employee's place on guide cannot be made by unilateral action during the school year, but only by corrective formal action of the board upon notice to the employee. *Stockton v. Trenton Bd. of Ed.*, 1987 *S.L.D.* 512. In the final decision in *Stockton* the Commissioner stated:

This is not to say, however, that a Board may never correct an error or mistake in salary or that a tenured teaching staff member erroneously/mistakenly placed on a salary guide forever more enjoys the benefits of said error or mistake. What it does mean is that, during a given school year, once an individual has been placed and paid at a given step of the salary guide, he or she may not be subject to any corrective action during that year, which reduces his or her salary or which places him or her at a lower guide step as occurred in this matter. Further, only a board of education may act to correct an error/mistake and it must provide reasonable notice to the individual that a correction is to be made. As stated by the State Board in Conti and Cutler v. Bd. of Ed. of Montgomery, decided by the Commissioner June 10, 1985, rev'd State Board July 2, 1986:

***[T]he Commissioner has long held that a board does not violate the school laws when it acts to correct its mistake by maintaining a staff member's salary at the same level for the ensuing year so long as no reduction of salary results. Honaker, supra; Massa, supra; Galop v. Hanover Tp. Bd. of Ed., 1975 *S.L.D.* 358, aff'd, 1975 *S.L.D.* 366; DeRenzo v. Passaic Board of Education, 1973 *S.L.D.* 236.

We believe that the results in these cases properly recognize that although an affected teacher is entitled to rely on a board's official action establishing his salary for a one year period, he is not entitled under the school laws to benefit further from the board's mistake by maintaining such favored position beyond that one year period. See Galop, supra, at 364-65.

[W]e emphasize that when such correction is necessary, it must be effectuated, as here, by official act of the board, with reasonable notice given to the affected teacher.

(Slip Opinion, at pp. 8-10)

Thus, if petitioner's placement on the negotiated salary guide was not in accord with the terms of the corrective bargaining agreement, the Board could have take action to correct such but only in conformity with the principles expressed above in Conti and Cutler.

Id. at 521-22. [Emphasis in original.]

It is clear from the stipulated facts that the petitioner had reasonable notice and even was granted an informal appearance before the Board before his salary was collected. It is also clear that the petitioner's salary was incorrect for some time because of administrative error.

In *Trenton Education Association v. Trenton Bd. of Educ.*, 1986 S.L.D. 2415, it was held that a mistake in salary due to error can be corrected by reducing salary to the proper level, but monies already paid out may not be recovered. Recovery has never been an issue in this case. The sole issue is correction of an error.

The petitioner's argument that his compensation was not reduced as a result of a reduction in the number of janitors in the district is fallacious. There was an RIF for economy reasons and his position was eliminated. It is time the Board realized no immediate economy in respect of this move because it forgot to correct the petitioner's salary downward. The Board eventually recognized its error and took steps appropriate to rectify it.

I adopt the stipulated facts supplied by the parties as facts herein. I **CONCLUDE** from a review of the applicable case law that the mistake in salary was simply that, a mistake. Because the Board has not attempted to recover any of the difference between the monies paid and the monies actually due to the petitioner, and because it gave notice and took formal action to correct the error, the Woodbridge Board of Education has acted properly in this case.

Accordingly, the motion of David Gerity for summary judgment is **DENIED** and the cross-motion of the Woodbridge Township Board of Education for summary judgment is **GRANTED**. The petition of appeal is hereby **DISMISSED**. It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

28 JULY 1995
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

7/31/95
DATE

Debra Cantanaitis
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 04 1995
DATE

Jeff S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cae

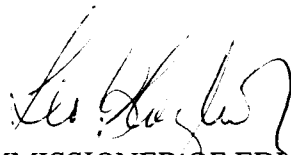
DAVID GERITY, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 : DECISION
 BOARD OF EDUCATION OF THE :
 TOWNSHIP OF WOODBRIDGE, :
 MIDDLESEX COUNTY, :
 :
 RESPONDENT. :

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review, the Commissioner concurs with the ALJ's conclusion that, following the good-faith abolition of petitioner's nontenured position as an Assistant Buildings and Grounds Supervisor, the salary granted to petitioner thereafter was a mistake, and the Board's action on September 22, 1994 was an attempt to correct said error. However, in accordance with Stockton, supra, petitioner should not have been subject to such corrective action during the course of the school year. As the record demonstrates, the Board reappointed petitioner at its June 16, 1994 meeting for the 1994-95 school year at a salary of \$49,809. Thus, the Board's corrective action could not take effect until after June 30, 1995. In the instant case, the reduction in salary was effective on October 1, 1994.

Accordingly, while the initial decision of the Office of Administrative Law is adopted in part as modified above, the recommendation that the appeal be dismissed is reversed. The Board is, therefore, directed to compensate petitioner for the time period October 1, 1994 through June 30, 1995, in an amount which represents the difference between the salary at which he was appointed for the 1994-95 school year and the salary which he was actually paid.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

SEPTEMBER 12, 1995

DATE OF MAILING SEPTEMBER 12, 1995

336-95 R

IN THE MATTER OF THE TENURE :
HEARING OF BARTHOLOMEW :
LOMBARDI, SCHOOL DISTRICT OF :
THE TOWNSHIP OF MIDDLETOWN, :
MONMOUTH COUNTY. :

COMMISSIONER OF EDUCATION
DECISION

SEPTEMBER 12, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 00389-95S

AGENCY DKT. NO. 473-12/94

**MIDDLETOWN TOWNSHIP BOARD OF
EDUCATION,**

Petitioner,

v.

BARTHOLOMEW LOMBARDI,

Respondent.

Peter Kalac, Esq., for petitioner (Kalac, Newman, Lavender & Campbell, attorneys)

Kenneth I. Nowak, Esq., for respondent (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Record Closed: July 17, 1995

Decided: July 26, 1995

BEFORE JEFF S. MASIN, ALJ:

The Middletown Township Board of Education ("petitioner") filed tenure charges against Bartholomew Lombardi ("respondent") with the Commissioner of Education on November 30, 1994. The charges alleged that the respondent had engaged in conduct unbecoming a teaching staff member. More specifically, the charges arose from a decision issued by Honorable Henry J. Byrne, Judge of Workers' Compensation, who determined in a workers' compensation proceeding pending before him that Mr. Lombardi, while allegedly totally temporarily disabled

and collecting temporary total disability benefits from the Board of Education was at the same time gainfully employed by the Monmouth-Ocean Educational Services Commission.

The tenure charges were transferred to the Office of Administrative Law as a contested case on January 11, 1995, pursuant to *N.J.S.A. 52:14B-1 to -13* and *N.J.S.A. 52:14F-1 to -21*. A prehearing conference was scheduled before this Administrative Law Judge, but the parties requested that the matter be continued pending attempts to resolve the issues in dispute. On July 17, 1995, the parties submitted a Stipulation of Settlement pursuant to which the Board of Education agreed that upon approval of the settlement terms Mr. Lombardi would execute and deliver to the Board a Promissory Note in the principal amount of \$16,803.00 payable over a four year period and that "in light of Lombardi's successful history as a teacher and coach in the district, there is no reason to pursue tenure charges" and the matter would therefore be dismissed with prejudice. Additional terms are contained in the Stipulation which is attached hereto and made a part hereof.

During a conference with the parties, counsel explained the circumstances surrounding the matter and indicated their desire to resolve this case without the necessity of a full hearing. Counsel have advised that their respective clients are satisfied that the resolution of this case, under the terms recited, is a sufficient response to the conduct involved and that settlement is entered into voluntarily. Based upon the representations of counsel and the nature of the issues involved, it appears that this settlement should be accepted.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.


This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

7/26/95


DATE

7/28/95

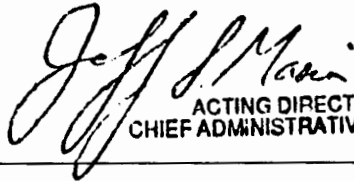
DATE



JEFF S. MASIN, ALJ
Receipt Acknowledged:



DEPARTMENT OF EDUCATION

Mailed to Parties:


ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

AUG 02 1995

DATE
mjm
Attachment

KALAC, NEWMAN, LAVENDER & CAMPBELL
A Professional Corporation
934 Highway 35
P.O. Box 4040
Middletown, New Jersey 07748
(908) 671-6100
Attorneys for Petitioner

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL Docket No. EDU 00389-95S
Agency Ref. No. 473-12/94

In the Matter of the Tenure :
Hearing of BARTHOLOMEW :
LOMBARDI, BOARD OF EDUCATION :
OF THE TOWNSHIP OF : **STIPULATION OF SETTLEMENT**
MIDDLETOWN, Monmouth County. :

The matter in controversy in the above entitled action having been amicably adjusted, the parties hereto, through their respective counsel, proposes the following settlement terms:

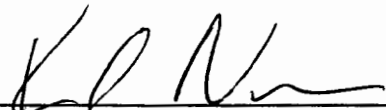
(1) Upon approval of these settlement terms, Bartholomew Lombardi will execute and deliver to the Middletown Township Board of Education a Promissory Note, in the principal amount of \$16,803.00, payable over a four year period, in a form agreed upon between the parties.

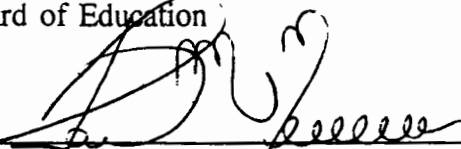
(2) The parties acknowledge that in light of Lombardi's successful history as a teacher and coach in the district, there is no reason to pursue tenure charges, and that upon approval of

the settlement terms, the entire matter will be dismissed with prejudice, and neither party shall file or pursue any other actions against the other which deal with, arise from, or concern the facts, issues and claims involved in this matter.

Zazzali, Zazzali, Fagella & Nowak
Attorneys for Bartholomew Lombardi

Kalac, Newman, Lavender & Campbell
Attorneys for the Middletown Township
Board of Education

By: 
Kenneth I. Nowak

By: 
Howard M. Newman

Dated: June 22, 1995

Dated: July 1, 1995

IN THE MATTER OF THE TENURE :
HEARING OF BARTHOLOMEW :
LOMBARDI, SCHOOL DISTRICT OF : COMMISSIONER OF EDUCATION
THE TOWNSHIP OF MIDDLETOWN, : DECISION
MONMOUTH COUNTY. :

The record in this matter and the initial decision of the Office of Administrative Law in the form of a joint stipulation of settlement have been reviewed.

Upon review, the Commissioner cannot be satisfied by the present record that the proposed settlement in this matter meets the Cardonick standards for settlement of tenure matters (In re Cardonick, decided by the Commissioner April 7, 1982, affirmed State Board of Education April 6, 1983, 1990 S.L.D. 842, 846.)

It is well established that, having once taken up the burden of tenure charges, the Board may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges can no longer be pursued or why it is now in the public interest not to pursue them. (In the Matter of the Tenure Hearing of Kenneth Smith, School District of the City of Orange, Essex County, decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, affirmed with modification by the State Board of Education November 2, 1983, affirmed Superior Court January 30, 1986.)

The present record contains no such explanation. Further, there is no indication that the within teaching staff member was advised of the Commissioner's duty, pursuant to N.J.A.C. 6:11-3.6, to refer tenure determinations for possible revocation of certificate. While the Commissioner does not preclude the possibility of settlement in this matter, he must be assured that any settlement is consistent with appropriate standards for setting aside of tenure matters as expressed in Cardonick, supra.

Accordingly, the initial decision of the Office of Administrative Law is remanded for revision of the settlement document and expansion of the record consistent with the intent of this decision.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

SEPTEMBER 12, 1995

DATE OF MAILING september 12, 1995

(336-95R)
257-96R

IN THE MATTER OF THE TENURE HEARING :
OF BARTHOLOMEW LOMBARDI, :
SCHOOL DISTRICT OF THE TOWNSHIP : COMMISSIONER OF EDUCATION
OF MIDDLETOWN, MONMOUTH COUNTY. : DECISION ON REMAND



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 08721-95S (EDU
00389-95S Remanded)

AGENCY DKT. NO. 473-12/94

**MIDDLETOWN TOWNSHIP BOARD
OF EDUCATION,**

Petitioner,

v.

BARTHOLOMEW LOMBARDI,

Respondent.

Howard M. Newman, Esq., for petitioner (Kalac, Newman, Lavender & Campbell,
attorneys)

Kenneth I. Nowak, Esq., for respondent (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Record Closed: April 12, 1996

Decided: April 25, 1996

BEFORE JEFF S. MASIN, ALJ:

This proceeding involves tenure charges brought by the Middletown Township Board of Education ("Board") against Bartholomew Lombardi, a teacher and coach in the district. The parties have previously sought to resolve the matter by settlement, which was approved by this judge, but rejected by the Commissioner of Education because the Commissioner was not satisfied that the record regarding the proposed settlement met the standards established in *In re*

Cardonick, decided by the Commissioner April 7, 1982, affirmed by the State Board of Education April 6, 1983, 1990 *S.L.D.* 842, 846.

The parties have now submitted a revised Stipulation of Settlement, which is attached. This document explains in some detail the Board's analysis of the information available to it in regard to the concerns which led it to file a tenure charge, namely the information obtained from a transcript from a Workers' Compensation hearing, which led the Board to charge Mr. Lombardi with engaging in conduct unbecoming a teacher by obtaining temporary disability payments from the Board while he participated in an after-school Latchkey program. The Board indicates that it does not believe that based on the information available to it, it can be assured that it will be able to prove that Mr. Lombardi had an intent to defraud or deceive the Board. Mr. Lombardi has denied any such intention and has agreed to repay the Board all temporary disability moneys which the Board paid to him during the time that he was out of work. In the Stipulation of Settlement the Board has explained the considerations which it has taken into account concerning the resolution of the charges, including Mr. Lombardi's "superior service as teacher and coach in the district without incident for many years."

Based upon a review of the standards established in *Cardonick*, it appears that the Stipulation of Settlement adequately explains the reasons for the settlement, including the nature of the charges, the considerations regarding matters of proof which the Board has taken into account in determining to resolve the case without pursuing removal, the agreement of both the Board and the teacher and the authorization of the Board to resolve the matter, and the agreement of Mr. Lombardi to voluntarily enter into the settlement with advice of counsel. Based upon the submission and consultation with counsel prior to its preparation, I **FIND** that the Board has adequately explained the reasons why it seeks to resolve this matter without a determination of the charges following hearing, and that the determination entered into is, under the circumstances, consistent with law and in the public interest. Therefore, I **CONCLUDE** that the Stipulation of Settlement is consistent with the concerns expressed by the Commissioner and the State Board in *Cardonick*, meets the requirements of *N.J.A.C.* 1:1-19.1, and that the settlement should be approved. I therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

The settlement will be returned to the Commissioner for his approval.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

April 25, 1996
DATE

Jeff S. Masin
JEFF S. MASIN, ALJ
Receipt Acknowledged:

May 1, 1996
DATE

Dr. Antoinette K.
DEPARTMENT OF EDUCATION

Mailed to Parties:

Barbara A. Harnes

MAY 3 1996

DATE

OFFICE OF ADMINISTRATIVE LAW

mjm
Attachment

RECEIVED

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KALAC, NEWMAN, LAVENDER & CAMPBELL
1115 Green Grove Road
Neptune, New Jersey 07753
(908) 922-2005
Attorneys for Middletown Township Board of
Education

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
One Riverfront Plaza
Newark, New Jersey 07102
(201) 623-1822
Attorneys for Bartholomew Lombardi

_____	:	STATE OF NEW JERSEY
	:	OFFICE OF ADMINISTRATI
	:	LAW OAL
In the Matter of the Tenure	:	Docket No. EDU 00389-9
Hearing of BARTHOLOMEW	:	Agency Ref. No. 473-12/
LOMBARDI, BOARD OF EDUCATION OF	:	
THE TOWNSHIP OF MIDDLETOWN,	:	STIPULATION OF SETTLEME
Monmouth County.	:	
	:	
	:	

1. The Middletown Township Board of Education (hereinafte "the Board") filed a tenure charge of unbecoming conduct again Bartholmew Lombardi, based upon a transcript from a Worker Compensation hearing. The charge alleges that Lombardi engage in unbecoming conduct by obtaining temporary disability payment from the Board while he participated in an after-school LatchK program.

2. Upon filing of the charge, the board did not suspe Lombardi and has allowed him to continue to teach.

3. The Board recognizes that in order to sustain its tenu charge against Lombardi, it must prove intent to defraud deceive the Board.

4. The Board recognizes further that Lombardi was no

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

charged with defrauding the Board in the Workers Compensation case and thus did not fully present all facts with regard to the issue of his participation in the LatchKey program.

5. Lombardi denies that he knowingly or intentionally engaged in any wrongdoing, and he has agreed to repay to the Board all temporary disability monies which the Board had paid to him during the time that Lombardi was out of work.

6. The Board has since had an opportunity to further review and consider the facts surrounding the issue of Lombardi having received temporary disability from the Board, and the Board is sufficiently convinced that Lombardi did not engage in any fraudulent or intentional misconduct, and that the Board might not be able to sustain its burden at a tenure hearing. While Lombardi acknowledges that he did not use his best judgment all of his actions, there is adequate support for believing that there was no intent to defraud and no unjust enrichment intended.

7. Lombardi has agreed that during the 1995-96 school year, he will not apply for, and shall not coach, any school sport in the 1995-96 school year.

8. The Board has determined that, in light of the absence of intent to defraud or deceive, and in light of Lombardi's superior service as teacher and coach in the District without incident for many years, and in light of his agreement to repay the Board in full for all payments made to Lombardi by the Board, and to refrain from coaching in the 1995-96 school year, the Board and Lombardi have agreed to amicably resolve the charges

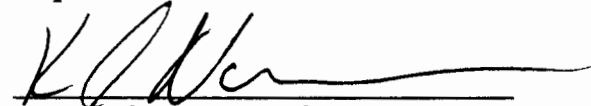
without further litigation by dismissal of the charge. The parties agree that neither party shall file or pursue any other charges or file any actions which arise out of or relate to the facts and issues giving rise to this dispute and the charge involved in this matter.

9. The parties each agree that, under the particular facts of this case, there is no reason to terminate Lombardi's teaching career and that this settlement is in the best interest of the Board, of Lombardi, of the students, and of the public.

10. Lombardi enters into this settlement voluntarily and with the advice of counsel.

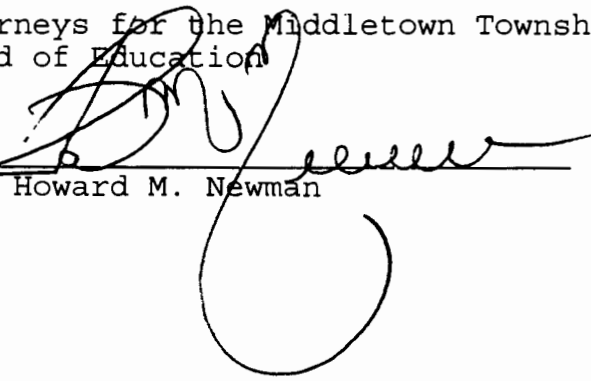
11. For the foregoing reasons, and for no other or unstated reasons, the Board and Lombardi agree to this settlement.

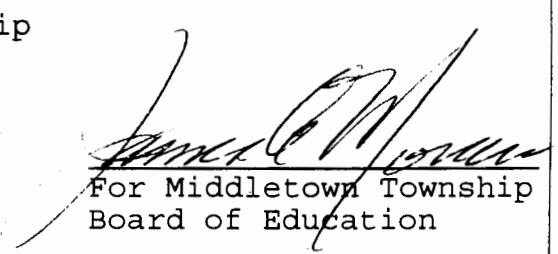
Zazzali, Zazzali, Fagella & Nowak
Attorneys for Bartholomew Lombardi

By: 
Kenneth I. Nowak


Bartholomew Lombardi

Kalac, Newman, Lavender & Campbell
Attorneys for the Middletown Township
Board of Education

By: 
Howard M. Newman



For Middletown Township
Board of Education

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

IN THE MATTER OF THE TENURE HEARING :
OF BARTHOLOMEW LOMBARDI, :
SCHOOL DISTRICT OF THE TOWNSHIP : COMMISSIONER OF EDUCATION
OF MIDDLETOWN, MONMOUTH COUNTY. : DECISION ON REMAND

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

JUNE 17, 1996
DATE OF MAILING JUNE 17, 1996

DENNIS HANDEL, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN- : DECISION

SHIP OF GREEN, ~~MORRIS~~ COUNTY, :

SUSSEX :

RESPONDENT. :

SYNOPSIS

Petitioner, parent and housing developer, alleged school bus stop for development was unsafe. This matter was transferred from Superior Court for consideration of two issues relating to pupil transportation arising under N.J.S.A. 18A:6-9, i.e. 1) at the time that the Board acted was the action arbitrary, unreasonable and capricious? 2) at the present time is there a change in circumstance which would make the welfare of the children an issue as to safety?

In light of the record, including testimony of experts, the ALJ concluded that the Board's actions in declining to change the bus stop were reasonable. ALJ found that Board's determination was made based upon information leading it to believe that the bus stop met the requirements for safety for the children. Moreover, ALJ found that petitioner failed to show by a preponderance of evidence that there has been a change of circumstance making the bus stop itself unsafe and a danger to the welfare of the students waiting for the bus at that particular location.

Commissioner adopted findings and determination in initial decision as his own.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 539-94
AGENCY REF. NO. 427-12/93

DENNIS HANDEL,
Petitioner,

v.

**BOARD OF EDUCATION OF
THE TOWNSHIP OF GREEN,
MORRIS COUNTY,**

~~Respondent~~ Respondent.

Vincent Verdiramo, Esq., for petitioner
(Verdiramo & Verdiramo, attorneys)

David A. Wallace, Esq., for respondent

Record Closed: June 15, 1995

Decided: July 28, 1995

BEFORE MARYLOUISE LUCCHI-McCLOUD, ALJ:

PROCEDURAL HISTORY

This matter arises out of an order transferring an action from the Superior Court to the Commissioner of Education which was dated December 9, 1993. The transfer occurred due to the fact that Judge Reginald Stanton, J.S.C., concluded that the case is one arising under the school laws within the meaning of *N.J.S.A. 18:6-9*, and that jurisdiction with respect to it lies with the New Jersey Commissioner of Education and not with the Superior Court. The original complaint that was filed with the Superior

Court was a complaint in lieu of prerogative writ naming the Board of Education of the Township of Green as well as a number of individuals. That complaint was dated September 17, 1993. An answer was filed on behalf of the Board on October 12, 1993 and then the case was transferred as indicated above to the Commissioner of Education.

On January 20, 1994 the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

A prehearing conference was held on March 25, 1994 at which time the petitioner was representing himself *pro se*. Original hearing dates were set for June 29 and 30, 1994. An adjournment of those dates were requested due to a pending motion to dismiss as well as a conflict in appearance before another judge by the board attorney. That request was granted and the matter was rescheduled. On June 14, 1994 a telephone conference was requested by the attorney for the respondent board due to discovery difficulties and alleged incomplete interrogatories. The pending motion to dismiss petitioner's cause of action was set for oral argument on June 6, 1994. On that date the petitioner's motion for summary decision was denied based upon reasons given on the record. Additionally those individual members listed in the caption were removed from the proceeding as this was an administrative action against the Board of Education and not against individual action. The June 29, 1994 and June 30, 1994 dates were adjourned based upon the Board attorney's unavailability. On December 8, 1994 this matter was set down for a telephone status conference. At this time the petitioner was still representing his interests *pro se*. Subsequently on December 8, 1994 a notice of appearance from Vincent S. Verdiramo, Esq., was entered on behalf of the petitioner. On Friday, December 9, 1994 a conference call was held between counsel and the undersigned regarding a joint request for adjournment of new hearing dates of December 13 and 14, 1994 in order to give newly retained counsel the opportunity to prepare for the case.

A February 24, 1995 conference was held with counsel regarding this case. Subsequent to this hearing dates were set and the hearing finally took place on May 30 and 31, 1995.

At the conclusion of testimony the hearing record was left open until receipt of posthearing submissions on June 15, 1995.

ISSUES

Prior to the beginning of the hearing attorneys for both sides agreed on the record that the issues would consist of

1. At the time that the Board acted was the action arbitrary, unreasonable and capricious?
2. At the present time is there a change in circumstance which would make the welfare of the children an issue as to safety?

Both sides agreed that although the original issue only dealt with the Board's original action the safety of the children was paramount and that the issue should be included in this matter.

TESTIMONY

The petitioner in this case testified that he has two children and lives on Mountainview Drive in Green Township. One child is thirteen years of age and the other four. The older has never taken the bus and that he will not allow his children to go to Route 517 where the bus stop is. He states that if he were to do so he would have to go and drive the older child to the bus and upon the bus's arrival would have to cross her. The bus's hearing in the morning would be northerly. Courtney Lane which

intersects Route 517 is a secondary street and the bus stops approximately 100 feet south of Courtney Lane on Route 517 according to Mr. Handel. Courtney Lane and Mountainview Drive are both streets located on Handel Estates. According to Mr. Handel it is approximately one-quarter mile on Route 517 between the two roads that are perpendicular to Route 517.

Mr. Handel stated that it is his opinion that it is an unsafe bus stop for his child because of knolls in the road of what he believe to be five to ten percent rise in grade combined with the speed of the vehicles. Mr. Handel, although the developer of Handel Estates, has no engineering expertise and was not qualified as an expert during the hearing. He stated that there was no sign indicating a knoll and that a knoll exists making it impossible to see the other end of the road. Traveling northbound on 517 approaching Courtney Lane he approximated the knoll to be 100 to 200 feet prior to the bus stop.

Mr. Handel also discussed an area that is outside the area in question which had a 40 percent rise in grade in his estimation however was not relevant to this particular bus stop.

In 1986 Mr. Handel had decided to make a housing development. During that time he submitted traffic and engineering studies to the town. Knolls were demarcated as to both their existence on Route 517 and their relation to Courtney Lane. He presented concerns to the board of education in 1993 in July or August by touching base with the school board secretary Ms. Van Aucken. According to him she state that she would like to see all bus stops removed from 517. She later got back in touch with him and informed him that the bus stop would not be moved.

The petitioner testified that he was originally told by Ms. Van Aucken that it would cost \$2,000 to move the bus stop. He stated that he understood that he would

be responsible for the payment. Since the filing of the law suit he has not gone back before the board of education.

Later in his testimony Mr. Handel acknowledged that if you travel out Courtney Lane onto Route 517 crossing to turn northbound it is approximately 300 feet to the knoll. The school in question is northwest from the subdivision and in the morning the school bus would be traveling northerly on Route 517. In the afternoon it would be a reverse run with the bus traveling in a southerly direction.

The petitioner also acknowledged that he has never seen any accident within 500 feet of the bus stop. He did state that he saw an accident involving an overturned concrete truck which was approximately 40 to 50 feet long on a non-school day at approximately 7:40 a.m. in the summertime. Photographs taken by the petitioner were entered into evidence. (P-1a through e, ev.).

The petitioner acknowledged that two children do use the bus stop now and that there are eight children in the subdivision who are of school age.

The petitioner has lived at his current address on Mountainview Drive for approximately four years. That has a different entrance to the subdivision from Route 517 than the Courtney Lane entrance. Immediately prior to this he lived at Highland Avenue which was not located in the development. Before that address he lived in the Handel Estates at 28 Sunny Lane approximately five or six years ago. At the time that he was living at the Sunny Lane location his daughter, who was school age, did not take the bus either. She also never took the bus when he lived on Highland Avenue which was not located in the development.

Prior to his Sunny Lane address Mr. Handel and his family lived on Mountainview Drive in Handel Estates for one year when his oldest daughter was also of the age to attend school. She did not take the school bus.

The petitioner acknowledged in cross-examination that at no time that he has lived in Green Township has his daughter taken the school bus. He acknowledged that while living on Highland Avenue which was not in the Handel Estates the bus stop for his daughter would not have been that located at Courtney and Route 517. He chose to drive the child to school anyway.

Mr. Handle estimates the site distance on Route 517 in the location of Courtney Lane as being 400 and 500 feet. He conceded that a site plan analysis in 1987 made that an expert report said that the area was field measured at this access road and that it was favorable for geometry and posted speed.

When Mr. Handel was shown a Travers Association report dated August 12, 1987 regarding a traffic evaluation he conceded that the report was his report submitted to the planning board. He also conceded that the report states that the site distance far exceeds 600 feet. It also indicated two access routes with the northerly one becoming Courtney Lane and the southerly one becoming South Mountainview although those were not the names originally given to the two particular roads. (R-1).

Mr. Handel acknowledged that on page four of this report under the portion entitled Site Plan Consideration it stated ... the proposed dual access roads are well separated at 1300 feet apart and encourage easy access to all 32 dwellings. He also acknowledged that on page five it stated "in summary, we find that the proposed residential development is well conceived from a traffic and safety point of view." He also indicated that he was aware of these statements in the report when it was presented to Green Township.

The witness was unable to identify what the site maps in R-2 indicated but acknowledges that they might have been submitted when he submitted the other documents to Green Township in order to build the subdivision.

The witness spent some time describing the photographs which he had taken of the accident. He did acknowledge that the road is straight until a bend where Mountainview Road is located. That is where the accident involving the concrete truck occurred. The petitioner contends that the driver of the concrete truck came out of the S-turns beyond Mountainview Avenue and lost control at which point he came into contact with the guardrail. While he stated that the truck was traveling northbound on Route 517 when shown photograph P-1d in evidence he acknowledged that he did not see any guardrails along the straight-away before the curve. Based on the witness's estimate the site distance looking south on Route 517 from Courtney Lane is 500 feet. He indicated that he has never been shown a county engineering report indicating that the site line exceeds 800 feet. He did acknowledge that he had seen a letter from the county school business administrator stating that the minimum necessary visibility that was required was 300 feet and that the bus stop in question exceeded that.

Petitioner also that he was unaware of any accidents either south or north on Route 517 at the area of the straight-away.

The next witness to testify was the petitioner's experts Calisto Bertin. Mr. Bertin has a bachelors in civil engineering as well as an M.S. in engineering and has worked in the industry from 1978 to 1984. He then worked with a small consultant firm. His areas of expertise have been in site plan and traffic. He testified that he is qualified three or four times in Superior Court as an expert and testifies approximately two times per week before the zoning and planning boards. He is licensed as a professional engineer in New Jersey, New York and Connecticut.

The witness was familiar with the subject matter and had been contacted to analyze a particular bus stop. In order to do so he made a site visit, took photographs and did a traffic inventory analysis.

Mr. Bertin stated that Route 517 is a north/south road which is straight and goes between two roads to the subdivision. He stated that the roads were put in with good site distance and that the road bends to the left while going in a northerly direction. Courtney Lane is the high point and the road drops in each direction. To the north there was one dip and to the south he stated that there were several dips. To him this indicated significance for visibility and the factors that he considered were whether or not a bus can be seen, whether or not a child can be seen and whether or not the location is a safe place to wait for a bus.

With respect to the intersection he stated that it is the high point and that children cross at the high point in the road. Motorists are able to see the bus and is activated lights as well as the crossing. He stated however that a child approximately 50 to 75 feet to the south of the bus stop would not be seen until a car came to the crest in the road. If children were waiting at that distance from the bus stop and were small in size there might be some difficulty in seeing them.

The petitioner's expert testified quite clearly that the location of the bus stop is safe in at least two aspects. He stated that the bus can be seen and that the child can be seen at the bus stop. His concern was that a child waiting in an area 50 to 75 feet away might not be able to be seen.

Mr. Bertin acknowledged that in his report (P-2, ev.) it states that the site distances at both Courtney Lane and Mountainview Drive intersections are greater than 50 feet in both the northbound and southbound directions.

When shown photographs taken in the northbound lane of Route 517 slightly south of the intersection he stated that it shows the northern view of 517 from the bus stop. He acknowledged being able to see the knoll and stated that it was more than 500 feet away.

While looking at a southbound view he stated that he was able to observe a knoll which was "not much" and would not have caused the view of a child to be obscured at the intersection.

The witness agreed that the bus in that general vicinity can be seen by motorists and that the children crossing Route 517 to Courtney Lane can also be seen. He once again reiterated he felt the problem was that children might not stand at the bus stop but might be "chasing a butterfly or a ball" as much as 50 feet to the south or 100 feet to the north. In order to determine what was visible he walked down Route 517 and crouched to what he considered to be the height of small children. He acknowledged that he had no evidence that children would wander from the appointed bus stop. He also acknowledged quite candidly that if the children remained where they are supposed to be he did not see any problem with this particular bus stop.

The witness also stated that in his report he recommended putting a sign advising of the bus stop at or near the location. He stated that according to the manual on uniform traffic control devices (MUTCD) as saying "since no bus stop sign exists then the bus stop should be relocated." He also acknowledged that the report of respondent's expert (R-5) stating a site distance in excess of 800 feet is consistent with his report. He stated that he indicated that the site distance was in excess of 500 feet.

The witness acknowledged that while his report (P-2) discusses site distances it does not discuss the wandering off of children from the location of the bus stop. He stated that he was aware that the manual of traffic control devices is the guiding factor in situations such as this and was also aware that the Sussex County engineers had found there to be more than adequate site distance. He stated that this is consistent with his report however he just considered more. By more he explained that to be the wandering off of students from the bus stop which he did not place in his report.

On redirect the witness stated that his scope in this matter was to look at the bus stop and find a safer place for a bus stop without detriment to school children.

The Board presented the testimony of John H. Rea who is a principal in the firm of McDonough and Rea Associates in Manasquan. A copy of Mr. Rea's professional profile was entered into evidence (R-4, ev.) and he was accepted as an expert in the area of traffic and site planning as was petitioner's previously presented expert.

Mr. Rea stated that he had been asked by the Green Township Board of Education to evaluate a school bus stop located at Courtney Lane and Route 517 for safety. In making his evaluation he conducted a site visit and measured the site distance on Route 517 both north and south of Courtney Lane and in addition he reviewed a number of documents consisting of:

1. Minutes of the Green Township planning board meeting held on August 13, 1987 regarding the Handel Estates subdivision application.
2. Transcript of testimony provided by Randall Voinier, P.E., traffic engineer for Handel Estates, with respect to site distance along Route 517 for the subject intersection.
3. Traffic impact study prepared by Randall Voinier, P.E., dated August 12, 1987 for the Handel Estates subdivision.
4. Copies of a portion of the Handel Estates subdivision map depicting site distances for the subject intersection.
5. Letter of January 13, 1995 from the Sussex County Department of Public Works, Division of engineering, to Lorraine Van Aucken, business administrator/board secretary, Green Township Board of Education,

regarding a request for "School Bus Stop Ahead" sign on Route 517 at the Courtney Lane intersection.

6. Traffic engineering report prepared by Bertin Engineering Associates, Inc., dated November 30, 1994 suggesting that the school bus stop should be relocated off Route 517 for safety reasons.

The witness pointed out that Mr. Bertin's report indicated that the site distance was in excess of 500 feet in either direction. The Sussex County engineer's report indicated that the site distance was in excess of 800 feet and a copy of the plan submitted for Handel Estates showed a site distance of in excess of 1,000 feet in each direction.

The witness described his own observation which included the alignment of the roadway. He stated that Courtney Lane is a horizontal straight road with a gentle rolling alignment. The vertical alignment on Route 517 does not, in his opinion prevent adequate site distance. He stated that motorists are able to clearly see children at the bus stop for in excess of 750 feet. According to the expert any vehicle less than 750 feet from the location of the bus stop traveling either north or south in the direction of Courtney Lane is able to clearly see any bus, children crossing, or activity.

As a result of his analysis the witness, based upon all of those things listed above found that there was more than adequate site distance available to the school bus stop at Route 517 and Courtney Lane. In his report (R--5) he pointed out that even the petitioner's experts report admits that site distance along Route 517 at the Courtney Lane bus stop is greater than 500 feet in both northbound and southbound directions although his measurement indicate that there are in excess of 750 feet in both directions. He pointed out that Mr. Bertin in his report (P-2) indicates that the minimum stopping site distance required on wet pavement for vehicle traveling at 50 miles per hour is 475 feet as stated in the transportation and traffic engineering handbook

published by the Institute of Transportation Engineers. The posted speed limit is 45 miles per hour north of the intersection and 35 miles per hour south of the intersection although the witness agreed with Mr. Bertin that average travel speeds along the pertinent section of Route 517 are approximately 50 miles per hour. It was therefore the opinion of respondent's expert that a minimum of 475 feet of site distance should be available for the school bus stop in order to provide for safe operating conditions.

Mr. Rea stated that it was his opinion that, based upon site distance measurements to the Courtney Lane intersection the knoll would not obscure a motorist's ability to view a pedestrian crossing at the Courtney Lane intersection. He further pointed out that it was more relevant in his estimation that the school children crossing Route 517 at the Courtney Lane intersection do not cross Route 517 until the northbound school bus stops at the Courtney Lane intersection, puts its flashing lights on, the school bus driver checks traffic on Route 517, and then motions to the school children to cross.

On cross-examination the witness stated that the number of cars passing through this area is irrelevant to the study and to the determination of the safety of the students even if the cars are speeding. It is only the first car which is relevant. That is where the site distance is measured. Other cars have a visibility of the car in front of them.

The witness stated that he feels that this bus stop is safe based upon the conditions and the children waiting at the intersection and all other factors which he took into account. He stated that he is assuming that the children would wait on the westerly side of Route 517 which is the Courtney Lane side and then cross. According to the witness the location that the children wait for the bus is relevant and the site distance is also relevant forming the two primary factors. When using the term site distance it is measured site distance as well as site distance to the school bus. The knolls did not in his opinion impede visibility under the measurements indicated in the

various studies, all of which exceeded the 475 foot stopping capability of a vehicle traveling at 50 miles per hour which was well above the speed limit. The witness acknowledged that he was unable to state whether or not a vehicle traveling at 65 miles per hour, far in excess of the speed limit, would be able to stop at a specific distance however he stated that according to the American Association of State Highway and Transportation Officials Manual which would tell the precise stopping distance, the stopping distance would still be less than the 750 feet which the witness determined by measurement that the site distance was in excess of.

Lorraine Van Aucken also testified regarding her dealings with the Green Township Board of Education and her position as the board secretary and business administrator. She also indicated that prior to that she had other jobs in the same field.

With respect to bus transportation and bus stops she is in charge of transportation however in Green Township the superintendent bears the ultimate responsibility. The witness stated that when a child registers with the secretary of the school that child is assigned to an approved bus stop. If no established bus stop exists the school secretary would call her and then she would then go out personally and see about the safety of a potential new stop and present her findings to the transportation committee consisting of three or four members of the board of education. After review the issue is ultimately presented the board of education.

Ms. Van Aucken made a distinction that the board deals somewhat differently between the change in a bus stop and a change in a bus route. In this case the route has always had stops even before Handel Estates. This case did not deal with the creation of a new route but would deal with a creation of a new bus stop.

Ms Van Aucken stated that the standards which are used to review consists of

1. Site distance of at least 300 feet;
2. The recommendation of the administrative code to stay away from

- situations involving left hand turns;
3. The distance between bus stops on individual routes.

According to Ms. Van Aucken two children in Handel Estates presently use the bus stop. Mr. Handel has never used the bus during the total time that his child has been of school age whether residing in Handel Estates or residing elsewhere in Green Township.

After visiting the site Ms. Van Aucken discussed the standards with the superintendent, the transportation committee and the matter was in turn presented to the board of education. She testified that the issue of the Handel Estates first arose in 1987 regarding a child who would have been boarding on an existing bus stop. The Handel child was assigned to that bus stop which was located more than 500 feet south on Route 517 at the time. The stop was across from Mountainview Road. Subsequently the bus stop was moved to Courtney where it intersects Route 517.

The witness stated that in her opinion there is approximately 1300 feet between Courtney Lane and Mountainview Road.

She stated that she did speak with Mr. Handel and that he did send photographs to her (P-1a through d). They also met in August 1993 but the photographs were received after this meeting. At that time he contended that the accident was "in the vicinity" of Route 517 and Courtney Lane. The board was shown the photographs at a public session and were aware of the accident because five members live near there. They looked at the photographs but no action was taken to change that particular bus stop. No statements were made regarding any interrelationship between the accident and the bus stop.

In August 1993 Mr. Handel had an appointment with Ms. Van Aucken and wanted information regarding transportation routes, contracts, bid specifications and bid procedures. She stated that she shared their whole transportation file with him.

According to her Mr. Handel said he would see to it that they had another transportation contractor other than the present one in Green Township by the next year. The following year the contract went out to bid however the township received only one bid although specifications were sent to five different entities. That one bid was the same contractor.

During the conversation Mr. Handel did not say that these requests had anything to do with the route other than that he felt a \$2,000 charge to enter Handel Estates was exorbitant. She stated that she told him the cost was \$2,000 based upon the contract however no discussion occurred as the payment and the board pays all transportation costs. At no time was there any discussion that Mr. Handel would be charged. It was the contractor who had given Ms. Van Aucken the figure of \$2,000 for an addendum based upon 180 school days. There was no mileage clause.

The board also presented the testimony of Robert B. Corbin who has an extensive history in education beginning in 1962 in administrative positions. Those were all detailed on the record. The pertinent portion of this is the period from August 1962 to February 1993 when he served as interim superintendent for Green Township as well as the fact that as of September 1994 he has been the interim superintendent at Green Township.

He stated that during thirteen years with Mansfield Township between 1974 and 1987 as the school superintendent as well as the period of time listed above as interim superintendent for Green Township he did not establish bus stops or routes but checked out the stops and passed on the information to the board and would meet with the engineer.

The standards he applied were site distance as well as proximity to other stops and the number of students as well as any inclines that might occur in the roadway.

Mr. Corbin checked out the bus stop in question on his own in the fall of 1994 as well as two times between January 1, 1995 and the date of his testimony on May 31, 1995. The observations he made at the site were the location of the bus stop which he observed both in his vehicle and standing outside his vehicle. He checked for visibility which he estimated exceeded 300 feet from the bus stop. He went to the edges of the intersection and found visibility to be good. He did find two knolls which he termed as "gentle."

The visit he made on the morning of his testimony was because he had never seen a child get on or off the bus before that date. On May 31, 1995 he did see one child board the bus. He observed the child wait in a vehicle until the bus came and activated its caution flashers. The bus stopped and signaled appropriately at which time the child crossed Route 517.

The witness acknowledged that he is not an engineer and does not take part in the actual designation of a bus stop however had extensive experience in dealing with these matters.

FINDINGS OF FACT

1. A bus stop has been _____ at the juncture of Courtney Lane and Route 517 in Green Township.
2. Children attending school in Green Township who are eligible for busing pursuant to N.J.S.A. 18A:39-1 who live in the immediate area would be required to use that bus stop, if taking the bus.
3. Site distance as far as this bus stop is concerned well exceeds 300 feet and has been estimated to be at the very least in excess of 500 feet and possible in excess of 800 feet.

4. The information presented during the Handel subdivision planning board meeting in 1987 indicates that the site distance far exceeds 600 feet in each direction.
5. Both the petitioner's expert and the respondent's expert agree that the stopping distance for a car exceeding the speed limit in either direction by traveling at 50 miles per hour would be approximately 475 feet.
6. Although an accident occurred some distance from the bus stop it was located in a curve in the road exceeding the relevant distance.
7. Appropriate personnel of the board of education evaluated the bus stop for safety prior to its establishment as well as at other times while established.
8. At no time was Mr. Handel told that he would personally be charged \$2,000 if the school bus entered Handel Estates.
9. Both experts for either side agree that the school bus meets the safety criterion for site distance at the location of the bus stop.
10. The only disagreement is that petitioner's expert believes that a student leave the area by 50 or 75 feet they might be in a situation that would be dangerous. This fact was not mentioned in Mr. Bertin's report.
11. Petitioner's expert, in his report (P-2, ev.) misreads the Manual of Uniform of Traffic Control Devices when, in testifying he points out that the very least a sign would be appropriate if not the actual moving of the bus stop.

12. Petitioner's expert quotes the manual as saying "It is not intended that these signs be used everywhere a school bus stops to pick up or discharge passengers but for use only where terrain and roadway features limit the approach site distances and where there is no opportunity to relocate the stop to another location with adequate visibility." Mr. Bertin testified and I **FIND AS FACT** that students waiting at the actual bus stop and not straying to either, as he put it chase a butterfly or a ball 50 or 75 feet or more from the bus stop, are at the rise in the roadway and are therefore visible to traffic in either direction.
13. Visibility and site distance therefore exceed, at a minimum, 500 feet. This is the site distance for both the school bus as well as the students located at the bus stop.
14. Petitioner's expert errs in claiming that a "school bus stop ahead" sign is required due to the fact that such a requirement is only when a school bus, stops to pick up discharge passengers, is not visible for a distance of 500 feet in advance. The manual states that it is not intended that these signs be used everywhere a school bus stops to pick up or discharge passengers but for use only where terrain and roadway features limit the approach site distance and where there is no opportunity to relocate the stop to another location with adequate visibility.
15. I **FIND** that adequate visibility exists at this bus stop.

LEGAL DISCUSSION

Counsel agreed prior to the hearing that only two issues were to be decided. Those issues were outlined and agreed to on the record as being the following:

1. At the time the board of education acted was that action arbitrary, unreasonable and capricious?
2. At the present time has there been a change in circumstance making the welfare of the children an issue as to safety.

Counsel for petitioner misconstrues the issues in this case in his posthearing submissions. He characterizes them correctly as to the first issue but incorrectly as to the second. He interprets the second issue as to whether or not the bus stop proposed by the petitioners would be safer. That is not the test in this case.

Regarding the question of whether or not the action of the board of education is arbitrary, capricious and/or an abuse of discretion will be addressed first. It is well established that actions of local boards that lie within their discretionary powers may not be upset unless they are arbitrary, without rational basis or induced by improper motives. *Kopera v. West Orange Board of Education*, 60 N.J. Super. 288 (App. Div. 1960). The standard for review at a hearing regarding this issue requires a determination of whether the underlying facts were as those who made the evaluation claimed and also whether it was unreasonable for them to conclude as they did upon those facts bearing in mind that they were the experts. The burden of proving unreasonableness is on the appellant. This is not a situation in which the Commissioner of Education will substitute judgment for that of the board of education. *Massaro v. Board of Education of the Borough of Bergenfield*, 165 S.L.D. 84. It is the management prerogative of boards of education that will not be usurped or assumed by the Commissioner of Education absent a definitive showing of bad faith or arbitrary actions taking bad faith without a rational basis. *Paddock v. Board of Education of the Borough of Demarest*. 1974 S.L.D., 435.

In this case the facts known to the board of education at the time they declined to move the bus stop were based upon information leading them to believe, and accurately so, that the bus stop met the requirements for safety for the children.

Second issue is whether or not there has been a change of circumstance that makes the welfare and safety of the children an issue. The issue is not whether or not a safer bus stop can be found but whether or not there has been any change of circumstance that would make this bus stop unsafe. Both experts agree that the bus stop location itself meets all of the applicable criterion. Both experts also took into account that individuals routinely exceed the speed limit and therefore calculated stopping distance based upon individuals who are speeding rather than merely upon the posted speed limits. Additionally both experts agree that students located at the bus stop are in a safe location. It is only petitioner's expert who states that danger exists for students who wander beyond the bus stop, although never mentioned in his expert's report.

It is the board of education that establishes the bus stop itself. While one always wishes for the safety of students the board is not under the obligation to choose necessarily the safest bus stop but it is under an obligation which is safe for students. It is impossible for the board of education to take into account contingencies such as wandering students or students running away or pursuing other activities. Their responsibility lies with the location of the bus stop itself.

Because of the agreement of both experts as to the location of the bus stop itself the petitioner has failed to show by a preponderance of the evidence that the action of the board of education at the time of the decision to decline to change the bus stop was arbitrary, capricious or an abuse of discretion.

Additionally for the same reasons expressed above the petitioner has failed to show by a preponderance of the evidence that there has been a change of

circumstance making the bus stop itself unsafe and a danger to the welfare of students waiting for the bus at that particular location.

CONCLUSION

Based upon the foregoing I **CONCLUDE** that the actions of the Green Township Board of Education in declining to change the bus stop were reasonable.

I further **CONCLUDE** that there has been no change of circumstance that would endanger the welfare of the children nor endanger their safety while waiting for the bus stop at that location and that therefore petitioner has failed to prove by a preponderance of the evidence that such a change exists.

ORDER

It is hereby **ORDERED** that the petition be and hereby is **DISMISSED**.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision on this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER**

DENNIS HANDEL, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN- : DECISION

SHIP OF GREEN, MORRIS COUNTY, :

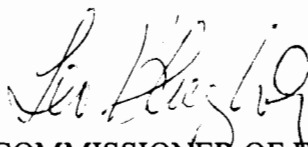
RESPONDENT. :

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that petitioner has failed to satisfy his burden of establishing, by a preponderance of the relevant credible evidence, that the Board's action in declining to change the location of the bus stop at issue herein was arbitrary, capricious or an abuse of its discretion. The Commissioner further agrees that petitioner has failed to establish that there has been a change of circumstance making this established bus stop unsafe or dangerous to the welfare of students waiting for the bus at that location.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons articulated therein, and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton,
New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be
sent to the judge and to the other parties.

8/28/95
DATE

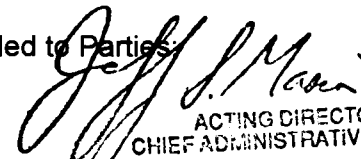

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

8/1/95
DATE

DNA
DEPARTMENT OF EDUCATION

AUG 03 1995
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

am

APPENDIX

Witnesses

For petitioner:

Dennis Handel
Calisto Bertin

For respondent:

John H. Rea
Lorraine Van Aucken
Robert B. Corbin

Evidence

P-1a through e, photographs

P-2, ev., Report from Bertin Engineering Associates, Inc., dated November 30, 1994
(8 pages)

R-1 Report from Travers Associates Consultants dated August 12, 1987 (7 pages)

R-2 Site line profile map (6 pages)

R-3 Letter dated September 14, 1990 from Lorraine Van Aucken to Joseph L. Padden

R-4, ev., Professional profile of John H. Rea, P.E. (3 pages)

R-5 Report of John H. Rea, P.E. dated January 26, 1995 (4 pages)

R-6, ev., Letter dated January 13, 1995 to Lorraine Van Aucken from John Risko,
assistant county engineer (2 pages)

(267-95E)

338-95

H.M.O., :
PETITIONER, : COMMISSIONER OF EDUCATION
V. : DECISION
BOARD OF EDUCATION OF GREATER :
EGG HARBOR REGIONAL HIGH SCHOOL :
DISTRICT, ATLANTIC COUNTY, :
RESPONDENT. :

SEPTEMBER 12, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 5893-95

AGENCY DKT. NO. 196-6/95

H.M.O.,

Petitioner,

v.

**BOARD OF EDUCATION OF GREATER
EGG HARBOR REGIONAL HIGH SCHOOL
DISTRICT, ATLANTIC COUNTY,**

Respondent.

Lauren P. Alterman, Esq., for petitioner

Louis Grecco, Esq., for respondent

Record Closed: August 1, 1995

Decided: August 1, 1995

BEFORE KATHRYN A. CLARK, ALJ:

In the above-entitled matter, I ruled on an application for emergent relief, under N.J.A.C. 1:61A-12.1, on June 8, 1995. This ruling disposed of the immediate question - whether petitioner would be allowed to participate in graduation activities. Since that time, this tribunal has received no communications to the effect that a plenary hearing on the merits is desired.

As the ruling on emergent relief apparently has rendered any remainder of the issue moot, I am hereby entering an order to dismiss the plenary case.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 1, 1995
DATE

Kathryn A. Clark
KATHRYN A. CLARK, ALJ

8/4/95
DATE

Receipt Acknowledged:
DNA
DEPARTMENT OF EDUCATION

AUG 10 1995
DATE

Mailed to Parties:
Jeff S. Main
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

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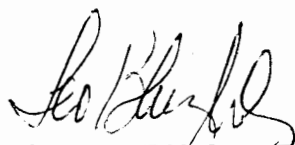
H.M.O., :
 PETITIONER, : COMMISSIONER OF EDUCATION
 V. : DECISION
 BOARD OF EDUCATION OF GREATER :
 EGG HARBOR REGIONAL HIGH SCHOOL :
 DISTRICT, ATLANTIC COUNTY, :
 RESPONDENT. :
 _____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Apparently, the Administrative Law Judge (ALJ) was not in possession of the Commissioner's decision of July 19, 1995 affirming the ALJ's denial of emergent relief and dismissing this matter as moot because the petition was limited to challenging petitioner's participation in graduation ceremonies, the date of which had since passed.

Accordingly, the Commissioner determines that his decision of July 19, 1995 is the final decision in this matter, so that the within appeal is dismissed as of that date.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

SEPTEMBER 12, 1995

DATE OF MAILING 12, 1995

M.B., by his parent and legal guardian, J.H., :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE TOWN- : DECISION ON MOTION
 SHIP OF WILLINGBORO, BURLINGTON :
 COUNTY, :
 RESPONDENT. :

SYNOPSIS

Petitioning parent sought stay of disciplinary determination by the Board on M.B., junior high school student, for alleged assault on a fellow student, contending his hearing did not provide required due process. M.B. was suspended pending formal due process hearing. Initial 21-day administrative suspension expired on June 19, 1995.

ALJ dismissed matter without prejudice, noting matter was prematurely filed since initial suspension had expired, student was returned to school, and the Board had not yet acted on the hearing officer's recommendation for discipline. Thus, there was no Board action for the Commissioner to review.

Commissioner adopted findings and determination in initial decision as his own.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DENYING APPLICATION FOR
TEMPORARY EMERGENT RELIEF
AND DISMISSING CASE

OAL DKT. NO. EDU 7849-95

AGENCY DKT. NO. 293-7/95

**M. B., BY HIS PARENT AND
LEGAL GUARDIAN, J. H.,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF WILLINGBORO,
BURLINGTON COUNTY,**

Respondent.

Jamie Epstein, Esq., for petitioner

Robert P. Martinez, Esq., for respondent (Martinez & Jennings, attorneys)

Record Closed: August 7, 1995

Decided: August 8, 1995

BEFORE M. KATHLEEN DUNCAN, ALJ:

This matter was opened before the undersigned on an application for temporary emergent relief. M.B. by his parent and legal guardian J.H. (hereinafter petitioner) had filed a petition of appeal with the Commissioner of Education on July 27, 1995, together with an application for

temporary emergent relief seeking a stay of implementation of disciplinary action imposed by the Board of Education of the Township of Willingboro (hereinafter respondent). A return date for oral argument on the motion for temporary emergent relief was scheduled for August 7, 1995 at the Trenton office of the Office of Administrative Law and took place as scheduled, whereupon the record closed.

FINDINGS OF FACT

The facts relevant to a determination of the motion for temporary emergent relief as well as those relevant to a disposition of the entire matter are not in dispute and I therefore **FIND** the following as uncontested facts.

M. B. was suspended from school, effective May 30, 1995, on charges of having assaulted a fellow student, J. V., on May 26, 1995. By letter dated June 13, 1995, petitioner's parents were advised that petitioner was suspended "pending a remand hearing before the Willingboro Board of Education on Monday, June 19, 1995 at 3 p.m." The letter enclosed a package of materials, the first document of which was entitled "Willingboro Public Schools Student Discipline Procedure Remanding of Students" which advised, *inter alia*, that petitioner had been suspended for a total of 21 days commencing May 30, 1995 and concluding June 19, 1995. The hearing which had been scheduled for June 19, 1995 was adjourned at the request of petitioner, first to June 27, 1995 and then again to July 5, 1995, in order for petitioner's attorney to be provided with certain documents he had requested concerning the matter. On July 5, 1995, petitioner appeared and testified before a hearing officer for respondent. On that date the hearing officer also heard the testimony of J. V., the student victim of the assault. Also considered by the hearing officer on that date were numerous written statements which had been given by students who had been present at the time of the assault. The students who had written the statements were not present at the hearing. On July 20, 1995, respondent's hearing officer issued a written report recommending that respondent find M. B. and another student who had been involved each answerable for the charge of assault upon J. V. The hearing officer further recommended that another hearing should be scheduled for each student separately at which the issue of appropriate

consequences would be addressed. The cover letter, dated July 20, 1995, forwarding to petitioner's parents the Hearing Officer's Report and Recommendations, advised that

a hearing on the consequences will be held on Wednesday, July 26, 1995 at 3:30 p.m. for M. We are counting on your attendance at this meeting. If you do not choose to be at this hearing, this matter will nevertheless proceed and will be presented to the Board.

Petitioner chose not to attend the July 26, 1995 hearing and, without receiving anything further from respondent, filed the within petition of appeal alleging, among other things, "on 7/26/95, respondent entered punishment against M. B."

During oral argument on petitioner's motion for temporary emergent relief imposing a stay of the implementation of punishment, it became clear that respondent has taken no action with respect to petitioner's disciplinary proceedings. The recommendations of the hearing officer concerning determination of guilt on the charges have not been presented to respondent; neither have the hearing officer's recommendations concerning the imposition of sanctions/remedial action been presented to the Board. Counsel for respondent represented that the next Board meeting will take place on August 28, 1995. It is not clear whether the hearing officer's recommendations concerning petitioner will be presented to the Board at that meeting since the agenda for that meeting has not yet been developed. Furthermore, counsel for respondent explained that respondent's standard procedure concerning disciplinary matters of students requires that the student be provided with a full due process hearing before the entire Board of Education if the student is not satisfied with the recommendations of the hearing officer. Counsel for respondent explained that this two-step procedure results in 90% of matters being settled between the student and the administration following the hearing before the hearing officer, thereby dramatically reducing the number of due process hearings which must be conducted before the full Board. Respondent has felt that this two-step procedure is necessary because of the large number of disciplinary matters which must be handled in its school district. Petitioner's attorney could offer no evidence that respondent had in fact acted with respect to imposing

disciplinary action upon petitioner. It is clear that, at the moment, no action has been taken by respondent with respect to discipline of petitioner, other than the initial 21-day administrative suspension which expired on June 19, 1995. Accordingly, petitioner can and should attend school when it reopens in September unless he receives written notice of action by respondent to the contrary.

APPLICABLE LAW AND DISCUSSION

N.J.S.A. 18A:37-2 (d) identifies "physical assault upon another pupil" as conduct which shall constitute good cause for suspension or expulsion of a pupil from the public schools in New Jersey. The power to reinstate pupils suspended administratively, to continue a suspension, or to expel a pupil is vested in the Board of Education. N.J.S.A. 18A:37-5. For a non-classified student, the length of time which an administratively imposed suspension may continue, as construed in case law and by the Commissioner, is not to exceed 21 days. R. R. v. Board of Education of Shore Regional High School, 109 N.J. Super. 337 (Ch. Div. 1970); Graham v. Board of Ed. of the Township of Ocean, 1978 S. L. D. 810. A suspension beyond the 21-day period may be imposed only after a full blown due process hearing before the Board of Education. Tibbs v. Board of Ed. of Franklin Tp., 59 N.J. 506 (1971). Actions of local boards of education which lie within the area of their discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives. Quinlan v. Board of Ed. of North Bergen, 73 N.J. Super. 40 (App. Div. 1962); Thomas v. Morris Township Board of Education, 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966); K.L. v. Matawan/Aberdeen High School Dist., 91 N.J.A.R. 2d. (EDU) 74; M. G. v. Monmouth Regional High School, 91 N.J.A.R. 2d. (EDU) 38.

In the within matter, the problem with reviewing respondent's actions in regard to petitioner to determine whether respondent violated petitioner's rights or otherwise acted in an arbitrary, capricious or unreasonable manner is that respondent has taken no action. The administrative suspension expired on June 19, 1995. Petitioner is not currently suspended from school. If respondent acts at some point in the future to suspend or expel petitioner from school,

petitioner may request the Commissioner of Education to review respondent's actions. The within matter is prematurely filed since there is no action for the Commissioner to review. Accordingly, for all of the foregoing reasons, the within petition of appeal is **DISMISSED WITHOUT PREJUDICE** to petitioner's rights to re-file in the event of adverse action by respondent.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Aug 8, 1995
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Aug 8, 1995
DATE

Receipt Acknowledged:

[Signature]
DEPARTMENT OF EDUCATION

AUG 15 1995
DATE

Mailed to Parties:
Jeff M. Main
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

EXHIBITS IN EVIDENCE

- J-1 Letter from Geraldine O. Foster to petitioner's parents, dated June 13, 1995
- J-2 Letter from Joan McAndrew to petitioner's parents, dated July 20, 1995
- J-3 "Willingboro Public School Student Discipline Procedure Remanding of Students" (2 pages)

WITNESSES

None

M.B., by his parent and legal guardian, J.H., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN- : DECISION ON MOTION
SHIP OF WILLINGBORO, BURLINGTON :
COUNTY, :
RESPONDENT. :

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner’s exceptions and an addendum to such exceptions were timely filed. Counsel for respondent Board was served with a copy of petitioner’s exceptions on September 5, 1995 and duly filed a reply to such exceptions within the timeframe required by N.J.A.C. 1:1-18.4.

Petitioner’s exceptions contend that if the Commissioner adopts the ALJ’s decision in this matter, school districts will be allowed to place an extreme burden on students facing disciplinary action by requiring them to go through multiple hearings before the board before being allowed to appeal the board’s decision to the Commissioner. Petitioner asserts

In this case, the student, M.B, was given notice of the charges against him on May 30, 1995 regarding an alleged assault on May 26, 1995. M.B. facing expulsion, was given notice of a formal due process hearing before the school board for which he obtained an attorney at the board’s suggestion.*** The board, at the conclusion of the two day hearing, rendered a written decision against the student.*** On July 26, 1995, the consequences for the

student were presented to the Board.*** (emphasis in text)
(Petitioner's Exceptions at p. 1)

Petitioner asserts that under the instant decision, rather than being allowed to appeal this determination to the Commissioner, he is now required to have another formal due process hearing before the Board. He contends that these unduly burdensome hearings cause students extreme hardship, in terms of time and finances, before they are allowed to appeal to the Commissioner of Education.

Petitioner's exceptions further maintain that, contrary to the understanding of the ALJ that the within Board has taken no action with regard to disciplinary proceedings against M.B., on August 25, 1995, petitioner received a letter detailing the Board's July 26, 1995 decision on punishment. He contends that "the Board has in fact suspended M.B. pending the outcome of his Child Study Team evaluation." (Petitioner's Exception Addendum) Petitioner additionally advises that the Board has scheduled a further hearing in this matter for September 18, 1995.

In reply, the Board argues that the disciplinary process employed by the Board, as detailed by the ALJ in her decision, provides students with a two-step procedure whereby such student is provided with a full due process hearing before the entire Board if the student is not satisfied with the recommendations of the hearing officer. The Board contends that "this two-step procedure results in 90% of the matters being settled between the student and the administration, thereby dramatically reducing the number of due process hearings before the full Board of Education." (Board's Reply Exceptions at p. 2)

The Board, additionally, contends that petitioner incorrectly states that the Board has taken disciplinary action against petitioner. It advances that petitioner incorrectly assumed

that the Board had adopted the recommendations of the hearing officer. Rather, it states that petitioner was advised in letters dated August 16, 1995 and August 23, 1995 "that petitioner would be afforded a due process hearing before the full Board and pending that hearing would be entitled to attend school in the normal course." (Board's Reply Exceptions at p. 2)

Upon a review of the record in this matter and the exceptions and replies advanced by the parties, the Commissioner concurs with the findings and conclusion of the ALJ that the within matter is prematurely filed. Given that petitioner is not currently suspended from school and a full due process hearing before the full Board is upcoming, there is currently no Board action for the Commissioner to review.

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

SEPTEMBER 18, 1995

DATE OF MAILING SEPTEMBER 18, 1995

BOARD OF EDUCATION OF THE CITY	:	
OF SALEM, SALEM COUNTY,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	
	:	DECISION
COMMON COUNCIL OF THE CITY OF	:	
SALEM, SALEM COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of \$200,582 made by governing body following voter rejection of proposed budget on April 18, 1995.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore \$141,384 (\$79,812 of this amount to be funded by surplus) for a total General Fund tax levy of \$1,783,339 for 1995-96 school purposes. Board was directed to submit a revised budget due to certain coding errors.

BOARD OF EDUCATION OF THE CITY	:	
OF SALEM, SALEM COUNTY,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
COMMON COUNCIL OF THE CITY OF	:	
SALEM, SALEM COUNTY,	:	
	:	
RESPONDENT.	:	

For the Board, John T. Barbour, Esq.

For the City, David J. Puma, Esq. (Waters, Sherman & Puma)

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education on June 14, 1995, through the filing of a Petition of Appeal by the Salem City Board of Education (Board), seeking restoration of reductions to the school budget made by the Common Council of the City of Salem (City) pursuant to N.J.S.A. 18A:22-37, following defeat of the budget at the annual school election on April 18, 1995.

At that election, the voters rejected a public question proposing a General Fund tax levy of \$1,922,349 for the 1995-96 school year. On May 15, 1995, following consultation with the Board as required by law, the City adopted a resolution determining to certify a General Fund tax levy of \$1,721,767 as sufficient to provide for a thorough and efficient system of

education (T&E) in the district. This amount represented a reduction of \$200,582 from the tax levy proposed by the Board, and was effectuated through cuts in seven line items, for the reasons given in the effectuating resolution. By resolution dated May 23, 1995, the Board determined to appeal these reductions and duly filed the within petition.

The amounts in dispute in this appeal are as follows:

<u>Tax Levy Proposed by Board</u>		<u>Tax Levy Certified by City</u>	
General Fund	\$1,922,349	General Fund	\$1,721,767
<u>Amount of Reduction by City</u>		<u>Amount of Reduction in Dispute</u>	
General Fund	\$200,582	General Fund	\$200,582

An Answer to the Board's petition was filed by the City on July 3, 1995. On July 20, 1995, and July 31, 1995, respectively, the parties filed Position Statements pursuant to N.J.A.C. 6:24-7.8, followed by the City's Responsive Statement on August 8, 1995, and the Board's Final Summation on August 15, 1995 and the City's Final Summation on August 21, 1995.

In addition, as the parties had previously been advised by letter from the Assistant Commissioner dated April 7, 1995 and distributed through the County Superintendent to boards and municipalities experiencing budget defeats, as part of the record of the within appeal, the Commissioner took official notice of the Board's revised budget and its June 30 financial report, the latter for the purpose of identifying whether the Board underestimated in its 1995-96 budget the amount of anticipated undesignated surplus.

Upon filing of the Board's Final Summation as noted above, the record of the appeal was closed.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line-item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education. Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).

Mindful, then, of the standard to be applied, the Commissioner makes the specific determinations set forth below.

COMMISSIONER'S DETERMINATION

Disputed Line-Item Number 1

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
6910	11-000-230-100	General Administration	\$181,774	\$36,347

PROPOSED REDUCTION: Elimination of the position of the secretary to the superintendent of schools.

The Board superintendent's secretary recently retired after many years of service. At the date of her retirement, this secretary earned \$36,347 per year. Her retirement has been anticipated for the past year and as such her responsibilities have been distributed to other clerical personnel during that time. The City believes that an economy can be realized by having one secretary and the existing administrative personnel service the secretarial needs of both the superintendent and the Board secretary, without creating a hardship or affecting a thorough and efficient education.

The Board's position is that this money, which equals the amount of money earned by the superintendent's secretary, must be restored so that a replacement can be hired for this secretary. The Board asserts that this money should not be removed from the budget as these duties cannot be "realistically and efficiently distributed to the existing administrative personnel without creating undue hardship, inefficiency and ineffectiveness in the operation of the central office and school district." (Board's Position Statement at p. 4) Additionally, the Board has already agreed to eliminate one of its four secretarial positions and finds it "inconceivable and insupportable" to lose another. Lastly, the Board argues that the support staff configuration must not be changed.

Upon review, the Commissioner finds that the Board has made a compelling argument in favor of the necessity for the position. However, the restoration should be made in an amount to fund a starting salary rather than the full \$36,347. The salary regulations provided by the District show a contracted starting salary for school office personnel in the amount of \$13,500. Therefore, the Commissioner restores \$13,500 to the school budget for an added secretarial position, but sustains the remaining \$22,847.

Disputed Line-Item Number 2

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
<u>7010</u>	<u>11-000-240-103</u>	<u>School Administration</u>	<u>\$390,906</u>	<u>\$108,117</u>

PROPOSED REDUCTION: Elimination of the high school vice-principal and the middle school vice-principal.

The City argues that the levels of enrollments in the high school and middle school do not warrant an assistant principal in each of these schools. The savings that would be recognized by the elimination of the district's two nontenured vice-principals is their combined salary of \$108,117. A thorough and efficient system can continue to operate if redistribution of these duties is carefully effectuated.

The Board responds that it is critical to the fulfillment of the District's constitutional and statutory educational obligations that the middle school vice-principal position serve a student body composed mostly of "at risk" students. As a qualifier, approximately 80% of the students qualify for free or reduced lunch. Without any certified subject area supervisors, as well as the elimination of the position of Director of Curriculum in the District, almost all of the duties of staff development, fall on the shoulders of the principal and vice-principal. This is in addition to the normal administrative duties. Also, the middle school vice-principal handles most of the disciplinary activities occurring in that school, which the Board characterizes as numerous. The vice-principal is also involved in conflict resolution, runs the school bank, is an unpaid advisor to the chess club, and works with the principal to prepare the school for the following year. Further, this person reviews all educational components that need adjustment,

coordinates receipt and distribution of supplies for the building and participates in the summer curriculum work of the District's five-year curriculum plan.

The elimination of the high school vice-principal is also strongly opposed by the Salem City Board of Education for the same reasons listed above. Additionally, the high school vice-principal is the primary catalyst for both the conflict resolution and mentoring programs at the high school. There are no other available personnel to whom these functions can be distributed. The Board also reduced the number of guidance counselors by attrition and the vice-principal will be assuming the duties of the retired guidance counselor as well, further increasing his already heavy workload. Curriculum instruction improvement is a crucial responsibility of the vice-principals. Thus, the Board argues that the District's need for the above positions is crucial.

Upon review the Commissioner finds that the money should be restored to the Board as it has made a compelling argument for the need of its vice-principals at the high school and at the middle school. However, the Board's position on the \$108,117 reduction for School Administration (11-000-240-103) discusses the additional responsibilities assumed by the two vice-principal positions with the reduction of other District staff positions. Based on the description of the duties, it appears that the appropriation for these position should be allocated between Other Support Services - Students - Regular (11-000-218-104) and Improvement of Instruction Services/Other Support Services - Instructional Staff (11-000-221-104). The District's 1995-96 budget shows a reduction in budgeted appropriations for those accounts and supports the Board's statement regarding reduction in staff in these areas. The 1994-95 actual expenditures for both accounts are comparable to the amounts budgeted. As such, it appears that

the District has not properly allocated the salaries of the vice-principals between their new additional areas of responsibility. Accordingly, the Commissioner restores the \$108,117, but directs the District to make the proper account allocation based on the time spent in performing duties for each of the functions in accordance with the chart of accounts prescribed under N.J.A.C. 6:20-2A.2(m), and to submit a final revised budget to both the County Office of Education and the Office of Finance reflecting the correct allocation.

Disputed Line-Item Number 3

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
7100	11-000-260-100	Operation Plant Services	\$434,326	\$29,763

PROPOSED REDUCTION: Eliminate the position of buildings and grounds supervisor.

The City argues that maintenance and operations of the school facilities have effectively been accomplished in past years without a buildings and grounds supervisor. This position, which was created several years ago, can be eliminated without appreciably affecting a thorough and efficient operation. The City further argues that the School Board Administrator is responsible for supervision of repairs and maintenance by statute, therefore, there is no need for the middle management position of buildings and grounds supervisor.

The Board argues that District maintenance staff consists of the position at issue and three other maintenance staff. The Salem City School District has had major problems in maintenance and physical plant operation with respect to the upkeep and maintenance of the facilities. The Board contends that because the schools are old (ranging from 25 to 83 years in

age), they are all in serious need of repair and maintenance. The School District had previously proposed and had rejected by the voters, a twelve million dollar bond referendum to address many of the major needs with its facilities. The rejection of this bond referendum heightens the need for maintaining the existing maintenance staffing levels. The buildings and grounds supervisor is key in keeping the building's infrastructure. Additionally, this person significantly reduces the need for outside contracted maintenance and maintenance repair services.

Upon review, the Commissioner concurs with the City Council that the position of buildings and grounds supervisor is not necessary to the operation of a thorough and efficient education. The Board has operated without such position in the past and the record indicates that sufficient maintenance staff is retained by the Board to maintain school grounds. Thus, the \$29,763 cut is sustained.

Disputed Line-Item Number 4

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
7360	11-000-290-220	Business & Supp. Servs.	\$129,000	\$5,058
7390	11-000-290-241	Business & Supp. Servs.	8,246	1,237
7410	11-000-290-250	Business & Supp. Servs.	20,354	412
<u>7420</u>	<u>11-000-290-290</u>	<u>Business & Supp. Servs.</u>	<u>1,185,336</u>	<u>19,648</u>

PROPOSED REDUCTION: Employee benefits associated with the reduction of \$174, 227 in salaries.

The City argues that the foregoing four line-item reductions are accomplished through the elimination of four full-time employees from the School District. The \$26,355 reduction to this line item constitutes the savings from the employee benefits associated with the reduction of the salaries paid to the four employees to be eliminated from the payroll.

The Board's response is that in light of the fact that the Board of Education rejects all three of the recommendations for the above-mentioned staff cuts, reductions dealing with benefits accrued to these positions/personnel would likewise be rejected since the money is needed to pay for the benefits of the above-stated positions.

Upon review, the Commissioner determined to restore 75% of the money budgeted for benefits since three of the four positions in question were determined to be necessary for a thorough and efficient education and it was not possible to determine precisely how much of each line item reflects each position. The Commissioner sustained a 25% cut to each account, however, since one of the four positions was not determined to be necessary. Accordingly, the Commissioner directs that \$3,794 be restored to line-item number 7360 and sustains a cut of \$1,264. It is further directed that \$928 be restored to line-item number 7390, and a cut of \$309 is sustained. Also, it is directed that \$309 be restored to line-item number 7410 and a cut of \$103 is sustained. Lastly, a cut of \$14,736 is restored to line-item number 7420 while a cut of \$4,912 is sustained.

APPLICATION OF SURPLUS

In its advertised annual School District budget statement, the Board projected an unreserved surplus of \$475,000 and allocated \$175,000 as revenue, leaving \$300,000 as undesignated unreserved surplus.

The Board's annual financial report filed pursuant to N.J.S.A. 18A:17-10 (June 30 Board secretary's report) reveals that the unreserved General Fund balance was underestimated by \$118,071, as the actual use of surplus in the 1994-95 budget was \$160,289. Based on the

advertised 1995-96 budget statement, excess surplus available to fund restorations is \$79,812 as follows:

1995-96 General Fund Appropriations (\$11,275,296) x 3%	\$338,259
June 30, 1994 Audited Unreserved Surplus	\$753,360
1994-95 Use of Surplus	<u>160,289</u>
Projected June 30, 1995 Unreserved Surplus	\$593,071
Less 1995-96 Budgeted Fund Balance	<u>(175,000)</u>
Remaining Unreserved, Undesignated Fund Balance	\$418,071
Less 3% Calculation	<u>(338,259)</u>
Amount Available to Fund Restorations	\$79,812

Based on the above, the Commissioner determines that \$79,812 is available to fund restoration herein, subject to verification through the Board's 1994-95 annual year-end audit report.

SUMMARY

In summary, the Commissioner directs restoration or sustaining of line-item reductions to appropriations as set forth below. The Commissioner further notes that all restorations to line-item appropriations are restricted in accordance with N.J.A.C. 6:20-2A.11(b)3.

<u>Line Item</u>	<u>Description</u>	<u>Sustained</u>	<u>Restored</u>
6910	General Administration - Secretary	\$22,847	\$13,500
7010 ¹	School Administration - Salaries	- 0 -	108,117
7100	Operation Plant Services - Salary	\$29,763	- 0 -
7360	Business and Supp. Services	1,264	3,794
7390	Business and Supp. Services	309	928
7410	Business and Supp. Services	103	309
7420	Business and Supp. Services	<u>4,912</u>	<u>14,736</u>
Total Line-Item Determinations:		\$59,198	\$141,384

¹ See discussion at pp. 6-7 above regarding allocation.

Tax Levy Certified by Governing Body:	\$1,721,767
Restoration of Reductions:	141,384
Amount of Restoration Funded by Surplus:	(79,812)
Total Tax Levy for 1995-96:	\$1,783,339

Accordingly, the Salem County Board of Taxation is directed to make the necessary adjustments, as set forth above, subject to verification of surplus amounts through the year-end audit, to reflect a total of \$1,783,339 to be raised in tax levy for General Fund purposes of the Salem City Board of Education for the 1995-96 school year. The Board is directed to submit an appropriately revised budget in accordance with the Commissioner's direction at line-item number 7010 above.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

SEPTEMBER 20, 1995

DATE OF MAILING SEPTEMBER 20, 1995 11

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF RIVERSIDE, :
: :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION :
: :
TOWNSHIP COMMITTEE OF THE TOWN- : DECISION :
SHIP OF RIVERSIDE, BURLINGTON : :
COUNTY, : :
: :
RESPONDENT. :

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of \$111,172 made by governing body following voter rejection of proposed budget on April 18, 1995.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line-item reductions was necessary in order to provide a thorough and efficient system of education in the District, Commissioner determined to restore \$111,172. However, in view of the fact that additional surplus sufficient to cover this amount is available to the District, the Commissioner let stand the General Fund tax levy of \$3,576,674 as certified by the Township for 1995-96 school purposes. In addition, the Board was directed to correct certain account code errors and to undertake a review of secretarial/clerical and maintenance staffing to identify efficiencies to be implemented in 1996-97 budget.

BOARD OF EDUCATION OF THE TOWNSHIP OF RIVERSIDE, :
 :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 :
 TOWNSHIP COMMITTEE OF THE TOWNSHIP OF RIVERSIDE, BURLINGTON : DECISION
 COUNTY, :
 :
 RESPONDENT. :

For Petitioner, John T. Barbour, Esq.

For Respondent, Dawn Marie Addiego, Esq. (Law Offices of Jeffrey A. Mintz)

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education on June 16, 1995, through the filing of a Petition of Appeal by the Riverside Township Board of Education (Board), seeking restoration of reductions to the school budget made by the Riverside Township Committee (Township) pursuant to N.J.S.A. 18A:22-37, following defeat of the budget at the annual school election on April 18, 1995.

At that election, the voters rejected a public question proposing a General Fund tax levy of \$3,687,846 for the 1995-96 school year. On May 18, 1995, following consultation with the Board as required by law, the Township adopted a resolution determining to certify a General Fund tax levy of \$3,576,674 as sufficient to provide for a thorough and efficient system of education (T&E) in the district. This amount represented a reduction of \$111,172 from the tax

levy proposed by the Board, and was effectuated through cuts in three line items, for the reasons given in the Identification of Specific Line Item Reductions, attached to the implementing Township resolution. By resolution dated May 24, 1995, the Board determined to appeal these reductions and duly filed the within petition.

The amounts in dispute in this appeal are as follows:

<u>Tax Levy Proposed by Board</u>		<u>Tax Levy Certified by Township</u>	
General Fund	\$3,687,846	General Fund	\$3,576,674
<u>Amount of Reduction by Township</u>		<u>Amount of Reduction in Dispute</u>	
General Fund	\$111,172	General Fund	\$111,172

An Answer to the Board's petition was filed by the Township on July 21, 1995. On July 24, 1995 and August 11, 1995, respectively, the Township and the Board filed Position Statements pursuant to N.J.A.C. 6:24-7.8, followed by a Responsive Statement from the Township on August 24, 1995.

In addition, as the parties had previously been advised by letter from the Assistant Commissioner dated April 7, 1995 and distributed through the County Superintendent to boards and municipalities experiencing budget defeats, as part of the record of the within appeal, the Commissioner took official notice of the Board's revised budget and its June 30 financial report, the latter for the purpose of identifying whether the Board underestimated in its 1995-96 budget the amount of anticipated undesignated surplus.

Subsequent to the Township's filing of a Responsive Statement, no further submissions were received and the record of the appeal was closed upon expiration of the time for such submissions.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line-item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education. Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).

Mindful, then, of the standard to be applied, the Commissioner makes the specific determinations set forth below.

COMMISSIONER'S DETERMINATION^{1 2}

Disputed Line-Item Number 1

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
7030	11-000-240-105	Salaries of Secretarial and Clerical Assistants	\$130,940	\$38,600

The Township argues that it has been made aware that retirements are taking place in the clerical staff and recommends that the position of a specific retiring secretary be eliminated and its duties reassigned among the remaining clerical staff. Also, the Township asserts that in the recent past the Board changed purchasing procedures by hiring a purchasing agent. The Township suggests this position be eliminated and the previous method for purchasing be reinstated, thereby eliminating the need for this position.

³The Board argues that the retirement of an individual secretary does not invalidate the need for that person's position, nor can these duties be realistically and efficiently distributed to remaining secretarial personnel without creating hardship, inefficiency and ineffectiveness in the District's operation. It avers that the job duties of this position include the

¹ In its Position Statement, the Board objects to the lateness of the Township's Answer in this matter which it asserts was due July 3, 1995 and not received by the Board until July 26, 1995. In light of the circumstances explained in a letter dated July 20, 1995 from the Township's counsel to the Bureau of Controversies and Disputes and in view of the fact that the Answer brought nothing to this record which was not previously expressed in the Township's effectuating resolution and attachment, the Answer was accepted for review and consideration in this appeal.

² The Board's Position Statement also advances allegations of Open Public Meetings Act violations with respect to the Township's meetings conducted to review the within budget. Given the decision herein on the merits of this matter, the Commissioner finds it unnecessary to address such allegations.

³ The Board's Position Statement raises a procedural objection to what it contends was a modification to the Township's identification of the first line item to be reduced in this matter. It asserts that such line item was originally identified as "Account and Item No. 11-000-240-104" in the resolution recorded in the Township's May 18, 1995 meeting and that such resolution and the official meeting minutes were subsequently altered to Account and Item No. 11-000-240-105. The Commissioner finds that it is clear from the numbers and discussion in the Township's attachments to its May 18 resolution that Account and Item No. 11-000-240-105 was the line item identified for cut. This is also demonstrated by the fact that there is no money listed in the 1995-96 budget for Account and Item No. 11-000-240-104. Therefore, the Commissioner finds no merit in the Board's objection.

data entry input for mandatory student record keeping for attendance, grades, standardized test scores and student scheduling for all students in grades 5 through 12. The Board contends that these essential duties cannot be redistributed to other staff members as their current responsibilities fully utilize their available time. The Board further argues that although the Township's sole rationale for the reduction in this item was not replacing a specific retiring secretary, this particular secretary's 1994-95 salary was \$28,300 not the \$38,600 which was cut.

Upon review, the Commissioner concurs that the Township's mere speculation regarding savings which might be achieved through the attrition of a specific secretarial position, absent a realistic examination of the incorporation of the required duties of such position, is arbitrary. Noting that the specific contentions on which the Board relies have gone unchallenged by the Township, and appear to be supported by the record, the Commissioner has accepted the Board's assertion as to the necessity of this position to the effective delivery of T&E services. Additionally, the Commissioner notes that the claim of elimination of a purchasing agent position arose for the first time in the Township's Position Statement, which provided no indication whatsoever of the proportionate savings intended to be realized from such elimination. Finally, the Commissioner's determination herein further considered that the Board's 1995-96 budget already projects a \$20,908 decrease in this particular line item over the actual 1994-95 budget. Accordingly, the Commissioner restores the reduction of \$38,600.

Notwithstanding the above, however, the Commissioner notes that the Board's arguments on the \$38,600 reduction for Salaries of Secretarial and Clerical Assistants, A/C

11-000-240-105, describe a position responsible for student record keeping. Based on the description of the duties, it appears that the appropriation for this position should be allocated between Attendance and Social Work Services (11-000-211-100) and Other Support Services - Students-Regular (11-000-218-105). The District's 1995-96 budget and June 30, 1995 report of the Board secretary show no appropriations or expenditures for 11-000-211-000. The amounts budgeted for 1994-95 and 1995-96 for both 11-000-240-105 and 11-000-218-105 are comparable. Also, the 1994-95 actual expenditures for both accounts are comparable to the amounts budgeted. As such, it appears that this is an instance of a historical miscoding of appropriations. Although the funds are being restored to the budget line cut by the municipality, the Board is hereby advised that the proper allocation must be made based on the time spent in performing duties for each of the functions in accordance with the chart of accounts prescribed under N.J.A.C. 6:20-2A.2(m). The Board is, therefore, directed to submit a final revised budget to both the County Superintendent and the Office of Finance reflecting the proper allocation of this restoration.

In addition, notwithstanding his restoration of the Township's reduction herein, the Commissioner finds that the Board might well be able to eliminate, consolidate or streamline certain functions and/or allocate duties in a more efficient manner, so as to permit reduction of clerical and secretarial costs in future budgets. Therefore, the Commissioner directs the Board to undertake a critical assessment of its administrative support functions in order to identify efficiencies which can be implemented in its 1996-97 budget, and to report the results of such assessment to the County Superintendent by February 1, 1996.

Disputed Line-Item Number 2

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
7100	11-000-260-100	Operation and Maint. of Plant Services/Salaries	\$451,921	\$40,000

The Township asserts a reduction in the number of supervisors will reduce salary costs and also strongly recommends the privatization of janitorial services as an additional cost-cutting action.

The Board argues that the District operates in buildings which substantially predate the Second World War and in light of the many state and local building codes and safety mandates, it is necessary that someone be in charge of the school facilities. It asserts that the District has had major problems in maintenance and physical plant operation with respect to upkeep and maintenance. The efforts of the Supervisor of Buildings and Grounds significantly reduce the need for outside contract maintenance and repair services and elimination of this position would cause a great increase in these costs. The Board avers that the District already operates with a skeleton maintenance staff and this particular position is a hands-on employee who acts more in the capacity of a working foreman than as an administrator.

Upon review, the Commissioner, again, notes the Township's elimination of a position without a concomitant examination of the resultant effect on the District's ability to assure provision of T&E and the absence of specific information to counter the Board's factual assertions. In addition, the Commissioner notes that the record supports the Board's contention with respect to its staff already being minimal, and that the numbers of total staff for delivery of all required services in the District remain constant, as between the 1994-95 and 1995-96 school

years, at 150. Finally, the record also appears to support the Board's contentions as to its buildings. Accordingly, the Commissioner restores the reduction of \$40,000.

Notwithstanding the above, the Commissioner finds, as in the case of administrative support staff, that a critical assessment of maintenance needs and related staffing should be undertaken in order to ascertain whether maintenance services can be more efficiently provided. Accordingly, the Board is likewise directed to conduct such a review and report its findings to the County Superintendent on or before February 1, 1996.

Disputed Line-Item Number 3

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
7420	11-000-290-290	Other Employee Benefits	\$1,249,366	\$32,572

The Township argues that if the recommended personnel cuts are made, these would allow for a concomitant reduction in benefit costs reflected in this line item.

The Board argues that even if the Township's proposal to cut the two previously described positions, Supervisor of Buildings and Grounds and one secretarial position, were reasonable, the benefits for these two positions, added together, would in no way approximate the \$32,572 the Township proposes cutting from this line item. The Board asserts that the employee benefits for these positions would be less than half that number. As such, if this reduction were to be sustained, the Board would be forced to reduce moneys allocated for other employment positions to come up with the dollar amount removed from this line item.

Upon review, the Commissioner finds that in light of his determinations on the prior two line items, this reduction cannot be sustained. Additionally, the Commissioner concurs with the Board's assertion that the cuts in this particular line item far exceed the benefit costs of

the positions recommended for elimination and, therefore, sustaining of such cuts would result in an undue hardship for the Board in its provision of contractually mandated benefits to other employees. Accordingly, the Commissioner restores the reduction of \$32,572.

APPLICATION OF SURPLUS

In its advertised annual school district budget statement, the Board projected an unreserved surplus of \$208,202 and allocated \$200,000 as revenue, leaving \$8,202 as undesignated unreserved surplus.

The Board's annual financial report filed pursuant to N.J.S.A. 18A:17-10 (June 30 Board secretary's report) reveals that the District underestimated its unreserved General Fund balance by \$419,511. Based on the 1994-95 Revised Appropriations column of the 1995-96 budget statement, excess surplus available to fund restorations is \$171,517 as follows:

1994-95 General Fund Appropriations (\$8,115,828) x 3%	\$243,475
June 30, 1994 Audited Unreserved Surplus	\$608,202
1994-95 Additional Surplus Generated	<u>19,511</u>
Projected June 30, 1995 Unreserved Surplus	\$627,713
Less 1995-96 Budgeted Fund Balance	<u>(200,000)</u>
Remaining Unreserved, Undesignated Fund Balance	\$427,713
Less 3% Calculation (\$8,539,853)	<u>(256,196)</u>
Amount Available to Fund Restorations	\$171,517

Accordingly, the Commissioner determines that \$171,517 is available to fund the restorations herein, subject to verification through the Board's 1994-95 annual year-end audit report.

SUMMARY


In summary, the Commissioner directs restoration of the Township's line-item reductions to appropriations as set forth below. The Commissioner further notes that all

restorations to line-item appropriations are restricted in accordance with N.J.A.C.
6:20-2A.11(b)3.

<u>Line Item</u>	<u>Description</u>	<u>Sustained</u>	<u>Restored</u>
⁴ 11-000-240-105	Salaries of Secretarial and Clerical Assistants	\$- 0 -	\$38,600
11-000-260-100	Operation and Maint. of Plant Services/Salaries	- 0 -	40,000
11-000-290-290	Other Employee Benefits	- 0 -	<u>32,572</u>
Total Line-Item Determinations:			\$111,172
Tax Levy Certified by Governing Body:			\$3,576,674
Restoration of Reductions:			111,172
Amount of Restoration Funded by Surplus:			<u>(111,172)</u>
Total Tax Levy for 1995-96:			\$3,576,674

Accordingly, subject to verification of surplus amounts through the year-end audit, the tax levy certified by the Riverside Township Committee for General Fund purposes of the Riverside Board of Education for the 1995-96 school year shall stand. The Board of Education is directed to submit to the County Superintendent and the Office of Finance a revised budget reflecting corrected allocations as set forth above at line item 11-000-240-105, and is further directed to submit to the County Superintendent the required reports on efficiencies in secretarial/clerical and maintenance staffing.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

⁴ See discussion above with respect to line-item allocation of this restoration.

SEPTEMBER 20, 1995

DATE OF MAILING SEPTEMBER 20, 1995

343-95

BOARD OF EDUCATION OF THE :
TOWNSHIP OF LIVINGSTON, :
ESSEX COUNTY, :

PETITIONER, :

V. :

RICARDO AND MARY ANN WALTERS, :

RESPONDENTS. :

COMMISSIONER OF EDUCATION

DECISION

BOARD OF EDUCATION OF THE :
TOWNSHIP OF LIVINGSTON, :
ESSEX COUNTY, :
PETITIONER, :
V. :
RICARDO AND MARY ANN WALTERS, :
RESPONDENTS. :

COMMISSIONER OF EDUCATION
DECISION

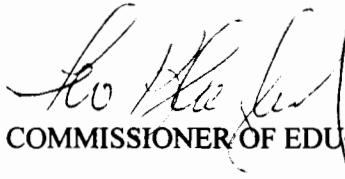
For the Board, James S. Rothschild, Jr., Esq.

This matter having been opened before the Commissioner of Education on May 5, 1995, by way of a Petition of Appeal alleging respondents failed to pay the District outstanding tuition for their minor child's illegal attendance at petitioning School District; and

The Commissioner having directed respondents on May 19, 1995 and June 8, 1995, and again by letter sent by both regular and certified mail on July 12, 1995, and received by respondents on July 29, 1995, to file an answer to the aforesaid petition; and

Respondents having failed as of this date to comply with the directive of the Commissioner, so that each count of the charges against them is deemed to be admitted pursuant to N.J.A.C. 6:24-1.4; now therefore

IT IS ORDERED this _____^{20th}_____ day of September, 1995 that summary judgment shall be granted to the Board, and Ricardo and Maryann Walters are hereby assessed tuition in the amount of \$2,000, covering the four months of their child's illegal attendance at Harrison Elementary Hill in the Township of Livingston.


COMMISSIONER OF EDUCATION

344-95

IN THE MATTER OF THE TENURE :

HEARING OF WILLIE E. PRYOR,

STATE-OPERATED SCHOOL DISTRICT :

COMMISSIONER OF EDUCATION

OF JERSEY CITY, HUDSON COUNTY.

DECISION

_____ :

SEPTEMBER 21, 1995

IN THE MATTER OF THE TENURE :
HEARING OF WILLIE E. PRYOR,
STATE-OPERATED SCHOOL DISTRICT : COMMISSIONER OF EDUCATION
OF JERSEY CITY, HUDSON COUNTY. DECISION

For the Board, Charlotte Kitler, Esq.


This matter having been opened before the Commissioner of Education on March 27, 1995, through certification of tenure charges of abandonment of position and extended unauthorized and excessive absenteeism against a tenured teaching staff member of the State-operated School District of Jersey City; and

The Commissioner having directed respondent via both certified and regular mail on March 28, 1995, the certified copy being signed for on April 13, 1995, to file an answer to the tenure charges against her; and

The Commissioner having sent such notice again on June 8, 1995 and on July 13, 1995, via regular and certified mail (with the July 13 letter being returned unclaimed), and respondent having failed as of this date to comply with the directive of the Commissioner, so that each count of the charges against her is deemed to be admitted; now therefore

IT IS ORDERED this 21st day of September, 1995 that summary judgment shall be granted to the Board, and Willie Pryor shall be dismissed from her tenured position as a teaching staff member in the District's employ as of the date of this order.

IT IS FURTHER ORDERED that, pursuant to N.J.A.C. 6:11-3.7, this matter shall be referred to the State Board of Examiners for review and action as it deems appropriate.


COMMISSIONER OF EDUCATION

SEPTEMBER 21, 1995
DATE OF MAILING SEPTEMBER 21, 1995

R.S., on behalf of her minor child, K.W.S., :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

DECISION

BOARD OF EDUCATION OF THE :
TOWNSHIP OF GLOUCESTER, :
CAMDEN COUNTY, AND, :
ROBERT A. SUESSMUTH, :
SUPERINTENDENT OF SCHOOLS, :

RESPONDENTS. :

_____ :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

OPINION AND ORDER

OAL DKT. NO. EDU 8171-95

AGENCY DKT. NO. 333-8/95

**R.S. ON BEHALF OF
HER MINOR CHILD, K.W.S.,**

Petitioner,

v.

**BOARD OF EDUCATION OF
THE TOWNSHIP OF GLOUCESTER
AND ROBERT A. SUESSMUTH,
SUPERINTENDENT OF SCHOOLS,**

Respondent.

Robert P. Becker, Jr., Esq., on behalf of petitioner (Hannold, Marshall & Becker,
attorneys)

John D. Wade, Esq., on behalf of respondent (Ferreri and Wade, attorneys)

Record Closed: August 31, 1995

Decided: September 1, 1995

BEFORE SOLOMON A. METZGER, ALJ:

This matter arises out of a motion for emergent relief filed with the Commissioner of Education, seeking to have K.W.S. placed in first grade for the coming school year. The matter

was transmitted to the Office of Administrative Law on August 22, 1995 and oral argument was heard on August 31, 1995.

The facts for purposes of the motion are undisputed. K.W.S. was born on October 5, 1989. He was denied entry into respondent's kindergarten program last year because of age and he attended and successfully completed a private kindergarten program. Petitioner now wants her son admitted to respondent's first grade. Respondent's policy on this issue has been in effect since 1978 and requires that children entering first grade be six years old by September 30. The affidavit of Robert A. Suessmuth, Superintendent of Schools, indicates that to his knowledge respondent has made no exceptions to this policy despite numerous requests to do so. Although counsel for petitioner suggested in argument that some parents have received special treatment, he acknowledged that firm proofs would have to await discovery. This is the substance of the record.

To prevail on a motion for emergent relief petitioner must first show that she is likely to succeed on the merits. *Crow v. DeGioia*, 90 N.J. 126 (1992). This has not been done. Respondent might have approached this problem with greater flexibility, but it has chosen to draw a bright line and it is imbued with broad policymaking discretion. *N.A.C. v. Cedar Grove Board of Education*, 94 N.J.R. 2d (EDU) 28; *H.A.B. v. Manalapan-Englishtown Regional School District, Monmouth County*, 92 N.J.A.R. 2d (EDU) 640. Though K.W.S. would be almost seven if he waited to start first grade in respondent's system, I am at liberty to do no more than state that this seems late to start first grade. Petitioner argues that K.W.S. is actually transferring in from another district and thus that the policy concerning entrance age for first graders does not apply. However, it seems that in the absence of a separate procedure for transferees, the existing policy applies.

Based on the foregoing, it is my conclusion that petitioner has failed to establish a likelihood of success on the merits and it is **ORDERED** that the motion be **DENIED**. The matter is to be scheduled expeditiously for plenary hearing.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A. 52:14B-10*.

DATE 9/1/95



SOLOMON A. METZGER, ALJ

R.S., on behalf of her minor child, K.W.S., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

DECISION

BOARD OF EDUCATION OF THE :
TOWNSHIP OF GLOUCESTER, :
CAMDEN COUNTY, AND, :
ROBERT A. SUESSMUTH, :
SUPERINTENDENT OF SCHOOLS, :

RESPONDENTS. :
_____ :


The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondents' reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioner's exceptions essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ), again contending, inter alia, that petitioner's child should be admitted to first grade, although the child's birthday falls after the Board's established cutoff date for first grade entrants. Further, petitioner argues that the ALJ should have considered petitioner's child a transfer student and admitted the child based on the District's transfer policy.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ denying emergent relief as petitioner failed to establish the standards for emergent relief as set forth in Crowe v. DeGjoia, 90 N.J. 126 (1982).

Accordingly, the Motion for Emergent Relief is denied and this matter shall duly proceed on its merits in accordance with the ALJ's recommendation.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

346-95

JET ELECTRIC, INC., :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE :
TOWNSHIP OF BRIDGEWATER, :
SOMERSET COUNTY, :

DECISION

RESPONDENT. :

_____ :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2320-95

AGENCY DKT. NO. 19-1/95

JET ELECTRIC, INC.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF BRIDGEWATER,**

Respondent.

Joseph Caruso, President, Jet Electric, Inc., for petitioner, pursuant to *N.J.A.C.*
1:1-5.4(a)5

Daniel C. Soriano, Jr., Esq., for respondent (Soriano & Soriano, attorneys)

Record Closed: June 27, 1995

Decided: August 10, 1995

BEFORE BRUCE R. CAMPBELL, ALJ:

This matter is a contract dispute concerning electrical work at the Bradley Gardens Elementary School, Bridgewater.

The petitioner, Jet Electric, Inc.(Jet), alleges the Bridgewater Board of Education, respondent, violated and broke a contract between them. The petition further alleges that the

Board has hired a contractor to complete the contract and has deducted \$9,000 from its payments to Jet. Jet further alleges that the Board has terminated the contract without cause, has made it impossible to complete a list of unfinished tasks and has frustrated Jet's efforts to complete its work.

The matter was transmitted by the Department of Education to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A. 52:14B-1* through *-15* and *N.J.S.A. 52:14F-1* through *-13*. After notice, a prehearing conference was held by telephone on May 1, 1995. Among other things, it was agreed that the Board would move for summary decision. A hearing date of September 25, 1995 was established for use if necessary. On June 7, 1995, the Board filed its motion for summary decision. By the close of business on June 27, no responsive papers had been filed. Accordingly, the record closed on that day. For the reasons that follow, summary decision is entered in favor of the Bridgewater Township Board of Education and the petition is **DISMISSED**.

The Board and Jet entered into a standard AIA Form of Agreement on September 1, 1992, for certain electrical work in the District. The agreement contained provisions for arbitration of disputes arising out of the contract. Jet posted a payment and performance bond in the amount of \$237,000 for which American Bankers Insurance Company of Florida was surety. By letter dated August 2, 1994 the Board terminated the contract for cause. The Board submits a US Postal service domestic return receipt showing the letter was received by Jet on August 3, 1994.

The Board then entered into a Construction Contract Takeover Agreement dated November 30, 1994 with American Bankers Insurance Company of Florida.

The Board makes four points: (1) the petitioner's contract with the Board was taken over by the surety on petitioner's performance bond, (2) the contract between the parties required arbitration of any disputes arising under the contract, (3) the petition was not filed within the 90-day limitation imposed by *N.J.A.C. 6:24-1.2(c)*, and (4), the Commissioner of Education does not have jurisdiction over this contract dispute.

DETERMINATION

The fact that American Bankers Insurance Company of Florida entered into a Construction Contract Takeover Agreement with the Board shows that the contract between Jet and the Board was taken over by the surety. Insurers not being widely known for their charitable impulses, it may safely be presumed that this was a proper case for takeover.

The contract between Jet and the Board required arbitration of any disputes. Contract sections 4.5.1 through 5.7. Nothing in the record indicates any attempt to take this matter to arbitration.

The petition of appeal was filed on January 26, 1995. Jet had notice of the cancellation on August 3, 1994. The ninetieth day following August 3, 1994 was November 1, 1994. *N.J.A.C. 6:24-1.2(c)* is quite clear. It provides that petitions shall be filed no later than the ninetieth day from the date of receipt of the notice of a final order, ruling or other action by the District Board of Education which is the subject of the requested contested case hearing. The rule is strictly applied. See, e.g., *Riely v. Hunterdon Central High School Board of Educ.*, 173 *N.J. Super.* 109 (App. Div. 1980). The present petition is nearly three months out of time.

In *Poole v. Passaic County Regional School District No. 1 Board of Educ.*, 1978 *S.L.D.* 1039, the State Board of Education definitively discussed the question of Commissioner jurisdiction in contract matters. Among other things, the State Board stated:

It is well settled that the Commissioner's jurisdiction does not extend to controversies arising under other laws, as for example pension or taxation acts, even though a school district may be a party to the controversy. (Citations omitted) Furthermore where questions purely of law are involved, the initial jurisdiction of the education authorities is not exclusive, but concurrent with that of the courts. . . . *Silverman v. Board of Education of Milburne*, 134 *N.J. Super.* 253 (Law Div. 1975).

In *Rainier's Dairies v. Board of Education of Collingswood*, 1967 *S.L.D.* 260, petitioner protested the cancellation by the respondent

Board of its contract . . . during the 1964-65 school year, and it sought to have the resolution of cancellation set aside and the contract renewed. When respondent challenged the Commissioner's jurisdiction to decide the controversy as one not arising under the school law, the Commissioner determined that the dispute arose out of its operation of cafeterias pursuant to the school law . . . , so that the Commissioner did have jurisdiction over the matter. On appeal of this ruling, the State Board reversed and dismissed the petition. Asserting that if the Commissioner's view were correct he would be obliged to take jurisdiction over negligence claims arising out of food consumed in school cafeterias, that State Board opinion said:

It is the opinion of the State Board of Education that the Commissioner has no jurisdiction in commercial matters of the kind involved in this case. It would certainly not be conducive to the expeditious determination of disputes to have part of the case determined by the Commissioner and the rest by the courts. We believe that the traditional jurisdiction of the courts in matters involving contracts, breach, damages and specific performance should not be disturbed except in cases arising directly under the school laws. This is not such a case. The decision of the Commissioner is reversed and the petitions are dismissed.

The Bridgewater Township Board of Education is correct on all four points. I so **FIND**.

I **CONCLUDE** that this matter is not properly before the Commissioner of Education and, therefore, **ORDER** the petition **DISMISSED** for lack of jurisdiction.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10 AUGUST 1995
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

8/11/95
DATE

DNA
DEPARTMENT OF EDUCATION

AUG 17 1995
DATE

Mailed to Parties:
Jeff S. Main
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cae

LIST OF WITNESSES

On behalf of Petitioner:

None

On behalf of Respondent:

None

LIST OF EXHIBITS

On behalf of Petitioner:

None

On behalf of Respondent:

None

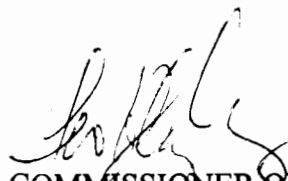
JET ELECTRIC, INC., :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE : DECISION
 TOWNSHIP OF BRIDGEWATER,
 SOMERSET COUNTY, :
 RESPONDENT. :
 _____ :

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful review of the record, the Commissioner concurs with the Administrative Law Judge's findings and conclusion that, as the contract dispute between the parties herein does not arise under school laws, the Commissioner of Education does not have jurisdiction to entertain this dispute.

Accordingly, the initial decision of the OAL is affirmed and the within Petition of Appeal is hereby dismissed for lack of jurisdiction.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

SEPTEMBER 21, 1995

DATE OF MAILING SEPTEMBER 21, 1995

MARY ELEANOR URSO, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE :

BOROUGH OF FLORHAM PARK, :

MORRIS COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION
DECISION

SYNOPSIS

Petitioner, member of the public, alleged she had the right to access the complete and unredacted Memorandum of Agreement between the Board and a resigning employee, among other allegations.

ALJ dismissed petition, concluding that the dispute in this matter did not arise under the school laws. ALJ found that the Commissioner is without jurisdiction to adjudicate alleged violations of the Open Public Meetings Act (OPMA), or the Right to Know Law absent a significant nexus to an underlying substantive school law issue.

Commissioner adopted findings and determination in initial decision as his own, emphasizing that he is without jurisdiction to adjudicate alleged violations of the OPMA or the Right to Know Law unless it is ancillary to an equally or more significant school law issue.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

ORDER OF DISMISSAL

MARY ELEANOR URSO,

Petitioner,

v.

**BOARD OF EDUCATION OF
THE BOROUGH OF FLORHAM
PARK,**

Respondent.

OAL DKT. NO. EDU 9540-94

AGENCY DKT. NO. 375-9/94

Mary Eleanor Urso, *pro se*

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

Record Closed: August 1, 1995

Decided: August 17, 1995

BEFORE RICHARD MCGILL, ALJ:

The dispute in this matter stems from a request by Mary Eleanor Urso (petitioner) for a copy of a memorandum of agreement between the Board of Education of the Borough of Florham Park (respondent) and an employee who had resigned from his employment. In response to that request, respondent provided a copy of the memorandum of agreement from which several paragraphs were redacted. In this proceeding, petitioner seeks to compel respondent to provide her with an unredacted copy of the memorandum of agreement and to

include a copy of the unredacted memorandum of agreement in the public record. Respondent now moves to dismiss the petition for lack of jurisdiction.

PROCEDURAL HISTORY

Petitioner filed her petition with the Commissioner of Education on September 9, 1994, and respondent filed an answer on September 19, 1994. The matter was transmitted to the Office of Administrative Law on September 29, 1994 for determination as a contested case.

A hearing in this matter was scheduled for July 14, 1995. Prior thereto, respondent filed a motion to dismiss for lack of jurisdiction on July 5, 1995, and the hearing scheduled for July 14, 1995 was adjourned pending disposition of the motion. Petitioner did not respond to the motion to dismiss.

MOTION TO DISMISS

a. Respondent's Position

Respondent moves to dismiss the petition in this matter for lack of jurisdiction. In support of the motion, respondent argues that the jurisdiction of the Commissioner of Education extends to disputes arising under the school laws. Respondent recognizes that the Commissioner of Education has incidental jurisdiction to resolve issues which, while not themselves under the school law, relate to a dispute under the school laws. Respondent argues that the petition does not raise any issues under the school laws and that therefore the petition should be dismissed.

b. Petitioner's Position

As legal authority supporting the petition, petitioner cites the Right to Know Law, *N.J.S.A. 47:1A-1 to -4*, Executive Order No. 11, Florham Park Board of Education Policy,

File Code #3570, and Florham Park Board of Education Bylaw, File Code #9326. Executive Order No. 11 is totally unrelated to this proceeding, but Executive Order Nos. 7, 8 and 9 relate to the implementation of the Right to Know Law. Florham Park Board of Education Policy, File Code #3570, and Florham Park Board of Education Bylaw, File Code #9326, are essentially guidance to respondent's personnel in regard to compliance with the Right to Know Law and also with the Open Public Meetings Act, *N.J.S.A.* 10:4-6 to -21.

c. Law and Analysis

The extent of the jurisdiction of the Commissioner of Education is set forth in *N.J.S.A.* 18A:6-9, which provides as follows:

The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the state board or of the commissioner.

In order for the Commissioner to exercise jurisdiction over a particular controversy, it must involve the Commissioner's overall responsibility for supervising educational determinations and require the Commissioner's expertise in regard to education. *Bd. of Ed. Englewood v. Englewood Teachers*, 64 *N.J.* 1, 8 (1973); *Dunellen Bd. of Ed. v. Dunellen Ed. Assn.*, 64 *N.J.* 17, 28 (1973).

The Commissioner of Education has additional incidental jurisdiction to determine issues under statutes such as the Open Public Meetings Act, where such issues are part of a controversy under the school laws. *Sukin v. Northfield Bd. of Ed.*, 171 *N.J.Super.* 184, 187 (App. Div. 1979). The Commissioner of Education may exercise this incidental jurisdiction despite the fact that enforcement under the Open Public Meetings Act is generally assigned to the Superior Court in accordance with *N.J.S.A.* 10:4-16 and *N.J.S.A.* 10:4-17. *Thomas v. Bergen Cty. Welfare Bd.*, 122 *N.J.Super.* 371, 376 (App. Div. 1973). However, where a dispute does not involve the school laws but rather is limited to some other statute such as the

Open Public Meetings Act, the Commissioner of Education does not have jurisdiction. *Cheung v. Freehold Tp. Board of Education*, 94 N.J.A.R.2d (EDU) 576; *Rovello v. Hopewell Valley Regional School District Board of Education*, 93 N.J.A.R.2d (EDU) 313. In *Rovello*, the Commissioner stated as follows:

While the Commissioner does have jurisdiction to address OPMA violations, . . . it is clear that such jurisdiction is ancillary, pendent to an equally or more significant "school law" issue. Since the only issue presented in the within petition concerns a purported Open Public Meetings Act (OPMA) violation, absent a significant nexus to an underlying substantive school law issue, the Commissioner is without jurisdiction to adjudicate the sole question presented under the OPMA. [*Id.* at 317.]

Here, none of petitioner's citations is part of the school laws. The Right to Know Law certainly is not a part of the school laws. Similarly, Executive Orders 7, 8 and 9 concern implementation of the Right to Know Law and do not in any particular way involve education or school laws. Finally, Florham Park Board of Education Policy, File Code #3570, and Florham Park Board of Education Bylaw, File Code #9326, provide guidance to respondent's personnel concerning compliance with the Right to Know Law and with the Open Public Meetings Act. Under the circumstances, I **CONCLUDE** that the dispute in this matter does not arise under the school laws. It follows that the petition in this matter must be dismissed for lack of jurisdiction.

Accordingly, it is **ORDERED** that the petition in this matter be dismissed.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education

does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Aug 17, 1995
DATE

Richard McGill
RICHARD MCGILL, ALJ

Aug 18 1995
DATE

Receipt Acknowledged:
D. Ventanillas
DEPARTMENT OF EDUCATION

AUG 23 1995
DATE

Mailed to Parties:
Jeff S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

am

MARY ELEANOR URSO, :
 :
 PETITIONER, :
 :
 V. :
 : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE :
 BOROUGH OF FLORHAM PARK, : DECISION
 MORRIS COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ) that the within petition does not arise under the school laws, and that the Commissioner is without jurisdiction to adjudicate alleged violations of the Open Public Meetings Act, N.J.S.A. 10:4-6 to -21, or the Right to Know Law, N.J.S.A. 47:1A-1 to -4, unless it is ancillary to an equally or more significant school law issue.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision of the Office of Administrative Law dismissing the within Petition of Appeal.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

SEPTEMBER 21, 1995

- 6 -

DATE OF MAILING SEPTEMBER 21, 1995

(200-95E)
348-95

SOUTH RIVER EDUCATION :
ASSOCIATION,

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION
DECISION

BOARD OF EDUCATION OF THE :
BOROUGH OF SOUTH RIVER, :
MIDDLESEX COUNTY, :

RESPONDENT. :

_____ :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION DISMISSAL

OAL DKT. NO. EDU 3865-95

AGENCY DKT. NO. 63-3/95

SOUTH RIVER

EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF

THE BOROUGH OF SOUTH RIVER,

Respondent.

Sanford R. Oxfeld, Esq., for petitioner (Balk, Oxfeld, Mandell & Cohen, attorneys)

Robert A. Blanda, Esq. for respondent

Record closed: July 10, 1995

Decided: August 16, 1995

BEFORE ROBERT W. SCOTT, ALJ:

On March 8, 1995, the petitioner filed an application for an Order Granting Emergent Relief seeking to restrain the respondent from appropriating approximately \$406,000 restored to the respondent's 1994-95 school budget. On April 17, 1995, the matter was transmitted to the Office of Administrative Law as a contested case. Oral argument on the petitioner's application was heard on May 10, 1995, and a decision denying the petitioner's application was issued by the undersigned on May 11, 1995.

The order denying the application provided that the Commissioner of the Department of Education had forty-five days to adopt, modify, or reject the undersigned's action. More than forty-five days has now transpired and said order has either been adopted, modified, or rejected by the Commissioner of the Department of Education or has been accepted by his silence. The above action, in the opinion of the undersigned, has fully disposed of all issues in controversy between the parties in the present action. Therefore, it is **ORDERED** that the petitioner's application be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Aug 16, 1995
DATE

Robert W. Scott
ROBERT W. SCOTT, ALJ

Aug. 18, 1995
DATE

Receipt Acknowledged:
D. Antanaitis
DEPARTMENT OF EDUCATION

AUG 24 1995
DATE

Mailed to Parties:
Jeff S. Main
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sf

SOUTH RIVER EDUCATION :
ASSOCIATION,

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION
DECISION

BOARD OF EDUCATION OF THE :
BOROUGH OF SOUTH RIVER,
MIDDLESEX COUNTY, :

RESPONDENT. :

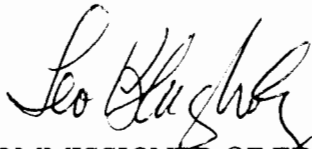
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The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

After an independent review of the record in this matter, the Commissioner concurs with the determination of the Administrative Law Judge herein that the May 11, 1995 decision of the OAL denying petitioner's Motion for Emergent Relief, which decision was subsequently adopted by the Commissioner on June 7, 1995, fully disposed of all issues in controversy between the parties in the present action.

Accordingly, the initial decision of the OAL is adopted and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

SEPTEMBER 21, 1995

DATE OF MAILING SEPTEMBER 21, 1995

STEVEN POKROVSKY AND SANDRA	:	
POKROVSKY,		COMMISSIONER OF EDUCATION
	:	
PETITIONERS,		DECISION ON MOTION
V.	:	
	:	
BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF PITTSBORO,	:	
SALEM COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

SYNOPSIS

Petitioning host family sought emergent relief for foreign exchange student to be permitted to register in District's high school. Board contended new rule required that it be given sufficient notice to prepare for exchange students. Thus, the application submitted by petitioners' student from Denmark, placed by an organization that facilitates student exchanges, was filed untimely.

Inasmuch as the Board subsequently determined to admit the exchange student on September 14, 1995, the dispute before the Commissioner was dismissed as moot. Return of file was requested from OAL.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF

OAL DKT. NO. EDU 8271-95

AGENCY DKT. NO. 346-9/95

**STEVEN POKROVSKY and
SANDRA POKROVSKY,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE
THE TOWNSHIP OF PITTSBORO,
SALEM COUNTY,**

Respondent.

Steven Pokrovsky and Sandra Pokrovsky, petitioners, pro se

**Gary D. Wodlinger, Esq., for respondent (Lipman, Antonelli, Batt, Dunpal, Wodlinger &
Gibson, attorneys)**

Record Closed: September 12, 1995

Decided: September 13, 1995

BEFORE KATHRYN A. CLARK, ALJ:

This is the matter of Pokrovsky v. Pittsboro Board of Education. This matter was brought before the Office of Administrative Law (OAL) by way of application for emergent relief, under N.J.A.C. 1:61A-12.1, and was transmitted to the OAL on September 7, 1995. A hearing was held on September 12, 1995.

Petitioners are the host family for an exchange student from Denmark, Gitte Hommelsgaard. Ms. Hommelsgaard was placed with the Pokrovskys through the Cultural Academic Student Exchange, Inc. (C.A.S.E.), an organization that facilitates student exchanges.

A worker for C.A.S.E. contacted the Pittsgrove School District in early August to advise them that an exchange student would be coming to Schalick High School. The District advised the worker that the Pittsgrove Board of Education (Board) had adopted a new policy in March, 1995, regarding exchange students, and that under the new rule, the application was not in time. The Pokrovskys appealed to the Board, asking for an exception from their policy, but the Board voted unanimously to reject their appeal.

Ms. Hommelsgaard would be the only exchange student in Schalick High School this school year. Schalick High School had four exchange students last school year, one of whom presented unusual challenges in language (a student of Japanese extraction from Mexico), and most of whom were brought to the School's attention late in the summer before they were to begin classes. I **FIND** that the Board acted reasonably and with justification in making a rule that asks and requires that it be given sufficient notice to prepare for exchange students, some of whom may present significant educational needs.¹

But I also **FIND** that the Board did not go about establishing this rule in a way that gave a realistic opportunity for notice of it to reach those people and agencies who would be most significantly affected by it. The notice the Board gave (publication in two newspapers, the Salem Sunbeam and the Elmer Times(a weekly)), technically was legally sufficient, but was not calculated to reach, nor did it reach those most likely to be affected by it. Additionally, the Board admitted, in response to a question from the bench, that it had made no attempt to notify any organization or person it knew to be involved with sending exchange students to its schools.

¹ The section of the Federal Register offered into evidence, is an adopted rule, and is cited as 22 CFR 514.25. It comports with the rule adopted by the Board regarding exchange students.

Credible testimony was received from Mrs. Pokrovsky that not only did the petitioners not know of the new policy, but the two organizations involved in sending the four exchange students to Schalick High School last year (ASSI and the 4H) did not know of it. Also, two former host families Mrs. Pokrovsky contacted did not know of the new rule, and a teacher in the Pittsgrove school system who has hosted exchange students in the past did not know of the new rule. Also, the agency that petitioners contacted, C.A.S.E., did not know of the new rule.

The rule itself, and the process the Board undertook in adopting it, are not legally deficient, but I **FIND** that in this first year of the new rule's operation, when the organizations that send exchange students to Pittsgrove, and the host parents, and the exchange students themselves, knew nothing of the existence of this rule, strict adherence to the rule would lead to an injustice.

New Jersey has a strong tradition of "home rule", a worthy tradition that acknowledges that people generally know what is best for themselves and for their communities. Along with that tradition is the principle that decisions of locally-elected Boards of Education should not be set aside unless there is a showing that the Board acted in an arbitrary or capricious manner, which the Board clearly did not do in this case. The Board acted properly, but should have exercised its discretion in this one case (because of the inadequacy of the notice), to allow this one exchange student to enroll.

I also understand the Board's point that this exchange student may have been brought to Pittsgrove to force the Board's hand, to make them admit her despite their rule. But there was no indication to petitioners until very recently that the Board would enforce its rule, and not grant the requested exemption. In light of the **FACT** that this is the first time this rule has been enforced, and also especially in light of the **FACT** that this rule was not publicized or made known to interested parties in enough time for them to take action in a way that would meet the requirements of the rule, it seems to this tribunal to be harsh to enforce it strictly in this case.

I further understand the position of the Board that there are other remedies available to petitioners, specifically, a small (45 student) private Christian academy 45 minutes away, or a

return to C.A.S.E. to arrange a placement at another school, which would involve placing Ms. Hommelsgaard with another family. Neither option is acceptable to petitioners, or to Ms. Hommelsgaard. The distance to the Christian academy, plus its small size, make it undesirable, and neither the petitioners nor Ms. Hommelsgaard wish to part company now.

The granting of emergent relief is an extraordinary remedy which can only be awarded based upon a showing that irreparable harm will result if it is not granted, and a further showing that there is a likelihood of success on the merits. See, N.J.A.C. 1:1-12.6.

The expanded criteria for determination of an application for emergent relief have been set forth in Crowe v. Degioia, 90 N.J. 126, 132-34 (1982). Four standards are articulated:

1. The relief should not be granted unless it is necessary to prevent irreparable harm. Harm is generally considered irreparable if it cannot be adequately redressed by monetary damages.
2. Such relief should not be granted when the legal rights underlying the claim are unsettled.
3. In order to prevail on an application for temporary relief, a party must make a preliminary showing of a reasonable probability of ultimate success on the merits.
4. The relative hardship of the parties in granting or denying the relief sought should be considered.

Irreparable injury has been defined as “substantial injury to a material degree coupled with the inadequacy of money damages.” Judice’s Sunshine Pontiac, Inc. V. General Motors, Inc., 418 F. Supp. 1212 (D. N.J. 1976); John Tully v. Mott Supermarkets, Inc., 337 418 F. Supp. 834 (D. N.J. 1972). I **CONCLUDE** that money damages would not benefit petitioners, and I further **CONCLUDE** that there has been a showing of “substantial injury to a material degree.”

Ms. Hommelsgaard herself, in excellent English, said that she wanted to remain with the Pokrovskys, and that she wanted a full American high school experience. Although Ms. Hommelsgaard is an intelligent and articulate young lady, she is still very young and a long way from home. To miss the first few days of school would be upsetting enough for any teenager. To possibly have to pick up and move again, just after she arrived and began to feel welcomed, or to

have to attend a small, sectarian private school 45 minutes away, is so unfair that I **FIND** that it constitutes "substantial injury to a material degree."

Balancing the harms to be suffered by the parties, I **FIND** that the harm to the Board would be in not having its rule enforced, while the harm to petitioners would be the sense of unfairness and the deep upset it would cause, and the harm to Ms. Hommelsgaard would be an unfavorable first impression of the American way of doing things. The Board's rule will stand, after this initial exception, because the local community is now well aware of the Board's rule regarding exchange students, given the press coverage of this instant case. Also, the organizations that engage in placing exchange students in the area now have good reason to know of the Board's rule and requirements. Any further excuses of ignorance of the rule will have much, much less weight.

Although I **FIND** the rule of the Board to be appropriate, justifiable and reasonable, I **FIND** that strict adherence to a rule that just went into effect in March, 1995, and further, was not known by persons and organizations most likely to be affected by it, should give way to an exception in this instance. Consequently, I **CONCLUDE** that petitioners' request for relief should be **GRANTED**, and that Ms. Hommelsgaard should be admitted to Schalick High School..

This order on application for emergency relief may be adopted, modified or rejected by **THE COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If **THE COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A. 52:14B-10*.

9/13/95

DATE

Kathryn A. Clark

KATHRYN A. CLARK, ALJ

WITNESSES

For Petitioner:

Gitte Hommelsgaard

For Respondent:

John Dasbrow, Superintendent of Schools

EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Host Family Handbook

R-2 Federal Register/Vol. 58, No. 52/Friday, March 19, 1993/ Rules and Regulations,
page 15207

STEVEN POKROVSKY AND SANDRA :
POKROVSKY, : COMMISSIONER OF EDUCATION

PETITIONERS, : DECISION ON MOTION

V.

BOARD OF EDUCATION OF THE :
TOWNSHIP OF PITTSBORO, :
SALEM COUNTY, :

RESPONDENT.

For petitioners, Steven Pokrovsky and Sandra Pokrovsky, pro se

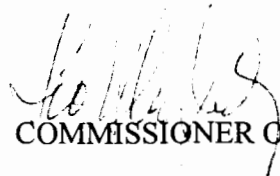
For respondent, Gary D. Wodlinger, Esq. (Lipman, Antonelli, Batt, Dunlap, Wodlinger & Gibson)

This matter was opened before the Commissioner of Education by way of Petition of Appeal and Motion for Emergent Relief filed on September 5, 1995, requesting that the Board permit a foreign exchange student living with petitioners as host family to attend high school in the District. The matter was transmitted to the Office of Administrative Law (OAL) on September 5, 1995, for hearing as a contested matter. A hearing on the emergent application was conducted on September 12, 1995, and an order by the Administrative Law Judge (ALJ) granting the relief requested was issued on September 13, 1995.

In lieu of exceptions, the Board submitted a letter on September 15, 1995, acknowledging that, inasmuch as the Board had subsequently determined to admit the exchange student on September 14, 1995, the dispute before the Commissioner is now moot.

Accordingly, the Commissioner dismisses the within Petition of Appeal and, by copy of this decision, requests return of the file from OAL in accordance with N.J.A.C. 1:1-3.3.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

SEPTEMBER 22, 1995

DATE OF MAILING SEPTEMBER 22, 1995

ANASTASIA H. MICHAELIDES, :

PETITIONER,

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE
BOROUGH OF EAST NEWARK ET AL.,
HUDSON COUNTY. :

DECISION


RESPONDENT.
_____ :

OAL DKT. NO. EDU 11492-94

ANASTASIA H. MICHAELIDES, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
BOROUGH OF EAST NEWARK ET AL., :
HUDSON COUNTY. :
RESPONDENT. :
_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

SEPTEMBER 27, 1995

DATE OF MAILING SEPTEMBER 27, 1995

IN THE MATTER OF THE ANNUAL
SCHOOL ELECTION HELD IN THE
SCHOOL DISTRICT OF BERKELEY
TOWNSHIP, OCEAN COUNTY.

:
:
:
:
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:

COMMISSIONER OF EDUCATION
DECISION

OAL DKT. NO. EDU 4682-95

IN THE MATTER OF THE ANNUAL
SCHOOL ELECTION HELD IN THE
SCHOOL DISTRICT OF BERKELEY
TOWNSHIP, OCEAN COUNTY.

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COMMISSIONER OF EDUCATION

DECISION

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

SEPTEMBER 27, 1995

DATE OF MAILING SEPTEMBER 27, 1995

R.M., on behalf of his minor child, M. M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
<hr style="width: 30%; margin-left: 0;"/>		

OAL DKT. NO. EDU 1238-95

R.M., on behalf of his minor child,
M. M., :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

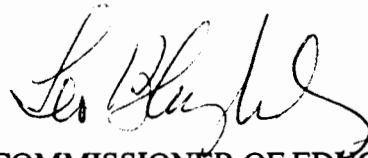
BOARD OF EDUCATION OF THE :
NORTHERN HIGHLANDS :
REGIONAL HIGH SCHOOL, :
BERGEN COUNTY, :

RESPONDENT. :

DECISION

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

SEPTEMBER 27, 1995

DATE OF MAILING SEPTEMBER 27, 1995

(214-95E)

353-95

P.C. AND R.C., on behalf of minor child,
K.C.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWN-
SHIP OF DEPTFORD, GLOUCESTER
COUNTY,

RESPONDENT.

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:

COMMISSIONER OF EDUCATION

DECISION

SEPTEMBER 27, 1995

OAL DKT. NO. EDU 6882-95

P.C. AND R.C., on behalf of minor child, :
K.C., :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF DEPTFORD, GLOUCESTER :
COUNTY, :

DECISION

RESPONDENT. :
_____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

354-95

BOARD OF EDUCATION OF THE :
LENAPE REGIONAL HIGH SCHOOL :
DISTRICT, BURLINGTON COUNTY, :

PETITIONER, :
V. :

COMMISSIONER OF EDUCATION

NEW JERSEY STATE DEPARTMENT :
OF EDUCATION, DIVISION OF :
SPECIAL EDUCATION, AND E.M., :
PARENT OF J.M., :

DECISION

RESPONDENTS. :
_____ :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1395-94

AGENCY DKT. NO. 381-11/93

**BOARD OF EDUCATION OF LENAPE
REGIONAL HIGH SCHOOL DISTRICT,**

Petitioner,

v.

**DEPARTMENT OF EDUCATION, DIVISION
OF SPECIAL EDUCATION AND E.M.,
PARENT OF J.M.,**

Respondent.

William H. Kenney, Esq., for petitioner (Archer & Greiner, attorneys)

Arlene Goldfus Lutz, Deputy Attorney General, for respondent, Department of Education, Division of Special Education (Deborah T. Poritz, Attorney General of New Jersey, attorney)

John T. Barbour, Esq., for respondent, E.M.

Record Closed: August 22, 1995

Decided: August 23, 1995

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

The Lenape Regional High School Board of Education appealed a decision of the Division of Special Education concerning a question of consent to release pupil records.

This matter was transmitted to the Office of Administrative Law on February 14, 1994, for a hearing pursuant to *N.J.S.A. 52:14B-1* through -15 and *N.J.S.A. 52:14F-1* through -13.

A series of negotiation sessions was held between and among the parties following a prehearing conference.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

23 AUGUST 1995
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

August 25, 95
DATE

Receipt Acknowledged:

Deborah N. Antonatos
DEPARTMENT OF EDUCATION

AUG 30 1995
DATE

Mailed to Parties:

Jeff S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cae

ARCHER & GREINER
A Professional Corporation
One Centennial Square
Haddonfield, New Jersey 08033
(609) 795-2121
Attorneys for Petitioner

BY: WILLIAM H. KENNEY, ESQUIRE

LENAPE REGIONAL HIGH SCHOOL	:	BEFORE THE COMMISSIONER
DISTRICT BOARD OF EDUCATION,	:	OF EDUCATION OF NEW JERSEY
	:	
Petitioner,	:	
	:	OAL DOCKET NO. 01395-94 S
OFFICE OF SPECIAL EDUCATION	:	
PROGRAMS, and E.M., PARENT	:	
OF J.M.,	:	STIPULATION OF DISMISSAL
	:	
Respondents.	:	
	:	

THIS MATTER having been brought before the Office of Administrative Law, upon the appeal of the Lenape Regional High School District Board of Education from the findings of a Complaint Investigation Report, and the Petitioner and Respondent, Office of Special Education Programs, through their counsel, Archer & Greiner, A Professional Corporation, attorneys for Petitioner and Deborah T. Poritz, Attorney General for the State of New Jersey, having reached a settlement of the issues raised in the appeal, and

WHEREAS N.J.A.C. 6:3-6.5(c)13 requires the written consent of the parent or adult pupil before organizations, agencies and persons from outside the school may have access to a pupil's records;

WHEREAS the Lenape Regional High School District Board of Education believed that under N.J.A.C. 6:28-2.3, it did not require the written consent of the parent or adult child when it sent pupil records to out-of-district schools in order to see if they would accept a pupil from the district;

WHEREAS a parent filed a complaint pursuant to N.J.A.C. 6:28-9.2 with the Department of Education, Office of Special Education Programs, stating that the Lenape Regional High School District Board of Education sent her son's pupil records to six out-of-district schools without her consent;

WHEREAS the complaint investigation determined that the records were not sent in accordance with the requirements of N.J.A.C. 6:3-6.5;

WHEREAS the Lenape Regional High School District Board of Education was directed to submit to the Burlington County Office of Education a corrective action plan that developed and implemented policies and procedures to ensure access to pupil records in accordance with N.J.A.C. 6:3-6.5;

WHEREAS the Lenape Regional High School District Board of Education challenged the findings of the complaint investigation pursuant to N.J.S.A. 19A:6-9;

WHEREAS the parties desire to settle the dispute between them amicably;

THEREFORE, the parties hereby stipulate to the following:

1. The appeal filed by the Lenape Regional High School District Board of Education is hereby withdrawn.

2. The withdrawal of the appeal is not intended to be, and shall not constitute an admission of any violation of the provisions of N.J.A.C. 6:3-6.5, or any other provision of the pupil records regulations.

3. While the Lenape Regional High School District Board of Education does not agree with the conclusion reached by the Office of Special Education Programs, it did develop and has implemented a corrective action plan, approved by the Burlington County Office of Education, which plan includes policies and procedures to insure that access to pupil records is provided in accordance with N.J.A.C. 6:3-6.5, either securing written consent prior to distribution, or redacting all personal identifying information prior to distribution of pupil records.

4. This Stipulation shall not be evidential except in an action by the State of New Jersey to enforce this agreement.

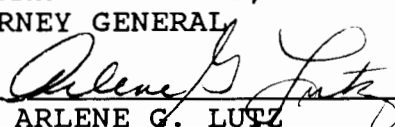
ARCHER & GREINER
A Professional Corporation
Attorneys for Petitioner

Dated: 8.8.95

BY: 
WILLIAM H. KENNEY

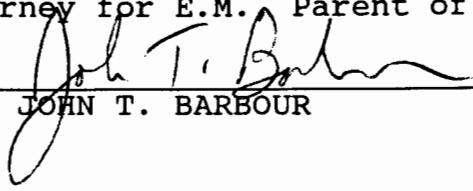
DEBORAH T. PORITZ,
ATTORNEY GENERAL

Dated: 8/17/95

BY: 
ARLENE G. LUTZ
Deputy Attorney General

JOHN T. BARBOUR, ESQUIRE
Attorney for E.M. Parent of J.M.

BY:



JOHN T. BARBOUR

Dated:

36

BOARD OF EDUCATION OF THE	:	
LENAPE REGIONAL HIGH SCHOOL	:	
DISTRICT, BURLINGTON COUNTY,	:	
	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
NEW JERSEY STATE DEPARTMENT	:	DECISION
OF EDUCATION, DIVISION OF	:	
SPECIAL EDUCATION, AND E.M.,	:	
PARENT OF J.M.,	:	
	:	
RESPONDENTS.	:	
_____	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

SEPTEMBER 28, 1995

DATE OF MAILING SEPTEMBER 28, 1995

355-95

IN THE MATTER OF THE :
 ANNUAL SCHOOL ELECTION : COMMISSIONER OF EDUCATION
 HELD IN THE SCHOOL DISTRICT : DECISION
 OF MIDDLE TOWNSHIP, CAPE MAY
 COUNTY. :

SYNOPSIS

Petitioner, defeated candidate for Board membership, alleged improprieties and violations of law in conduct of school election.

ALJ concluded Board complied in all respects with the provisions of the statute which require that the polls be open at specified times and that proper notice of an election be given. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4710-95

AGENCY REF. NO. 115-4/95

**IN THE MATTER OF THE ANNUAL SCHOOL
ELECTION HELD IN THE SCHOOL DISTRICT
OF MIDDLE TOWNSHIP, CAPE MAY COUNTY**

No one appeared for petitioner

Lou Dwyer, Esq. for respondent, Middle Township School District

Record Closed: August 16, 1995

Decided: August 17, 1995

BEFORE EDGAR R. HOLMES, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Linda S. Dellavalle, representing the Concerned Citizens of Middle Township School District, filed a petition with the Commissioner of Education dated April 20, 1995, requesting an investigation of the April 18, 1995, District Election.

The matter was transmitted to the Office of Administrative Law (OAL) on May 10, 1995, for determination as a contested case pursuant to the Administrative Procedures Act, N.J.S.A. 52:14B-1 to -15, and the act creating the OAL, N.J.S.A. 52:14F-1 to -13.

FACTS

The petition alleged that the voting period between 5:00 p.m. and 9:00 p.m. was insufficient, signs indicating polling places were insufficient and that no notice of the election was published. No one appeared to describe the impact, if any, of these alleged violations.

The Middle Township School Board attorney appeared with witnesses. He filed a copy of the Notice of Election which appeared in The Press, Atlantic City, New Jersey, Friday, April 7, 1995, and which was duly posted. It clearly states the times and locations of voting.

LAW

Opening and closing of the polls is required between 5:00 p.m. and 9:00 p.m. on the day of election. Additional times are not required but are permissible as early as 7:00 a.m. on election day. N.J.S.A. 18A:14-45.

Notice is required by publication and posting. N.J.S.A. 18A:14-19. The Board's attorney described and produced a copy of adequate posting and notice. This was not disputed at the hearing.

I therefore **CONCLUDE** that the Middle Township School District complied in all respects with the provisions of the statute which require that the polls be open at specified times and that proper notice of an election be given.

I **DISMISS** the petition filed herein.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

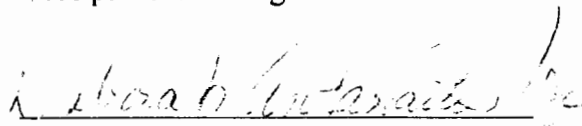
Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/17/95
DATE



EDGAR R. HOLMES ALJ

Receipt Acknowledged:

8/23/95
DATE


DEPARTMENT OF EDUCATION

AUG 29 1995
DATE

Mailed to Parties

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

FOR PETITIONER

NONE

FOR RESPONDENT

NONE

DOCUMENTS IN EVIDENCE

FOR PETITIONER

NONE

FOR RESPONDENT

R-1 COPY OF NOTICE IN THE PRESS

OAL DKT. NO. EDU 4710-95

IN THE MATTER OF THE :
ANNUAL SCHOOL ELECTION : COMMISSIONER OF EDUCATION
HELD IN THE SCHOOL DISTRICT : DECISION
OF MIDDLE TOWNSHIP, CAPE MAY
COUNTY. :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review, the Commissioner concurs with the conclusion of the Administrative Law Judge that the Middle Township School District complied in all respects with the pertinent provisions of the election statute.

Accordingly, the initial decision is adopted for the reasons expressed therein, and the petition is dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

SEPTEMBER 28, 1995

DATE OF MAILING SEPTGEMBER 28, 1995 - 5 -

356-95

R.C., on behalf of his daughter, E.C., :

PETITIONER, :

V.

COMMISSIONER OF EDUCATION
DECISION

BOARD OF EDUCATION OF THE :
BOROUGH OF ORADELL, BERGEN :
COUNTY, :

RESPONDENTS. :

SEPTEMBER 28, 1995

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STATE OF NEW JERSEY
OFFICE OF THE CLERK

SILLS CUMMIS ZUCKERMAN RADIN
TISCHMAN EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-6500
(201) 643-7000
Attorneys for Respondents

-----X
ROBERT COHEN, on behalf of, : BEFORE THE
his daughter, E.C., :
 : COMMISSIONER OF EDUCATION
 :
Petitioner, :
 :
-v- : AGENCY REF. NO. 272-7/94
 : OAL DOCKET NO. EDU OS 01241-95N
 :
ORADELL BOARD OF EDUCATION, :
SCOTT RYAN, JUDITH CONK, :
JOHN DiGIOVACHINO, SUSAN :
LOWENSTEIN, and LORI EDWARDS, : INITIAL DECISION DISMISSING
 : PETITION WITH PREJUDICE
 :
Respondents. :
-----X

THIS MATTER having been opened to the Court by Respondents Oradell Board of Education, Scott Ryan, Judith Conk, John DiGiovachino, Susan Lowenstein and Lori Edwards through their counsel, Sills Cummis Zuckerman Radin Tischman Epstein & Gross, P.A. (Derlys Maria Gutierrez, Esq., appearing), by way of application for an Order dismissing the petition, and Petitioner Robert Cohen on behalf of his daughter E.C., having opposed the motion, (Robert Cohen appearing, pro se), and the Court having considered the pleadings and supporting documents, and for good cause shown as spread upon the record in open Court; and

WHEREAS, the Court has made the following findings:

1. That the issues raised in the Petition are moot insofar as E.C. can no longer attend kindergarten during the 1994-1995 school year in the Oradell School District because the school year commenced in September, 1994 and because E.C.

attended a private kindergarten program in Tenafly, New Jersey during the 1994-1995 school year.

THEREFORE, I CONCLUDE that the issues raised by the Petition are moot and ORDER that the Petition be dismissed with prejudice.

I hereby file this initial decision with the Commissioner of the Department of Education for Consideration.

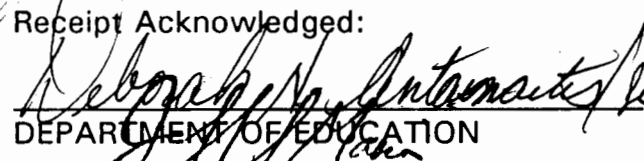
This recommended decision may be adopted, modified or rejected by the Commissioner of the Department of Education, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

AUG 15 95
DATE

Aug. 25, 95
DATE
AUG 29 1995
DATE


HONORABLE JEFFREY GERSON, A.L.J.


Receipt Acknowledged:

DEPARTMENT OF EDUCATION
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

R.C., on behalf of his daughter, E.C., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
BOROUGH OF ORADELL, BERGEN :
COUNTY, :
RESPONDENTS. :

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review, the Commissioner concurs with the ALJ that the issues in the within petition are moot. Accordingly, the Commissioner determines to adopt the initial decision of the ALJ for the reasons expressed therein, and the petition is hereby dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

SEPTEMBER 28, 1995

- 3 -

DATE OF MAILING SEPTEMBER 28, 1995

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE COMMISSIONER OF EDUCATION
 SCHOOL DISTRICT OF POINT : DECISION
 PLEASANT BOROUGH, OCEAN
 COUNTY. :

SYNOPSIS

Petitioner, defeated candidate for Board membership, alleged improprieties and violations of law in the conduct of the school election. Petitioner contended election literature was improperly disseminated.

In light of exhibits and testimony of witnesses, the ALJ concluded that petitioner did not show any violation of the statutes governing school elections and had not established any basis for ordering a new school election for the two Board positions. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own. Commissioner, however, directed the Board to adopt an appropriate policy governing the release of student directory information and sale of labels.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4709-95

AGENCY DKT. NO. 112-4/95

**IN THE MATTER OF THE
ANNUAL SCHOOL ELECTION
HELD IN THE SCHOOL DISTRICT
OF POINT PLEASANT BOROUGH,
OCEAN COUNTY**

S. Ted Scarito, petitioner, pro se

Daniel S. Popovitch, Esq., on behalf of the Point Pleasant Borough School Board, Ocean County

Record Closed: July 17, 1995

Decided: August 25, 1995

BEFORE BEATRICE S. TYLUTKI, ALJ:

This matter was initiated by the petitioner, S. Ted Scarito, an unsuccessful candidate for the Point Pleasant Borough School Board (School Board) in the annual school election held in Point Pleasant Borough (Borough). The petitioner requested an inquiry as to alleged statutory violations relating to a flyer sent to parents or guardians of students (P-2), a flyer given to students to be taken home (P-1), and a notice of election posted at various public locations (P-3).

The matter was transmitted to the Office of Administrative Law on May 10, 1995 for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The hearing took place on July 17, 1995, and the record closed on that date.

FACTUAL FINDINGS

The annual school election took place in the Borough on April 18, 1995. In addition to the school budget questions, there were four candidates on the ballot for the two vacancies on the School Board. Initially, it was announced that Victor J. Marini and Loren C. MacIver won the election. Thereafter, there was a request for a recount and on May 12, 1995 the Commissioner of Education issued a decision in which he determined that the two persons elected were Loren C. MacIver and Brian C. Bartlett.

At the hearing, the petitioner and his two witnesses, Mr. Marini, one of the unsuccessful School Board candidates, and Steve J. Ciliberto, a current member of the School Board, stated that a flyer endorsing the candidacy of two of the four people running for the School Board vacancies (P-2) was sent to the parents or guardians of students using directory information labels produced by the Point Pleasant Borough School District (School District). The flyer endorses the candidacy of Brian C. Bartlett and Loren C. MacIver, and the flyer states that it was paid for by the Friends of Bartlett and MacIver (P-2). Mr. Marini testified that he has children attending the Borough schools, that he received a copy of the flyer by mail, and that he recognized the label as being similar to those used by the School District to send material to parents of students.

After the school election and before the decision as to the recount was issued, Mr. Marini attended a workshop run by the School District. At that time, Mr. Marini asked George Kane, the superintendent of schools, whether he could have bought the directory information labels prior to the school election. Mr. Kane stated that he would not have sold the labels to Mr. Marini prior to the school election.

Mr. Kane testified that after checking with Daniel S. Popovitch, Esq., the School Board's attorney (R-1), he agreed to sell the directory information labels to the Parent-Teachers Organization so that the group could send out literature endorsing a bond issue to be voted on at

a special election held in February 1995. Mr. Kane stated that Brian C. Bartlett purchased the labels for \$25.00 on behalf of the Parent-Teachers Organization, and at that time Mr. Bartlett was not a candidate for the School Board. After the labels were purchased, Mr. Kane had no information as to whether any or all of them were used to mail bond related information and he found out after the fact that some or all of the labels had been used to send the flyer endorsing Mr. Bartlett and Mr. MacIver.

According to Mr. Kane, the School Board does not have a policy regarding the sale of directory information labels and therefore he has the discretion to decide whether to sell said labels. Mr. Kane stated that he thought it was appropriate to sell the labels to the Parent-Teachers Organization to be used for information regarding the bond referendum; however, he did not feel it was appropriate to sell labels to any School Board candidate. Mr. Kane stated that he had no inquiry regarding the labels prior to the school election.

Mr. Marini stated that he recalled receiving by mail a flyer regarding the bond issue; However, to the best of his recollection, the label was not similar to that used by the School District but rather was addressed to him and his wife as voters.

Mr. Scarito noted that he had requested information from Mr. Kane regarding the directory information labels on June 13, 1995 (P-6), and that he did not get a response to his inquiry until the day of the hearing. Apparently, Mr. Popovitch advised Mr. Kane not to answer the letter and advised Mr. Scarito to submit all questions to him since the litigation was pending (P-6). Sometime later Mr. Kane sent Mr. Popovitch responses to the questions raised by Mr. Scarito in his July 13, 1995 letter (P-5).

I **FIND** Mr. Kane to be a credible witness and I believe his testimony that he sold the directory information labels to the Parent-Teachers Organization to be used for the distribution of bond referendum information, and that he had no knowledge that it would be used for another purpose. In the absence of a School Board's policy, I do not find it unreasonable for Mr. Kane to decide not to sell the labels to any School Board candidates. It is obvious that the labels or a reproduction of the labels were used for the flyer endorsing the candidacy of Bartlett and MacIver; however, this was beyond the control of Mr. Kane. It was also established during the

hearing that none of the candidates for the School Board asked Mr. Kane to purchase similar labels prior to the 1995 school election.

As to the second flyer in issue (P-1), the petitioner and his two witnesses testified that it was their understanding that the flyer was produced using school equipment and paper by the president of the Parent-Teachers Organization, and was distributed to the students at the schools to be taken home.

Mr. Kane testified that the flyer (P-1) was written by him and he sent copies of the flyer to the schools to be reproduced and sent home with the students. It is Mr. Kane's position that he has the legal right to issue information about the school budget prior to the school election and he stated that the flyer did not endorse any specific candidate for the School Board. According to Mr. Kane, no member of the Parent-Teachers Organization was involved in the preparation of the flyer.

Mr. Ciliberto confirmed that the School Board is allowed by law to issue factual information regarding the school budget prior to the school election.

As to the flyer given to the student to take home (P-1), I **FIND** Mr. Kane's testimony to be credible and the petitioner has presented no proof that this flyer was prepared by the Parent-Teachers Organization.

As to the notice in issue (P-3), it was established at the hearing that the notice regarding the election and the availability of absentee ballots was prepared by the School District and posted in the schools and in other public places. This notice does not contain any information as to who paid for the printing and distribution of the notice (P-3). Mr. Kane stated that this notice was also prepared to him to notify voters regarding the school election.

It was also noted during the hearing that a number of children delivered a flyer (P-4) to homes on a Saturday before the school election, and that this flyer was issued by and paid for by the Point Pleasant Education Association. This flyer endorses two budget questions which appeared on the school election ballot (P-4).

CONCLUSIONS OF LAW

The petitioner stated that the flyer (P-1) prepared by Mr. Kane recommends a favorable vote as to two budget items and argued that this indirectly endorses the candidacy of Mr. Bartlett and Mr. MacIver, both of whom supported the two budget items. Also the petitioner argued that if all candidates had access to the labels, the election results might have been different since all candidates could have sent information directly to the parents or guardian of the students. Mr. Scarito argued that there were violations and that a new election for the two board positions should be ordered.

On behalf of the School Board, Mr. Popovitch argued that the petitioner had not shown any school election violations. Mr. Popovitch argued that Mr. Kane sold the labels to the Parent-Teachers Organization for a reasonable fee and that there was no showing that his action was improper or that he knew the labels would be used for another purpose. Also, Mr. Popovitch argued that no candidate asked about purchasing labels prior to the school election, and it is immaterial that Mr. Kane later told Mr. Marini that he would not have sold the labels to any candidate.

As to the fact that the two candidates used the directory information labels for a flyer, Mr. Popovitch argued that the petitioner had not shown that the use of these labels affected the outcome of the election. Mr. Popovitch noted it has been established that a new election is not required unless violations occurred and there is proof that such violations affected the outcome of the election. In the Matter of the Annual School Election held in the School District of Willingboro Township, Burlington County, 92 N.J.A.R. 2d (EDU) 564. See also, In re Application of Moffat, 142 N.J. Super. 217, 224 (App. Div. 1976), certif. denied Sub Mon., Princeton Township v. Bleiman, 71 N.J. 527 (1976).

As to the flyer and notice prepared by Mr. Kane, Mr. Popovitch argued that the school has the right to supply factual information to the electorate and he noted that neither the flyer nor the notice endorsed any specific candidate. Also as to the flyer prepared by Mr. Kane, Mr. Popovitch

argued that the petitioner has failed to show that it was prepared by the Parent-Teacher Organization using school equipment and paper.

After reviewing the testimony and exhibits, I concur with Mr. Popovitch's arguments, and I **CONCLUDE** that the petitioner has not shown any violation of the statutes governing school elections and has not established any basis for ordering a new school election for the two School Board positions.

Therefore, I **ORDER** that the relief sought by the petitioner be denied and that this matter be **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 25, 1995
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

8/25/95
DATE

TND
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 31 1995
DATE

Jeff S. Martin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

- P-1 Flyer regarding the April 18, 1995 school election distributed to students to be taken home
- P-2 Flyer regarding the April 18, 1995 school election which was sent by the Friends of Bartlett and MacIver
- P-3 Notice of the Annual School Election to be held on April 18, 1995, which was posted at various public locations
- P-4 Flyer regarding budget items on the April 18, 1995 school election ballot, paid for by PPEA-PAC, delivered by children on a Saturday before the election
- P-5 Letter from George Kane, Superintendent, to Daniel Popovitch, Esq., dated July 13, 1995
- P-6 Letter from S. Ted Scarito to George Kane, Superintendent, dated June 13, 1995, and a letter from Daniel S. Popovitch, Esq., to S. Ted Scarito, dated June 19, 1995

For the Respondent:

- R-1 Letter from Daniel S. Popovitch, Esq., to George Kane, Superintendent, dated January 30, 1995

WITNESSES:

For the Petitioner:

Victor J. Marini
Steve J. Ciliberto
S. Ted Scarito

For the Respondent:

George Kane

OAL DKT. NO. EDU 4709-95

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF POINT : DECISION
PLEASANT BOROUGH, OCEAN
COUNTY. :


The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions were timely filed by petitioner pursuant to N.J.A.C. 1:1-18.4.

Petitioner's exceptions concern the alleged illegality of the Board's dissemination of student directory information in the form of mailing labels, as well as the alleged improper distribution of flyers. Inasmuch as these exceptions merely provide a restatement of petitioner's claims, the Commissioner finds that petitioner's arguments were fully and fairly considered by the ALJ at the hearing, and said arguments are not recounted herein.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the credibility determinations, findings and conclusions of the ALJ. However, notwithstanding that the ALJ found that petitioner has not shown any violation of the statutes governing school elections, nor any basis for ordering a new school election, the Commissioner directs that the Board develop and adopt an appropriate policy, in accordance with pertinent state and federal guidelines, governing the release of student directory information and sale of labels.

Accordingly, the Board is so directed, and the initial decision of the Office of Administrative Law dismissing the Petition of Appeal is adopted for the reasons expressed therein.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

SEPTEMBER 29, 1995

DATE OF MAILING SEPTEMBER 29, 1995 10

BOARD OF EDUCATION OF THE	:	
BOROUGH OF ROCKAWAY,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
MAYOR AND COUNCIL OF THE	:	DECISION
BOROUGH OF ROCKAWAY, MORRIS	:	
COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of \$278,998 made by governing body following voter rejection of proposed budget on April 18, 1995.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line-item reductions was necessary in order to provide a thorough and efficient system of education in the District, Commissioner determined to restore \$34,072. However, in view of the fact that additional surplus sufficient to cover this amount is available to the District, the Commissioner let stand the General Fund tax levy of \$3,458,255 as certified by the Council for 1995-96 school purposes.

BOARD OF EDUCATION OF THE
BOROUGH OF ROCKAWAY,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE
BOROUGH OF ROCKAWAY, MORRIS
COUNTY,

RESPONDENT.

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COMMISSIONER OF EDUCATION

DECISION

For Petitioner, Russell J. Schumacher, Esq. (Rand, Algeier, Tosti & Woodruff)

For Respondent, Richard H. Beilin, Esq. (Wacks, Mullen & Kartzman)

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education on June 19, 1995 through the filing of a Petition of Appeal by the Rockaway Borough Board of Education (Board), seeking restoration of reductions to the school budget made by the Rockaway Borough Mayor and Council (Council) pursuant to N.J.S.A. 18A:22-37, following defeat of the budget at the annual school election on April 18, 1995.

At that election, the voters rejected a public question proposing a General Fund tax levy of \$3,737,253 for the 1995-96 school year. On May 17, 1995, following consultation with the Board as required by law, the Council adopted a resolution determining to certify a General Fund tax levy of \$3,458,255 as sufficient to provide for a thorough and efficient system

of education (T&E) in the District. This amount represented a reduction of \$278,998 from the tax levy proposed by the Board, and was effectuated through cuts in 22 line items¹, for the reasons given in Attachment A attached to the implementing Council resolution. By resolution dated May 25, 1995, the Board determined to appeal these reductions and duly filed the within petition.

The amounts in dispute in this appeal are as follows:

<u>Tax Levy Proposed by the Council</u>		<u>Tax Levy Certified by the Council</u>	
General Fund	\$3,737,253	General Fund	\$3,458,255
<u>Amount of Reduction by the Council</u>		<u>Amount of Reduction in Dispute</u>	
General Fund	\$278,998	General Fund	\$278,998

An Answer to the Board's petition was filed by the Council on July 5, 1995. On August 7, 1995, both parties filed Position Statements pursuant to N.J.A.C. 6:24-7.8, followed by Responsive Statements filed by both parties on August 17, 1995 and Final Summations on August 24, 1995 and August 28, 1995.

In its Position Statement, the Board indicated it had withdrawn its appeal of reductions in six of the 22 accounts (Salaries of Teachers-Perceptually Impaired; Salaries of Teachers-Speech Instruction; Salaries of Teachers-Basic Skills; Salaries/Support Services/General Administration; Salaries-Secretarial; and Tuition/Special Education). Additionally, in their summations, the Board conceded to overbudgeting in account numbers 11-110-100-101 and 11-120-100-101, and the Council reduced its cut of account number 11-000-213-100, Health

¹ Actual line-item reductions effectuated by the Council totaled \$284,758. However, because the Council also determined to add \$5,760 to the Board's budget, the line-item reductions were thereby reduced by that amount, for a total of \$278,998 in line-item reductions.

Salaries, by \$3,500. Thus, the total amount actually in dispute remained somewhat fluid through the course of the appeal as reflected in the line-item discussions below.

In addition, as the parties had previously been advised by letter from the Assistant Commissioner dated April 7, 1995 and distributed through the County Superintendent to boards and municipalities experiencing budget defeats, as part of the record of the within appeal, the Commissioner took official notice of the Board's revised budget and its June 30 financial report, the latter for the purpose of identifying whether the Board underestimated in its 1995-96 budget the amount of anticipated undesignated surplus.

Upon filing of the parties' Final Summations as noted above, the record of the appeal was closed.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for T&E system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line-item reduction imposed by the governing body is necessary for the provision of T&E system of education. Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of

Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).

Mindful, then, of the standard to be applied, the Commissioner makes the specific determinations set forth below.

COMMISSIONER'S DETERMINATION

At the outset, the Commissioner notes that the Board's budget contains numerous coding errors. The Board is instructed to note the appropriate accounts for erroneously coded expenditures, as identified herein, and to reappropriate miscoded items accordingly. Further, the Board is hereby directed to follow the chart of accounts required for district use pursuant to N.J.A.C. 6:20-2A.2(m) and to accurately code its expenditures.

Disputed Line-Item Numbers 1 through 3

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
02510	11-110-100-101	Preschool/Kindergarten Salaries of Teachers	\$78,917	\$3,034
02520	11-120-100-101	Grades 1-5 Salaries	861,805	6,868
02530	11-130-100-101	Grades 6-8 Salaries	699,530	3,369

The Board argues that, salary negotiations now completed, it has determined its salary needs for the above accounts to be \$77,974, \$851,119 and \$711,941, respectively. Thus, the Board concedes that it overbudgeted by \$943 in account number 11-110-100-101, and by \$10,686 in account number 11-120-100-101, and underbudgeted by \$12,411 in account number 11-130-100-101.

The Council argues that the reductions of \$3,034, \$6,868 and \$3,369, respectively, from these accounts, are based on actual salaries reported by the Board.

Upon careful review, the Commissioner finds the Board's calculations to be supported by the record and notes that the Council has provided no basis for its salary determinations. The Commissioner therefore finds: that \$2,091 of the Council's reduction in account number 11-110-100-101 be restored and \$943 of the Council's reduction to that account be sustained; that the Council's reduction of \$6,868 to account number 11-120-100-101 be sustained; that the Council's reduction of \$3,369 in account number 11-130-100-101 be restored.

Further, it is noted that the District included \$10,000 in its revised support of the budgeted appropriations in account number 11-120-100-101 for a retirement stipend. Such payments are properly budgeted in Other Employee Benefits, account number 11-000-290-290, and the District should revise its budget to so reflect.

Disputed Line-Item Number 4

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
<u>02670</u>	<u>11-190-100-500</u>	<u>Other Purchased Services</u>	<u>\$500</u>	<u>\$600</u>

The Board contends that the \$600 reduction made in an account which budgeted only \$500 was clearly erroneous. The Board argues that this account includes appropriations for staff travel expenses in connection with attendance at workshops and conferences, pursuant to the Generally Accepted Accounting Principles (GAAP). Any reduction, the Board avers, is unreasonable.

The Council does not address the discrepancy between the \$600 figure which appears in its Resolution 54-95, and the \$500 proposed reduction which appears in its Position Statement. The Council maintains the entire line item should be eliminated since it has been substantially underused in the past two years. In 1994-95, the Council illustrates, although \$600

was budgeted in this line item, no funds were expended; in 1994, only \$11 was charged to this account.

Noting the Council's obvious error in its reduction of \$600 to a \$500 appropriation, the Commissioner restores the \$100 at the outset. Further, the Commissioner notes that appropriations for staff travel expenses are properly budgeted in Other Purchased Services, account number 11-000-221-500, yet finds that no funds were spent during 1994-95 in either the proper or the miscoded account. Accordingly, the \$500 cut is sustained.

Disputed Line-Item Number 5

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
<u>02700</u>	<u>11-190-100-800</u>	<u>Other Objects</u>	<u>\$12,759</u>	<u>\$3,000</u>

The Board attests that this account provides for activities which support its educational program, such as staff development, summer curriculum development and scoring for the Iowa Test of Basic Skills. The Board further argues that its budgeted figure is already a reduction of \$5,496 from the prior year, and that further reduction would significantly impair its educational program inasmuch as the budgeted activities are either mandated, as with standardized testing, or support the development and improvement of the District's curriculum and instructional staff.

The Council counters by indicating that, of the \$18,255 budgeted for this line item in the prior year, barely one-third had been expended through the first ten months of the school year, causing a large lapsed balance. The Council further contends that the nearly \$5,500 reduction proposed by the Board for this year is insufficient inasmuch as it represents a 48%

increase over 1994's actual spending. In difficult economic times, the Council reasons, overhead accounts draw scrutiny and budgeting for items such as conventions and travel must be curtailed.

Upon careful review, the Commissioner determines to restore the reduction of \$3,000, noting, however, that appropriations for Miscellaneous Expenditures for Regular Instruction, account number 11-190-100-800, included a number of items properly budgeted elsewhere. Specifically, the scoring of standardized tests should be budgeted as Other Purchased Services, account number 11-000-221-500; summer curriculum work should be budgeted in Salaries of Other Professional Staff, account number 11-000-221-104; teacher course work should be budgeted as Employee Benefits, account number 11-000-290-290; and costs for the NJEA Convention should be budgeted as Other Purchased Services, account number 11-000-221-500. The District is, therefore, directed to revise its budget accordingly.

Disputed Line-Item Number 6

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
<u>06430</u>	<u>11-000-213-100</u>	<u>Salaries/Health Services</u>	<u>\$60,921</u>	<u>\$3,809</u>

The Board asserts that its budget figure consists of costs of salaries for three positions: salaries for two nurses totaling \$57,111.36 and a salary for a school physician at \$3,500, with a \$309.64 balance to cover costs for substitute nurses. The Board contends that the Council omitted the salary for the school physician when it directed its reduction, and asserts that this reduction is arbitrary, capricious and unreasonable.

The Council concedes in its reply statement that, after further analysis, it has determined that it did not take into account the salary of the school physician when it directed the

reduction of \$3,809. Consequently, the Council affirms that \$3,500 should be reinstated, and the balance of the reduction, \$309.64, should stand.

The Commissioner determines to restore the reduction of \$3,809, as a reasonable allocation for substitutes is necessary for T&E.

Disputed Line-Item Number 7

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
<u>06440</u>	<u>11-000-213-300</u>	<u>Purchased Prof'l Services</u>	<u>\$6,200</u>	<u>\$2,000</u>

The Board submits no position statement in opposition to the reduction by Council.

The Council argues the reduction is consistent with past spending by the Board. In 1993-94, the Board expended \$3,470 and only \$1,495 was expended in 1994-95, as of the date of the Council's review. Consequently, it argues, the \$6,200 proposed amount well exceeds the anticipated expenditure for these services and a \$2,000 reduction will not negatively affect the district.

Receiving no opposition to the reduction by the Board, the Commissioner determines to sustain the reduction of \$2,000.

Disputed Line-Item Number 8

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
<u>06920</u>	<u>11-000-230-331</u>	<u>Legal Services</u>	<u>\$8,500</u>	<u>\$4,000</u>

The Board asserts its proposed costs for legal services is reasonable in that it must adequately budget for fees required for its representation in this budget appeal, for general counsel services and for labor grievances. It further argues that, were the Board to become

involved in even one contested matter, this amount is likely to be insufficient, thus necessitating transfers from other accounts.

The Council argues that, based on recent history, the reduction will have no negative impact. It notes that in 1994, \$3,182 was spent in this account and, through May 1995, only \$921 was spent in this account. It further maintains that the Board should not be budgeting for the "worst case scenario." (Council's Reply Statement)

The Board counters in its reply that it has expended \$11,205 in this account for the 1994-95 school year, in excess of the budgeted amount of \$8,500.

Upon careful review, the Commissioner determines to sustain the reduction of \$4,000, noting that the Board has not demonstrated that such reduction will impair its ability to provide a T&E system of education.

Disputed Line-Item Number 9

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
06990	11-000-230-890	Miscellaneous Expenditures	\$25,935	\$2,000

The Board contends that this account provides for New Jersey School Board Association dues, a mandated expenditure, as well as the costs of legal advertisements and reasonable amounts for printing, attendance at conventions and public relations. It asserts that the Council's reductions are arbitrary and capricious.

The Council again looks to past expenditures to validate its reductions. It argues that expenditures in this line-item account were \$20,834 in 1993-94, yet the following year the Board had a revised appropriation of \$26,444, and this year's proposed figure is only \$509 less than the 1994-95 amount. Here, the Council again argues that an overhead account must be

clearly scrutinized and a reduction of \$2,000 will not have a direct impact on students where the Board diligently works to reduce items such as printing, postage, advertising, travel and other administrative expenses.

Upon careful review, which included the Board's breakdown of proposed expenditures in this account, the Commissioner notes that the Board is supporting its budgeted appropriations for Miscellaneous Expenditures-General Administration with a number of items that should properly be budgeted elsewhere. Specifically, convention expenses and workshops should be budgeted as Other Purchased Services, account number 11-000-230-590; postage and meter rental should be budgeted as Communications, account number 11-000-230-530; advertising costs should be properly budgeted as Other Purchased Services, account number 11-000-230-590; physicals, eye exams and fingerprinting costs should be budgeted as Employee Benefits, account number 11-000-290-290; costs for copy paper should be included in Supplies and Materials, account number 11-000-230-600; and printing costs should be budgeted as Other Purchased Services, account number 11-000-230-590. Since the Board appears to have sufficient funds budgeted in the correct accounts, the Commissioner sustains the Council's reduction of \$2,000. In sustaining the reduction, the Commissioner further notes that the Board's support for this account includes \$150 for a teacher breakfast/lunch and \$500 for flowers and gifts, costs which cannot be considered as necessary for a T&E system of education.

Disputed Line-Item Numbers 10 & 11

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
07070	11-000-240-600	Supplies and Materials	\$13,801	\$6,000
07080	11-000-240-800	Other Objects	10,230	2,000

The Board contends that reductions ordered by the Council in these accounts are arbitrary, capricious and unreasonable in that it failed to examine current year needs when comparing this figure to the prior year's figure. The increase in the Supplies and Materials account from \$12,975 in 1994-95 to \$13,801 in 1995-96 reflects, the Board warrants, an increase in costs of copy paper as assigned to the buildings, rather than being included in the general administrative account (central office). The Board argues the "Other Objects" account covers various expenditures supporting the educational program, including costs associated with graduation, the student handbook and yearbooks. The Board further asserts that there is no justification provided for the Council's reduction.

The Council's arguments consider not only the above two accounts, but account number 11-000-240-300, Purchased Professional and Technical Services (\$3,500 budgeted) and account number 11-000-240-500, Other Purchased Services (\$8,085 budgeted) and notes that spending in these accounts was \$15,746 in 1993-94, that the suggested figure for 1995-96 is more than double that amount, and argues that such a dramatic increase is not justifiable. Moreover, the Council questions why the general administrative account does not appear to be reduced in accordance with the Board's assertion that it has now assigned costs for copying paper to account number 11-000-240-600. Thus, the Council recommends a reduction of \$2,000 from "Other Objects," and a reduction of \$6,000 from Supplies and Materials.

Upon careful review, the Commissioner notes that, contrary to the argument advanced by the Council, the Board evidences a reduction in its general administrative accounts, where the total Support Services-General Administration appropriation was \$252,022 in 1994-95, and the proposed 1995-96 appropriation is \$236,141. Accordingly, the Commissioner

determines to restore the reduction of \$6,000 to the Supplies and Materials account. Further, the Commissioner notes that the District is supporting its budgeted appropriations in account number 11-000-240-800, Other Objects, with a number of items that should be budgeted elsewhere. Specifically, costs for attendance at conventions should be budgeted as Other Purchased Services in account number 11-000-240-500; yearbook costs should be budgeted as Transfer to Cover Deficit in account number 11-401-100-930; costs for report cards, letterhead and envelopes should be budgeted as Supplies and Materials, account number 11-000-240-600; costs attributed to computer expansion cards should be budgeted as Supplies and Materials, account number 11-000-240-600; and bus service and hall rental for graduation should be budgeted as Other Purchased Services, account number 11-000-240-500. Since the Board appears to have sufficient funds budgeted in the correct accounts, the Commissioner sustains the reduction of \$2,000.

Disputed Line-Item Number 12

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
07100	11-000-260-100	Salaries - Operations	\$234,150	\$13,703

The Board argues that the Council's reduction in this account leaves it without funds for summer help or for overtime custodial services, costs which are necessary for the District to maintain a safe and healthy environment for staff and students. Summer help, the Board affirms, is used to complete projects which cannot otherwise be completed while school is in session, as well as to cover for full-time employees taking summer vacations. Overtime services are essential, the Board continues, to ensure timely snow and ice removal; failure to promptly do so leaves the District liable. The Board argues that the reduction, therefore, is

unreasonable and could adversely affect the educational program if these costs are unavoidable and must be drawn from other accounts.

In its Reply Statement, the Council concedes that upon further review, the summer help and overtime costs were not originally provided for in its budget analysis. Consequently, it agrees to the restoration of the \$13,703.

The Commissioner accordingly determines to restore the reduction of \$13,703.

Disputed Line-Item Number 13

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
<u>07120</u>	<u>11-000-260-420</u>	<u>Cleaning, Repair & Maint.</u>	<u>\$38,690</u>	<u>\$5,000</u>

The Board avers that all proposed expenditures in this account are necessary to properly maintain its physical plant and property. Were the reduction to be sustained, the Board argues, it will be forced to defer the repair of its parking lot at the Lincoln School, which represents a risk to staff, students and visitors. The Board asserts that the Council's reduction is made without examination of expenditures and is, therefore, arbitrary, capricious and unreasonable.

The Council cautions that the 1994-95 revised appropriation of \$63,073 included many "one time" items, rendering comparison with 1995-96 more difficult. Against this sum, however, the Council asserts that only \$33,872 had been spent through March 31, 1995, with only \$11,291 encumbered at that time. Actual spending in 1993-94 was, the Council notes, \$27,414. The Council further questions why, if items such as the parking lot truly represented a hazard to the Board, the funds were not encumbered and spent in the 1995-96 school year when nearly \$18,000 was available to make such repairs. Moreover, the Council argues that it is

“ludicrous” to suggest that a \$5,000 reduction will jeopardize the parking lot repairs and result in unsafe conditions. (Council’s Reply) The Council maintains the 1993-94 figure represents a sum sufficient to cover routine maintenance, contracts and monthly service fees and should, therefore, remain somewhat constant, if the Board properly plans its projects. The Board’s proposed sum of \$38,690, however, exceeds the 1993-94 expenditures by over 40%, the Council argues. The \$5,000 reduction directed by the Council still leaves the Board with an amount which represents a 23% increase above the 1993-94 expenditures and should accommodate inflation and increased usage.

Upon careful review, the Commissioner notes that the Board has insufficiently demonstrated the need for these funds to provide T&E system of education, and finds that the Council’s reductions are reasonable. The Commissioner determines to sustain the reduction of \$5,000.

Disputed Line-Item Number 14

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
07140	11-000-260-490	Other Purchase Prop. Services	\$10,850	\$2,000

The Board avers that this account includes costs of water, lease/purchase of the administration building copier and lease/purchase of heat controls at Lincoln School, which are fixed costs. Thus, any reductions in the account, the Board asserts, will require reductions in other accounts, creating an adverse effect on the educational program.

The Council notes that the Board expended only \$1,713 in this account in 1993-94, and the 1994-95 revised appropriation was \$6,124. Actual spending over the two-year period, was, according to the Council \$7,522. The account, the Council maintains, has been

“grossly increased” when compared to the 1993-94 expenditures. (Council’s Position Statement) Additionally, this account includes items such as the copier which, the Council observes, is also included in the Support Services-School Administration Accounts (240-103 through 240-800). Thus, the \$2,000 reduction is reasonable.

Upon careful review, the Commissioner finds that, the Council properly notes that the rental/lease purchase of a copier for the administration building should be budgeted under School Administration, Other Purchased Services, account number 11-000-240-500 or 11-000-230-590. Inasmuch as sufficient amounts are budgeted in the two possible accounts where the cost would properly be coded, the Commissioner determines to sustain the Council’s reduction of \$2,000.

Disputed Line-Item Number 15

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
07370	11-000-290-220	Social Security	\$43,000	\$2,000

The Board asserts that its recommendation for appropriation in this account is appropriate and in accordance with increases in salaries of staff. The Board further indicates that \$42,102.44 was expended in this account in the 1994-95 school year. The Board notes that most of its staff members earn less than \$60,600, the maximum amount of salary on which social security is paid. Any shortfall in this account, the Board argues, will require the Board to make reductions in other accounts, which would negatively impact its educational program.

The Council argues that, as the Board has already noted, its actual salaries to staff members will be lower than the figures which it originally submitted. However, the Council continues, the Board has calculated the proposed budget for the social security account based on

the higher salaries included in the original budget, and has not reduced the social security account in an amount commensurate with the actual salary figures. In light of these salary reductions to which the Board has agreed, the Council now submits that the account should be reduced by \$1,000, and that \$1,000 should be restored.

The Commissioner determines to restore the \$2,000 reduction, in view of the salary determinations made at line-item numbers 1-3 above.

Disputed Line-Item Number 16

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
07490	11-000-290-890	Miscellaneous Expenditures	\$5,450	\$2,100

The Board asserts that the increase in this account (from \$3,100 in 1994-95) represents the amount needed to fulfill the District’s requirement under the Right to Know Law. The Board explains that the services were formerly provided to the District gratis by a citizen who is no longer available.

The Council again recalls the District’s spending history, noting that in 1993-94, the Board spent \$2,408 in this account. In 1994-95, as of the time of its review, the Board spent \$1,480 of the \$3,100 budgeted. Thus, the Council concludes, the reduction should not negatively impact the Board. Moreover, the Council contends in its Reply Statement that the Board fails to indicate the costs of a “Right to Know” person who will fulfill the requirements of that law, and further does not indicate whether the Board has attempted to obtain these services gratis from another private citizen. Additionally, the Council reiterates the need to clearly scrutinize miscellaneous and overhead accounts. It argues that “such accounts should at best be frozen, and certainly should not increase during difficult economic times.” (Council’s Position Statement)

Upon review, the Commissioner observes that the Board's support for reinstatement of the \$2,100 reduction is based upon its need for funds to be in compliance with the Right to Know Law. Inasmuch as sufficient funds are budgeted in the proper account, Operations and Maintenance, account number 11-000-260-XXX, to support Right to Know activities, the Commissioner determines to sustain the reduction of \$2,100.

Increase to Revenues

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Increased</u>
00250	10-1XXX	Revenues	\$55,000	\$10,000

The Board argues that, as surplus is depleted, *infra*, the amount of interest income earned will be significantly less than the prior year. Thus, the Board challenges the Council's addition of \$10,000 in miscellaneous income as unreasonable, based upon projections of the fund balance for the 1995-96 year, and current interest rates. The Board notes that its only sources of miscellaneous income are rental income, projected at \$32,000, and interest income.

The Council, however, asserts that, the available evidence suggests that at least \$65,000 in miscellaneous income will be realized. The Council reasons that, assuming rental income of \$32,000, only \$33,000 must be generated from other sources. It argues that the surplus balance is in place during the months of July and August, but with the school year not yet commencing, expenses have not been paid out in cash. The Council further attests that the Board will receive its tax levies from the governing body during that time, even though the funds for the most part are not in use. Thus, the Council calculates, the interest income earned during those months, coupled with the interest income to be earned during the remainder of the year, will generate well over \$33,000, assuming even a modest interest rate.

As per the June 30, 1995 financial report of the Board secretary, the Board earned \$114,644 in investment income and \$32,000 in rental income, compared to the total budgeted miscellaneous income of \$101,434. Although the Board is budgeting a significant amount of surplus (\$375,000), it should be able to earn \$33,000 (\$65,000 less \$32,000) in interest income. Accordingly, the Commissioner determines to sustain the Council's increase of \$10,000.

APPLICATION OF SURPLUS

In its advertised annual school district budget statement, the Board projected an unreserved surplus of \$425,844 (line no. 01650) and allocated \$175,000 (line no. 00120, account no. 10-303) as revenue, leaving \$250,844 (line no. 01670) as undesignated unreserved surplus.

The Council argues that, by the Board's estimate, the 1994-95 school year will end with a surplus of approximately \$425,844. Recognizing that the Board proposes to use \$175,000 of this surplus to balance the 1996 budget, the Council contends this leaves a sum of \$250,844, representing 5.8% of the current expense budget for 1996. However, the Council also maintains that an additional \$168,131 will be available to the Board.² Based on these figures, the Council maintains that the \$200,000 can be added to surplus utilization, leaving in place a surplus which is sufficiently above the 3% standard.

Addressing the Board's arguments as presented in its Position Statement, the Council states that the Board has expended over \$250,000 of these funds which it received from the sale of property for needed facility repairs and has an additional approximately \$60,000 for

² The Council's attachment to the Petition of Appeal filed by the Board states that "****\$154,042 lapsed to surplus in 1994 due to overbudgeted appropriations and \$13,765 due to underbudgeted revenue. In 1993, these figures were \$133,435 and \$67,777, respectively. The Councils predict that these balances could be as high as \$128,000 for unspent appropriations and \$40,000 for excess revenues for 1995 for a total credited of over \$160,000. This would bring the Board's surplus to over \$400,000, which is nearly 10% of the 1996 budget."

boiler and oil tank removal. The Council thus argues, "Given the extensive repairs which have already been performed, it is clear that any further facility repairs required would not be of the type which would require expenditure of funds above and beyond those which would remain in the fund free balance if the Respondent's reductions are upheld." (Council's Reply Statement)

The Council contends that a 5% surplus is sufficient to address urgent matters which may arise.

The Board's annual financial report filed pursuant to N.J.S.A. 18A:17-10 (June 30 Board secretary's report) reveals that the unreserved General Fund balance was underestimated by \$344,332, as the actual use of surplus in the 1994-95 budget was \$86,609. Based on the advertised 1995-96 budget statement, excess surplus available to fund restorations is \$265,575 as follows:

1995-96 General Fund Appropriations (\$4,320,355) x 3%	\$129,611
June 30, 1994 Audited Unreserved Surplus	\$856,785
1994-95 Use of Surplus	<u>86,609</u>
Projected June 30, 1995 Unreserved Surplus	\$770,176
Less 1995-96 Budgeted Fund Balance	<u>(375,000)</u>
Remaining Unreserved, Undesignated Fund Balance	\$395,176 ³
Less 3% Calculation	<u>(129,611)</u>
Amount Available to Fund Restorations	\$265,565

Based on the above, the Commissioner determines that, subject to verification through the Board's 1994-95 annual year-end audit report, \$200,00 can be added to surplus utilization and, even with the additional use of surplus, any restorations of appropriations can be funded through surplus.

³ It should be noted that the Board has filed budgets for the 1994-95 and 1995-96 school years which reflected that General Fund free balances were maintained within the 7.5% limitation required by N.J.S.A. 18A:7D-27.1, when, in fact, the Board in both of these years maintained an unreserved, undesignated fund balance of 9.1%.

SUMMARY

In summary, the Commissioner directs restoration or sustaining of the Council's line-item reductions to appropriations and increases to revenue as set forth below. The Commissioner further notes that all restorations to line-item appropriations are restricted in accordance with N.J.A.C. 6:20-2A.11(b)3.

<u>Line Item</u>	<u>Description</u>	<u>Sustained</u>	<u>Restored</u>
00120	Surplus	\$200,000	\$- 0 -
02510	Preschool/Kindergarten Salaries/Teachers	943	2,091
02520	Grades 1-5 Salaries/Teachers	6,868	- 0 -
02530	Grades 6-8 Salaries/Teachers	- 0 -	3,369
02670	Other Purchased Services	500	100
02700	Other Objects	- 0 -	3,000
06430	Salaries/Health Services	- 0 -	3,809
06440	Purchased Professional Services	2,000	- 0 -
06920	Legal Services	4,000	- 0 -
06690	Miscellaneous Expenditures	2,000	- 0 -
07070	Supplies and Materials	- 0 -	6,000
07080	Other Objects	2,000	- 0 -
07100	Salaries/Operations	- 0 -	13,703
07120	Cleaning, Repair and Maintenance	5,000	- 0 -
07140	Other Purchased Professional Services	2,000	- 0 -
07370	Social Security	- 0 -	2,000
07490	Miscellaneous Expenditures	2,100	- 0 -
00250	Revenues	<u>10,000</u>	<u>- 0 -</u>
Total Line-Item Determinations:		\$37,411	\$34,072 ⁴
Tax Levy Certified by Governing Body:		\$3,458,225	
Restoration of Reductions:		34,072	
Amount of Restoration Funded by Surplus:		<u>(34,072)</u>	
Total Tax Levy for 1995-96:		\$3,458,255	

⁴ The amounts sustained and restored by line-item determination herein total \$7,515 less than the amount originally in dispute. See discussion at pp. 2-3 above.

Accordingly, subject to verification of surplus amounts through the year-end audit, the tax levy certified by the the Rockaway Council for General Fund purposes of the Rockaway Borough Board of Education for the 1995-96 school year shall stand.

Additionally, in view of the coding alterations required herein, the Commissioner directs the Board to submit a revised 1995-96 budget to the County Superintendent and the Office of Finance.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Leo M. ...", is written over the printed title.

COMMISSIONER OF EDUCATION

OCTOBER 2, 1995

DATE OF MAILING OCTOBER 2, 1995

IN THE MATTER OF THE SPECIAL :
 SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
 SCHOOL DISTRICT OF THE CITY : DECISION
 OF PLEASANTVILLE, ATLANTIC :
 COUNTY. :

SYNOPSIS

Petitioning citizen sought inquiry into alleged improprieties and violations of law at special school bond referendum.

ALJ concluded that Board was in violation of N.J.S.A. 18A:42-4 and 14-97. However, he concluded that the irregularities demonstrated were insufficient to warrant setting aside the election. (In re Wene) Petition was dismissed.

Commissioner concurred with ALJ, noting that N.J.S.A. 18A:14-97 is no longer enforceable in light of U.S. Supreme Court decision in McIntyre.

October 3, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5216-95

AGENCY DKT. NO. 65-3/95

**IN THE MATTER OF THE SPECIAL SCHOOL
ELECTION HELD IN THE SCHOOL DISTRICT
OF THE CITY OF PLEASANTVILLE,
ATLANTIC COUNTY**

Edward M. Thompson, Esquire, for the complainant, (Callaghan & Thompson,
attorneys)

James L. Jackson, Esquire, for respondent, Pleasantville Board of Education

Record Closed: September 1, 1995

Decided: September 20, 1995

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

**STATEMENT OF THE CASE
AND PROCEDURAL HISTORY**

Frank LaRosa, complainant, together with fifteen (15) signatories, petitioned the Commissioner of Education (Commissioner) to conduct an inquiry of the Special School Election held in the School District of the City of Pleasantville on March 21, 1995. The complainant

alleges certain irregularities in the conduct of the election held under the direction of Board of Education of the City of Pleasantville (Board).

The Commissioner, on May 19, 1995, transmitted the matter to the Office of Administrative Law (OAL) as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A telephone prehearing conference was held on July 11, 1995, at which, among other things, the date of August 28, 1995, was set down for the inquiry.

Subsequently, on July 13, 1995, the Board requested the Commissioner to accelerate the proceedings. On July 19, 1995, the Commissioner granted the Board's request, pursuant to N.J.S.A. 1:1-9.4, and agreed to enter his final decision within 15 days of receipt of the herein initial decision.

The inquiry was held on August 28, 1995, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey. The parties requested, and were granted, leave to submit posthearing memoranda. The submissions were received by the undersigned on September 1, 1995, which constitutes the close of the hearing record.

ISSUE

The issue to be determined by this tribunal is whether the alleged election irregularities were sufficient to overturn the election results of the Special School Election held on March 21, 1995.

THE RESULTS OF THE ELECTION

The results of the election held on March 21, 1995 are not in dispute and are as follows:

	<u>YES</u>	<u>NO</u>
District 1 - Leeds Avenue	116	269
District 2 - North Main Street	110	71
District 3 - Washington Avenue	120	59
District 4 - South Main Street	251	131
Absentee	4	2
TOTAL	601	532

THE PETITION

Complainants Petition included the following alleged election violations:

1. Distributing election material at and around the voting booths;
2. Display of election information at and around the voting booths; and,
3. School officials interfering with elections at and around voting booths.

Subsequent to complainants having filed its Petition with the Commissioner, Complainant Frank LaRosa addressed a letter, dated April 7, 1995, to Hope R. Blackburn, Director of the Bureau of Controversies and Disputes, Department of Education, wherein he supplemented the original petition with six (6) additional alleged violations as follows:

1. By a carefully calculated act of deception, notifications to voters within certain higher tax paying areas were never notified of the meetings open to the public on March 14th, 15th and 16th until after the meetings were over, voters thereby being denied public input.

As one petition signer will attest, a postal worker has reported Public Meeting notifications were not on the mailing platform until the night of the 16th, under permit number 107.

2. Poll worker will testify in Court if necessary the fact that hand-outs were being distributed by school children within the hallways of the polling place and within 100 ft (sic) of the polling place door and in some instances voters were followed into the polling place itself and handed the enclosed political hand-out baring (sic) no disclaimer to vote "YES".

3. School personnel came into the polling place wearing large lapel buttons to vote "YES" for the new schools. Surely an act of voter intimidation and contrary to N.J. SA18A and Title 19 Election Laws which must be upheld even at a school election.

4. At the Leeds Ave. School, voting area designated by the School Board, school personnel was discovered directing voting procedures at the poll workers table by informing voters who had no pages in the voting regulations book they could vote simply by visiting the Board of Education Office and signing an affidavit. The informer was not a designated poll worker and had no business interfering with the election.

5. Printed affidavits and voting authorities were issued by the Board of Education leaving poll workers no way of making a signature comparison, the voter having no page in the book.

The Atlantic County Board of Elections does a splendid year-round job of removing pages from the Election Reg. Book of voters who have failed to vote within a specified period, moved from the voting District or when the voter has died or placed in jail, keeping elections fair and honest. For the Secretary of the local Board of Education to inform the poll workers we can't depend upon pages missing from the County Board of Election Books, is indeed an insult to the intelligence of our Election Board workers, or for him to imply the pages are not accurate or updated is a gross usurping of the Election Laws.

While the "YES" vote passed by only a 56 majority, one cannot help but wonder just how many fraudulent affidavits were presented and how many unlawful votes were cast and we are in sincere hopes you may make this issue a part of your investigation.

6. It is further reported the Principal at the North Main Street School was observed greeting voters at the door thanking them for coming out to vote "YES" for the two (2) new schools. In addition, another source has offered to testify to the effect she was passing out tickets of chance to those who came to vote "YES."

In view of the many infractions, an immediate investigation is requested and those responsible for violations of the Election Laws fined or suspended and the Special Election declared null and void during the period of your investigation.

SUMMARY OF THE TESTIMONY

Richard McAvaddy, a City of Pleasantville Council member, testified on behalf of complainants asserting, among other things, that he voted at the Board's North Main Street School. Upon his arrival, he was met by a young girl who offered him a soft drink and a pretzel. Subsequently, he was met by Dr. Edna Hunter, principal of the North Main Street School who offered him a ticket (p-1, p-2) for what he believed to be a chance to win a turkey. He asserted there was no charge for the ticket and that Dr. Hunter thanked him for supporting the school bond issue because the school district really needed it.

Mr. McAvaddy visited other polling places after he voted at North Main Street School. He visited Leeds Avenue School and did not observe anything unusual there. Subsequently, he visited Washington Avenue School at approximately 6:00 p.m. where he observed a couple of children outside of the schoolhouse. The children asked Mr. McAvaddy if he was going to vote for the school bond referendum and proceeded to hand him a brochure (p-3). Mr. McAvaddy entered the school and approached Mr. Earl B. Fairchild, a poll worker, and asked him if he was aware that children were handing out a brochure on the school grounds. Mr. Fairchild advised Mr. McAvaddy that he was aware and that he had been collecting the brochures all day.

Mr. McAvaddy testified he last visited South Main Street School where he was told that people tried to vote, however, their names were not in the signature copy register.

On cross-examination Mr. McAvaddy testified, among other things, that he did not attend a raffle nor did he know whether a raffle took place at the North Main Street School. He also asserted there were no adults with the children who were handing out the brochures.

Mr. Fairfield testified he voted at the Board's special election and was also a poll worker at the Washington Avenue School from 2:00 p.m. until the polls closed after 9:00 p.m. on March 21, 1995. He witnessed the distribution of election brochures (p-3) by school aged children, and observed the children follow voters into the schoolhouse with the printed material. Mr. Fairfield testified he repeatedly reminded the children that they could not distribute the brochures within 100 feet of the polling place. He observed the children open the schoolhouse doors for voters and then hand the voters a brochure. He asserted that the brochures were distributed from 3:00 p.m. until after 6:00 p.m. Mr. Fairfield reported the incident to the Washington School principal who then confiscated the brochures.

Robert Cornett testified that he voted at Washington Avenue School on March 21, 1995, and also acted as a challenger at the polling place for Mr. Frank LaRosa. He arrived after the polling place had opened and was approached by five or six juveniles who attempted to hand him printed material within 100 feet of the polling place. Upon his entry into the polling place, he advised Mr. Fairfield of the incident. Mr. Fairfield advised Mr. Cornett of the irregularities he had observed including the brochures and election buttons (p-4) worn by faculty members of the

Washington Avenue School which supported the bond referendum. The button states, "Parents for Pleasantville Progress-Vote Yes" (p-4). Mr. Cornett testified he was told that those who wore the buttons were faculty members. However, he did not know whether or not those wearing the buttons were, in fact, faculty members.

Marie Dix testified she voted on March 21, 1995 and also was a poll worker at the Leeds Avenue School between 2:00 p.m. and 9:00 p.m. She asserted that there was only one problem which involved a voter who was not permitted to vote because her name did not appear in the signature copy register. The voter left the polling place and subsequently returned with the principal of Leeds Avenue School. The principal and the voter talked with Mrs. Mahoney, Judge of Elections concerning the matter. A telephone call was then placed with Mr. Frank Dingler, the Board's Business Administrator/Board Secretary, who advised Mrs. Mahoney that the voter could execute an affidavit (p-8) and vote. The voter did so. Ms. Dix asserted there were no other problems at the Leeds Avenue School polling place.

Edna Cole testified on behalf of complainants asserting, among other things, that she voted at the special election. She contended she was in receipt of election literature (p-5) at her home by way of mail through the United States Post Office (USPO). The election literature advised, among other things, that the Board's Superintendent of Schools was to be present and provide information about the Board's bond referendum on March 14th, 15th and 16th, 1995, at divers locations in the school district. Ms. Cole received the printed matter on the afternoon of March 17, 1995. She telephoned the USPO to determine when the material was mailed and was advised that it was received by the USPO on March 16, 1995.

Ms. Cole asserted that there was nothing on the printed matter (p-5) to indicate who printed or paid for the literature. She conceded that the return address indicated that the literature was from the Pleasantville Public Schools. She believed that it came from the Board.

Complainant Frank LaRosa testified that he voted at the Washington Avenue School and observed several irregularities. He observed individuals who wished to vote, however, their names did not appear in the signature copy registers. Notwithstanding the absence of the names

in the signature copy register, he asserted that these individuals were permitted to vote by affidavit.

Mr. LaRosa became aware that children were passing out election material (p-3) at the Washington Avenue School. He asserted the children were running in and out of the schoolhouse with the election literature, pleading with the voters to vote in favor of the bond referendum. Mr. LaRosa then telephoned the Board's Business Administrator/Board Secretary to report the activities of the children. Mr. LaRosa inquired of the Business Administrator/Board Secretary about any policy of the Board with respect to the use of school children and the distribution of election literature. Mr. Dingler subsequently provided Mr. LaRosa with a copy of the Board's policy entitled, "Use of Students", which states as follows:

The participation of students in disseminating public information materials should be encouraged with the understanding that students shall not:

- A. Be utilized for the benefit of any individual or group or be used as agents for distributing commercial material to the community or their homes;
- B. Participate in such activities unless approved by the Superintendent;
- C. Be used to distribute materials or information pertaining to a school election, budget or bond issue.

All publicity or materials to be disseminated by students shall be presented to the Superintendent for approval prior to distribution.

All surveys, questionnaires or other similar items requiring student or parent/guardian response shall be reviewed and approved by the Board prior to dissemination.

Date: April 1, 1986

Legal Reference: N.J.S.A. 18A:42-4 Distribution of literature (p-6)

Mr. LaRosa asserted that the distribution of the election material at the Washington Avenue School by the children was not approved by the Board's Superintendent.

Mr. LaRosa testified that he investigated alleged problems at the Leeds Avenue School polling place. He asserted that people were allowed to vote by affidavit when there was no way to compare the voters signature which should have appeared in the signature copy register. He further alleged that there was interference with the election process at the Leeds Avenue School polling place.

Mr. LaRosa testified that he visited South Main Street School where a voter, who allegedly had moved out of the voting district, was allowed to vote. Mr. LaRosa also asserted that he had heard of the turkey raffle and investigated the matter. He asserted that Mr. Joseph Brenner, who did not attend the herein hearing and, therefore, did not testify, had witnessed the distribution of raffle tickets at the North Main Street School.

Bernita Vaughn Harman, Judge of Elections at Washington Avenue School, testified, among other things, that Mr. Earl Fairchild was appointed one of the Clerks of Elections at Washington Avenue School. Ms. Harman asserted she was not provided with any information that there were challengers appointed for the Washington Avenue School polling place. She contended that Robert Cornett had no certificate of appointment from the Board Secretary and, therefore, had no official capacity at the polling place.

Ms. Harman testified she did not see any children handing out election material to voters. She observed that Mr. Fairfield had a copy of election literature (p-3) in his rear pocket. Mr. Fairchild told Ms. Harman that children were handing out the literature to voters. Ms. Harman looked down the school corridor from the library, the polling place, but did not observe any children present.

Ms. Harman testified that a gentleman came into the polling place wearing a badge which had print that stated, "Parents for Pleasantville Progress-Vote Yes" (p-4). She asserted that Mr. Fairchild told the gentleman to remove the badge whereupon the man was alleged to have responded, "If you want to remove it, you're going to have to remove it." Ms. Harman advised the gentleman that he must remove the badge, whereupon the gentleman left the polling place. Subsequently, a woman arrived at the Washington Avenue School polling place with a handicapped voter who was also wearing a similar badge. When advised she must remove the

badge within the polling place, the woman covered the badge with her clothing and proceeded to vote. Ms. Harman asserted she did not observe any other people within the polling place wearing the badge.

Ms. Harman testified she remained in the polling place at all times during the election except to leave for approximately five (5) minutes to go to the restroom. She asserted that lunch was sent to the polling place for the election workers. The luncheon was paid for by the Board.

Janet Crouse, Public Relations Officer for the Board, testified, among other things, that she published and had printed the document marked P-5 in evidence at the direction of the Superintendent of Schools. She asserted that the election information material was mailed through the USPO by way of bulk-mail. There were a total of 6,855 pieces of mail, bagged according to mail routes, and delivered to the USPO on March 13, 1995, for distribution. Document R-1 in evidence is a United States Postal Service Statement of Mailing with Permit Imprints which is dated 3-13-95.

The election information brochure stated certain facts concerning the bond referendum, the date and time of the vote on the referendum, a map of the voting districts and a schedule of Town Meetings at which the Superintendent was to provide citizens information about the referendum. The brochure (p-5) was paid by the Board and was the second document to be printed. The first brochure was recalled and not mailed because there was a mistake in the information included thereon. Ms. Crouse asserted she was aware that the brochure (p-5) announced meetings with the Superintendent on March 14th, 15th and 16th, 1995. The delay in mailing the brochure was due to the recall of the first publication with the misinformation and the publication and printing of the second brochure (p-5).

Mr. Frank Parker, Principal of Washington Avenue School, testified he was not in the school building when the polling place was open at 2:00 p.m. on March 21, 1995. He was attending to his responsibilities in another school and did not return to Washington Avenue School until approximately 3:00 to 3:15 p.m. School dismissal was at 2:45 p.m. He remained at the school until approximately 3:50 or 4:00 p.m.

When Mr. Parker arrived at the Washington Avenue School, he was approached by Mr. Fairfield who advised him that election brochures were being illegally distributed at the school. Mr. Fairfield advised Mr. Parker that the brochures were in Mr. Parker's office. Mr. Parker investigated and determined that an unidentified parent had delivered the election brochures to the main office at Washington Avenue School with instructions to distribute the brochures to the children. Mr. Parker determined that the Community Relations Aide, a Board employee, distributed the brochures to the classrooms. Mr. Parker asserted that the brochures were collected before school was dismissed on March 21, 1995. He did not, however, know who collected the illegal material. Mr. Parker was aware that the distribution of the brochures P-5, was illegal and in violation of Board policy (p-6).

Edna Hunter, Principal of North Main Street School testified that on March 21, 1995, she conducted a contest with the children in the school where she arranged the children into three teams who were encouraged to have their parents, neighbors and grandparents vote in the school bond referendum. She asserted that the team with the most voters would win a pizza party.

A two-part ticket was used, where the name and address of the voters, together with the name of the pupil, was placed. She asserted that the voters were not advised as to how to vote but, rather, just to vote. Two classes in the school won a pizza party based upon the number of tickets handed in.

On cross-examination, Ms. Hunter admitted she handed out the tickets to voters at the polling place. She also admitted that she did not have permission from the Board or the Superintendent to conduct the contest.

Ms. Hunter was aware there was generally a low level of voter turn-out at such school elections and determined that the contest among the pupils would generate interest in the bond proposal. Ms. Hunter was in favor of the bond referendum, however, she asserted she did not convey her feelings to the pupils.

Frank Dingler, Board Secretary/Business Administrator, testified, among other things, that he was responsible for the conduct of the school elections held within the school district. He employed the poll workers and certified the appointment of challengers. There were no petitions for challengers for the election held on March 21, 1995. He, therefore, served no credentials for any challengers for the bond referendum election.

Mr. Dingler testified that between 3:00 p.m. and 3:30 p.m. on March 21, 1995, he was advised by Mr. Parker that election brochures were in the Washington Avenue School with directions that the brochures were to be sent home by the pupils. Mr. Dingler advised Mr. Parker that the brochures should be recalled immediately. There were no reports of election brochures at any of the other polling places.

Mr. Dingler testified that an individual went to Washington Avenue School to vote and was not permitted to do so because the individual's name was not in the signature copy register. The individual who came to Mr. Dingler's office asserted that the individual was under 18 years of age prior to the election day. Mr. Dingler telephoned the Atlantic County Board of Elections which advised that persons name under the age of 18 years may not be in voter signature copy register until that person reaches the age of 18. Mr. Dingler was further advised that a person may vote on the day of the election if that person had reached the age of 18 on that date.

Mr. Dingler testified there were problems at the Leeds Avenue School where the voters names were not in proper alphabetical order in the signature copy register. He asserted that eight or nine people were permitted to vote by affidavit.

FINDINGS OF FACT

Having carefully reviewed and considered all of the evidence adduced at the hearing, including the testimony of the witnesses, and having assessed their credibility and given fair weight thereto, I **FIND** the following **FACTS**:

On March 21, 1995, the Board held a special election for a bond referendum for the construction of a new high school and middle school. The Board assigned five of its schools as

designated polling places for various voting districts within its jurisdiction. The polls were open from 2:00 p.m. to 9:00 p.m. The results of the election, which are not in dispute, demonstrates that there were a total of 601 votes in favor of the referendum and 532 votes against the proposal. The proposal was approved by the electorate.

On March 21, 1995, an unnamed or unidentified individual delivered printed material to Washington Avenue School with instructions that the literature be given to the pupils for distribution. The printed election material (p-3) did not bear a statement of the name and address of the person or persons causing the material to be printed, copied or published, or who paid for the printed material. The Board's Community Relations Aide delivered the printed material to the classrooms without any official authority to do so.

Washington Avenue School was one of the four schools the Board designated was a polling place for the special election held on March 21, 1995. Washington Avenue School regularly dismisses its pupils at 2:45 p.m. At approximately 3:00 p.m., Frank Parker, Washington Avenue School principal, arrived at the school and was advised by poll worker Earl Fairchild of the existence of election printed material being distributed by school children. Mr. Fairchild advised Mr. Parker that the material was in Parker's office and had been distributed to voters by Washington Avenue School pupils. Mr. Parker went to his office and telephoned Frank Dingler, Board Secretary/Business Administrator who advised Parker to collect the election material and not permit it to be distributed by pupils. Mr. Parker located the election literature and handed it over to Mr. Fairchild.

Mr. Parker investigated the matter, however, he did not observe any pupils distribute the election material inside or outside of the schoolhouse. He also inquired of certain faculty members concerning the distribution of the printed material and they asserted that it did not occur.

Mr. Frank LaRosa, complainant, determined that the unauthorized printed election material distributed by the pupils at the Washington Avenue School was in direct violation of the Board's policy regarding the dissemination of information by pupils. (p-6).

Mr. Fairchild testified he observed pupils delivering the election printed matter to voters both inside and outside of the schoolhouse. Mrs. Benita Vaughn Harman, Judge of Elections at Washington Avenue School, testified she did not observe any pupils distributing election material either inside or outside of the schoolhouse. Mrs. Harman was at the Washington Avenue School polling place from 2:00 p.m. until after the polls closed at 9:00 p.m.

On March 21, 1995, Richard McAvaddy arrived at the Board's North Main Street School to cast his vote. He was approached by Dr. Edna Hunter, principal of North Main Street School, and offered a ticket stub. Mr. McAvaddy testified that the ticket was for a turkey raffle. Dr. Hunter testified that the ticket stub was for a contest to determine which class in the school could encourage the most voters to participate in the Board's special election. The ticket stub was to indicate the name and address of the voter together with the name of the pupil who encouraged the voter to cast his/her vote.

Mr. Robert Cornett testified that he acted as a challenger for Mr. Frank LaRosa at the Washington Avenue School. Board Secretary/Business Administrator Dingler testified that Mr. Cornett was not appointed as a challenger, pursuant to the statute. Therefore, Dingler was neither requested to issue, nor did he issue, Cornett a certificate of appointment as a challenger.

Election buttons which stated, "Parents for Pleasantville Progress - Vote Yes" (p-4), were worn at the Washington Avenue School polling place by two individuals during the election. One voter refused to remove the election button when requested to do so. The other voter covered over the button and proceeded to register, vote and leave the polling place. There was no evidence produced to demonstrate that Washington Avenue School faculty members wore such badges in the polling place during the election.

An individual who appeared at the Leeds Avenue School was denied the opportunity to vote because the individual's name did not appear in the signature copy register. The voter left the polling place and subsequently returned with the principal of the Leeds Avenue School who discussed the matter with the poll workers. The individual was allowed to vote by executing an affidavit.

The names of several individuals did not appear in the voter signature copy register. Mr. Frank LaRosa observed that these individuals were permitted to vote by executing voter affidavits at the Washington Avenue and Leeds Avenue Schools. (p-8).

Printed election material produced by the Board was sent to the homes of the electorate through the United States Postal Service (p-5). The election material arrived too late for Ms. Edna Cole to attend public meetings held by the Board's Superintendent to provide information regarding the proposed construction project which was the subject of the bond referendum. Complainants allege that this late notice constitutes an election irregularity.

DISCUSSION AND CONCLUSIONS

The printed election material which complainants allege was distributed by the pupils of Washington Avenue School is strictly prohibited by statute and the Board's own policy (p-6). The statute, N.J.S.A. 18A:42-4, states that:

No literature which in any manner and in any part thereof promotes, favors or opposes the candidacy of any candidate for election at any annual school election, or the adoption of any bond issue, proposal, or any public question submitted at any general, municipal or school election shall be given to any public school election shall be given to any public school pupil in any public school building or on the grounds thereof for the purpose of having such pupil take the same to his home or distribute it to any person outside of said building or grounds, nor shall any pupil be requested or directed by an official or employee of the public schools to engage in any activity which tends to promote, favor or oppose any such candidacy, bond issue, proposal, or public question. The board of education of each school district shall prescribe necessary rules to carry out the purposes of this section.

Complainants produced evidence that an unauthorized election brochure had been prepared and distributed by pupils at the Washington Avenue School polling place. (p-3) The Commissioner has admonished local boards of education which have permitted such activity in the past. In the Matter of the Annual School Election Held in the School District of the Town of

Nutley, Essex County, 1976 S.L.D. 612, 614, the Commissioner "... cautions this Board that anything less than strict compliance with the statutory requirements cannot be tolerated."

The herein Board is also cautioned that it allowed an unidentified or unnamed individual to solicit the use of pupils enrolled at Washington Avenue School to distribute illegal election printed matter which violates N.J.S.A. 18A:14-97. This statute provides that:

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

The printed election material did not include the statutorily required statement of the name and address of the person or persons which caused the brochures to be printed, copied or published. Nor did it contain the name and address of the person or persons who bore the cost of the brochures. The penalty for such an offense is set forth at N.J.S.A. 18A: 14-104, and provides that the offender "... shall be a disorderly person and shall be punished by a fine not exceeding \$500 or by imprisonment not exceeding one year, or both."

I **CONCLUDE** that complainants presented sufficient credible evidence to demonstrate that the Board was in violation of N.J.S.A. 18A:42-4, by allowing an unnamed or unidentified individual to place election printed material into the hands of pupils at its Washington Avenue School for distribution. It is not known to what extent the distribution of the literature occurred on March 21, 1995. The evidence is sufficient to show that some distribution by pupils occurred. To repeat the Commissioner's words here that "... anything less than strict compliance with the statutory requirements cannot be tolerated." IMO Annual School Election Held in the School District of the Town of Nutley, supra. at 614.

I **FURTHER CONCLUDE** that the distribution of the election material by the unknown or unnamed person was in violation of N.J.S.A. 18A:14-97.

The Board's approved printed material (p-5), while technically in violation of N.J.S.A. 18A:14-97, does pass statutory muster. It provides a return address which identifies the publisher as the Pleasantville Public Schools. Our Supreme Court held in Citizens to Protect Public funds, et al. v. Board of Education of the Township of Parsippany-Troy Hills, 172 N.J. 173, 179 (1953) that boards of education have implied powers to make reasonable expenditures for the purpose of giving voters relevant facts to aid them in reaching an informed judgment when voting on school bond election proposals. That was the intent of the herein Board when it mailed p-5 to its constituents. It is regrettable that the information did not reach all of those who wished to appear at one of the five town meetings at which the Superintendent provided information about the proposed construction. The Board would be well advised to comport with N.J.S.A. 18A:14-97 in the future and include all of the indicia required. I **CONCLUDE**, therefore, that there was no violation of the election laws with respect to the Board's production of p-5.

Regarding the raffle or election contest conducted by the principal Edna Hunter at the North Main Street School, the Commissioner has held that the conduct of an unlicensed raffle is in violation of the school elections statutes, N.J.S.A. 18A:14-92 through -97. See, In the Matter of the Annual School Election Held in the School District of the Township of Madison, Middlesex County, 1974 S.L.D. 744. Dr. Hunter asserted she was concerned about the low turnout of voters in school elections and decided to engage the pupils in her school to encourage voters to come to the polls and cast their vote. She asserted that she developed a contest whereby the voters coming into the North Main Street School polling place were to place their name, address and the name of a pupil on a ticket offered to the voter by Dr. Hunter. The class of pupils which tallied the most voters would win the contest. Dr. Hunter admitted that she had not secured the permission of the Superintendent to carry on the contest in the polling place.

I **CONCLUDE** that a polling place located in a schoolhouse is reserved for the conduct of the elections and no other business during the hours advertised; *i.e.*, 2:00 p.m. to 9:00 p.m. Dr.

Hunter's confrontation with prospective voters for the purpose of conducting a contest was inappropriate and ill advised, which may constitute interference with the election process.

The statute, at N.J.S.A. 18A:14-52, clearly provides for a voter to cast his/her vote by way of affidavit. The statute, in its entirety, is set forth below as follows:

In any school election, if the duplicate permanent registration form of any person cannot be found in the signature copy register at the time he applies for a ballot and such person claims that he was permanently registered in such municipality at least 40 days prior to such election or that he was permanently registered in another municipality within the same county and filed or forwarded a change of residence notice to the commissioner of registration of the county or the clerk of the municipality, if the municipality is not the one in which the county seat is located, certifying that he has moved to the municipality in which he seeks to vote at least 40 days prior to such election, one of the school election officers shall require such person to make and sign an affidavit, which may be taken by any school election officer, in the form which shall have been prescribed by the commissioner of education, which form shall include a statement that such person was permanently registered at least 40 days prior to such election in such municipality or in another municipality within the same county and filed or forwarded a change of residence notice to the commissioner of registration of the county or the clerk of the municipality, other than the municipal clerk of the municipality in which the county seat is located, certifying that the has moved to the municipality in which he seeks to vote at least 40 days prior to such election, and that such person has the qualifications required to vote at such election. If such form has been properly filled out by a school election officer and signed by such person, such person shall be eligible to receive a ballot. The number of the ballot shall be recorded on such form and the form shall be transmitted to the superintendent of schools of the county, in the sealed packet required by this title.

Complainants produced no evidence that the four voter affidavits (p-8) were in any manner irregular, false, fraudulent or inconsistent with the law. Thus, the voters exercised their franchise and voted by affidavit because their names did not appear on the signature register copy. **I CONCLUDE**, therefore, without a showing of any irregularity, the votes are held to be valid.

As the Court said in In re Wene, 26 N.J. Super. 363 (Law Div. 1958), aff'd 13 N.J. 185 (1953):

The rule in our State is firmly established that if any irregularity or any other deviation from the election law by the election officials is to be adjudged to have the effect of invalidating a vote or an election, where the statute does not so expressly provide there must be a connection between such irregularity and the result of the election; that is, the irregularity must be the producing cause of illegal votes which would not have been cast or of defeating legal votes which would have been counted, had the irregularity not taken place, and to an extent to challenge or change the result of the election; or it must be shown that the irregularity in some other way influenced the election so as to have repressed a full and free expression of the popular will. Nothing of this kind is even changed or suggested in the instant case. at 383

See also, Sharrock v. Keansburg, 15 N.J. Super. 11 (App. Div. 1951).

I **CONCLUDE** that there is nothing in the record to demonstrate, by clear and convincing evidence, that the irregularities set forth by complainants constitute sufficient reason to set aside the will of the electorate by vitiating the results of the election. The Commissioner has consistently declined to set aside contested school elections absent clear and convincing proof that the irregularities improperly affected the results of the election. I **CONCLUDE** that no such showing has been demonstrated here. Nutley, supra., In re Wene, supra.

ORDER

Accordingly, it is **ORDERED** that the results of the Special Election held in the School District of the City of Pleasantville shall stand as reported and the herein Complaint is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is

otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 20, 1995
DATE

Lillard E. Law
LILLARD E. LAW, ALJ *Acting Director*

Receipt Acknowledged:

9/23/95
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 25 1995
DATE

Jeff S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

FOR COMPLAINANTS:

EARL B. FAIRCHILD
ROBERT CORNETT
MARIE DIX
EDNA COLE
FRANK LaROSA

FOR RESPONDENT:

BERNITA VAUGHN HARMAN
JANET CROUSE
FRANK PARKER
EDNA HUNTER
FRANK DINGLER

DOCUMENTS IN EVIDENCE

FOR COMPLAINANTS:

P-1 "KEEP THIS COUPON"
P-2 NOT ADMITTED
P-3 PARENTS FOR PLEASANTVILLE PROGRESS (FLYER)
P-4 PARENTS FOR PLEASANTVILLE PROGRESS - VOTE YES (BADGE)
P-5 POSTAL CUSTOMER, PLEASANTVILLE, NJ 08232
P-6 USE OF STUDENTS
P-7 RESULTS OF SPECIAL ELECTION
P-8 AFFIDAVIT FORM (4)

FOR RESPONDENT:

R-1 STATEMENT OF MAILING WITH PERMIT IMPRINTS

IN THE MATTER OF THE SPECIAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY : DECISION
OF PLEASANTVILLE, ATLANTIC :
COUNTY. :
_____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner. No replies were permitted consistent with the provisions of N.J.A.C. 1:1-9.4 (accelerated proceedings).


In his exceptions, petitioner contends that the ALJ failed to include certain relevant portions of testimony in his summations; that he erred in concluding that the Board's literature was in substantial compliance with N.J.S.A. 18A:14-97 and 14-97.2, which require inclusion of names and addresses of persons/associations paying for election literature; that it is incorrect to say that no evidence was presented in support of petitioner's allegations regarding the irregularity and illegality of the four contested voter affidavits; and that the ALJ applied the wrong standard for the burden of proof in this matter, using "clear and convincing evidence" rather than "preponderance of the credible evidence." (Petitioner's Exceptions at pp. 1-3)

Upon review, the Commissioner finds that petitioner's exceptions do not alter the outcome of this matter. Initially, allegations regarding representation of testimony cannot be assessed in the absence of hearing transcripts, which have not been provided to the Commissioner herein. Further, N.J.S.A. 18A:14-97 et seq. can no longer be used as a basis for invalidating an election in light of the United States Supreme Court's ruling in McIntyre v. State of Ohio, 1995 W.L. 227810 (U.S.). Also, while it may not be precisely accurate to say that *no* evidence was brought forward regarding contested voter affidavits, the evidence presented in the record before the Commissioner *was* insufficient to warrant a finding of impropriety such that would rise to the level of invalidating the election. Finally, even applying the proper standard to the proofs herein, petitioner has not shown that improprieties found were sufficient to have

altered the outcome of the election, consistent with the well established standard articulated by the court in In re Wene, supra.

Accordingly, for the reasons expressed therein as amplified above, the initial decision of the Office of Administrative Law is adopted as the final decision in this matter, which is hereby dismissed with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

October 3, 1995
Date of Mailing, October 4, 1995

360-95E

KAREN BALSAMO, on behalf of her minor child, C.B., :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF MONTVALE, BERGEN COUNTY, :

DECISION ON MOTION

RESPONDENT. :

October 3, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
GRANTING EMERGENT RELIEF

OAL DKT. NO. EDU 9770-95

AGENCY DKT. NO. 358-9/95

**KAREN BALSAMO, ON BEHALF OF
HER MINOR CHILD, C.B.,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE
BOROUGH OF MONTVALE, BERGEN
COUNTY,**

Respondent.

Arthur E. Balsamo, Esq., attorney for petitioner

Stephen R. Fogarty, Esq., attorney for respondent (Fogarty and Hara, attorneys)

Record Closed: September 13, 1995

Decided: September 13, 1995

BEFORE MARIE P. SIMONELLI, A.L.J.

THIS MATTER having been opened to the Office of Administrative Law on petitioner's application for emergent relief pursuant to *N.J.A.C. 1:1-12.6*; and the Administrative Law Judge

having read and considered the moving papers and having heard the arguments of counsel; and the Administrative Law Judge having found that petitioner has met the requirements for the granting of emergent relief; and for other good cause shown

IT IS on this 13th day of September 1995

ORDERED that petitioner's request for emergent relief be and hereby is **GRANTED**; and it is further

ORDERED that respondent shall provide transportation for C.B. to and from the Fieldstone Middle School until a final determination in this matter; and it is further

ORDERED that if a final determination is made in favor of respondent, petitioner shall reimburse respondent for the cost, if any, of the transportation; and it is further

ORDERED an independent measurement of the route calculated by respondent on September 8, 1995 shall be conducted by the Bergen County Superintendent and the parties shall be bound by that measurement; and it is further

ORDERED that respondent shall contact the Bergen County Superintendent and shall arrange for the measurement as soon as possible.

This Order Granting Emergent Relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this Order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this Order within forty-five days, this recommended Order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A. 52:14B-10*.

Sept. 13, 1995

DATE



MARIE P. SIMONELLI, A.L.J.

KAREN BALSAMO, on behalf of her minor child, C.B.,
PETITIONER,
V.
BOARD OF EDUCATION OF THE BOROUGH OF MONTVALE, BERGEN COUNTY,
RESPONDENT.

COMMISSIONER OF EDUCATION
DECISION ON MOTION

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of the Board and response thereto by petitioner were timely filed pursuant to the requirements of N.J.A.C. 1:1-18.4.

The Board's exceptions contend that the Administrative Law Judge (ALJ) in this matter issued an order granting petitioner emergent relief without considering those elements essential to the determination of such an application under Crowe v. DeGioia, 90 N.J. 126 (1982), i.e., the existence of irreparable harm, probability of prevailing on the merits, and a balancing of the equities of the parties. Initially, the Board proffers that, although petitioner claims that absent bus transportation her child will suffer irreparable harm, she has not presented any evidence that the child would have no reasonable, alternative means of transportation or demonstrated any other rational basis which justifies emergency action herein. To the contrary, it argues that petitioner was advised that if she was unable to secure transportation arrangements for her child for the 95-96 school year, she should contact the P.T.O. which had offered to assist

children experiencing similar difficulties. To date petitioner has chosen not to contact this organization.

The Board further contends there is no basis upon which it could be concluded that petitioner has a reasonable probability of prevailing on the merits in this matter. Petitioner essentially argues that she believes the denominated walkway is not only in excess of two miles, but also dangerous due to high-volume traffic. The Board advances that numerous cases support “the proposition that the Board is not responsible for the safe condition of the roadways and, furthermore, is under no affirmative duty to seek out the safest route***.” (Board’s Exceptions at p. 2) Notwithstanding this existing legal proposition, the Board contends that the route it designated is, in fact, the safest route for petitioner’s child.

The Board urges, in view of the fact that in granting her emergent order in this matter the ALJ made none of the required determinations necessary for the granting of emergent relief and did not even hear arguments on these issues, and because it is also clear that petitioner has not met the criteria necessary for the granting of such relief, the Commissioner should reverse the ALJ’s order and deny petitioner’s application.

In reply, petitioner argues that the absence of specific determinations by the ALJ with respect to satisfaction of the Crowe standard should not be fatal to her emergent application as the existence of the necessary required elements was clearly evident from testimony adduced at the hearing.

Initially, petitioner argues that there is a substantial probability that she will prevail on the merits of this matter. As testified to at the hearing, the Board measured the distance of a walking route to school for her child on August 14, 1995 and September 8, 1995, and computed the distance on both occasions to be exactly 2 miles. She asserts that the Board is

taking the position that the language of the relevant statute requires the distance from a child's home to school must be in excess of two miles before he has entitlement to school busing. As such, one additional inch added to the Board's measurement gives petitioner's child entitlement to busing under the statute. Petitioner asserts that, under the circumstances existing in this matter, it is clear she will establish the existence of the required inch. She argues

Petitioner having accompanied Respondent on the first measurement is aware, based upon her observations, that on the first measurement Respondent did not include the distance from the bottom step of the side door of her residence to the door itself. Since the measurement must be door to door, even if we utilize Respondent's computation, inclusion of the twenty-six inches from the bottom step to the residence door would result in Respondent's measurement being in excess of the requisite two miles.

(Petitioner's Reply Exceptions at p. 2)

Petitioner additionally contends that there is also an inherent problem with utilizing the measuring "wheel" in that this device is unable to include "the distances lost from the measurement each time the wheel goes up or down the curb." (Id.)

Petitioner posits that after testimony at the hearing adduced that the Board's second measurement found the distance from petitioner's home to the school to be two miles or in excess of two miles depending upon which route was utilized, and that petitioner's measurements of the route determined the actual distance to be in excess of 2 miles, there was no need for additional argument regarding petitioner's likelihood of success on the merits in this matter.

With respect to irreparable harm, petitioner asserts that private bus transportation for her child is no longer an available option for this school year and transportation by his parents would require the child to arrive at school an hour before it officially opened and would also necessitate him not being returned home until after 4 p.m. She contends that if the child were to

be required to walk to school, he would be compelled to traverse a route which is dangerous and unsafe. She further maintains “that passing off Respondent’s obligation for busing to the P.T.O. for a car pool arrangement is not an acceptable alternative.” (Petitioner’s Reply Exceptions at p. 3)

Petitioner proffers that irreparable harm was also established at the hearing as “[d]uring the course of his arguments counsel for Respondent conceded that the road was dangerous and highly trafficked and was one of the two roads in town which the Board considered unsafe for children to traverse.” (Id.)

Upon review of the record of this matter, which it is noted included an audio tape of the hearing conducted at OAL, and consideration of the appropriate standard for grant of emergent relief as set forth in Crowe, supra, the Commissioner is compelled to reverse the ALJ’s grant of emergent relief in this matter.


The granting of emergent relief is an extraordinary remedy which may not be granted absent the establishment of immediate and irreparable harm and a demonstration that the applicant has a reasonable probability of ultimately succeeding on the merits of the case. In the instant matter, in addition to petitioner’s central factual premises being strenuously disputed by the Board and the law in this matter being far from settled, resulting in an inability at this juncture to make a reasoned determination as to which party is more likely to prevail on the merits of this matter, the Commissioner finds and determines that petitioner herein has not demonstrated irreparable harm. Although it is clear that petitioner finds alternative options for the transportation of her child to be inconvenient and burdensome, such inconvenience does not rise to the level of constituting irreparable harm. As such, the Commissioner cannot reasonably conclude that the equities in this matter favor petitioner and, therefore, finds no basis for

compelling the Board to provide bus service to petitioner's child, thereby placing the Board in the position of having to exact payment for such service should it ultimately prevail in this matter.

The Commissioner does concur with the ALJ, however, that because this controversy could be concluded expeditiously with a measurement being conducted by the County Superintendent, as agreed to by the parties, such measurement should be rapidly completed.

Accordingly, the Commissioner reverses the recommended order of the ALJ granting emergent relief in this matter. The Commissioner further orders that, within two weeks of the date of this decision, the County Superintendent conduct a measurement of the distance from petitioner's residence to Fieldstone Middle School utilizing the agreed-upon route calculated by the Board on September 8, 1995. If the result of such measurement satisfies the statutory requirement entitling petitioner's child to busing by the Board, the parties are directed to take the necessary steps to withdraw this matter at the OAL. If, on the other hand, the measurement comes in at less than the required statutory distance for busing entitlement, this matter shall proceed to a hearing with respect to the safety issue as recommended by the ALJ in the tape recording of the September 13, 1995 hearing on emergent relief.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

October 3, 1995
Date of Mailing, October 4, 1995

363-95

BOARD OF EDUCATION OF THE :
BOROUGH OF FAIRVIEW, :
: PETITIONER, :
V. :
MAYOR AND COUNCIL OF THE :
BOROUGH OF FAIRVIEW, BERGEN :
COUNTY, : COMMISSIONER OF EDUCATION
: RESPONDENT. : DECISION
AND :
IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCA- :
TION OF THE BOROUGH OF FAIRVIEW, :
BERGEN COUNTY. :

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of \$466,196 made by governing body following voter rejection of proposed budget on April 18, 1995.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line-item reductions was necessary in order to provide a thorough and efficient system of education in the District, Commissioner determined to restore \$215,016.

Board also appealed General Fund cap waiver in the amount of \$1,042,859 rejected by voters.

Upon review of the record, Commissioner determined to order the increase of \$943,055 in cap waiver monies for a total General Fund tax levy of \$8,302,356 for 1995-96 school year.

October 5, 1995

BOARD OF EDUCATION OF THE	:	
BOROUGH OF FAIRVIEW,	:	
	:	
PETITIONER,	:	
V.	:	
	:	
MAYOR AND COUNCIL OF THE	:	
BOROUGH OF FAIRVIEW, BERGEN	:	
COUNTY,	:	COMMISSIONER OF EDUCATION
	:	
RESPONDENT.	:	DECISION
	:	
AND	:	
	:	
IN THE MATTER OF THE CAP WAIVER	:	
APPEAL OF THE BOARD OF EDUCA-	:	
TION OF THE BOROUGH OF FAIRVIEW,	:	
BERGEN COUNTY.	:	
_____	:	

For Petitioner, Dennis J. Oury, Esq. (Oury & Mizdol, P.C.)

For Respondent, John L. Schettino (Giblin & Giblin)

PROCEDURAL HISTORY

This consolidated matter was opened before the Commissioner of Education on June 16, 1995, through the filing of separate Petitions of Appeal by the Board of Education of the Borough of Fairview (Board), one seeking restoration of reductions to the school budget made by the Mayor and Council of the Borough of Fairview (Council) pursuant to N.J.S.A. 18A:22-37 following defeat of the budget at the annual school election on April 18, 1995, and the other seeking to appeal the defeat of the Board's cap waiver proposal at that same election.

In February 1995, the Board had advised the County Superintendent that the Board would need a "voter cap waiver" pursuant to N.J.S.A. 18A:7D-28(f) in order to be able to provide for a thorough and efficient education (T&E) in the District. The County Superintendent ultimately determined, by way of letter dated March 27, 1995, that \$1,042,859 of the Board's voter cap waiver was necessary for T&E, and therefore appealable in the event of voter defeat, but the remaining \$172,000 was not.

At the annual school election, the voters rejected a public question proposing a General Fund tax levy of \$7,611,055 for the 1995-96 school year, as well as a proposed cap waiver question of \$1,214,859 representing the total of both T&E and non-T&E amounts. Following consultation with the Board as required by law, the Council adopted a resolution determining to certify a General Fund tax levy of \$7,144,285 as sufficient to provide for a T&E in the District. This amount represented a reduction of \$466,770 from the tax levy proposed by the Board, and was effectuated through cuts in nine line items, for the reasons given in Exhibit A attached to the implementing Council resolution. The Board duly resolved to appeal these reductions and the voter rejection of the T&E portion of the General Fund cap waiver in the amount of \$1,042,859, and duly filed the within petition.

The Board filed a petition on June 16, 1995, requesting the Commissioner to overturn the Council's action in failing to provide the necessary tax levy; the Council filed its answer on July 12, 1995. A petition contesting the cap waiver defeat was also filed on June 16, 1995. No answer to this petition was filed by the Council, and the appeal was deemed uncontested consistent with the Council's July 11, 1995 letter to the Commissioner.

On July 21, 1995, the Board filed a Position Statement pursuant to N.J.A.C. 6:24-7.8. Neither a position statement nor a response to the Board's statement was filed by the Council.

On August 3, 1995, the Bergen County Superintendent of Schools filed his affidavit and supporting documents attesting to the process of review and analysis that led to his conclusion, and that of the Department of Education's Cap Waiver Review panel, that a \$1,042,859 "T&E voter cap waiver" should be granted to the Board so as to permit it to increase its General Fund budget beyond the established permissible level. The County Superintendent's filings also reflected a panel directed reallocation of resources in the amount of \$50,000 from anticipated miscellaneous revenues and \$25,000 from general administration.

In addition, as the parties had previously been advised by letter from the Assistant Commissioner dated April 7, 1995 and distributed through the County Superintendent to boards and municipalities experiencing budget defeats, as part of the record of the within appeal, the Commissioner took official notice of the Board's revised budget and its June 30 financial report, the latter for the purpose of identifying whether the Board underestimated in its 1995-96 budget the amount of anticipated undesignated surplus.

During the course of review of the record, it was determined that additional documentation was required in order for the Commissioner to complete his review. Accordingly, by letter dated, September 8, 1995, the parties were notified that the following items were required to be submitted by the Board: 1) analyses of the activities in tuition account numbers 11-000-100-561, 11-000-100-562 and 11-000-100-565; 2) Letters of confirmation from the receiving districts regarding actual payments made during 1994-95 by Fairview, and tuition adjustments issued related to 1992-93 certified tuition rates, which under code are required to be

made in 1995-96, whether paid (including date and amount of payments) or unpaid; and 3) Copies of existing special education tuition contracts for the 1995-96 school year and justification from Fairview for any budgeted appropriations in excess of the contracted amounts. Documents were timely filed on September 18, 1995, as was the Council's reply. At this time, the matter was consolidated and the record of the appeal was closed.

The amounts in dispute in this appeal are as follows:

<u>Tax Levy Proposed by Board</u>		<u>Tax Levy Certified by the Council</u>	
General Fund	\$7,611,055	General Fund	\$7,144,285
<u>Amount of Reduction by Council</u>		<u>Amount of Reduction in Dispute</u>	
General Fund	\$466,770	General Fund	\$466,196 ¹
<u>Amount of Cap Waiver Approved as T&E and Appealed Herein</u>		<u>Amount of Cap Waiver Not Approved as T&E and Not Appealed Herein</u>	
	\$1,042,859		\$172,000

TOTAL AMOUNT ON APPEAL: \$1,509,055

The cap waiver requested by the Board included the following line items, which were determined by the County Superintendent to be necessary, or not necessary, for T&E as set forth below:

Necessary for T&E

<u>Account Title</u>	<u>Account Number</u>	<u>Dollar Amount</u>
Tuition to Other LEA's within the State-Regular	11-000-100-561	\$1,042,859

¹ The Board has chosen not to appeal one of the line-item reductions, specifically, a \$574 reduction to Account Number 11-204-100-101, Salaries of Teachers - Neurologically Impaired. Thus, the amount in dispute totals \$466,196.

Not Necessary for T&E

Operation and Maintenance/Salaries	11-000-260-100	\$24,000
Cleaning, Repair and Maintenance	11-000-260-420	25,000
Student Transportation/Contract Services-Vendors	11-000-270-511	123,000
	TOTAL	\$172,000

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line-item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education. Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989). Additionally, with respect to appeals involving cap waivers, before the Commissioner can direct restoration of any amount of a waiver defeated by the voters, the Commissioner must determine that such amount is fully necessary for purposes of T&E and unable to be derived from further reallocation within the base budget. Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, Bergen County, State Board decision July 7, 1993, and Board of Education of the Borough of Edgewater v.

Mayor and Council of the Borough of Edgewater, Bergen County and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, Bergen County, State Board decision July 6, 1994.

Mindful, then, of the standard to be applied, the Commissioner makes the specific determinations set forth below.

COMMISSIONER'S DETERMINATION - BUDGET

Disputed Line-Item Number 1

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
2530	11-130-100-101	Grades 6-8/Teacher Salaries	\$702,660	\$50,325

The Board argues that the Council's reduction of this line item is short-sighted and that the Board's projections for this and account numbers 11-110-100-101 (Preschool/Kindergarten Teacher Salaries) and 11-120-100-101 (Grades 1-5 Teacher Salaries) take into account years of service, the 1995 salary guide (exclusive of contract raise) and a 2% contract raise. The Board further contends that the Council's reduction does not take into account salaries of those teachers whose teaching assignments cut across all grade levels, including salaries for home economics, music, art, and computer teachers.

The Council asserts that its reduction is based upon the full salary requirements, increased by 4% for salary settlements. It maintains that this method is consistent with salary increases that have been received by surrounding school districts.

Upon review, the Commissioner notes that, according to the Board's calculations in its supporting documents, its salary needs for teachers in account numbers 11-130-100-101 (Grades 6-8), 11-110-100-101 (Preschool/Kindergarten) and 11-120-100-101 (Grades 1-5) total \$1,781,868, and it has appropriated \$1,760,778. Additionally, the Commissioner notes that the

Council does not propose elimination of positions and that expenditures in these categories totaled \$1,610,587, as indicated in its June 30, 1995 report. Inasmuch as the Council provides no compelling reason to accept its calculations over the Board's and does not provide sufficient detail to determine the basis for its reduction, the Commissioner determines to restore the reduction of \$50,325.

Disputed Line-Item Number 2

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
3080	11-205-100-101	Salaries of Teachers/ Perceptually Impaired	\$134,755	\$2,545

The Board argues that, although it originally projected a need of \$134,755 for this account, based on the 1995-96 salary guide increase and a 2% contract raise, as set forth in the Board's Exhibit "E", the projected total salaries for the three teachers in this category will be \$137,674, or \$3,000 more than originally budgeted. The Board further argues that the Council has not refuted any of the facts or salary requirements as set forth in supporting documents, that its proposed reduction is impractical and does not reflect reality.

The Council contends that the reduction is based on the actual salary requirements, increased by 4% of salary settlements. It further argues that this method of calculation is consistent with salary increases that have been received by surrounding school districts.

Upon review, the Commissioner notes that the Board's projected salary needs in this category, as evidenced by supporting documents, are \$137,674, which is more than the Board has budgeted. Inasmuch as the Council does not provide sufficient detail enabling the

Commissioner to accept alternative calculations, he determines to restore the reduction of \$2,545.

Disputed Line-Item Number 3

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
3860	11-213-100-101	Salaries of Teachers/ Resource Room	\$192,900	\$4,682

The Board asserts that it has budgeted for six resource room teachers required by the District, together with salaries, including adjustments for the 1995-96 salary guide and a 2% contract increase. The Board claims that the Council's reductions to this account are arbitrary, and not based on the hard facts.

The Council again contends that its reduction is based upon the salary requirements, increased by 4% for salary settlements, and that such calculation is consistent with salary increases that have been received by the surrounding school districts.

Upon review, the Commissioner observes that, according to the Board's calculations in its supporting documents, the projected need for teacher salaries in this category is \$189,720 for 1995-96, and it has budgeted for \$192,900. Additionally, the Council does not provide sufficient detail which would permit the Commissioner to accept alternative calculations. Therefore, the Commissioner determines to sustain \$3,180 of the Council's reduction, and restore \$1,502, thus, permitting the District to meet its salary need, as projected.

Disputed Line-Item Number 4

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
4310	11-218-100-101	Salaries of Teacher/Speech Instruction	\$33,300	\$644

The Board originally budgeted \$33,300 for this account, to cover costs for one position, but asserts that its projected need will now be \$43,289, for one full-time and one part-time salary. The Board argues that the Council's reduction to this account would render it unable to fund the needed part-time speech therapist position.

The Council again contends that its reduction is based upon actual salary requirements, increased by 4% for salary settlements, and that such calculation is consistent with salary increases that have been received by the surrounding districts.

Upon review, the Commissioner determines to restore the reduction of \$644, as the Council has not disputed the need for this position and offers no support for its calculations.

Disputed Line-Item Number 5

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
6270	11-000-100-561	Tuition/Other LEAs Within State-Regular	\$1,846,880	\$170,000

The Board states that its estimate of \$1,846,880 is based upon tuition for 340 students at \$8,500 each for the 1995-96 year at the Cliffside Park High School. Inasmuch as the Council's reduction was based upon an anticipated tuition credit, the Board concedes that its budgeted figure does not account for an expected refund of \$269,804 for the 1992-93 school year in accordance with N.J.A.C. 6:20-3.1(e)3.

The Council argues that the actual tuition credit for the 1994-95 [sic] school year was \$798 per student, for a total of \$269,804, rendering the \$170,000 cut a reasonable reduction.

Upon careful review, the Commissioner notes the following history of appropriations and expenditures in this category: 1993-94 expenditures totaled \$2,419,944; 1994-95 appropriations totaled \$2,873,000 and expenditures, as indicated on the June 30, 1995

report, totaled \$2,463,796. Additionally, the Commissioner recognizes that the proposed funds in this account are being combined with those requested through T&E voter waiver. While the district argues these funds will be necessary for tuition for 340 students at Cliffside High School (340 x \$8,500 = \$2,890,000), its concession as to the anticipated refund of \$269,804 is significant. The Commissioner, therefore, determines to sustain the reduction of \$170,000 in this line item and to reduce the cap waiver request, infra, by the balance remaining of the anticipated tuition refund.

Disputed Line-Item Number 6

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
6280	11-000-100-562	Tuition/Other LEAs Within State-Special	\$592,140	\$160,000

The Board argues that although the Council asserts its reduction is based on an accounting error, it has failed to indicate what the error is, or where it specifically appears in the budget. Consequently, it argues that it cannot adequately refute the Council’s reduction without additional information.

The Council states that its “reduction is based upon an accounting error for the Cliffside Park Resource Room Tuition which appears to have been included twice on the District’s detailed budget workpapers.” (Council’s Answer at p. 7)

Upon review, the Commissioner again highlights the Board’s history of appropriations and expenditures in this category: In 1993-94, expenditures totaled \$384,923; in 1994-95, the Board appropriated \$366,000, but actually expended, according to the June 30, 1995 financial report, \$563,368. For the 1995-96 school year, the Board, by its supporting documents, evidences a need for an even larger amount. The Commissioner recognizes that the

Council provides insufficient detail on which to evaluate its decision to reduce this account, and that the Board has demonstrated its need for the disputed funds. Consequently, the Commissioner determines to restore the reduction of \$160,000.

Disputed Line-Item Number 7

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
6310	11-000-100-565	Tuition to CSSD and Regional Day Schools	\$239,800	\$72,000

The Board argues² that \$236,860 needed for this account is necessary to cover costs for 16 emotionally and perceptually impaired, trainable mentally retarded, and multiply handicapped students. The Board alleges that a reduction in this account would severely impact them, inasmuch as the numbers are “immutable,” having been previously determined by the Bergen County Board of Social Services. (Board’s Petition at p. 5)

The Council again asserts that the reduction is based on an accounting error for County Special Services Commission (CSSC) tuition, as it appears to have been included twice in the Board’s detailed budget workpapers.

Upon careful review, the Commissioner reflects on recent appropriations and expenditures and notes: In 1993-94, the Board expended \$162,375 in this category; in 1994-95, the District appropriated \$165,000 and expended, according to its June 30, 1995 financial report, \$165,893. The Commissioner further finds that the Board provides no documentation to support its claim regarding these expenditures as being fixed by the Bergen County Board of Social

² The Board’s Position Statement does not include an argument against the reductions for this account. Inasmuch as the Petition of Appeal included such an argument and there is no indication that the Board has withdrawn its appeal of this line-item reduction, the Commissioner assumes the omission is an oversight and reviews the Board’s argument as presented in its Petition.

Services. Accordingly, the Commissioner sustains the reduction of \$72,000, as it will bring the appropriation to a level more consistent with actual expenditures.

Disputed Line-Item Number 8

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
6960	11-000-230-590	Undistributed Expenditures Other Purchased Services	\$79,050	\$6,000

The Board asserts that the increase in this line item from last year's budget includes expenditures for liability insurance for two new pieces of property acquired by the Board this year. The Board maintains that these expenses are reasonable.

The Council argues that the reduction is based upon the Board's increase for superintendent's expenses from \$10,000 for the 1994-95 school year to \$18,000 for the 1995-96 school year.

Upon careful review, the Commissioner notes that expenditures in this account totaled \$68,475 in 1993-94, and \$65,124 in 1994-95, according to the June 30, 1995 financial report. Thus, the Commissioner finds that the Council's reduction is in accordance with recent expenditures for this budget category, and further observes that the Board provides no documentation to support its claim regarding increased liability costs. Accordingly, the Commissioner determines to sustain the reduction of \$6,000.

COMMISSIONER'S DETERMINATION - CAP WAIVER

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
6270	11-000-100-561	Tuition to Other LEA's Within the State- Regular	\$1,042,859

The Board argues that the cap waiver is necessary to provide for tuition, pursuant to a sending-receiving contract, for Fairview students to attend Cliffside Park in the 1995-96

school year. Specifically, as shown in supporting documents, tuition for those students is \$8,500 each for 340 students, totaling \$2,890,000. The balance of the funds needed for tuition are appropriated in the general fund budget.

In accordance with the Commissioner's determination as to account number 11-000-100-561, Tuition-Other LEAs - Within State-Regular, supra, \$943,055 of the cap waiver is approved and \$99,804 is denied, based on the Board's concession to its anticipated tuition refund.

APPLICATION OF SURPLUS

In its advertised annual school district budget statement, the Board projected an unreserved surplus of \$169,950 and allocated \$0 as revenue, leaving \$169,950 as undesignated unreserved surplus.

The Board's annual financial report filed pursuant to N.J.S.A. 18A:17-10 (June 30 Board secretary's report) reveals that the unreserved general fund balance was overestimated by \$23,972, as the 1994-95 budget will generate an actual use of surplus in that amount for the 1994-95 school year.

Based on the above, the Commissioner determines that no excess surplus is available for appropriation, subject to verification through the Board's 1994-95 annual year-end audit report.

SUMMARY

In summary, the Commissioner directs restoration or sustaining of the Council's line-item reductions to appropriations and approval of cap waiver amounts as set forth below. The Commissioner further notes that all restorations to line-item appropriations are restricted in accordance with N.J.A.C. 6:20-2A.11(b)3.

<u>Line Item</u>	<u>Description</u>	<u>Sustained</u>	<u>Restored</u>
2530	Grades 6-8/Salaries of Teachers	\$- 0 -	\$50,325
3080	Salaries of Teachers/Perceptually Impaired	- 0 -	2,545
3860	Salaries of Teachers/Resource Room	3,180	1,502
4310	Salaries of Teachers/Speech Instruction	- 0 -	644
6270	Tuition/Other LEAs/Within State - Regular	170,000	- 0 -
6280	Tuition/Other LEAs/Within State - Special	- 0 -	160,000
6310	Tuition/CSSD and Regional Day Schools	72,000	- 0 -
6960	Undistributed Expenditures-Support Services - Other Purchased Services	<u>6,000</u>	<u>- 0 -</u>


Total Line-Item Determinations: \$251,180 \$215,016

<u>Cap Waiver</u>	<u>Not Necessary</u>	<u>Necessary</u>
6270 Tuition to Other LEAs	\$99,804	\$943,055

Tax Levy Certified by Governing Body: \$7,144,285
Restoration of Reductions: 215,016
Amount of Restoration Funded by Surplus: - 0 -
Cap Waiver Amount Approved 943,055
Total Tax Levy for 1995-96: \$8,302,356

Accordingly, the Bergen County Board of Taxation is directed to make the necessary adjustments, as set forth above, subject to verification of surplus amounts through the year-end audit, to reflect a total of \$8,302,356 to be raised in tax levy for General Fund purposes of the Fairview Board of Education for the 1995-96 school year.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

October 5, 1995
Date of Mailing, October 6, 1995

C #363-95
SB # 2-96

BOARD OF EDUCATION OF THE	:	
BOROUGH OF FAIRVIEW,	:	
	:	
PETITIONER-APPELLANT,	:	STATE BOARD OF EDUCATION
	:	
V.	:	DECISION
	:	
MAYOR AND COUNCIL OF THE	:	
BOROUGH OF FAIRVIEW, BERGEN	:	
COUNTY,	:	
	:	
RESPONDENT-RESPONDENT,	:	
	:	
AND	:	
	:	
IN THE MATTER OF THE CAP WAIVER	:	
APPEAL OF THE BOARD OF EDUCA-	:	
TION OF THE BOROUGH OF	:	
FAIRVIEW, BERGEN COUNTY.	:	

Decided by the Commissioner of Education, October 5, 1995

For the Petitioner-Appellant, Oury & Mizdol (Dennis J. Oury, Esq., of Counsel)

For the Respondent-Respondent, Giblin & Giblin (John L. Schettino, Esq., of Counsel)

This appeal results from a decision of the Commissioner of Education following voter rejection of the education budget proposed by the Board of Education of the Borough of Fairview (hereinafter "Board") for the 1995-96 school year and defeat of a proposal made pursuant to N.J.S.A. 18A:7D-28(f) to exceed the District's maximum permissible budget. After the Council of the Borough of Fairview (hereinafter "Council")

6/5/96

made its reductions to the proposed budget pursuant to N.J.S.A. 18A:22-37, the Board appealed to the Commissioner seeking restoration of those amounts, as well as those items which it had intended to fund through the proposal it had made pursuant to N.J.S.A. 18A:7D-28(f).

In his decision of October 5, 1995, the Commissioner determined that it was necessary to direct the Bergen County Board of Taxation to increase the tax levy for General Fund purposes for 1995-96 from \$7,144,285, which the Council had certified to be sufficient, to \$8,302,356 in order to enable the District to provide a thorough and efficient education to its students. In arriving at this decision, the Commissioner directed restoration of specific line items which had been subject to reduction by the Council as well as items that had been included in the Board's proposal under N.J.S.A. 18A:7D-28(f). Based on his review, he however concluded that the District did not have any excess free balance available for appropriation so as to fund such restorations through further reallocation of surplus. Accordingly, he determined to make no further reallocations at that point, but made this determination subject to verification of the District's surplus through the Board's 1994-95 annual year-end audit report.

By letter of December 7, 1995, the Director of the Bureau of Controversies and Disputes notified the parties that the Commissioner was providing them with the opportunity to be heard on the question of whether the allocation of surplus set forth in his October 5 decision should be altered because of a discrepancy between the June 30 report and the audit filed with the Department of Education in November 1995.

On February 2, 1996, the Commissioner made his final determination with respect to whether alteration of the allocation of surplus established by his October 5

decision was warranted. As embodied in the Commissioner's letter decision, after providing an opportunity for the parties to be heard on the issue, the Commissioner determined that the discrepancy was not significant and sustained the allocation he had made in his earlier decision.

After the Legal Committee reviewed the notice of appeal which the Board filed on January 2, 1996, the Board was advised by letter of February 28, 1996, that although premature, its notice had been sufficient to preserve its rights and had been deemed to constitute adequate and timely notice of appeal from the Commissioner's determination of the allocation of surplus as set forth in his decisions of October 5, 1995 and February 2, 1996. The Board was also advised that its appeal was limited to those issues relating to that determination.¹

On March 4, 1996, the Board filed its appeal brief and, on April 10, the Council filed a response.

We again stress that the appeal now before us is limited to the question of whether the allocation of surplus established by the Commissioner was proper. Hence, although the Board has gone beyond the scope of this question in its brief, we have limited our consideration to that question alone. After reviewing the arguments of counsel and the record in this matter, we find that the Board has not shown that the allocation of surplus should be changed. Although the Board contends that it was left without sufficient funds, it has failed to demonstrate that it was unable to provide a

¹ We note that pursuant to N.J.S.A. 18A:6-28, notice of appeal to the State Board must be filed within thirty days of the filing date of the decision being appealed. Hence, any appeal from the Commissioner's decision of October 5 had to be filed by November 7, 1995. As indicated, the Board did not file any appeal by that date. However, because the Commissioner expressly made his determination of the allocation of surplus subject to verification, his final determination of this issue was not made until February 2, 1996, and N.J.S.A. 18A:6-28 did not foreclose the Board from appealing that limited issue.

thorough and efficient education unless the allocation of surplus for 1995-96 was changed. Therefore, the State Board of Education dismisses the appeal in this matter.

June 5, 1996

Date of mailing JUN 07 1996

364-9/95

F.T. AND L.T., on behalf of minor child, V.T., :
P.W., on behalf of minor child, I.W. AND
A.F., on behalf of minor child, E.C., :

PETITIONERS, :

COMMISSIONER OF EDUCATION

V. :

DECISION

NEW JERSEY STATE INTERSCHOLASTIC :
ATHLETIC ASSOCIATION, :

RESPONDENT. :

_____ :

SYNOPSIS

Petitioners, parents or custodians of students involved in altercation at Lakewood High School, sought reversal of determination of NJSIAA's Eligibility Appeals Committee (EAC) rendering students ineligible for participation in interscholastic athletic events following transfers to other schools. NJSIAA decision was based on the finding that the students transferred for "athletic advantage" specifically as a "means to nullify punitive action by the previous school," violating Article V, Section 4K(6)(D) of the NJSIAA Bylaws.

Upon review of the record, including transcripts submitted, the Commissioner found that the NJSIAA's determination was not arbitrary, capricious or otherwise improper. Commissioner found each petitioner was afforded due process and the EAC made its decision to deny students eligibility to play interscholastic sports with full knowledge of their particular educational circumstances, concluding instead that the students had transferred to avoid discipline by Lakewood. Commissioner adopted findings and conclusions of the EAC as his own and dismissed Petition of Appeal.

F.T. AND L.T., on behalf of minor child, V.T., :
P.W., on behalf of minor child, I.W. AND
A.F., on behalf of minor child, E.C., :

PETITIONERS, :

COMMISSIONER OF EDUCATION

V. :

DECISION

NEW JERSEY STATE INTERSCHOLASTIC :
ATHLETIC ASSOCIATION, :

RESPONDENT. :

For Petitioners, Christopher J. LaMonica, Esq. (Wilbert & Montenegro)

For Respondent, Steven P. Goodell, Esq., (Pico, Herbert & Kennedy)

This matter has come before the Commissioner of Education by way of Petition of Appeal and Motion for Emergent Relief filed by F.T. and L.T., P.W. and A.F., on behalf of minor students, (Petitioners), on September 22, 1995, seeking reversal of a determination of the New Jersey State Interscholastic Athletic Association (NJSIAA) rendering the students ineligible for participation in interscholastic athletic events. The NJSIAA decision was based on a finding that petitioners violated Article V, Section 4K(6)(d) of the NJSIAA Bylaws in transferring from Lakewood High School for "athletic advantage," as "a means to nullify punitive action by the previous school." (NJSIAA 1994-95 Handbook at p. 46) The order of ineligibility was issued on September 14, 1995 by the NJSIAA Eligibility Appeals Committee (EAC) following a hearing on September 11, 1995.

Upon receipt of an Answer and response to the Motion for Emergent Relief, duly filed by NJSIAA on September 27, 1995, the Acting Director of the Bureau of Controversies and Disputes notified counsel that, upon review of these submissions, the Motion for Emergent Relief and the merits of the Petition of Appeal would be decided simultaneously on the papers on an accelerated basis.¹

Upon careful consideration of the briefs of counsel, the record and transcript of NJSIAA proceedings, and the Commissioner's established standard of review in NJSIAA matters, the Commissioner determines that the NJSIAA's decision to deny the eligibility appeal reflects a reasonable interpretation of NJSIAA's Bylaws and, accordingly, may not be upset by the Commissioner in the absence of petitioners having met their burden of establishing otherwise.

FACTUAL BACKGROUND

On March 22, 1995, a fight erupted in the Lakewood High School cafeteria. A student and a teacher were injured. Petitioners were admittedly involved in the fight. The Lakewood administration reacted by immediately suspending those students who were identified as being part of the fight. The Board of Education, on March 27, 1995, extended the suspensions pending a hearing to determine whether the students should be expelled. Before the District scheduled expulsion hearings, however, each of the athletes transferred out of the Lakewood School District. E.C. withdrew from Lakewood on April 25, 1995, and entered Toms River South the following day. V.T. left Lakewood on May 4, 1995, and enrolled in Toms River North shortly thereafter. I.W. withdrew from Lakewood High School on April 11, 1995, and also

¹ Two additional submissions were filed by petitioners on September 29, 1995 and on October 2, 1995, respectively. However, as no provision had been made for allowing for submissions beyond the Petition of Appeal, Answer, and initial briefs, these are not considered herein.

transferred to Toms River North. These students were all starters on Lakewood's football team-- one the starting quarterback, one the starting tailback, and the third a potential all-state tackle.

Lakewood, Toms River North, and Toms Rivers South are all members of the NJSIAA. Pursuant to NJSIAA guidelines, following these transfers, the Lakewood principal was required to sign "transfer waiver forms," which certified that the transferring students did not transfer to their respective new schools for athletic advantage. The principal refused to sign the waiver forms. Shortly thereafter, Lakewood brought this matter before the NJSIAA, alleging that petitioners should be ineligible to participate in interscholastic athletics as the transfers were in violation of NJSIAA Bylaws.

APPLICABLE LAW

The NJSIAA is a voluntary association. The Commissioner's scope of review in NJSIAA determinations is an appellate one. N.J.S.A. 18A:11-3; Board of Education of the City of Camden v. NJSIAA, 92 N.J.A.R. 2d (EDU) 182, 188. The Commissioner may not overturn an action by NJSIAA in applying eligibility rules absent a finding that NJSIAA applied the rules in a patently arbitrary, capricious or unreasonable manner. B.C. v. Cumberland Reg. Sch. Dist., 220 N.J. Super. 214, 231-232 (App. Div. 1987). Further, the burden of proof that an action was so deficient rests with the person challenging the decision. Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 297 (App. Div. 1960). In such cases, the Commissioner may not substitute his judgment for that of the NJSIAA, even when he might judge otherwise in a de novo review. Dam Jin Koh and Hong Jun Kim v. NJSIAA, 1987 S.L.D. 259.

ARGUMENTS OF THE PARTIES

Initially, petitioners assert that the action by NJSIAA was arbitrary, capricious and not based on sufficient credible evidence, and that petitioners did not leave Lakewood to

avoid punitive action but only to seek the education guaranteed to all New Jersey children under the New Jersey Constitution. They further allege that the students were not receiving proper home tutoring from the Lakewood school district while under suspension and that, therefore, they should not be penalized for their decision to pursue educational alternatives by transferring to other high schools. (Petition at p. 3)

Further, petitioners allege that the NJSIAA hearing was tainted by conflict of interest, admission of improper written and testimonial evidence, and other jurisdictional, procedural and substantive due process defects that render the EAC determination void and of no force and effect. (Petition at p. 7)

In their filings, petitioners specifically assert that Lakewood was not an NJSIAA member when the fight giving rise to their suspension took place, and, therefore, was not subject to NJSIAA rules. Petitioners further aver that Richard Kane, chairperson of the EAC, should not have participated in the eligibility hearing as he had a conflict of interest because he is also the Athletic Director of Manalapan High School, a rival of Toms River North. (Petition at p. 7) Petitioners allege that NJSIAA ignored evidence that allegations were initially made by Lakewood of improper recruitment by Toms River North and South, but then later withdrawn. This, petitioners aver, reveals that, “***Lakewood’s sole purpose for this objection was an attempt to retain the students at Lakewood for purposes of their participation in various Lakewood athletic programs, more specifically, football and basketball.” (Id. at p. 6). Petitioners further contend that NJSIAA delayed the commencement of the EAC eligibility hearing in a manner that unfairly prejudiced students, in that the scheduled date was two weeks prior to NJSIAA football season in New Jersey. Further, they aver no reasons were given to explain the failure to conduct an eligibility hearing in August of 1995, which would have

afforded the students a reasonable opportunity to appeal any adverse ruling, characterizing it as “insensitive and unfair scheduling.” (Petition at p. 11) Lastly, petitioners argue that there were procedural and substantive due process errors, including NJSIAA’s failure to notify directly the parents and/or guardians concerning the nature and scope of the eligibility hearing. In their application for emergent relief, petitioners also allege that irreparable harm will result from this decision because they will be unable to display their athletic ability to college recruiters, unless they are permitted to play football this season, thus, denying them their only opportunity to earn a scholarship to attend college.

In its responsive papers, NJSIAA asserts that its EAC did not act in an arbitrary or capricious manner, that petitioners were provided full and complete due process and that there is an adequate basis for the NJSIAA decision. NJSIAA points out that petitioners notably did not object to any of the evidence presented during proceedings before it. (NJSIAA Answer at Letter Brief p. 10) NJSIAA further argues that its decision is based on sound policy, in that the student athletes, each of whom was suspended and faced expulsion because of his role in a serious fight, seek to have the Commissioner order the NJSIAA to allow them to play football for new schools. “If successful, these students would return to Lakewood, not as students who have satisfied their discipline, but as football players for the opposing team. Neither the law nor sound educational policy permit this.” (NJSIAA’s Answer at Letter Brief, p. 2).

In response to the arguments raised by petitioners’ counsel above, NJSIAA rejects each count as without merit. With respect to the argument that Lakewood was not a member school at the time of the fight which gave use to the suspension, NJSIAA argues that Lakewood paid its dues in August 1, 1994 to NJSIAA for the upcoming school year and that it participated in interscholastic competition throughout the school year. It contends that the mere fact that the

Board's resolution to follow its guidelines was formally adopted after the fight underlying the within matter was a technicality not rising to the level of rendering Lakewood a non-member. Further, NJSIAA contends that it does not matter whether students transfer between NJSIAA member schools or from a non-member school to a member school; as long as the transfer was for athletic advantage, the student is ineligible to participate in sports at the *new* school. (NJSIAA's Answer at Letter Brief, p. 11)

With respect to petitioners' contention that a conflict of interest existed in the eligibility hearing by the participation of Richard Kane, NJSIAA argues that Mr. Kane, as Chairperson of the EAC did not vote at the hearing. Further, he clearly identified himself and his position at the start of each petitioner's hearing, and neither the attorney representing Toms River, nor the attorney representing petitioners objected. (*Id.* at p. 12) As such, NJSIAA argues, no conflict can be found to exist by the Commissioner and, further, a claim that a conflict automatically results because two teams play football against each other is without legal support.

NJSIAA also states that petitioners never requested an earlier hearing and that eligibility hearings are often scheduled in September so that schools can know who has enrolled or tried out for the team. (*Id.* at p. 14) Further, NJSIAA contends that notification was sent out on July 20 and July 25, 1995 to the member schools, but that NJSIAA is not required to notify individual students or parents under NJSIAA Bylaws. Additionally, NJSIAA avers the transcript reveals that each party was given ample time and opportunity to present his case at the hearing and, further, that none of the attorneys or witnesses objected that the time period was insufficient or otherwise inappropriate. Lastly, NJSIAA argues that it was not required to release minutes from its Executive Session, as it is not a governmental entity subject to the Open Public Meetings Act and, thus, is permitted to deliberate in private. (*Id.* at p. 15)

NJSIAA finally argues that petitioners' claim that they withdrew from Lakewood for reasons unrelated to that school's punitive action was simply a pretext, in that petitioners' transfers relate directly to the suspensions imposed by Lakewood High School since they left while on suspension and facing possible expulsion from school. NJSIAA states that its transfer rule is intended to prevent an athlete from defying discipline imposed by one school for inappropriate conduct by simply moving to another school and continuing to participate in interscholastic sports. In justification of its rule, NJSIAA argues that public policy supporting discipline in our high schools would be severely undermined if offending students could simply move to another school with impunity and continue to participate in sports. (NJSIAA's Answer at p. 20)

COMMISSIONER'S DETERMINATION

Upon careful consideration of these arguments and review of the record and transcripts submitted, the Commissioner finds that the record herein is sufficient to establish that the NJSIAA's determination was not arbitrary, capricious or otherwise improper and that its findings were reasonably based on the testimony and evidence.

In so finding, the Commissioner notes that each of the petitioners received an individual, full hearing, was represented by counsel and presented witnesses. The Commissioner finds that petitioners were accorded full due process in that they were given ample opportunity to present their positions, object to procedural guidelines at the hearing and cross-examine witnesses. Consequently, the Commissioner rejects the contention that the hearing was tainted by conflict of interest, admission of improper written and testimonial evidence, and other jurisdictional, procedural and substantive due process defects, reiterating that counsel did not

object to the procedures of the hearing at the time, as noted by NJSIAA and as evidenced in the transcripts.

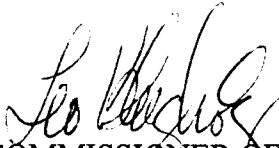
The Commissioner further finds that the EAC made its decision to deny petitioners eligibility to play interscholastic sports with full knowledge of their particular educational circumstances and notes that each student had been referred to a child study team for evaluation, planning for housebound instruction had begun, and letters had been sent to parents concerning suspensions, possible expulsion and Child Study Team referral at the time the petitioners chose to leave Lakewood. The EAC reasonably determined that the credible testimony before it showed that each student transferred to avoid the results of the action taken by Lakewood after the fight. The Commissioner notes no deficiency in the NJSIAA's findings which would compel a reversal of its ultimate determination.

The fact that Lakewood had not adopted its resolution to adhere to NJSIAA rules until after the fight is not significant since it is clear that Toms River North and South were member schools and, as such, those schools *are* required to follow NJSIAA guidelines. Additionally, the Commissioner is not persuaded that a conflict of interest existed in that the Chairperson of the EAC, Richard Kane, did not cast a vote on the outcome and in that he disclosed his employment with Manalapan High School to the parties at the outset of each hearing and this was not objected to by counsel.

Accordingly, for the reasons set forth herein, the Commissioner finds that petitioners have failed to demonstrate by substantial credible evidence that the determination by NJSIAA was arbitrary, capricious or unreasonable. Thus, the Commissioner adopts as his own the findings and conclusions of the NJSIAA in this matter and dismisses the Petition of Appeal,

with prejudice. Having so determined this matter on the merits, the Commissioner does not reach to the Motion for Emergent Relief.

IS SO ORDERED.


COMMISSIONER OF EDUCATION

October 6, 1995
Date of Mailing, October 6, 1995

365-95E

PELLEGRINO POLO, on behalf of his minor
child, R.P., :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE LENAPE
VALLEY REGIONAL SCHOOL DISTRICT, :
SUSSEX COUNTY, :

DECISION ON MOTION

RESPONDENT. :

_____ :

October 10, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING

EMERGENT RELIEF

OAL DKT. NO. EDU 11025-95

AGENCY DKT. NO. 374-9/95

**PELLEGRINO POLO on behalf of
his minor child, R.P.**

Petitioner,

v.

**LENAPE VALLEY REGIONAL SCHOOL
DISTRICT,**

Respondent.

Pellegrino Polo, *pro se*

David B. Rand, Esq., for respondent
(Rand, Algeier, Tosti and Woodruff, attorneys)

BEFORE SEBASTIAN GAETA, JR., ALJ

This application for emergency relief pursuant to *N.J.A.C. 1:1-12.6* was forwarded to the Office of Administrative Law on September 20, 1995. Pursuant to that request, a hearing was conducted on September 25, 1995.

Petitioner seeks to have his daughter enrolled at Lenape Valley Regional High School to complete her senior year. Respondent refuses to enroll petitioner's daughter because she is not domiciled within its school district.

It was determined that petitioner's residential premises are within the Township of Netcong, which is part of the respondent's school district, and the Township of Mount Olive, which is served by another school district. Although the mailing address is Netcong, the house in which the family resides is located in Mount Olive.

It is well settled that domicile of a child determines what school district is responsible for that child's public education. It is also clear that where premises extend over municipal boundaries it is the actual location of the residential structure which determines domicile for that purpose.

An application for emergent relief may only be granted to prevent irreparable harm and where it appears that the moving party, the petitioner, has a reasonable probability of ultimate success on the merits.

While it is understandable that petitioner's daughter wishes to return for her senior year at the same high school that she has attended for three years, she is only entitled to a public education by the school district serving the place of her domicile. There is no showing or contention that the Mount Olive school district has refused to provide her that education.

It further appears there is no reasonable probability that petitioner will achieve ultimate success on the merits.

ORDER

It is **ORDERED** that the application for emergent relief be **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

September 26, 1995
DATE

Sebastian Gaeta, Jr.
SEBASTIAN GAETA, JR., ALJ

cb

PELLEGRINO POLO, on behalf of his minor child, R.P.,
PETITIONER,
V.
BOARD OF EDUCATION OF THE LENAPE VALLEY REGIONAL SCHOOL DISTRICT, SUSSEX COUNTY,
RESPONDENT.

COMMISSIONER OF EDUCATION
DECISION ON MOTION

The record of this matter and the Order Denying Emergent Relief of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record, including the audio tape of the hearing conducted at OAL on September 25, 1995, the Commissioner agrees with the findings and conclusion of the Administrative Law Judge (ALJ) for the reasons clearly articulated by him in the Order.

Accordingly, the recommended Order of the ALJ denying emergent relief is adopted as the final decision on motion and this matter is hereby returned to the OAL for such further proceedings as are necessary to bring it to conclusion.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

366-95

BOARD OF EDUCATION OF THE CITY
OF WILDWOOD, CAPE MAY COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT
OF EDUCATION,

RESPONDENT.

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COMMISSIONER OF EDUCATION

DECISION

October 6, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8017-94

AGENCY REF. NO. 193-6/94

**BOARD OF EDUCATION OF THE CITY OF
WILDWOOD, CAPE MAY COUNTY,**

Petitioner,

v.

**NEW JERSEY STATE DEPARTMENT
OF EDUCATION,**

Respondent.

Bruce M. Gorman, Esq., for petitioner

JoAnn Fitzpatrick, Deputy Attorney General, for respondent, (Deborah T. Portiz,
Attorney General of New Jersey, attorney)

Record Closed: July 10, 1995

Decided: August 17, 1995

BEFORE EDGAR R. HOLMES, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The respondent New Jersey State Department of Education (DOE) charged the petitioner, Board of Education of Wildwood (W.W.) with the cost of the education of M.M., a minor child, for the 1993-94 school year. M.M. was placed at Bonnie Brae Residential Treatment Center by

the Division of Youth and Family Services (DYFS). The basis of the charge was that at the time of placement on November 23, 1992, M.M.'s mother resided in Wildwood, New Jersey. N.J.S.A. 18A:7B-12 provides that the school district responsible for a child's education is the present district of residence of the parent or guardian. If this cannot be determined, then the responsible district is the district in which the child resided prior to placement. If the district of residence of the parent cannot be determined according to the following criteria or if the district of residence is outside the state, the State shall assume fiscal responsibility for the child's education. The criteria identifies the "present district of residence" as the residence of the parent as of the last school day prior to October 16. N.J.A.C. 6:20-5.3.

FACTS

On November 23, 1992, M.M. and her mother V.M., resided in Wildwood. It was on this date that M.M. was admitted to Bonnie Brae. W.W. did not dispute that it was fiscally responsible for M.M. during the 1992-93 school year. It only disputes the 1993-94 charge.

Glenn Daisey was the DYFS worker assigned to M.M.'s family which consisted of M.M., his brother, his mother and his mother's paramour, P.F.

Daisey last saw M.M.'s mother in November 1992, when she signed a consent to enroll M.M. in Bonnie Brae.

Thereafter, Daisey attempted to track M.M.'s mother by sending form letters to various institutions and agencies according to a protocol devised by DYFS. He was unsuccessful in locating her although he learned that M.M.'s brother was enrolled in school in Philadelphia and that M.M.'s mother lived at 2407 Carpenter Avenue in Philadelphia, Pennsylvania, in December of 1992. He did not visit her there.

Daisey also learned in March, 1994, that M.M.'s brother was enrolled in a school in Millville, New Jersey for one week. He does not know when. He went to the address in Millville from which M.M.'s brother was registered, and the landlord told him that M.M.'s mother lived there in January of 1994.

Robert Douglas, a private detective, New Jersey License #4331, was employed by W.W. to track M.M.'s mother. He was able to track her through her paramour, P.F., whom he found to be on dialysis in Orlando, Florida.

Paul Lewis was P.F.'s landlord in Orlando, Florida. He testified telephonically that he remembered P.F., V.M. (M.M.'s mother) and the child who resided with them (M.M.'s sibling). He placed them at 1261 23rd Street, Orlando, Florida from June 1993 to September 1993 and at 1245 23rd Street, Orlando, Florida from September 1993 until August of 1994. Lewis actually dealt with M.M.'s mother rather than with P.F. His description of them; she was white; P.F. was black and on dialysis; and they were accompanied by a teen-aged boy; exactly matched the description given to Detective Douglas by Glenn Daisey and V.M.'s mother whom Douglas interviewed on several occasions. It is clear that M.M.'s mother was in Orlando, Florida at the relevant time. BOE of Atlantic City vs. NJ D.O.E., 92 N.J.A.R. 2d. (E.D.U.) 545 (1992).

I FIND and CONCLUDE that M.M.'s mother resided in Orlando, Florida on October 15, 1993.

I FURTHER CONCLUDE, that pursuant to N.J.S.A. 18A:7B-12(d) the State is the proper party to assume financial responsibility for M.M. during the 1993-94 school year and not the Board of Education of the City of Wildwood.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

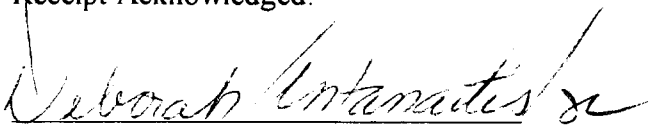
This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

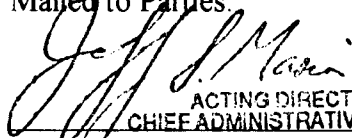
8/17/95
DATE


EDGAR R. HOLMES, ALJ

8/23/95
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

AUG 29 1995
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

FOR PETITIONER

ROBERT DOUGLAS

PAUL LEWIS

FOR RESPONDENT

GLENN DAISEY

DOCUMENTS IN EVIDENCE

FOR PETITIONER

- P-1 DOUGLAS TO LEWIS
- P-2 PRINTOUT V.M.
- P-3 PRINTOUT V.M.
- P-4 PRINTOUT P.F.
- P-5 PRINTOUT P.F.
- P-6 FAX AND COVER NEEDHAM

FOR RESPONDENT

- R-1 DYFS TO POSTMASTER
- R-2 DAISEY TO HOSPITAL
- R-3 DAISEY TO DMV
- R-4 DYFS TO ABSENT PARENT UNIT
- R-5 DAISEY TO MATTERN
- R-6 DAISEY TO STATE POLICE
- R-7 DAISEY TO PROBATION
- R-8 DAISEY TO WW POLICE
- R-9 DYFS TO POSTMASTER
- R-10 DYFS TO SOCIAL SECURITY
- R-11 DYFS TO V.M.

BOARD OF EDUCATION OF THE CITY :
OF WILDWOOD, CAPE MAY COUNTY, :
 :
PETITIONER, :
 :
 : COMMISSIONER OF EDUCATION
V. :
 :
 : DECISION
NEW JERSEY STATE DEPARTMENT :
OF EDUCATION, :
 :
RESPONDENT. :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions were filed by respondent pursuant to N.J.A.C. 1:1-18.4 and 1:1-18.8.

Respondent asserts in its exceptions that the evidence in this case does not support the findings and conclusions of the ALJ. Specifically, respondent avers that Douglass/Lewis memorandum (P-1) does not establish where V.M. was living as of October 15, 1993, the critical date for assigning responsibility for payment of M.M.'s tuition for the 1993-94 school year, nor does his verbal testimony offer a credible basis for finding such fact. Thus, respondent argues, if V.M.'s residency as of October 15, 1993 cannot be definitively determined, then the Board, as the District of V.M.'s residency at the time M.M. was originally placed in Bonnie Brae, is the District responsible for M.M.'s educational costs for the 1993-94 school year. (Respondent's Exceptions at p. 3)

Upon careful and independent review, the Commissioner finds that, inasmuch as the determination of V.M.'s residency on October 15, 1993 is fundamental to the outcome of this matter, N.J.A.C. 6:20-5.3(a)1, the testimony of Paul Lewis is critical. However, the Commissioner further finds an apparent contradiction, not accounted for in the record, between Mr. Lewis' written comments, as entered into evidence, and his verbal testimony, as summarized by the ALJ. Absent reconciliation of these two forms of evidence, a determination regarding V.M.'s residence on October 15, 1993 cannot be made by the Commissioner, and responsibility for M.M.'s tuition cannot, therefore, be properly assigned.

Accordingly, this matter is hereby remanded to the Office of Administrative Law for additional fact-finding as is necessary to clarify the apparent discrepancy between Mr. Lewis' written and verbal testimony regarding the residency of V.M. on October 15, 1993.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

October 6, 1995
Date of Mailing, October 10, 1995

EDU # 8017-94
C # 366-95
EDU #10066-95
C # 569-96R
SB # 4-97

BOARD OF EDUCATION OF THE CITY :
OF WILDWOOD, CAPE MAY COUNTY, :
PETITIONER-APPELLANT, :
V. :
NEW JERSEY STATE DEPARTMENT :
OF EDUCATION, :
RESPONDENT-RESPONDENT. :

STATE BOARD OF EDUCATION
DECISION

Remanded by the Commissioner of Education, October 6, 1995
Decided by the Commissioner of Education, December 30, 1996
For the Petitioner-Appellant, Bruce M. Gorman, Esq., of Counsel
For the Respondent-Respondent, JoAnn Fitzpatrick, Deputy Attorney General
(John J. Farmer, Attorney General of New Jersey)

This case involves the question of who is financially responsible for the costs of one child's placement in a State residential facility for the 1993-94 school year. M.M., the child in question, had resided with his mother in Wildwood until November 23, 1992, at which time DYFS placed M.M. with his mother's consent at the Bonnie Brae School, a State institution for troubled children. Consequently, under the applicable statute, the Wildwood school district was responsible for the costs of the placement for 1992-93.

JUNE 7, 2000

However, in 1993, M.M.'s mother moved out of Wildwood. Under the pertinent statute, Wildwood was not necessarily responsible for the costs of the placement for 1993-94. N.J.S.A. 18A:7B-12, the statute that controls the financial responsibility for such placements, provides in pertinent part that the Commissioner of Education shall determine the district of residence for school funding purposes as follows:

- b. The district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, private schools or out-of-state facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency.
- c. If this cannot be determined, the district of residence shall be the district in which the child resided prior to such admission or placement.
- * * * * *
- d. If the district of residence cannot be determined according to the criteria contained herein, or if the criteria contained herein identify a district of residence outside of the State, the State shall assume fiscal responsibility for the tuition of the child....

N.J.A.C. 6:20-5.3 of the New Jersey Administrative Code defines "present district of residence" as follows:

- (a) The district of residence for school funding purposes shall be determined according to the following criteria:
 - 1. The "present district of residence" of a child in a residential State facility defined in N.J.S.A. 18A:7D-3 and referred to in paragraph one of N.J.S.A. 18A:7B-12(b) shall mean the New Jersey district of residence of the child's parent(s) or guardian(s) as of the last day prior to October 16.
 - 2. The "present district of residence" of a child placed by a State agency in a group home, private school or out-of-

state facility also referred to in paragraph one of N.J.S.A. 18A:7B-12(b) shall mean the New Jersey district of residence of the child's parent(s) or guardian(s) as of the date of the child's initial placement by the State agency. In subsequent school years spent in the educational placement made by a State agency, the child's "present district of residence" shall be determined in the same manner as for a child in a residential State facility or placement by a State agency....

3. The "district of residence" referred to in paragraph two of N.J.S.A. 18A:7B-12(b) shall mean the New Jersey District of residence in which the child resided with his or her legal guardian immediately prior to his or her initial admission to a State facility or placement by a State agency....

Under this framework, the initial obligation for paying tuition falls on the district in which the parents reside when the placement is made. In this case, the school district of Wildwood had financial responsibility for M.M.'s placement for the 1992-93 school year.

However, the financial responsibility for the subsequent year, 1993-94, is initially on the district of residence in which the child's parent resided as of October 15 of that year. If the district of residence is outside of the state, the State is responsible for the child's tuition.

The Administrative Law Judge ("ALJ") determined that the State was responsible for M.M.'s tuition for the 1993-94 school year on the basis of his finding that M.M.'s mother was living in Orlando, Florida as of October 15, 1993. This finding was based on two days of hearing at which M.M.'s mother's landlord in Florida had testified by telephonic communication.

The Commissioner found that there was an "apparent contradiction" between the landlord's written comments and his testimony and remanded the matter to the ALJ for

additional fact-finding to “clarify the apparent discrepancy.” Commissioner’s Decision of October 6, 1995, slip op. at 7.

Following the remand, the parties agreed that a transcript of the landlord’s testimony would be helpful in resolving the “apparent contradiction,” and transcripts were ordered. The ALJ found that the landlord’s testimony clearly explained what appeared to be a gap in his written response concerning M.M.’s mother’s residence in Florida. Based on the transcript, the ALJ found that there was a mistake on the written form that the landlord had filled out in response to inquiry by a detective hired by the Wildwood Board. The ALJ then concluded, based on all of the testimony, that M.M.’s mother had resided in Orlando, Florida from June 1993 until August 1994, except for a short stay in Millville, New Jersey in January 1994. The ALJ therefore concluded that the State had financial responsibility for M.M.’s tuition for 1993-94.

The Commissioner rejected the ALJ’s determination, concluding that he could not rely on the record as it stood to determine with any degree of certainty that M.M.’s mother had resided in Florida on October 15, 1993.

The Wildwood Board appealed to the State Board of Education, arguing that the State is responsible for M.M.’s tuition for 1993-94 because his mother was living in Orlando, Florida on October 15, 1993. It further argues that the State is responsible for tuition for that year because, even if the exact whereabouts of M.M.’s mother had not been established, her present district of residence could not be determined. The Board also asserts that the State did not make an adequate effort to locate M.M.’s mother in Florida and, consequently, had come to the proceedings with unclean hands.

For the reasons that follow, we reverse the Commissioner’s decision.

As the head of this agency, the State Board of Education is the ultimate administrative decisionmaker and fact-finder in matters arising under the school laws. In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), certif. denied, 121 N.J. 615 (1990); Dore v. Bedminister Tp. Bd. of Ed., 185 N.J. Super. 447, 452 (App. Div. 1982). Our review of the record, including the transcripts from the hearings held in the Office of Administrative Law, shows that the ALJ correctly concluded that M.M.'s mother was residing in Florida on October 15, 1993. Furthermore, the ALJ's decision on remand accurately explains the minor discrepancy between the landlord's remarks on the written form and his testimony.

As embodied in the ALJ's decisions, the landlord identified M.M.'s mother, as well as her paramour and her second son. He recalled that the paramour was receiving dialysis treatment. Tr. 2, 29:8-12. He tracked M.M.'s mother's residence in Orlando, Florida from a one-bedroom apartment at 1261 23rd Street to a two-bedroom apartment during the period between June 1993 and September 1993. Tr. 2, 28:15-23. He traced her move to 1245 23rd Street in September 1993. Tr. 2, 31:2-4. He testified that he saw her there periodically and, specifically, that he saw her there when he visited the property prior to purchasing it. Tr. 2, 31:5-9. Moreover, his testimony was based on his business records, as well as his memory. Tr. 2, 32:23-33:6.

Based on the landlord's uncontroverted testimony, we find, as did the ALJ, that M.M.'s mother was residing in Florida on October 15, 1993. In this regard, we stress that although we are the ultimate fact-finder in this context, we have given due regard to the credibility determinations of the ALJ, who had the opportunity to hear the witnesses and judge their credibility. Close v. Kordulak Bros., 44 N.J. 589 (1965). Accordingly,

his determinations with respect to the credibility of the witnesses should be given great weight. Moreover, as a stranger to this matter, the landlord had nothing to gain from the outcome of the case. In the absence of anything more than the one minor discrepancy explained by the ALJ, there is no reason to doubt his veracity.

Hence, for the reasons set forth herein, as well as those expressed by the ALJ in his decisions, we find that M.M.'s mother was residing in Florida on the relevant date and, consequently, that the State is responsible for M.M.'s tuition for the 1993-94 school year. In view of our findings, we need not resolve where financial responsibility would lie if we had been unable to determine where M.M.'s mother was living on October 15, 1993.

Attorney exceptions are noted.

June 7, 2000

Date of mailing JUN 09 2000

GEORGE A. PASSES, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BURLINGTON COUNTY INSTITUTE
OF TECHNOLOGY, BURLINGTON
COUNTY, :

DECISION

RESPONDENT. :

_____ :

October 10, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1667-94

AGENCY DKT. NO. 396-11/93

GEORGE A. PASSES,

Petitioner,

v.

**BURLINGTON COUNTY
INSTITUTE OF TECHNOLOGY,**

Respondent.

Frederick W. Hardt, Esq., for petitioner

Richard W. Hunt, Esq., for respondent (Almeida & Hunt, attorneys)

Record Closed: August 28, 1995

Decided: August 29, 1995

BEFORE BRUCE R. CAMPBELL, ALJ:

The petitioner alleged wrongful refusal to appoint him to the position of recruitment coordinator.

This matter was transmitted to the Office of Administrative Law on February 23, 1994, for a hearing pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

29 AUGUST 1995
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

8/31/95
DATE

DNA
DEPARTMENT OF EDUCATION

SEP 05 1995
DATE

Mailed to Parties.
Jeff S. Main
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cae

RECEIVED
STATE OF N.J.
OFFICE OF THE CLERK
JAN 17 1995

FREDERICK W. HARDT

SUITE 101
300 CHESTER AVENUE
P.O. BOX 840
MOORESTOWN, N.J. 08057
(609) 234-4141
(609) 387-0054

ATTORNEY FOR Petitioner

GEORGE A. PASSES, : BEFORE THE COMMISSION OF
 : EDUCATION OF THE STATE OF
 Petitioner : NEW JERSEY
 : OAL DKT. NO. EDU 1667-94
 v. : AGENCY DKT. NO. 396-11/93

BURLINGTON COUNTY : SETTLEMENT AGREEMENT
INSTITUTE OF TECHNOLOGY, : AND
 : ORDER
 Respondent.

THIS MATTER being opened to the Court on the petition of George A. Passes, Frederick W. Hardt, Esquire appearing, and the matter having been answered by the Burlington County Institute of Technology, John A. Almeida, Esquire of the firm of Almeida & Hunt appearing, and the parties having met and resolved the dispute between them, it being deemed appropriate to enter this Order memorializing this Agreement, and good cause appearing:

RECITAL

The parties agree and recite the facts agreed upon in this matter as follows:

1. George A. Passes is a tenured employee of the Burlington County Vocational and Technical School, now the Burlington County Institute Of Technology. (BIT)

2. During the school year 1981-1982 Mr. Passes held the tenured position of Director of Student Personnel Services with the District.

3. In the Fall of 1981 the Board of Education (Board) for the District authorized a reorganization of its administrative personnel.

4. Effective January 1, 1982 the reorganization led to a reduction in force with the District. As a result of this reduction, Mr. Passes' position as Director of Student Personnel Services was eliminated and he was transferred to the position of Guidance Counselor.

5. Thereafter the District created the position of Supervisor of Curriculum and Instruction, a position to which Mr. Passes was not appointed.

6. Mr. Passes petitioned the Commissioner of Education leading ultimately to a determination on or about January 12, 1984, the provisions of which are incorporated within this recital by reference.

7. The parties agree that between 1984 and 1990 Mr. Passes was in the position of Guidance Counselor and from 1990 to the present date has held the position of Coordinator of Grants. In January of 1993 the Board approved a revised job description for the position of Coordinator of Recruitment.

8. On or about September 7, 1993 the District adopted a new salary guide for the District and assigned the Coordinator of Recruitment to Rank 4. Based on this ranking the pay for the position exceeds the pay earned by George Passes as a Coordinator of Grants with the District.

9. On or about September 28, 1993 at a Board meeting, the Board approved employment of Neil Sternberg as Recruitment Coordinator.

10. Mr. Passes asserts that based on the Commissioner's decision in 1984 he has seniority rights to the position of Recruitment Coordinator which cannot be by-passed; This view is disputed by the BIT.

11. In the petition to the Commissioner, Mr. Passes seeks appointment to the position cited and back pay.

12. Mr. Passes has been ill undergoing serious medical treatment involving conditions unrelated to the present litigation. Mr. Passes has expressed the desire to retire from the District.

13. Mr. Passes is not subject to any current disciplinary action and the settlement reached in this matter is not an attempt to resolve such a tenure complaint.

14. The current settlement is designed to retroactively adjust Mr. Passes' salary without acknowledging an entitlement to the position in question with neither party admitting liability but recognizing that the cost of litigation will far exceed the numbers in issue.

NOW, THEREFORE, it is agreed that:

1. The Board agrees to pay Mr. Passes in full and complete settlement of all its obligations the sum of EIGHTEEN THOUSAND (\$18,000.00) DOLLARS.

2. The settlement shall be prorated over past years as an adjustment to salary in the following fashion:

Year of Contract	Base Amount of Salary	Salary Adjustment	Total Salary
1992 - 1993	\$59,685.00	\$7,038.00	\$66,723.00
1993 - 1994	\$63,266.00	\$5,580.00	\$68,846.00
1994 - 1995	\$67,062.00	\$5,382.00	\$72,444.00

3. The Board shall deduct from the total package paid all taxes, pension benefits and other obligations normally deducted from the pay of an employee.

4. George Passes shall resign his position with the Burlington County Institute of Technology at the time the Settlement Agreement and Order are executed by the Honorable ^{Bruce R.}~~Donald F.~~ Campbell, A. L. J.

5. The settlement reached by this Agreement shall not be deemed an admission by the Respondent of any wrong doing but rather an acknowledgment that the high cost of litigation would not further the interests of education nor the interest of any of the parties.

6. Nothing in this Agreement shall preclude Mr. Passes from receiving at time of retirement all accrued entitlement for sick time and vacation time which his seniority and longevity with the District provides.

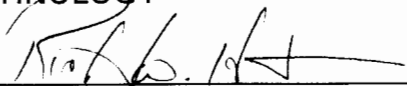
7. Compliance with the payment provisions of this order shall take place within thirty (30) days of the date this order is approved by the Commissioner of Education.

Law Offices of
FREDERICK W. HARDT
SUITE 101
300 CHESTER AVENUE
P.O. BOX 840
MOORESTOWN, NJ 08057

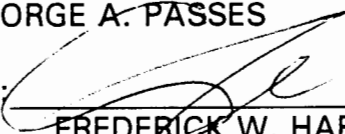

BRUCE R. CAMPBELL, A.L.J.

**AGREED TO AS TO
FORM AND SUBSTANCE:**

BURLINGTON COUNTY INSTITUTE
OF TECHNOLOGY

BY: 
RICHARD W. HUNT, ESQUIRE

GEORGE A. PASSES

BY: 
FREDERICK W. HARDT

Law Offices of
FREDERICK W. HARDT
SUITE 101
300 CHESTER AVENUE
P.O. BOX 840
MOORESTOWN, NJ 08057

GEORGE A. PASSES,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BURLINGTON COUNTY INSTITUTE	:	DECISION
OF TECHNOLOGY, BURLINGTON	:	
COUNTY,	:	
	:	
RESPONDENT.	:	
<hr/>		

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


 COMMISSIONER OF EDUCATION

368-95

IN THE MATTER OF THE TENURE :
 HEARING OF ALVIN DAVIS, STATE- :
 OPERATED SCHOOL DISTRICT OF THE : COMMISSIONER OF EDUCATION
 CITY OF PATERSON, PASSAIC COUNTY. :
 _____ : DECISION

SYNOPSIS

District certified tenure charges of neglect of duty, unbecoming conduct: substance abuse, theft, misbehavior and insubordination against respondent chief custodian.

ALJ found that the District made reasonable accommodation of respondent's drug abuse handicap by referring him to a treatment facility and providing two leaves of absence. ALJ further found that the District sustained its burden of showing that respondent continued to engage in the acts of misbehavior. Since these acts were uncontradicted by respondent or his counsel, the ALJ concluded that petitioner was entitled to summary judgment on the tenure charges. Respondent was ordered dismissed from his tenured position as chief custodian.

Commissioner adopted findings and determination in initial decision as his own. District's Motion for Summary Judgment was granted and respondent was ordered dismissed from his tenured position.

October 10, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11976-94
AGENCY DKT NO 454-11/94

**IN THE MATTER OF THE TENURE
HEARING OF ALVIN DAVIS,
STATE OPERATED SCHOOL DISTRICT
OF THE CITY OF PATERSON**

GREGORY G. JOHNSON, ESQ., for petitioner, Paterson Public Schools

MARY S. HAMMER, ESQ., for respondent, Alvin Davis
(Bucceri & Pincus, attorneys)

Record Closed: August 28, 1995

Decided: August 31, 1995

BEFORE IRENE JONES, ALJ:

On November 9, 1994, petitioner, The Paterson Public Schools filed with the Commissioner of Education a statement of charges against the respondent, Alvin Davis seeking to remove him from his position as a tenured custodian. Petitioner charged the respondent with neglect of duty, insubordination, excessive tardiness, leaving early, substance abuse, theft of school monies, unauthorized work/accepting cash payments and misbehavior.

On December 13, 1994, the Commissioner of Education transmitted the matter to the Office of Administrative Law for a disposition as contested matter. A hearing was held on August 25, 1995 wherein the petitioner appeared at the hearing. Although his counsel appeared, Mr. Davis failed to appear to defend against the charges. Petitioner

presented the testimony of two witnesses in support of the charges, Richard Garibell, Principal of Public School No. 4 and Wilfredo Gonzalez, Supervisor of Maintenance.

The testimony was presented with out objection or contradiction and thus, I find the following unrefuted facts which are adopted as the **FACTS** herein:

1. The petitioner employs the respondent as a tenured chief custodian assigned to Public School No. 4;

2. The respondent admitted to the school principal Richard Garibell that he had a substance abuse problem. Petitioner granted respondent a leave of absence from his job, from October 7, 1993 to October 27, 1993, to undergo residential treatment for drug addiction at Valley View in Kenoza Lake, New York. Respondent returned to work on October 28, 1993.

3. In February, 1994, respondent admitted to school personnel that he took student picture monies, approximately \$72.00, which he later returned.

4. On February 17, 1994, petitioner ordered the respondent to submit to a monitored urine drug test which produced positive results for cannabinoids (marijuana) and cocaine.

5. From March 2, 1994 to March 28, 1994, respondent was again granted leave of absence from his job to undergo residential treatment at Valley View. Respondent returned to work on March 29, 1994.

6. In August, 1994, Principal Garibell suspected that respondent had suffered a relapse based upon reports from fellow custodians that respondent neglected his duties and appeared at work under the influence of drugs.

7. On September 14, 1994, respondent was ordered by the petitioner to submit to a monitored urine drug test which produced a positive result for cocaine.

FINDINGS, DISCUSSION AND CONCLUSION

Based on the foregoing, I **FIND** respondent is a drug abuser entitled to protection pursuant to N.J.A.C. 13:13-2.5b, which requires the petitioner to demonstrate that it made a reasonable accommodation to his drug handicap.

I **FIND** that the petitioner has made reasonable accommodation of the respondent's drug abuse handicap by referring the respondent to a treatment facility and providing leaves of absences on two occasions, October 7, 1993 and March 2, 1994. See, *Matter of Cahill*, 245 N.J. Super. 397, 401 (App. Div. 1991).

I further **FIND** that the petitioner, has sustained its burden of showing that the respondent engaged in acts of neglect of duty, insubordination, excessive tardiness, leaving early, substance abuse, theft of school monies, and unauthorized work/accepting cash payments and other acts of misbehavior. These acts are uncontradicted and thus, I **FIND** and **CONCLUDE** that petitioner is entitled to summary judgment on the tenure charges.

It is therefore **ORDERED** that petitioner's motion for summary judgment on the tenure charges is hereby **GRANTED** and the respondent is hereby **DISMISSED** from his tenured position as chief custodian.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/31/95
Date

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

Sept. 6, 1995
Date

Deborah N. Antonaitis/pe
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 7 1995
Date

Jeff S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

kep

EXHIBIT LIST

Witnesses:

For Petitioner
Richard Garibell
Wilfredo Gonzalez

Exhibits in Evidence:

- P-1 Packet of letters
- P-2 Letter from Valley View dated 10/15/93
- P-3 Letter from Valley View dated 10/26/93
- P-4 Letter from S. Finney dated 2/23/94
- P-5 Letter from Valley View dated 3/30/94

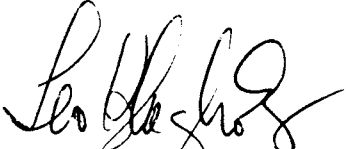
IN THE MATTER OF THE TENURE :
HEARING OF ALVIN DAVIS, STATE- :
OPERATED SCHOOL DISTRICT OF THE : COMMISSIONER OF EDUCATION
CITY OF PATERSON, PASSAIC COUNTY. :
: DECISION
_____ :

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge for the reasons clearly articulated in her initial decision.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter. Petitioner's Motion for Summary Judgment on the within tenure charges is granted and the within respondent is hereby dismissed from his tenured position as chief custodian in the State-operated School District of the City of Paterson.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

October 10, 1995
Date of Mailing, October 11, 1995

BOARD OF EDUCATION OF THE :
 LAKELAND REGIONAL SCHOOL :
 DISTRICT, PASSAIC COUNTY, :

PETITIONER, :
 V. : COMMISSIONER OF EDUCATION

CITY COUNCIL OF THE BOROUGH OF :
 RINGWOOD AND CITY COUNCIL OF :
 THE BOROUGH OF WANAQUE, PASSAIC :
 COUNTY, :

RESPONDENTS. :

DECISION

For the Board, Cherie L. Maxwell, Esq. (Sills, Cummis, Zuckerman, Radin,
 Tischman, Epstein & Gross)

For the Borough of Ringwood, Richard J. Clemack, Esq. (D'Angelo & Clemack)

For the Borough of Wanaque, Robert Graves Rosenberg, Esq.

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education on June 16, 1995 through the filing of a Petition of Appeal by the Lakeland Regional High School Board of Education, seeking restoration of reductions to the school budget made by the Councils of the Borough of Ringwood and the Borough of Wanaque (Councils) pursuant to N.J.S.A. 18A:22-37 following defeat of the budget at the annual school election on April 18, 1995.

At that election, the voters rejected a public question proposing a General Fund tax levy of \$7,486,749 for the 1995-96 school year. On May 16, 1995, following consultation

with the Board as required by law, the Borough of Wanaque adopted a resolution determining to certify a General Fund tax levy of \$7,191,249 as sufficient to provide for a thorough and efficient education (T&E) in the District. On May 17, 1995, following consultation with the Board as required by law, the Borough of Ringwood adopted a resolution determining to certify a General Fund tax levy of \$7,191,249 as sufficient to provide T&E in the District. In each case, this amount represented a reduction of \$295,500 from the tax levy proposed by the Board, effectuated through cuts in 10 line items, for the reasons given in the implementing resolutions. By resolution dated May 23, 1995, the Board determined to appeal these reductions and duly filed the within petition.

The Board further alleges that the Councils conducted closed session meetings to discuss proposed budget reductions in violation of the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-5 et seq., and all actions taken as a result of such meetings are, therefore, void. The Board contends that the Councils did not give the public adequate written notice of the meetings, nor did they make reasonable efforts to have the notice published in time to provide the requisite 48-hour notice.

The amounts in dispute in this appeal are as follows:

<u>Tax Levy Proposed by Board</u>		<u>Tax Levy Certified by Councils</u>	
General Fund	\$7,486,749	General Fund	\$7,191,249
<u>Amount of Reduction by Councils</u>		<u>Amount of Reduction in Dispute</u>	
General Fund	\$295,500	General Fund	\$295,500

An Answer to the Board's petition was filed by the Respondent Borough of Ringwood on July 18, 1995. An Answer was filed by the Respondent Borough of Wanaque on July 25, 1995. On August 14, 1995, the Board filed its Position Statement pursuant to N.J.A.C.

6:24-7.8. The Borough of Ringwood filed a Responsive Statement on August 31, 1995 and subsequently notified the Commissioner that this filing would constitute the Final Summation. The Borough of Wanaque filed its Position Statement and Final Summation on September 8, 1995.

In addition, as the parties had previously been advised by letter from the Assistant Commissioner dated April 7, 1995 and distributed through the County Superintendent to boards and municipalities experiencing budget defeats, as part of the record of the within appeal, the Commissioner took official notice of the Board's revised budget and its June 30 financial report, the latter for the purpose of identifying whether the Board underestimated in its 1995-96 budget the amount of anticipated undesignated surplus.

Upon filing of the parties' Final Summations as noted above, the record of the appeal was closed.¹

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for T&E. The Legislature by way of statutory scheme has delegated the responsibility for providing such T&E to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line-item reduction imposed by the governing body is necessary for the provision of T&E. Board of Education of East

¹ Concurrent with their final papers, the Councils submitted a general request for oral argument and hearing. The Commissioner, finding such not to be necessary pursuant to N.J.A.C. 6:24-7.8(a)7, denies this request.

Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).

Mindful, then, of the standard to be applied, the Commissioner makes the specific determinations set forth below.

COMMISSIONER'S DETERMINATION

Initially, as to the Board's allegations of OPMA violation, the Commissioner finds that, even if such violation is assumed as true, arguendo, the effect of such a finding would be to render voidable the tax levy certifications made on May 16 and May 17, 1995, thus resulting in a failure to certify and the Commissioner's consequent setting of the District's budget pursuant to N.J.S.A. 18A:22-38. Thus, the Commissioner finds that no good purpose would be served in reaching to the Board's allegations in the present context, and turns instead to determination of specific line-item reductions as set forth below.

At the outset, the Commissioner notes that the Board's budget contains numerous coding errors. Therefore, the Board is directed to note the appropriate accounts for erroneously coded expenditures, as identified herein, and to reappropriate miscoded items accordingly. Further, the Board is directed to henceforth follow the chart of accounts required for district use pursuant to N.J.A.C. 6:20-2A.2(m) and to accurately code its expenditures.

Additionally, a review of the June 30, 1995 Board Secretary's report reveals minor discrepancies between sections that indicate problems with either the software or accounting procedures being used. The District should review its practices in this regard, and consult with the County Superintendent or Office of Finance as necessary.

Disputed Line-Item Number 1

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
8290	12-000-400-710	Land and Improvements	\$9,000	\$9,000

In 1994, the Board had approved a resolution to implement the planning and construction of Project Adventure Challenge Ropes Course, which would be integrated into the school's physical education curriculum and assist in combating drug use among students. The Board explains that a separate line item is required for installation of telephone poles for Project Adventure curriculum activities, which installation will require blasting six-to-seven-foot holes. The Board argues that Project Adventure cannot be implemented without restoration of the disputed \$9,000 to this account.

The Councils contend that this appropriation is basically for athletic equipment. While the Board argues that it is related to the fight against drug use, no evidence was submitted showing the relationship. This is a nonmandated and nonrequired item. If the Board already made a commitment to purchase the same, it can be paid for out of other budget line items. Further, the Board should not have made a commitment pending approval of a budget by the electorate.

Upon review of the Board's arguments and its supporting documentation as to the estimated cost of installation of telephone poles for Project Adventure, the Commissioner determines that this expenditure is not necessary for T&E, nor for the District to teach physical education or address substance abuse issues. In addition, the Commissioner notes that the proper account for site improvements subsequent to acquisition is 12-000-400-450, Construction Services. The budget cut of \$9,000 is accordingly sustained.

Disputed Line-Item Number 2

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
2680	11-190-100-610	General Supplies	\$11,000	\$11,000

The Board argues that this line item, which the Councils eliminated as duplicative in purporting to fund the position for a Project Adventure supervisor, was a cut based on an error. The Board argues that the monies are for General Supplies Regular Programs under the Supervisor of Health and Physical Education and Driver Education. Without adequate equipment, the teaching staff will not be able to safely teach challenging and up-to-date subject matter and to implement effective teaching techniques. This program is a priority of both the physical education curriculum and the Community Alliance for Prevention of Illegal Drugs. A financial penalty will be assessed to the AWARE/ASAP municipal grant due to the elimination of matching funds from Lakeland's proposed budget.

The Commissioner finds that notwithstanding the Councils' error, the Board has not shown how the specific equipment proposed is necessary in order to effectively teach physical education and implement the Community Alliance for Prevention of Illegal Drugs. Therefore, the budget cut of \$11,000 is sustained.

Disputed Line-Item Number 3

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
8200	12-000-290-730	Capital Outlay	\$18,000	\$9,000

This line item is for a computer purchase. The Councils argue that the present system is operational and does not have to be replaced in one year, but can be phased in over two years. Further, the Councils argue that this is not an expense necessary for T&E.

The Board argues that the purchase of a new, affordable mid-range computer system is overdue at Lakeland. The obsolete System 36 computer in the Business Office was purchased in 1983. IBM has not supported this system for four years. Hardware replacement utilizing the existing software is necessary to maintain the fiscal integrity of the Business Office. Out of 15 districts using the System 36 surveyed, all but 10 have upgraded their hardware.

Lakeland's System 36 Business Computer memory capacity was exceeded two years ago with the implementation of GAAP. At that time, additional memory was not justified due to the fact that the system is obsolete and repairs are not guaranteed.

Upon review, the Commissioner concurs with the Councils' argument and finds that it is reasonable for this project to be completed over a two-year period. Thus, the budget cut of \$9,000 is sustained.

Disputed Line-Item Number 4

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
8160	12-000-260-730	Maintenance & Plant Svcs.	\$20,000	\$10,000

This line item is designated for the purchase of a four-wheel-drive vehicle. The Board argues that with the acquisition of a new vehicle, the need for repairs is reduced substantially.

The Councils' position is that the District's reasons for desiring this purchase are unclear. Additionally, it argues that a four-wheel-drive vehicle is not necessary nor warranted as it will cause even greater expenditures as its operating costs become apparent. A truck-type four-wheel-drive vehicle costs more to insure and operate, and gas and oil are used at a much greater rate than by a normal automobile.

The Commissioner determines that this purchase is not necessary for T&E. Thus, the Commissioner sustains the cut of \$10,000.

Disputed Line-Item Number 5

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
8150	12-000-240-730	Locker Refurbishment	\$13,000	\$6,500

The Board's position indicates that the appropriation is for locker refurbishment. The proper account code for this type of appropriation is A/C 12-000-400-450, Construction Services.

The Board argues that its plan to refurbish lockers is part of Lakeland's five-year comprehensive maintenance plan, which was developed in accordance with N.J.A.C. 6:8-49(a). This corrective project in the East Building is overdue. No refurbishments/renovations have been made since 1958. Lockers have been abandoned leaving a poor appearance in all corridors. The Councils' tactic to postpone or lease purchase 50% of the project is unacceptable to the Board since interest charges will be incurred. This project has been deferred for the last five years.

The Councils' recommendation is for the refurbishment to be done over a two-year period. It also argues that the program has not started and cannot be done during the upcoming term. Since it will extend into next year, it can be budgeted accordingly.

Upon review of the Board's arguments and supporting documentation as to cost of work and interest, and in light of the fact that this project has been deferred for five years, the Commissioner finds that the Board has presented a strong argument as to why this project cannot be completed over a two-year period. The Commissioner directs restoration of \$6,500 to A/C 12-000-400-450 and appropriate adjustment, if any, to the 12-000-240-730 account.

Disputed Line-Item Number 6

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
8150	12-000-240-730	Administrative Comp.	\$40,000	\$28,000

This line item is to complete installation of a new computer system which maintains student records. The Councils recommend that replacement of computers be done over a two-year period. The Board argues that this item is not a replacement project but a continuation project which will improve the accessibility and accountability of student records including health, attendance, scheduling, and discipline. All student records are maintained on this system. Fifty percent of this project was completed in the 1993-94 school year. The completion of this system was deferred to the 1995-96 school year.

Upon review of the information on record, it does appear that the Board originally budgeted \$40,000 for this project, rather than \$53,000. The Commissioner sustains the cut of \$28,000, however, because the Board has not demonstrated that without full completion of this project in one year, the students will be deprived of T&E.

Disputed Line-Item Number 7

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
2650	11-190-100-320	Inservice Staff Developmt.	\$58,000	\$18,000

The Board contends that funding for this item is essential to providing T&E. The Board has developed T&E goals and has provided by contract for professional improvement plans including inservice workshops and graduate studies. In the Board's opinion, failure to fund this item will adversely impact the Board's inservice goals required by monitoring and the teachers' negotiated contract, which requires a Board contribution for graduate studies. In addition, the Board provides inservice training utilizing the Kentucky Network via satellite and

New Jersey Network's Satellite Educational Resources Consortium. The 1994-95 costs were \$2,100 for both programs. These activities are the minimum necessary to permit the school staff to remain as a Star School as recognized by the New Jersey Department of Education.

The Councils eliminated this money and recommended that the funding remain at last year's level.

Upon review, the Commissioner notes that the Board argues that disputed line-item 7, A/C 11-190-100-320, is for inservice staff development, including tuition reimbursement for teacher graduate studies. The proper account for budgeting inservice teacher training is A/C 11-000-221-XXX, Improvement of Instruction Services/Other Support Services - Instructional Staff. The proper account for budgeting tuition reimbursement is A/C 11-000-290-290, Business and Other Support Services - Other Employee Benefits. It does not appear that the District has budgeted any funds for inservice and teacher training in A/C 11-000-221-XXX in 1995-96. It is further not possible to determine if any amounts have been budgeted in 1995-96 for tuition reimbursement in A/C 11-000-290-290. However, comparison of the 1994-95 actual expenditures, 1994-95 final budget, and 1995-96 budget indicates that the 1994-95 actual expenditures are \$58,407 more than the 1995-96 budget amount and \$15,734 less than the revised 1994-95 budget as of February 1, 1995. The amount cut by the Councils represents only a portion of the District's total inservice training and tuition reimbursement budget. The certified budget includes \$40,000 for training and tuition reimbursement in A/C 11-190-100-320 that has not been cut by the Councils. This amount, which is sufficient for the stated purpose, should be recorded in the proper appropriation accounts as indicated above. Thus, the Commissioner sustains this cut of \$18,000.

Disputed Line-Item Number 8

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
2640	11-190-100-106	Salaries for Instruction	\$42,900	\$10,000

The Board argues that two full-time aides are essential to provide T&E for the following reasons. Both aides are long-term employees and are utilized in the school discipline process, thus, freeing teachers and supervisors from supervising in-school suspension, lunch room, Saturday detention and bus duties. Both employees survived reductions in force in the 1994-95 budget year when three full-time aides positions were eliminated and three part-time aides were reassigned to the Cafeteria Enterprise Fund.

The minimum amount necessary for the 1995-96 Budget appropriation is \$42,845. The two budgeted salaries equal \$41,000 without a raise from 1994-95 school year. Additionally, the Board asserts that this staffing level is the minimum necessary to be in compliance with N.J.A.C. 6:8-7. The Councils eliminated this money, recommending that the growth from last year represents a proposed salary increase of 8.2%. The Councils recommend a 5% increase or below based on present rate of inflation. The Councils also argue that these aides are not sought for teaching positions, but for the relatively low-skill tasks of watching children during lunch and after school. The Board should be able to employ two people in these tasks for much less than the budgeted amount.

Upon review, the Commissioner notes that employees hired specifically for the activities proposed herein are budgeted in A/C 11-000-260-100. Review of the salary documentation provided for this account reveals an appropriation for two vacant positions in the amount of \$28,500. As of February 1, 1995, the 1994-95 revised budget for A/C 11-000-260-100 reflects \$415,750, while the 1995-96 budget includes \$449,010 on this line. Inasmuch as the

miscoded amount under appeal in A/C 11-190-100-106 is \$10,000, and considering what appears to be funding budgeted under the proper A/C 11-000-260-100, the Commissioner has determined to sustain this cut of \$10,000.

Disputed Line-Item Number 9

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
2540	11-140-100-101	Salaries of Teachers	\$4,539,600	\$159,000

The Board contends that this line item is essential to providing T&E. Teachers are the essence of T&E.

Both Councils had determined to cut this salary as the percentage salary increase for teachers was 8.2% and the Councils recommend only a 5% increase. They argue that no staff reduction is necessary to implement the cut. The total cut represents only 3.5% of the funds allocated to teachers' salaries. Ringwood notes that Project Adventure, the new athletic program, included additional personnel which will not be necessary since the project is not being funded.

Wanaque argues that a staff reduction is warranted and that a \$40,000 salary can be saved in the Physical Education/Health Department by allowing a vacant position to remain unfilled, with the other physical education personnel covering that position. Wanaque further argues that all physical education teachers have the same qualifications and can teach health. Additionally, Wanaque argues that a math vacancy may remain unfilled as it has existed for some time and should be eliminated from the budget. Lastly, Wanaque argues that a position in the Art Department should remain unfilled.

Wanaque also argues that the population of the students has decreased to warrant the elimination of one social studies teacher and one science teacher. Wanaque argues that these staff reductions will not adversely affect the T&E education offered by the District. In fact, these

staff reductions would be helpful to the District because teachers would know how absolutely important they are to the educational system, which is not promoted by overstaffing.

The Board has determined that T&E cannot possibly be conducted with the remaining funds. Lakeland has continuously spent less than 13 other regional high schools of comparable size in five northeast counties of New Jersey as per the 1994-95 New Jersey School Boards Association cost of education study. Lakeland's efficiency can be measured by its having spent \$1,098 per pupil less than the enrollment group by region or \$1,181,448 less than the average total expenditure for Regular Teachers Instructional Salaries.

The eighty-four and two-fifths (84.4) full-time equivalent Regular Teachers Salaries totaling \$4,430,600 and averaging \$52,495 per teacher is the minimum number necessary to provide a thorough and comprehensive curriculum of regular instruction. A reduction of \$159,000 in this account will equate to a reduction of four full-time equivalent teaching staff when fringe benefits are factored into the total. This 4.7% staff reduction will directly impact the Lakeland 2000 goals of increasing graduation requirements by reducing by 20 the number of class sections taught. The Board has increased the required credits from 120 to 135 or 12.5% over a three-year period beginning in the 1993-94 school year. During the school years 1993-94 and 1994-95, the Board addressed its declining enrollment by reducing staff and reorganizing across all categories of employees. In addition, the Board has increased the instruction day from eight periods to nine periods, a 12.5% increase.

Upon review, the Commissioner is persuaded by the Board's arguments that such increase is for the funding of vacant teaching positions is necessary for T&E. Additionally, salary increases are contractual, and therefore, will not be altered. However, the Board's papers indicate that the account includes \$7,000 for summer curriculum work. Summer curriculum

curriculum work is not budgeted in this account but rather in A/C 11-000-221-104, Improvement of Instruction Services/Other Support Services - Instruction Staff - Salaries of Other Professional Staff, which is adequately funded. The supporting documentation submitted by the Board also indicates that the account includes \$4,000 for inservice training. The cost of inservice teacher training should be included in A/C 11-000-221-XXX, Improvement of Instruction Services/Other Support Services - Instructional Staff (see disputed line-item number 7). Therefore, the Commissioner directs restoration of \$148,000 to this account and sustains \$11,000 of the Councils' reduction.

Disputed Line-Item Number 10

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
7010	11-000-240-103	Principal & Asst. Principal	\$255,430	\$35,000

The Councils cut \$35,000, arguing that a new person could be hired at a lesser scale and with a reduction in benefits. The Board argues that this longstanding position should remain as is. The Commissioner's own review persuades him that this expenditure is excessive and not necessary for the provision of T&E. Therefore, the cut of \$35,000 is sustained.

APPLICATION OF SURPLUS

In its advertised annual school district budget statement, the Board projected an unreserved surplus of \$37,258 and allocated \$0 as revenue, leaving \$37,258 as undesignated unreserved surplus, predicated on the use of \$316,850 of the June 30, 1994 fund balance. Based on the Board Secretary's June 30, 1995 financial report, unreserved General Fund balance was underestimated by \$356,989. Based on the advertised 1995-96 budget statement, excess surplus available to fund restorations, subject to verification through the Board's 1994-95 amount year-end audit report, is \$11,385 as follows:

1995-96 General Fund Appropriations (\$12,762,058) x 3%	\$382,862
June 30, 1994 Audited Unreserved Surplus	\$354,108
1994-95 Surplus Generated	<u>40,139</u>
Projected June 30, 1995 Unreserved Surplus	\$394,247
Less 1995-96 Budgeted Fund Balance	<u>(- 0 -)</u>
Remaining Unreserved, Undesignated Fund Balance	\$394,247
Less 3% Calculation	<u>(382,862)</u>
Amount Available to Fund Restorations	\$11,385

SUMMARY

In summary, the Commissioner directs restoration or sustaining of the \$295,500 line-item reductions to appropriations as set forth below. The Commissioner further notes that all restorations to line-item appropriations are restricted in accordance with N.J.A.C. 6:20-2A.11(b)3.


<u>Line No.</u>	<u>Description</u>	<u>Appealed Reduction</u>	<u>Sustained</u>	<u>Restored</u>
8290	Land and Improvements	\$9,000	\$9,000	\$- 0 -
2680	General Supplies	11,000	11,000	- 0 -
8200	Capital Outlay	9,000	9,000	- 0 -
8160	Maintenance & Plant Services	10,000	10,000	- 0 -
8150	Locker Refurbishment	6,500	- 0 -	6,500
8150	Administrative Comp.	28,000	28,000	- 0 -
2650	Inservice Staff Development	18,000	18,000	- 0 -
2640	Salaries for Instruction	10,000	10,000	- 0 -
2540	Salaries of Teachers	159,000	11,000	148,000
7010	Principal & Asst. Principal	<u>35,000</u>	<u>35,000</u>	<u>- 0 -</u>
	Totals	\$295,500	\$141,000	\$154,500

Tax Levy Certified by Councils:	\$7,191,249
Restoration of Reductions:	154,500
Amount of Restoration Funded by Surplus:	<u>(11,385)</u>
Total Tax Levy for 1995-96:	\$7,334,364

Accordingly, the Passaic County Board of Taxation is directed to make the necessary adjustments, as set forth above, subject to verification of surplus amounts through the

year-end audit, to reflect a total of \$7,334,364 to be raised in tax levy for General Fund purposes of the Lakeland Regional Board of Education for the 1995-96 school year. The Board of Education, consistent with the Commissioner's instructions regarding proper account coding above, is directed to submit a revised budget to the County Superintendent and Office of Finance.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

October 10, 1995
Date of Mailing, October 11, 1995

370-95

BOARD OF EDUCATION OF THE :
CITY OF LONG BRANCH, :

PETITIONER, :
V. :

COMMISSIONER OF EDUCATION

DECISION

MAYOR AND CITY COUNCIL OF THE :
CITY OF LONG BRANCH, :
MONMOUTH COUNTY, :

RESPONDENT. :
_____ :

SYNOPSIS

Board appealed Mayor and Council's line-item reductions, totaling \$415,200, to General Fund Budget following defeat by the voters at annual school election. Reduction by Mayor and Council brought General Fund Tax Levy to \$21,104,184, which represented \$279 more than the minimum amount required by law for special needs districts. Mayor and Council also identified additional areas where they would have taken action to reduce had it not been for the minimum tax levy law.

Commissioner directed restoration of line items totaling \$229,146, but offset this amount by incorporating further reductions within limitations of minimum tax levy required by law. Thus, tax levy certified by Mayor and Council was directed to stand. Due to numerous coding errors noted in review, Board was directed to revise budget to reflect proper coding. Board was further directed to examine its spending and financing practices in capital outlay and report to the County Superintendent.

October 10, 1995

BOARD OF EDUCATION OF THE :
CITY OF LONG BRANCH, :

PETITIONER, :

V. :

MAYOR AND CITY COUNCIL OF THE :
CITY OF LONG BRANCH, :
MONMOUTH COUNTY, :

RESPONDENT. :
_____ :

COMMISSIONER OF EDUCATION

DECISION

For the Board, McOmber and McOmber (Richard D. McOmber, Esq.)

For the City, Schottland, Aaron and Manning (James G. Aaron, Esq.)

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education on May 26, 1995, through the filing of a Petition of Appeal by the Long Branch Board of Education (Board), seeking restoration of reductions to the school budget made by the Mayor and City Council (City) pursuant to N.J.S.A. 18A:22-37 following defeat of the budget at the annual school election on April 18, 1995.

At that election, the voters rejected a public question proposing a General Fund tax levy of \$21,519,384 for the 1995-96 school year. On May 18, 1995, following consultation with the Board as required by law, the City adopted a resolution determining to certify a General Fund tax levy of \$21,104,184¹ as sufficient to provide for a thorough and efficient system of education (T & E) in the district. This amount represented a reduction of \$415,200 from the tax levy proposed by the Board, and was effectuated through cuts in ten line items and an increase to Miscellaneous Income revenues, for the reasons given in the City's implementing resolution. By

¹ The certification amount given at one point in the City's original resolution (\$21,103,905) represented a reduction of \$415,479, notwithstanding that line items identified totaled only \$415,200 and the final certification figure accurately reflected this total. The error was subsequently discovered, the resolution amended and the correct amount certified.

resolution dated May 24, 1995, the Board determined to appeal these reductions and duly filed the within petition.

The amounts in dispute in this appeal are as follows:

<u>Tax Levy Proposed by Board</u>		<u>Tax Levy Certified by City</u>	
General Fund	\$21,519,384	General Fund	\$21,104,184
<u>Amount of Reduction by City</u>		<u>Amount of Reduction in Dispute</u>	
General Fund	\$ 415,200	General Fund	\$ 415,200

An answer to the Board's petition was filed by the City on June 12, 1995. On June 29, 1995, both parties filed position statements pursuant to N.J.A.C. 6:24-7.8, followed by responsive statements on July 10, 1995 (Board) and July 11, 1995 (City), and final summations on July 17, 1995 (Board; amended July 18, 1995) and July 18, 1995 (City).

In addition, as the parties had previously been advised by letter from the Assistant Commissioner dated April 7, 1995 and distributed through the County Superintendent to boards and municipalities experiencing budget defeats, as part of the record of the within appeal, the Commissioner took official notice of the Board's revised budget and its June 30 financial report (due August 1), the latter for the purpose of identifying whether the Board underestimated in its 1995-96 budget the amount of anticipated undesignated surplus.

Upon receipt of the June 30 financial report in early August as noted above, the record of the appeal was deemed closed.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line-item reduction imposed by the governing

body is necessary for the provision of a thorough and efficient system of education. Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).

Mindful, then, of the standard to be applied, the Commissioner makes the specific determinations set forth below.

COMMISSIONER'S DETERMINATION

As a precedent to the discussion below, the Commissioner initially notes that, pursuant to the criteria set forth in N.J.S.A. 18A:7D-3, Long Branch has been classified as a special needs district, and that, in accordance with P.L. 1995, c. 164, special needs districts are required to certify a local General Fund tax levy for 1995-96 at least equal to that of 1994-95.

In its appeal, the Board raises threshold allegations of bad faith and procedural deficiency in the actions of the City, and argues that the City's reductions should be restored in full on that basis alone. In the second count of its petition, the Board alleges that, notwithstanding the City having met with the Board as required by law, the City in fact determined, for political reasons, to cut the maximum amount permitted by law and then to justify this amount after the fact by having its accountants identify the necessary number of specific line-item reductions. The Board also alleges violations of the Open Public Meetings Act (OPMA), in that the City purportedly took action to reduce the budget at a meeting held on May 15, 1995, then adopted its effectuating resolution at a subsequent meeting, on May 18, 1995, which was not advertised sufficiently in advance in accordance with N.J.S.A. 10:4-8 et seq. The City responds that it took no action on May 15, but merely deliberated as to its pending course of action on the school budget, and that, at a meeting occurring within the statutory time frame for municipal action, i.e., on or before May 19, 1995, it duly considered and adopted a resolution fully in accordance with law, identifying specific line items to be reduced and giving reasons for such reductions expressly based on necessity for T & E. As to public notice of the latter meeting, the City contends that the decision to hold this meeting was made on the night of May 15, 1995 as a result of the need to continue discussion of the school budget issue while having the matter fully resolved by May 19, 1995, and that the requisite notices were

placed the very next morning, although one paper was unable to publish the notice until May 17, 1995, and the other until May 18, 1995, the actual day of the meeting.

In considering this issue, the Commissioner's review of the record clearly indicates discussion by the City, at its meeting of May 15, 1995, centering on whether to accept a compromise settlement with the Board or to make reductions to the extent permitted by law in the belief that such reductions were fully possible without affecting T & E. Notwithstanding these discussions, however, the outcome of that meeting was a formal determination to scrutinize the budget to identify such reductions consistent with appropriate standards, not a resolution certifying a tax levy as required by N.J.S.A. 18A:22-37. While the initial rationale expressed by the City for pursuing this course of action may have been rooted in political concerns, the fact remains that it was familiar with the Board's proposed budget from its two meetings with the Board, and that based on that familiarity, acted on the belief that significant reductions could be made with appropriate scrutiny. That a "target" amount was established at this meeting reflects less an arbitrary determination on the part of the City than a recognition that, while the City clearly believed further reduction was possible, the law permitted no more than the amount specified. Ultimately, and within the statutory time frame, the City duly adopted a resolution certifying a statutorily sufficient tax levy, identifying line-item reductions and giving reasons for such reductions as required by law, which reasons were more fully explicated in the City's filings on appeal.

In an instance such as this, the Commissioner is mindful that he cannot properly effectuate his statutory and constitutional responsibilities by resolving an appeal of municipal budget reductions on procedural grounds alone, nor can he completely ignore the municipality's political concerns and override the will of the electorate without some necessity strictly related to the constitutional mandate for T & E. Deptford, supra; Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater and in the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, State Board Decision, July 6, 1994. Accordingly, the Commissioner declines to find any infirmity in the City's actions herein sufficient to warrant denial of a determination on the proofs.

As to the Board's allegations of OPMA violation, the Commissioner finds that, even if these violations are assumed as true, arguendo, the effect of such a finding would be to

render voidable the tax levy certification made on May 18, 1995, thus resulting, in view of the fact that no tax levy was certified on May 15, 1995, in a failure to certify and the Commissioner's consequent setting of the district's budget pursuant to N.J.S.A. 18A:22-38. Thus, the Commissioner finds that no good purpose would be served in reaching to the Board's allegations in the present context, and turns instead to determination of specific line-item reductions as set forth below.

By way of general introduction, the Commissioner notes that, as indicated above, the City in making its reductions was mindful of limitations imposed by c. 164 and did in fact certify the requisite amount, the 1994-95 tax levy being \$21,103,905 and the 1995-96 levy being certified at \$21,104,184. However, the City contended at the time of its reductions (see reasons given for line-item reductions in the effectuating resolution), and contends again on appeal, that the Board can sustain even greater reductions than the City actually made in each line item due to the limitations imposed by c. 164. For each line item, therefore, the City both defends its original cuts and identifies an even greater amount of reduction, which it urges the Commissioner to consider if restorations elsewhere would bring the tax levy certification to the statutorily required minimum level. In the determinations below, the Commissioner does in fact undertake such consideration, in view of the fact that this appeal presents a unique circumstance where the City was limited by constraints of law in the amount of tax levy it ultimately had to certify, notwithstanding any belief it may have had that particular line-items were susceptible to even greater cuts, and in view of the fact that the City expressly identified such line-items and amounts in the statement of reasons adopted at the time of reduction, so that the Board has been on notice of the City's position from the outset.

For its part, the Board notes that it has effectuated numerous cost-cutting measures over the past several years, while still attempting to provide a quality educational system to a diverse and needy population. The Board opines that its proposed 1995-96 budget represents an increase of only 1.5% over 1994-95 levels and a modest per-household tax increase, and that it reflects the bare minimum dollar amounts necessary to provide T & E.

Initially, the Commissioner notes that review of the record herein indicates that the District has made a number of coding errors. Therefore, during the course of the discussion below, various directives are given with respect to coding, and the District is generally cautioned

that it must henceforth comply with the chart of accounts required for use under N.J.A.C. 6:20-2A2(m). Also, the City appears to have made its reductions based on an advertised budget that did not always reflect separate lines by specific number, so that specific account numbers are assigned below where such is possible and the District is directed to make proper allocation where it is not.

Increase to Revenues

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount of Increase</u>
250	10-1XXX	Misc. Revenues	\$ 69,191	\$100,000

The City argues that the Board has consistently underbudgeted this account, and that it could in fact be increased by \$300,000 without impairing the district's ability to provide T & E. However, in light of the requirement for special needs districts to certify a minimum tax levy equal to that of 1994-95, the City has increased the account by only \$100,000. In response to the Board's arguments on appeal, the City contends that, while it may not be possible to estimate the precise amounts or sources that will make up this account, that does not give the Board latitude to assume no money will be available and underbudget this account beyond all reason.

The Board argues that a conservative estimate is appropriate for this account, given the amount of surplus actually available on July 1, 1994 (\$1,649,554), plus additional estimated excess balance (\$195,539) multiplied by the prevailing savings interest rate (3.75%), together with the fact that Fund Balances have been steadily decreasing by amounts ranging from \$400,000 to \$700,000 from 1993 to present. Moreover, certain other types of income such as returns on insurance premiums cannot be accurately forecast, and others sources such as pay phone usage commission and summer school tuition are not stable from year to year. In addition, the \$700,000+ infusion referred to by the City in its papers on appeal represents a one-time rebate from the State Health Benefits Plan (SHBP) and cannot be used to argue for large amounts of miscellaneous revenue typically being available.

Upon review, the Commissioner finds that, while prudent estimates may be appropriate in an account of this nature and the Board could not reasonably be expected to anticipate infusions of the size of its SHBP rebate, the Board's past experience overall does not appear to warrant a revenue estimate of the modesty proposed by the Board. To the contrary, the

Commissioner finds that an increase to this account in the amount of \$100,000 is rationally based on the Board's prior experience and will in no way impede the District's ability to provide T & E. Accordingly, the \$100,000 increase to revenues is sustained, but the Commissioner declines to make further increases to this account.

Disputed Line-Item Number 1

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
Various	11-1XX-100-XXX	Reg. Prog. Instr. Sal.	Various	\$95,000

The City argues that these funds are intended to support hiring of three new teachers due to increased enrollment. However, the enrollment increase was not as large as projected by the Board, and the growth in class size resulting from maintaining staff at 1994-95 levels is sufficiently slight so as not to compromise provision of T & E. Moreover, a retiring teacher to be replaced by the Board had her position budgeted at \$64,304 (her salary at retirement), when a new hire could be placed at the minimum level of \$33,000, for a savings of \$31,304. In this account, while the City only cut \$95,000 because of the minimum tax levy requirement, the City believes a \$155,054 cut is actually appropriate (3 new teachers at \$41,250 each plus salary savings on the retired position). Alternatively, even if the teaching positions are found necessary, they should be budgeted at the lowest starting salary for new hires (approximately \$33,000), not at the higher amount proposed by the Board.

The Board argues that each of the three positions cut by the City is essential for T & E. Without an additional elementary teacher, class sizes will increase to 28 pupils in grades 3 - 5, including mainstreamed special education students; the Board contends that the additional needs of these students, together with the special needs of the district's regular pupil population, simply cannot be met with class sizes this large, and that the Commissioner himself has recognized this in his *Comprehensive Plan for Educational Improvement and Financing, An Interim Report*, where class sizes of less than 23 are indicated for special needs districts. Without an additional bilingual teacher, the district will not be able to accommodate the needs of a large Portuguese population requiring full-time bilingual programs in grades 3 - 5 and part-time in Kindergarten and grades 3 - 12. Finally, without one additional math teacher, the District cannot adequately meet the basic skills needs of the high percentage of students who have scored below established proficiency levels on standardized tests; remedial services represents an area where

the Board has been trying to focus resources in response to the recommendations of a Department of Education External Review Team in 1991. The Board also contends that the retirement/entry salary issue arose well after the budget was struck and should not be an issue in this appeal.

Upon review, the Commissioner finds that the Board has demonstrated the need for the teaching positions at issue in this reduction, and that the amount of salary budgeted for each is appropriate, in that the Board should not be locked into necessarily hiring minimum salary candidates for all new positions when better qualified but more costly candidates may be available and interested. However, notwithstanding that the issue of the retiring teacher arose after the City acted, the fact remains that this position will not now require the full amount budgeted. Accordingly, \$23,054 of the City's reduction is sustained (\$64,304 - \$41,250) and \$71,946 is restored. Because the affected positions should be budgeted under various separate line items (e.g., a grade 3-5 teacher under 11-120-100-101 and a bilingual teacher under 11-240-100-101), the Board is directed to revise its budget to make the correct allocations and to submit such revised budget to the County Superintendent and Office of Finance forthwith.

Disputed Line-Item Number 2

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
Various	11-2XX-100-XXX	Spec. Ed. Purch. Prof.	Various	\$15,000

The City argues that the Board anticipated only a 5% increase in special education students, yet increased this line item by 22%. Although contending that the account is actually overbudgeted by \$50,000 without impairment of T & E, the City cut only \$15,000 in recognition of the district's need to certify the legally specified minimum tax levy. In addition, the City contends that the Board overbudgeted for 1994-95, as shown by the amount of money left in these accounts as of May 1995.

The Board argues that, while the District's special education population may have increased by only 5% overall, the bulk of this increase (from 80 to 95 students) is in preschool handicapped students, the group requiring the highest level of occupational/physical therapy and neurological evaluation. In addition, over the past few years, the District's disabled children have required an ever-increasing degree of service, and the Board tries to bring a degree of prudent planning to this account, which could end up severely underbudgeted if even one high-

cost special needs student moves into the district after the budget is struck. With respect to the amount of money left in May 1995, the Board explains that many special education services are provided by contract, and that bills are often not received until very late in the school year; indeed, certain billings were still being invoiced at the time of appeal.

Upon review, the Commissioner finds that the Board has demonstrated the necessity for these amounts and has proffered an explanation that fully accounts for the disparity noted by the City. The Commissioner further notes that the Board has offered no compelling rationale for its contentions that the Board can provide T & E without the funds at issue. Accordingly, the \$15,000 reeducation to this account is restored. However, it is noted that the Board appears to have generally coded amounts for the purposes stated herein under line item 11-215-100-320, rather than under line item 11-000-219-320. Therefore, the Board is directed to revise its budget to reflect the proper allocations and to submit such budget to the County Superintendent and Office of Finance forthwith.

Disputed Line-Item Number 3

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
Various	11-000-230-340	Undistr. Ex.- Supp. Serv.	93,800	\$10,000

The City argues that the Board has increased this account by 19% over last year's expenditures, so that it is overbudgeted by at least \$16,000. However, in light of the district's need to certify the legally specified minimum tax levy, the City cut only \$10,000. On appeal, the City also adds that public relations materials could be more efficiently and economically provided, and that computer expansion costs should fall under capital outlay.

The Board argues that this account includes computer service operations (not hardware) for the entire district and professional printing services for various community newsletters and the student handbook. Both of these were identified by the External Review Team as areas where the District needed to expend funds, and community publications are specifically mandated by N.J.A.C. 6:8-9.6.

Upon review, the Commissioner finds that, while the district's public relations efforts are laudable, costs in this area increased from \$8,597 in 1994-95 to \$21,300 in 1995-96. The Commissioner further concurs with the City that this function could be more economically and less elaborately provided. Accordingly, while restoring the City's \$10,000 reduction for this

year, in view of the City's having based it solely on the percentage increase from last year and Board's need for time to revise plans and providers as necessary, the Commissioner directs that the Board examine this area, in consultation with the County Superintendent, in advance of 1996-97 budget preparation in order to effectuate appropriate economies and efficiencies. In addition, to the extent that costs related to computer lines are included in this account rather than in line item 11-000-230-530, the Board is directed to make the necessary reallocations and submit a revised budget as necessary.

Disputed Line-Item Number 4

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
7160	11-000-260-590	Undistr. Ex. - Misc. Serv.	\$104,200	\$33,200

The City notes that this is a new account for 1995-96 and finds the entire \$104,200 unnecessary for T & E. However, in light of the district's need to certify the legally specified minimum tax levy, the City cut only \$33,200. On appeal, the City argues that the Board should be held accountable for its coding errors and not be given the funds at issue.

The Board argues that this is not a new account. Rather, it represents a coding error and shows monies that should properly appear in Line Item 11-000-260-420 (Cleaning, Repair and Maintenance Services), so that the total of that account if properly coded would be \$388,970 (\$284,770 already in correct line item plus \$104,200 incorrectly coded under 111-000-260-590). These monies reflect costs for cleaning, repair and maintenance of various machines and equipment (including FAX, copying machines, typewriter, mail machine, fire equipment, air conditioning, phones, electrical equipment, etc.), and the account has been decreased by \$144,500 from 1994-95 levels as part of the District's attempt to effect economies.

Upon review, the Commissioner finds the record to comport with the Board's explanation and no rational basis for the City's claim that these funds are not necessary for T & E. Accordingly, the \$33,200 reduction is restored; however, the restoration is to be made to the correct account and the District is directed to submit an appropriately revised budget to the Office of Finance and the County Superintendent.

Disputed Line-Item Number 5

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
7150	11-000-260-520	Undistr. Ex. - Insurance	\$228,045	\$12,500

The City argues that the Board has budgeted a 20% increase over 1994-95 allocations of \$190,501, which increased from actual expenditures of \$188,493 in 1993-94, thus representing an overbudgeting of at least \$37,554. However, in light of the District's need to certify the legally specified minimum tax levy, the City cut only \$12,500. In addition, on appeal, the City argues that rate increases cannot be anticipated as claimed by the Board, as such increases would be known by this point and would be supported by contracts in the record.

The Board argues that its increase in this account (from \$214,201 to \$228,045) is due to a combination of factors: The cost of mandatory flood insurance for one building has increased by \$3,300, the cost of insuring a formerly occupied building which is now vacant has increased to \$14,000 (the rates for unoccupied buildings being significantly higher), the Board has added an Alternative School in a special facility which has added \$12,500 to insurance costs, and the Board's insurance broker has recommended that normal property value increase dictates concomitant increase in insurance coverage, although the Board opted for a 7.5% increase rather than the recommended 10% in the interest of economy. This account also includes student accident insurance, any decrease in which would increase the costs of the District's liability policy.

Upon review, the Commissioner finds that the Board has included in its arguments insurance amounts already appearing in other accounts, and that, furthermore, the Board is basing its contention that it needs additional funds on a letter that advises a "cushion" for possible rate increase, notwithstanding that no increases have been set for the upcoming year. Accordingly, the Commissioner finds this amount not necessary for T & E, and the \$12,500 reduction is sustained.

Disputed Line-Item Number 6

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
7180	11-000-260-620	Undistr. Ex. - Energy	\$963,600	\$32,500

The City argues that 1994-95 expenditures were well below the \$914,600 budgeted, and that this account is overbudgeted by at least \$160,000. However, in light of the district's need to certify the legally specified minimum tax levy, the City cut only \$32,500. On appeal, the City also notes that, as of May 1995, actual 1994-95 expenditures totaled only

\$763,724, and that the “new” buildings referenced below were actually new in 1994-95, not 1995-96, so that attendant energy costs are actually reflected in 1994-95 expenditures.

The Board argues that it very carefully planned this account based on actual expenditures for 1993-94 (\$809,247), multiplied by the “normal winter weather factor” (8%) and estimated rate increases (4.3% for 1994-95 and 4% for 1995-96) recommended by the utility company, plus \$15,600 in additional energy costs necessitated by the opening of three previously unused, newly renovated locations (alternative school, audio-visual center and maintenance building). In addition, the Board stresses that it based its 1994-95 budget and its projected costs for 1995-96 on the actual 1993-94 base because it did not want to repeat its 1993-94 experience of \$50,000+ shortfall in budgeted as opposed to actual costs. Also, the Board contends that although it acquired its “new” buildings in 1994-95, it did not budget for energy use at those sites until 1995-96.

Upon review, the Commissioner finds that the Board has used as the base for its calculations a winter (1993-94) among the most extraordinarily harsh in recent memory. Thus, while the Board’s method of projecting expenses may be essentially sound, the high base used has resulted in an amount inconsistent with typical usage, as noted by the City in its comments on 1994-95 actual expenditures. Accordingly, the Commissioner finds this amount not necessary for provision of T & E, and sustains the \$32,500 reduction. He declines, however, to cut the full \$160,000 recommended by the City, as that number is based on the District’s experience for a winter that was unusually mild, and instead directs an additional reduction of \$67,500, for a total reduction of \$100,000.

Disputed Line-Item Number 7

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
2680	11-190-100-610	Reg. Prog. Instr. - Supplies	\$717,055	\$25,000

The City argues that the Board has increased this amount by over 62% from its 1994-95 appropriation, and that the whole increase cannot be attributed to the District’s conversion to GAAP. Nor would this explain the numerous transfers made from this account in 1994-95. Although the account is overbudgeted by at least \$200,000, in light of the District’s need to certify the legally specified minimum tax levy, the City cut only \$25,000.

The Board explains that, pursuant to the District's DOE-mandated Educational Improvement Plan (EIP), monies for use by the School Based Planning Team must be placed in supply accounts until the Team makes its allocations according to strategies not yet developed at the time of budgeting. If past practice holds, the Board anticipates that it will actually expend an amount close to 1994-95 levels on general supplies, with the rest (approximately \$393,450) to be distributed over various accounts in accordance with EIP dictates.

Upon review, the Commissioner finds that the Board has demonstrated the need for the monies at issue in order to provide T & E and successfully refuted the City's basis for reduction. Accordingly, the Commissioner restores the \$25,000. However, the Commissioner notes that, contrary to the Board's assertion, budget monies for use by School Planning Teams pending development of strategies are to be placed not in supply accounts, but rather in line item 11-190-100-800 (Regular Programs - Instruction - Other Objects). Therefore, the Board is directed to make the necessary reallocations and submit a revised budget accordingly.

Disputed Line-Item Number 8

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
6950	11-000-230-530	Undistr. Ex. - Comm./Tel.	\$256,360	\$20,000

The City argues that the Board has budgeted a 19% increase over 1994-95, thus representing an overbudgeting of at least \$45,000. That such an increase is unwarranted is shown by the fact that, as of May 30, 1995, the District had expended only 68% of the amount it proposes to budget for 1995-96. However, in light of the District's need to certify the legally specified minimum tax levy, the City cut only \$20,000.

The Board argues that increases in this account reflect an ongoing commitment to technological improvement, including a modem link to the State Department of Education, networking elementary school buildings and libraries to the District's central data system, and usage charges for distance learning applications. In addition, 1995-96 budgeting reflects the added cost for newly leased Xerox equipment not included in the 1994-95 budget. Also, contrary to the City's assertions, the phone lines at issue herein are not owned by the Board, so that the costs associated with their use are reflected in monthly phone bills and cannot be considered and financed as capital outlay.

Upon review, the Commissioner finds that the Board has explained the disparity between 1994-95 and 1995-96 amounts that formed the basis of the City's reduction, and has further demonstrated the necessity of the items to be funded for T & E. Accordingly, the \$20,000 reduction is restored. However, the Commissioner notes that documents submitted by the Board appear to refer to replacement and maintenance contracts rather than rental agreements, and, further, that lease of copiers should not be coded under a communications account, but rather as a purchased service under the appropriate function where the copiers are being used. The Board is, therefore, directed to revise its budget as necessary to reflect proper coding of such items.

Disputed Line-Item Number 9

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
Various	11-000-290-290	Undistr. Ex. - Empl. Ben.	Various	\$18,000

The City argues that the three positions eliminated by its reduction to the teacher salary accounts enable an additional cut of \$6,000 for each position in cost of benefits. In addition, the City argues on appeal that a further \$480,095 can be cut from these accounts due to the savings effectuated by the Board's change from the State Health Benefits Plan (SHBP) to alternative private coverage (Cigna), even allowing for increased dental and prescription plan costs.

The Board argues that, as indicated above under the pertinent salary accounts, the three positions at issue are essential for T & E, and that contractual benefit costs cannot be eliminated where such positions are kept. Moreover, any savings realized must be viewed in light of increased costs for dental and prescription plans.

Upon review, the Commissioner finds that the Board's explanation as to why this reduction cannot be absorbed by savings from its change to the SHBP does not account for the vast majority of the savings realized. Accordingly, the Commissioner finds the reduced monies in this account not necessary for T & E and sustains the \$18,000 reduction. In addition, in that the insurance quote submitted by the district (\$3.8 million) is significantly less than actual expenditures for 1994-95, the Commissioner determines to sustain an additional reduction of \$161,646.

Disputed Line-Item Number 10

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
Various	12-000-400-450	Capital Outlay	\$200,000	\$54,000

The City argues that certain of the projects intended to be funded by this account are long-term improvements which could be handled by certificates of participation (COPs), so that their cost would be spread out over a five-year period, allowing a savings of \$54,000 in 1995-96 (total \$67,000 cost of projects less one year debt of \$13,000). In addition, the City argues on appeal that the Board has historically "padded" this account following adoption of the school budget by means of extraordinarily large transfers from other areas, so as to mask its true intentions and avoid more appropriate mechanisms for financing capital projects.

The Board argues that it carefully considered all options for funding its modest but needed improvement projects, and learned, from sources including a capital management consultant and the DOE Office of Finance, that financing such a small amount of construction cost (\$67,000) over a five-year period would significantly increase interest costs (by about \$17,785 or 5%, based on 8.5% interest on the declining balance). In addition, the Board points out that its entire capital outlay budget for 1995-96 represents a tax levy cost over and above the District's capital outlay state aid allotment (\$181,946) of only \$18,054. In response to the City's accusations of padding, the Board argues that it has budgeted prudently so as to use savings in other accounts to be able to make such repairs and improvements as are necessary to maintain the health, safety and good condition of its school buildings and grounds, rather than letting matters fall into such a serious state that large-scale building referenda are needed.

Upon review, the Commissioner finds that the Board's proposed method of financing the particular projects at issue is not inappropriate in view of their size, so that the full amount of the proposed appropriation is necessary and is accordingly restored. However, in view of the City's contentions regarding the Board's general spending and financing patterns in this area, the Board is directed to undertake an analysis of its past practices and anticipated needs and to submit its findings to the County Superintendent, so that he may ascertain whether the Board's methods of funding are consistent with proper use of this account and provide such guidance and directives as may be appropriate.

APPLICATION OF SURPLUS

In its advertised annual school district budget statement, the Board projected an unreserved surplus of \$1,249,554 and allocated \$400,000 as revenue, leaving \$849,554, or about 2% of the General Fund budget, as undesignated unreserved surplus.

The Board's annual financial report filed pursuant to N.J.S.A. 18A:17-10 (June 30 Board Secretary's report) reveals no discrepancy between projected and actual surplus amounts that would result in excess surplus, so that the Commissioner determines, subject to verification through the Board's 1994-95 annual year-end audit report, that no further allocation from surplus is available to fund restorations herein.

SUMMARY

In summary, the Commissioner directs restoration or sustaining of the City's line-item reductions to appropriations and increases to revenue as set forth below. The Commissioner further notes that all restorations to line-item appropriations are restricted in accordance with N.J.A.C. 6:20-2A.11(b)3, and that in the case of improperly coded accounts, appropriations are restricted to the correct accounts as reflected in the budget to be revised by the Board in accordance with the directives above.

<u>Line Item</u>	<u>Description</u>	<u>Sustained</u>	<u>Restored</u>
10-1XXX	Misc. Revenues	\$100,000	\$ -0-
11-1XX-100-XXX	Reg. Prog. Instr. Sal.	23,054	71,946
11-2XX-100-XXX	Spec. Ed. Purch. Prof.	-0-	15,000
11-000-230-340	Undistr. Ex. - Supp. Serv.	-0-	10,000
11-000-260-590	Undistr. Ex. - Cleaning/Repair	-0-	33,200
11-000-260-520	Undistr. Ex. - Insurance	12,500	-0-
11-000-260-620	Undistr. Ex. - Energy	32,500	-0-
11-190-100-610	Reg. Prog. Instr. Supplies	-0-	25,000
11-000-230-530	Undistr. Ex. - Comm./Tel.	-0-	20,000
11-000-290-290	Undistr. Ex. - Empl. Ben.	18,000	-0-
12-000-400-450	Capital Outlay	<u>-0-</u>	<u>54,000</u>

Total Line-Item Determinations:	\$186,054	\$229,146
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Further Reductions Consistent with City Recommendation re. Minimum Levy Requirement:

11-000-260-620	Undistr. Ex. - Energy	\$ 67,500
11-000-290-290	Undistr. Ex. - Empl. Ben.	<u>161,646</u>
		\$229,146

Tax Levy Certified by Governing Body:	\$21,104,184
Restoration of Reductions Based on Minimum Levy:	229,146
Less Further Reductions	(229,146)
Amount of Restoration Funded by Surplus:	(-0-)
Total Tax Levy for 1995-96:	\$21,104,184

Accordingly, the tax levy certified to the Monmouth County Board of Taxation by the Mayor and Council of the City of Long Branch for General Fund purposes of the Long Branch Board of Education for the 1995-96 school year shall stand, subject to verification of surplus amounts through the year-end audit.

The Board is directed to make all necessary coding corrections to budget amounts and to submit, to the County Superintendent and the Office of Finance, a revised budget so reflecting. The Board is further directed to undertake the necessary analyses and reports as set forth above with respect to its public relations program and its spending and financing practices in the area of capital outlay.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

October 10, 1995
Date of Mailing, October 11, 1995

BOARD OF EDUCATION OF THE TOWN :
OF KEARNY, HUDSON COUNTY, :

PETITIONER, :

COMMISSIONER OF EDUCATION

V. :

DECISION

CARMEN FERNANDEZ, on behalf of her :
minor child, J.F., :

RESPONDENT. :

BOARD OF EDUCATION OF THE TOWN :
OF KEARNY, HUDSON COUNTY, :

PETITIONER, :

COMMISSIONER OF EDUCATION

V. :

DECISION

CARMEN FERNANDEZ, on behalf of her :
minor child, J.F., :

RESPONDENT. :

For the Board, Kenneth P. Davie, Esq.

For the Respondent, Carmen Fernandez, Pro Se

This matter having been opened before the Commissioner of Education on March 6, 1995, by way of a Petition of Appeal alleging respondent failed to pay the District outstanding tuition for her minor child's illegal attendance at the petitioning school district; and

The Commissioner, having directed respondent on March 13, 1995, and April 20, 1995, and, again, by letter sent by both regular and certified mail on July 19, 1995, to addresses in Kearny and in Newark, to file an answer to the aforesaid Petition; and

Respondent, having failed as of this date to comply with the directives of the Commissioner, so that each count of the charges against her is deemed to be admitted pursuant to N.J.A.C. 6:24-1.4; now therefore

IT IS ORDERED this 19th day of October, 1995 that summary judgment shall be granted to the Board and Carmen Fernandez is hereby assessed tuition in the amount of \$9,311 covering the period of her child's illegal attendance in the public schools of the Town of Kearny.



COMMISSIONER OF EDUCATION

OCTOBER 19, 1995

DATE OF MAILING OCTOBER 19, 1995

371-95

WILLIAM RAGO, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

STATE-OPERATED SCHOOL DISTRICT : DECISION

OF THE CITY OF JERSEY CITY, HUDSON :

COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner, tenured teaching staff member, contended the District improperly withheld his employment and adjustment increments due to allegedly unsatisfactory ratings.

ALJ concluded that petitioner failed to meet his burden of proof by a preponderance of credible evidence that the District's action was arbitrary, capricious or unreasonable. (Kopera) ALJ affirmed the District's determination to withhold petitioner's increments for unsatisfactory performance for the 1993-94 school year and denied petitioner's requested relief.

Commissioner adopted findings and determination in initial decision as his own, noting petitioner received several less than satisfactory evaluations. Petition was dismissed.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO EDU 8489-94
AGENCY DKT. NO. 329-8/94

WILLIAM RAGO,

Petitioner,

v.

**STATE OPERATED SCHOOL DISTRICT OF
THE CITY OF JERSEY CITY, HUDSON COUNTY,**

Respondent.

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

Charlotte Kitler, Esq., for respondent.
(General Counsel, State Operated Jersey City School District)

Record Closed: June 8, 1995

Decided: September 6, 1995

BEFORE MUMTAZ BARI-BROWN, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, William Rago, appeals from the action by the State Operated School District of the City of Jersey City, Hudson County (District) to withhold his salary increment for school year 1993-1994. Rago alleges that the Board's action was arbitrary, capricious, and unreasonable.

The matter was transmitted to the Office of Administrative Law (OAL) on September 1, 1994 as a contested case pursuant to *N.J.S.A. 52:14b-1-15* and *N.J.S.A. 52:14f-1 to -13*. Hearings were held on March 20 and 21, 1995. The parties filed post-hearing briefs and the record closed on June 8, 1995. The forty-five (45) day statutory period to file the initial decision with the Department of Education expired on July 23, 1995. A request for an extension of time to issue the initial decision was granted pursuant to *N.J.S.A. 52:14b-10(c)*.

FINDING OF FACTS

Based upon the testimonial and documentary evidence, I **FIND** the following relevant **FACTS**:

1. Rago is certified to teach science and biology. He was employed by the District in 1966 and assigned to Lincoln High School where he taught Biology. In September 1967, Rago was transferred to Snyder High School (Snyder) where he has taught science.
2. For school years, 1991-92 and 1992-93, Rago taught earth science.
3. In school year 1993-94, Snyder replaced most of the science courses with approximately twenty biology courses. Biology is an elective course taught by eight teachers and open to all grade levels.

4. During the school year 1993-94, Rago was assigned to teach three basic biology and laboratory classes. To prepare for this assignment, Rago reviewed the materials in his personal library.
5. Rago received his class list in October. Twenty to thirty students were enrolled in each of his classes. He received sixteen text books at the end of September and the balance of the books were delivered in mid-December. Additionally, he was given minimal laboratory equipment for his classes.
6. Rago's teaching performance was evaluated during the 1993-94 school year on December 14, 1993, February 17, 1994 and April 19, 1994. The District's Instructional Observation Report lists five performance factors: (1) Demonstrates proficiency in subject matter; (2) Assesses needs and evaluates progress of pupils; (3) Employs effective organization and planning; (4) Utilizes effective instructional techniques; (5) Addresses affective domain. Performance is rated "S"-Satisfactory, "NI"-Needs Improvement, "U"-Unsatisfactory, or "N/A"-Not Applicable.
7. Gwendolyn Long, the Building Supervisor at Snyder, observed Rago's performance on December 14, for 35 minutes from 11:25 am until 12:00 noon. Long has taught science and biology in the District for thirty years.
8. Long rated Rago's performance "NI" in all five performance areas. The lesson was on taxonomy. She observed several deficiencies in Rago's performance. Her major concern were that during the lesson Rago appeared to lecture to the students instead of engaging them in a dialogue.

9. Long also viewed Rago deficient in his ability to evaluate the needs and progress of his pupils. His plan book indicated that he intended to cover the text book at the rate of one chapter each week. Thus, Long concluded that Rago was focusing on getting through the text book rather than pacing the lessons with the students' progress.
10. Rago allowed the pupils to take open book tests because he believed that they had difficulty reading. Long believed that open book tests were counterproductive because the students were not learning the material if they had to use their books for the correct answers.
11. Long also found Rago deficient in the areas of organization and planning. Rago recorded what would be covered in the textbook, but his instructional objectives were not clear. Long conceded that initially there was a shortage of lab equipment. Notwithstanding the lack of equipment, Rago prepared very little lab work for the students even though he had some lab materials available.
12. Long observed that only six of the twenty students who were present focused on the lesson and interacted with the teacher. Other students sat quietly doing nothing. Half of the class socialized among themselves and paid no attention to the lesson. Consequently, Rago attempted to teach above the voices of those who were socializing.
13. Long believed that Rago held low expectations for the students and focused on the things which they were unable to do well. For example, he asserted that many of the students in the class could not read or write, and they did not understand the substance contained in the textbook.

14. Long had a post observation meeting with Rago on December 20, 1993. She offered suggestions for improvement such as using more activities with the students, more lab work, and more hands on activities.
15. Long evaluated Rago the prior school year on May 7, 1993. She rated his performance "S" in three areas and "NI" in two areas. She observed that the students were engaging in various activities not related to the lesson. For example, one student stood and looked out the window, another went to the door to talk to someone in the hall, and one student launched a paper airplane. Rago responded that most of the students were "special needs", classified or unclassified, could not "read, spell or comprehend on or even close to grade level", and that his class was a "holding area" for certain students. (J-3). In the 1992-93 annual performance report Long noted that there was little or no interaction between students and teacher. To improve his performance, Long suggested that Rago should use a variety of instructional methods to engage the students in as many activities as time and equipment permit.
16. Maria Cannizzaro, District Supervisor of Science, observed Rago's performance on February 17, 1994, from 10:35 to about 11:15 am. Cannizzaro served in the District for four years and had taught science for twenty years in public high schools, colleges and universities.
17. Cannizzaro rated Rago's performance as "unsatisfactory" in all five performance areas.
18. Cannizzaro observed a lesson on seeds and seed germination. She described the students' response to the instruction; they were very passive and unmotivated. Some put their heads on the desks and others

stared out the window. Most of the students did not take notes; they did not do much of anything constructive.

19. Cannizzaro described the lesson as very simplistic, repetitious, and boring. She believed that the level and the manner of instruction was inappropriate for the students. For example, Rago spent most of class period listing underground roots on the chalkboard, e.g., carrots and potatoes. The level at which the subject was taught was more suitable for a general science class in elementary school, not high school biology. She believed that the students understood the point after five minutes and then they became impatient and uncooperative. Cannizzaro also believed that Rago's presentation did not challenge or stimulate these high school students. Cannizzaro concluded that Rago was not sensitive to the students' needs because he failed to keep the class moving at a pace that would peak their interest.
20. Cannizzaro conceded that the students may have had a short attention span. Thus, there was a greater need to vary the teaching style. For example, lecturing for 30 minutes to 45 minutes will not capture the students' attention. Instead, the teacher should use various teaching methods. Rago could have devoted five minutes to discussion, five minutes to cooperative learning and several minutes to list information on the chalkboard.
21. Cannizzaro was "particularly disturbed" over the clutter in the classroom. There were bags and piles of old magazines and other materials around the room. Bulletin boards were not updated in years and papers were old and yellowed. (J-9).

22. Cannizzaro acknowledged that the students enrolled in biology were in different grades and some may have had special needs. The students in Rago's class represented the "typical" Snyder student. The lesson she observed was predominantly a teacher-dominated lesson lacking in intellectual stimuli. There was little or no interaction between teacher and student. Further, she observed no cooperative learning or interaction among the students on the lesson plan. She suggested that Rago clean his classroom, create a learning environment for his students, vary his teaching style and treat all students with respect. (J-9).

23. On February 25, Cannizzaro returned to Rago's classroom with her evaluation report and for a post observation conference. Although Rago disagreed with her comments, he refused to discuss the report with Cannizzaro and wanted to confer with his union representative. On direct examination, Rago stated that he mentioned to Cannizzaro that he wanted to meet with her at another time but she never contacted him. Under cross examination, Rago conceded that he did not ask Cannizzaro to return at a later date to discuss the report.

24. Rago's third performance evaluation was conducted on April 18, 1994 by Vernelle Harris, a Vice-Principal at Snyder. Prior to the observation, Harris informed Rago that she would be observing his class.

25. Harris rated Rago's performance "S" in two areas and "NI" in three areas. (J-10). The lesson was on coral reefs and included audio/visual aids. Harris testified that the overall concept of the lesson was unclear to her and the class. "There was no hint of the relevancy of the lesson on coral reefs." (J-10). She also observed the students. Some came to class late and only four of the fourteen students present were attentive. The other students did not take notes, ask any relevant questions, or show an

interest in the lesson. She concluded that Rago's instructional techniques were not motivating his students to participate in class discussions or show any interest in the lesson.

26. Rago kept detailed records of the students' progress. Test scores on Chapters 26 through 30 ranked as follows: notebook grades, 0-90; lab grades, 60-75; all homework grades, 0; most tests grades 0. (J-10). Harris also concluded that the students had not learned the subject matter and that the teacher failed to address their educational needs. Harris believed that Rago could have been successful in reaching the students if he used different teaching strategies, rather than the lecture method. When presenting slides and a video, she was not able to determine whether the students were learning from the presentation because there was no feedback.
27. Harris held a post observation conference with Rago on May 11, 1994. Contrary to Rago's belief that his classes had a greater number of students with learning disabilities, Harris stated that that the students in his class were no different than the students enrolled in the other regular biology classes. Rago responded that his students vary in age, grade levels, reading and comprehension levels. "Most have limited listening skills and are not capable of carrying on a meaningful conversation within the subject area. If one cannot readily read/comp. and/or has limited attention span; what I have written is rather axiomatic...." (J-10).
28. Harris evaluated Rago in prior years. In April 1991, she observed his earth science class. In seven performance areas she rated him excellent in three areas, good in two areas and fair in two areas. (J-1). Harris' report noted Rago's strengths in several areas including knowledge of the subject matter, creating a classroom environment that was conducive to

learning, and a demonstrated wholesome, rapport with students. On the other hand, Harris believed that Rago needed improvement in using a range of techniques and methods to address the students' needs. He also needed to use tasks which motivated and challenged the students. Harris suggested that Rago confer with other teachers, including special education teachers, for ways to maximize student classroom involvement and time-on-task activities. In June 1992, she spoke to Rago and recommended that he attend the Teacher Training Academy during the summer.

29. The Teacher Training Academy is a program for teachers who experience difficulties in classroom instruction and performance. Although Cannizzaro approved the recommendation that Rago attend the academy, he chose not to attend because it was not mandatory.
30. After Harris observed Rago's performance on April 18, 1994, she concluded that he had not done anything to change or vary his instructional techniques as was suggested in the prior observation reports. Therefore, she recommended to the school principal that Rago's increment should be withheld for unsatisfactory performance during the 1993-94 school year.
31. By April 19, 1994, Rago received notice from Jeanne Oppel, Principal at Snyder High School, that she recommended that his increment be withheld for unsatisfactory performance during the 1993-94 school year. (J-11).
32. On May 28, 1994 Rago received a letter dated May 12, 1994, informing him that the District Superintendent had determined to withhold his

employment and adjustment increments due to "unsatisfactory" ratings. (J-12).

33. Rago filed a petition appealing the determination on August 4, 1994.

DISCUSSION AND CONCLUSIONS

N.J.S.A. 18A:29-14 provides that a board of education may withhold "a teacher's salary increment for inefficiency or other good cause." Salary increments are "a reward for meritorious service" *Probst v. Haddonfield Bd. of Educ.*, 127 N.J. 518, 527 (1992). Thus, the Legislature has vested local boards with the power to withhold increments from teachers who have not performed well during the previous year. *Id.* at 526. Indeed, a decision to withhold an increment is a matter of management prerogative which the Legislature has delegated to the local school board. *North Plainfield Educ. Ass'n v. No. Plainfield Bd. of Educ.*, 96 N.J. 587 (1984); *Bernard Twp. Bd. of Educ., v. Bernard Twp. Educ. Ass'n*, 79 N.J. 311 (1979). Accordingly, the Commissioner is prohibited from substituting his judgment for that of the board.

The scope of review on appeal is limited to whether there exists a reasonable basis for the board's decision. The local board's exercise of discretionary powers may not be upset unless it is patently arbitrary, capricious, unreasonable or induced by improper motives. *Kopera v. West Orange Bd. of Educ.*, 60 N.J. Super. 288 (App. Div. 1975). Thus, the Commissioner must determine: "(1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was reasonable for them to conclude as they did upon those facts, bearing in mind that they were experts,..." *Id.* at 296-97. The burden proof proving that the increment withholding was arbitrary, capricious, or unreasonable rests with the person challenging the decision. *Kopera* at 297.

At the outset, petitioner alleges several procedural defects in the District's decision to withhold his increment. Petitioner contends that there is no direct evidence that the state appointed Superintendent issued a directive to withhold Rago's increment, and that the evaluations did not comply with the District's procedures.

The takeover legislation has vested the superintendent in state-operated school districts with the essential authority previously granted to the local school board. Indeed, a district superintendent is empowered to engage in all necessary activities to allow the district to be fully functional. *N.J.A.C. 18A:7A-35(e)*. This necessarily includes the power to act on a recommendation to withhold an increment. See *Brown v. State-Operated School Dist. of Jersey City*, 93 *N.J.A.R. 2d.* (EDU) 875. Here, the Superintendent's decision to withhold Rago's increment is supported by joint Exhibit J-12. Petitioner did not contest the source or veracity of the statement at the hearing. Instead, much of the evidence showed that petitioner did not receive the letter until the end of May 1994. Thus, I **CONCLUDE** that petitioner's challenge that the Superintendent did not approve the recommendation to withhold Rago's increment is unsupported by the record.

Petitioner also contends that the withholding of his increment is procedurally defective because the District did not follow policies, procedures and deadlines. For example, petitioner claims that two observations were for less than the full class period, he had no post-observation conference with Cannizarro after she observed his performance, and the principal's recommendation to Human Resources about his increment was made several weeks after the March 15 deadline. Additionally, petitioner asserts that pursuant to the collective bargaining agreement he should have been notified about his increment status by April 30, but the letter which notified him of his status was dated May 12, mailed on May 26, and received on May 28, 1994.

Petitioner's assertions lack merit and must be rejected. The length of time required to observe the teacher's performance "shall be of such duration as to

adequately view a complete lesson, activity or class period.” J-18 at 3. Each of the three evaluators had sufficient opportunity to adequately describe the lesson, the teacher-student interaction, and Rago’s performance. There was no post observation conference between Rago and Cannizzaro because he refused to discuss the matter with her when she returned to his class on February 25, 1994. The record does indicate that the school principal sent Human Resources her recommendation about Rago’s increment in April 1994, several weeks after the March 15 deadline. However, I agree with respondent that petitioner failed to demonstrate undue prejudice by the three week delay. The record reflects that petitioner received notice about his increment from the principal in mid-April. Although the Superintendent’s decision to withhold Rago’s increment was not issued until May 1994, the failure to timely meet a statutory deadline should not be set aside if the statutory defect is not fatal. The intent of the notification requirement is to give the affected employee opportunity to appeal or grieve the decision. Moreover, technical defects will not void a board’s decision to withhold an increment if the record supports a conclusion that “petitioner knew or should have known the reasons for withholding the increment”. *Sheehan v. Newark Bd. of Educ.*, 1986 S.L.D. 1724, 1739..(ALJ May 20), rev’ on other. grounds, 1987 S.L.D. 2701 (St. Bd. Dec. 2).

Here, I **CONCLUDE** that petitioner was not prejudice by the delay because he received notice of the Superintendent’s decision in time to perfect an appeal to the Commissioner or to file a grievance on the alleged breach of the union contract. Allegations that the District violated the collective bargaining agreement are not subject to the Commissioner’s jurisdiction. *Fair Lawn Bd. of Educ. v. Fair Lawn Bd. of Educ. Ass’n*, 171 N.J. Super 544, 560 (App. Div. 1980) *Salley v. Newark Bd. of Educ.*, 1984 S.L.D. 1714, 1717 (Comm’r of Educ., Sept. 20). Thus, petitioner’s contractual claims will not be considered.

I have considered the remaining arguments of the parties. The facts demonstrate that petitioner had difficulty with classroom management and getting the

students' attention. Each evaluator candidly reported that the students were not paying attention to the lesson, appeared to be disinterested, and socialized among themselves. Nearly the entire period was devoted to lecture style teaching with no time for discussion, no feedback from students, and no intellectual stimulation. Rago's explanation that his students had a short attention span, could not "read, spell or comprehend on or even close to grade level" is not acceptable. Respondent correctly points out that if a student has poor skills, it is the "teacher's function as part of the teacher's corps... to identify such problems and to take appropriate steps to remedy whatever perceived deficiencies in the pupils he discerns." *Cotyk v. Essex Cty. Voc. Bd. of Ed.*, 1987 S.L.D. 628, 635-636. Although the class contained students in various grade and academic levels, and Rago was quick to point out the deficiencies he perceived in the pupils, petitioner presented no evidence that he tried to address their problems by taking corrective action or changing his teaching methods. He made no contacts with the child study team about students whom he believed had learning problems and he did not confer with other teachers who may have assisted him with students who had academic difficulties. Evaluations conducted in the previous school year alerted Rago to the same problems and recommended that that he attend the Teacher Training Academy. Rago refused to attend the program. Rather than varying his teaching techniques to appeal to all the students, Rago concentrated his efforts on a small group of five or six students.

The purpose of *N.J.S.A. 18A:29-14* is "to reward only those who have contributed to the educational process thereby encouraging high standards of performance." *Bernards Twp*, 79 *N.J.* at 321. An annual increment is not a statutory right; it is a reward for good performance. *North Plainfield, supra*. 96 *N.J.* at 594. Petitioner's overall performance for school year 1993-94 did not meet the high standards of performance required by the District.

Based on the careful review of the record , I **CONCLUDE** that the District had reasonable basis for its action to withhold petitioner's employment and adjustment increments.

I further **CONCLUDE** that petitioner has failed to meet his burden of proof, by a preponderance of the credible evidence, that the District's action was unreasonable, arbitrary, or capricious.

ORDER

It is hereby **ORDERED** that the District's determination to withhold petitioner's increment for school year 1993-94 for unsatisfactory performance is **AFFIRMED** and the requested relief by petitioner is **DENIED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Sept. 6, 1995
DATE

Mumtaz Bari Brown
MUMTAZ BARI BROWN, ALJ

Receipt Acknowledged:

Sept. 8, 95
DATE

Deborah N. Antanaitis
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 13 1995
DATE

Jeff S. Main
ACTING DIRECTOR AND
OFFICE OF ADMINISTRATIVE LAW JUDGE

cb/njf

APPENDIX

Witnesses:

For Petitioner:

William Rago

For Respondent:

Maria R. Cannizzaro
Vernelle Harris
Gwendolyn Long

Exhibits:

- J-1 Instructional Observation Report, April 19, 1991
- J-2 Annual Performance Report, May 28, 1992
- J-3 Instructional Observation Report, May 7, 1993
- J-4 Annual Performance Report, June 30, 1993
- J-5 Incident Report, September 22, 1993
- J-6 Memo to Rago from Harris, December 6, 1993
- J-7 Instructional Observation Report, December 1993
- J-8 Commentary Response by Rago, December 20, 1993
- J-9 Instructional Observation Report, February 17, 1994
- J-10 Instructional Observation Report, April 18, 1994
- J-11 Letter to Rago from Opiel, stamped received April 19, 1994
- J-12 Letter to Rago from Granick, May 12, 1994
- J-13 Copy of envelope, stamped May 26, 1994
- J-14 Copy of certified mail receipt
- J-15 Memo to Faculty from Opiel, May 24, 1994
- J-16 Annual Performance Report, June 22, 1994

- J-17 Contract Agreement, September 1, 1993 to August 31, 1995
- J-18 Jersey City Public Schools Instructional Staff Evaluations, 1992-93

- P-1 Letter to Rago from Scambio, April 28, 1994
- P-2 Annual Instructional Performance Report, June 22, 1994
- P-3 Page two of Performance Report
- P-4 Letter to Rago from Harris, October 24, 1991

- R-1 Guidelines on handling PIPs
- R-2 Letter to Rago from Granick, July 7, 1992
- R-3 Memo to Oppel from Cannizzaro, RE: Training Academy, February 28, 1994
- R-4 Memo to Oppel from Cannizzaro, March 11, 1994
- R-5 Signed Evaluation of February 17, 1995 by Cannizzaro

WILLIAM RAGO, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT : DECISION
OF THE CITY OF JERSEY CITY, HUDSON :
COUNTY, :
RESPONDENT. :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondent's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioner's exceptions challenge the factual findings of the Administrative Law Judge (ALJ), contending, *inter alia*, that in the initial decision the findings reveal numerous errors and an overall failure to examine facts in the context in which they arose, but rather accept the "self-serving" testimony of petitioner's supervisors. The remainder of petitioner's exceptions essentially recast and reiterate arguments advanced before the ALJ, contending, *inter alia*, that respondent provided no evidence that the state-appointed superintendent issued a directive to withhold petitioner's increments; that there were procedural deficiencies in withholding petitioner's increments in that the District did not follow policies, procedures and deadlines; and that the District's determination to withhold petitioner's increments was not supported by the facts, in that petitioner did not receive "unsatisfactory" ratings but, instead, received ratings that indicated that petitioner needed improvement.

Respondent's reply exceptions argue that there was ample evidence in the record to support the findings of fact and conclusions of law in the ALJ's initial decision and that, therefore, this decision should be affirmed by the Commissioner.

Upon a careful and independent review of the record, including transcripts of the hearings, the Commissioner concurs with the findings and conclusion of the ALJ upholding respondent's withholding of petitioner's increments for the 1993-94 school year pursuant to N.J.S.A. 18A: 29-14. It is well-settled that actions concerning increment withholding may not be upset unless they can be demonstrated to be patently arbitrary, capricious, unlawful or induced by improper motive. Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). Further, the burden of proof that an action was so deficient rests with the person challenging the decision. Kopera at 297. The Commissioner determines that, based on the record before him, the District's decision to withhold petitioner's increments, where he received several less than satisfactory evaluations, did not exceed the reasonable use of the District's broad discretionary policy. Moreover, the Commissioner concurs that petitioner has not met his burden of establishing otherwise. Therefore, the Commissioner may not substitute his judgment for that of the District in exercising its lawful discretionary authority.

Accordingly, for the reasons clearly articulated therein, the Commissioner adopts the initial decision of the Office of Administrative Law and dismisses the instant Petition of Appeal.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

CONSTANCE J. THOMAS, :
 PETITIONER, :
 V. :
 BOARD OF EDUCATION OF THE MAN- : COMMISSIONER OF EDUCATION
 CHESTER REGIONAL HIGH SCHOOL :
 DISTRICT, PASSAIC COUNTY, AND : DECISION
 BOARD OF EDUCATION OF THE :
 BOROUGH OF PROSPECT PARK, :
 PASSAIC COUNTY, :
 RESPONDENTS. :
 _____ :

SYNOPSIS

Petitioning parent alleged that her daughters, T.W. and A.T., were wrongfully removed from respondents' schools as a result of a residency dispute.

ALJ concluded that, pursuant to N.J.S.A. 18A:38-1, petitioner's children were not residing in or domiciled in the respective school districts and, thus, were not entitled to a tuition-free education therefrom. ALJ ordered T.W. and A.T. removed from respondents' school districts for the 1995-96 school year. ALJ did deny tuition reimbursement as respondents did not present any proof as to how much tuition was owed or how tuition costs were derived. Otherwise, summary judgment was granted to respondents.

Commissioner adopted in part and reversed in part the findings and conclusions of the ALJ. Commissioner concurred that respondents' children were not entitled to tuition-free education from respondents' school districts. Commissioner, however, found that petitioner was responsible for tuition to both school districts based on the clear and uncontroverted language of the statute. Commissioner ordered petitioner to pay for the periods of ineligible attendance as calculated by the Boards in accordance with N.J.S.A. 18A:38-1(b)(2) beginning with the first date of ineligible attendance up to and inclusive of the date of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5215-95

AGENCY DKT. NO. 155-4/95

CONSTANCE J. THOMAS,

Petitioner,

v.

**THE BOARD OF EDUCATION OF THE PASSAIC
COUNTY MANCHESTER REGIONAL HIGH
SCHOOL DISTRICT, PASSAIC COUNTY AND
THE BOARD OF EDUCATION OF THE BOROUGH
OF PROSPECT PARK, PASSAIC COUNTY,**

Respondents.

Constance J. Thomas, Petitioner, *pro se*

Gary P. Hall, Esq., for Manchester Regional High School, Respondent
(Fogarty & Hara, attorneys)

Anthony C. Sartori, Esq., for Prospect Park Board of Education, Respondent

Record Closed: August 15, 1995

Decided: August 30, 1995

BEFORE IRENE JONES, ALJ:

Petitioner, Constance J. Thomas, mother of A.T. and T.W., filed a petition with the Commissioner of Education appealing the decision of the superintendents of the Boards of Education of the District of Prospect Park and Manchester Regional High School removing her children from their respective school districts. Respondents timely filed answers to the petition. Further, respondents filed motions for summary judgments. On May 19, 1995, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case.

On June 6, 1995 Manchester Regional High School (Manchester) renewed its motion for summary judgment. On July 13, 1995 Manchester filed a brief in support of its motion. Thereafter, on August 15, 1995 Manchester filed a proof of service attesting to service on both the petitioner and respondent, Prospect Park Board of Education. Petitioner did not file a response to the motions for summary judgments.

I **FIND** the following as the undisputed facts and thus they are adopted as the **FACTS** herein.

1. Petitioner and her two minor children resides at 881 East 23rd Street in Paterson, New Jersey (P-1).
2. Petitioner's oldest daughter T.W. is enrolled at Manchester Regional High School.
3. Petitioner's daughter A.T. is enrolled at Prospect Park School District.
4. During the academic school year of 1995 petitioner moved from the Prospect Park school district to 881 East 23rd Street, Paterson, New Jersey.
5. On March 16, 1995, the Manchester BOE moved to disenroll petitioner's daughter, T.W. from the school district because she was no longer domicile or residing in the school district.

6. The Board Secretary, by letter dated March 17, 1995 informed petitioner of the Board of Education's March 16th decision.
7. By letter dated March 17, 1995, the superintendent of the Prospect Park School District notified petitioner she did not meet the residency requirements in *N.J.S.A. 18A:38* and thus she was required to remove A.T. from its school district.

FINDINGS DISCUSSION AND CONCLUSIONS

Based on the findings of fact, I **FIND** that petitioner is residing in Paterson, New Jersey and thus she is no longer domiciled or residing in Prospect Park, New Jersey. Petitioner has failed to refute that she is no longer a resident of Prospect Park. I further **FIND** that petitioner has failed to defend this matter or otherwise show cause that her children are by law entitled to attend the respondent's school districts. Pursuant to *N.J.A.C. 1:1-12.5* summary judgment shall be issued where there is no material facts in dispute and the moving party is entitled to prevail as a matter of law. I **FIND** that this matter is appropriate for summary disposition because the petition filed by the petitioner admits that she and the children are no longer residents or domiciled in the respondents school districts. Thus, there are no material facts in dispute.

I **FIND** and **CONCLUDE** that T.W. was enrolled in Manchester Regional High School on a tuition-free basis at the beginning of the 1994-1995 school year because her mother lived in Prospect Park, one of the Board's three constituent municipalities.

I further **FIND** and **CONCLUDE** that A.T. was enrolled in the Prospect Park School District on a tuition-free basis at the beginning of the 1994-95 school year because her mother lived in Prospect Park, one of the Board's three (3) constituent municipalities. Subsequently, the Board's Superintendent of Schools became aware

that petitioner and A.T. had moved out of Prospect Park to a non-constituent municipality.

N.J.S.A. 18A:38-1, provides, that public schools shall be free to any person, between five and 20 years of age, who is either: domiciled within the school district; kept in the home of another person domiciled within the school district and supported by that other person; or temporarily residing in the district. A domicile is the place of one's abode where a person intends to remain and to which she intends to return when absent. Conversely, a residence is a place where a person presently stays, but not necessarily with the intended permanence associated with domicile. See, *R.A. on behalf of her minor children, S.H. and D.A. v. Ewing Tp. Bd. Of Educ.*, 95 N.J.A.R.2d (EDU) 49, 50 (October 4, 1995 Comm. Ed.). When a child lives with her parent, the domicile and/or residence of the child will follow that of her parent unless contrary evidence exists. See, *Middle Tp. Bd. Of Educ. v. K.K. and P.K.*, 93 N.J.A.R.2d (EDU) 461, 463 (September 8, 1992 Comm. Ed.).

I **CONCLUDE** that pursuant to the statute that petitioner's children are not residing in or domiciled in the respective school districts and thus not entitled to a tuition free education therefrom.

I hereby **ORDER** the removal of A.T. and T.W. from the respondents school districts for the 1995-1996 school year.

Respondents both request reimbursement for tuition. However, respondents did not present any proof as to how much tuition is owed or how tuition costs were derived. In absence of said proofs, I hereby **DENY** tuition reimbursement. In all other respects respondent's motion for summary judgment is hereby **GRANTED**.

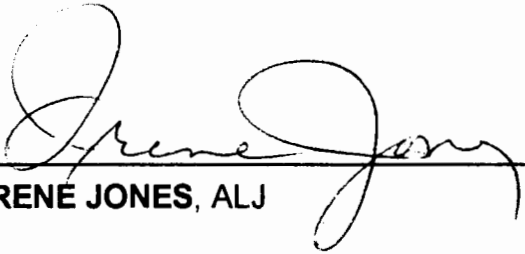
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/30/95

DATE



IRENE JONES, ALJ

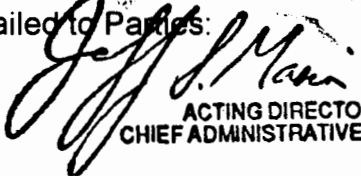
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9/11/95

DATE

DNA

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 5 1995

DATE
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OFFICE OF ADMINISTRATIVE LAW

CONSTANCE J. THOMAS,	:	
	:	
PETITIONER,	:	
	:	
V.	:	
	:	
BOARD OF EDUCATION OF THE MAN-	:	COMMISSIONER OF EDUCATION
CHESTER REGIONAL HIGH SCHOOL	:	
DISTRICT, PASSAIC COUNTY, AND	:	DECISION
BOARD OF EDUCATION OF THE	:	
BOROUGH OF PROSPECT PARK,	:	
PASSAIC COUNTY,	:	
	:	
RESPONDENTS.	:	
_____	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Respondent Manchester Regional High School District Board of Education's (Manchester) exceptions and petitioner's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Manchester's exceptions initially urge acceptance of the Administrative Law Judge's (ALJ) conclusion that petitioner was not a resident, nor domiciled in its school district. Manchester further points out that N.J.S.A. 18A:38-1(b)(2) requires that if the Commissioner concludes that the evidence does not support a claim for tuition-free enrollment, then the Commissioner shall assess the parent tuition pro-rated to the time of the student's ineligible attendance. Pursuant to N.J.S.A. 18A:38-1(b)(2), a school district's annual per pupil cost is to be multiplied by the number of days of actual ineligible attendance, in order to arrive at a tuition

amount to assess against a parent. Additionally, the Board argues that the calculation of the number of days of ineligible attendance should be up to and inclusive of the date of the Commissioner's decision herein.

In her reply exceptions, petitioner does not challenge the ALJ's findings but asks the Commissioner to reconsider the removal of her eldest daughter, T.W., from Manchester's high school rather than "subjecting her to unsafe and sometimes volatile environments of alternative high schools in the Paterson area***."

She further contends that placing T.W. in a private school will cause petitioner family hardship. Petitioner suggests that T.W. reside with her sister in Haledon, so that T.W. can complete school in Prospect Park.


Upon a careful and independent review, the Commissioner adopts in part and reverses in part the findings and conclusions of the ALJ. The Commissioner concurs that petitioner is not entitled to the relief which she seeks based on her failure to demonstrate that her minor child, T.W., was domiciled in the Manchester school district and, therefore, eligible for a free public education. Nor does N.J.S.A. 18A:38-1(b)(1) allow petitioner to relocate her daughter with her sister "****solely for the purpose of receiving a free public education within the district."

In making this determination, the Commissioner further finds that petitioner is responsible for tuition to both school districts based on the clear and uncontroverted language of the statute and thus, reverses the ALJ's findings with respect to denial of tuition owed both Boards, ordering petitioner to pay for T.W.'s period of ineligible attendance in Manchester and for A.T.'s period of ineligible attendance at Prospect Park. The period of ineligible attendance

should be calculated by the Board in accordance with N.J.S.A. 18A:38-1(b)(2) beginning with the first date of ineligible attendance up to and inclusive of the date of this decision.

Accordingly, the Commissioner affirms the decision of the ALJ except as herein modified to hold that each Board is entitled to receive tuition pursuant to N.J.S.A. 18A:38-1(b)(2). Petitioner is, therefore, directed to remit to each Board the amount owed pursuant to statute, and the within appeal is hereby dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

OCTOBER 16, 1995

DATE OF MAILING OCTOBER 16, 1995

373-95

MICHAEL W. BELLESFIELD,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWN-	:	DECISION
SHIP OF RANDOLPH, MORRIS COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING
SUMMARY DECISION

OAL DKT. NO. EDU 5151-95
AGENCY DKT NO. 81-4/95

MICHAEL W. BELLESFIELD,

Petitioner,

v.

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

Respondent.

Michael W. Bellesfield, *Pro se*

Aaron Schwartz, Esq., for respondent
(Vogel, Chait, Schwartz and Collins, attorneys)

Record Closed: August 8, 1995

Decided: September 5, 1995

BEFORE MARYLOUISE LUCCHI-MCCLOUD, ALJ:

This case comes by way of petition filed by Michael W. Bellesfield (petitioner) with the Department of Education on April 6, 1995. An answer was filed and received by the Department on April 24, 1995. The matter was then transmitted on May 17, 1995 for determination as a contested case pursuant to *N.J.S.A. 52:14B-1 to 15* and *N.J.S.A. 52:14F-1 to 13*.

The matter was originally set down for a in-person prehearing for July 25, 1995. However, that date was adjourned due to the lack of availability of respondent's attorney. The matter was rescheduled for August 8, 1995 for oral argument on a

motion for summary decision which had been filed on June 14, 1995. Responding papers had been received on July 3, 1995.

Oral argument took place on August 8, 1995 and at the conclusion the hearing, the record closed for the purposes of this motion.

FACTS

In this case, the facts necessary to make a determination on this motion are not in dispute.

The petitioner's request in this case consists of several different subparts. The first of these is that petitioner seeks an Order enforcing a settlement that was incorporated in a decision by the Honorable James A. Ospenson, ALJ on June 29, 1993. The second request is that the undersigned bar any evidence and any and all records that have previously been listed for destruction by the agreement from use in a Superior Court matter. The third request is one that is in the nature of discovery, requesting depositions and oral examination from current and former district employees whose names would be supplied by the petitioner. Petitioner also asks for access to the District's State and Federal funding application records. Lastly, the petitioner requests that he and a minor child who is now in the custody of the Division of Youth and Family Services (DYFS) receive monetary compensation from the Board of Education for damages "due to trauma".

Subsequent to the decision of Judge Ospenson, ALJ an Order was entered in the Superior Court in a separate matter entitled *New Jersey Division of Youth and Family Services v. Terry Kenny and Michael Bellesfield / IMO E.B.*, Docket NO. FN-14-33-34. On May 19, 1994 the Honorable Robert L. Penza, J.S.C. entered an Order directing the Board of Education in the Township of Randolph to maintain any records it had regarding E.B.

The petitioner seeks expungement of those records which would have been expunged pursuant to a schedule in the original agreement before Judge Ospenson in the intervening time prior to the Superior Court Order.

DISCUSSION

For the purposes of ease, it may be best to deal with the motion to enforce the settlement which was incorporated in Judge Ospenson's decision first. Upon receipt of full settlement terms in writing by consent order or stipulation signed by all parties or their attorneys or, orally, by the parties or their representatives, the Administrative Law Judge must then determine whether the stipulation of settlement or the parties oral declaration of a settlement under oath is voluntary, consistent with the law and fully dispositive of all issues in controversy. *N.J.A.C. 1:1-19.1(b)*. In this case, a decision was rendered finding the agreement to be voluntary and dispositive of all of the issues in the case. Due to the fact that that case was a special education case (OAL DKT. EDS 3837-93) Judge Ospenson's decision was a Final Decision. The decision in that case indicated that the Order was final pursuant to 20 *U.S.C. §1415(e)* and 34 *C.F.R. §300.509* (1986).

Enforcement of a settlement is in the nature of a summary proceeding as described by N.J. Ct. Rule 4:67-6. Judge Ospenson's Order was a Final Order and Final Decision and a summary proceeding to enforce these must be brought in the appropriate forum. Pursuant to the rules, as well as case law, that is not within the purview of the OAL and in turn the Department of Education to enforce a settlement. A summary proceeding must be brought pursuant to the rules. As a result, no jurisdiction to enforce that settlement agreement, if in fact it has been breached, exists with the OAL.

The petition also requests compensatory and punitive damages based upon an allegation of trauma. The jurisdiction of the Commissioner of Education is set forth in *N.J.S.A. 18A:6-9* which provides that the Commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, except in those governing higher education, or under the rules of the State Board or of the Commissioner. The courts have "repeatedly reaffirmed great breadth of his power..." *Henfey v. Matawan Regional Bd. of Ed.*, 77 N.J. 514, 524 (1978), however, this is not limitless. It has been consistently held that the Commissioner cannot award punitive damages, *North Bergen Fed. of Teachers' Bd. of Ed. of Bergen*, 1975 S.L.D. 461, 467 or counsel fees, *Balsley v. North Hunterdon Bd. of Ed.*, 117 N.J. 434, 442-443 (1990). It has also been held that the Commissioner cannot award legal cost. *Lilenfield v. Bd. of Ed. of Watchung*, 1977 S.L.D. at 315, 323; *Watsula v. Bd. of Ed. Plumstead*, 1977 S.L.D. 692, 695. Moreover, the payment of any damages other than lost earnings or restoring an increment which has been improperly withheld, is not within the Commissioner's authority. *McLean v. Bd. of Ed. of Glenridge*,

177 S.L.D. 311, 314; *Smith v. Bd. Of Ed. Of Hamilton*, OAL DKT. NO. EDU 5468-87, adopted in part on other grounds, *Comm. Of Ed. Decision* (April 21, 1988).

Administrative agencies only have those powers specifically granted either expressly or by implication. "An Administrative Officer is a creation of Legislation who must act only within the bounds of the authority delegated to him." *In Re Jamesburg High School Closing*, 83 N.J. 540, 549 (1980).

As a result, the Commissioner of Education does not have the power, and this is not the appropriate forum, either for enforcement of the settlement agreement or to grant damages for any alleged trauma incurred during the ongoing relationship between the petitioner and the school district.

The petitioner also requests things in the nature of discovery of documents, however, as pointed out above, no jurisdiction for the relief requested exists in this case. When there is no underlying case at the OAL and before the Commissioner of Education discovery is unnecessary and inappropriate.

Additionally, it is unclear whether the discovery sought is really a part of the Superior Court matter before the Honorable Judge Penza, J.S.C. If that is the case, then the petitioner must seek discovery there. No inherent right to discovery without an underlying action exists before the Commissioner of Education and in turn before the OAL.

CONCLUSION

Based upon the foregoing, I **CONCLUDE** that the OAL and the Commissioner of Education are the inappropriate forum for enforcement of a prior decision in a special education case. I further **CONCLUDE** that the Commissioner of Education is without jurisdiction to grant monetary compensation for alleged traumatic injury. I further **CONCLUDE** that all questions of discovery become moot due to the fact that no underlying matter in controversy is appropriately before this forum.

ORDER

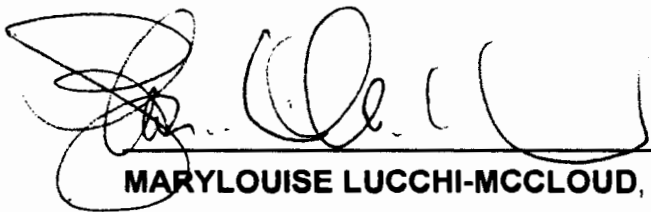
It is hereby **ORDERED** that the respondent's motion for summary decision be and hereby is granted and the petition in this case be and hereby is dismissed.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

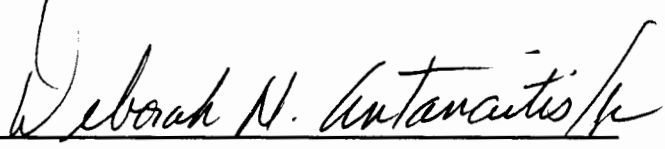
Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9/5/95
DATE


MARYLOUISE LUCCHI-MCLOUD, ALJ

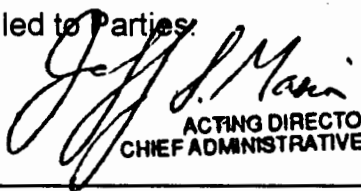
Receipt Acknowledged:

Sept. 8, 1995
DATE


DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 13 1995
DATE


ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sej(FV)mxl

OAL DKT. NO. EDU 5151-95

MICHAEL W. BELLESFIELD,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWN-	:	DECISION
SHIP OF RANDOLPH, MORRIS COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that the relief requested by petitioner in the instant Petition of Appeal falls outside the jurisdictional purview of the Commissioner of Education.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons clearly articulated in the initial decision. Respondent's motion for summary decision is granted and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

OCTOBER 16, 1995

DATE OF MAILING OCTOBER 16, 1995

374-95

CHARLES HOILMAN,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF TRENTON, MERCER COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9908-94

AGENCY DKT. NO. 358-8/94

CHARLES HOILMAN,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
CITY OF TRENTON, MERCER COUNTY,**

Respondent.

Thomas W. Sumners, Jr., Esq., for petitioner (Sumners Council George & Dortch,
attorneys)

Richard A. Friedman, Esq., for respondent (Zazzali, Zazzali, Fagella & Nowak,
attorneys)

Record Closed: August 31, 1995

Decided: September 5, 1995

BEFORE STEVEN C. REBACK, ALJ:

This matter was transmitted to the Office of Administrative Law on October 12, 1994, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded. I further note that the parties have agreed to waive the right to file exceptions and cross-exceptions.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

9/5/95
DATE

Steven C. Reback
STEVEN C. REBACK, ALJ

Sept. 12, 1995
DATE

Receipt Acknowledged:
Deborah N. Antonaitis
DEPARTMENT OF EDUCATION

SEP 14 1995
DATE

Mailed to Parties:
J. J. Moran
OFFICE OF ADMINISTRATIVE LIAISON

jz

SUMNERS COUNCIL GEORGE & DORTCH, P.C.

120 Sanhican Drive - Suite 300

P.O. Box 7824

Trenton, New Jersey 08618

(609) 393-6604

Attorneys for Respondent

RECEIVED
STATE OF N.J.
OFFICE OF THE ATTORNEY GENERAL

AUG 31 11 07 AM '95

Charles Hoilman,

Petitioner,

vs.

Board of Education of the
City of Trenton, Mercer County,

Respondent.

: Before The Commissioner Of Education
: Of The State Of New Jersey

: Agency Docket No. 358-8/94

: OAL Docket No. EDUOA 09908-94S

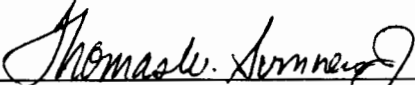
: **STIPULATION OF SETTLEMENT**

The parties in the above-captioned matter, Petitioner, Charles Hoilman, and the Respondent, Board of Education of the City of Trenton, Mercer County, hereby agree to resolve all disputes arising out of the above-captioned petition as follows:

- 1) Petitioner shall be appointed to the position of Microcomputer Specialist effective September 6, 1995 at the salary of \$44,841.00 a year based upon Step 19, Guide C, of the 1994-95 Salary Guide for the Business & Technical collective bargaining unit. The Petitioner's salary is subject to adjustment for 1995-96 and thereafter, pending the results of collective bargaining negotiations between the Respondent and the Trenton Business & Technical Association, and Petitioner shall not be required to return to work until two (2) weeks after receipt of notice that Respondent has approved this Stipulation;
- 2) Although Petitioner will return to work on September 6, 1995, or as specified above, his appointment for service credit is retroactive to the termination date of his employment, July 1, 1994, but without any retroactive salary because Petitioner has mitigated all salary loss;


- 3) Petitioner will receive one-half (1/2) of his previously accumulated sick leave prior to his termination effective July 1, 1994, equaling sixty-three (63) sick days. Additionally, he is entitled to any sick days, vacation days, and other benefits pursuant to the collective bargaining agreement between the Respondent and the Trenton Business & Technical Association starting with his return to employment on September 6, 1995 or thereafter;
- 4) Petitioner will attempt to obtain pension credit for the period between his termination and his return to active service. However, the Respondent shall not be compelled to pay any share of any pension contributions even if this limitation affects Petitioner's ability to obtain pension credit. Further, this settlement shall be effective irrespective of whether Petitioner obtains such credit;
- 5) There is no concession by the Respondent that Petitioner obtained tenure during his employment prior to July 1, 1994 when he was serving in the capacity as Program Analyst. Petitioner does not abandon or waive any claims that he obtained tenure as a Program Analyst. All claims with respect to tenure by the Petitioner are preserved. All defenses and denials by the Board with respect to tenure are preserved. It is mutually understood and agreed by the parties that in the event Petitioner's position is abolished and/or his employment terminated in the future, he may assert any tenure rights that he feels he is entitled, and the Respondent does not concede that he is tenured and it may assert any defenses it may have in the future in the event his position is abolished and/or his employment terminated.
- 6) In consideration for this agreement, Petitioner dismisses all claims set forth in the within Petition, as well as any claims that were not set forth but could have been.
- 7) It is the intent of the parties to have the Petitioner return to employment with the Respondent on September 6, 1995 or as specified in paragraph 1 above. In the event that approval of this settlement is not received by Administrative Law Judge Steven C. Reback or the Commissioner of Education, Petitioner shall still commence employment on September 6, 1995, or as specified in paragraph 1 above.

- 8) In the event the Commissioner does not approve this settlement agreement, this matter shall return to the Office of Administrative Law for further proceedings, and Respondent may continue Petitioner's employment as Microcomputer Specialist unless prohibited by the Commissioner.
- 9) This agreement is entered into voluntarily without any duress or undue influence.



Thomas W. Sumners, Jr., Esq.
Attorney for Respondent

Date: August 21, 1995



Richard A. Friedman, Esq.
Attorney for Petitioner

Date: 8/22/95

OAL DKT. NO. EDU 9908-94

CHARLES HOILMAN, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 CITY OF TRENTON, MERCER COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.



COMMISSIONER OF EDUCATION

OCTOBER 17, 1995

-4-

DATE OF MAILING OCTOBER 17, 1995

375-95

IN THE MATTER OF THE TENURE :
HEARING OF ALESHIA JACKSON, :
STATE-OPERATED SCHOOL DISTRICT :
OF THE CITY OF PATERSON, PASSAIC :
COUNTY. :

COMMISSIONER OF EDUCATION

DECISION



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12444-94

AGENCY DKT. NO. 467-11/94

**IN THE MATTER OF THE TENURE HEARING OF
ALESHIA JACKSON
STATE-OPERATED SCHOOL DISTRICT OF
THE CITY OF PATERSON, PASSAIC COUNTY**

Gregory G. Johnson, Esq., for petitioner Paterson School District

Sheldon H. Pincus, Esq., for respondent Alice Smith (Bucceri & Pincus, attorneys)

Record Closed: September 11, 1995

Decided: September 13, 1995

BEFORE EDITH KLINGER, ALJ:

On December 27, 1994, this matter was transmitted to the Office of Administrative Law as a contested case pursuant to *N.J.S.A. 52:14F-1 to -15* and *N.J.S.A. 52:14F-1 to -13*. A prehearing conference held on April 18, 1994, and a hearing was scheduled on July 27 and 31, 1995.

On July 27, 1995, the parties advised the undersigned that this matter, involving tenure charges against respondent, a tenured secretary, had been resolved. The parties drafted a Settlement Agreement indicating the terms of settlement.

The executed Settlement Agreement attached hereto was subsequently submitted on September 11, 1995 and is herein incorporated by reference.

I have reviewed the record and the settlement terms and I **FIND**:

1. The parties have voluntarily agreed to the settlement, as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 13, 1995
DATE



EDITH KLINGER, ALJ

Receipt Acknowledged:

Sept. 15, 95
DATE

Deborah N. Antanates
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 18 1995
DATE

Jeff S. Marin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

md

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
SETTLEMENT AGREEMENT

OAL DKT. NO. ~~EDU~~ 12444-94 PM '95
AGENCY DKT. NO. 467-11/94

**IN THE MATTER OF THE TENURE HEARING OF
ALESHIA JACKSON
STATE-OPERATED SCHOOL DISTRICT OF
THE CITY OF PATERSON, PASSAIC COUNTY**

The parties agree as follows relative to the tenure charges filed against the respondent, Aleshia Jackson, by the petitioner, State-Operated School District of the City of Paterson (District):

1. The District certified tenure charges against respondent on November 16, 1994.
2. Respondent filed her Answer to the charges on December 16, 1994.
3. On April 18, 1994, a prehearing conference in this matter was conducted by the Honorable Edith Klinger, ALJ. The following dates were set aside for the hearing, July 27 and 31, 1995.
4. Respondent, Ms. Jackson, tenders her resignation to be effective September 30, 1995. If respondent intends to retire, the District agrees to cooperate in submitting all requisite data and forms to PERS in connection with respondent's retirement application. However, this Agreement is not contingent on such application being accepted. The District makes no representation and shall bear no responsibility regarding respondent's rights and options under PERS.
5. The District hereby agrees, upon receipt of the written resignation, to withdraw tenure charges filed with the Commissioner on November 16, 1994, Agency Ref. 467-11/94 and OAL Docket No. 12444-94.

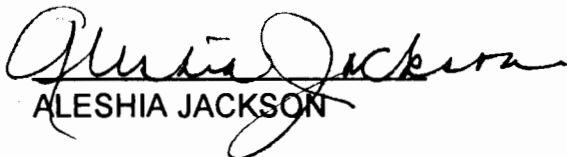
6. Respondent shall be compensated in total \$5,298.68 (two months' salary at \$31,792 or \$2,649.34 per month). The payment of the salary amount of \$5,298.68 shall be the only salary due to respondent from the District for the period from July 27, 1995 through September 30, 1995 and shall be in lieu of any moneys otherwise due or claimable by her. All rights to salary will cease as September 30, 1995, assuming this agreement is approved by the Commissioner of Education and Administrative Law Judge.
7. The parties respectively acknowledge that each has had ample opportunity to seek independent legal counsel, financial or other advice regarding this Agreement, and that each is signing this Agreement freely and voluntarily, without coercion, duress or pressure from the other party.
8. By entering this Agreement, each party releases and discharges the other with respect to all claims or rights that either party may have against the other. This includes all claims, including those of which either party is not aware and those not mentioned herein. The releases by each party apply to all claims resulting from anything which has happened up to now. It specifically includes, without limitation, all claims which Ms. Jackson may have respecting tenure, discrimination on any basis, rights under any collective bargaining agreement, disability payments, sick leave, salary or any other matter pertaining to her employment.
9. This agreement is subject to approval by the Office of Administrative Law and the Commissioner of Education.
10. The parties entry into this agreement should not constitute an admission of wrongdoing or guilt or liability by either party.
11. The District shall not oppose or contest any application for unemployment compensation benefits that respondent may file subsequent to September 30, 1995.

12. The District shall not release any medical information concerning the respondent unless she provides another release.

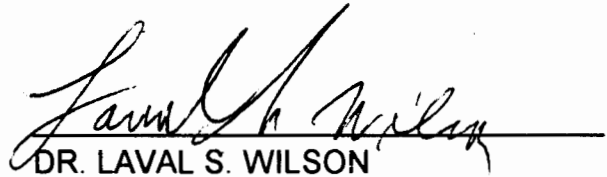
~~x13x All potential employer inquiries shall be answered limited to date of hire, dates of employment and reason for separation being resignation~~

Initials
YH
HME
AJ

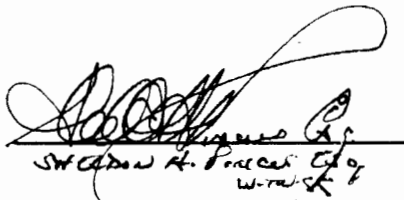
FOR THE STATE-OPERATED
SCHOOL DISTRICT OF PATERSON


ALESHIA JACKSON

Dated: 7/27/95


DR. LAVAL S. WILSON

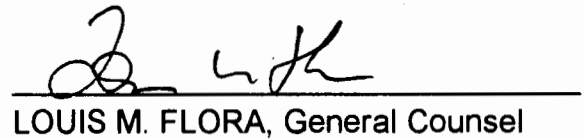
Dated: 8/2/95


GREGORY G. JOHNSON, Esq.

Dated: 7/21/95


GREGORY G. JOHNSON, Esq.

Dated:


LOUIS M. FLORA, General Counsel


Dated: 8/2/95

OAL DKT. NO EDU 12444-94

IN THE MATTER OF THE TENURE :
HEARING OF ALESHIA JACKSON, :
STATE-OPERATED SCHOOL DISTRICT : COMMISSIONER OF EDUCATION
OF THE CITY OF PATERSON, PASSAIC : DECISION
COUNTY. :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

OCTOBER 17, 1995

DATE OF MAILING OCTOBER 17, 1995

381-95

BOARD OF EDUCATION OF THE :
TOWNSHIP OF OCEAN, :

PETITIONER, :
V. :

COMMISSIONER OF EDUCATION

DECISION

MAYOR AND TOWNSHIP :
COMMITTEE OF THE TOWNSHIP :
OF OCEAN, OCEAN COUNTY, :

RESPONDENT. :

AND

IN THE MATTER OF THE CAP :
WAIVER APPEAL OF THE BOARD OF :
EDUCATION OF THE TOWNSHIP OF :
OCEAN, OCEAN COUNTY. :

SYNOPSIS

Board appealed actions taken by Township as result of defeat of the proposed school budget and a proposed cap waiver question at the annual school election. Township had acted to examine both General Fund budget and cap waiver question, making reductions and reallocations throughout all portions of same, including that portion of the cap waiver question found not to be necessary for provision of a thorough and efficient education (T & E) upon review by the County Superintendent prior to the election.

Commissioner noted that action of Township in reviewing and making reallocations from cap waiver line items was ultra vires and instead treated cap waiver items "reduced" by the Township as contested for purposes of the within appeal. Upon review of all General Fund line items at issue and each line item of the T & E cap waiver question, Commissioner determined to sustain \$63,974 of Township's reductions to the proposed \$5,788,555 General Fund budget and to grant \$339,503 of the Board's \$381,904 cap waiver request, with a directive that \$153,994 of amounts restored or approved be funded by surplus. Commissioner directed certification of a General Fund tax levy of \$5,910,090, which amount did not include \$132,149 improperly "reallocated" by the Township for provision of courtesy busing. Commissioner further directed correction of numerous coding errors, submission of a revised budget to the County Superintendent and Office of Finance, and development of a plan for revising the District's administrative structure.

BUDGETS

SUMMARY OF COMMISSIONER'S DECISION

Board of Education of the Township of Ocean v. Mayor and Township Committee of the Township of Ocean, and In the Matter of the Cap Waiver Appeal of the Board of Education of the Township of Ocean, Monmouth County.

Board appealed actions taken by Township as result of defeat of the proposed school budget and a proposed cap waiver question at the annual school election. Township had acted to examine both General Fund budget and cap waiver question, making reductions and reallocations throughout all portions of same, including that portion of the cap waiver question found not to be necessary for provision of a thorough and efficient education (T & E) upon review by the County Superintendent prior to the election.

Commissioner noted that action of Township in reviewing and making reallocations from cap waiver line items was ultra vires and instead treated cap waiver items "reduced" by the Township as contested for purposes of the within appeal. Upon review of all General Fund line items at issue and each line item of the T & E cap waiver question, Commissioner determined to sustain \$63,974 of Township's reductions to the proposed \$5,788,555 General Fund budget and to grant \$339,503 of the Board's \$381,904 cap waiver request, with a directive that \$153,994 of amounts restored or approved be funded by surplus. Commissioner directed certification of a General Fund tax levy of \$5,910,090, which amount did not include \$132,149 improperly "reallocated" by the Township for provision of courtesy busing. Commissioner further directed correction of numerous coding errors, submission of a revised budget to the County Superintendent and Office of Finance, and development of a plan for revising the District's administrative structure.

BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF OCEAN,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	
	:	DECISION
MAYOR AND TOWNSHIP	:	
COMMITTEE OF THE TOWNSHIP	:	
OF OCEAN, OCEAN COUNTY,	:	
	:	
RESPONDENT.	:	
AND	:	
IN THE MATTER OF THE CAP	:	
WAIVER APPEAL OF THE BOARD OF	:	
EDUCATION OF THE TOWNSHIP OF	:	
OCEAN, OCEAN COUNTY.	:	
_____	:	

For Petitioner, Paul J. Carr, Esq. (Murray & Carr, L.L.C.)

For Respondent, Gregory P. McGuckin (Dasti, Murphy & Wellerson)

PROCEDURAL HISTORY

This consolidated matter was opened before the Commissioner of Education on June 21, 1995 through the filing of two separate Petitions of Appeal by the Board of Education of the Township of Ocean (Board), one seeking restoration of reductions to the school budget made by the Mayor and Township Committee of the Township of Ocean (Township) pursuant to N.J.S.A. 18A:22-37 following defeat of the budget at the annual school election on April 18, 1995, and the other seeking to appeal the defeat of the Board's cap waiver proposal at that same election.

In February 1995, the Board had advised the County Superintendent that the Board would need a "voter cap waiver" pursuant to N.J.S.A. 18A:7D-28(f) in order to be able to provide for a thorough and efficient education (T&E) in the District. The County Superintendent ultimately determined, by way of letter dated March 21, 1995, that \$381,904 of the Board's voter

cap waiver was necessary for T&E, and therefore appealable in the event of voter defeat, but that the remaining \$196,891 was not.

At the annual school election, the voters rejected a public question proposing a General Fund tax levy of \$5,788,555 for the 1995-96 school year, as well as a proposed cap waiver question of \$578,795 representing the total of both T&E and non-T&E amounts. Following consultation with the Board as required by law, the Township adopted a resolution determining to certify a General Fund tax levy of \$5,509,330 as sufficient to provide for T & E in the District. Although this amount represented an effective reduction of \$279,225 from the General Fund tax levy proposed by the Board, it was not implemented solely through cuts in General Fund budget line items pursuant to N.J.S.A. 18A:22-37. Rather, the Township examined the proposals placed before the voters as a totality and made "reductions" and "reallocations" throughout all three portions of the proposed budget, i.e., the General Fund budget, the T & E cap waiver and the non-T & E cap waiver, so that the certification amount finally arrived at reflects not only reductions to the General Fund budget, but also "offset" monies moved into that budget from both portions of the cap waiver request. The Board resolved to appeal these actions, as well as the voters' rejection of the T&E portion of the General Fund cap waiver, and duly filed the within petition. With its papers, the Board also included a letter requesting that the Commissioner consider a "courtesy busing" line item deemed non-T & E by the County Superintendent, either finding that, in view of litigation having been initiated by the provider of such transportation based on a multi-year contract obligation, such funding was necessary for T & E, or that the contract in question could not be enforced.

The Township filed its Answer to the budget appeal on July 6, 1995. No answer was filed to the cap waiver petition, the Township having expressed its position on which line items it considered unnecessary through its comprehensive action as described above. On August 1, 1995, the Township filed a letter in lieu of Position Statement pursuant to N.J.A.C. 6:24-7.8, the Board having included an initial Position Statement with its original petition. On August 9, 1995, the Board filed a revised and expanded statement, to which the Township responded on August 28, 1995.

On July 14, 1995, the Ocean County Superintendent of Schools filed her affidavit and supporting documents attesting to the process of review and analysis that led to her

conclusion, and that of the Department of Education's Cap Waiver Review panel, that, in addition to a "Commissioner cap waiver" in the amount of \$157,251 granted pursuant to N.J.S.A. 18A:7D-28(e) for reason of enrollment increase, a \$381,904 "T&E voter cap waiver" should be granted to the Board so as to permit it to increase its General Fund budget beyond the established permissible level upon approval of the question by the voters. The County Superintendent's filings also reflected a panel-directed reallocation of resources in the amount of \$23,575.

In addition, as the parties had previously been advised by letter from the Assistant Commissioner dated April 7, 1995 and distributed through the County Superintendent to boards and municipalities experiencing budget defeats, as part of the record of the within appeal, the Commissioner took official notice of the Board's revised budget, its June 30 financial report and its year-end audit report, the latter two for the purpose of identifying whether the Board underestimated in its 1995-96 budget the amount of anticipated undesignated surplus.

Upon expiration of the time for filing of final summations pursuant to N.J.A.C. 6:24-7.8, the matters under appeal were consolidated for determination and the record of the appeal was closed.

The effective amounts in dispute in this appeal are as follows:

<u>Tax Levy Proposed by Board</u>		<u>Tax Levy Certified by Township</u>	
General Fund	\$5,788,555	General Fund	\$5,509,330
<u>Effective Amount of Reduction by Township</u>		<u>Amount of Reduction in Dispute</u>	
General Fund	\$ 279,225	General Fund	\$ 279,225
		<u>Amount of Cap Waiver Approved as T&E and Appealed Herein</u>	
		\$ 381,904	
		<u>Amount of Cap Waiver Not Approved as T&E</u>	
		\$ 196,891	

TOTAL AMOUNT ON APPEAL: \$ 661,129*

*Does not reflect total of individual line items below due to manner of Township's revisions as described above.

The cap waiver requested by the Board included the following line items, which were determined by the County Superintendent to be necessary, or not necessary, for T & E as set forth below:

Necessary for T & E

<u>Account Title</u>	<u>Account Number</u>	<u>Amount</u>
Preschool/Kdg. - Salaries	11-110-100-101	\$ 23,575
Grades 1-5 - Salaries	11-120-100-101	118,792
Grades 6-8 - Salaries	11-130-100-101	15,663
General Supplies	11-190-100-610	7,362
Textbooks	11-190-100-640	500
Salary Other Professional Staff	11-000-219-104	12,220
Salary Secretary/Clerical Asst.	11-000-219-105	3,008
Supplies and Materials	11-000-240-600	2,000
Cleaning, Repair & Maintenance	11-000-260-420	4,000
Social Security Contributions	11-000-290-220	1,998
Other Employee Benefits	11-000-290-290	39,128
Preschool/Kdg. Equipment	12-110-100-730	550
Grades 1-5 Equipment	12-120-100-730	23,059
Grades 6-8 Equipment	12-130-100-730	8,470
Resource Room/Resource Center	12-213-100-730	1,870
Basic Skills/Remedial Instr.	12-230-100-730	4,772
Undistr. Expend. Support Serv.	12-000-219-730	6,150
Undistr. Expend. School Administration	12-000-240-730	13,715
Undistr. Expend. Operation Plant	12-000-260-730	3,100
Undistr. Expend. Business/Other	12-000-290-730	3,252
Construction Services	12-000-400-450	18,000
Other Salaries	11-000-218-110	34,350
Salaries	11-000-260-100	<u>36,370</u>
Total Amount:		\$ 381,904

Not Necessary for T & E

Contract Services (Home & School Transportation)	11-000-270-511	\$ 161,149
Contract Services (Other Home & School)	11-000-270-512	<u>35,742</u>
Total Amount		\$ 196,891

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line-item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education. Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989). Additionally, with respect to appeals involving cap waivers, before the Commissioner can direct restoration of any amount of a waiver defeated by the voters, the Commissioner must determine that such amount is fully necessary for purposes of T&E and unable to be derived from further reallocation within the base budget. Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, Bergen County, State Board decision July 7, 1993, and Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater, and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, Bergen County, State Board decision July 6, 1994.

Mindful, then, of the standard to be applied, the Commissioner makes the specific determinations set forth below.

COMMISSIONER'S DETERMINATION

Initially, the Commissioner notes that the Township exceeded the authority conferred upon it pursuant to N.J.S.A. 18A:22-37 in reviewing and making determinations regarding the Board's proposed cap waiver request, and that, contrary to the Township's assertions, infra, the State Board's decision in Edgewater in no way expands this authority or lends support to the Township's actions. For purposes of the within appeal, however, the effect

given these actions will be to consider those cap waiver line items which the Township “reduced” as contested, while treating those left intact as uncontested; where “reductions” were made that were less than the total cap waiver amount requested, the “contested” heading so notes. Also, in several instances, General Fund budget and cap waiver line items are grouped together for determination, as they involve the same or similar accounts and are often treated as a whole by the parties for purposes of argumentation. Finally, it is noted that line-item discussions are frequently cast in terms of sub-accounts, as this was the manner in which the Township made its determinations.

Disputed Line-Item Group 1

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Cut or Contested by Township</u>
2510	11-110-100-101	Salaries -K/PreK	\$41,418.45
		(Budget Amount Reduced:	\$18,073.95)
		(Cap Amount At Issue:	\$23,344.50)
2510	11-110-100-101	Salaries -K/PreK	\$ 630.00
		(Budget Amount Reduced:	\$ 400.00)
		(Cap Amount At Issue:	\$ 230.00)

Related Cap Waiver Accounts Not Contested by Township

2520	11-120-100-101	Salaries 1-5	\$118,792.00
2530	11-130-100-101	Salaries 6-8	\$ 15,663.00

The Board argues that the base budget funds cut by the Township represent a prorated appropriation (\$13,191.45) for the physical education teacher providing instruction to kindergarten classes, and a prorated appropriation (\$4,882.50) for the District’s Gifted and Talented Teacher placed in this account to comply with GAAP, notwithstanding that this teacher does not actually provide services to kindergarten classes; the account also includes prorated substitute costs for these positions (\$400). The cap waiver amount represents the prorated salaries of art and music instructors who provide the District’s entire programs in these areas, grades 1 - 6 (2 music teachers, 1-3/5 art teachers per about 675 students), as well as the prorated cost of substitutes (\$230). The Board opines that art and musical experiences are critical to the District’s educational program, as they are interwoven into instruction aimed at development of cognitive skills, exposure to other culture and civilizations, and enrichment activities for gifted,

remedial and special education students. Loss of the monies at issue herein will result in the complete elimination of these programs.

The Township argues that the District provides only a half-day kindergarten, and that kindergarten students do not require the specialized services of the teachers at issue in these accounts. Accordingly, budget and cap amounts for Kindergarten purposes should be reduced. (The Township does not contest the cap waiver amounts for grades 1-6.)

Upon review, the Commissioner finds that the Board has demonstrated the necessity for the amounts at issue, and that, even allowing for a modest level of service to kindergarten students, there appears to be no justification for further reducing the number of special teachers in the District. Accordingly, the Commissioner restores \$18,474 (\$18,074 + \$400) to the base budget and grants the Board's waiver requests for \$23,345, \$230 (\$23,575 total), \$118,792 and \$15,663 respectively. However, to the extent that the apportionment of these salaries among grade-level accounts may not accurately reflect actual allocation of staff assignment, the Board is directed to revise its coding accordingly and submit a revised budget to the County Superintendent and Office of Finance.

Disputed Line-Item Group 2

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Cut</u>
2510	11-110-100-101	Summer Curriculum Writing K/Pre-K	\$ 500
2520	11-120-100-101	Summer Curriculum Writing 1 -3	\$ 1,800
2520	11-120-100-101	Summer Curriculum Writing 4 -5	\$ 1,500
2530	11-130-100-101	Summer Curriculum Writing 6	\$ 1,000

The Board argues that these monies are required to permit the District to adequately address its 5-year curriculum plan, stipends for which are set by the collectively negotiated teachers' contract. For 1995-96, the District needs to develop new curriculum guides for Language Arts, Social Studies and Science. Performance of this work during the school year is not viable because it would require an inordinate number of student half-days, is not conducive to working in small blocks of sporadic time, and would preempt any other opportunity for meaningful inservice in more appropriate areas, including presentation of new programs, skill development and general professional interface. Summer writing is the most efficient and effective way to accomplish this important and necessary goal.

The Township contends that these appropriations amount to extra pay for work teachers can and should do during the school year on inservice days, which can be credited as full days for purposes of student attendance. The Township also contends that the Board did not use its full 1994-95 appropriation in this area, thus showing that it is not necessary for T & E.

Upon review, the Commissioner finds that the Board has demonstrated that its curriculum development program is both appropriately structured and necessary for T & E. Neither does the fact that 1994-95 expenditures proved to be less than anticipated serve to counter such finding, as the budgetary needs at issue herein are based on projected costs for different areas of curriculum, which may or may not be susceptible to the cost-savings effectuated in 1994-95 . Accordingly, the Commissioner restores the \$500, \$1,800, \$1,500 and \$1,000 reduced by the Township in these accounts. However, in that summer curriculum work is properly budgeted under Account 11-000-221-104, the restorations are made to that account.

Disputed Line-Item Group 3

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Cut</u>
2650	11-190-100-320	Per Diem Summer Inservice	\$ 350
2650	11-190-100-320	Professional Inservice Registration	\$ 350
2700	11-190-100-800	Mileage Reimbursement	\$ 100

The Board argues that the first amount represents a \$37.50 per diem stipend for teacher attendance at inservice programs which are not available or cannot be scheduled except during the summer, and view it as a small price to pay for non-contractual days which can be scheduled at whatever times, and with whatever groupings of staff, are appropriate. The second amount is for registration fees at workshops offered during the summer, while the third represents a cost that has already been reduced by 1/3 when compared to the 1994-95 budget.

The Township argues that inservice should be done during the school year, when all staff are available and at no additional cost. If teachers wish to obtain additional training during the summer, they should do so at their own expense. In addition, although the Board claims to need the full amount of mileage monies, it does not explain why, nor does it explain why 50% of 1994-95 appropriations remained unused.

Upon review, the Commissioner finds that the Board has not identified the particular programs it would be required to forego in the absence of these funds, and that there

appear to be sufficient funds in the remainder of this account to cover any modest cost associated with programs the Board may ultimately deem necessary for T & E, as well as costs associated with mileage for such programs. Accordingly, the \$800 (\$350 + \$350 + \$100) reduction is sustained. In addition, the Commissioner notes that monies for per diem teacher inservice should be budgeted to the appropriate teacher salary accounts, and amounts for registration and mileage reimbursement should be budgeted under Account 11-000-221-500, so that the Board should correct its coding accordingly and submit a revised budget.

Disputed Line-Item Group 4

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Cut</u>
2670	11-190-100-500	Field Trips	\$ 500
2670	11-190-100-500	Ancillary Materials	500

The Board argues that the first amount represents the cost of a special 6th grade trip to honor 30+ members of the safety patrol and thank them for their service; all other trips are funded by the PTA. The second amount represents a modest appropriation for curriculum related trips, as the Board cannot assume that the PTA will necessarily cover these costs each year.

The Township contends that the first cost can and should be covered by the PTA or fundraising, and that, in the second case, there is no reason to assume that PTA funding will not be available as it has been for the past several years. Finally, in 1994-95, only 20% of the budgeted amount in this area was actually expended.

Upon review, the Commissioner determines to sustain these reductions of \$500 and \$500, as amounts remaining in the proper account for budgeting of field trips (11-190-100-500) are sufficient based on prior year expenditures so that T & E will not be impaired.

Disputed Line-Item Group 5

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Cut.</u>
2680	11-190-100-610	General Supplies/Workbooks	\$ 2,788
2690	11-190-100-640	Textbooks	\$ 2,500
			<u>Related Cap Waiver Account</u>
2690	11-190-100-640	Textbooks	\$ 500
2680	11-190-100-610	General Supplies	\$7,362

The Board argues that these amounts are needed to purchase textbooks, materials, kits, workbooks and computer software associated with the newly revised Social Studies

curriculum in accordance with the District's 5-year plan. Cap waiver monies are for art and music curriculum as set forth under salary accounts above.

The Township believes accounts such as these should be based on actual expenditures, and that, even with the Township's cut, the amount remaining in supplies represents a 5% increase over last year's actual expenditures, while the amount remaining in textbooks represents a 10% increase. With respect to the cap waiver amount, the Township contends that the portion allocated for kindergarten be deleted on the same basis as salary accounts above.

Upon review, the Commissioner does not concur that actual expenditures are necessarily the best indicator of necessity for T & E, as budgetary needs will vary depending on the projects to be undertaken and the purchases to be made. Herein, the Board has demonstrated the necessity of its proposed expenditures for T & E, so that the Township's reductions of \$2,788 and \$2,500 are restored, and the cap waiver requests for \$7,362 and \$500 are granted.

Disputed Line-Item Group 6

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
3040	11-204-100-610	Special Ed. (NI) Supplies	\$454
3050	11-204-100-640	NI Textbooks	\$210
3920	11-213-100-640	Resource Room Textbooks	\$1,000

The Board argues that the need for supplies and textbooks in special education categories is directly related to the needs and objectives of the children's IEPs (Individual Education Programs) as defined by the child study team consistent with the requirements of N.J.A.C. 6:28. The N.I. supplies account is not an increase over last year. The Perceptually Impaired supplies account was eliminated in FY 1995-96--a net decrease of \$2,750. This was due to the increased enrollment of N.I. students in the self-contained class. The 1995-96 budget for N.I. supplies is \$4,254--an increase over FY 1994-95 of only \$521. The overall reduction, not increase, in supplies is \$2,229, or a decrease of 34%, while the number of special education students increased from 82 to 111. Similarly, overall amounts for textbooks have decreased by \$3,190, not increased, from 1994-95 to 1995-96. In addition, a new reading program designed to reduce out-of-district placements is being instituted in FY 1995-96. Account 11-0213-100-

640, Resource Room Textbooks, is remaining the same as FY 1994-95, while last year Account 11-0213-100-640 was reduced by \$1,100, or 25%, over FY 1993-94.

The Township argues that, based upon last year's expenditures for the first two line items, after deducting cuts, said amounts would still represent a 5% increase for NI supplies and textbooks over last year's actual expenditures. Actual expenditures represent the best evidence as to whether an item is necessary for T & E. As to resource room textbooks, with the current budget and potential tax increase to local residents, a T & E education can be met by simply replacing worn books at this time. Continuing the present curriculum for one additional year will not adversely impact upon a thorough and efficient education.

Upon review, the Commissioner finds the items funded by the first two accounts to be necessary for T & E, and the amounts budgeted driven by the number of affected students, which is not necessarily comparable from year to year. With respect to resource room textbooks, the Board has established that such are an integral part of the ongoing development of its special education program, and as such are necessary for T & E. Accordingly, the Commissioner restores these reductions of \$454, \$210 and \$1,000.

Disputed Line-Item Group 7

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
4090	11-215-100-610	Presch. Handicapped Supplies	\$337

The Board argues that the requirements of the law, the expansion of preschool to two sessions, and the increase in special education students are the reasons this cut cannot be sustained. The preschool program population has increased from 7 students in June, 1994 to 17 students in June, 1995. The FY 1994-95 supplies account was \$3,300. This amount was a \$1,000 reduction or a 23% decrease of the previous year. The 1995-96 budget for preschool supplies is \$2,337--\$936 less than FY 1994-95, or an additional 29% decrease in this amount. This account has already been severely reduced.

The Township argues that funds were transferred out of this line item in the 1994-95 budget and consequently are not needed for such supplies. Actual expenditures represent the best evidence as to whether such an item is necessary for T & E.

Upon review, the Commissioner finds that the items constituting this account are necessary for T & E, and that the Board appears to have already reduced its budget appropriately

in comparison to the 1994-95 levels cited by the Township. Accordingly, the Commissioner restores the \$337.

Disputed Line-Item Group 8

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
4310	11-218-100-101	Teacher Salaries-Speech	\$12,220

The Board argues that the number of students requiring speech correction services has increased from 55 in 1994 to 88 in 1995. In addition, recent law has required more speech services in the evaluation and assessment of preschool handicapped children, and one such student has been identified as in need of intensive speech correction. If the position funded by this account is eliminated, the District will not be able to provide legally mandated services to the 88 students, and the preschool handicapped student will be sent out of district.

The Township argues that a thorough and efficient education for speech can be met with one full-time teacher. Assuming one full-time speech teacher teaching for 5-1/2 hours per day, such teacher could devote two 45-minute periods per week to each child, with more difficult students being given additional time for evaluations and testing. In addition, peak demands can be satisfied with substitute teachers, which line item has not incurred any expenditures in the current year. In addition, although the system consists of two school buildings, it is a single campus setting separated by a playground.

Upon review, the Commissioner finds that neither the Board nor the Township has provided sufficient information for the Commissioner to conclude that its argument is entirely valid, as number of students is not necessarily indicative of time and staffing needed for the resultant caseload. However, in view of the fact that the District's eligible population has increased substantially, the Commissioner determines to restore funding for a 1/5 position (rather than 2/5 as requested) and accordingly restores \$6,110 of the Township's reduction and sustains the remaining \$6,110.

Disputed Line-Item Group 9

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
4810	11-230-100-101	Teacher Salaries-Basic Skills (Summer)	\$1,190

The Board argues that these funds are necessary for the salaries of teachers who provide instruction for students who, instead of being retained in grade level, can receive concentrated summer instruction and be promoted. This is especially for sixth grade at-risk students, those students who have already been retained, or students new to the District and not yet able to meet its standards.

The Township argues that a thorough and efficient education does not necessarily include summer school programs. Parents have the ability to take students to other districts which have summer school programs and to pay the appropriate tuition and/or fees. The taxpaying public should not be required to pay for something in the summer which was previously provided during the year.

Upon review, the Commissioner finds the summer basic skills program to be an integral part of the District's plan for student remediation. Such remediation is an important aspect of any T & E educational program, and cannot be dismissed because it may appear to repeat, in whole or part, material covered during the regular educational program. Accordingly, the Commissioner restores this reduction of \$1,190.

Disputed Line-Item Group 10

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
4860	11-230-100-610	Basic Skills Supplies	\$1,057
4870	11-230-100-640	Basic Skills Supplemental-Textbooks	\$ 280

The Board argues that its Basic Skills program is the last line of defense before more expensive interventions, e.g., Special Education, begin. Reducing the supplies account will severely weaken the Basic Skills program. While the need for basic skills intervention in both buildings has increased, the budget amount for supplies in FY 1995-96 remains the same as for FY 1994-95; the FY 1994-95 budget for Basic Skills supplies was \$500 less than the previous year, or a 17% decrease. Recent federal emphasis in Chapter I Grant monies has moved most funding to "urban poor" districts, severely diminishing funds for Basic Skills supplies and texts. In addition, textbook allocations reflect a 10% reduction from last year.

The Township argues that the amounts budgeted for the 1994-95 school year were not used for this line item, as funds were transferred out of same. As reduced, these line items

would represent an actual increase of over 5% over last year's actual expenditures for these items. Actual expenditures represent the best evidence as to whether such items are necessary for a T & E.

Upon review, the Commissioner finds that, notwithstanding its reduction of expenditures over prior years, the Board has not demonstrated that it cannot meet its needs in this area within the allocation made by the Township. Accordingly, the reductions of \$1,057 and \$280 are sustained.

Disputed Line-Item Group 11

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
4950	11-240-100-610	Bilingual Ed-Instruction	\$1,000

The Board argues that a first grade student was identified in September 1992, but moved out of the District after five months. Because the Board continues to receive revenue for bilingual instruction, expenditures were created.

The Township argues that 100% remains from the amount budgeted for the current school year, which funds were then transferred out of this line item to another expenditure. Consequently it cannot be said that same is necessary for T & E. Actual expenditures represent the best evidence as to whether such an item is necessary for T & E.

Upon review, the Commissioner finds that this amount is not necessary for provision of T & E and accordingly sustains the reduction of \$1,000.

Disputed Line-Item Group 12

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
6270	11-000-100-561	Regular Tuition to LEA's Within State	\$9,584

The Board argues that its tuition contract with Southern Regional High School for regular students is completed in the Spring of 1995 for the 1995-96 school year. No adjustments can be made until two years later when the state audit is complete and the actual tuition rate and number of students attending is established.

The Township argues that the typical dropout rate of Ocean Township High School students attending Southern Regional High School is approximately 2 students per year. The amount of reduction represents one full year's tuition for the cost of one student, which the Board of Education will realize in savings in the event of two high school students leaving

school in the middle of the year. On average however, most dropouts occur early in the school year.

Upon review, the Commissioner finds that prospective adjustments of the sort proposed by the Township are neither possible within the current regulatory framework nor appropriate in terms of educational expectation. Accordingly, this amount is deemed necessary for T & E and the \$9,584 is restored.

Disputed Line-Item Group 13

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
6280	11-000-100-562	Special Education Tuition to LEA's within the State	\$23,172

The Board argues that the Township's reason for this cut is unclear. However, the justification for these funds is provided in the previous line item since it is part of the tuition contract with Southern Regional High School. In addition, these special education placements are determined by the child study team and, thus, required.

The Township argues that the amount budgeted for this line item in the 1994-95 budget year does not approach the proposed increase in said funds for the next budget year. Based upon last year's expenditures, the amount cut reflects the actual amount which can be expected to be expended from this line item. Actual expenditures represent the best evidence as to whether such an item is necessary for a T & E.

Upon review, the Commissioner finds the Township's rationale to be invalid, since these amounts represent actual costs and are not necessarily constant from year to year. The services supported by this account being necessary for T & E, the Commissioner restores the \$23,172.

Disputed Line-Item Group 14

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
6280	11-000-100-562	Tuition for Public Schools Handicapped Within the State	\$2,800
6310	11-000-100-565	Tuition to Reg'l Day School	\$1,400
6320	11-000-100-566	Tuition to Priv. Sch. for the Handicapped Within the State	\$15,000

The Board argues that placement of special education students into summer programs is determined by the Child Study Team in accordance with N.J.A.C. 6:28. Funds are therefore required to implement students' IEPs.

The Township argues that while tuition for public schools for the handicapped is absolutely essential for a thorough and efficient education, tuition for summer school is not. No other summer-school line items are remaining, nor should this one. Parents are free to pay tuition to an outside school district in the event they wish their children to attend summer school. The taxpayers are required to provide a thorough and efficient education, they should not be required to pay twice for something previously taught during the school year.

Upon review, the Commissioner finds that the Township misconstrues the nature of special education summer placements. Where such placements are found necessary as part of a student's IEP, they must be provided by the District regardless of the presence or absence of any other summer program. Accordingly, as these monies are necessary for T & E, these reductions of \$2,800, \$1,400 and \$15,000 are restored.

Disputed Line-Item Group 15

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
6430	11-000-213-100	Salary for Medical Inspector	\$2,000

The Board argues that it is required by law and policy to examine each student annually to determine the presence of physical defects. The Board has agreed to pay the Medical Inspector \$4,751 for 1995-96 school year, an amount which represents less than \$10 per student, per examination. The Medical Inspector is paid twice a year, in December and June, so that the 1994-95 account will zero out on June 30, 1995. The disputed funds are necessary to provide the full salary for the Medical Inspector for the 1995-96 school year.

The Township argues that, based upon the current school year's expenditures with respect to this line item, \$2,000 can be cut without affecting a thorough and efficient education. Moreover, the Board's own policy permits students to provide proof of physicals from their own doctors which are paid for by themselves and their families and/or through their private health insurance.

Upon review, the Commissioner determines that physical exams are required pursuant to statute and regulation, and that a provision permitting substitution of a private

physician at the choice of the parents cannot be construed to permit boards to rely on such choices in failing to provide for a mandated service. The Commissioner further finds that there are no excess funds in the 1994-95 account, as claimed, so that the full 1995-96 appropriation of \$2,000 is restored as necessary for a T & E education.

Disputed Line-Item Group 16

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
6430	11-000-213-100	Nurse's Salary (WES)	\$32,150
6430	11-000-213-100	Subst. Nurse's Salary (WES)	\$600
6460	11-000-213-600	Supplies and Equipment	\$600

The Board argues that these funds are necessary to provide salaries for the two nurses assigned to the District's two schools and a substitute, as well as for replenishing nursing supplies. Currently, the Waretown Elementary school has a student population of 420 students with yearly increases which will bring that amount to 435-440 students in the 1995-96 school year, and approximately 300 students in the Frederic A. Priff School. In sampling the nurse's reports to the Board, it is noted that between the two schools the nurses see nearly 1700 students (conservative estimate) monthly for illness, accident or other reasons. The nurses teach health/family life classes, Here's Looking At You 2000, Operation Aware, B.A.B.E.S., and the HIV/AIDS curriculum. They also dispense between 40 to 50 medications daily, attend to emergency situations (including an ever-increasing number of respiratory situations) for both students and staff. Nurses are responsible for reports, data and work related to dental health programs, school lunch/nutrition programs, physicals, emergency carding and follow-up, screenings, PAC (Pupil Assistance Committee) and the NERC grant. Provisions must be made for a substitute to dispense medication when the regular nurse(s) are on field trips.

The Township argues that the District, while it consists of two school buildings, is actually a single campus setting with two schools separated by a playground. A thorough and efficient education can clearly be provided by a single nurse working a half a day in each building. To travel from one building to the other requires a simple walk across a playground. Modern communications such as phone and beeper systems make the remaining nurse available instantly in the event of an emergency. In addition, the Department of Education has determined that elementary students do not require transportation to school within a two-mile radius if

hazardous conditions do not exist, and no hazardous condition would prevent students from walking across a playground to another school building to see a nurse. The Township Committee believes that a thorough and efficient education is provided in other school districts which do not provide for a campus type setting, with larger student populations and a single nurse. Although it is a salutary goal to have two nurses in the school district, a reduction of force must be taken to promote economy. This reduction of the nursing staff to a single nurse would not adversely affect T & E, and there is no basis to require nurses to attend field trips. As to supplies, as a result of the reduction in force in nursing staff necessitated by current budget constraints, a savings in supplies will be realized. In addition, based on last year's expenditures, the amount of this item as reduced is a more accurate reflection of actual expenditures for the current school year. Actual expenditures represent the best evidence as to whether such an item is necessary for T & E.

Upon review, the Commissioner finds that, notwithstanding the broad scope of their duties within the District's T & E educational program, as well as their provision of necessary medical services, two nurses are not essential to a district of the type and configuration of Ocean Township. The Commissioner finds that many duties assigned to two school nurses may be performed by the remaining nurse and other appropriately certificated staff, including the Student Assistance Counselor funded in part below. While two full-time nurses may be an optimal arrangement, this configuration cannot be found strictly necessary for T & E and, thus, cannot be sustained herein. Similarly, with respect to supplies, sufficient funds appear to be available to properly equip the nurse's office based on prior actual expenditures. The Board has, however, demonstrated its need for substitute coverage, in that pupils with medical conditions may not be prevented from attending field trips on that basis. Accordingly, the reduction of 600 for substitutes is restored, while the salary and supply reductions of \$32,150 and \$600 are sustained.

Disputed Line-Item Group 17

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
6490	11-000-218-104	Other Support Serv.-Students Reg. Detention-Sal. Other Prof. Staff	\$500

The Board argues that these funds are necessary to pay for staff members who monitor after-school detention, which is an important part of the District's discipline program. The appropriation is calculated exactly for the number of sessions and the cost for salaries as listed in the contract with the teachers' union. All funds will be expended by June 1995 from the current 1994-95 school budget, notwithstanding that when the Township looked at the current budget, these funds had not yet been expended. Detention provides a tangible consequence for infraction of school rules and reminds students of their responsibility in the education process and in the importance of appropriate behavior. It also reduces the incidence of suspension by providing intermediate disciplinary action.

The Township argues that this line item as reduced, more accurately reflects the expenditures in this item in the current school year budget. As amended, the amount provided would still represent a 5% increase over the actual expenditure in this line item in the current school-year budget. Actual expenditures represent the best evidence as to whether such an item is necessary for a thorough and efficient education. In addition, taxpayers should not have to support discipline imposed after school so as to necessitate paying staff.

Upon review, the Commissioner finds that the Board has explained the disparity between 1994-95 expenditures and 1995-96 budget amounts, thus vitiating the primary basis for the Township's reduction. The Commissioner further finds that detentions are an appropriate component of a comprehensive discipline plan, maintenance of which is necessary for T & E so that this reduction of \$500 is restored. However, if the amounts budgeted are paid to teachers, they should be coded in the appropriate teacher salary accounts, while if not, they should be coded under Operations and Maintenance as a health and safety cost. The Board is, therefore, directed to revise and resubmit its budget accordingly.

Disputed Line-Item Group 18

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Cap Waiver Requested</u>	<u>Amount Contested</u>
6510	11-000-218-110	Other Salaries-Student Assistance Counselor	\$34,350	\$33,000

The Board argues that this amount, which was part of its T & E cap waiver request, funds the salary of the student assistance counselor who provides services to the entire student/parent community, including counseling at-risk students and families, parent/teacher

training in child development and handling of difficulties, coordination of substance abuse prevention programs, liaison and referral person for social service and other outside agencies, directing of peer mediation and conflict resolution programs, and grantwriting. The counselor has proven to be a vital part of keeping the District's students ready and able to learn, and of preventing loss of students to disaffection, substance abuse and other ills.

The Township argues that T & E does not mandate a full-time counselor to be provided in the Ocean Township School District. Social workers are available, as well as appropriate administrative and teaching staff members. In addition, as a result of the voters' defeat of the 1993-94 School District budget, the Township Committee recommended that this position not be filled during the current calendar year. The Ocean Township School District agreed to the amount of said reduction without an appeal being filed with the Commissioner, but then funded this position from other line items.

Upon review, the Commissioner finds that the Board has demonstrated the necessity for services of the type provided by this position, but that it has not demonstrated that such services cannot be provided to a student population of 650 with less than a full-time position given the overall staffing patterns of the district. Accordingly, the Commissioner determines to grant a cap waiver in the amount of \$17,175 in order to fund this position on a half-time basis.

Disputed Line-Item Group 19

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Cap Waiver Requested</u>	<u>Amount Contested</u>
6580	11-000-219-104	Salaries-Other Prof. Staff	\$12,220	\$12,220
6590	11-000-219-105	Salaries-Secretarial Clerical Assistant	\$ 3,008	\$ 3,008

The Board argues that these funds are necessary to provide a part-time social worker over and above the full-time position now in the District, and to support increasing the child-study team secretary from 1/2-time to 3/4 time. These positions are necessitated by the enormous increase in special education needs that has occurred over the past few years, with preschool handicapped programs doubling in size and special education programs having increased by 35%. Professional duties would include case management, crisis counseling, and

parent training in coordination with IEP services, while clerical include preparation of child study team reports, IEP and parent notices.

The Township argues that one full-time social worker in a single campus elementary school setting is sufficient to meet the Constitutional mandate for T & E. Modern communications would make this social worker available, in either school, at a moment's notice. In addition, the Board has not provided any evidence that clerical work is currently not being done within current staffing patterns, and, rather than increasing a 1/2 position to a 3/4 position so as to necessitate provision of full benefits, in an effort to economize, the Board could hire an hourly worker with no additional benefits in order to deal with any overflow.

Upon review, the Commissioner notes that the funds within the base budget designated for child study team salaries appear sufficient to fully fund two full-time positions. Accordingly, there is no basis on which to permit waiver of expenditure limitations in order to fund an additional part-time position. The Board has, however, demonstrated the need for extended clerical services. Accordingly, the Commissioner denies the cap waiver request for \$12,220 and approves the request for \$3,008.

Disputed Line-Item Group 20

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
6670	11-000-219-800	Supervisor's Dues, Journal Subscription, Mileage	\$300

The Board argues that it has a contractual obligation to pay professional organization dues for the Supervisor of Special Education. Professional journals and mileage expenses are also reasonable appropriations.

The Township argues that this line item as reduced more accurately reflects the actual expenditures in the same account in the current school year. Where no basis is provided for an increase, actual expenditures represent the best evidence as to whether such an item is necessary for a thorough and efficient education.

Upon review, the Commissioner finds that the Board has not demonstrated that it cannot meet its obligations in this area without the funds in dispute. Accordingly, the reduction of \$300 is sustained. However, it is noted that funds related to the supervisor should be budgeted in Improvement of Instruction Services, under function 221, and that mileage should be

coded to a purchased services account in the 400-500 objects. Accordingly, the Board is directed to revise and resubmit its budget accordingly.

Disputed Line-Item Group 21

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
6850	11-000-222-100	Substitute Salaries-Media Spec./Library Media Clerk	\$200

The Board argues that it does not always call in a substitute for the library assistant; however, on days when there is heavy student use of in the library, the help of the assistant is vital for the efficient running of the library.

The Township argues that it is not necessary for T & E to have a substitute assistant be available each and every day. Assuming the regular assistant is absent for ten full days in accordance with the contract with the Board of Education, for illness, this loss of a library assistant for these ten days will not affect the thorough and efficient education of the students.

Upon review, the Commissioner finds that while an assistant might be helpful and even desirable during periods of peak usage, the Board has not demonstrated that it cannot provide T & E in the absence of such an assistant. Accordingly, the reduction of \$200 is sustained.

Disputed Line-Item Group 22

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
6850	11-000-222-100	Salaries-Educational Media Library	\$900

The Board argues that, during the summer, its library assistant does a great deal to prepare new books, file cards and access data into the library computer. Because the library is not fully automated, the assistant does a great deal to prepare student files and set up new class schedules for the library in the computer. In a three-week period she prepares books for shelving and does all the retrofitting so there is no delay in library and book selection. If the District did not have this person working in the Summer, students would not be able to properly utilize the library until later in the fall. This disruption of program would impact negatively on T & E.

The Township argues that a thorough and efficient education does not require a summer library assistant. Any work performed by this assistant can be scheduled during the school year at no additional cost to the Board of Education by staff members. Based upon current budget constraints and the potential loss of programs and staff members, this cannot be considered a thorough and efficient item.

Upon review, the Commissioner finds that a T & E system of education requires a properly functioning library, and that where services cannot be provided during the school year without significant disruption of student library use, the Board is justified in procuring summer assistance to assure that the library is functional at the start of the year. Accordingly, the Commissioner restores this amount of \$900.

Disputed Line-Item Group 23

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
6880	11-000-222-600	Media/School Library Supplies, Materials, Books	\$12,800

The Board argues that, according to American Library Association Recommendations and Standards, a library, well-established, needs to purge outdated and overused books at regular intervals, adding new titles and replacing worn-out old books. The District's library circulation is high and books wear out from use. Also, reference materials need constant updating to remain current. Lack of adequate computerized sources necessitates buying encyclopedias, almanacs, geography materials and general research resources yearly. The librarian has analyzed the District's collection and at least 1,000 volumes must be discarded because they contain outdated information, such as an anticipated first trip to the moon. Non-fiction books must contain accurate information, and this replacement alone will conservatively cost \$15,000 (at a low figure of \$15 per book - most are higher). New books are needed in fiction to stimulate reading among students whose interest will drop rapidly if all they see are old books. The school is very involved with the county library system, but it is not readily accessible to all students or to large groups at one time. Students would need to be bused to use the town library, and the building itself is not appropriate for all students' needs. The State's mandatory requirement for teaching of library and research skills is best met in an adequately stocked school library. Finally, the Board notes that full expenditure of this line has not occurred because it was

frozen before completion of ordering for the year. Two years ago the full book amount was zeroed out, and the District is simply trying to catch up to circulation and students' needs. The Board contends that technology in the library is seriously inadequate with no computers for student use.

The Township argues that the library in the Frederic A. Priff Elementary School has been in existence for well over 15 years. The library is well established. The amount this item is reduced would still permit adequate expenditures for periodical updates, etc., and maintenance of the library to insure a thorough and efficient education for the students. In times of budgetary constraints, when programs, and/or staff members may be reduced, additional expenditures for new books, technology and equipment, when balanced, cannot be considered necessary for a thorough and efficient education. In addition, a full services branch of the Ocean County Library which is about to expand, is available to supplement the school District's library. Finally, the current school year budget has not approached full expenditure of this item. Actual expenditures represent the best evidence as to whether such an item is necessary for a thorough and efficient education.

Upon review, the Commissioner finds that a site-based library is an important component of T & E in an elementary school district such as Ocean Township, and that the updating and enhancements proposed by the Board are necessary to ensure continued provision of T & E. Accordingly, this reduction of \$12,800 is restored.

Disputed Line-Item Group 24

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
6880	11-000-222-600	Library Equipment/New Replacement	\$2,700

The Board argues that, although the Waretown Elementary School Library is relatively new, it is emerging as the hub of the newly constructed elementary school. In order to provide T & E, periodicals, new books, supplies to keep automation of the library current, bulbs and proper equipment for the efficient running of the audio visual equipment in the media center are necessary.

The Township argues that the Ocean Township School District, although consisting of two buildings, is actually one campus, separated by a single playground. All

students have access to the Frederic A. Priff Library, which has been in existence for over 15 years. In addition, a full-service branch of the Ocean County Library System, which is about to expand, is available for students to meet their library needs. The Waretown School Library should certainly expand in the future; however, such expansion, in the face of potential loss of programs and staff members, should be undertaken at a slow and deliberate pace.

Upon review, the Commissioner finds that the updating and expansion proposed by the Board do not reflect any ambitious growth and development, but rather reflect a desire to keep the library current rather than let it fall into deficiencies and obsolescence so serious as to require major expenditures at some future date. As maintaining a functional library is necessary for T & E, the Commissioner restores this reduction of \$2,700.

Disputed Line-Item Group 25

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
6950	11-000-230-530	Telephone Communication	\$2,000

The Board argues that it needs the entire amount appropriated, and responds to arguments regarding 1994-95 levels by noting that it anticipates spending \$2,000 when May and June invoices are received from AT&T and Bell Atlantic.

The Township argues that nearly 34% of this line item was not expended during the current budget year, that, even after the reduction of \$2,000, this line item nevertheless represents a 30% increase over actual expenditures incurred during 1994-95, and that actual expenditures represent the best evidence as to whether such an item is necessary for a thorough and efficient education.

Upon review, the Commissioner finds that the Board has demonstrated that the Township's arguments are based on incomplete information and cannot be sustained. Accordingly, the reduction of \$2,000 is restored.

Disputed Line-Item Group 26

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
6950	11-000-230-530	Stamped Envelopes, Postage for Special Services	\$725

The Board argues that the number of special education students has increased from 82 to 111. This will require additional postage to send classified records by registered mail for students that transfer out of the district, letters and "Parental Right Handbook" materials to parents, and IEPs to parents at the end of the summer. In addition to an increase in the number of students to be served, postage costs have increased as well.

The Township argues that a substantial portion of this line item has never been expended during the current budget year. Even as reduced, this line item will represent a 25% increase over the actual expenditures made during the current calendar year. Actual expenditures represent the best evidence as to whether such an item is necessary for a thorough and efficient education.

Upon review, the Commissioner finds that the Board has not shown that it cannot meet its needs within the limits of the remaining appropriation. Accordingly, this reduction of \$725 is sustained.

Disputed Line-Item Group 27

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
6950	11-000-230-530	Postage	\$300
6950	11-000-230-530	General Admin.-Support	\$1,000
6950	11-000-230-530	Stamped Envelopes & Postage	\$300
6950	11-000-230-530	Postage for Transport. Dept. Serv. Communicat./Postage	\$480
6950	11-000-230-530	Postage	\$500

The Board argues that the first appropriation is the same as for the 1994-95 budget, and that the entire amount is needed since student enrollment is up and postage costs have increased. The second appropriation is needed since the Board is planning to send an additional newsletter to the public in 1995-96, and postage costs have increased. The third item is needed because the District currently utilizes a good deal of postage at the end of the summer and the beginning of the school year and this amount includes petty cash funding that helps to efficiently run the District office. The fourth appropriation is needed since student enrollment is up and postage rates have increased; also, additional mailings will be required to parents in order to communicate information as a result of the loss of courtesy busing. Finally, the last amount is due to postage increases and increases in UPS costs.

The Township argues that most of these line items have significant amounts remaining in the current calendar year, and that, as reduced, they more accurately reflect the actual expenditures incurred by the Board of Education while allowing for reasonable increases. As to transportation-related accounts, the Township argues that it is not necessary for a thorough and efficient education for each and every home to receive personal correspondence which would reflect a bus schedule. Other means are available to notify parents including free publication in local newspapers or classified advertising. Public facilities such as municipal buildings, schools, post offices, etc., could be utilized for the positing of same. In addition, the current cable television system, through Southern Regional High School, will televise such schedules on its high school news network. The Township Committee cannot understand how a mailing to parents reflecting bus stops can represent an amount necessary for a thorough and efficient education when the actual transportation of said students does not.

Upon review, the Commissioner concurs that there appears to be no reason why the Board cannot, by effectuating reasonable economies, conduct its essential business within the confines of the reductions made by the Township, which do in fact allow for some increase from last year's demonstrated spending levels so as to account for cost increases. Accordingly, these reductions of \$300, \$1,000, \$300, \$480 and \$500 are sustained.

Disputed Line-Item Group 28

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
7010	11-000-240-103	Salary-Principal	\$27,900
7050	11-000-240-300	Principal's Expenses/Workshops	\$200
7060	11-000-240-500	Mileage for Workshops, Meals, Accommodations	\$250
7080	11-000-240-800	Sch. Administration-Misc.	\$700

The Board argues that elimination of a building principal, as proposed by the Township, would require the superintendent to function as both building principal and superintendent. The Board contends that the position of principal is necessary for a thorough and efficient education for the students in the Priff School because the alternative (superintendent/principal combination) would not adequately meet the educational needs and goals of the District. Eight years ago, the superintendent did function as both superintendent and building principal, contrary to the State Department of Education's recommendation during

monitoring that these positions be separated. At the time the District was growing and the functions of the two positions were too much for one person, so the Board of Education placed one person in each position. The District has continued to grow and the responsibilities associated with these positions have continued to increase as well. The superintendent's duties are different from the principal's and both require full-time attention. The superintendent is responsible for coordination of the entire District, including all issues related to our sending relationship to Southern Regional Middle School and High School. The superintendent has required meetings with the County Superintendent, the community, the Board of Education, and local school staff which are separate from the principal's meetings with county staff and other elementary district principals, curriculum meetings, school planning and education council meetings. The superintendent coordinates District departmental operations for both elementary schools to include: professional administrators, school business department, cafeteria management, maintenance/custodial departments and the transportation department. Also, the Ocean Township School District does not employ a curriculum supervisor - the principal fulfills this duty, as well as other duties, some of which in larger districts are assigned to other supervisors. The only supervisor in Ocean Township is one for Special Education/Basic Skills.

In terms of work hours, the superintendent and principals work well beyond regular hours. The principal is involved in all school programs and with students on a daily basis. The superintendent must be available for the District and community at large to deal with issues such as building additions, long-range facilities planning, District-wide plans, overall management, coordination of supervisory teams, public relations, air quality, asbestos, Right to Know, etc., especially in light of the recent death of the maintenance supervisor and the possibility of his non-replacement (on appeal as part of cap waiver). Disciplinary problems are now more serious and complex in grades K-6 than in the past, and the principal works each day to prevent problems, to assist high-risk students, and to provide consultative time to staff, counselors and parents. The Frederic A. Priff elementary principal is also a New Jersey certified Director of Pupil Personnel Services and supervises the counseling program and shares the counselor's case load. The assistant counselor is only available three days per week at the Frederic A. Priff School. Counseling in crisis matters requires five days per week and sometimes weekend work.

The Board contends that its schools operate well due to the judicious use of administrative personnel and division of labor. The District is responsive to parental and community requirements and expectations for the thorough and efficient education because staff work with families and make them part of the educational process. The administrative structure allows for prompt, efficient and realistic communication and coordination with parents and the community regarding programs, planning, issues and individual student needs. A reduction in the administrative team would drastically curtail the District's ability to fulfill even the "letter of the law" in terms of educational responsibilities to children, not to mention the negative impact on its spirit. When people are overworked to the degree this reduction would require, the price paid in long-term quality would be far greater to the students and the schools than the financial cost of the principal's position. Finally, the Board notes that Ocean Township was not one of the 70 districts penalized for excessive administrative costs when the State Department of Education reviewed such costs last year.

The Township argues that the District currently has over 600 students at the elementary school level, who are divided between schools which are separated by a playground. As part of a reduction in force and in an effort to economize, one principal position should be eliminated and the Ocean Township Superintendent should act as a Superintendent/Building Principal. Recognizing that a principal with tenure, affected by a reduction in force, may through seniority, make a claim for a position as opposed to any nontenured teacher within the principal's area of teaching certification, the Township reduced this line item by \$27,900 to reflect the current salary of a starting nontenured teacher who would actually be affected by this reduction in force. In addition, K-6 districts do not incur the disciplinary problems which would exist in K-8 or K-12 districts. Finally, due to elimination of the principal's position, line items covering incidental expenses can be eliminated as well.

Upon review, the Commissioner finds that the Township's reduction is based solely on the number of students and buildings within the District, and takes no meaningful account of the District's current administrative structure, which cannot be so significantly altered on such short notice. Accordingly, the Township's reductions of \$27,900, \$200, \$250 and \$700 are restored. However, the Commissioner agrees that District's current administrative configuration could be made more efficient, and, therefore, directs the Board to undertake an

analysis of its administrative needs and develop a plan for revision to be presented to the County Superintendent prior to development of the Board's budget for 1996-97.

Disputed Line-Item Group 29

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
7070	11-000-240-600	Administrative Office Supplies and Materials	\$1,000

The Board argues that 1994-95 appropriations remained unused because the superintendent issued a budget freeze which caused the office to do without some needed supplies and to deplete all stock in inventory, instead of buying ahead at cheaper prices during off-peak ordering time.

The Township argues that over 45% remains in the current school budget in this line item. As reduced, the line item will still retain over a 5% increase in actual expenditures from the current school year. Actual expenditures represent the best evidence as to whether such an item is necessary for a thorough and efficient education.

Upon review, the Commissioner finds that the Board has not demonstrated its inability to provide a T & E education in the absence of these funds. Accordingly, the reduction of \$1,000 is sustained.

Disputed Line-Item Group 30

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
7070	11-000-240-600	Administrative Office Supplies and Materials	\$1,000
		<u>Related Cap Waiver Request</u>	
7070	11-000-240-600	Supplies and Materials	\$2,000

The Board contends, with respect to the General Fund budget, that earlier in the budget process it cut 15% of the original, already bare minimum amount, and that it cannot sustain a cut of \$1,000 more without the efficient running of the office being affected. Supplies and materials reflect the cost of toner for existing and budgeted Xerox machines and printers.

The Township argues that the current school year budget maintains approximately 37% in the 11-100-240-600 account which has not been expended. This reduction will not affect a thorough and efficient education and more accurately reflects actual expenditures.

Upon review, the Commissioner finds that the Board has not demonstrated that it cannot provide T & E within the totality of the limitations of the base budget line item as fixed by the Township with the addition of requested cap waiver amounts. Accordingly, the Township's reduction of \$1,000 is sustained, and the cap waiver request of \$2,000 is granted.

Disputed Line-Item Group 31

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
7100	11-000-260-100	Salary-Sub. Custodians (FAP)	\$2,500
7100	11-000-260-100	Salary-Sub. Custodians (WES)	\$2,500

The Board argues that these funds are used for substitutes during the summer who provide basic cleaning, while regular custodians perform maintenance duties such as painting, carpentry, electrical and plumbing repairs, etc., all critical for getting buildings cleaned, repaired and ready for school in September.

The Township argues that the District does not employ in-house maintenance personnel, so substitutes are not warranted. In addition, \$3,000 was budgeted in the current school year and said amount has not been fully expended. There is no reason provided for an increase in this line item over current expenditures.

Upon review, the Commissioner finds that the Board has not shown its inability to accomplish the necessary tasks within the limits of available appropriations. Accordingly, the reductions of \$2,500 and \$2,500 are sustained.

Disputed Line-Item Group 32

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
7110	11-100-260-300	Purchased Professional & Technical Services	\$1,000

The Board argues that no one on staff is licensed to deal with chemicals for weed control. In addition, it is just as economical to have a vendor provide services as it is for the District to provide for in-house staff time and materials.

The Township argues that nearly 86% of the amount budgeted for this line item in 1994-95 has not been expended. No contracts have been provided to the Township Committee to substantiate the items set forth in this line item. In particular, the Township Committee does not believe that weed control is necessary for a thorough and efficient education. In addition, account 11-000-260-610 contains an amount of \$1,500 for "grounds care," which could be a duplication of the weed control expense set forth under this line item.

Upon review, the Commissioner finds that the Board has not demonstrated its inability to provide for adequate grounds care in the absence of this line item. Accordingly, the reduction of \$1,000 is sustained.

Disputed Line-Item Group 33

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
7120	11-100-260-420	Operation/Maintenance Services, Cleaning, Repair, Maintenance Services	\$ 740

The Board argues that this amount is appropriated for typewriter cleaning/repair, copy machine maintenance contract (toner and repairs) and maintenance clean-up services by Department of Correction workers. The superintendent's office needs to keep office machinery in good working order and the District needs the assistance of Department of Correction workers for large clean-up projects that cannot be done by custodial staff.

The Township argues that the current school-year budget reflects that only \$900 has been spent from this line item as of this date. As reduced, this line item would reflect an increase over last year's actual expenditures by over 30%. Actual expenditures represent the best evidence as to whether such an item is necessary for a thorough and efficient education.

Upon review, the Commissioner finds that the Board has not demonstrated that the allocation remaining after reduction, particularly in light of its concurrent cap waiver requests in related areas of this account, is insufficient to enable necessary tasks to be performed. Accordingly, the reduction of \$740 is sustained.

Disputed Line-Item Group 34

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
7120	11-000-260-420	Maintenance of Computer, Printers	\$3,000
7120	11-000-260-420	Operation/Maintenance of	\$1,000

Plant Services

Related Cap Waiver Request

7120 11-000-260-420 Operations/Maintenance \$4,000

The Board argues that computer, copier and laminator usage is at a high level in a school and a main office serving 50 staff and 420 children. It is essential to properly maintain both existing, budgeted machines and donated, used machines through adequate supply provisions and service contracts.

The Township argues that, according to records provided by the Board of Education, over \$2,000 from this line item was transferred out and spent elsewhere during 1994-95. Expenditures from this line item amounted to only approximately \$4,000 in 1994-95, so that, as reduced, the account would still reflect an increase over last year's expenditures by approximately 10%. As to the Board's cap waiver request, the Township also notes that reduction of a principal's position, supra, should result in a need for less office equipment, hence elimination or reduction of the Board's request.

Upon review, the Commissioner finds that the Board has not demonstrated its need for both the General Fund budget amount and the cap waiver request in order to provide T & E. Accordingly, the Township's reductions of \$3,000 and \$1,000 are sustained, but the cap waiver request of \$4,000 is granted.

Disputed Line-Item Group 35

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
7170	11-000-260-610	Materials for Bookcases, Classrooms Computer Tables, Shelves	\$200
7170	11-100-260-610	Materials for Mailboxes, Shelves, Bookcases	\$500

In the first instance, the Board argues that the entire account is \$500 and that the shelves in question are not for the administrator's office, but rather for the entire school. Also, it should be obvious by the small amount of money in the account that the project is spaced out over years. In the second instance, the Board contends that it needs to expand mailboxes in the main office due to increased staff and space needs, and that since a new wing has opened, it has been without needed shelves and bookcases as they were removed from last year's budget.

The Township argues that a thorough and efficient education does not require additional expenditures for shelves and bookcases in the administration office. Likewise, such an expenditure can be spaced over different budget years rather than purchasing all at one time. With respect to mailboxes, the Township contends that, during 1994-95, amounts for this line item were not expended for those purposes, but rather transferred out. If mailboxes are actually required, even as amended, this line item leaves sufficient funds during this next budget year.

Upon review, the Commissioner finds that the Board has not demonstrated its inability to meet these costs within the limits of available appropriations remaining in appropriate supply accounts. Accordingly, the reductions of \$200 and \$500 are sustained.

Disputed Line-Item Group 36

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
7170	11-000-260-610	Tools, Etc.	\$500

The Board argues that this amount is required to replace hand and power tools and parts. It is also needed to purchase paint and humidifiers for areas of the schools that become damp in humid weather.

The Township argues that an excessive amount has been budgeted for hand tools. As reduced, \$1,000 would remain to purchase such drills, ratchets, wrenches and power tools.

Upon review, the Commissioner finds that the monies in this account are intended not only for purchase of tools, but also for other maintenance purposes necessary to T & E. Accordingly, the reduction of \$500 is restored.

Disputed Line-Item Group 37

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
7180	11-000-260-620	Energy Costs	\$10,000

The Board argues that there is no room in the buildings for the offices and programs that occupy the four modular classrooms, and that the amount appropriated is a very conservative estimate based on 1994-95 experience. A cold winter and a hot summer could cause serious budgetary difficulty.

The Township argues that the District has recently completed additions to its two schools, for which it is currently paying through a lease purchase arrangement. While outside

trailers may have been necessary prior to the completion of these additions and, in fact, was the reason cited for said additions, that need no longer exists. A thorough and efficient education can certainly be provided with administrative offices being in the currently existing school buildings at less cost to the Board of Education. While some school districts may provide for separate administration buildings from school facilities, and a need may arise in the future in the event future additions are required, that need does not currently exist. Finally, as a result of the reduction of a principal position, the superintendent/principal should be located in the building for which he will be responsible.

Upon review, the Commissioner finds that the supporting documentation provided by the Board consistent with the instructions contained in the April 7, 1995 letter from the Assistant Commissioner referenced above demonstrate that the Board's current space usage is appropriate. Moreover, the Township's proposed elimination of a principal's position will not necessarily result in a need for sufficiently less administrative space to warrant complete closure of modular classrooms. Accordingly, the reduction of \$10,000 in this account is restored.

Disputed Line-Item Group 38

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
7210	11-000-270-270	Salary-Transportation Liaison	\$15,000
7320	11-000-270-600	Office Supplies	\$500
7340	11-000-270-890	Mileage, Tolls, Dues	\$240

The Board argues that the transportation liaison provides a critical function in the school district, in that this person develops routes, coordinates services, prepares bid specifications, resolves parental problems, etc. Office supplies are for the transportation liaison's office, and mileage, tolls and dues are for workshop registrations, travel expenses, etc.

The Township argues that T & E does not require a full-time transportation liaison when the Board contracts for its busing services. This position represents a duplication of services and is the responsibility of the contractor. While certainly at the beginning of a school year, transportation issues may arise, these issues can and should be addressed by existing or hourly employees to act as liaison with parents. As amended, a sufficient sum remains to pay such a liaison for the beginning of a school year. It is the contractor's responsibility to insure that its drivers are licensed and meet all state requirements, and it is not necessary for a thorough

and efficient education for a coordinator to oversee a private company who is being paid to provide such services. Finally, as a result of the defeat of the cap waiver, in the event courtesy busing is completely eliminated, clearly there is no need for a transportation liaison.

Upon review, the Commissioner finds that the services provided by the transportation liaison do not duplicate contracted services and are necessary for T & E. Accordingly, the reductions of \$15,000, \$500 and \$240 are restored. However, the Board is directed to make the mileage, tolls and dues restorations to the proper account (11-000-270-593) and submit its revised budget accordingly.

Disputed Line-Item Group 39

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Non-T & E Waiver Amount</u>	<u>Amount Added</u>
		Transportation Costs (Regular) to Vendors/Aid-		
7260	11-000-270-511	in-Lieu of Transportation	\$161,149	\$132,149

The Board notes that these funds are appropriated in the non-T&E cap waiver budget. Voter rejected cap waivers are not subject to the review and action of the governing body, and there is no provision in law or code which authorizes a governing body to set a budget appropriation over cap. As noted above, however, the Board asks the Commissioner to consider this amount as necessary for T & E in light of the Board busing contractor's pending suit for enforcement of contract, or alternatively, to declare that the contract cannot be enforced.

The Township argues that it strongly believes that a thorough and efficient education cannot be satisfied unless students are safely transported and arrive at their school building. The majority of Township residents are located on the opposite side of a state highway from the two school buildings and must traverse same in order to arrive safely. Contrary to repeated requests of the Township Committee, the NJ Department of Transportation has not authorized any additional traffic lights along State Highway Route 9 where only one currently exists in the municipality. The Township Committee by and through its Chief of Police has determined pursuant to P.L. 1995, c. 95 that a hazardous walking condition exists for the great majority of the Township's school children. At the time the budget was presented to the voters, the law was not yet in effect. However, the Township is cognizant that both it and/or the County Superintendent of Schools and/or the Commissioner of Education, in accordance with Board of

Education of Borough of Edgewater vs. Mayor and Council of the Borough of Edgewater, supra. may and, in fact, should attempt to reallocate those items necessary for a thorough and efficient education with respect to the Board's general base budget and its cap waiver request. The Township has determined that the sum of \$132,149 is necessary to provide safe transportation for the students of this elementary school district to cross a state highway and along a county road. As the voters of the Township of Ocean did not have an opportunity to vote on same as part of the Board's general budget, the Township has determined that this sum must be reallocated and placed back into this account number to insure a thorough and efficient education and the safety of these elementary school children.

Upon review, the Commissioner determines that, it being well-established that non-mandatory ("courtesy") busing for reason of safety is not a necessary component of T & E, this amount cannot be appropriated by the District in the wake of voter rejection of the Board's cap waiver question, nor can any directive of the County Superintendent or Commissioner result in such appropriation. Further, as noted above, the Township has no authority to make cap waiver "reallocations" of any kind within the framework of its review of the defeated General Fund budget proposition, contrary to its reading of Edgewater, supra. Neither is the present appeal an appropriate forum for determining, assuming, arguendo, that the Commissioner would even have jurisdiction to do so, the enforceability of the Board's existing multi-year contract with its busing provider. Accordingly, the Township's action appropriating funds for provision of courtesy busing is reversed and no amount for courtesy busing is included within either the General Fund budget or T & E cap waiver amounts approved herein.

Disputed Line-Item Group 40

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
7310	11-000-270-593	Vehicles - Insurance	\$200

The Board argues that this money covers insurance costs for a bus used for the summer Latchkey Program. The bus does not transport students to and from the program, but to a local lake and other areas for recreation.

The Township argues that summer school is not necessary for a thorough and efficient education, so that a vehicle with respect to same is not necessary.

Upon review, the Commissioner finds that, given the existence of the Latchkey Program and the absence of any dispute (and hence any information on record) regarding its continuation overall, that insurance costs to maintain its present mode of operation should be considered as necessary for T & E. Accordingly, the reduction of \$200 is restored.

Disputed Line-Item Group 41

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
7360	11-000-290-100	Salaries - Board Office	\$7,000

The Board argues that the position of secretary/payroll clerk was filled September 1, 1993 because the school business administrator/board secretary and bookkeeper could no longer handle the workload. Reducing this position to part-time would impact severely on the school business administrator/board secretary and bookkeeper, who is also responsible for preparing purchase orders (approximately 1,200 for 1994-95 as of May) and handling Accounts Payable (at least 100 checks issued each month). The responsibilities of the secretary/payroll clerk entail more than processing a monthly payroll and following through with monthly, quarterly and year-end reports, as indicated in the job description for that position.

The Township argues that the position of secretary/payroll clerk, in view of the reduction in force and potential loss of programs in the current budget, should be scaled back to a half-time position and the bookkeeper should do payroll. In addition, an hourly part-time secretary could be hired, with no additional cost of benefits to the Board to assist with payroll.

Upon review, the Commissioner finds that the functions performed by this position are necessary for the T & E operation of the District, and that there appears to be no significant advantage--indeed, there would be a disadvantage in loss of continuity and commitment--in reducing the position to part-time and then hiring hourly help with overflow. Accordingly, the reduction of \$7,000 is restored.

Disputed Line-Item Group 42

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>	
7370	11-000-290-220	Social Security Wages		\$5,000
			<u>Related Cap Waiver Account</u>	
			<u>Requested</u>	<u>Contested</u>
7420	11-000-290-290	Other Employee Benefits	\$39,128	\$39,020
7370	11-000-290-220	Social Security Wages	\$ 1,998	\$ 1,998

As a result of the actions of the Township, four full-time positions would be eliminated and two full-time positions would be scaled back to part time with a loss of benefits. Consequently, six benefit packages, calculated at \$6,503 per employee, would be saved, as would social security costs. Thus, the Township argues that these costs can be reduced without affecting a thorough and efficient education, while the Board contends that these monies are necessary because the positions to which they are attached are necessary.

Upon review, as a result of his determinations with respect to the disputed positions herein, the Commissioner restores the \$2,668 of the Township's \$5,000 reduction (\$5,000 - \$2,332 or 2x \$1,166 average social security cost per employee), partially grants the cap waiver request for \$26,122 (\$39,128 - \$13,006 or 2x \$6,503 average benefit cost per employee) and fully grants the waiver request for \$1,998.

Disputed Line-Item Group 43

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
7420	11-000-290-290	Business & Other Support Serv. Tuition Reimbursement	\$1,000

The Board argues that these funds are necessary for its contractual obligation to the teaching staff to provide some reimbursement college courses taken to advance professional development.

The Township argues that the current school budget contains over 80% of this line item which was not expended, and that its reduction can be made while still providing for a 25% increase over actual expenditures during the current budget year.

Upon review, the Commissioner finds that, in an account of this type, actual expenditures are not necessarily the best indication of budgetary obligations, which can be fluid from year to year. However, in that the Board has offered no supporting evidence whatsoever for its claim, the Commissioner sustains the Township's reduction of \$1,000.

Disputed Line-Item Group 44

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
7450	11-000-290-500	Business & Other Support Services Other Purchased Services/Printing	\$400

The Board argues that this appropriation is necessary for printing costs for the Board's newsletters to the public.

The Township argues that over 40% of this line item remains in the current school year budget, consequently, it cannot be said that the amount sought is necessary for a thorough and efficient education.

Upon review, the Commissioner finds that the Board has not demonstrated its inability to provide newsletters and other public communication materials within the limitations of the appropriation set by the Township. Accordingly, the reduction of \$400 is sustained.

Disputed Line-Item Group 45

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Cut</u>
7490	11-000-290-890	Business & Other Support Services	\$45

The Board argues that this is not a duplication, as claimed by the Township, but funds to purchase the 1995 edition of *NJ Statutes, Title 18A - Education* for the business office. Under General Administration (Function 230), the superintendent maintains the four hardbound volumes of Title 18A, with funds also appropriated to receive the updated inserts.

The Township argues that Updates to Title 18A are provided for elsewhere in the budget, so that this duplication is not required for T & E.

Upon review, the Commissioner determines that the Board has refuted the basis for the Township's action and shown that the amount budgeted is necessary for T & E operation of the District. Accordingly, the reduction of \$45 is restored.

Disputed Line-Item Group 46

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Cap Waiver Amount Requested</u>
7100	11-000-260-100	Maintenance Salaries	\$36,370

The Board argues that these funds are necessary to support the position of maintenance supervisor, the person responsible for maintenance and repair of all systems associated with two elementary schools and two storage facilities, including heating, air conditioning, plumbing, electrical, structural, roofing, etc. This person is also responsible for the supervision of custodians, ordering and maintenance of supplies, training of workers, and various

papers and reports required by the business office or environmental laws. The Township notes only that this position should have been included in the base budget rather than the cap waiver request.

Upon review, the Commissioner finds that, within the context of the District's staffing and administrative structure, this position is necessary for the T & E operation of the District. Accordingly, the cap waiver request of \$36,370 is granted.

Disputed Line-Item Group 47

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Cap Waiver Amount Requested</u>
7700	12-110-100-730	Presch./Kdg. Equip.	\$550

The Board argues that these prorated funds are necessary to purchase a computer for use in the Waretown Elementary School Library for K-3 students to access the card catalog. The Board contends that it is essential to provide a library computer to enhance students' initial knowledge of the computer and its functions. Presently, the District does not have a computer lab in the Waretown Elementary School, so the library will become the hub of the technology instruction as part of the initial phase of the District's updated technology plan.

The Township argues that computers have previously been purchased and currently exist in each and every classroom in both buildings of the school district. A thorough and efficient education is clearly being met with such computer services. In addition, a separate computer room with a computer teacher is provided for.

Upon review, the Commissioner finds that a computer for library purposes within the context of the District's overall curriculum and technology plans is necessary for T & E. Accordingly, this cap waiver amount of \$550 is approved. However, the Board is directed to place monies for the purchase of equipment into the proper account (12-000-222-730) and submit its revised budget accordingly.

Disputed Line-Item Group 48

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Cap Waiver Requested</u>	<u>Contested</u>
7710	12-120-100-730	Library Media	\$23,059 Total	\$4,032
	12-120-100-730	Equipment Over \$500	(\$15,919 contested)	\$9,457
	12-120-100-730	Equipment Over \$500		\$1,000
	12-120-100-730	Library Equipment		\$1,430
7720	12-130-100-730	Media Equipment	\$8,470	--

The Board argues that these funds are needed to enable the District to implement its comprehensive plan to integrate technology into the school program. Plans include a technology lab at the Priff school, automation of the library, computers for certain classrooms now lacking adequate equipment, music equipment, CD Rom players, laser disc players, laminators and printers.

The Township argues that in times of economy, the Board should “make do” with existing equipment, which can be shared and does not all need to be upgraded to the level the Board contends. In addition, there is no reason why this project cannot be phased in over several years.

Upon review, the Commissioner finds that the stated purposes, within the context of the District’s overall curriculum and technology plan, are necessary for provision of T & E. Accordingly, these cap waiver amounts of \$23,059 and \$8,470 are approved. However, the Board is directed to place monies for the purchase of equipment into the proper account (12-000-222-730) and submit its revised budget accordingly.

Disputed Line-Item Group 49

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Cap Waiver Requested</u>	<u>Contested</u>
7860	12-213-100-730	Resource Room	\$1,870	--
7960	12-230-100-730	BSI Equipment - New/ Replacement	\$4,772	\$4,772

The Board argues that funds are needed to replace and expand computers and software in resource room and basic skills programs. The resource room software programs are tailored to IEP needs in reading and math, while the basic skills programs are designed to achieve maximum effect with slower learners, and new hardware is needed to enable all eligible students to have access to computer-assisted learning.

The Township argues that new computers and programs were purchased under account 12-130-100 for use in the same building and certainly co-use should be applied when faced with budgetary constraints, reductions in force and potential loss of programs.

Upon review, the Commissioner finds that this amount represents a reasonable expenditure that will enable the Board to maintain ongoing T & E programs for its special needs populations. Accordingly, the waiver requests for \$1,870 and \$4,772 are granted.

Disputed Line-Item Group 50

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Waiver Requested</u>	<u>Contested</u>
8120	12-100-219-730	Equipment-Special Services Supervisor's Office	\$6,150	\$5,600

The Board argues that these funds are necessary to replace the old, obsolete and currently nonfunctioning copier in the Special Services office. This copier services the special education, bilingual, homeless, Title I, basic skills and preschool handicapped programs, and is extremely heavily used, due both to increases in the affected populations and extensive paperwork requirements associated with these programs and students.

The Township argues that in times of budgetary constraints, the Board should repair or upgrade the existing copier, rather than seek to purchase or lease a new one.

Upon review, the Commissioner finds that the Board has demonstrated its need for a new machine and that the Township's suggestion of repair and/or upgrade is neither viable in the short run nor efficient in the long run. Accordingly, the Commissioner grants the Board's waiver request for \$6,150. However, monies for this machine, being for the supervisor's office, should be coded under Account 11-000-221-730, and the Board is directed to so budget the monies granted.

Disputed Line-Item Group 51

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Cap Waiver Requested</u>
8150	12-000-240-730	Principal's Office and Math Office	\$13,715

The Board argues that these funds are necessary to replace a copy machine that is fragile to the point of collapse and two computers in principals' offices which are so obsolete that they cannot be upgraded. The Board contends that, due to budgetary restrictions, it has ignored routine replacement and upgrade to such an extent that its heavily used office equipment is now

at the point where its condition actually impedes T & E operation of the District. Finally, a small portion of these funds is needed to purchase a storage closet.

The Township argues that an upgrade to the currently existing copy machine in the main office can be provided in times of budgetary constraints. In addition, this machine is no longer necessary due to the Township's having reduced a principal's position, and a single computer for each administrative office would certainly satisfy the need for a thorough and efficient education. Finally, a new closet in principal's office cannot be considered necessary for a thorough and efficient education.

Upon review, the Commissioner finds that the Board has demonstrated, nor has the Township refuted, that its equipment needs have reached the point of requiring large-scale replacement in order for District administration to function in a reasonably efficient manner. In addition, by making these purchases part of the District's overall technology upgrade, the Board may be able to realize economies and efficiencies not possible if purchases are made in small lots. Accordingly, the cap waiver request for \$13,715 is granted.

Disputed Line-Item Group 52

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Cap Waiver Requested</u>	<u>Contested</u>
8160	12-000-260-730	Capital Outlay	\$3,100	\$1,500

The Board argues that these funds are needed to purchase a fence to separate the playground area and roadway between the District's two schools, and for purchase of two doors for the District's modular offices to replace current ones that have rusted out.

The Township argues that, as set forth in the General Fund line item above, Modular trailer offices are not necessary for a thorough and efficient education when additions have been provided to the currently existing school buildings.

Upon review, the Commissioner finds these items necessary for basic safety and maintenance, and, in view of his prior position on the District's need for modular offices, accordingly grants the waiver request for \$3,100.

Disputed Line-Item Group 53

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Cap Waiver Requested</u>
8200	12-000-290-730	Undistr. Ex. - Bus. Other	\$3,252

The Board argues that these funds are necessary to replace the Business Office's nine-year-old printer, which is needed for GAAP, budgeting and purchase orders.

Upon review, the Commissioner finds that this is a necessary component of the District's attempt to upgrade its equipment so as to function efficiently. Accordingly, the waiver request for \$3,252 is granted.

Disputed Line-Item Group 54

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Cap Waiver Requested</u>
8270	12-000-400-450	Construction	\$18,000

The Board argues that funds are needed to repair a leaking roof in the Waretown Elementary School, which has caused the room below it to be unusable so that speech classes are now doubled up in one instructional area.

The Township contends that no itemization has been provided by the Board as to whether the amount set forth represents a new roof for the building's recently added wing, or maintenance/upgrading of the currently existing roof. If part of the recent addition, clearly the proposed repair is covered by the contractor who performed the construction. If for the maintenance of the old roof and or replacement of same, the repairs should be undertaken step by step.

Upon review, the Commissioner finds that a condition of disrepair or damage which prevents utilization of a necessary instructional space cannot be phased in over time, but must be remedied so as to provide for adequate facilities. There being no indication that any contractor is responsible for this repair so as to effectuate it at once, as opposed to the Board seeking to recover costs later, the Commissioner grants the waiver amount of \$18,000 as necessary for T & E.

APPLICATION OF SURPLUS

In its advertised annual school district budget statement, the Board projected an unreserved surplus of \$206,759 and allocated none of this amount as revenue, leaving the full \$206,759 as undesignated unreserved surplus.

Upon review of the District's annual year-end audit report,¹ the Commissioner finds that the Board underestimated its unreserved General Fund balance by \$228,122, so that \$153,994 in excess surplus is available to fund restorations as follows:

1995-96 General fund Appropriations (\$9,362,909) x 3%	\$280,887
June 30, 1994 Audited Unreserved Surplus	\$811,870
1994-95 Use of Surplus	<u>(376,989)</u>
June 30, 1995 Audited Unreserved Surplus	\$434,881
Less 1995-96 Budgeted Fund Balance	(-0-)
Remaining Unreserved, Undesignated Fund Balance	\$434,881
Less 3% Calculation	<u>(280,887)</u>
Amount Available to Fund Restorations:	\$153,994

SUMMARY

In summary, the Commissioner directs restoration or sustaining of the Township's line-item reductions to appropriations, and approval or non-approval of cap waiver amounts, as set forth below. The Commissioner further notes that all restorations and approvals of line-item appropriations are restricted in accordance with N.J.A.C. 6:20-2A.11(b)3, and that the chart below does not necessarily reflect correct codings in those cases noted above where allocations must be made by the Board based on actual usage or program distribution.

Budget Determinations

<u>Account Number</u>	<u>Description</u>	<u>Sustained</u>	<u>Restored</u>
11-110-100-101	K/PreK Salaries	\$ -0-	\$18,074
11-110-100-101	K/PreK Salaries	-0-	400
11-000-221-104	K/PreK Summer Curriculum	-0-	500
11-000-221-104	Salaries Grades 1-3	-0-	1,800
11-000-221-104	Salaries Grades 4-5	-0-	1,500
11-000-221-104	Salaries Grade 6	-0-	1,000
11-190-100-320	Summer Inservice	350	-0-
11-190-100-320	Regular Inservice	350	-0-

¹ The Commissioner notes that the 6/30/95 Report of the Board Secretary was incorrect in its balance sheet presentation. The recapitulation of budgeted fund balance, one of the most important sections of the report, was left blank. A district administration's failure to provide its board with an interim report in the mandated format will result in the board's being denied a full understanding of the district's fiscal position throughout the year, a situation which cannot be countenanced if the board is to meet its statutory and Constitutional obligations.

11-190-100-800	Mileage	100	-0-
11-190-100-500	Field Trips	500	-0-
11-190-100-500	Ancillary Materials	500	-0-
11-190-100-610	Supplies	-0-	2,788
11-190-100-640	Textbooks	-0-	2,500
11-204-100-610	NI Supplies	-0-	454
11-204-100-640	NI Textbooks	-0-	210
11-213-100-640	Resource Room Textbooks	-0-	1,000
11-215-100-610	Presch. Hand. Supplies	-0-	337
11-218-100-101	Speech Salaries	6,110	6,110
11-230-100-101	BSI Salaries	-0-	1,190
11-230-100-610	BSI Supplies	1,057	-0-
11-230-100-640	BSI Textbooks	280	-0-
11-140-100-610	Bilingual Instruction	1,000	-0-
11-000-100-561	Regular Tuition LEA	-0-	9,584
11-000-100-562	Special Tuition LEA	-0-	23,172
11-000-100-562	Special Tuition LEA	-0-	2,800
11-000-100-565	Regional Day Tuition	-0-	1,400
11-000-100-566	Presch. Hand. Tuition	-0-	15,000
11-000-213-100	Medical Insp. Salary	-0-	2,000
11-000-213-100	Nurse Salary	32,150	-0-
11-000-213-100	Substitute Nurse Salary	-0-	600
11-000-213-600	Medical Supplies	600	-0-
11-000-218-104	Support Services	-0-	500
11-000-219-800	Supervisor Dues, Etc.	300	-0-
11-000-222-100	Media Salaries	200	-0-
11-000-222-100	Media Salaries	-0-	900
11-000-222-600	Media Supplies	-0-	12,800
11-000-222-600	Library Equipment	-0-	2,700
11-000-230-530	Telephone Communication	-0-	2,000
11-000-230-530	Envelopes, Postage	725	-0-
11-000-230-530	General Postage	300	-0-
11-000-230-530	Administrative Postage	1,000	-0-
11-000-230-530	Misc. Postage	300	-0-
11-000-230-530	Transportation Postage	480	-0-
11-000-230-530	Misc. Postage	500	-0-
11-000-240-103	Principal Salaries	-0-	27,900
11-000-240-300	Principal Expenses	-0-	200
11-000-240-500	Mileage, Meals, Etc.	-0-	250
11-000-240-600	Administrative Supplies	1,000	-0-
11-000-240-600	Administrative Supplies	1,000	-0-
11-000-240-800	Misc. Administrative Costs	-0-	700
11-000-260-100	Custodian Salaries	2,500	-0-
11-000-260-100	Custodian Salaries	2,500	-0-
11-000-260-300	Purchased Professional Services	1,000	-0-

11-000-260-420	Operation/Maintenance	740	-0-
11-000-260-420	Operation/Maintenance	3,000	-0-
11-000-260-420	Operation/Maintenance	1,000	-0-
11-000-260-610	Materials/ Shelving	200	-0-
11-000-260-610	Materials/Shelving	500	-0-
11-000-260-610	Tools, Etc.	-0-	500
11-000-260-620	Energy	-0-	10,000
11-000-270-107	Transportation Liaison Salary	-0-	15,000
11-000-270-600	Transportation Office Supplies	-0-	500
11-000-270-593	Mileage, Etc.	-0-	240
11-000-270-593	Insurance	-0-	200
11-000-290-100	Board Office Salaries	-0-	7,000
11-000-290-220	Social Security	2,332	2,668
11-000-290-290	Tuition Reimbursement	1,000	-0-
11-000-290-500	Printing	400	-0-
11-000-290-890	Misc. Expenditures	<u>-0-</u>	<u>45</u>
Total Line-Item Determinations		\$63,974	\$176,522

Special Determination:

11-000-270-511 Courtesy Busing Township Action Appropriating \$132,149 Reversed

Cap Waiver Determinations

Not Necessary Necessary for T & E

<u>Account Title</u>	<u>Account Number</u>	<u>Dollar Amount</u>	<u>Dollar Amount</u>
Preschool/Kdg. - Salaries	11-110-100-101	\$ -0-	\$ 23,575
Grades 1-5 - Salaries	11-120-100-101	-0-	118,792
Grades 6-8 - Salaries	11-130-100-101	-0-	15,663
General Supplies	11-190-100-610	-0-	7,362
Textbooks	11-190-100-640	-0-	500
Salary Other Professional Staff	11-000-219-104	12,220	-0-
Salary Secretary/Clerical Asst.	11-000-219-105	-0-	3,008
Supplies and Materials	11-000-240-600	-0-	2,000
Cleaning, Repair & Maintenance	11-000-260-420	-0-	4,000
Social Security Contributions	11-000-290-220	-0-	1,998
Other Employee Benefits	11-000-290-290	13,006	26,122
Preschool/Kdg. Equipment	12-000-222-730	-0-	550
Grades 1-5 Equipment	12-000-222-730	-0-	23,059
Grades 6-8 Equipment	12-000-222-730	-0-	8,470
Resource Room/Resource Center	12-213-100-730	-0-	1,870
Basic Skills/Remedial Instr.	12-230-100-730	-0-	4,772
Undistr. Expend. Support Serv.	12-000-221-730	-0-	6,150
Undistr. Expend. School Admin.	12-000-240-730	-0-	13,715

Undistr. Expend. Operation Plant	12-000-260-730	-0-	3,100
Undistr. Expend. Business/Other	12-000-290-730	-0-	3,252
Construction Services	12-000-400-450	-0-	18,000
Other Salaries	11-000-218-110	17,175	17,175
Salaries	11-000-260-100	<u>-0-</u>	<u>36,370</u>

Total Cap Waiver Determinations: \$ 42,401 \$ 339,503

Tax Levy Proposed by Board:	\$5,788,555
Governing Body Reductions Sustained:	(63,974)
Cap Waiver Amount Approved:	339,503
Amounts to be Funded by Appropriation of Surplus:	(153,994)
Total Tax Levy for 1995-96:	\$5,910,090

Accordingly, the Ocean County Board of Taxation is directed to make the necessary adjustments, as set forth above, to reflect a total of \$5,910,090 to be raised in tax levy for General Fund purposes of the Ocean Township Board of Education for the 1995-96 school year. The Board is in turn directed to submitted a revised budget, with accounts properly coded as noted herein, to the County Superintendent and Office of Finance, and to henceforth conform its June 30, 1995 Report of the Board Secretary to the mandated format. In addition, the Board is directed to prepare and submit to the County Superintendent a plan for administrative revision as set forth above.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

OCTOBER 19, 1995

DATE OF MAILING OCTOBER 20, 1995

GLENN F. KENNEDY,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWN-	:	DECISION ON MOTION
SHIP OF WARREN, SOMERSET COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT

ORAL INITIAL DECISION

DENYING EMERGENT RELIEF

OAL DKT. NO. EDU 8787-95

AGENCY DKT. NO. 388-9/95

GLENN F. KENNEDY,

Petitioner

v.

**BOARD OF EDUCATION OF THE TOWNSHIP
OF WARREN, SOMERSET COUNTY,**

Respondent.

Glenn F. Kennedy, petitioner, pro se

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

Record Closed: October 5, 1995

Decided: October 5, 1995

BEFORE J. ROGER PERSICHILLI, ALJ:

Beginning of Transcript

Petitioner, Glen F. Kennedy, a resident of Warren, New Jersey, seeks emergent relief to enjoin the local board of education from disseminating false and misleading information and

postponing a vote on a bond referendum scheduled for October 17, 1995 until the board provides the affected taxpayers with specific information on the manner in which these bonds will be redeemed. Petitioner asserts that irrevocable harm will occur if a vote is forced before the information is provided. He requests that the Warren Board of Education be required to distribute a brochure to all Warren residents on or before October 10, 1995, addressing the manner in which the bonds will be redeemed and their true tax effect on the taxpaying public or, alternatively, cancel the election until ten days after a brochure is distributed. He also requests that the Board be prevented from using taxpayer funds to support this referendum. This latter point is somewhat inconsistent with petitioner's demand that the Board distribute a brochure to all Warren residents. Petitioner has supplied an affidavit with exhibits attached, in support of his position. He has also presented further argument this morning.

The Warren Board of Education denies that it has provided false or misleading information concerning resulting real estate tax increases, assuming that the voters approve the October 17, 1995 bond referendum. It also denies any allegation that it has inaccurately reflected projected student enrollment or that it expended funds for any purpose other than educating the public concerning bond referendum issues. The Board has submitted the affidavit of Murray S. Peyton, the School Business Administrator and Board Secretary which addresses issues relating to the bond referendum. It also presented the further arguments of counsel this morning.

I have considered the submissions and I have considered the arguments and in my judgment petitioner's emergent relief application must be **DENIED**.

Initially, I **FIND** that the petitioner has offered insubstantial evidence, at best, to challenge the certification of Dr. Murray S. Peyton which details facts surrounding the two proposals to be submitted to the voters of Warren Township. One concerns the issuance of bonds in the principal amount of \$7,250.00 for certain identified major construction and the second proposal concerns the additional expenditure of \$960,000 to construct two additional kindergarten classrooms.

I also **FIND** that there is insubstantial evidence, that is, viewed in this light most favorable to petitioner, to suggest that the Board has either intentionally or unintentionally issued false or

misleading statements which would, effectively either be confusing or misleading to the voters of Warren Township. Essentially Mr. Kennedy sees contradictions and/or discrepancies which he feels are "misleading" in nature. He also recognizes that what is misleading to one individual may not be misleading to another; Mr. Kennedy feels that this information must be viewed essentially from the average citizens point of view and not necessarily from the perspective of a CPA. But I have really nothing credible before me to suggest who that average citizen may or may not be and it is equally likely that the average citizen may also subscribe to petitioner's point of view in assessing this information. In any event, the information appears adequate, perhaps more than adequate, and voters can certainly vote yes or no on the information before them.

In my judgment, petitioner has not demonstrated a reasonable probability of success on the merits. In fact, the once case that I could locate in this abbreviated time schedule, Twp. of Berkeley, Ocean Cty. v. Central Ocean Regional Board of Education, Ocean Cty., which is found in 1964 SLD (School Law Decisions) 159, fully supports the Board's actions:

The last allegation is that the Board of Education failed to place the financial implications of the proposal before the voters. Petitioner's argument on this point seems to rest on the contention that the Board failed to offer alternative methods of financing the proposed improvement on even advise the voters that alternative methods were available and did not advise the voters that any surplus could be used for tax reduction in future budgets. The Commissioner is able to find no basis in this allegation for setting the election aside. Alternative proposals in a referendum are inadvisable because they do not yield dispositive results. It is perfectly proper as a matter of procedure to submit one proposition to the voters which they can approve or reject. Additionally, a board of education which submits a legitimate proposal in a lawful manner, is not legally obliged to advise its constituency that alternative methods exist whereby such a proposal may be effectuated.

It is not my function to get into the merits at this juncture, but it is only to the extent that I **FIND** that Mr. Kennedy has not demonstrated reasonable probability of ultimate success on the merits. This is one criteria of consideration in Crowe v. DeGioja, 90 N.J. 126 (1982) and under N.J.A.C. 1:6A-12.1(e). In my further judgment petitioner has not demonstrated affirmatively that any other relevant criterion is present for him to prevail in this emergent relief application. Postponement of the referendum will not accomplish what petitioner perceives to be the problem

nor does it translate, in any fashion, to irreparable harm. The perceived harm is speculative and without credible support. Postponement of the referendum will, most likely, result in unreasonable expense and significant, if not substantial, inconvenience to the Board and ultimately to the residents of Warren Township.


It's within the Board's proper discretion, to call for a special election for important issues relating to capital outlay. There are open-door discussions, and information is available to the taxpayer, certainly sufficient to enable the taxpayer to make an informed vote. In fact, the information presented today reveals that there is a public meeting scheduled to be heard on October 9, 1995, concerning this referendum and certainly public members can further inquire into the need and/or specifics pertaining to any issue relating to their taxpaying concerns.

In final analysis, I am compelled to **CONCLUDE** that petitioner has failed to demonstrate that emergent relief should be granted pursuant to N.J.A.C. 1:6A-12.1(e) or under the basic principals of Crowe v. DeGojja, previously cited. Thus, I **ORDER** the application for emergent relief be **DENIED**.

End of Transcript

I, Eileen Jarosz, certify that the foregoing is a true and accurate transcript to the best of my ability, of Judge J. Roger Persichilli's oral final decision rendered in the above matter on October 5, 1995.

Dated October 5, 1995

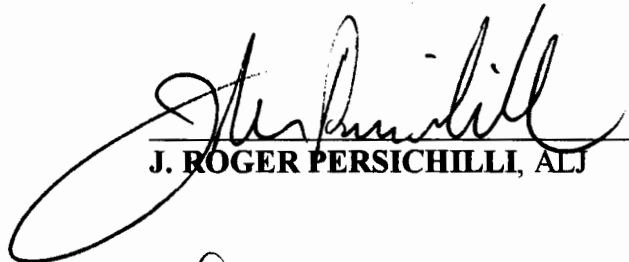

Eileen Jarosz

I hereby **FILE** this final initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

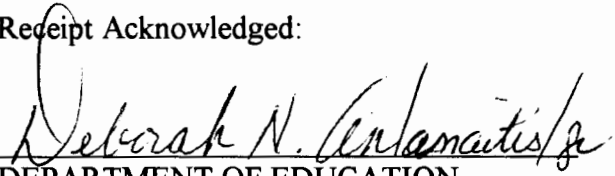
Oct 5, 1995
DATE



J. ROGER PERSICHILLI, ALJ

Receipt Acknowledged:

Oct. 6, 1995
DATE

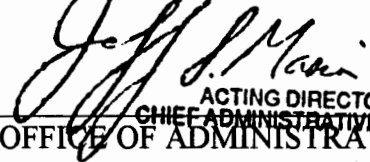


DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 10 1995

DATE



**ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW**

ej


GLENN F. KENNEDY, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE TOWN- : DECISION ON MOTION
 SHIP OF WARREN, SOMERSET COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge denying emergent relief as petitioner failed to meet the standards for such relief as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982).

Accordingly, the Motion for Emergent Relief is denied and the matter shall next proceed as appropriate at the Office of Administrative Law.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

OCTOBER 23, 1995

DATE OF MAILING OCTOBER 23, 1995

CHRIS SHUSTER,	:	
	:	
PETITIONER	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWN-	:	DECISION ON MOTION
SHIP OF MONTGOMERY, SOMERSET	:	
COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING

MOTION FOR INJUNCTION

OAL DKT. NO. EDU 8772-95

AGENCY DKT. NO. 334-8/95

CHRIS SHUSTER,

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP
OF MONTGOMERY, SOMERSET COUNTY,**

Respondent.

Chris Shuster, petitioner, pro se

David W. Carroll, Esq., for respondent (Carroll & Weiss, attorneys)

BEFORE JOHN R. TASSINI, ALJ:

STATEMENT OF THE CASE

The petitioner alleges that the Montgomery Township Board of Education (BOE) recommended a particular, two-story plan for construction of a new middle school in conjunction with a referendum on a proposal authorizing the BOE to issue bonds and to undertake such construction. The BOE denies that the proposal referred to, incorporated or was limited by a particular plan. Township voters approved the proposal. Thereafter, for reasons including a

Freshwater Wetlands Protection Act ruling that made more land available on the construction site than was originally expected, the BOE abandoned the two-story plan and endorsed a new, one-story plan. N.J.S.A. 13:9B-8. Construction of the school according to the one-story plan is expected to cost approximately the same amount of money as construction according to the two-story plan. However, the petitioner alleges that, compared to the two-story plan, the one-story plan is educationally inferior, that it will cost more to maintain and that it will provide less flexibility for expansion. The petitioner claims that the BOE should be enjoined from moving forward with the construction according to the one-story plan and he claims that the BOE should be ordered to construct the new school according to the two-story plan.

This order resolves the petitioner's motion for an order immediately enjoining the Board from moving forward with the construction according to the one-story plan, pending a plenary hearing and a decision on the case. The BOE submits, inter alia, that the petitioner fails to satisfy the standards for such an injunction.

PROCEDURAL HISTORY

On August 22, 1995, the petitioner's verified petition was filed with the Department of Education. N.J.S.A. 18A:6-9. In a letter dated August 23, 1995, the Department notified the petitioner that he would need to file a notice of motion, etc., to obtain an emergent injunction of the BOE. In a letter filed with the Department on September 18, 1995, the petitioner did not refer to a notice of motion, but set forth enumerated allegations and argument by which he attempted to demonstrate that he met the standards for the granting of a motion for an injunction. On September 27, 1995, the BOE's answer to the petition was filed with the Department. The Department transmitted the matter to the Office of Administrative Law (OAL) where, on September 28, 1995, it was filed as a contested case. N.J.S.A. 52:14B-1 to -15. The OAL's clerk construed the petitioner's letter as a motion for emergent injunction of the BOE and mailed to the parties notice that, on October 5, 1995, the "motion" would be argued. On October 5, 1995, the parties appeared, the BOE objected to the argument of the motion because of the lack of notice of same and the motion was argued.

FINDINGS OF FACT

The area served by the Montgomery Township school district is being developed. Consequently, the area's population is growing and is expected to continue to grow further, increasing demands for governmental services, including school services. The petitioner is a resident of the area served by the school district.

A "Building Project Ad-Hoc Committee," including members of the community, the BOE and the school administration, studied the matter, collected information and, in 1994, based upon criteria including "completion time, flexibility to meet changing population and program needs, site availability and cost," prepared a report including a recommended a plan of action to "resolve current facilities problems and meet the long-term needs of the students and the community." P-1, N.J.S.A. 18A:33-1. The committee recommended a substantial construction project, including construction of a middle school with features including "a configuration that permits clustering of academic classrooms by grade level" and serving 800 students. The BOE retained Faridy Thorne Fraytak, P.C., which, based upon expectations, such as the amount of land available at a given site, prepared plans, including a two-story plan for a new middle school with grade "cluster[s]." P-1, P-2. The total cost of the project was estimated to be over \$32,000,000, of which the cost of construction of the new middle school was estimated to be about \$17,000,000.

Consistent with N.J.A.C. 6:22-1.1, the BOE obtained the Department's approval of the plans and, at the BOE's October 10, 1994 meeting, it passed a resolution providing for a special school district referendum election to be held on November 29, 1995 during which election, the following proposal would be submitted:

The [BOE] is authorized (a) to provide for [1] the construction of an addition to connect the Burnt Hill Road School and the Orchard Road School to provide core facilities and the renovation of and the construction of additions to each school to provide additional space, other interior improvements and additional parking, [2] the construction of renovations and additions to the High School to provide for science laboratories, locker room and auditorium improvements and [3] the construction of a new middle school on land owned by the [BOE], including play fields and, [4] for all of the above, including play fields and, for

installation of equipment and furnishings and related work, and (b) to issue bonds of the School District for such purpose in the principal amount of \$31,368,000.

[R-1, emphasis added.]

Faridy Thorne Fraytak presented the plans for the project, including the two-story "proposed middle school layout," to the public and the project was the subject of public debate. P-4. The BOE Vice President and chairman of the BOE Building Committee, in a letter published in the October 21, 1994 edition of The Princeton Packet, a local newspaper, characterized the proposed buildings' plans as "preliminary schematics." P-3. A BOE member, in a letter published in the November 18, 1994 edition of The Princeton Packet, wrote that the "plan recommended by the ad hoc facilities committee and approved by the [BOE] is the most effective option available to meet our district's needs" and she urged voter approval of the proposal. P-5. The superintendent of schools, in a letter published in the November 18, 1994 edition of The Princeton Packet, wrote that "The plan is not vague, rather it is quite detailed. The educational specifications upon which the architect's drawings are based are several hundred pages of detailed descriptions of every space to be built renovated or modified." P-6.

Prior to the referendum, the BOE mailed to voters a "referendum brochure" which referred, e.g., to the current enrollment and "need" for additional facilities for current and/or expected enrollment; (if the referendum was not approved and the project did not go forward) the possibility of a "disruptive" "split session plan;" the "cost" of available options; etc. The brochure also included copies of the plans for the project, including the two-story plan for the new middle school. P-7.

On November 29, 1994, copies of the plans for the project, including the two-story plan for the new middle school, were placed at the polling place and the voters approved the referendum. P-8.

Following approval of the referendum, the BOE learned that a Freshwater Wetlands Protection Act ruling that made more land available for the new middle school site than was expected when the two-story plan was prepared. N.J.S.A. 13:9B-8. That is to say, the school's

“footprint” no longer had to be limited to that of the two-story plan and could be enlarged as in a one-story plan. The BOE and its consultants reconsidered the matter and, in 1995, abandoned the two-story plan and endorsed a new, one-story plan. P-9. Construction of the school according to the one-story plan is expected to cost approximately the same amount of money as construction according to the two-story plan and the one-story plan provides for expansion, including expansion by way of second stories that can be added.

The petitioner demonstrated no expertise but offered his opinions that, compared to the two-story plan, construction according to the one-story plan is educationally inferior; that, ultimately, construction according to the one-story plan will cost more to maintain; and that construction according to the one-story plan will provide less flexibility for expansion. The petitioner’s unqualified opinions were not well-defined, not detailed and not credible.

The BOE is preparing to offer bonds to finance the project in mid-November 1995 and, the BOE alleges, an injunction and delay in the project will complicate the bond process and will result in an increased interest rate for the borrowed money. Such an increase would have to be borne by the district taxpayers.

CONCLUSIONS OF LAW

In deciding on a motion for entry of the extraordinary remedy of a preliminary restraint, the following must be considered: (1) As a matter of law, the moving party must be clearly entitled to the relief claimed. (2) As a matter of fact, it must be reasonably probable that the moving party will prevail on its claim when it is fully heard; *i.e.*, all the material facts should not be in issue. (3) The moving party must suffer immediate and irreparable harm if the restraint is not immediately entered and the moving party must have no adequate remedy at law. (4) The relative hardships resulting to the parties if the restraint is granted or denied must be balanced against one another and the hardship of the moving party if the restraint is denied must outweigh the hardship of the objectors if the restraint is granted. N.J.A.C. 1:1-12.6, R. 4:52-1. See also, Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982); Suenram v. The Society of the Valley Hosp., 155 N.J. Super. 593, 596-97 (Law Div. 1977); Noble v. D. Van Nostrand, Co., 63 N.J. Super. 534 (Ch. Div. 1960); Dolan v. DeCapua, 16 N.J. 599, 614 (1954); New Chancellor Cinema, Inc.

v. Town of Irvington, 169 N.J. Super. 564, 572-73 (Law Div. 1979); Green v. Piper, 80 N.J. Eq. 288 (Ch. 1912).

Weighing in favor of the petitioner is the fact that the BOE presented the two-story plan to the voters as part of the basis for the vote on the proposal. Weighing against the petitioner is the following: The proposal, as stated, did not incorporate or refer to a particular plan. The BOE Vice President and chairman of the BOE Building Committee publicly characterized as (merely) "preliminary" the project's plans, including the two-story plan. The cost of construction according to the two-story plan is the same as the cost according to the one-story plan. Finally, most importantly, the petitioner has not proven that construction according to the one-story plan, would substantially change the costs and uses of the school from those of the two-story plan such that construction according to the new plan would contravene the voters' approval of the proposal. Contrast with Borough of Farmingdale v. Board of Education of the Borough of Farmingdale, 81 SLD 130, at 133, wherein the proposal, as stated, specifically authorized construction of "a library, kindergarten and a multipurpose room" and, after approval of the proposal, the board eliminated the proposed new library, the kindergarten was reduced from 1,050 square feet to 900 square feet, the multipurpose room was reduced by 20 square feet and, instead, the board proposed administrative offices, nurse's room, teachers' room, mechanical room, maintenance room and a machine room.

Given the above, there is a genuine issue of material fact as to whether construction according to the new plan would contravene the voters' approval of the proposal. Consequently, I **CONCLUDE** that the petitioner has failed to show that it is reasonably probable that he will prevail on his claim when it is fully heard; the petitioner has not demonstrated that, in the event the injunction is not granted, he will suffer immediate and irreparable harm; and in the event the injunction is granted, the BOE and taxpayers may suffer irreparable harm to the bonding process.

ORDERS

I **DENY** the motion for preliminary restraint.

An expeditious hearing being necessary, by October 12, 1995, the parties may serve any discovery requests and, by October 19, 1995, the parties must serve answers to timely served discovery requests. The parties will be notified of the hearing date.

Finally, I encourage the parties to confer and work to settle their differences in order to avoid the costs that will result from full litigation of this case.

This Order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without delay, but no later than forty-five (45) days following entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

October 6, 1995
DATE

John R. Tassini
JOHN R. TASSINI, ALJ

EXHIBITS

Petitioner's:

- P-1 Montgomery Township Schools, Building Project Ad-Hoc Committee, report
- P-2 Plans for Montgomery Middle School, by Faridy Thorne Fraytak, P.C., 1994
- P-3 Letter of Vice Preseident of the BOE, appearing in The Princeton Packet, October 21, 1994
- P-4 Newspaper article "\$31 million plan pays a courtesy call," The Princeton Packet, November 11, 1994
- P-5 Letter of member of the BOE, appearing in The Princeton Packet, November 18, 1994
- P-6 Letter of Suprintendent of Schools, appearing in The Princeton Packet, November 22, 1994
- P-7 BOE's "Bond Referendum Information," forwarded to voters before the November 29, 1994 vote.
- P-8 Photograph of bond referendum polling place, showing proposed school plans, November 29, 1994.
- P-9 Plan for Montgomery Middle School, by Faridy Thorne Fraytak, P.C., 1995
- P-10 Borough of Farmingdale v. Board of Education of the Borough of Farmingdale, 81 SLD 173 (1980)
- P-11 Board of Ed. of Belvidere v. Bosco, 138 N.J. Super. 368 (Law Div. 1975)
- P-12 Plans for Montgomery Middle School, by Faridy Thorne Fraytak, P.C., 1994 & 1995
- P-13 "Supplement to Petition, dated October 4, 1995

Respondent's:

- R-1 Extract from minutes of Boe's October 10, 1994 meeting, including "PROPOSAL NUMBER 1," to provide for construction of a new middle school, etc.

OAL DKT. NO. EDU 8772-95


CHRIS SHUSTER, :
 :
 PETITIONER :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE TOWN- : DECISION ON MOTION
 SHIP OF MONTGOMERY, SOMERSET :
 COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ) denying emergent relief as petitioner failed to meet the standards for emergent relief as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), N.J.A.C. 1:1-12.6 and R. 4:52-1.

Accordingly, the Motion for Emergent Relief is denied and the matter shall next proceed as recommended by the ALJ.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

October 23, 1995
Date of Mailing, October 23, 1995

384-95

BOARD OF EDUCATION OF THE MORRIS :
HILLS REGIONAL SCHOOL DISTRICT, :
MORRIS COUNTY, :

PETITIONER, :

V. :

MAYOR AND COUNCIL OF THE TOWN- :
SHIP OF DENVILLE, MAYOR AND :
COUNCIL OF THE BOROUGH OF ROCK- :
AWAY, MAYOR AND COUNCIL OF THE :
TOWNSHIP OF ROCKAWAY AND MAYOR :
AND COUNCIL OF THE BOROUGH OF :
WHARTON, MORRIS COUNTY, :

COMMISSIONER OF EDUCATION

DECISION

RESPONDENTS. :
_____ :

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of \$1,352,332 made by governing body following voter rejection of proposed budget on April 18, 1995.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line-item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore \$804,332, for a total General Fund tax levy of \$21,435,784 for 1995-96 school purposes. Due to coding errors, Board was directed to submit a revised budget. Board was further directed to undertake a study of its administrative structure and custodial costs.

October 24, 1995

BOARD OF EDUCATION OF THE MORRIS :
HILLS REGIONAL SCHOOL DISTRICT, :
MORRIS COUNTY, :

PETITIONER, :

V. :

MAYOR AND COUNCIL OF THE TOWN- :
SHIP OF DENVILLE, MAYOR AND :
COUNCIL OF THE BOROUGH OF ROCK- :
AWAY, MAYOR AND COUNCIL OF THE :
TOWNSHIP OF ROCKAWAY AND MAYOR :
AND COUNCIL OF THE BOROUGH OF :
WHARTON, MORRIS COUNTY, :

RESPONDENTS. :

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Sidney A. Sayovitz, Esq. (Young, Dimiero & Sayovitz)

For the Respondents, John H. Dorsey, Esq. (Dorsey and Fisher)

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education on June 16, 1995 through the filing of a Petition of Appeal by the Morris Hills Regional Board of Education (Board), seeking restoration of reductions to the school budget made by the Mayor and Council of the Township of Denville, Mayor and Council of the Borough of Rockaway, Mayor and Council of the Township of Rockaway, and Mayor and Council of the Borough of Wharton (Councils) pursuant to N.J.S.A. 18A:22-37 following defeat of the budget at the annual school election on April 18, 1995.

At that election, the voters rejected a public question proposing a General Fund tax levy of \$21,988,784 for the 1995-96 school year. On May 15, 1995, following consultation with the Board as required by law, the Councils adopted a resolution determining to certify a General Fund tax levy of \$20,631,452 as sufficient to provide for a thorough and efficient system of education (T&E) in the District. This amount represented a reduction of \$1,357,332 from the tax levy proposed by the Board, and was effectuated through cuts in 28 line items, for the reasons given in Attachment A, appended to the implementing Councils' resolutions. By resolution dated May 23, 1995, the Board determined to appeal these reductions and duly filed the within petition.

The amounts originally in dispute in this appeal were as follows:

<u>Tax Levy Proposed by Board</u>		<u>Tax Levy Certified by Councils</u>	
General Fund	\$21,988,784	General Fund	\$20,631,452
<u>Amount of Reduction by Councils</u>		<u>Amount of Reduction in Dispute</u>	
General Fund	\$1,357,332	General Fund	\$1,357,332

An Answer to the Board's petition was filed by the Councils on June 30, 1995. On July 25, 1995 and July 31, 1995, respectively, the Board and Councils filed Position Statements pursuant to N.J.A.C. 6:24-7.8, followed by Responsive Statements on August 14, 1995 by the Board, with Final Summations filed by the Board on August 23, 1995, and a Response and Summation filed by the Councils on August 15, 1995. During the course of the proceedings before the Commissioner, the Board raised objections to the timing of the Councils' filings. However, in view of the fact that the Councils' Answer was timely filed, and it presented an adequate statement of reasons at the time of the reductions, the lateness of subsequent filings neither prejudiced the Board, nor compromised the time frame for development of the appeal.

Accordingly, all Councils' filings are accepted and reviewed herein. To the extent that the Councils, as alleged by the Board, brought new arguments to the appeal in their Final Summation, the Commissioner, in making his determinations, has been mindful of the lateness of those arguments and has assessed their weight accordingly.

In its position statement, the Board indicated that it concedes to the Councils' reduction of \$5,000 in Account No. 11-000-270-420 (Cleaning, Repair and Maintenance). The amounts remaining in dispute are, thus, as follows:

<u>Tax Levy Proposed by Board</u>		<u>Tax Levy Certified by Councils</u>	
General Fund	\$21,988,784	General Fund	\$20,631,452
<u>Amount of Reduction by Councils</u>		<u>Amount of Reduction in Dispute</u>	
General Fund	\$1,357,332	General Fund	\$1,352,332

In addition, as the parties had previously been advised by letter from the Assistant Commissioner dated April 7, 1995 and distributed through the County Superintendent to boards and municipalities experiencing budget defeats, as part of the record of the within appeal, the Commissioner took official notice of the Board's revised budget and its June 30 financial report, the latter for the purpose of identifying whether the Board underestimated in its 1995-96 budget the amount of anticipated undesignated surplus.

Upon filing of the parties' Final Summations as noted above, the record of the appeal was closed.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for T&E. The Legislature by way of statutory scheme has delegated the responsibility for providing such T&E

to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line-item reduction imposed by the governing body is necessary for the provision of T&E. Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).

Mindful, then, of the standard to be applied, the Commissioner makes the specific determinations set forth below.

COMMISSIONER'S DETERMINATION

At the outset, the Commissioner notes that the Board's budget contains numerous coding errors. The Board is instructed to note the appropriate accounts for erroneously coded expenditures, as identified herein, and to reappropriate miscoded items accordingly. Further, the Board is hereby directed to henceforth follow the chart of accounts required for district use pursuant to N.J.A.C. 6:20-2A.2(m) and to accurately code its expenditures, including allocating salaries of employees based on functions performed, rather than titles held.

Disputed Line-Item Number 1

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
02670	11-190-100-500	Other Purchased Services	\$105,360	\$8,000

The Board contends that the Councils are incorrect in taking the position that this account does not directly involve classroom expenditures. Rather, the Board submits that this

category includes classroom-related costs such as computer repair, student field trips and paper products. Further, the Board notes that it has added 100 to 150 computers in each of the last three years and the increase in the service account reflects the additional hardware. Additionally, the Board has determined that the District will be involved in the "World Games," a multi-cultural program designed to incorporate economics, geography and culture into a "hands-on" experience. The cost of the World Games exceeds \$4,000. Thus, the Board asserts the \$8,000 reduction is unjustified.

The Councils argue that the Board should be willing to do with less for all overhead accounts which do not directly involve classroom expenditures, as well as accounts for travel and extraordinary expenses. The Councils note that in 1993-94, the Board spent \$88,757 in this category, and the \$105,360 proposed budget represents an 18.7% increase. Further, the Councils assert they wish to allow the Board normal recurring expenditures, but argue that new overhead items should not be added during tight budget periods. Moreover, Councils argue that they have failed to locate accounts which could verify the Board's addition of 100 to 150 computers each year. Nor, the Councils add, did the Board indicate if these computers were replacements, which would enable substitution of one service contract for another, or new additions. The Councils also maintain that they do not wish to eliminate funding for the World Games, and thus left a "generous increase" in this account over normal spending patterns. However, Councils contend that if these games are so important to the Board, "then Board member travel should be curtailed to pay for them." (Councils' Reply/Summation at p. 3)

Upon review, the Commissioner finds that neither the Board's supporting documentation nor its past expenditures and appropriations justify the full amount of increase proposed in this budget category. Accordingly, the Commissioner determines to sustain the

reduction of \$8,000. In addition, the Commissioner notes that all repairs and maintenance, other than for transportation vehicles, should be budgeted under Operations and Maintenance, Account No. 11-000-260-420. Additionally, admission fees for field trips should be coded in Account No. 11-190-100-800, and the transportation costs for said trips are to be coded in the Transportation (270) function. Finally, paper products are properly coded as Supplies and Materials in Account No. 11-190-100-610.

Disputed Line-Item Number 2

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
02680	11-190-100-610	Instruction-General Supplies	\$302,950	\$20,000

The Board asserts that, contrary to Councils' position that this account should not vary from year to year other than for changes in enrollment, this account reflects changes in curriculum. The Board again contends that computers are a necessity, and, accordingly, the District has added 100 to 150 computers in each of the last three years. Further, the Board avers it has increased its graduation credits from 120 to 140, phased in over a four-year period, as well as doubled the fine and practical arts credits required for graduation. The Board notes that, as a result of the increased art requirements, enrollments in the arts have increased dramatically (from 414 in the 1991-92 school year to 858 in the 1995-96 school year). To accommodate this increased interest, the Board offered a new "Computers in Art" course, which has created a corresponding need for increased teaching supplies and related consumables. The Board maintains that the art supplies associated with increased enrollments and the additional supplies needed by the increased use of computers do not permit further reduction in this account.

The Councils assert that an account such as this should not vary much from year to year, other than for changes in enrollment, which have not been significant in the District, and

changes in prices, which recently have not been material. The Councils also argue that an account such as this offers the potential for one-time savings if the Board holds off on advance purchasing of next year's supplies with current year budget funds. The Councils note that the Board spent \$248,310 for teaching supplies in 1993-94 and has spent \$272,832 in the 1994-95 school year, as of the date of their review, and the Councils expect that April-to-June requirements should be minimal. Therefore, the Councils reason, if the Board allows the balance in this account to lapse, that balance will be approximately \$50,000 or 12.5% of the Councils' recommended surplus addition of \$400,000. Any supplies for next year can then be purchased beginning in July. The Councils further argue that the Board's projection of \$302,950 for the 1995-96 school year would then appear excessive by approximately \$20,000, allowing for the small enrollment and price increases. It is unlikely, the Councils maintain, that the Board will need to spend \$629,081 (combined 1994-95 and 1995-96 budgets) over a 24-month period for teaching supplies when it only spent \$248,310 for the prior 12 months. The Councils direct that savings within this account can be achieved with proper management, either through a lapse to surplus and utilization as revenue or through advance purchasing of 1995-96 supplies and corresponding reduction in the 1995-96 budget. In recommending the \$20,000 reduction, the Councils also point to a significant lapse to surplus in this account for 1994-95 and argue that if this lapse is not realized by the Board due to advance purchasing, the 1995-96 budget can be reduced even further.

In its Reply/Summation, Councils dispute the Board's contention that increases in this category are a reflection of changes in curriculum. Instead, Councils assert, "Curriculum changes simply change the types of supplies purchased and do nothing to change the overall level of purchases." (Councils Reply/Summation at p. 3) The Councils further argue that use of

computers should result in a decreased need for teaching supplies, rather than an increased need. As for the Board's argument about new courses, the Councils counter that new courses replaced old courses and do not always result in the need to purchase more supplies. Moreover, the Board's art enrollment for 1995-96 is a total of 24 students, which, Councils contend, does not justify a more than 10% increase in this account.

In its Final Submission, the Board asserts that the Councils' contention with regard to the replacement of old courses with new courses reflects its "simplistic non-educational bias***." (Board's Summation at p. 3) Additionally, the Board maintains that "erasers, pencils, paper and workbooks are still needed in classrooms and are used everyday," irrespective of the Board's increased use of computers for instruction. (Id.)

Upon review, the Commissioner finds that neither the Board's supporting documentation, nor its past expenditures and appropriations justify the full amount of the increase proposed in this budget category. Accordingly, the Commissioner sustains the reduction of \$20,000.

Disputed Line-Item Number 3

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
02640	11-140-100-101	Grades 9-12 Salaries of Teachers	\$9,432,220	\$86,000

The Board initially contends the Councils' analysis is flawed in that it presumed the Board's budget would be in excess of the settlement needs. Instead, the Board asserts, it budgeted for a 4% increase and the final settlement was for a 4.9% increase. Thus, the Board contends it was forced to cut programs in the technology/occupational curriculum; specifically, Cosmetology 1-2 and Child Care Services 1-2 were eliminated. While 21 students have attempted to enroll in Cosmetology for the 1995-96 school year, the Board notes that only 16

will be able to be serviced through the Morris County Vocational Technical School. Similarly, 22 District students enrolled in Child Care Services, and only three have been accepted by the Morris County Vocational Technical School. The Board affirms that the salaries for the two teachers affected by these program cuts are in excess of \$90,000. It further argues that the reduction impedes the implementation of its philosophy to meet the needs of all students in a comprehensive high school setting and anticipates a risk of high school dropouts where students' needs are left unmet by the curriculum.

The Councils argue that the Board consistently achieves favorable budget results in this account due to "breakage," or the replacement of retiring teachers, who are at the top of the pay scale, with new hires closer to the bottom of the pay scale. The Councils add that the Board's history of breakage is significant, and more than accounts for the \$86,000 reduction in this account. Comparing the 1995-96 budget for teaching salaries with the 1994-95 projected year-end results, the Councils contend there is "an increase which is substantial and likely far in excess of any settlement which may be reached by the Board. This is indicative of breakage that has already occurred which has not been reflected in the 1996 budget." (Councils' Position Statement, Section 7) The Councils, therefore, argue that the reduction fairly accounts for the final settlement and teacher advancement on the pay scale. The Councils further argue that, since they cannot yet accurately allocate this reduction between regular teachers and teachers in various areas of special education, they leave the Board with the task of making such allocations through budgetary transfers, and take the \$86,000 from the "regular" salary line item.

Upon review, the Commissioner determines to sustain the reduction of \$86,000, based on the Board's past expenditures and transfer patterns.

Disputed Line-Item Number 4

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
06090	11-402-100-100	Athletics Instruction Salaries	\$757,530	\$40,000

The Board avers the increased budget proposed for this account reflects the following: longevity increases; three new coaching positions to accommodate expanding girls' soccer and field hockey programs, for a total of \$10,050; the \$4,000 increase in the athletic director's salary; a \$900 increase for the athletic department's secretary; and a \$2.50 increase per official as mandated by the Iron Hills Conference. (Two officials per event at \$2.50 each = \$5.00 x 1,600 events = \$8,000). These increases, the Board argues, add a total of \$54,470 to the current spending. Given the 1994-95 expenditures of approximately \$660,000, and applying the negotiated 4.9% increase, approximately \$692,000 will be required simply to cover salary guide increases. Add to this the \$54,470 and the Board, thus, concludes that \$757,530 is a reasonable appropriation. The \$40,000 reduction will, the Board asserts, result in the inability to supply the athletic program in its current format and will deprive the district of its ability to properly coach the girls' soccer teams and field hockey teams.

The Councils argue that the Board appears to have substantial excess in the athletic salaries account. The Councils note that in 1993-94, \$654,766 was spent for salaries, leaving a budgeted balance of \$67,779. During that year, Councils assert, all sports were offered and no programs were cut, yet the budget was excessive. The Councils aver the same situation exists for 1995-96, inasmuch as the two year's proposed figures represent a 15.7% increase from 1993-94. The Councils further argue that while there may be more positions filled now than in prior years, as well as more expansive programs, it does not appear that the Board needs such large increases in these accounts. While the Councils recognize the need for new positions and

normal increases in salaries, they assert that even where there were new positions and salary increases in the past, there was never more than a 1% increase in total expenditures, due to turnover in coaching (and the corresponding breakage) and the fact that many planned positions go unfilled. Accordingly, the Councils recommend reductions of \$40,000 from salaries, noting that the resulting budget amounts are still far in excess of current spending patterns. The Councils add that the reduction of \$40,000 still leaves nearly a 9% provision for an increase to cover salary raises and new positions. "If a 15% annual increase were normal, this account would be over \$1,000,000 in a few years." (Councils' Reply/Summation at p. 5)

Upon review, the Commissioner notes that while the Councils' reduction may inhibit the expansion of athletic opportunities, the Board has not demonstrated such expansion is integral to its provision of T&E. Accordingly, the Commissioner sustains the reduction of \$40,000. Further, the Commissioner notes that this line item should not accommodate funds for secretarial positions. Funds for school secretaries are properly budgeted to school administration in Account No. 11-000-240-105.

Disputed Line-Item Number 5

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
06100	11-402-100-500	Athletics-Purchased Services	\$158,830	\$20,000

The Board argues that the increased proposed appropriation in this line item reflects increased costs and participation of students in the athletic programs. Among the additional costs which did not exist in 1994-95, the Board identifies boys' and girls' freshman soccer transportation (practices and games), soccer transportation (practices and games), field hockey transportation (games), and uniforms and protective equipment for three additional sport levels. The Board also identifies increased costs, such as the rise in cost of ice time from \$150 to

\$175 per hour at an estimated 100 additional hours. Thus, the Board concludes that the \$20,000 cut will deprive it of its ability to provide the programs that currently exist, as well as the additional programs for field hockey and soccer for the girls.

The Councils consider not only the above line item, but account number 11-402-100-600 (Athletics/Supplies and Materials) and account number 11-402-100-800 (Athletics/Other Objects). The Councils note that in the 1993-94 school year, spending totaled \$247,187 for these three accounts, leaving budgeted balances of \$27,975 (other expenses) unexpended. The Councils further note that while 1994-95 expenditures remained rather steady, the 1995-96 projections climb significantly to \$280,880, an increase of 13.6% from the 1993-94 school year. Thus, the Councils recommend a \$20,000 reduction from the Purchased Services account, noting that the resulting budget is still far in excess of current spending patterns. The Councils indicate that, as proof of the overbudgeting in these areas (referring also to disputed item number 4, supra), the 1994 audit shows \$49,948 unspent in co-curricular program salaries and \$9,693 unspent in other expenses. Like athletics, the Councils reason, these areas have direct student impact, yet the Board chose not to spend the full amount available for these programs in 1993-94.

Upon review, the Commissioner finds that the Councils have sufficiently demonstrated that the additional costs in this budget category are not necessary for the District's provision of T&E. Accordingly, the Commissioner sustains the reduction of \$20,000. Further, the Commissioner notes that this line item should not accommodate funds for transportation of pupils in athletic programs. As noted above, all transportation costs are properly budgeted in the Transportation (270) function.

Disputed Line-Item Number 6

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
06360	11-000-100-56X	Instruction/Tuition	\$1,145,108	\$150,000

The Board indicates that the above-referenced budget reflects costs in special education tuition for 35 students totaling \$992,071, tuition (increased from \$400 to \$800 per student) to Morris County Vocational Technical School for 77 students totaling \$61,600, and tuition for three students attending state facilities totaling \$44,164. These costs total \$1,097,835. The Board further argues that the Councils' calculations do not account for changing student populations (i.e., students transferring into the District, students subject to reevaluation which determines a need for specialized day placements and students leaving the District) which created a net gain of five students in the 1994-95 school year. The Board anticipates, based on past experience, an average of three "net" students requiring specialized placements over and above those projected for 1995-96. Further, the Board cites a "due process" case and court-approved settlement which required the District to pay educational costs of \$37,429 in 1995-96. Of the \$1,145,108, the Board has budgeted \$1,097,835 for tuition, supra, with the remaining \$47,273 available for the anticipated three new students or new placements as may be needed for the 1995-96 school year.¹ The Councils' \$150,000 cut, the Board contends, would not permit sufficient monies to pay for existing students even without the anticipated increase of three students.

The Councils take the position that the Board has ample room in its reduced 1995-96 budget, to pay all remaining bills, plus two large potential settlements. The Councils

¹ Even without the \$150,000, the Board argues that the average special education placement is \$20,000 per student, so the tuition for three additional students would exceed \$60,000.

contend that new placements can be covered for the partial year tuition by surplus appropriations. Alternatively, the Councils argue that new placements are no more likely than placements being moved out of the District, which is always a source of unanticipated funds. The Councils further challenge that 15 more projected students in 1995-96 can result in more than double the actual costs of 1993-94 (81 students at \$1,145,108 versus 66 students at \$538,970). They contend that, despite the Board's listing of student names, actual enrollment for 1995-96 is not likely to be as projected, and the Board's history of overbudgeting accounts casts doubt on its analysis. Thus, the Councils conclude that the nearly 32% increase over 1994-95 spending does not appear warranted, and the \$150,000 reduction is reasonable.

The Board counters that the Councils' argument regarding overbudgeting in 1995-96 ignores the actual names of students (by initials) which the Board documents as requiring tuition costs for the coming year.

Upon review, the Commissioner finds that the Board has insufficiently taken into account the possibility of students leaving the District and the availability of ample funds in its surplus account to cover any unforeseen placements. Accordingly, the Commissioner sustains the reduction of \$150,000.

Disputed Line-Item Number 7

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
06430	11-000-213-100	Health Services/Salaries	\$229,440	\$10,000

The Board argues that it will be more cost effective to use its in-house physicians and nurses to perform routine physicals required of its athletes than to continue to use the private medical organization, "Urgent Care," to provide these services, a cost which did not appear in this line item. Thus, the Board continues, the additional costs associated with having school

nurses present for additional hours will be \$1,650; the physician costs will also increase to an estimated \$9,920. The Board reasons that these total additional costs of \$11,570 are significantly less than costs the Board has incurred by using Urgent Care.

The Councils argue that this account is up over 17.5% from the projected 1994-95 spending, but indicate that, inasmuch as this account includes doctor stipends, the source of the overbudgeting is difficult to determine. The Councils note in their Reply/Summation that, while the Board proposes to use in-house medical staff for routine physicals, it fails to indicate where the corresponding cost savings will be realized. Since the remaining (non-salary) health accounts total only \$4,270, and the Councils contend that the Urgent Care costs must have been charged within the health accounts, they conclude that the Board could only have charged these expenses to salary accounts, thus proving that the 1995-96 provision is excessive in that it does not reflect the anticipated savings.

The Board counters that the total athletic department budget increased by 1% for the 1995-96 school year, even with additional personnel, so that the savings caused by the increase in the Health salaries account is reflected in the Athletic Department's budget.

Upon review, the Commissioner notes that, although the Board argues that the use of in-house physicians and nurses is a cost-saving measure, as indicated by the Councils, such savings do not appear to be reflected elsewhere in the budget as claimed by the Board. Accordingly, the Commissioner determines to sustain the reduction of \$10,000.

Disputed Line-Item Number 8

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
06490	11-000-218-104	Other Support Services/ Sal.	\$938,720	\$40,000

The Board argues that, while \$789,035 was spent on this account in 1993-94, the District had erroneously failed to charge one of its counselor's salaries to this account, but later remedied the error when the counselor was correctly charged to the account for 1994-95. In 1994-95, \$921,455 was budgeted, and the Board anticipates \$905,000 will actually be expended. Applying the 4.9% increase to salary expenditures of \$905,785, approximately \$950,000 will be required to pay for salaries of guidance counselors in 1995-96. Thus, the Board avers the 1995-96 increases are not excessive. Moreover, the Board notes that the Councils do not challenge the number of guidance counselors and argues that its current staffing level is required to provide a T&E system of education.

The Councils argue that the Board should be making attempts to reduce rather than increase, administrative out-of-classroom costs. The Councils note that in 1993-94, the Board spent \$789,035 in this line item and, at the time of its review, Councils projected the Board would have spent \$856,196 in 1994-95. The Councils dismiss the Board's argument as to misclassification, asserting that such misclassification in 1993-94 would only have caused the Councils to reduce more from the teaching salary account, where the salary was erroneously applied. The Councils further note that the Board's analysis is incomplete where it fails to include salary of the (misclassified) guidance counselor. Thus, the Councils conclude that, given that no new hires are planned, the 1995-96 proposed budget is excessive, and they, therefore, recommend a \$40,000 reduction.

The Board counters in its Summation that the Councils were provided the salary of the employee who was misbudgeted as a teacher.

Upon review, the Commissioner finds that the Board's proposed salaries in this category, as appropriately coded, are justified in accordance with maintenance of T&E levels of

student support services and with past appropriations and expenditures, as well as negotiated salary increases. Accordingly, the Commissioner restores the reduction of \$40,000.

Disputed Line-Item Number 9

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
06760	11-000-221-104	Improvement/Instructional Services/Salaries/Other Professional Staff	\$186,670	\$93,332

The Board argues that the administrative position eliminated by the Councils would severely impact upon the District's ability to provide a T&E system of education. The eliminated position is one of two Directors of Instruction. One director is responsible to evaluate 22 English teachers, three consulting teachers and two basic skills teachers. The other is responsible for evaluating 28 math/computer science teachers, three consulting teachers and two basic skills teachers. In the 1994-95 school year, the Board notes that these two directors each conducted 114-118 written evaluations of staff. The Board argues that the elimination of one of the District Directors of Instructional Services positions will have a devastating impact upon the District's ability to evaluate teachers in such areas as English or Mathematics. The responsibility for evaluating these teachers cannot be simply reassigned, the Board contends, to other administrators who are already evaluating teachers in various disciplines. Additionally, the Board avers that it does not employ subject supervisors, but must use existing staff to fill in as needed. The Board further sets forth the ratios of teachers to administrators and the rate of students to administrators in comparably sized districts.

The Councils maintain that they are looking for provisions that are excessive and would likely result in transfers from the accounts during 1995-96. The Councils indicate that this line item contains costs for one secretarial position (\$40,570) and three professionals, whose

salaries are \$93,332, \$93,332 and \$110,084, and who are primarily responsible for staff evaluations. The Councils further argue that in most cases, these functions are handled by school principals, vice-principals, superintendents and their assistants. The Councils maintain that Morris Hills has an adequate complement of both of these levels of administrative staff, and these three positions seem to be more of a luxury rather than a necessity. The Councils suggest that the District has an aggressive plan of evaluation which can be scaled back, and argue that the positions do not appear to be absolutely necessary for T&E within the District. Accordingly, the Councils recommend the elimination of just one position within this account and corresponding salary reduction of \$93,332.

In its Reply/Summation, the Councils add that with the number of administrators in Morris Hills, they find implausible the Board's argument that it would be "impossible" to function without one position. The Councils assert that if the State of New Jersey's position is that local governments and school boards must become more efficient, then areas like this account must be reduced.

In its Summation, the Board clarifies that it uses the administrators to perform multiple functions, such as evaluations, discipline and other duties, as evidenced in its supporting documentation. The performance of evaluations, the Board maintains, is the most optimal use of its staff.

Upon review, the Commissioner finds that the Board has demonstrated the need for this position within its current administrative structure, and, accordingly, restores the reduction of \$93,332. The Commissioner directs, however, that the Board undertake, and submit to the County Superintendent, an analysis of this structure in order to identify, prior to

development of the 1996-97 budget, ways in which to accomplish appropriate economies and efficiencies.

Disputed Line-Item Numbers 10, 11, 12

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
06790	11-000-221-320	Purchased Professional	\$93,420	\$20,000
06800	11-000-221-390	Other Purchase Prof'l & Tech.	21,750	8,000
06810	11-000-221-500	Other Purchase Services	5,500	2,000

The Board argues that account number 11-000-221-320 is used to fund discretionary staff development activities and mandated T&E testing. Citing its recent recognition by the New Jersey State Department of Education for its staff development activities, the Board asserts it is committed to an extensive program of staff development activities, and has tangible evidence of the positive effect of these activities on the District. The Board indicates that although the program is voluntary, a high percentage of staff participate. Additionally, the District has produced a Framework for Instructional Decision Making, a written document which incorporates the best ideas from the staff development program and which teachers use as a guide in lesson planning. The Board further alleges that one of the goals of the program is to permit students to become more active learners; while there can be no conclusive link between the program and student achievement measures, there have been increases in SAT scores, and AP scores and the District has scored near the top of its socioeconomic grouping on the HSPT-11 scores. The Board maintains that its staff development program attempts to develop in-house expertise for teachers, thereby reducing the need for outside consultants. The 1995-96 staff development budget, thus, contains a cut of \$30,000 from the 1994-95 expenditures because of the reduction in use of outside consultants. The Board, therefore, submits that the staff

development activities for 1995-96, already reflecting a \$30,000 reduction, should not be cut further and the activities recognized by the Commissioner should be allowed to continue.

The Councils argue that the Board should be reducing rather than increasing overhead accounts. The Councils note that in 1993-94, a total of \$49,499 was spent on purchased services and supplies within the accounts covered by the four employees, as discussed, supra, and, through nine months of 1994-95, \$73,377 was expended. The Councils further note that in 1995-96, the budget jumps to \$123,170. The Councils point to this account as one which does not have direct classroom impact, and also point to a 1995-96 budget which is 2 1/2 times the actual spending of two years ago. The Councils assert that the District must attempt to control administrative overhead and eliminate items that are desirable but not necessary for T&E. Moreover, the Councils argue that the Board does not dispute that a \$93,420 provision in this overhead account is excessive compared to a \$41,186 spending level in 1993-94, and \$62,254 through nine months of 1994-95. Accordingly, the Councils recommend a reduction of \$30,000 from these accounts, as follows: \$20,000 from Purchased Professional Services, \$8,000 from Other Technical Services and \$2,000 from Other Purchased Services.

Upon review, the Commissioner finds that the Board's supporting documentation does not justify the proposed appropriation in this budget category. Accordingly, the Commissioner determines to sustain the reductions of \$20,000, \$8,000 and \$2,000, respectively to these line items.

Disputed Line-Item Number 13

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
06850	11-000-222-100	Library/Salaries	\$347,330	\$50,000

The Board denies that this line item is overbudgeted. The Board indicates that it spent \$283,679 for library/media personnel salaries during the 1993-94 school year; in 1994-95, \$364,590 was budgeted and \$335,129 was actually expended, leaving a balance of \$29,461. For the 1995-96 school year, the actual salaries for the employees in the library/media program will be \$346,970, based on the recently negotiated agreement. These actual salaries represent \$360 less than the budgeted amount for the 1995-96 school year, the Board maintains. Moreover, the 22.4% increase cited by the Councils, argues the Board, can be explained by the fact that one librarian's salary was inadvertently charged to the teacher's salary account in 1993-94 rather than to this library/media account. When this salary is added to the 1993-94 salaries, and two years of increases are taken into account, the Board asserts it is clear that the library/media account is appropriately budgeted, and readily apparent that the Councils' analysis here is flawed based on a misunderstanding of this account. The Board further argues that, although new instructional services, such as on-line research, have been placed upon the libraries, no new staff have been added to the budget.

The Councils assert that the Board's overbudgeting in this line item is "glaring" (Councils' Position Statement, Section 14.) The Councils note that salaries are up 22.4% in two years and even more compared to actual projected spending this year. The Councils further argue that a savings should be reflected in the 1995-96 budget since one position remains vacant. Accordingly, the Councils recommend the reduction of \$50,000 from this account, arguing that if the position was deemed unnecessary to be filled by the Board's own actions, then the Councils feel that it should remain unfilled throughout 1995-96.

Upon review, the Commissioner notes that the Board has clarified the reasons for the discrepancy between 1993-94 expenditures and subsequent appropriations, and, moreover,

has sufficiently demonstrated that the proposed 1995-96 budget is necessary to maintain its current staffing levels, as the vacant position referenced by the Councils is, in fact, not funded by the Board's proposed budgeted amount. Accordingly, the Commissioner determines to restore the reduction of \$50,000.

Disputed Line-Item Number 14

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
06870	11-000-222-500	Library/Purchased Services	\$27,750	\$12,000

The Board argues that the 1995-96 budget reflects additional expenditures; specifically, the Board is replacing a circulation desk purchased in 1964 which will cost \$13,370. Further, the 1995-96 budget reflects costs for technology needed to maintain the library: a \$7,000 purchase of library management software to allow for full integration of library systems and services; labor costs of converting existing system to the computerized system (\$13,000); and \$5,000 for the purchase of two computers.

The Councils assert that library expenses are up substantially over prior spending. The Councils observe that \$69,173 was spent two years ago, \$53,187 was spent through nine months of 1994-95, and the budget climbs to \$93,910 for 1995-96. While the Councils "do not wish to take a single library book out of the hands of students***," (Councils' Position Statement, Section 15) they argue that the Board cannot justify a 35% increase in this account in just two years. The Councils also question the timing of the Board's expenditures. Specifically, they question why the Board did not purchase the circulation desk in 1994-95 with the \$44,353 which was not actually spent through the first nine months. Similarly, the Councils question why the computer system was not purchased with the \$31,337 that lapsed in the 1993-94 budget. The Councils further indicate that in account 300, there was \$10,000 budgeted and \$0 spent for

1993-94 and \$10,000 budgeted and \$665 spent in 1994-95, and \$10,000 again budgeted for 1995-96. The Councils argue that the \$12,000 budget reduction can be almost covered by this one account, which has never been budgeted accurately in the past. The Councils recommend the reduction of \$12,000 from this account.

Upon review, the Commissioner notes that the Board is supporting its budgeted appropriation in this line item with, inter alia, the need for library equipment purchases which should be budgeted elsewhere. Specifically, the proper account for library equipment purchases is Account No. 12-000-220-730. Since the Board appears to have adequate funds for these purchases elsewhere in the budget, the Commissioner sustains the reduction of \$12,000.

Disputed Line-Item Number 15

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
06930	11-000-230-339	Support Services/General Admin/Other Purchased Professional Services	\$49,080	\$6,000

The Board asserts that the amount budgeted is required for negotiations and services anticipated during the 1995-96 school year. The Board maintains that it will be involved in negotiations with three of its bargaining units during the 1995-96 school year and the expenditures for negotiations alone will require a significant increase in this line item. Further, the Board rejects the Councils' "simplistic analysis" that it must reduce all overhead accounts. (Board's Position Statement, Section N) The Board contends that the negotiations process significantly affects its ability to provide a T&E system of education, inasmuch as salaries make up the overwhelming majority of expenditures within the District. The Board argues that to arbitrarily reduce an account in which three bargaining units will be participating in negotiations is to ignore the obvious necessities of running a public school system.

The Councils argue that the 1995-96 budget is a duplicate of the 1994-95 budget (\$49,080), despite the fact that the Board's spending in the first 10 months of 1994-95 was \$37,414. The Councils also question why, if negotiations will require a significant increase in funds, the Board budgeted the same amount for 1995-96 as in 1994-95. Urging the Board to reduce all overhead accounts, the Councils recommend a reduction of \$6,000.

Upon review, the Commissioner notes that while the Board indicates that the funds in this category are designated for bargaining unit negotiations, insufficient justification is offered to permit the Commissioner to maintain this line item at the proposed amount. Accordingly, the reduction of \$6,000 is sustained.

Disputed Line-Item Number 16

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
06950	11-000-230-530	Support Services General Admin/Telephone	\$132,000	\$8,000

The Board indicates that its 1995-96 budget for this line item remains largely the same as the 1994-95 budget. The Board's preliminary estimates for 1994-95 expenditures are approximately \$120,765. The difference between this amount and the 1995-96 budgeted amount is \$11,250; however, with Councils' cut, the difference is \$3,250. The Board argues that the 1995-96 school year budget reflects an additional cost of \$8,400 for a digital data line connecting the District's schools to an Internet access provider. The Board asserts that the access of the student body to the Internet brings the future into the high schools. Currently, only two of the District's 2,000 students can avail themselves of access to Internet simultaneously; whereas, the Board argues, the installation of the new digital data line would significantly increase the number of students who have access to the information superhighway. Moreover, the Board recognizes that the existing telephone system provides unrestricted student access to the Internet allowing

students to retrieve information which may be unsuitable for high-school age students; whereas, the new digital data line will provide the capability for appropriate filtration of the information provided to the students. The Board further warrants that its 1995-96 instructional program has been planned with the digital data line as a necessary prerequisite. For instance, the foreign language programs will utilize interaction with students in foreign countries; mathematics and science students will enter on-line competitions sponsored by the Stevens Institute of Technology; students in social studies will access the Library of Congress, and science students will access information from NASA. The Board maintains that it does not regard accessibility to Internet as a luxury which should be eliminated, but rather a critical component of education for the 1995-96 school year and beyond. The Board calculates that the line-item reduction, together with expected increases in telephone costs, will affect the District's ability to provide T&E.

The Councils review past expenditures, noting that in 1993-94, \$111,557 was spent, and in the first 10 months of 1994-95, \$99,803 was spent. Thus, the Councils argue that the Board seeks to budget for 1995-96 an amount which represents an 18.3% increase from 1993-94. The Councils contend that allowing for increased usage of fax machines (which should actually reduce postage) and some provision for cost increases, a \$124,000 budget should be adequate for the Board. The Councils, therefore, recommend a reduction of \$8,000 from this account.

Upon review, the Commissioner observes that, assuming 1995-96 school year costs are comparable to those in 1994-95, the Board will require, based on its figures, approximately \$120,800, together with funds for telephone line purchase and installation at \$8,400, for a total need, absent a provision for cost increase, of \$129,200. Accordingly, the

Commissioner determines to restore \$6,000 and sustain \$2,000 of the Councils' reduction to this account.

Disputed Line-Item Number 17

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
06960	11-000-230-590	Support Services/General Admin/Other Purch. Servs	\$183,450	\$50,000

The Board avers that while it budgeted \$198,450 in this account in 1994-95, it expended \$201,578, due to a postal rate increase and increased costs of paper. The Board affirms that it is committed to reducing costs, inasmuch as it has budgeted an amount in 1995-96 which is \$15,000 less than the 1994-95 budgeted amount. Yet, the Board contends that Councils' reduction in excess of 27% from the amount budgeted is drastic. The Board is willing to concede to a \$15,000 cut, but argues that a \$50,000 cut will deprive it of needed services during the school year.

The Councils again look to past expenditures and note that in 1993-94, the Board spent \$126,072 in this account. Thus, they argue the 1995-96 budgeted amount represents a 45.5% increase from two years prior. The Councils aver that since this account covers items such as insurance, advertising and travel, there should not be material fluctuations from year to year, as there is in this instance. The Councils argue that the largest component herein, liability insurance, shows a savings from the budgeted amount every year, yet the budget never is reduced. Moreover, Councils indicate that travel, another major component of this account, should be minimized by the Board in times of budget constraints; yet, this also seems to remain stable or increase. Further, Councils assert that areas such as printing and public relations, while nice to have, are not necessary for the Board to provide T&E. Past spending patterns, Councils

maintain, do not justify a provision of \$183,450 within this account. Accordingly, the Councils recommend a \$50,000 reduction.

In its Reply/Summation, the Councils contend that if the District in fact spent \$201,578 in 1994-95 in this account, then, they reason, \$78,750 was spent in the last three months of the school year. Since the insurance bills were already paid at the time of the Councils' analysis, the Councils question what could have caused the spending of this large amount in three months when only \$40,943 was actually encumbered as of March 30, 1995. The Councils assert that this is likely an attempt by the Board to negate the Councils' analysis of lapseable surplus funds, while providing historical spending patterns to negate the 1995-96 budget cuts. Councils argue this action by the Board raises serious doubts as to their financial credibility. They conclude that the Board deliberately spent down budget appropriations to counteract the Councils' budget reductions and surplus projections.

The Board counters that its spending patterns are not necessarily equally dispersed over the course of twelve months, and argues that the issue is not the timing of expenditures, but the necessity of expenditures. The Board asserts that, had the Councils ascertained the Board's projected spending over the last three months of the 1994-95 school year, they might not have been surprised by the uneven fluctuations in spending patterns. (Board's Summation, p. at 7)

Upon review, the Commissioner finds that the Board's past expenditure pattern fully supports the Councils' contention. Accordingly, the Commissioner sustains the reduction of \$50,000, and notes in addition that postal costs are properly coded in Account No. 11-000-230-530.

Disputed Line-Item Number 18

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
07060	11-000-240-500	Support Services - Admin/ Purchased Services	\$137,220	\$27,000

The Board argues that the increase in this account item reflects increased costs of the items in the account. Specifically, the Board indicates that it experienced a postal rate increase of 10%, and that the cost of paper has risen in excess of 80% during the last six months of the 1994-95 school year. The Board states that more than half of the budgeted amount in this account is for postage and printing costs for students (e.g. progress reports and report cards mailed home eight times a year; the costs of the printing of student handbooks for 2,000 students.) The Board contends that a reduction in this amount is arbitrary and does not reflect its increased costs.

The Council asserts that postage, travel, printing and other overhead items cannot be allowed to rise from \$101,203 in 1993-94 to \$137,220 in 1995-96. At a minimum, Councils argue these items should be kept stable and, hopefully, they should be reduced by the Board. Councils acknowledge the increase in postage, but argue that, since this increase occurred in early 1995, the effect in the 1995-96 budget is only 5% rather than 10%. The Councils suggest that the Board reduce its newsletters and public relations when postage and paper costs rise, rather than ask for more funding for these areas. None of these items will have a direct impact on students according to Councils' analysis, and the reduced amount should be sufficient for normal spending with provisions for inflation. Accordingly, the Councils recommend the reduction of \$27,000 from this account. The Councils hold that the \$27,000 reduction can be managed by the Board by minimizing expenditures. The Board counters in its Summation that, even when costs of particular items, like paper, rise, these items are still needed by students. The

Board states that it regards Councils' argument as analogous to a claim that hospitals should reduce the usage of medicine when prices rise.

Upon review, the Commissioner finds that the Councils' reduction in this line-item account is in accordance with past expenditures, and notes that the Board has not established that such reduction will impair its ability to provide a T&E system of education. Accordingly, the reduction of \$27,000 is sustained.

Further, the Commissioner notes that all postal costs are properly coded in Account No. 11-000-230-530.

Disputed Line-Item Number 19

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
07100	11-000-260-100	Operation & Maintenance/ Salaries	\$1,372,530	\$100,000

The Board asserts that Councils are recommending the elimination of three positions without benefit of review of the Board's space and analysis of its programs. The Board argues that proper maintenance of facilities and compliance with all relevant codes and statute are integral to T&E. In this regard, the Board contends that its regional high school services 2,000 regular day students, 350 adult high school students, and 4,500 adults enrolled in the 200 courses offered each semester after school. Further, the Board justifies that there are 399,375 square feet of building space in the two main high school buildings, and 153 functioning classrooms. In addition to the two high schools, the Board notes that the custodial and maintenance staff also must service a maintenance building, garage and the stadium field house, along with the 89 acres of usable land for athletic fields, lawn areas and parking lots. These facilities, the Board avers, are utilized many times even within the same day. The Board also provides supporting documentation demonstrating the use of District facilities by both in-school

and outside organizations. Thus, the Board reasons, given the demands placed upon the use of the 400,000 square feet of building space and the 89 acres of outdoor fields, the need for proper maintenance and cleaning cannot be underestimated. The Board affirms that there are 23 custodians who are responsible for cleaning 400,000 square feet and they must often clean their areas more frequently than traditional cleaning services required in office buildings who work 9-5 shifts. The Board reasons that while each custodian is responsible for approximately 17,391 square feet, the custodian is actually responsible for far more since facilities are often used twice a day. The Board, therefore, argues that it is reasonable to add a factor of 30% to the cleaning obligations of the custodians. Accordingly, the Board determines each custodian is responsible for more than 22,500 square feet of cleaning; in the 1995 survey by "American Schools and University" of maintenance and operations, it was reported that the average custodian cleaned 16,824 square feet. Thus, the Board concludes that Councils' budgetary reduction is an arbitrary number which, if implemented, will have a serious and deleterious impact upon the maintenance of the Morris Hills facilities. If these facilities are allowed to deteriorate, the Board affirms, T&E will be jeopardized.

While the Councils recognize the need for clean schools and properly functioning equipment, and acknowledge that the District occupies larger than usual buildings with more acreage than most schools surveyed, they nevertheless find the provision for the number of employees and large amounts of overtime to be excessive. Thus, Councils argue that three positions can be eliminated from this budget and that overtime, given the remaining complement of employees, should be cut in half. Accordingly, the Councils recommend the reduction of \$100,000 from this account. Moreover, Councils assert this reduction of \$100,000 is an attempt to permit attrition since retirements or resignations are likely to occur in this account. The first

three positions vacated for any reason will not be filled, according to the Councils' recommendation.

In their Reply/Summation, Councils also challenge the Board's need for \$125,000 in overtime when it has a staff of nearly 40 employees working around the clock. Councils maintain that reductions can be taken from overtime without any impact on the number of positions. However, Councils indicate that no other district surveyed has the number of operations and maintenance personnel as Morris Hills on a per-square-foot basis and none paid as much overtime per employee as Morris Hills.

Upon review, the Commissioner finds that the Board has demonstrated a need for these services, based on the size of the District and the documented current usage of District facilities. Accordingly, the Commissioner restores the reduction of \$100,000. However, in view of the extent of the Board's expenses in this line item, the Board is hereby directed to undertake a analysis of its custodial situation and to develop, and submit to the County Superintendent of Schools, a plan for effectuating cost reductions. In addition, as it appears from amounts budgeted in Miscellaneous Revenues that the Board does not charge a usage fee to the many outside groups and organizations which regularly utilize District facilities, that such plan should consider, among other things, a provision for charging such fees in order to partially offset the Board's maintenance costs.

Disputed Line-Item Number 20

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
07180	11-000-260-620	Operation and Maintenance/ Energy	\$659,000	\$80,000

The Board asserts that it expended \$545,288 during the 1993-94 school year; in the 1994-95 school year, \$552,074 was spent. The Board reasons that proper budgeting for the energy account requires some acknowledgment of the extreme fluctuations which have been experienced in recent history. For instance, while the Board is now paying approximately 60 cents per gallon for heating oil, there were years when the price of heating oil exceeded \$1.09 per gallon. Thus, the Board strongly believes that it is imprudent to budget based upon the lowest prices and not provide any reasonable excess for potential, sudden increases in energy costs. Accordingly, the Board has budgeted the 1995-96 school year at an average cost of 85 cents per gallon for heating oil, which it anticipates as reasonably precautionous. Thus, the Board asserts that the Councils' arbitrary reduction to the current low price for heating oil is imprudent. The reduction of \$80,000 to \$579,000 provides insufficient flexibility should the price of heating oil increase by even small amounts. The Board asserts that any reduction in excess of \$25,000 in this account could seriously jeopardize the Board's ability to keep schools open either in a very cold winter or if heating oil prices suddenly increase.

The Councils note that \$545,228 was spent in the 1993-94 school year where one of the harshest winters was experienced. Through the first 10 months of the 1994-95 school year, approximately \$450,000 was spent, with the light energy-usage months of May and June remaining. Councils observe that the Board now seeks to raise its budget in this account to \$659,000, an amount 20% higher than the average spending of the last two years. The Councils further advise that the Board cannot continue to budget for the worst case scenario. They argue that if there are drastic price increases, surplus appropriations can be made to cover these costs, or transfers can be made from discretionary spending accounts without the need for budgeting excessively. Consequently, the Councils recommend an \$80,000 reduction.

The Board counters in its Summation that, rather than budgeting for the worst possible case, it has budgeted at an average cost of 85 cents per gallon for heating oil and projected consumption is based on an average winter.

Upon review and in consideration of past expenditures, the Commissioner finds that such energy expenses are necessary and the Board's method of budgeting is neither unreasonable nor adhering to a "worst case scenario." Recognizing the Board's concession as to the feasibility of a \$25,000 reduction, the Commissioner, sustains \$25,000 and restores \$55,000 of the reduction.

Disputed Line-Item Numbers 21, 22, 23

<u>Line Nos.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
07210- 07230	11-000-270-10X	Student Transportation Salaries	\$611,000	\$26,000

The Board indicates that the salaries in this account have been the subject of an unsettled contract with the Bus Drivers' Association for over two years. The Board explains that during the 1993-94 and 1994-95 school years, salaries were paid at 1992-93 rates. The Board expended \$533,511 for transportation salaries in 1994-95. Further the Board indicates that a tentative settlement has been reached and is expected to be implemented. The Board asserts that this settlement requires a 6% salary increase for the 1993-94 school year, a 4% increase for the 1994-95 school year and a 4% increase for the 1995-96 school year. Applying these increases to the 1992-93 expenditures of \$533,511, the Board calculates the following salary totals: for the 1993-94 school year, the salary expenditures should be \$565,521; for the 1994-95 school year, the salary expenditure should be \$588,142; for the 1995-96 school year, the salary expenditures should be \$611,668. Accordingly, the Board notes that for the 1995-96 school year, the implementation of the mediator's salary settlement will require \$668 more in this account than

the \$611,000 that is budgeted. Additionally, the Board will be required to fund the retroactive salary increases for the 1993-94 and 1994-95 school years. Thus, there will be a retroactive payment to the bus drivers in the amount of \$32,010 (\$565,521 - \$533,511) and \$54,631 (\$588,142 - \$533,511) for the 1994-95 school year, for a total of \$84,641 in additional salary adjustments required to be funded out of the 1995-96 school year budget.

The Councils argue that there appear to be excess funds within this salary account. A total of \$611,000 is budgeted in 1995-96 against a 1993-94 spending amount of \$530,235 representing an over 15% increase in two years. A projection of 1994-95 spending made by the Councils is approximately \$555,000. Thus, Councils argue, the excess in this account is expected to be \$26,000; they recommend reduction by this amount and maintain there is adequate provision for not only next year's raises, but also the prior year's retroactive raises which may not have been fully reserved as of the settlement.

In their Reply/Summation, the Councils counter that the Board's appreciation of anticipated raises to the 1992-93 spending level is only appropriate if the exact same complement of personnel exists in 1995-96 as existed in 1992-93. Additionally, Councils indicate there is a large unspent balance in the 1994-95 salary account, according to their analysis as of March 30, 1995, which will more than cover the cost of the retroactive salary increases for 1993-94 and 1994-95, unless the funds were transferred by the Board since May 15, 1995.

The Board questions the Council's claim that a large unspent balance in the 1994-95 salary account should cover the retroactive cost adjustment, since Councils have repeatedly observed that the unspent monies will fall into surplus.

Upon review, the Commissioner finds that the Board has duly demonstrated its need for the increased appropriation in these line items due to its contract settlement, and, accordingly, restores the reduction of \$26,000.

Disputed Line-Item Number 24

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
07230	11-000-270-600	Student Transportation/ Supplies and Materials	\$142,000	\$42,000

The Board argues that, contrary to the Councils' assertions, the Board spent \$139,706 in this account in 1994-95, a significant increase over the monies spent in 1993-94 (\$79,880). The Board attributes the sudden increase in this account to the difficulty in predetermining expenditures for the repair of large school buses. The Board asserts that the in-house expenditures of \$79,880 for 1993-94 rose to \$139,706 in 1994-95. In addition, the costs of outside services (accounts 511-515) rose from \$213,592 in 1993-94 to \$255,257 in 1994-95, for a total of \$394,963. The amount budgeted in 1994-95, the Board indicates, was only \$380,000. The Board also argues that the Councils' attempt to isolate Account No. 11-000-270-600 from the sister accounts of 11-000-270-511 to 515 ignores that all these accounts concern the costs of operating the school buses; focusing on only one account creates a misleading impression of overbudgeting. The Board submits that based upon the 1994-95 actual expenditure of \$139,706, its 1995-96 budget of \$142,000 is reasonable and the reduction in this account is unjustified.

The Councils assert that perhaps nowhere is the Board's history of overbudgeting more obvious. The Councils contend that the Board has never spent even \$100,000 for supplies in this account, yet the \$142,000 budget is repeated, unrealistically, for 1995-96. The Councils note that although through March of 1995 only \$57,221 has been spent, indicating that a large balance can be expected to lapse to surplus, the Board again has an unreasonable budget request

for 1995-96. The Councils further challenge the Board's method of analyzing "sister accounts" and argue that each account is specific and it is entirely proper to evaluate this particular account without reviewing any of the other 500 series accounts. The Councils, therefore, recommend the reduction of \$42,000 from this account which, they assert, based on actual spending, will have absolutely no impact on the education of students within the District.

Upon review, the Commissioner finds the Councils' argument persuasive and that the Board has made no showing that the monies in dispute are necessary for T & E. Accordingly, the Commissioner determines to sustain the reduction of \$42,000.

Disputed Line-Item Number 25

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
07430	11-000-290-330	Business and Other Support Serv./Purch. Prof'l Services	\$62,000	\$9,000

The Board argues that the Councils' analysis does not constitute a detailed review of this account. The Councils' position, the Board asserts, incorrectly implies that there have been generous increases in this account over 1993-94 expenditures. However, the Board states, in the 1993-94 school year, the District expended \$50,105 in this account; in 1994-95, the District expended \$59,825, due to rate increases by professional service vendors. The increase in the budget in this account represents a 3.3% increase over actual expenditures for the 1994-95 school year. The Board argues that such an increase is not generous, but merely reflects anticipated cost of living increases. Further, the Board argues that this account provides services for activities under the "Right to Know" Law, as well as asbestos abatement/testing, hazardous waste disposal and architectural work. Much of the work provided for in this line item is statutorily mandated and cannot be reduced. Thus, the Board concludes that the Council's

reduction of \$9,000 is clearly unjustified and will deny the Board its ability not only to provide the required services, but to ensure the safety and health of students and employees.

The Council's position is that an increase over prior spending does not appear to be justified and again questions the timing of the Board's expenditures. Therefore, the Councils recommend a reduction of \$9,000 from this account, still allowing for what they assert are generous increases over 1993-94 amounts.

Upon review, the Commissioner determines to restore the reduction of \$9,000, inasmuch as the Councils provide insufficient detail for directing reduction of expenditures for mandatory activities which appear to be consistent with prior costs. However, the Commissioner notes the following miscodings and directs that the restoration be attributed to the correct accounts: Costs related to the Right to Know Law, asbestos abatement/testing and hazardous waste disposal should be budgeted under Operations and Maintenance of Plant Services (function 260) in the appropriate object (420, 490 or 590); and funds for architectural work are properly budgeted in capital outlay under Facilities Acquisition and Construction Services, Account No. 12-000-400-390.

Disputed Line-Item Number 26

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
07450	11-000-290-500	Business & Other Supplies Serv./Other Purch. Services	\$89,500	\$40,000

The Board argues that this account has been one where expenditures vary greatly from year to year. In the 1993-94 school year, the Board expended \$192,847 in this account; in the 1994-95 school year, only \$45,981 was expended. The Board notes that while the \$89,500 proposed 1995-96 budget represents a figure nearly double the 1994-95 expenditures, it is still less than half of that spent in 1993-94. The Board explains that the major expenditures in these accounts are attributable to the data processing department which provides student scheduling, warning notices, report cards, attendance and other student-related services, as well as business functions. The Board contends that the major fluctuation in these accounts is due to the upgraded hardware and software, and the purchase of service agreements which are needed for a rapidly changing technology environment in the 1990s. The Board further argues that because of the lapse of existing service agreements which accompanied the purchase of new computers and equipment, it was forced to enter into a one-year computer maintenance agreement for 189 computer systems in excess of \$46,600 for the 1995-96 school year. Also included in this account is the software service agreement for the personnel package at a rate of \$2,500 per year. The Board explains that any software revisions needed in the student software package which produces schedules, report cards, progress reports, attendance and other student-related operations costs between \$3,000 and \$6,000 per year. Accordingly, the Board contends that the three computer-related costs will produce from \$52,000 to \$55,000 in expenses for the 1995-96 school year. Additionally, this account includes expenses of the business office, such as mandated advertising and postage (\$12,000). Therefore, the Board argues, the Councils' assumption that a \$49,500 budget will be sufficient to cover all expenses in an account in which the Board expended \$192,847 in 1993-94 is clearly unjustified. Further, the Board maintains the loss of services in this account will have a direct effect on the operations of the District and will

result in serious impact upon report cards, scheduling and other information services related to students.

The Councils argue that items such as postage, travel and advertising must be reduced by the Board in tough economic times. The \$40,200 amount budgeted in 1994-95 increased to \$89,500 for 1995-96, even though only \$24,158 was spent through the first nine months of that year. The Councils further argue that the lapse of one service agreement and replacement with another does not justify the need for more funding. The Councils argue that the Board provides no evidence that this account must be higher than the 1994-95 budgeted amount of \$40,200, and note that the report cards, scheduling and other information services relative to students were accomplished in 1994-95 for \$45,981 and can be done in 1995 for \$49,500. Accordingly, the Councils recommend the reduction of \$40,000 from this account.

Upon review, the Commissioner notes that the Board has failed to demonstrate the need for virtually doubling this account, but does, however, demonstrate a need for increased appropriations. Accordingly, the Commissioner determines to restore \$20,000 of the Councils' reduction and to sustain \$20,000. Additionally, the Commissioner notes the following miscodings and directs that the restoration be attributed to the proper account: repair and maintenance contracts on computers are properly budgeted under Operations and Maintenance, Account No. 11-000-260-420, and all postal costs are properly coded in Account No. 11-000-230-530.

Disputed Line-Item Number 27

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
07460	11-00-290-600	Business & Other Support Serv./Supplies & Materials	\$46,100	\$5,000

The Board notes that it spent \$39,540 in the 1993-94 school year and \$40,630 in the 1994-95 school year in this account. The Board argues that the increase in this account for 1995-96 is the result of a significant increase in the cost of paper for photocopying equipment. The bid price during the 1994-95 school year for one case of copier paper was \$16.42 and the bid price for the 1995-96 school year is \$29.70 per case. The Board indicates that the business office accounts for approximately 43% of this budget item and the need for paper constitutes a significant portion of those expenses. The increase of approximately \$5,500 in this account is required by the dramatic increase in the cost of paper.

The Councils assert that the Board should be decreasing this budget, inasmuch as past and current spending (\$39,540 in 1993-94 and \$29,470 through ten months of 1994-95) do not support a budget request of \$46,100. The Councils question why, if paper costs went up 80% six months into the last school year, the total costs for 1994-95 only rose to \$40,630 from \$39,540 in 1993-94. The Councils assert that the Board's attempt to blame every supply account increase on the cost of paper is unsubstantiated, and therefore, recommend a \$5,000 reduction from this account.

Upon review, the Commissioner determines that the Board's usage for the first ten months of 1994-95, together with the increased cost of paper, which is undisputed by the Councils, justifies increases to this line item. Accordingly, the reduction of \$5,000 is restored.

APPLICATION OF SURPLUS

In its advertised annual school district budget statement, the Board projected an unreserved surplus of \$1,197,945 and allocated \$340,572 as revenue, leaving \$857,373 as undesignated unreserved surplus.

The Councils argue that based on a line-by-line analysis of the 1994-95 budget

and an independent projection of spending in each line item through the end of the year, over \$1,000,000 will lapse to surplus for 1994-95. Inasmuch as the Board indicated to the Councils that no major expenditures were planned during May and June that were unexpected at the time of budget preparation, and assuming that the Board does not transfer funds for new projects or new initiatives, but simply allows funds to lapse, Councils argue there will be at least an additional \$400,000 in surplus funds to be added to the Board's revenues for 1995-96.

The Board's annual financial report filed pursuant to N.J.S.A. 18A:17-10 (June 30 Board secretary's report) reveals that the Board estimated an unreserved general fund balance on June 30, 1995 of \$1,197,945. It further demonstrates that the unreserved General Fund balance was overestimated by \$222,883, as the actual use of surplus in the 1994-95 budget was \$1,546,761. Based on the advertised 1995-96 budget statement, there is no excess surplus available to fund restorations, as shown in the following calculation:

1995-96 General Fund Appropriations (\$28,341,383) x 3%	\$850,241
June 30, 1994 Audited Unreserved Surplus	\$2,521,823
1994-95 Use of Surplus	<u>1,546,761</u>
Projected June 30, 1995 Unreserved Surplus	\$975,062
Less 1995-96 Budgeted Fund Balance	<u>(340,572)</u>
Remaining Unreserved, Undesignated Fund Balance	\$634,490

The budgeted fund balance used in the calculation above is the amount of surplus originally appropriated by the District and does not include the additional surplus recommended by the Councils of \$400,000. Based on the report of the Board secretary, it would appear that the \$400,000 additional appropriation of surplus as a revenue would place the District in a precarious position, leaving only \$234,490 in unreserved fund balance, or only 0.8% of its 1995-96 General Fund appropriation. Accordingly, the Commissioner restores the \$400,000 to undesignated unreserved surplus. He does so, however, expressly contingent upon verification of actual surplus amounts through the District's 1994-95 annual year-end audit report.

SUMMARY

In summary, the Commissioner directs restoration or sustaining of the Councils' line-item reductions to appropriations and surplus accounts as set forth below. The Commissioner further notes that all restorations to line-item appropriations are restricted in accordance with N.J.A.C. 6:20-2A.11(b)3, provided, however, that where amounts at issue have been incorrectly coded, as noted above, appropriations are restricted to the correct account.

<u>Line Item</u>	<u>Description</u>	<u>Sustained</u>	<u>Restored</u>
01650	Surplus	\$ - 0 -	\$400,000
02670	Other Purchased Services	8,000	- 0 -
02680	Instruction-General Supplies	20,000	- 0 -
02640	Teaching Salaries	86,000	- 0 -
06090	Athletic Instruction Salaries	40,000	- 0 -
06100	Athletic Purchased Services	20,000	- 0 -
06360	Tuition	150,000	- 0 -
06430	Health Services-Salaries	10,000	- 0 -
06490	Other Support Services/Salaries	- 0 -	40,000
06760	Instruction Salaries/Other Prof'l Staff	- 0 -	93,332
06790	Purchased Professional-Ed. Services	20,000	- 0 -
06800	Other Purchased Prof'l and Technical	8,000	- 0 -
06810	Other Purchased Services	2,000	- 0 -
06850	Library Salaries	- 0 -	50,000
06870	Library/Purchased Services	12,000	- 0 -
06930	Gen. Admin./Other Purchased Services	6,000	- 0 -
06950	Telephone	2,000	6,000
06960	Other Purchased Services	50,000	- 0 -
07060	Sch. Admin./Other Purchased Services	27,000	- 0 -
07100	Operation Salaries	- 0 -	100,000
07180	Energy	25,000	55,000
07210-07230	Transportation Salaries	- 0 -	26,000
07230	Transportation Supplies	42,000	- 0 -
07430	Other Purchased Services	- 0 -	9,000
07450	Other Purchased Services	20,000	20,000
07460	Supplies and Materials	<u>- 0 -</u>	<u>5,000</u>
	Total Line-Item Determinations:	\$548,000	\$ 804,332

Tax Levy Certified by Councils:	\$20,631,452
Restoration of Reductions:	804,332
Amount of Restoration Funded by Surplus:	<u> - 0 -</u>
Total Tax Levy for 1995-96:	\$21,435,784

Accordingly, the Morris County Board of Taxation is directed to make the necessary adjustments, as set forth above, subject to verification of surplus amounts through the year-end audit, to reflect a total of \$21,435,784 to be raised in tax levy for General Fund purposes of the Morris Hills Regional Board of Education for the 1995-96 school year. The Board is further ordered to submit to both the County Office of Education and the Office of Finance, as directed above, a revised budget accurately coded in accordance with N.J.A.C. 6:20-2A.2(m), supra, and to undertake the required studies in the areas of administrative and maintenance costs, as directed above.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

October 24, 1995
 Date of Mailing, October 25, 1995

385-95

BOARD OF EDUCATION OF THE TOWNSHIP OF FLORENCE, :

PETITIONER, :

V. :

TOWNSHIP COUNCIL OF THE TOWNSHIP OF FLORENCE, BURLINGTON COUNTY, :

RESPONDENT. :

AND :

IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF FLORENCE, BURLINGTON COUNTY. :

_____ :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of \$214,824 made by governing body following voter rejection of proposed budget on April 18, 1995. Board also appealed General Fund cap waiver in the amount of \$790,716 rejected by voters.

Upon review of the appeal herein to determine whether restoration of specific line item reductions and approval of cap waiver amounts was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore \$213,294 and order the increase of \$790,716 in cap waiver monies for a total General Fund tax levy of \$6,565,878 for 1995-96 school year.

October 24, 1995

BOARD OF EDUCATION OF THE TOWNSHIP OF FLORENCE,	:	
	:	
PETITIONER,	:	
V.	:	
TOWNSHIP COUNCIL OF THE TOWNSHIP OF FLORENCE, BURLINGTON COUNTY,	:	COMMISSIONER OF EDUCATION
	:	
RESPONDENT.	:	DECISION
AND	:	
IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF FLORENCE, BURLINGTON COUNTY.	:	
_____	:	

For the Petitioner, R. Louis Gallagher, II, Esq.

For the Respondent, William T. Wilkins, Esq. (Wilkins & Vallone)

PROCEDURAL HISTORY

This consolidated matter was opened before the Commissioner of Education on June 15, 1995 through the filing of two separate Petitions of Appeal by the Board of Education of the Township of Florence (Board), one seeking restoration of reductions to the school budget made by the Council of the Township of Florence (Council) pursuant to N.J.S.A. 18A:22-37 following defeat of the budget at the annual school election on April 18, 1995, and the other seeking to appeal the defeat of the Board's cap waiver proposal at that same school election.

In February 1995, the Board had advised the County Superintendent that the Board would need a "voter cap waiver" pursuant to N.J.S.A. 18A:7D-28(f) in order to be able to provide for a thorough and efficient system of education (T&E) in the District. The County Superintendent ultimately determined, by way of letter dated March 27, 1995, that \$790,716 of the Board's voter cap waiver was necessary for T&E and, therefore, appealable in the event of voter defeat, but that the remaining \$114,982 was not.

At the annual school election, the voters rejected a public question proposing a General Fund tax levy of \$5,776,692 for the 1995-96 school year, as well as a proposed cap waiver question of \$905,698 representing the total of both T&E and non-T&E amounts. Following consultation with the Board as required by law, the Council adopted a resolution determining to certify a General Fund tax levy of \$5,561,868 as sufficient to provide for T&E in the District. This amount represented a reduction of \$214,824 from the tax levy proposed by the Board, and was effectuated through cuts in 32 line items, for the reasons given in the implementing Council resolution. The Board resolved to appeal these reductions and the voter rejection of the T&E portion of the General Fund cap waiver in the amount of \$790,716, and duly filed the within petition.

The Board filed a petition on June 15, 1995 requesting the Commissioner to overturn the Council's action in failing to provide the necessary tax levy; the Council filed its Answer on July 21, 1995.¹ A petition contesting the cap waiver defeat was also filed on June 15, 1995. An Answer to this petition was filed by the Council on July 21, 1995.

¹ On July 31, 1995 the Board submitted a letter objecting to the lateness of the Council's Answer in this matter, which it asserts was due June 30, 1995 and not received by the Board until July 24, 1995. It urged rejection of this Answer and all subsequent Council submissions. However, in view of the circumstances detailed in a letter to the parties from the Acting Director, Bureau of Controversies and Disputes, the Council's Answer and subsequent submissions are accepted for consideration herein by the Commissioner.

On July 19, 1995 and July 28, 1995, respectively, the Board and the Council filed Position Statements pursuant to N.J.A.C. 6:24-7.8. On August 7, 1995 the Board filed a response to the Council's Position Statement and on August 16, 1995 the Board filed a Final Summation.

On August 18, 1995, the Burlington County Superintendent of Schools filed his affidavit and supporting documents attesting to the process of review and analysis that led to his conclusion, and that of the Department of Education's Cap Waiver Review panel, that a \$790,716 "T&E voter cap waiver" should be granted to the Board so as to permit it to increase its General Fund budget beyond the established permissible level. The County Superintendent's filings also reflected that the panel directed a move of \$51,331, representing \$22,979 for CST Testing Materials and \$28,352 for in-school suspension, from the T&E cap waiver to the non-T&E cap waiver request, and a reallocation of resources from the base budget in the amount of \$50,701. The County Superintendent's submission also reflects that the Board requested a Commissioner's cap waiver of \$415,579, which amount, based upon increased special education costs, was approved by the Acting Commissioner by letter dated March 20, 1995.

In addition, the parties had previously been advised by letter from the Assistant Commissioner dated April 7, 1995 and distributed through the County Superintendent to boards and municipalities experiencing budget defeats, that as part of the record of the within appeal, the Commissioner would take official notice of the Board's revised budget and its June 30 financial report, the latter for the purpose of identifying whether the Board underestimated in its 1995-96 budget the amount of anticipated undesignated surplus.

Upon filing of the County Superintendent's affidavit as noted above, the matter was consolidated and the record of the appeal was closed.

The amounts in dispute in this appeal are as follows:

<u>Tax Levy Proposed by Board</u>		<u>Tax Levy Certified by the Council</u>	
General Fund	\$5,776,692	General Fund	\$5,561,868
<u>Amount of Reduction by the Council</u>		<u>Amount of Reduction in Dispute</u>	
General Fund	\$214,824	General Fund	\$214,824
<u>Amount of Cap Waiver Approved as T&E and Appealed Herein</u>		<u>Amount of Cap Waiver Not Approved as T&E and Not Appealed Herein</u>	
	\$790,716		\$114,982

TOTAL AMOUNT ON APPEAL: \$1,005,540

The cap waiver requested by the Board included the following line items, which were determined by the County Superintendent to be necessary, or not necessary, for T&E as set forth below:

Necessary for T&E

<u>Account Number</u>	<u>Account Title</u>	<u>Dollar Amount</u>
11-000-213-105	Nurses Clerical Aide	\$ 9,879
11-000-218-104	Substance Abuse Coordinator	19,899
11-000-218-500	Guidance Workshops	280
11-000-218-610	Guidance Supplies	452
11-000-219-104	CST Salaries	42,711
11-000-219-610	CST Testing Materials	3,200
11-000-222-100	Librarian Salaries	30,380
11-000-222-610	Library Books, Publication Subscription	29,466
11-000-230-240	Data Processing/Payroll and Budget	13,651
11-000-230-331	Solicitor	5,000
11-000-230-890	Election Expenses	2,750
11-000-260-100	Custodian/Maintenance Salaries and Subs.	43,110
11-000-260-420	Repairs/Maintenance Building/Grounds	52,956
11-000-260-610	Custodial Supplies	2,000
11-000-260-620	Electric/Gas Costs	91,020
11-000-270-107	Bus Aides Salaries	11,962
11-000-270-109	Field Trip Transportation	8,986
11-000-290-290	Insurance Benefits	21,249
11-000-290-500	Advertisement/Public Notices	6,500

<u>Account Number</u>	<u>Account Title</u>	<u>Dollar Amount</u>
11-000-290-730	Replacement Music Instructional Equipment	\$16,250
11-120-100-101	ESL Teacher Salary	25,655
11-130-100-101	Teacher Salaries Grades 6-8 English	14,893
11-140-100-101	Teacher Salaries Grades 9-12 English	14,893
11-190-100-106	Teacher Substitutes	38,072
11-190-100-610	Supplies	63,192
11-190-100-640	Textbooks	7,275
11-230-100-101	SCE Teacher Salary	23,731
11-230-100-610	SCE Teaching Supplies	2,700
11-401-100-100	Extra Curricular Salaries	47,277
11-402-100-100	Athletic Salaries	48,531
11-402-100-610	Sports Equipment/Supplies	370
11-402-100-800	Sports Officiating	2,321
12-000-100-730	New Instructional Equipment	23,799
12-000-219-730	CST New Equipment-Computer	2,000
12-000-221-730	New Curriculum Equipment-Computer	9,000
12-000-240-730	High School Replacement Furniture	1,900
12-000-260-730	New Non Instructional Equipment	6,170
12-000-300-730	Guidance Office Equipment	3,600
11-000-230-339	Architect Services	1,500
11-000-230-339	Appraisal/Paying Agency	6,250
11-190-100-106	Department Coordinators	8,456
11-190-100-106	Morning Coverage Duty	2,430
11-000-290-290	Retirement Accumulated Leave	<u>25,000</u>
	Total	<u>\$790,716</u>

Not Necessary for T&E

<u>Account Number</u>	<u>Account Title</u>	<u>Dollar Amount</u>
11-000-240-110	Cafeteria Aide	\$ 3,125
11-000-270-107	Bus Driver, Subs. Overtime	15,118
11-000-270-109	Sports Transportation	3,065
11-000-270-420	Vehicle Repair/Maintenance	4,105
11-000-270-513	Transportation Contract Services	2,895
11-000-270-593	Vehicle Insurance	2,199
11-000-270-600	Vehicle Parts, Lubrication, Oil	2,218
11-000-290-220	Contributions to S. S.	1,046
11-000-290-241	Contributions to Pension	1,039
11-000-290-290	Insurance Benefits	8,322
11-402-100-100	Soccer Coaches	5,814
11-402-100-610	Soccer Equipment/Supplies	13,000
11-402-100-800	Soccer Officiating	1,705

<u>Account Number</u>	<u>Account Title</u>	<u>Dollar Amount</u>
11-000-221-500	Workshops	\$22,979
11-130-100-101	In School Suspension	14,176
11-140-100-106	In School Suspension	<u>14,176</u>
	Total	<u>\$114,982</u>

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line-item reduction imposed by the governing body is necessary for the provision of T&E. Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989). Additionally, with respect to appeals involving cap waivers, before the Commissioner can direct restoration of any amount of a waiver defeated by the voters, the Commissioner must determine that such amount is fully necessary for purposes of T&E and unable to be derived from further reallocation within the base budget. Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, Bergen County, State Board decision July 7, 1993, and Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater,

Bergen County and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, Bergen County, State Board decision July 6, 1994.

Mindful, then, of the standard to be applied, the Commissioner makes the specific determinations set forth below:

COMMISSIONER'S DETERMINATION - BUDGET

By way of introduction, the Commissioner notes the Council's stated general position with respect to all of the cuts made in the instant budget. The Council maintains that to avoid program cuts, its budget committee directed primary attention to salary expenditures which were increased in excess of 6%, which the Council contends exceeded the Board's salary obligations. Following its review of documentation provided by the Board, the Council's budget committee concluded that the Board had overbudgeted salaries for administrators, teachers, nonteachers, and support staff by 3.01%. The Council applied this percentage reduction to all budgeted salaries, and concluded that \$214,823 in the budget could be removed without affecting programs or T&E. The Council relies on this general position in support of each of the cuts made to the following line items and urges the Commissioner to sustain all its reductions.

The Board generally contends that the mathematical formula utilized by the Council in making all of its cuts was fatally flawed. It maintains that the Council erroneously added all the salary accounts, then added all of the actual contracts, both negotiated and nonnegotiated, and subtracted to find the difference. The Council then determined a percentage that it believed accounted for overbudgeting by the Board (3.01%) and arbitrarily applied this percentage to every line item that pertained to salaries, previously negotiated or nonnegotiated. The Board argues that this approach overlooked settled contracts with other employee groups,

substitute accounts, travel reimbursements, overtime costs, and other contracted items which the Board is obligated to fulfill, where actual costs were budgeted.

Disputed Line-Item Group 1

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
2510	11-110-100-101	Preschool/Kinder. Salaries	\$134,591	\$4,051
2520	11-120-100-101	Grades 1-5 Salaries	1,679,387	50,550
2530	11-130-100-101	Grades 6-8 Salaries	899,074	27,062
2540	11-140-100-101	Grades 9-12 Salaries	1,169,206	<u>35,193</u>
				<u>\$116,856</u>

The Board argues that at the time the budget was prepared, the teachers' contract had not settled. Therefore, the Board budgeted an anticipated 4% salary increase in these accounts. Subsequently, this contract settled at a 3.5% salary increase. The Board further asserts that it should be noted that this 3.5% increase does not include longevity benefits. Although the longevity rates were frozen at the current levels, those rates are not included in the 3.5% and, thus, the Board requests that the budget be restored.

Upon review, the Commissioner determines to sustain a cut of .5% to each of the above accounts as the budgeted amount exceeds actual costs by this amount on these salary accounts. The Commissioner, therefore, orders restoration of 3.5% to each of the salary accounts as the Board has demonstrated that this money is necessary to meet its contractual obligations.

In sum, the Commissioner orders \$4,031 restored to Account No. 11-110-100-101; \$50,297 restored to Account No. 11-120-100-101; \$26,927 restored to Account No. 11-130-100-101; and \$35,017 restored to Account No. 11-140-100-101.

Disputed Line-Item Group 2

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
<u>2640</u>	<u>11-190-100-106</u>	<u>Instruct./Other Salaries</u>	<u>\$111,157</u>	<u>\$3,346</u>

The Board points out that included in this account are teacher aides' salaries, department coordinator stipends, funds for classroom coverages, morning duty coverages, after school detention coverages, teacher substitutes, credit advancements on the salary guide, retirement and accumulated leave. It argues that the teacher aides account reflects the actual salary increase costs under contracts currently in place which the Board has a legal obligation to meet. The Council does not contend that the District employs too many aides; rather the Council suggests that the Board budgeted more than is needed in this account, which is not the case according to the Board. With respect to the other components of this account, the Board argues that when it prepares a budget, there are certain assumptions which must be made, i.e., projected costs of substitutes and classroom coverages. The Board contends that these estimates were based upon what has occurred in the District over the two years preceding the preparation of the proposed budget, and the figures utilized here reflect accurate estimates.

Upon review, as this account is composed of actual contractual obligation costs and what the Commissioner finds, based on the Board's submissions, to be reasonable projected estimates, the Commissioner orders that \$3,346 be restored to Account No. 11-190-100-106.

The Commissioner notes, however, that there are appropriations in Account No. 11-190-100-106 which should have correctly been budgeted elsewhere pursuant to the chart of accounts required for use pursuant to N.J.A.C. 6:20-2A.2(m).² Thus, the Commissioner directs the Board to reclassify all miscoded appropriations to the proper accounts. In making its

² Examples of miscodings include department coordinator stipends which are properly coded to Account No. 11-000-240-104, unless proration for those who also teach is not possible, in which case the entire amount should be included in instruction as teachers' salaries; retirement and accumulated leave funds which are properly budgeted in Account. No. 11-000-290-290; and funds for teacher substitutes and credit advancements on salary guides which are properly included in the applicable program category as teachers' salaries.

adjustments, the Board must reclassify the entire amounts which are miscoded, not just the restored portions.

Disputed Line-Item Group 3

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
3080	11-205-100-101	Salaries/Teachers	\$320,775	\$9,655
3090	11-205-100-106	Other Salaries/Instruction	71,469	<u>2,151</u>
				<u>\$11,806</u>

The Board points out that this account includes two categories: (1) salaries for the instructors of the perceptually impaired classes; and (2) salaries for the aides in each of the classes.

The Board argues that the account for the teachers includes the addition of a middle school classroom teacher for the perceptually impaired. The Board asserts it found this additional position necessary because of the increase in the number of special students. It contends that the District has reached the maximum allowable number of students in the other two classes. It addresses that this year, the Board was required to ask the County Office for a waiver for new students, so it would not be required to pay tuition to send the students out of the District. The additional class will enable the District to keep students in the District, thus avoiding unnecessary tuition costs.

The teacher aides account reflects the actual salary cost under contracts currently in place. There were no additional monies placed in this account. Again, the Board argues that the Council does not question the need for the employees represented in this account and believes these programs should not be touched. However, the Board maintains that the Council's assumption that the Board overbudgeted is incorrect. The Board suggests that the personnel in these accounts are needed to maintain the District's current efforts to provide T&E.

Upon review, with respect to Account No. 11-205-100-101, in that the teachers' contract ultimately settled for a 3.5% increase while the Board projected a 4% increase, the Commissioner determines that .5% of the reduction must be sustained and 3.5%, or \$9,607 restored. In that Account No. 11-205-100-106 represents actual rather than projected salary expense, the Commissioner determines to restore the full amount of the reduction, \$2,151.

Disputed Line-Item Group 4

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
3860	11-213-100-101	Resource Room-Salaries	\$71,689	\$2,158

The Board proffers that this line item pertains to the salaries of the resource room teachers. At the time the budget was prepared, the teachers' contract had not been settled and the Board, therefore, estimated a reasonable percentage salary increase of 4%. The contract subsequently settled at 3.5%. Therefore, there is not an extra 3.01% budgeted in this account as alleged by the Council. The Board states that its intention is to maintain the current program and this account does not include any new positions.

Upon review, the Commissioner determines to sustain a cut of .5% and restore the remaining 3.5% to reflect actual contractual costs in this line item. As such, \$2,147 is restored to Account No. 11-213-100-101.

Disputed Line-Item Group 5

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
4310	11-218-100-101	Salaries/Teachers	\$80,938	\$2,436

The Board states that this line item represents the salaries for the District's two speech therapists. It argues that, again, the Council's position is that the Board overbudgeted by 3.01%, when, in fact, as the contract was not yet settled, the Board estimated a reasonable 4%

increase. As previously noted, the teachers' contract ultimately settled at a salary increase of 3.5% and the Council does not suggest that the District is overstaffed. The Board finds it necessary to maintain the current staff. The Board avers that the Council does not suggest that this area is overstaffed and it avers that two speech therapists for over 1,500 students is entirely reasonable.

Upon review, in that the teachers' contract subsequently settled at a 3.5% salary increase rather than the 4% budgeted by the Board, the Commissioner determines to sustain a cut of .5%, and restore the remaining 3.5% of the amount in dispute to the Board, in that this represents actual contractual expense. Restoration of \$2,424 to Account No. 11-218-100-101 is ordered.

Disputed Line-Item Group 6

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
4400	11-219-100-101	Salaries/Special Education	\$7,000	\$211

The Board argues that it has estimated the probable costs of providing home instruction for the 1995-96 school year based upon an examination of home instruction costs over the previous years, and that the estimate utilized in this account is entirely reasonable.

The Council argues that the Board did not provide the Council with the actual cost or details supporting the "probable costs" and thus, the Council relies on the rationale set forth above to support its 3.01% cut in this account.

Upon review, the Commissioner finds the Board's submitted documentation sufficient to support its assertions with respect to this account and finds these costs necessary for T&E. Therefore, the Commissioner restores the reduction of \$211.

Disputed Line-Item Group 7

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
4810	11-230-100-101	Salaries/Basic Skills	\$184,117	\$5,542
4820	11-230-100-106	Salaries Instruction	62,161	<u>1,871</u>
				<u>\$7,413</u>

The Board contends that the first account in this category represents the salaries of basic skills teachers. Again, at the time the budget was prepared, the teachers' contract had not been settled and, therefore, the Board anticipated reasonable budget increases of 4%. The contract was subsequently settled at 3.5%. The Board argues that it budgeted only for personnel to maintain the current program, and this account does not include any new positions.

The Board advances that the second account, Account No. 11-230-100-106, includes the percentage of salaries of the supervisors and secretaries correlating to the percentage of time they spend on basic skills related tasks. The salaries for supervisors represent actual contracted costs. In that the secretarial unit had not settled its contract at the time the budget was prepared, the Board anticipated a reasonable increase of 4% and budgeted this amount in this account. The contract subsequently settled for a 5.44% salary increase, resulting in an underbudgeting of 1.44% for this expense.

As to Account No. 11-230-100-101, the Commissioner determines to restore 3.5% of the amount in dispute, or \$5,514, as this represents actual contractual cost of the Board.

As to other amounts, the Commissioner notes that the Board has attempted to allocate the support services costs related to Basic Skills to the Basic Skills Programs. Under the appropriate chart of accounts, support services costs related to general current expense are to be rendered under the applicable support services program code. Salaries for supervision of instruction are coded to Account No. 11-000-221-102, Improvement of Instruction

Services/Other Support Services Instructional Staff - Salaries of Supervisors of Instruction. Inasmuch as Account No. 11-230-100-106 includes secretarial salaries, as well as supervisors, the Commissioner directs restoration of \$1,871 to Account No. 11-230-100-106, as this total amount is required to meet the Board's actual contractual obligations in this item. The Commissioner further directs the District to reclassify to Account No. 11-000-221-102 all amounts that have been included in Account No. 11-230-100-106 for supervisors.

Disputed Line-Item Group 8

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
4900	11-240-100-101	Salaries/Bilingual Education	\$15,621	\$470

The Board states that this line item represents the salary of the teacher of English as a Second Language, replacing the current teacher who is retiring. The Board budgeted the salary of a teacher with no more than three years' experience, and therefore, argues that this account reflects the actual cost of employing a new teacher.

Upon review, in light of the documentation submitted by the Board, the Commissioner finds this line item necessary for T&E and the manner of estimating salary reasonable. Accordingly, he determines to restore the reduction of \$470.

Disputed Line-Item Group 9

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
6030	11-401-100-100	Salaries/Cocurricular	\$12,627	\$380
6090	11-402-100-100	Salaries/Athletics	93,574	<u>2,817</u>
				<u>\$3,197</u>

The Board argues that the money in these accounts is necessary for the current extracurricular program. No new programs are proposed. The Board avers that the Council applied the same mathematical rationale to these accounts that the Council did for all salary

accounts. However, the Board asserts that the rationale is faulty. The Board was able to negotiate a freeze on extracurricular salaries at the current rate for one year. The Board contends that extracurricular activities salaries are part of a school district's T&E. Throughout the years, the Board argues it has budgeted for extracurricular activities because of the Board's belief that these activities positively contribute to the characteristics and value associated with educating youth.

The Board, however, concedes that Account No. 11-401-100-100 has \$142 more than required expenditures in 1995-96. In Account No. 11-402-100-100, the Board contends the budget contains \$633 more than anticipated actual expenses.

Upon review, the Commissioner determines to restore \$238 to Account No. 11-401-100-100 and \$2,184 to Account No. 11-402-100-100, for a total restoration of \$2,422 in that he finds these are actual costs necessary for T&E.

Disputed Line-Item Group 10

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
6370	11-000-211-100	Salaries/Attendance	\$4,055	\$122
6430	11-000-213-100	Salaries/Health	118,607	<u>3,570</u>
				<u>\$3,692</u>

The Board argues that the first line item represents the attendance officer's salary. It contends that this amount is the actual contracted salary for this position which the Board is legally obligated to provide. There is no extra money in this line item, the Board warrants.

The Board asserts that the second line item represents salaries of the three nurses. The Board contends that at the time this budget was prepared, the salary contracts for these individuals had not yet been negotiated; therefore, the Board budgeted for a reasonable 4% increase. This line item merely provides for the maintenance of the current program.

Upon review, the Commissioner determines, in that the first line item represents actual contractual rather than projected salary expense, to restore the entire \$122 reduction to Account No. 11-000-211-100. The Commissioner further determines that the second line item here comprises a .5% excess appropriation over the actual negotiated salary costs. Therefore, the Commissioner sustains a .5% reduction in this line item and restores 3.5% of the amount in dispute, or \$3,552, to Account No. 11-000-213-100.

Disputed Line-Item Group 11

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
6490	11-000-218-104	Salaries/Other Prof. Services	\$272,845	\$8,213
6500	11-000-218-105	Salaries/Secretarial, Clerical	26,833	<u>808</u>
				<u>\$9,021</u>

The Board argues that the first line item represents salaries for guidance counselors. It contends that this account reflects an increase due to the move of a position from the nurses' account and the proper placement of this position under guidance. It avers that there are no additional positions in this account.

The Board further argues that Account No. 11-000-218-105 contains one salary, the position of a guidance office secretary. The Board asserts that at the time the budget was prepared, the contract negotiations for secretaries had not been concluded and, therefore, the Board budgeted a reasonable 4% increase for this line item. The Board notes that the secretarial contract subsequently settled on a 5.44% salary increase, leaving this line item underbudgeted by 1.44%.

Upon review, the Commissioner determines that Account No. 11-000-218-104 reflects a .5% excess over the actual contracted salary increase for the guidance counselors. Therefore, the Commissioner determines to sustain a cut of .5%, or \$41, and restores the

remaining 3.5% of the amount in dispute, \$8,172, to this account as the Board is contractually obligated for this salary amount.

Additionally, to Account No. 11-000-218-105, the Commissioner restores the entire \$808 cut made to fund the full amount required under the actual negotiated salary increases currently in place.

Disputed Line-Item Group 12

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
6580	11-000-219-104	Salaries Other Prof'l Staff	\$109,954	\$3,310
6590	11-000-219-105	Salaries Secretarial/Clerical	21,107	<u>635</u>
				<u>\$3,945</u>

The Board argues that the first line item contains child study team salaries and provisions for the team to work two weeks in the summer to complete required evaluations. It posits that no new positions are suggested. The Board asserts that, although the Council suggests that the Board budgeted excess funds of 3.01% in this account, in actuality, it decreased the amounts in the account because of the retirement of the psychologist and learning disability teacher consultant, who, the Board projects will be replaced by two new employees hired at a lesser salary.

The second line item pertains to the salary of the secretary. As previously discussed, the contract with the secretarial unit was ultimately settled at a 5.44% salary increase, while the Board budgeted for a 4% salary increase when preparing this budget. As such, this account is already underbudgeted.

Upon review, the Commissioner finds the Board's documentation warrants full restoration of all monies in these two line items as necessary for T&E and, therefore, orders \$3,310 restored to Account No. 11-000-219-104 and \$635 restored to 11-000-219-105.

Disputed Line-Item Group 13

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
6750	11-000-221-102	Salaries/Supp. Instruction	\$87,225	\$2,625

The Board argues that this line item represents the salaries of two curriculum supervisors and accurately reflects negotiated salary increases in place for the two positions. It asserts that no new employees, nor positions are included here and no extra money was budgeted in these accounts.

Upon review, as this line item represents actual contracted salary expense, the Commissioner determines to restore the \$2,625 reduction.

Disputed Line-Item Group 14

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
6850	11-000-222-100	School Librarian Salaries	\$84,316	\$2,538

The Board argues that this line item represents the salaries of three librarians. The District has four schools. However, the middle school and the high school share one librarian. There are no new positions in this account. Again, the Board argues that, at the time this budget was prepared, salary negotiations had not yet been concluded and the Board, therefore, budgeted a reasonable projected salary increase of 4%. Subsequently, the contract negotiations settled at a 3.5% salary increase.

Upon review, the Commissioner determines that the budgeted amount in this line item exceeds actual contracted expense by .5%. Therefore, the Commissioner sustains a .5% cut to Account No. 11-000-222-100 and orders that the remaining \$2,525 be restored as necessary for T&E.

Disputed Line-Item Group 15

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
6910	11-000-230-100	General Admin. Services	\$127,532	\$3,839

The Board argues that this line item represents the salaries of the superintendent, secretary to the superintendent, election workers and the treasurer's salaries. The money in these accounts reflect the actual salaries of these individuals, with no additional money being budgeted in these accounts.

Upon review, as this line item represents actual salary expense, the Commissioner determines to restore the full \$3,839 reduction to this account.

Disputed Line-Item Group 16

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
7010	11-000-240-103	Salaries of Principal/Asst.	\$359,635	\$10,825
7030	11-000-240-105	Salaries of Secret. /Clerical	150,656	4,535
7040	11-000-240-110	Other Salaries	15,091	<u>454</u>
				<u>\$15,814</u>

The Board asserts that the first line item, 11-000-240-103, represents the salaries of the principals and assistant principals. It asserts that the contract with this bargaining unit had been settled when this budget was prepared and, consequently, the monies budgeted in this account are actual salaries to be paid to these five employees.

The Board argues that the second line item, 11-000-240-105, represents the salaries for the school secretaries whose contract, ultimately settled after the preparation of the budget, called for a 5.44% salary increase, while the Board in this budget had projected an increase of only 4%. As such, it asserts that this account is already underfunded.

Finally, the Board argues that the third line item, 11-000-240-110, includes actual contractual salaries of the cafeteria aides and projected costs of aide substitutes needed. The

Board maintains that all projections were based on previous years experience and are reasonable approximations.

Upon review, the Commissioner determines to restore the budgeted amount of \$10,825 to line item 11-000-240-103 as this line item represents actual rather than projected salary expense. The Commissioner further determines to restore the full reduction of \$4,535 to Account 11-000-240-105 in that this amount is also necessary to meet existing contractual salary obligations. With respect to line item 11-000-240-110, the Commissioner restores the full reduction of \$454 to this line item as he determines, based upon the justifying submissions of the Board, that it represents actual costs and reasonable projected estimates. It is noted, however, that salaries for employees hired specifically as cafeteria aides are properly budgeted in Account No. 11-000-260-100. Therefore, the Board is hereby directed to reclassify the budgeted amount for cafeteria aides and substitutes to the proper account.

Disputed Line-Item Group 17

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
7100	11-000-260-100	Salaries of Maintenance and Plant Services	\$473,985	\$14,267

The Board asserts that this line item includes several accounts, i.e., (1) custodial salaries, (2) maintenance/grounds salaries, (3) director of building/grounds, (4) custodial substitutes, (5) maintenance substitutes, (6) overtime for custodial and maintenance staff, and (7) clothing allowances for custodial and maintenance staff. The Board argues that the contracts for salaries and other provisions represented in this line item were settled at the time this budget was prepared and, consequently, this line item reflects the actual expenses the Board will incur for the 1995-96 school year.

Upon review, as this line item represents actual contracted expense, the Commissioner determines to restore the full \$14,267 reduction to this account.

Disputed Line-Item Group 18

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
7210	11-000-270-107	Sal. for Pupil Transportation	\$133,036	\$4,004
7220	11-000-270-108	Sal. for Pupil Trans. Spec. Ed.	79,024	2,379
7230	11-000-270-109	Sal. for Pupil Transportation	7,788	<u>234</u>
				<u>\$6,617</u>

The Board asserts that these accounts include the salaries of the bus drivers, whose contract was settled at the time the budget was composed. As such, the amount of money budgeted in these accounts are the actual salaries required for these individuals in 1995-96. Further, the Board argues that these accounts reflect the pupil transportation costs without the inclusion of courtesy busing, since it was eliminated from the budget.

Upon review, as this line item represents actual contracted expense, the Commissioner determines to restore the full \$6,617 reduction to these accounts.

Disputed Line-Item Group 19

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
<u>7360</u>	<u>11-000-290-100</u>	<u>Business & Other Supp. Sal.</u>	<u>\$151,911</u>	<u>\$4,573</u>

The Board argues that this line item includes the salaries for the business administrator and the business office staff. Although, again, the Council contends that the Board overbudgeted in this account by 3.01%, in fact, the amounts budgeted here are actual expenditures necessary to meet the Board's contracted obligations. No excess money was included.

Upon review, as this line item represents actual contracted salary expense, the Commissioner determines to restore the full \$4,573 reduction to this account.

COMMISSIONER'S DETERMINATION- CAP WAIVER

Although the Council filed an Answer generally denying the necessity for the T&E cap waiver appealed herein, no arguments were submitted with respect to specific line items included in the cap waiver. Accordingly, while the Council's position of general denial is duly noted, the recitation below reflects specific arguments only from the Board.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
6430	11-000-213-105	Nurses Clerical Aide	\$9,879

The Board argues that in January 1994 it opened a middle school adjacent to the high school. A decision was made to share much of the staff. The Board contends that one nurse now serves the needs of approximately 770 students. On an average monthly basis, the nurse of the MS/HS sees 870 students for medical reasons. Moreover, due to the athletic programs, the nurse administers first aid to 240 students per month. Due to the heavy case load of the nurse, it is virtually impossible to effectively maintain student health records. Although it was the superintendent's recommendation that another part-time nurse was needed, the Board, in an attempt to maintain costs, budgeted for a part-time clerical aide. This position is necessary to ensure that student records are accurately maintained and all legal provisions are met.

Upon review, the Commissioner finds that this amount has been proven necessary for T&E and, accordingly, approves this appropriation of \$9,879.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
6490	11-000-218-104	Substance Abuse Coordinator	\$19,899
6540	11-000-218-500	Guidance Workshops	280
6550	11-000-218-610	Guidance Supplies	<u>452</u>
			<u>\$20,631</u>

The Board argues that in this account are the salary of the substance abuse counselor, the supplies necessary for the program, and provisions for the SAC's professional

development. Florence is experiencing a major increase in the abuse of drug and alcohol, occurring in conjunction with the increase in substance abuse is an increase in fights, vandalism, and school suspensions. The staff, under the leadership of the substance abuse counselor has begun a proactive, aggressive campaign to tackle these problems. Moreover, the SAC provides expertise in assisting the District teachers in meeting the requirements of N.J.A.C. 6:29-6.1 et seq. to provide drug and alcohol education.

Upon review, the Commissioner finds that this amount has been proven necessary for T&E and, accordingly, approves these appropriations of \$19,899, \$280 and \$452.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
6580	11-000-219-104	CST Salaries	\$42,711
6660	11-000-219-610	CST Testing Materials	<u>3,200</u>
			<u>\$45,911</u>

The Board argues that during the course of the 1994-95 school year, two members of the child study team retired. In an effort to maintain costs, the two positions were not filled. Rather, the Board contracted the services of a psychologist and a learning disability teacher consultant. As a result, the District has had difficulty meeting all of the requirements of N.J.A.C. 6:28-1.1 et seq. These accounts include the salary to replace the learning disability teacher consultant and obtain the testing materials necessary to accurately assess and place special education students. The dollar amount reflects what is necessary to maintain the current program which enables the District to provide T&E to a population with specialized needs.

Upon review, the Commissioner finds that this amount has been proven necessary for T&E and, accordingly, approves these appropriations of \$42,711 and \$3,200.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
6850	11-000-222-100	Librarian Salaries	\$30,380
6880	11-000-222-610	Library Books, Publications, Subscription	<u>29,466</u>
			<u>\$59,846</u>

The Board argues that the Florence School District employs three librarians for four schools. The salary of a librarian currently employed is an item in this account. The librarians are necessary to implement the study skills curriculum approved by the Board under N.J.A.C. 6:8-4.5(a)2.

In addition to the salary of one librarian, this account provides for all materials necessary for the libraries in the four schools. For example, library supplies include all new library books, reference materials, newspapers and magazine subscriptions, AV material and cataloging needs. A total amount of \$29,466 is what is budgeted for library materials for all four schools.

Upon review, the Commissioner finds that this amount has been proven necessary for T&E and, accordingly, approves these appropriations of \$30,380 and \$29,466.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
<u>6940</u>	<u>11-000-230-240</u>	<u>Data Processing/Payroll and Budget</u>	<u>\$13,651</u>

The Board argues that this account reflects the fee to contract all data processing services for the maintenance of pupil and financial records. This amount is one-half of the actual service fee the District is charged. The other portion is budgeted in the base budget. This service is necessary to meet the mandates of N.J.A.C. 6:8-1.1 et seq., including N.J.A.C. 6:8-4.9(a)1, N.J.A.C. 6:8-4.9(a)2, N.J.A.C. 6:8-4.9(a)3, N.J.A.C. 6:8-4.9(a)4, as well as, N.J.A.C. 6:20-2A et seq.

Upon review, the Commissioner finds that this amount has been proven necessary for T&E and, accordingly, approves this appropriation of \$13,651. It is noted, however, that the Board has allocated these monies to Account No. 11-000-230-240, which is not a valid account number under the chart of accounts required for use pursuant to N.J.A.C. 6:20-2A.2(m).³ The Board is hereby directed to reclassify these funds, along with funds in the base budget, which are allocated to this invalid account number, to the proper accounts.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
6920	11-000-230-331	Solicitor	\$5,000

The Board argues that the efficient managing of a school district has become increasingly complex due to mandates and the ever present issue of liability. Moreover, labor relations and contract negotiations require advanced knowledge in the law. A Board of Education must employ the services of a skilled solicitor. The \$5,000 in this account constitutes one-half of the predicted expenses of the Board's attorney. The remaining portion of the fee is located in the base budget.

Upon review, the Commissioner finds that this amount has been proven necessary for T&E and, accordingly, approves this appropriation of \$5,000.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
6990	11-000-230-890	Election Expenses	\$2,750

The Board argues that it is required by law to conduct annual school elections, N.J.S.A. 18A:14-1 et seq. To provide for the voters when they arrive at the polls, the Board must

³ This appropriation represents funds for pupil and financial data processing services. Data processing services for pupil records is appropriately coded to Account No. 11-000-211-300 if the records are attendance related. If such records are physical, medical, standardized test results, have background personal and sound development and school performance, the appropriate account is Account No. 11-000-290-340. Financial data processing services are appropriately budgeted to Account No. 11-290-340.

employ election workers. The money in this account provides for the payment of the election workers.

Upon review, the Commissioner notes that the proper account for budgeting election workers is Account No. 11-000-230-339, General Administration-Other Purchased Professional Services. The Commissioner finds that this amount has been proven necessary for T&E and, accordingly, approves appropriation of \$2,750 to Account No. 11-000-230-339.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
7100	11-000-260-100	Custodian/Maintenance Salaries and Subs.	\$43,110
7170	11-000-260-610	Custodial Supplies	<u>2,000</u>
			<u>\$45,110</u>

The Board argues that included in this account is the salary of one presently employed custodian. In that the negotiated contract for custodians was in place at the time the budget was prepared, the money budgeted for this individual's salary represents actual cost. Also, included in this account are the estimated costs of substitutes for the 14 custodians and two maintenance employees. The estimate for the substitutes was based on an analysis of past years and the current school year. No new positions are budgeted. This account reflects the personnel needed to maintain the current operations and maintenance program to provide for the health and safety of the District's students, N.J.A.C. 6:8-4.9(a)6.

In addition to the salary of one custodian, this account also has designated \$2,000 for custodial supplies. The proposed amount was predicted by analyzing the expenses in the account over the last three years. The money is needed to provide for the health and safety of the District's students.

Upon review, the Commissioner finds that this amount has been proven necessary for T&E and, accordingly, approves these appropriations of \$43,110 and \$2,000.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
7120	11-000-260-420	Repairs/Maintenance Building/Grounds	\$52,956

The Board argues that in this account is \$12,695 for the contracted services of a concrete company. The walkways by the high school gym door exit and the high school main gym entrance pose a safety problem to students and spectators. The repair to these walkways cannot be postponed for another year. Pursuant to N.J.A.C. 6:8-4.9(a)7, the Board is required to develop and implement a multi year comprehensive maintenance plan. The money for this project cannot be allocated within the base budget.

Included also in this account is \$40,174 for building improvements. Historically in Florence, it is this account which has been cut in an effort to go below cap and to respond to the needs of the taxpayer. As a result, many needed projects have been neglected. Proposed projects in this category include: replacement of designated exit doors that do not meet code; replacement of lavatory partitions; installation of a security system in one school where visibility is blocked and easy access is an issue; and removing stage curtains and installing curtains that meet code. Money in this account will enable the District to meet the requirements of N.J.A.C. 6:8-4.9(a)6 and N.J.A.C. 6:8-4.9(a)7.

Review of the Board's cap waiver position statement indicates that the appropriation includes the services of a concrete company for the repair of concrete walkways. Majors repairs are coded to Account No. 12-000-400-450, Facilities Acquisition and Construction Services, while routine maintenance is coded to Account No. 11-000-260-420. Repairs to the concrete walkways are a major repair and, accordingly, should be coded to Account No. 12-000-400-450, as should amounts budgeted for building improvements.

Upon review, the Commissioner finds that this amount has been proven necessary for T&E and, accordingly, approves this appropriation of \$52,956, and directs the restoration to Account No 12-000-400-450.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
7180	11-000-260-620	Electric/Gas Costs	\$91,020

The Board argues that this year the District encountered difficulty in meeting the financial obligations of its electric and gas costs. School personnel realized the dilemma in December. As a result, the 1995-96 budget was composed to more accurately reflect the estimate of heat, gas and electric. The opening of the middle school wing contributed to the increased costs of these items. The money in this account is needed so a healthy and comfortable environment is available to students.

Upon review, the Commissioner finds that this amount has been proven necessary for T&E and, accordingly, approves this appropriation of \$91,020.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
7210	11-000-270-107	Bus Aides Salaries	\$11,962

The Board argues that included in this amount are the salaries for two currently employed bus aides. The transportation supervisor has indicated that the same number of special education routes will be necessary in the 1995-96 school year. As a result, bus drivers will be transporting students with physical and/or emotional difficulties. To safely transport the students, four aides are needed to cover these runs. Two aides were budgeted in the base budget. Two more are budgeted in this T&E cap waiver proposal. This account does not reflect any new positions. The Board is attempting to maintain the current transportation program mandated for special education.

Upon review, the Commissioner finds that this amount has been proven necessary for T&E and, accordingly, approves this appropriation of \$11,962.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
7230	11-000-270-109	Field Trip Transportation	\$8,986

The Board argues that it has philosophically throughout the year supported the concept of student field trips. Financially, the Board has budgeted for field trips in every budget. Florence Council Policy #6153 recognizes field trips as an educationally sound and important component of the instructional program. Pursuant to N.J.A.C. 6:21-1.1 et seq., the school district is responsible for transporting the student to related activities. Because of the economic status of many students in the District, the trips provided by the Board are the only ones that they experience, so that the Board believes that field trips are necessary to provide T&E to its particular student population. The account includes the same number of trips provided in the past, and provides for no enhancements or expansions.

Upon review, the Commissioner finds that this amount has been proven necessary for T&E and, accordingly, approves this appropriation of \$8,986.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
7420	11-000-290-290	Insurance Benefits	\$21,249

The Board argues, that under its negotiated labor contracts, all employees are entitled to certain insurance benefits. The Board has a legal obligation to meet the terms and conditions of these contracts. To keep under the cap imposed on the District, some money for these benefits was moved to the cap waiver. The total amount for insurance benefits is a projection based on estimates that the relevant insurance providers gave to the business office.

Upon review, the Commissioner finds that this amount has been proven necessary for T&E and, accordingly, approves this appropriation of \$21,249.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
7450	11-000-290-500	Advertisement/Public Notices	\$6,500

The Board argues that it is required by law to advertise all Board of Education meetings (N.J.S.A. 10:4-8d, 4-18). Moreover, the regulations of the affirmative action statutes require the Board to advertise when openings in various positions are available. Based on the previous years' experience, this amount reflects a reasonable estimate of the Board's expenses for advertising and public notice for 1995-96 budget.

Upon review, the Commissioner finds that this amount has been proven necessary for T&E and, accordingly, approves this appropriation of \$6,500. The Commissioner does, however, note that this account includes funds for both personnel and legal advertisements. Legal advertisements are properly budgeted in Account No. 11-000-230-590, General Administration - Other Purchased Services. The Board is, therefore, directed to make the appropriate adjustment to reclassify the funds in this account budgeted for legal advertisements to the proper accounts.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
8200	12-000-290-730	Replacement Music Instruct. Equipment	\$16,250

The Board argues that it has supported through the years teaching of various mandated and elective subjects to their students. Pursuant to N.J.A.C. 6:8-4.5(a)1 and N.J.A.C. 6:8-4.5(a)2, the Board annually approves the music curriculum and provides the financial resources to support the program. This account reflects the costs of replacing miscellaneous instructional equipment for the four schools. This equipment includes: laser printer for the

middle school and high school computer labs; video projector/player for the high school; replacement of one appliance in home economics; two computers; replacement of a drying oven for the high school science lab; piano for middle school music class; and instruments for the instrumental music program. This account is budgeted to maintain the current program.

Upon review, the Commissioner finds that this amount has been proven necessary for T&E and, accordingly, approves this appropriation of \$16,250. However, instructional equipment should be coded to the applicable program code based on who is using the equipment. Accordingly, the Commissioner orders the restoration of funds to Account No. 12-000-100-730 and directs the District to reclassify the funds to the appropriate accounts.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
2520	11-120-100-101	ESL Teacher Salary	\$25,655

The Board argues that the ESL Program is a state-mandated program (N.J.S.A. 18A:35-15). In order to maintain the current program for Florence's ESL students, the Board has budgeted for the teacher's salary. Part of the salary is contained in the base budget. The remainder of the salary is budgeted in the T&E cap waiver.

Upon review, the Commissioner finds that this amount has been proven necessary for T&E and approves this appropriation of \$25,655. However, the Commissioner notes that the proper account for the appropriation is Account No. 11-240-100-101, Bilingual Instruction - Salaries of Teachers. Accordingly, the Commissioner orders restoration of \$25,655 to Account No. 11-240-100-101 and further directs the Board to make any necessary adjustments to ensure that the remainder of the salary found in the base budget is recoded in the proper account.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
2530	11-130-100-101	Teacher Salaries Grades 6-8 English	\$14,893
2540	11-140-100-101	Teacher Salaries Grades 9-12 English	<u>14,893</u>
			<u>\$29,786</u>

The Board argues that District personnel have made a commitment to improve the language skills of their students. When the middle school was opened in January 1994, no new staff members were hired. Consequently, the number and types of available courses were greatly decreased. To provide additional sections for middle school students, the burden fell upon the Language Department. The cap waiver provides for an additional English teacher to maintain attempts to improve the curriculum and student skills.

Upon review, the Commissioner finds that this amount is necessary for T&E and, accordingly, approves these appropriations of \$14,893 and \$14,893.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
<u>2640</u>	<u>11-190-100-106</u>	<u>Teacher Substitutes</u>	<u>\$38,072</u>

The Board argues that this year the District encountered difficulties in the amount of money budgeted for teacher substitutes. The reasons for this financial deficit was the need for a number of long-term substitutes and the underestimation of the cost of substitutes for the number of teachers employed. When the budget was composed for 1995-96, the Board budgeted a more realistic figure. The money budgeted for substitutes is based on past experience and a formula that estimates the number of days teachers may be absent, multiplied by the cost of substitutes. Part of this figure is located in the base budget, and the remainder is contained in the cap waiver.

Upon review, the Commissioner finds that this amount has been proven necessary for T&E and, accordingly, approves this appropriation of \$38,072. The Commissioner notes,

however, that this amount should have correctly been budgeted pursuant to the chart of accounts required in the applicable program category as teachers' salaries for use pursuant to N.J.A.C. 6:20-2A.2(m). The Board is hereby directed to reclassify this miscoded appropriation to the proper accounts.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
2680	11-190-100-610	Supplies	\$63,192
2690	11-190-100-640	Textbooks	<u>7,275</u>
			<u>\$70,467</u>

The Board argues that these accounts include necessary supplies and teaching materials for all programs at all three schools. The budgeted amounts maintain the current programs, and do not provide for any new initiatives. To provide for T&E and to meet the mandates of N.J.A.C. 6:8-4.5(a)1 and N.J.A.C. 6:8-4.5(a)2, this money must be maintained.

Upon review, the Commissioner finds that this amount is necessary for T&E and, accordingly, approves these appropriations of \$63,192 and \$7,275.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
4810	11-230-100-101	SCE Teacher Salary	\$23,731
4860	11-230-100-610	SCE Teaching Supplies	<u>2,700</u>
			<u>\$26,431</u>

The Board argues that included in these accounts are the salary of the basic skills teachers and supplies for the program. The \$2,700 allotted for supplies is the total cost for the basic skills program in four schools. The Board is not increasing staff or services. The figures represent maintenance of the current program. To fulfill the requirements of N.J.A.C. 6:8-4.10(a)1 in providing programs and services for pupils at risk, the current staff and needed supplies must be retained.

Upon review, the Commissioner finds that this amount has been proven necessary for T&E and, accordingly, approves these appropriations of \$23,731 and 2,700.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
6030	11-401-100-100	Extra Curricular Salaries	\$47,277
6090	11-402-100-100	Athletic Salaries	48,531
6110	11-402-100-610	Sports Equipment/Supplies	370
6120	11-402-100-800	Sports Officiating	<u>2,321</u>
			<u>\$98,499</u>

The Board argues that these accounts pertain to salaries dedicated to cocurricular activities. They represent salaries for coaches and advisors of activities that are currently in place, sports equipment and actual fees for sports officiating based on actual fees quoted to the athletic director. There were no additional clubs or sports planned for next year. In fact, the Board contends that Florence cocurricular activities have been decreased over the past five years. For example, the sports program includes basically varsity level teams. Students interested in a sport compete immediately at the junior varsity level. Except for football, there are no freshman teams. Florence has a proud tradition of cocurricular activities that have merited accolades throughout the years. The student population would be devastated if this tremendous source of pride was eliminated.

Upon review, the Commissioner finds that this amount is necessary for T&E and, accordingly, approves these appropriations of \$47,277, \$48,531, \$370 and \$2,321. It is noted, however, that the \$2,321 appropriation for sports officiating has been miscoded to Account No. 11-402-100-800. The proper account for budgeting these monies is Account No. 11-402-100-500.

Therefore, the Commissioner directs this approved appropriation be reclassified by the Board to Account No. 11-402-100-500.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
8090	12-000-100-730	New Instructional Equipment	\$23,799

The Board argues that this account applies to all instructional equipment with an individual cost of over \$500. Included are the purchase of computers, science lab equipment, music equipment and other items listed for particular programs. The District is lagging behind other districts in the whole area of technology. The Board proposed a budget that would allow the gradual implementation of technology to the schools. To adequately prepare the students to be competitive in the work place, the Board must respond to demands for a technology-sophisticated student population.

Upon review, the Commissioner finds that this amount has been proven necessary for T&E and, accordingly, approves this appropriation of \$23,799. It is noted, however, that instructional equipment should be coded to the applicable program code based on who is using the equipment, pursuant to N.J.A.C. 6:20-2A.2(m). Equipment which crosses program categories is coded to Account No. 12-000-100-730, Equipment-Undistributed Expenditures-Instruction. The Board is directed to reclassify these funds to the proper accounts.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
8120	12-000-219-730	CST New Equipment-Computer	\$2,000

The Board argues that there is only one item in this account and that is a computer for the child study team office. The team does not have a computer that can be used for the standard IEP software programs. The team has requested a computer in the last three budgets. The child study team needs the equipment to adequately meet mandates pertaining to special education, and the needs of the district's special education students.

Upon review, the Commissioner finds that this amount has been proven necessary for T&E and, accordingly, approves this appropriation of \$2,000.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
<u>8130</u>	<u>12-000-221-730</u>	<u>New Curriculum Equipment-Computer</u>	<u>\$9,000</u>

The Board argues that none of the building level administrators has a computer. The Board has determined that over a three-year span, the administrative staff would receive the equipment necessary to fulfill the administrative responsibility of providing T&E. It was decided that the purchases would begin in the curriculum area, as the two supervisors are responsible for many reports for the Board, County and State. Since most of the required reports are now on disk, the purchase of computers for the curriculum supervisors would enable them to complete their reports in a timely, efficient manner.

Upon review, the Commissioner finds that this amount has been proven necessary for T&E and, accordingly, approves this appropriation of \$9,000.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
<u>8150</u>	<u>12-000-240-730</u>	<u>High School Replacement Furniture</u>	<u>\$1,900</u>

The Board argues that monies included in this account are for replacement of various pieces of furniture in the classrooms. It asserts that both the high school and its contents date back to the 1950s. Each year, the Board has been attempting to update the school when replacement furniture is required.

Upon review, the Commissioner finds that this amount is necessary for T&E and, accordingly, approves this appropriation of \$1,900. However, equipment purchases are coded to the appropriate program/function based on who will use the equipment. High school classroom

furniture should be budgeted in Account No. 12-140-100-730, Equipment - Grades 9-12. Accordingly, the Commissioner directs this appropriation to Account No. 12-140-100-730.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
<u>8160</u>	<u>12-000-260-730</u>	<u>New Non-Instructional Equipment</u>	<u>\$6,170</u>

The Board argues that this account pertains to the budgeted purchases for operations and maintenance. The equipment items in the cap waiver are: a six-foot steel maintenance platform; three rear-load dumpsters; one walk-behind snow blower; one vacuum carpet extractor and attachment; and one electric scrubber. These materials are necessary for the maintenance of the buildings and grounds; and represent very basic equipment present in most school districts. These are necessary purchases to keep the schools in the condition required to provide T&E.

Upon review, the Commissioner finds that this amount is necessary for T&E and, accordingly, approves this appropriation of \$6,170.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
<u>8210</u>	<u>12-000-300-730</u>	<u>Guidance Office Equipment</u>	<u>\$3,600</u>

The Board argues that when the middle school was opened in Florence, the building included a guidance office specifically for middle school students. The guidance counselor and pupil records are housed in this office. By law, the office is required to maintain student records in fireproof file cabinets with locks. The money in this account would enable the Board to fulfill this legal obligation. Moreover, the Board asserts that the office needs a computer to assist the counselor in maintaining proper records. This equipment would increase the probability that students were receiving the correct information in selecting the courses needed for T&E.

Upon review, the Commissioner finds that this amount is necessary for T&E and, accordingly, approves this appropriation of \$3,600. It is noted, however, that these monies should have correctly been budgeted pursuant to the chart of accounts for use under N.J.A.C. 6:20-2A.2(m), to Account No. 12-000-210-730, Equipment - Support Services Students-Regular. As such, the Commissioner directs the Board to reallocate these appropriated monies to the proper account.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
6930	11-000-230-339	Architect Services	\$1,500

The Board argues that throughout the course of the year, problems arise that require the services of an architect. A total of \$3,000 was placed in the 1995-96 budget, half in the base which was not reduced by the Council, and the remaining half in the cap waiver. Facility problems cannot be solved if the Board is not able to use the professional services of the architect as judged necessary by the County Superintendent.

Upon review, the Commissioner finds that this amount is necessary for T&E and, accordingly, approves this appropriation of \$1,500. It is noted, however, that architect fees are properly budgeted in Account No. 12-000-400-390. The Board is hereby directed to reallocate these appropriated monies to the proper account.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
6930	11-000-230-339	Appraisal/Paying Agency	\$6,250

The Board argues that included in this account are the costs to update the fixed asset inventory, a requirement of GAAP. There is also money budgeted for an Early Retirement Incentive Report should the State again offer that incentive. If so, the Board would need the services of an accounting firm to determine the advantages or disadvantages of engaging in the

plan. Finally, this account includes the actual, mandatory fee to the paying agency for the Board's bonds.

Upon review, the Commissioner finds that this amount has been proven necessary for T&E and, accordingly, approves this appropriation of \$6,250. It is noted, however, that the portion of this account which has been budgeted for fixed asset appraisal and early retirement incentive reports is properly budgeted in Account No. 11-000-290-330. The Board is hereby directed to make the necessary adjustments to transfer the funds budgeted for these items to the proper account.

<u>Line No.</u>	<u>Account Number</u>	<u>Description</u>	<u>Dollar Amount</u>
2640	11-190-100-106	Department Coordinators	\$8,456
2640	11-190-100-106	Morning Duty Coverage	2,430
7420	11-000-290-290	Retirement Accumulated Leave	<u>25,000</u>
			<u>\$35,886</u>

The Board argues that these accounts include the money necessary to meet contractual obligations to the Teachers Association. Funds pertain to the stipends for four coordinators and morning duty coverage. The largest cost is for the funds needed to pay retirees for accumulated sick days. The administration has some indication that approximately six people will be retiring. The Board has a legal obligation to reimburse those employees for this benefit.

Upon review, the Commissioner finds that this amount has been proven necessary for T&E and, accordingly, approves these appropriations of \$8,456, \$2,430 and \$25,000.

APPLICATION OF SURPLUS

In its advertised annual school district budget statement, the Board projected an unreserved surplus of \$135 and allocated \$0 as revenue, leaving \$135 as undesignated unreserved surplus.

Based on his review of the Board's 1994-95 annual year-end audit report filed pursuant to N.J.S.A. 18A:23-3 (June 30 Comprehensive Annual Financial Report), the Commissioner determines, that while some additional surplus funds are available, they are insufficient to warrant any reallocation.

SUMMARY

In summary, with respect to the budget appeal, the Commissioner directs restoration of the Council's line-item reductions to appropriations and increases in permissible expenditure levels as set forth below. The Commissioner further notes that all restorations to line-item appropriations are restricted in accordance with N.J.A.C. 6:20-2A.11(b)3. Where the Commissioner has directed herein reexamination and reclassification of funds due to coding errors on the part of the Board, these adjustments must be immediately completed. The Board is consequently directed to submit a final revised budget, reflecting the proper allocations, including the Commissioner's restorations, to both the County Office of Education and the Office of Finance as soon as possible.

<u>Line Item</u>	<u>Description</u>	<u>Sustained</u>	<u>Restored</u>
2510	Preschool/Kindergarten Salaries	\$20	\$4,031
2520	Grades 1-5 Salaries	253	50,297
2530	Grades 6-8 Salaries	135	26,927
2540	Grades 9-12 Salaries	176	35,017
2640	Instruction Other Salaries	- 0 -	3,346
3080	Salaries/Teachers	48	9,607
3090	Other Salaries/Instruction	- 0 -	2,151
3860	Resource Room Salaries	11	2,147
4310	Salaries/Teachers	12	2,424

<u>Line Item</u>	<u>Description</u>	<u>Sustained</u>	<u>Restored</u>
4400	Salaries/Special Education	- 0 -	211
4810	Salaries/Basic Skills	28	5,514
4820	Salaries Instruction	- 0 -	1,871
4900	Salaries/Bilingual Education	- 0 -	470
6030	Salaries/Cocurricular	142	238
6090	Salaries/Athletics	633	2,184
6370	Salaries/Attendance	- 0 -	122
6430	Salaries/Health	18	3,552
6490	Salaries/Other Professional Services	41	8,172
6500	Salaries Secretarial/Clerical	- 0 -	808
6580	Salaries Other Professional Staff	- 0 -	3,310
6590	Salaries Secretarial/Clerical	- 0 -	635
6750	Salaries/Support Instruction	- 0 -	2,625
6850	School Library Services	13	2,525
6910	General Administrative Services	- 0 -	3,839
7010	Salaries of Principals/Assistant Principal	- 0 -	10,825
7030	Salaries of Secretarial/Clerical	- 0 -	4,535
7040	Other Salaries	- 0 -	454
7010	Salaries of Maintenance and Plant Services	- 0 -	14,267
7210	Salaries for Pupil Transportation	- 0 -	4,004
7220	Salaries for Pupil Transp. Special Education	- 0 -	2,379
7230	Salaries for Pupil Transportation	- 0 -	234
7360	Business and Other Support Salaries	<u>- 0 -</u>	<u>4,573</u>
Total Line-Item Determinations:		\$1,530	\$213,294

With respect to the cap waiver appeal, the Commissioner finds that all of the \$790,716 appealed by the Board herein is necessary for provision of a thorough and efficient system of education in the district, and further, that the monies in question cannot be derived from reallocation within the General Fund budget. The Commissioner additionally notes that all line-item waivers to expenditure limitation granted herein, as summarized below, represent restricted appropriations in accordance with N.J.A.C. 6:20-2A.11(b)3. Where the Commissioner has directed herein reexamination and reclassification of funds due to coding errors on the part of the Board, these adjustments must be immediately completed, and, as above, the Board is

directed to submit a final revised budget reflecting the proper allocations, to both the County Office of Education and the Office of Finance.

<u>Account Number</u>	<u>Account Title</u>	<u>Amount Necessary</u>	<u>Not Necessary</u>
11-000-213-105	Nurses Clerical Aide	\$9,879	- 0 -
11-000-218-104	Substance Abuse Coordinator	19,899	- 0 -
11-000-218-500	Guidance Workshops	280	- 0 -
11-000-218-610	Guidance Supplies	452	- 0 -
11-000-219-104	CST Salaries	42,711	- 0 -
11-000-219-610	CST Testing Materials	3,200	- 0 -
11-000-222-100	Librarian Salaries	30,380	- 0 -
11-000-222-610	Library Books, Publications, Subscription	29,466	- 0 -
11-000-230-240	Data Processing/Payroll & Budget	13,651	- 0 -
11-000-230-331	Solicitor	5,000	- 0 -
11-000-230-339	Election Expenses	2,750	- 0 -
11-000-260-100	Custodian/Maintenance Salaries & Subs.	43,110	- 0 -
11-000-260-610	Custodial Supplies	2,000	- 0 -
12-000-400-450	Repairs/Maintenance Building/Grounds	52,956	- 0 -
11-000-260-620	Electric/Gas Costs	91,020	- 0 -
11-000-270-107	Bus Aides Salaries	11,962	- 0 -
11-000-270-109	Field Trip Transportation	8,986	- 0 -
11-000-290-290	Insurance Benefits	21,249	- 0 -
11-000-290-500	Advertisement/Public Notices	6,500	- 0 -
12-000-100-730	Replacement Music Instruct. Equipment	16,250	- 0 -
11-240-100-101	ESL Teacher Salary	25,655	- 0 -
11-130-100-101	Teacher Salaries Grades 6-8 English	14,893	- 0 -
11-140-100-101	Teacher Salaries Grades 9-12 English	14,893	- 0 -
11-190-100-106	Teacher Substitutes	38,072	- 0 -
11-190-100-610	Supplies	63,192	- 0 -
11-190-100-640	Textbooks	7,275	- 0 -
11-230-100-101	SCE Teacher Salary	23,731	- 0 -
11-230-100-610	SCE Teaching Supplies	2,700	- 0 -
11-401-100-100	Extra Curricular Salaries	47,277	- 0 -
11-402-100-100	Athletic Salaries	48,531	- 0 -
11-402-100-610	Sports Equipment/Supplies	370	- 0 -
12-402-100-500	Sports Officiating	2,321	- 0 -
12-000-100-730	New Instructional Equipment	23,799	- 0 -
12-000-219-730	CST New Equipment-Computer	2,000	- 0 -
12-000-221-730	New Curriculum Equipment-Computer	9,000	- 0 -
12-140-000-730	High School Replacement Furniture	1,900	- 0 -
12-000-260-730	New Non-Instructional Equipment	6,170	- 0 -
12-000-300-730	Guidance Office Equipment	3,600	- 0 -
11-000-230-339	Architect Services	1,500	- 0 -
11-000-230-339	Appraisal/Paying Agency	6,250	- 0 -


<u>Account Number</u>	<u>Account Title</u>	<u>Amount Necessary</u>	<u>Not Necessary</u>
11-190-100-106	Department Coordinators	8,456	- 0 -
11-190-100-106	Morning Coverage Duty	2,430	- 0 -
11-000-290-290	Retirement Accumulated Leave	<u>25,000</u>	<u>- 0 -</u>
	Total Line-Item Determinations:	\$790,716	\$- 0 -

Tax Levy Certified by Governing Body:	\$5,561,868
Restoration of Reductions:	1,004,010
Amount of Restoration Funded by Surplus:	<u>- 0 -</u>
Total Tax Levy for 1995-96:	\$6,565,878

Finally, upon review of the Board's Position Statements for both the base budget and cap waiver appeals, it is generally noted that the coding practices of the Board appear to be haphazard at best. Therefore, the Board is directed to revise its procedures and henceforth conform its budgeting practices to the chart of accounts required for use pursuant to N.J.A.C. 6:20-2.A(m).

Accordingly, the Burlington County Board of Taxation is directed to make the necessary adjustments, as set forth above, to reflect a total of \$6,565,878 to be raised in tax levy for General Fund purposes of the Florence Board of Education for the 1995-96 school year, and the Board is directed to reform its coding practices and submit its revised budget as set forth above.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

October 24, 1995
 Date of Mailing, October 25, 1995

386-95R

IN THE MATTER OF THE TENURE :
HEARING OF ROBERT OLEK, SCHOOL :
DISTRICT OF THE CITY OF GARFIELD, :
BERGEN COUNTY. :
_____ :

COMMISSIONER OF EDUCATION
DECISION ON REMAND

October 24, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3547-94

AGENCY DKT. NO. 51-2/89

STATE BOARD NO. 36-91

(ON REMAND EDU 1944-92,

EDU 8346-90 AND EDU 2640-89)

**SCHOOL DISTRICT OF THE CITY
OF GARFIELD, BERGEN COUNTY,**

Petitioner,

v.

ROBERT B. OLEK,

Respondent.

Toni Belford Damiano, Esq., for petitioner

Sanford R. Oxfeld, Esq., for respondent

(Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: August 1, 1995

Decided: September 11, 1995

BEFORE ELINOR R. REINER, ALJ:

The State Board of Education remanded this matter to the Commissioner of Education for further proceedings on the merits. The history of the instant matter has been previously and specifically set forth in the prior initial decision rendered by the undersigned and in the State Board of Education decision, dated March 2, 1994.

Of import, this case was initiated in April 1989 when the Board of Education of the School District of Garfield (hereinafter "Board") certified tenure charges against Robert Olek (hereinafter "respondent"), a tenured teaching staff member, alleging that he had engaged in unbecoming conduct. Those charges followed respondent's arrest on December 6, 1988, for possession of anabolic steroids and drug paraphernalia in his home. In July 1989, respondent pled guilty to possession of a hypodermic syringe or needle, unlawful possession of a prescription legend drug and obtaining a prescription legend drug unlawfully. He was sentenced on November 14, 1989.

In August 1989, the Board filed a motion for summary decision. During the time the motion was pending, the parties entered into settlement discussions which resulted in a settlement agreement. Subsequent thereto, the Commissioner of Education voided the agreement and remanded the case to the Office of Administrative Law on October 11, 1990, for a hearing on the merits of the tenure charges. On remand, the Board renewed its motion for summary decision, seeking respondent's removal by means of the forfeiture statute, *N.J.S.A. 2C:51-2*. Respondent maintained that the forfeiture provisions did not apply because the offenses which did not involve controlled dangerous substances did not satisfy the required elements of the statute. On May 15, 1991, the undersigned administrative law judge recommended granting the Board's motion. On June 27, 1991, the Commissioner adopted the administrative law judge's recommended decision, concluding that respondent had forfeited his position and granting the Board's motion for summary decision. On March 4, 1992, the State Board reversed the Commissioner's decision granting summary decision and remanded the matter for further proceedings.

On March 16, 1992, the matter was remanded to the undersigned judge for proceedings consistent with the State Board's decision of March 4, 1992. As a result of ongoing settlement negotiations, the hearing was not held until January 22, 1993. At the conclusion of the hearing, the parties submitted briefs, and the record closed on March 26, 1993. A decision was rendered by the undersigned judge on May 10, 1993, concluding that a careful examination of the facts in the case revealed that respondent's offenses touched and involved his employment to the extent meriting forfeiture pursuant to *N.J.S.A. 2C:51-2*. The undersigned determined that respondent had forfeited his employment as a teacher and a wrestling coach with the Garfield Board of Education and granted petitioner's motion for summary decision. On June 28, 1993, the Commissioner adopted the findings and conclusions of the undersigned judge. Concluding that the Board had established a nexus between the offenses and respondent's employment, the Commissioner directed forfeiture of respondent's employment.

On March 2, 1994, the State Board of Education reversed the Commissioner's decision that respondent had forfeited his employment by operation of *N.J.S.A. 2C:51-2*. More particularly, the State Board found that the record failed to establish that there was a sufficient nexus between the offenses to which respondent pled guilty *i.e.*, the use and possession of steroids found in his home, and his employment in the district so as to warrant the penalty of forfeiture of all state employment. The State Board could not conclude that the offenses to which respondent pled guilty touched and involved his employment in the district to an extent warranting imposition of the severe penalty of forfeiture of all public employment pursuant to *N.J.S.A. 2C:51-2*. The State Board recognized that reversal of the Commissioner's decision required that the tenure charges that were certified by the Board against respondent now be resolved and remanded the matter to the Commissioner for further proceedings on the merits of those charges.

On April 15, 1994, the instant matter was remanded to the Office of Administrative Law for tenure proceedings consistent with the State Board decision of

March 2, 1994. This matter was assigned to the undersigned judge on April 20, 1994, and an in person prehearing conference held on October 21, 1994. At that time the issues were isolated, and a hearing scheduled for April 17, 18, 19, and 20, 1995, at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey 07102. (The hearing dates of April 17 and 18, 1995 were subsequently adjourned.) Settlement discussions were held, and a settlement agreement was entered into on April 19, 1995. Thus, the hearing was adjourned. A signed settlement agreement was received on August 1, 1995.

The parties have agreed to settle this matter and have prepared the attached Resolution and Agreement between petitioner and respondent indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement and resolution meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 11, 1995
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

Sept. 13, 1995
DATE

Deborah N. Antonietti
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 13 1995
DATE

Jeff S. Mann
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

dgi

RESOLUTION

WHEREAS Robert Olek (hereinafter referred to as "Olek") was employed by the Garfield School District (hereinafter referred to as "District") as a teacher and Assistant Wrestling Coach; and

WHEREAS Olek was suspended from his employ within the District, without pay, in December 1988, following his arrest for possession of steroids, marijuana, and hypodermic needles; and

WHEREAS Olek last received pay from the District in May 1989, resulting in an accrual of his back pay in the approximate amount of \$405,000.00 up to and including his pay for the 1994-95 school year; and

WHEREAS N.J.S.A. 18A:6-14 provides that a teacher who is suspended without pay must receive his/her regular salary after the 120th day of suspension, pending adjudication of the charges against said teacher in a formal tenure hearing; and

WHEREAS a tenure hearing was not scheduled in this matter until April 19, 1995, due to the fact that Olek and the Board had entered into a settlement agreement, from which Olek later withdrew his consent, and said agreement was vacated by the Commissioner of Education; and

WHEREAS a tenure hearing was not scheduled in this matter until April 19, 1995 due to various proceedings in the Administrative Courts in regard to whether Olek had forfeited his employment in the District, pursuant to N.J.S.A. 2C:51-2, on the grounds that Olek's offenses touched upon his employment in the District; and

WHEREAS the New Jersey State Board of Education ultimately ruled that Olek did not forfeit his position in the district,

Motion by *Genovese* Seconded by *[Signature]*

Record of Vote

	AYE	NAY	EXCUSED	ABSENT	ABSTAINED
Delaney J. _____		/			
Scannella, M. _____		/			
Anastos, G. _____	/				
Pinto, J. _____	/				
Caruso, P. _____	/				
Wurms, M. _____	/				
Zangara, V. _____	/				
Wich, G. _____	/				
Benanti, S. _____	/				

Date JUN 13 1995 Resolution Passed: Yes 6 No 3

RESOLUTION NO. 527-A COMMENT: _____

WHEREAS the New Jersey State Board of Education ultimately ruled that Olek did not forfeit his position in the district, pursuant to N.J.S.A. 2C:51-2, as the State Board did not find that Olek's offenses had touched upon his employment; and

WHEREAS Olek was entitled to all of his back pay and benefits from May 1989, through the 1994-95 school year, in the approximate amount of \$405,000.00, and the Board had been ordered, by the Honorable Elinor R. Reiner, A.L.J., to immediately return Olek to salary status as of December 1, 1994; and

WHEREAS the purpose of the tenure hearing, scheduled on April 19, 1995 was to determine the sole issue of whether or not Olek was entitled to reinstatement to his teaching position in the District; and

WHEREAS if Olek had prevailed at the tenure hearing, he would have been entitled to immediate reinstatement as a teacher in the District; and

WHEREAS at the start of the tenure hearing, Olek's attorney made a motion to the Court to compel the Board to immediately pay Olek all of his back salary, in a lump sum, to which it had previously been adjudicated that he was entitled to these monies; and

WHEREAS at the start of the tenure hearing, the Board's attorney, Toni Belford Damiano, Esq., made a motion to reopen the forfeiture issue on the grounds of newly discovered evidence; and

WHEREAS Olek and the Board recognized that they both potentially faced serious repercussions if this matter were to proceed to a final tenure hearing and, as such, they desired to achieve an amicable resolution to this matter; and

Motion by _____ Seconded by _____

Record of Vote

	AYE	NAY	EXCUSED	ABSENT	ABSTAINED
Delaney J. _____	_____	_____	_____	_____	_____
Scannella, M. _____	_____	_____	_____	_____	_____
Anastos, G. _____	_____	_____	_____	_____	_____
Pinto, J. _____	_____	_____	_____	_____	_____
Caruso, P. _____	_____	_____	_____	_____	_____
Wurms, M. _____	_____	_____	_____	_____	_____
Zangara, V. _____	_____	_____	_____	_____	_____
Wich, G. _____	_____	_____	_____	_____	_____
Benanti, S. _____	_____	_____	_____	_____	_____

Date JUN 13 1995 Resolution Passed: Yes _____ No _____

RESOLUTION NO. 52B COMMENT: _____

Education hereby accepts and ratifies the terms of the settlement, as set forth in the Settlement Agreement attached hereto, and further resolves to direct the Superintendent of Schools, Thomas Cangialosi, to enter into said agreement for purposes of finalizing this matter;

AND BE IT FURTHER RESOLVED, that the Garfield Board of Education agrees to be bound by the terms of the agreement, as set forth in the Settlement Agreement attached hereto.

WHEREAS the Board and Olek have arrived at a tentative settlement of all issues in this matter, the terms of which are set forth in a settlement agreement which is attached hereto and made a part of this Resolution; and

WHEREAS the Board and Olek feel that the terms of this agreement are mutually acceptable and most beneficial to both parties;

NOW THEREFORE, be it resolved that the Garfield Board of Education hereby accepts and ratifies the terms of the settlement, as set forth in the Settlement Agreement attached hereto, and

Motion by _____ Seconded by _____

Record of Vote

	AYE	NAY	EXCUSED	ABSENT	ABSTAINED
Delaney J. _____	_____	_____	_____	_____	_____
Scannella, M. _____	_____	_____	_____	_____	_____
Anastos, G. _____	_____	_____	_____	_____	_____
Pinto, J. _____	_____	_____	_____	_____	_____
Caruso, P. _____	_____	_____	_____	_____	_____
Wurms, M. _____	_____	_____	_____	_____	_____
Zangara, V. _____	_____	_____	_____	_____	_____
Wich, G. _____	_____	_____	_____	_____	_____
Benanti, S. _____	_____	_____	_____	_____	_____

Date JUN 13 1995 Resolution Passed: Yes _____ No _____

RESOLUTION NO. 520 COMMENT: _____

It is hereby agreed by and between Robert Olek and the School District of Garfield, in full settlement of EDU 1944-92 and any other existing matters, including those which may be filed in the Superior Court of New Jersey, the State Board of Education and/or the Appellate Division, as follows:

WHEREAS, the parties to this settlement recognize that substantial issues still exist, including, but not limited to: (1) whether Mr. Olek is entitled to be on the active payroll of the School District; (2) whether the issue of whether Mr. Olek forfeited his position should be reopened; (3) the amount of back pay to which Mr. Olek would be entitled; and (4) whether there exists cause to terminate Mr. Olek's employment in Garfield; and

WHEREAS, the damages to Mr. Olek, should he prevail on each issue approximate \$400,000.00 and his reinstatement; and if he does not prevail, Mr. Olek could lose his position, his tenure, all back pay and his pension being vested; and

WHEREAS, accordingly, both sides desire to achieve an amicable resolution so that each can be assured of the terms of the settlement and proceed accordingly.

NOW THEREFORE, this matter is settled on the following terms and conditions:

1. This document, executed by Mr. Olek, shall act as his resignation from the Garfield Board of Education effective June 30, 1995, and his representation that he shall never seek future employment in the Garfield School District.

Motion by _____ Seconded by _____

Record of Vote

	AYE	NAY	EXCUSED	ABSENT	ABSTAINED
Delaney J. _____	_____	_____	_____	_____	_____
Scannella, M. _____	_____	_____	_____	_____	_____
Anastos, G. _____	_____	_____	_____	_____	_____
Pinto, J. _____	_____	_____	_____	_____	_____
Caruso, P. _____	_____	_____	_____	_____	_____
Wurms, M. _____	_____	_____	_____	_____	_____
Zangara, V. _____	_____	_____	_____	_____	_____
Wich, G. _____	_____	_____	_____	_____	_____
Benanti, S. _____	_____	_____	_____	_____	_____

Date JUN 13 1995 Resolution Passed: Yes _____ No _____

RESOLUTION NO. 52 D COMMENT: _____

2. In consideration of the above, Mr. Olek shall receive \$40,000.00 upon approval of this settlement by the Commissioner of Education and \$30,333.33 thereafter for a period of six (6) years so that the total settlement payments to Mr. Olek equals \$221,999.98 but in no event shall the first \$30,333.33 be payable on or before July 1, 1996.

3. If any payment from the Board to Mr. Olek is not made within 30 days after the date it is due, the following shall occur:

- a. all amount still due and owing to Mr. Olek shall be payable immediately;
- b. Mr. Olek shall receive 10% interest and any moneys unpaid until the date they are received by him;
- c. the Board shall be responsible for all reasonable attorneys fees to Mr. Olek's attorney in his/her efforts to obtain said moneys.

4. The sum set forth SUPRA of paragraph 2 shall be considered a full and complete settlement agreement and recognition of the total compensation to which Mr. Olek would be entitled for the period April 1, 1989 until June 30, 1995.

5. Mr. Olek's salary, as per the Labor Agreement between the Board and Education Association, is;

1994-95	\$70,074.00
1993-94	\$65,428.00
1992-93	\$60,926.00

6. By entering into the settlement Mr. Olek is aware of the options of the Commissioner in connection with his Certification, including it possible revocation.

7. Mr. Olek, his heirs and assigns hereby releases the Board, its officers, assigns, agents and employees from any and all claims that exist of this date; except to pursue a claim if the

Motion by _____ Seconded by _____

Record of Vote

	AYE	NAY	EXCUSED	ABSENT	ABSTAINED
Delaney J. _____	_____	_____	_____	_____	_____
Scannella, M. _____	_____	_____	_____	_____	_____
Anastos, G. _____	_____	_____	_____	_____	_____
Pinto, J. _____	_____	_____	_____	_____	_____
Caruso, P. _____	_____	_____	_____	_____	_____
Wurms, M. _____	_____	_____	_____	_____	_____
Zangara, V. _____	_____	_____	_____	_____	_____
Wich, G. _____	_____	_____	_____	_____	_____
Benanti, S. _____	_____	_____	_____	_____	_____

Date JUN 13 1995 Resolution Passed: Yes _____ No _____

RESOLUTION NO. 52E COMMENT: _____

Board breached this settlement agreement.

8. The Board, its officers, assigns, agents and employees hereby release Mr. Olek, his heirs and assigns from any and all claims that exist as of this date; except to pursue a claim if Mr. Olek breached this settlement agreement.

9. All parties recognize that this agreement is contingent upon the ratification and adoption of a resolution by five members of the Garfield Board of Education accepting the above terms of settlement.


10. It is further understood by both parties that all the terms of this settlement are contingent upon approval of this settlement by both the Administrative Law Judge and the Commissioner of Education.

11. The Board agrees to cooperate with Mr. Olek in his application for a pension, and to pay out of Mr. Olek's initial installment, full payment to the Division of Pension to make Mr. Olek eligible for his full pension.

DATED: 4-25-95


ROBERT OLEK

DATED: 4-25-95


THOMAS CANIGIOLOSI, SUPERINTENDENT

Motion by _____ Seconded by _____

Record of Vote

	AYE	NAY	EXCUSED	ABSENT	ABSTAINED
Delaney J. _____	_____	_____	_____	_____	_____
Scannella, M. _____	_____	_____	_____	_____	_____
Anastos, G. _____	_____	_____	_____	_____	_____
Pinto, J. _____	_____	_____	_____	_____	_____
Caruso, P. _____	_____	_____	_____	_____	_____
Wurms, M. _____	_____	_____	_____	_____	_____
Zangara, V. _____	_____	_____	_____	_____	_____
Wich, G. _____	_____	_____	_____	_____	_____
Benanti, S. _____	_____	_____	_____	_____	_____

Date JUN 13 1995 Resolution Passed: Yes _____ No _____

RESOLUTION NO. 52F COMMENT: _____

OAL DKT. NOS. EDU 1944-92, EDU 8346-90 AND EDU 2640-89 (ON REMAND)

IN THE MATTER OF THE TENURE :
HEARING OF ROBERT OLEK, SCHOOL :
DISTRICT OF THE CITY OF GARFIELD, : COMMISSIONER OF EDUCATION
BERGEN COUNTY. :
_____ :
DECISION ON REMAND

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

October 24, 1995
Date of Mailing, October 25, 1995

387-95

ALICE LIGHTDALE,	:	
	:	
PETITIONER,	:	
	:	
V.	:	
	:	
BOARD OF EDUCATION OF THE UNION	:	COMMISSIONER OF EDUCATION
COUNTY REGIONAL HIGH SCHOOL	:	
DISTRICT NO. 1, UNION COUNTY,	:	
	:	DECISION
RESPONDENT,	:	
	:	
AND	:	
	:	
WILLIAM COYLE,	:	
	:	
INTERVENOR.	:	

SYNOPSIS

Petitioner, guidance counselor who was bumped from her position, alleged she had superior tenure and seniority rights to the guidance counselor position than the individual who replaced her (intervenor - former director of guidance).

ALJ concluded that intervenor accrued credit in the seniority category applicable to guidance counselors and in the seniority category applicable to directors simultaneously pursuant to N.J.A.C. 6:3-5.1(f). Intervenor was required by the District to hold dual endorsements under the educational services certificate as part of the job qualifications and he was expected to perform direct services in addition to supervisory responsibilities. Thus, intervenor had greater seniority rights than petitioner to the position of guidance counselor. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7869-94

AGENCY DKT. NO. 291-7/94

ALICE LIGHTDALE,

Petitioner,

v.

**BOARD OF EDUCATION OF UNION
COUNTY REGIONAL HIGH SCHOOL
DISTRICT NO. 1,**

Respondent and

WILLIAM COYLE,

Intervenor.

Brian Miller Adams, Esq., for petitioner
(Dwyer & Canellis, attorneys)

Nathanya G. Simon, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Wayne J. Oppito, Esq., for intervenor

Record Closed: July 24, 1995

Decided: September 7, 1995

BEFORE: KEN R. SPRINGER, ALJ:

Statement of the Case

This is an appeal by a tenured guidance counselor who claims that the board of education violated her seniority rights under *N.J.S.A. 18A:28-9 to -14* when it terminated her employment for the 1994-95 school year. As the result of an administrative reorganization in June 1994, the school district abolished the position of guidance director and a former guidance director replaced petitioner in a regular guidance-counselor position. It is undisputed that the guidance director had served in the district longer than petitioner. Basically, petitioner contends that her replacement had accrued seniority credit only in the specific category of guidance director and not in the separate category applicable to guidance counselors. Since the guidance director was required to hold dual endorsements on his certificate and his job duties entailed both supervisory and direct counseling responsibilities, the district maintains that the former director accrued seniority in both categories. For the reasons which follow, it is concluded that the district's action fully complied with the seniority standards set forth at *N.J.A.C. 6:3-5.1* and, therefore, did not violate petitioner's statutory seniority rights.

Procedural History

On July 15, 1994, petitioner Alice Lightdale ("Lightdale") filed a verified petition with the Commissioner of Education ("Commissioner"). Respondent Board of Education of Union County Regional High School District No. 1 ("Board") filed its answer on August 3, 1994. Subsequently, on August 16, 1994, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. Meanwhile, William Coyle ("Coyle"), the former guidance director who had replaced Lightdale as guidance counselor, applied to intervene in the proceeding. By order entered on October 13, 1994, the OAL granted Coyle's application for intervention status. The OAL held a hearing on June 5, 1995. Witnesses and exhibits

are listed in the appendix.¹ The parties filed post-hearing briefs by July 24, 1995, on which date the record closed.

Findings of Fact

All of the relevant facts are either stipulated or undisputed. **I FIND:**

William Coyle started working for the district in December 1988 as a full-time guidance director. Among other certificates, he held an educational-services certificate endorsed both as "director of student personnel services" and in "student personnel services."² The only qualification for guidance director mentioned in the district's written job description is possession of appropriate "New Jersey State Certification." However, the parties agree that the district required its guidance directors to hold both the director and the guidance-counselor endorsements. Dr. Donald Merachnik, district superintendent for twenty-four years, emphasized that, "When we interview applicants for guidance director, we ask for both [endorsements] to make sure that he [or she] has the necessary experience." Although Coyle also happens to hold an administrative certificate endorsed as "principal/supervisor", his entire service for the district was performed under his educational-services certificate. Coyle testified that he had never been asked for his administrator's certificate.

¹In two footnotes to its post-hearing brief, the Board seeks to supplement the existing record by offering Lightdale's answers to respondent's interrogatories as additional exhibits in the case. This unconventional approach is rejected, for failure of the Board either to introduce the proposed exhibits at the hearing (affording Lightdale the opportunity to explain or amplify any answer) or to serve formal notice of motion on the other parties (affording opposing counsel the opportunity to object).

²An educational-services certificate is the general rubric for a grouping of endorsements which relate to various types of support services within a school. *N.J.A.C. 6:11-11.1 to -11.20. Dennery v. Passaic Cty. Reg. High Sch. Dist. #1*, 131 *N.J.* 626, 636-637 (1993). Endorsement as "director of student personnel services" is necessary "for any person who is assigned as a director, administrator or supervisor of guidance and student personnel services of a school system[.]" *N.J.A.C. 6:11-11.10*. Endorsement in the field of "student personnel services" is necessary "for any person assigned to perform student personnel services such as . . . counseling with teachers, students, and parents regarding personal, social, educational and vocational plans and programs[.]" *N.J.A.C. 6:11-11.11*.

In his capacity as guidance director, Coyle's primary duties included: supervising and evaluating other guidance counselors; administering a program to assist students in making educational and career choices; administering a student record-keeping system; implementing in-service training for guidance counselors; and supervising secretarial and clerical support staff. Additionally, the written job description expressly specifies that the guidance director "provides direct counseling services for a segment of the student body." Superintendent Merachnik explained that the district had required its guidance directors to assume responsibility for their own counseling caseload since the early 1980's, long before Coyle came to the district.

Generally, a guidance director in the district must maintain a counseling load of twenty to twenty-five students, plus any overload which the regular guidance counselors are unable to handle.³ In comparison, a full caseload for a guidance counselor is normally about 145 students, although that number has recently increased to 170 students. When he joined the district in 1988, Coyle was assigned to Governor Livingston High School where he had a counseling load of some twenty-seven students. That number remained largely unchanged until February 1992, when Coyle took on added supervisory responsibility for the guidance department at Arthur L. Johnson High School and his student counseling load dropped to about ten students. He "gave away" the lower grades and "kept the seniors and juniors" whom he had been counseling at Governor Livingston. The nature of Coyle's counseling services, however, were no different from those performed by other guidance counselors in the district. His counseling duties included: assisting students with course selection and class scheduling; helping students complete their college applications or explore vocational opportunities; supportive counseling relating to personal or family issues; and participating in meetings with parents, teachers and administrators. In other words, Coyle's direct-counseling function differed in quantity but not quality from the job duties of a regular guidance counselor.

³ Roughly thirty percent of a guidance director's time is devoted to direct counseling services, although the number may vary from day to day, depending on the individual needs of students.

Alice Lightdale was hired by the district as a guidance counselor in October 1986. She worked only half-time until the 1993-94 school year, when her hours were increased to full-time. Lightdale's service was performed under an educational-services certificate endorsed in "student personnel services." Her duties were substantially similar to those which Coyle performed in his role as guidance counselor, except that Lightdale had larger caseload. It is stipulated that Coyle has 5.7 years of service in the district, as compared to Lightdale who has 4.5 years.⁴

On June 21, 1994, Board adopted a reorganization plan, whereby the existing twelve-month guidance director positions, including Coyle's, were abolished and a more senior individual became "supervisor of guidance" for the entire district. Consequently, the Board recognized that Coyle had "bumping rights into a ten-month guidance counselor position" and reassigned him to that position for 1994-95. In turn, the Board notified Lightdale that her employment would "be terminated effective June 30, 1994" and that she would be placed "on a preferred eligibility list" in the event of any future vacancy in the position of guidance counselor. Due to the retirement of another guidance counselor, an opening occurred in a guidance counselor position and Lightdale returned to full-time employment on February 2, 1995. Thus, her damage claim is limited to lost salary and other benefits for the first five months of the 1994-95 school year.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Coyle accrued credit in the seniority category applicable to guidance counselors and, therefore, that he has a greater seniority right than Lightdale to the position of guidance counselor.

⁴ Lightdale does not challenge the Board's good faith in taking these measures for genuine reasons of economy and administrative organization

N.J.S.A. 18A:28-9 empowers a school board to reduce the size of its teaching staff, including its guidance department, whenever "it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of changes in the administrative or supervisory organization of the district or for other good cause." *Impey v. Shrewsbury Bd. of Educ.*, No. A-89, slip op. at 14 (N.J. Sup. Ct. Aug. 14, 1995). Because Coyle and Lightdale have both attained tenure under their educational-services certificate, see *Dennery v. Passaic Cty. Reg. High Sch. Dist. #1*, 131 N.J. 626, 638-639 (1993), their employment rights are governed by seniority rules. Seniority is a mechanism for ranking all tenured teaching staff members so that reductions in force can be effected in an equitable fashion and in accord with sound educational policies. *Lichtman v. Ridgewood Bd. of Educ.*, 93 N.J. 362, 368, n. 4 (1983); *Ellicott v. Frankford Bd. of Educ.*, 251 N.J. Super. 342, 349 (App. Div. 1991). Dismissal of tenured staff resulting from a reduction in force "shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board." N.J.S.A. 18A:28-10.

State regulations prescribe that "[s]eniority shall be determined according to the number of academic or calendar years of employment . . . in the school district in specific categories[.]" N.J.A.C. 6:3-5.1. Essentially, the categories used for determining seniority are whatever the Commissioner has said they should be. *Howley v. Ewing Bd. of Educ.*, 6 N.J.A.R. 509, 524 (Comm'r 1982). In order to earn seniority, a staff member must have actual experience in the particular subject area or field. *Ressler v. Saddle Brook Bd. of Educ.*, OAL Dkt. Nos. EDU 0705-92 & EDU 5018-92 (May 13, 1994), adopted (Comm'r June 27, 1994). Anyone employed in a position requiring an educational services certificate acquires seniority *only* for the period of actual service under such certificate and at the particular grade level involved. N.J.A.C. 6:3-5.1 (l)(17)(iii), -(18)(ii).

Current regulations do not restrict acquisition of seniority to a single category. Instead, N.J.A.C. 6:3-5.1(f) provides, "Whenever a person shall hold employment simultaneously under two or more subject area endorsements or in two or more categories, seniority shall be counted in all subject area endorsements and categories

in which he or she is or has been employed.” Prior to 1983, the predecessor rule, *N.J.A.C. 6:3-1.10(e)*, provided that, “Whenever a person shall hold employment simultaneously in two or more categories, seniority shall be counted in the category in which he spends the greatest percentage of his time. If the percentage of time spent in two or more categories shall be equal, the person shall be permitted to elect in which category his seniority shall be counted.” 15 *N.J.R.* 464 (April 4, 1983); 15 *N.J.R.* 1017 (June 20, 1983). An appellate court had interpreted the old language as precluding a subject supervisor who taught social studies classes from being put in the same seniority category as a social studies teacher. *Huff v. Ramapo-Indian Hills Reg. Sch. Dist.*, No. A-5729-81T3 (App. Div. Oct. 28, 1982) [unofficially reported at 83 *S.L.D.* 1555]. In so doing, the court declined to express any comment on the application of the 1983 revisions to the seniority regulations. *Huff*, 83 *S.L.D.* at 1561. After the change, however, the Commissioner declared that the purpose of the revision was to acknowledge “the seniority entitlement of persons serving simultaneously in two categories[.]” *In re Seniority Rights of Certain Teaching Staff Members*, 1984 *S.L.D.* 1414, 1417-18 (Comm’r Aug. 6), *aff’d* 1985 *S.L.D.* 1989 (St. Bd. Jan. 2), *aff’d* No. A-2241-84T6 (App. Div. June 17, 1986). Further, the Commissioner noted that this approach is consistent with the underlying educational philosophy “that seniority would be based solely upon actual experience in a subject area or category and would no longer be awarded upon the mere possession of a certificate endorsement.” *Id.*

Applied to the instant case, the revised rule entitles Coyle to seniority credit in the category for guidance counselors as well as the category for directors.⁵ Several factors support that analysis. First, the school district required its guidance director to hold dual endorsements under the educational services certificate as part of the job qualifications. Thus, the fact pattern is reminiscent of *Dennery, supra*, where a class supervisor was required to hold dual certificates to qualify for a particular position. It also distinguishes the situation from *Ebel v. South Amboy Bd. of Educ.*, 1980 *S.L.D.* 158 (Comm’r March 6), *aff’d* 1980 *S.L.D.* 171 (St. Bd. Dec. 3), where a teacher was

⁵ Guidance counselors fit within *N.J.A.C. 6:3-5.1(l)(19)*, which establishes a separate category for “specific educational service endorsements” such as pupil personnel services. *N.J.A.C. 6:3-5.1(l)(3)* establishes a category for the position of “director.”

denied seniority credit under a second endorsement on the theory that her services were incidental to her primary endorsement. Second, it is common for school districts to expect supervisory staff to perform direct services in addition to their supervisory responsibilities. See *Gargano v. Union Twp. Bd. of Educ.*, 93 N.J.A.R. 2d (Vol. 4B) 670 (Comm'r Aug. 31, 1993). (mathematics supervisor assigned to teach three math classes). Coyle is entitled to seniority credit as a guidance counselor not merely because he possessed a guidance-counselor endorsement, but because he actually performed services under that endorsement.. Third, there are valid educational reasons for encouraging guidance directors to engage in actual delivery of services. Award of seniority credit is an effective incentive to achieve this desired result. As noted in the *Huff* opinion, subject supervisors "must demonstrate effective teaching techniques to their teachers" and "provide an example to the members of their department." (83 S.L.D. at 5161.) Subject supervisors bear major responsibility for in-service training of teachers and for assisting department members in solving day-to-day problems. *Id.* Similarly, guidance directors should not completely lose touch with the daily demands of counseling if they are to remain effective in carrying out their supervisory responsibilities.

Order

It is **ORDERED** that the relief requested by petitioner Alice Lightdale is denied.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Sept. 7, 1995
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Sept. 13, 1995
DATE

Receipt Acknowledged:
Deborah N. Antonetti, Jr.
DEPARTMENT OF EDUCATION

SEP 13 1995
DATE
al

Jeff M...
Mailed to Parties
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

APPENDIX

List of Witnesses

1. Dr. Rosalie Lamonte, high school principal, Union County Regional High School District No. 1
2. Dr. Donald Merachnik, superintendent of schools, Union County Regional High School District No. 1
3. William Coyle, guidance counselor, Union County Regional High School District No. 1
4. Alice Lightdale, guidance counselor, Union County Regional High School District No. 1

List of Exhibits

No.	Description
J-1	Copy of certificate of Alice L. Lightdale in student personnel services, issued August 1984
J-2	Copy of certificate of Alice Lightdale as teacher of social studies, issued May 1980
J-3	Copy of certificate of William Coyle as director of student personnel services, issued April 1985
J-4	Copy of certificate of William Coyle in student personnel services, issued June 1978
J-5	Copy of certificate of William Coyle as principal/supervisor, issued in April 1987

- J-6 Copy of certificate of William Coyle as teacher of social studies, issued in August 1984
- J-7 Copy of job description for guidance counselor, dated October 22, 1979
- J-8 Copy of job description for guidance director, revised August 2, 1983
- J-9 Copy of minutes of conference meeting of the Board of Education of the Union County Regional High School District No. 1 held on June 21, 1994
- J-10 Copy of the minutes of a meeting of the Board of Education of the Union County Regional High School District No. 1 held on January 3, 1995
- R-1 Copy of seniority list of guidance counselors, dated June 1994
- R-2 Copy of employment history card for Alice L. Lightdale showing years of employment through 1993-94 school year and update effective February 2, 1995
- R-3 Copy of employment history card for William Coyle showing years of employment through 1994-95 school year
- R-4 Copy of performance evaluation of William Coyle for the period July 1, 1988 to June 30, 1989
- R-5 Copy of job performance evaluation of William Coyle for July 1, 1989 to June 30, 1990

- R-6 Copy of job performance evaluation of William Coyle for July 1990 to June 30, 1991
- R-7 Copy of job performance evaluation of William Coyle for July 1, 1991 to June 30, 1992
- R-8 Copy of job performance evaluation of William Coyle for July 1, 1992 to June 30, 1993
- R-9 Copy of job performance evaluation of William Coyle for July 1, 1993 to June 30, 1994
- R-10 Copy of memorandum entitled "projected guidance ratios 1990/1991," undated
- R-11 Copy of memorandum entitled "Hierarchy of the Guidance Department," dated November 26, 1986
- R-12 Copy of letter to William Coyle from Donald Merachnik, Ph.D., dated June 24, 1994
- R-13 Copy of letter to Alice Lightdale from Donald Merachnik, Ph.D., dated June 24, 1994
- R-14 Copy of minutes of conference meeting of the Board of Education of the Union County Regional High School District No. 1 held on September 20, 1994
- R-15 Copy of memorandum to staff members from Dr. Lamonte, dated January 30, 1992

- R-16 Copy of memorandum to all board members from D. Merachnik, dated February 4, 1992

- R-17 Copy of memorandum to Charles Bauman from Rosalie Lamonte, dated March 4, 1991

ALICE LIGHTDALE, :
 :
 PETITIONER, :
 :
 V. :
 :
 BOARD OF EDUCATION OF THE UNION :
 COUNTY REGIONAL HIGH SCHOOL : COMMISSIONER OF EDUCATION
 DISTRICT NO. 1, UNION COUNTY, :
 : DECISION
 RESPONDENT, :
 :
 AND :
 :
 WILLIAM COYLE, :
 :
 INTERVENOR. :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondent's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioner's exceptions essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ), contending, *inter alia*, that she is entitled to superior seniority rights entitling her to the position of guidance counselor over William Coyle (Intervenor). She argues that she had a heavier student caseload when she was a part-time guidance counselor than Coyle had in his capacity as director of guidance. (Petitioner's Exceptions at p. 2) She further argues that Coyle was not required by the District, but by the State, to possess dual endorsements as student personnel services (guidance counselor

endorsement) and as director of student personnel services (director of guidance endorsement), thereby rendering the ALJ's conclusion incorrect and insignificant that this was a District requirement for purposes of determining seniority status. (Id.)

Petitioner further avers that the position of director of guidance is classified separately under N.J.A.C. 6:3-5.1(1)(3)(ii) for seniority determinations and, thus, seniority in the position of guidance counselor should not accrue to him. (Petitioner's Exceptions at pp. 3-4) Petitioner contends that equitable application of the seniority statutes and regulations demands that an employee only accrue credit for the one position in which the individual is employed, otherwise superior seniority rights would be conferred on supervisors and directors, whose job descriptions and positions include direct services. (Id. at p. 6)

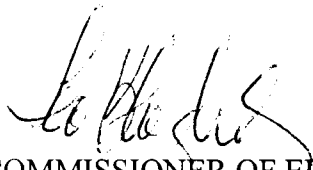
In its reply, the Board argues that the ALJ's initial decision was correct and should be adopted in its entirety. The Board points out that N.J.A.C. 6:3-5.1(f) permits simultaneous accrual of seniority as a guidance counselor and as director of guidance and that accrual of seniority rights is not dependent on the number of students in a counselor's or director's caseload, but based upon actual employment. (Board's Exceptions at pp. 3-4) Additionally, the Board asserts that the Board, not the State, required its director of guidance to perform counseling duties and that petitioner's argument concerning dual endorsements referred to licensing requirements, not job duties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that petitioner's seniority rights were not violated by the Board's actions herein. The law is well-settled to permit simultaneous accrual of seniority rights in more than one seniority category. (N.J.A.C. 6:3-5.1(f)) In the instant case, the Commissioner

finds that consistent with the ALJ's determination, Coyle is entitled to seniority credit in the category for guidance counselors, as well as the category for directors. The Commissioner so determines not merely because Coyle possessed a guidance counselor endorsement, but because he actually performed services under that endorsement. The Commissioner further concurs that the quantity of cases held by Coyle is not determinative in such analysis, but rather his actual service as a guidance counselor, notwithstanding that such service was rendered in the position of director of guidance. Finally, the Commissioner concurs that licensing requirements are distinguishable from assignment of job duties, so that the dual certification required herein is a function of Board action, not State.

Accordingly, for the reasons well-expressed therein, the Commissioner adopts the initial decision of the Office of Administrative Law as his own and dismisses the within Petition of Appeal with prejudice.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

October 25, 1995
Date of Mailing, October 26, 1995

GREGORY R. MARTUCCI, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY : DECISION

OF LINDEN, UNION COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioning principal alleged Board violated his tenure rights when it failed to offer him a contract for the 1994-95 school year.

ALJ determined that petitioner had met the precise requirements of N.J.S.A. 18A:28-6 including employment in his new position of principal for a period of two consecutive calendar years. Therefore, ALJ concluded that petitioner had achieved tenure in the position of principal. Petitioner's Motion for Summary Decision was granted.

Commissioner concurred with ALJ's determination that petitioner achieved tenure in the position of principal. Commissioner ordered petitioner reinstated with all salary, benefits and emoluments retroactive to July 1, 1994.

October 25, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 8079-94

AGENCY DKT. NO. 289-7/94

GREGORY R. MARTUCCI,

Petitioner,

v.

BOARD OF EDUCATION OF

THE CITY OF LINDEN,

Respondent.

Wayne J. Oppito, Esq., for petitioner

Francis J. Campbell, Esq., for respondent
(Kalac, Newman, Lavender & Campbell, attorneys)

Record Closed: August 4, 1995

Decided: September 8, 1995

BEFORE RICHARD MCGILL, ALJ:

Gregory R. Martucci (petitioner) seeks by way of motion for summary decision a determination that he had tenure in the position of principal with the Linden School District and that the determination by the Board of Education of the City of Linden (respondent) not to offer him a contract for the 1994-95 school year violated his tenure rights. Respondent denies

that petitioner received tenure in the position of principal and, like petitioner, moves for summary decision.

PROCEDURAL HISTORY

Petitioner filed his petition with the Commissioner of Education on July 14, 1994 pursuant to the Commissioner's authority to hear and determine controversies arising under the school laws pursuant *N.J.S.A.* 18A:6-9. Respondent filed an answer on August 10, 1994, and the matter was transmitted to the Office of Administrative Law on August 19, 1994 for determination as a contested case.

Petitioner and respondent filed motions for summary decision on April 13, 1995 and April 18, 1995, respectively. After additional papers were submitted, an oral argument was conducted on August 4, 1995.

MOTIONS FOR SUMMARY DECISION

A motion for summary decision should be granted where there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5(b). The same standard is applied in the courts of this State pursuant to *R.* 4:46-2. Summary judgment "is designed to provide a prompt, businesslike and inexpensive method" to dispose of actions which do not present any genuine issue of material fact. *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 67, 74 (1954).

a. Facts

The parties are in agreement that there is no genuine issue of material fact in this case and stipulate as follows:

1. The petitioner was employed as a teaching staff member by the Board of Education (hereinafter "Board") on September 1, 1970.
2. The petitioner was continuously employed as a teacher by the Board until July 1, 1992, when his appointment as a principal in the Linden City School District was effective.
3. Petitioner's service as a principal extended from July 1, 1992 through June 30, 1994.
4. On April 27, 1994, the Board took action determining that the petitioner would not be offered a contract as a principal for the 1994-95 school year. Petitioner received written notice from the Board that his contract was not being renewed, on May 2, 1994.
5. The petitioner was continued in his employment as a principal of the Soehl Middle School pursuant to the terms of the contract that existed between the Board and the petitioner, through the 1993-94 school year.
6. The instant litigation then ensued and a Petition was filed with the Commissioner of Education on or about July 14, 1994.

Attachments to the Joint Stipulation of Facts included petitioner's complete employment history with respondent and the employment contract in question.

b. Law and Analysis

Tenure is a status granted to teachers in New Jersey by statute. *Spiewak v. Rutherford Bd. of Ed.*, 90 N.J. 63, 72 (1982). The objective of tenure statutes is to protect competent and qualified teachers in the security of their positions during good behavior against removal for unfounded, flimsy, or political reasons. *Zimmerman v. Board of Education of Newark*, 38 N.J. 65, 71 (1962). Because of its remedial purpose, the Tenure

Act should be liberally construed to achieve its beneficent ends. *Spiewak v. Rutherford Bd. of Ed.*, 90 N.J. at 74.

The conditions under which teachers secure tenure are set forth in the Tenure Act, N.J.S.A. 18A:28-1 to -18. *Spiewak v. Rutherford Bd. of Ed.*, 90 N.J. at 72. This statute makes tenure a mandatory term of a teacher's employment. *Ibid.* A teacher achieves tenure through compliance with the specific terms of the statute. *Zimmerman v. Board of Education of Newark*, 38 N.J. at 72.

Teaching staff members as defined in N.J.S.A. 18A:1-1 initially receive tenure pursuant to N.J.S.A. 18A:28-5. Upon transfer or promotion, tenure is granted in accordance with the conditions set forth in N.J.S.A. 18A:28-6. Generally, a teaching staff member achieves tenure "if (1) she works in a position for which a teaching certificate is required; (2) she holds the appropriate certificate; and (3) she has served the requisite period of time." *Spiewak v. Rutherford Bd. of Ed.*, 90 N.J. at 74.

Here, it is undisputed that petitioner worked in a position for which a teaching certificate is required and that he held the appropriate certificate. The issue in this proceeding is whether petitioner has served the requisite period of time.

Tenure in a promotional position is governed by N.J.S.A. 18A:28-6, which provides in pertinent part as follows:

Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:

(a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purposes; or

(b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or

(c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;

A principal is a teaching staff member as defined in *N.J.S.A.* 18A:1-1. The term "calendar year" refers a period of one full year commencing on any date and is not limited to a period from January 1 to December 31. *Bd. of Ed. of Manchester Tp. v. Raubinger*, 78 *N.J.Super.* 90, 100-101 (App. Div. 1963).

Petitioner argues that by working as a principal from July 1, 1992 through June 30, 1994, he fulfilled the requirement of a period of employment of two consecutive calendar years in the new position as set forth in *N.J.S.A.* 18A:28-6(a). Relying upon the principles set forth in *Spiewak, supra*, petitioner concludes that he has achieved tenure in the position of principal.

Respondent contends that the notice given to petitioner prior to the completion of the period of two consecutive calendar years in the new position to the effect that he would not be offered a new contract for the following year defeats his claim for tenure. Respondent specifically relies on a concurring opinion in *Nissman v. Board of Educ.*, 272 *N.J.Super.* 373 (App. Div. 1994), certif. denied 137 *N.J.* 315 (1994), for the proposition that notice will defeat tenure.

Nissman involved two issues. One issue was substantially the same as the question of law in the case *sub judice*, while the other issue related to the ninety-day time limitation for filing a petition with the Commissioner of Education under *N.J.A.C.* 6:24-1.2(c). The case was ultimately decided on the basis of the ninety-day rule but not before the substantive issue

was addressed by the Administrative Law Judge, the Commissioner of Education and one judge of the Appellate Division.

Blossom S. Nissman and the Board of Education of the Township of Long Beach Island entered into a contract under which Nissman was to serve as an elementary school principal. The term of the contract was from September 1, 1987 to August 31, 1990. On April 23, 1990, the Board of Education adopted a resolution in compliance with *N.J.S.A.* 18A:27-10, which is quoted below, providing as follows: “RESOLVE that the employment contract of Dr. Blossom Nissman expiring August 31, 1990 not be renewed and she not be offered a new contract or granted tenure.”

Nissman continued to work in her position up to and including August 31, 1990, the last day of her contract. At the end of that work day, Nissman advised the Board of Education by telefax that she had acquired tenure in the position of principal pursuant to *N.J.S.A.* 18A:28-5(a). Evidently, Nissman was not in a promotional position and therefore required employment for a period of three calendar years in order to acquire tenure pursuant to *N.J.S.A.* 18A:28-5(a). The Board’s counsel faxed a response stating that Nissman did not have tenure and should not report to work for the school year that was about to begin.

Nissman appealed to the Commissioner of Education, and the matter was transmitted to the Office of Administrative Law as a contested case. The Administrative Law Judge (ALJ) determined that Nissman’s appeal was not barred by the ninety-day rule pursuant to *N.J.A.C.* 6:24-1.2(c) and further that Nissan had achieved tenure in the position of principal since she met the precise requirements of *N.J.S.A.* 18A:28-5(a) in that she was employed for three consecutive calendar years from September 1, 1987 to August 31, 1990. *Nissman v. Board of Education of the Township of Long Beach Island*, 92 *N.J.A.R.* 2d (EDU) 71. The Commissioner of Education affirmed the ALJ’s decision. *Id.* at 74-76.

The State Board of Education reversed the Commissioner’s decision based upon the view that the appeal was time barred by the ninety-day rule. *Nissman v. Long Beach Island*

Township Board of Education, 92 *N.J.A.R.* 2d (EDU) 621. The State Board emphasized that it was deciding the case solely on the basis of Nissman's failure to file the petition in a timely manner and not on the merits of her underlying claim. *Id.* at 622. Nonetheless, the State Board included a footnote to the effect that it was unaware of any precedent that would have required the Board to breach its contract with Nissman in order to preclude her from acquiring tenure. *Ibid.*

Nissman appealed from the decision of the State Board of Education, and the majority in the Appellate Division affirmed the State Board's dismissal based upon the ninety-day time limit set forth in *N.J.A.C.* 6:24-1.2(c). However, a concurring opinion expresses the view that the case should be decided on the substantive issue of tenure rather than the procedural question. According to the concurring opinion, the adoption and service of the Board's resolution before April 30, 1990 had the effect of preventing the acquisition of tenure in light of the legislative policy set forth in *N.J.S.A.* 18A:27-9 and *N.J.S.A.* 18A:27-10.

These two statutes relate to contracts of teaching staff members. One statute, *N.J.S.A.* 18A:27-9, provides as follows:

If the employment of a teaching staff member is terminated on notice, pursuant to a contract entered into with the board of education, it shall be optional with the board whether or not the member shall continue to perform his duties during the period between the giving of the notice and the date of termination of employment thereunder.

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

On or before May 15 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either

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

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

A determination in this case requires an appreciation of the relationship between the tenure statutes and a teaching staff member's contract status. The leading case in regard to this relationship is *Canfield v. Board of Ed. of Pine Hill Borough*, 51 N.J. 400 (1968), rev'g on dissent 97 N.J. Super. 483 (App. Div. 1967), wherein teacher Gladys Canfield was originally employed by the Board of Education on November 19, 1962. Her contract was renewed annually for three ensuing school years from September 1, 1963 to June 30, 1964, from September 1, 1964 to June 30, 1965, and from September 1, 1965 to June 30, 1966. Her contract of employment provided that it could be terminated by either party upon giving sixty days' notice in writing of intention to terminate. By November 19, 1965, Canfield would have actually served three full academic years, which would have satisfied the requirements of the statute, N.J.S.A. 18:13-16, in effect at the time, allowing for tenure "after employment, within a period of any four consecutive academic years, for the equivalent of more than three academic years." The Board of Education notified Canfield on November 15, 1965, that it was terminating her teaching contract to take effect immediately and giving her two months pay. Canfield contended that because the sixty days' pay was to run beyond the date when she would otherwise have achieved tenure, she is entitled to tenure.

The majority in the Appellate Division determined that the Board of Education had the power to prevent Canfield from continuing to render services even if doing so breached the contract, but that without sixty days' notice, the action did not terminate Canfield's employment. The majority concluded that Canfield's employment continued for the sixty-day notice period and that therefore Canfield achieved tenure.

The New Jersey Supreme Court reversed for reasons expressed in the dissenting opinion of Judge Gaulkin, who stated in part as follows:

It seems to me that tenure and contract are two different concepts; tenure is statutory and arises only by passage of the time fixed by the

statute, and the discharge of an employee before the passage of the required time bars tenure, even if the discharge is in breach of an employment contract which, if not breached, would have extended to a date which would have given tenure.

. . .

Finally, I find nothing in the contract which justifies the conclusion reached by my Brothers that the dismissal was not effective on the date the notice of dismissal was given. If this was a dispute arising out of the breach of the contract itself in which the question of the date of termination of the contract became important, it might be held that the termination was not effective until 60 days after the notice of dismissal was given. . . . But here we are concerned not with the contract or its breach, but with the status of the plaintiff -- *i.e.*, tenure. It seems to me that the dismissal immediately stopped the running of the time to tenure. The burden of proving the right of tenure is upon plaintiff and ordinarily that right must be clearly proved. I do not think a municipality should be trapped into tenure by the construction of words which neither party expected to have that meaning. *Canfield v. Bd. Edu. of Pine Hill*, 97 *N.J.Super.* at 490-493.

Thus, even where a contract requires the employee to be retained beyond the tenure date, a timely prior dismissal precludes tenure. In short, tenure is not controlled by the contractual status of the teaching staff member. Rather, tenure is achieved by compliance with the specific requirements of the tenure statute. Also noteworthy is that it seems to be a foregone conclusion that Canfield would have acquired tenure if the Board of Education had given her sixty days' notice of termination and then allowed her to work for that period of time.

A case with a remarkably similar fact pattern but a different issue from the matter *sub judice* is *Bd. of Ed. of Manchester Tp. v. Raubinger*, 78 *N.J.Super.* 90 (App. Div. 1963). Milo E. Schumacher and the Board of Education of Manchester Township entered into a two-year contract for his employment as a principal from July 1, 1959 to June 30, 1961. By resolution dated May 11, 1961, the Board of Education reappointed Schumacher as a principal, and a one-year contract was executed providing for his employment from July 1, 1961 to June 30, 1962. Each contract contained a clause which permitted either party to

terminate the employment by giving the other sixty days' written notice. Notice was not given pursuant to this provision of the contract, but at a meeting on May 10, 1962, the Board of Education voted that "an employment contract be denied Mr. Schumacher." Schumacher continued his employment through June 30, 1962. Thus, the facts were substantially identical to the case *sub judice*.

Schumacher contended that he achieved tenure by virtue of his employment for three consecutive calendar years as required by the tenure statute in effect at the time, *N.J.S.A.* 18:13-16. The Board of Education did not argue that the denial of a contract renewal prevented Schumacher from achieving tenure but instead contended that a calendar year referred to the period from January 1 to December 31 and that Schumacher had not completed three such periods. As noted above, the court rejected the Board's argument and held that the term "calendar year" refers to a full year starting on any date. *Bd. of Ed. of Manchester Tp. v. Raubinger*, 78 *N.J.Super.* at 100. Schumacher was granted tenure. Thus, under substantially identical facts, a principal was granted tenure.

The Court's opinion in *Raubinger* is also noteworthy for a discussion of the history of tenure statutes in New Jersey. A key point in this discussion is that the tenure laws have been amended from time to time to prevent abuse by boards of education that devised methods to deny teachers tenure, in some cases indefinitely. *Id.* at 94-97.

The case of *Mullen v. Jefferson Board of Education*, 1960-61 *S.L.D.* 194 (1961) produced a similar result. There, John J. Mullen was employed as a Superintendent of Schools pursuant to contracts from July 1, 1957 to June 30, 1960. On the latter date, the Board of Education voted to void his contract. The Commissioner of Education concluded that Mullen had achieved tenure since he was actually employed in the performance of his duties through the evening of June 30, 1960. The standard employed by the Commissioner was whether the superintendent was actually employed in the performance of his duties through the last day of the period of three consecutive calendar years. Thus, *Canfield*,

Raubinger and *Mullen* indicate that the long-standing practice and interpretation was that individuals in petitioner's position were found to have tenure.

Respondent relies upon *N.J.S.A.* 18A:27-9 and *N.J.S.A.* 18A:27-10, which it characterizes as later enacted statutes. Respondent's characterization is based on a reference to the original enactment of the Tenure Act in 1909. This reference is of little significance since *Spiewak*, the leading case in regard to tenure, was decided in 1982, a number of years after the enactment of *N.J.S.A.* 18A:27-9 (L. 1967, c. 271, which may be traced to L. 1954, c. 80) and *N.J.S.A.* 18A:27-10 (L. 1971, c. 436).

Respondent's reliance on *N.J.S.A.* 18A:27-9 and *N.J.S.A.* 18A:27-10 is otherwise misplaced. *N.J.S.A.* 18A:27-9 concerns a situation where a teacher is terminated on notice pursuant to a contract and provides that the board has the option whether the member will continue to perform his duties during the period between the giving of notice and the date of termination of employment. Clearly, respondent in this case did not give petitioner notice of termination pursuant to the contract, and therefore, *N.J.S.A.* 18A:27-9 is inapplicable. Moreover, this statute clearly contemplates that a teacher's employment may continue subsequent to a notice of termination if the board chooses to allow the teacher to perform his duties during the period from the notice to the effective date of the termination.

Respondent's notice to petitioner that he would not be offered a contract for the next year was based upon *N.J.S.A.* 18A:27-10. However, this statute was most certainly intended to benefit non-tenured teaching staff members by providing notice in the event that a new contract would not be offered. *Nissman v. Bd. of Educ.*, 272 *N.J. Super.* at 380. Thus, it is highly unlikely that the legislative intent behind *N.J.S.A.* 18A:27-10 was to undermine the acquisition of tenure.

Respondent seems to believe that the footnote in the State Board's decision in *Nissman, supra*, as set forth above intimates that notice of non-renewal is sufficient to prevent the acquisition of tenure. This notion is unpersuasive since the State Board

specifically stated that it was not addressing the merits of the substantive issue. Additionally, it is noteworthy that as of April 27, 1994, respondent could have given petitioner sixty days' notice of termination, thereby preventing him from obtaining tenure, without breaching his contract. In regard to the concurring opinion upon which respondent places great reliance, it is noteworthy that the majority in the Appellate Division did not join in the concurrence, which was not the opinion of the court.

Respondent in effect argues that it complied with the general purposes of the tenure statutes by allowing petitioner to work as a principal on a probationary basis for a period approaching two years and then, after deciding that it did not want petitioner to receive tenure in the new position, gave him adequate notice that he would not be offered a new contract as a principal. Respondent sees its approach as fair to petitioner and generally consistent with the tenure laws.

The fundamental flaw in respondent's analysis is that the Legislature and the courts have taken a different approach to tenure. In order to prevent abuses by school boards and to protect teachers, the Legislature has set forth specific requirements with which a teaching staff member must comply to achieve tenure. *Zimmerman v. Board of Education of Newark*, 38 N.J. at 72; *Bd. of Ed. of Manchester Tp. v. Raubinger*, 78 N.J. Super. at 96. The notion that notice defeats tenure raises the concern of possible abuses by boards of education. If it were established that notice bars tenure, the opportunity would exist for creativity in regard to the contents of the notice. It is certainly a reasonable concern that boards of education will devise means to provide notice to a teaching staff member prior to the expiration of the period of time set forth in the tenure statute but allow that individual to continue to perform his duties for an indefinite additional time without achieving tenure. This result is fundamentally inconsistent with the purposes of the tenure statutes.

One of the specific requirements under the tenure statutes is that the teacher has served for the requisite period of time. *Spiewak v. Rutherford Bd. of Ed.*, 90 N.J. at 74. N.J.S.A. 18A:28-6(a) provides that a teaching staff member in a promotional position

receives tenure upon “the expiration of a period of employment of two consecutive calendar years in the new position. . . .” In effect, respondent argues that where a teaching staff member is given notice of non-renewal but continues to perform his duties for the balance of his contract, such effort does not constitute “employment” within the meaning of *N.J.S.A.* 18A:28-6. Respondent’s position is inconsistent with the long-standing interpretation of the term “employment” as reflected in *Canfield*, *Raubinger* and *Mullen*, *supra*, and also represents a departure from the specific requirement in *Spiewak* that the teacher has served for the requisite period of time. Moreover, respondent’s position is certainly not a liberal interpretation of the Tenure Act as required by *Spiewak*.

Petitioner has met the precise requirements of *N.J.S.A.* 18A:28-6 including employment in the new position for a period of two consecutive calendar years. Therefore, I **CONCLUDE** that petitioner has achieved tenure in the position of principal.

Accordingly, it is **ORDERED** that:

1. Petitioner’s motion for summary decision is granted.
2. Respondent’s motion for summary decision is denied.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Sept. 8, 1995
DATE

Richard McGill
RICHARD MCGILL, ALJ

Receipt Acknowledged:

Sept. 13, 1995
DATE

Deborah M. Santanaitis
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 13 1995
DATE

Jeff S. Mann
ACTING DIRECTOR AND
OFFICE OF ADMINISTRATIVE LAW JUDGE

am

GREGORY R. MARTUCCI, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE CITY : DECISION
 OF LINDEN, UNION COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of the Board were untimely, having been filed on September 27, 1995, in response to an initial decision mailed to the parties on September 13, 1995, and are, therefore, not herein considered.

Upon a careful and independent review of the record, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that because petitioner satisfied the requirements of N.J.S.A. 18A:28-6, including employment in his new position for a period of two consecutive calendar years, he achieved tenure in the position of principal. The Commissioner further concurs that this is so, notwithstanding the Board's determination on April 27, 1994, and subsequent written notice to petitioner on May 2, 1994, that he would not be offered a contract for the 1994-95 school year.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons clearly articulated in the initial decision. Petitioner's

Motion for Summary Decision is granted and the Board of Education of the City of Linden is hereby ordered to reinstate petitioner to the position of principal with all salary, benefits and emoluments, retroactive to July 1, 1994.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

October 25, 1995

Date of Mailing, October 26, 1995

EDU #8079-94
C # 388-95
SB # 108-95

GREGORY R. MARTUCCI,	:	
	:	
PETITIONER-RESPONDENT,	:	
	:	
V.	:	STATE BOARD OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF LINDEN, UNION COUNTY,	:	
	:	
RESPONDENT-APPELLANT.	:	
_____	:	

Decided by the Commissioner of Education, October 25, 1995

For the Petitioner-Respondent, Wayne Oppito, Esq.

For the Respondent-Appellant, Kalac, Newman, Lavender and Campbell
(Francis J. Campbell, Esq., of Counsel)

The facts in this case are not in dispute. Petitioner was first employed by the Board of Education of the City of Linden on September 1, 1970, as a teacher. He was continuously employed as a teacher until July 1, 1992. On that date, his employment as a principal became effective, and he began serving in that capacity. Petitioner served as a principal during the 1992-93 and 1993-94 school years. However, on May 2, 1994, the Board notified him that it was not going to offer him a contract for 1994-95. Accordingly, petitioner's employment as a principal ended on June 30, 1994, when his contract for 1993-94 expired.

12/4/96

On July 14, 1994, petitioner initiated this litigation by filing a Petition of Appeal with the Commissioner claiming that he had achieved tenure as a principal pursuant to N.J.S.A. 18A:28-6(a). That statute provides in pertinent part that:

Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:

(a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purposes.

Petitioner contended that by working as a principal from July 1, 1992 through June 30, 1994, he fulfilled the precise terms of this statutory provision so that he achieved tenure under the principles of Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63 (1982).

The Administrative Law Judge ("ALJ") agreed. Rejecting the Board's argument that its notice of non-renewal barred petitioner's acquisition of promotional tenure, the ALJ concluded that petitioner had acquired tenure by serving as a principal for two years. He therefore recommended that the Commissioner grant summary decision to petitioner.

The Commissioner adopted the ALJ's determination as his decision in this matter and directed that petitioner be reinstated as a principal.

The Board appealed to the State Board, maintaining that petitioner's claim to promotional tenure was barred by its notice to him in May 1994 that it was not going to offer him a new contract as a principal.

While the Legal Committee was reviewing this appeal, the New Jersey Supreme Court issued its decision in Picogna v. Board of Education of the Township of Cherry

Hill, 143 N.J. 391 (1996). In that case, the Cherry Hill Board had terminated an Assistant Superintendent for Business on April 29, 1988, before he had served in the position for a sufficient time period to acquire tenure under N.J.S.A. 18A:28-5(a). Picogna's employment contract had been for three consecutive calendar years, and he claimed that he had achieved tenure because he would have served the requisite period if the district board had not breached his contract by terminating him approximately two months before his contract was due to expire.

The specific issue which the Court decided was whether the deliberate breach of a three-year employment contract confers tenure on a teaching staff member if, as a result, he is discharged before he actually serves the period required by the statute for the achievement of tenure. Citing Zimmerman v. Board of Education of Newark, 38 N.J. 65 (1962), cert. denied, 371 U.S. 956 (1963), the Court found that Picogna had not acquired tenure because he had not served the requisite three years mandated by N.J.S.A. 18A:28-5(a), which was the statute applicable to the case. As the Court expressed its conclusion:

We reaffirm this Court's holding in [Canfield v. Board of Educ., 51 N.J. 400 (1968)] that breach of a contract covering a full probationary period of employment that may have resulted in tenure had no breach occurred does not confer tenure in the absence of continued employment after service for the requisite number of consecutive probationary years in the same district. To obtain tenure based on N.J.S.A. 18A:28-5(a), plaintiff was required to serve three consecutive calendar years with defendant and then be reemployed by the Board for at least one day in a fourth year. Zimmerman, supra, 38 N.J. at 75-76. That is required to satisfy the statutory requirement of employment after expiration of three consecutive years.... In addition, the Board's absolute right not to renew the employment relationship on sixty-days notice is compelling evidence that

the parties did not intend to confer tenure upon entry into the contract or after substantial performance under the contract.

Picogna, supra, at 401-2.

In view of the Court's holding in Picogna, we requested both parties to submit briefs addressing the effect of that decision on the instant case. After considering the arguments presented therein, as well as the record previously developed, we find that the decision in Picogna compels the conclusion that petitioner in the case now before us did not acquire tenure as a principal.

Picogna involved the application of N.J.S.A. 18A:28-5(a). As set forth in the Court's opinion, Picogna, supra, at 400, the exact language of that statutory provision mandates in pertinent part that:

The services of all teaching staff members...shall be under tenure during good behavior and efficiency...after employment in such district or by such board for:

(a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose.

Zimmerman, which the Picogna Court cited to support its conclusion that N.J.S.A. 18A:28-5(a) required reemployment in order to support a claim of tenure, involved a teaching staff member employed on an academic year basis rather than on a calendar year basis. Under the current statutory framework, a claim such as Zimmerman's is controlled by N.J.S.A. 18A:28-5(a) rather than 28-5(b). Petitioner argues that the distinction between these statutory provisions is such that the Picogna Court's citation to Zimmerman renders meaningless its conclusion that N.J.S.A. 18A:28-5(a) precludes the acquisition of tenure for calendar year employees unless they are reemployed upon the expiration of their contracts. We do not agree.

In Zimmerman, the Court considered a claim by a teacher employed on an academic year basis who had been dismissed in May of his third year although his employment contract did not expire until June 30. Zimmerman was successful before the New Jersey Supreme Court in challenging the Newark Board's action in dismissing him, which had been taken on the basis of his refusal to testify before a subcommittee of the House Un-American Activities Committee. However, when this agency determined that Zimmerman's relief was limited to receiving his salary for the period between his dismissal and the expiration of his contract, he appealed, seeking reinstatement and claiming tenure under N.J.S.A. 18:13-16, the predecessor statute to N.J.S.A. 18A:28-5.

The New Jersey Supreme Court reviewed the matter on direct certification. Focusing on the date upon which Zimmerman had begun his service as a teacher, the Court concluded that he was not entitled to tenure because he had not been employed for three calendar years prior to his dismissal. Zimmerman, supra, at 74. The Court's conclusion was grounded in an interpretation of the word "employment" under N.J.S.A. 18:13-16 by New Jersey's prior Supreme Court. Under that interpretation, "employment" for an academic year employee, for purposes of establishing the date upon which a teacher begins to acquire tenure, starts on the date he begins teaching and not on the date he enters into the contract. Zimmerman, supra, at 74, citing Chalmers v. State Board of Education, 11 N.J. Misc. 781 (Sup. Ct. 1933).

The Court also rejected Zimmerman's contention that tenure normally follows "automatically" when a teacher receives satisfactory evaluations for three academic years. In this respect, the Court found that:

Except for statutory conditions, a teacher is retained solely on a contract basis during his probationary employment. At the expiration of an annual contract period, the employment relationship ceases to exist unless a new contract has been entered into....

Zimmerman, supra, at 75.

Equally applicable here is the Zimmerman Court's construction of the terms of N.J.S.A. 18:13-16. That statute provided in pertinent part that:

The services of all teachers...shall be under tenure during good behavior and efficiency, (a) after the expiration of a period of employment of three consecutive calendar years in that district...or (b) after employment for three consecutive academic years together with employment at the beginning of the next succeeding academic year, or (c) after employment, within a period of any four consecutive academic years, for the equivalent of more than three academic years.

The Zimmerman Court interpreted this language to mean that "tenure status may be secured only after employment for the probationary periods specified [therein]."

Zimmerman, supra, at 72. In this respect, the Court stressed that:

Inherent in the tenure legislation is the policy that a board's duty to hire teachers requires more than merely appointing licensed instructors; it demands that permanent appointments be made only if teachers are found suitable for the positions after a qualifying trial period. In essence, this constitutes a "proving out" period....

Id. at 72-73.

It is this principle, derived from consideration of N.J.S.A. 18:13-16, which underlies the Picogna Court's interpretation of N.J.S.A. 18A:28-5. When the Legislature recodified N.J.S.A. 18:13-16 in 1967, effective January 1968, it altered the structure of the statute so that the phrase "after employment," which had been repeated

at the beginning of each of the specific provisions in N.J.S.A. 18:13-16, was placed instead in the opening section applicable to all three of the provisions of N.J.S.A. 18A:28-5. However, we can find nothing to indicate any intent to change the meaning of the phrase.

In contrast to Picogna, the claim in this case is for promotional tenure, which is governed by N.J.S.A. 18A:28-6(a). That statute provides in pertinent part that:

Any...teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter...shall not obtain tenure in the new position until after:

(a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose.

However, both N.J.S.A. 18A:28-6(a) and N.J.S.A. 18A:28-5(a) apply to teaching staff members employed on a calendar year basis, and the language of the statutes is substantially the same in all respects relevant herein. Moreover, central to the Picogna Court's construction of N.J.S.A. 18A:28-5(a) is the fact that the exact language of N.J.S.A. 18A:28-5 provides that a teaching staff member acquires tenure only after employment in a tenure-eligible position for the requisite period. The language of N.J.S.A. 18A:28-6 is virtually identical in this respect to that of N.J.S.A. 18A:28-5. Hence, there is no basis to construe this requirement of N.J.S.A. 18A:28-6(a) differently than the Court has interpreted it under N.J.S.A. 18A:28-5(a).

In sum, we hold in this case that petitioner did not acquire tenure as a principal because, although he served the entire term of his contract, he was not reemployed by the Board as a principal after being employed in that capacity for two years. Picogna,

supra. We find that sound educational policy supports this result. Were we to hold otherwise, district boards would be forced to terminate the contracts of calendar year employees in order to prevent tenure acquisition. We find no justification for the disruption to the school system that such a result would cause. Nor can we justify the additional expense that would be inevitable in those cases where payment must be made to the employee under the employment contract following his termination while, at the same time, the district would be required to pay for his replacement.

We stress that in contrast to N.J.S.A. 18A:28-5, any teaching staff member to whom N.J.S.A. 18A:28-6 applies retains his tenure rights in his previous position. Accordingly, although we conclude that petitioner did not acquire promotional tenure as a principal, he is entitled under that statute to be returned to his former position at the salary he would have received had he not been promoted together with any increase to which he would have been entitled during the period of his promotion.

Attorney exceptions are noted.

December 4, 1996

Date of mailing DEC 08 1996

IN THE MATTER OF THE TENURE :
 HEARING OF NATHAN PURNELL, :
 BOARD OF EDUCATION OF THE TOWN : COMMISSIONER OF EDUCATION
 OF IRVINGTON, ESSEX COUNTY. :
 _____ :
 :

DECISION

SYNOPSIS

Board certified tenure charges of unbecoming conduct, insubordination, incompetence, incapacity and other just cause against tenured janitor.

ALJ concluded that the preponderance of credible evidence established that on numerous occasions between 1990 and 1994, respondent failed to perform his duties in a satisfactory manner, despite repeated warnings. Moreover, the ALJ concluded that he acted unprofessionally and inappropriately toward two of his female coworkers. ALJ determined respondent's behavior warranted his removal from his position as janitor.

Commissioner concurred with findings and determination in initial decision and ordered respondent dismissed from his tenured position.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO EDU 9748-94
AGENCY NO. #363-9/94

**IN THE MATTER OF THE TENURE CHARGES
AGAINST NATHAN PURNELL, IRVINGTON PUBLIC
SCHOOL DISTRICT, ESSEX COUNTY**

Nicholas Celso, III, Esq. and Joseph R. Morano, Esq., for petitioner,
Irvington Board of Education
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Joel C. Seltzer, Esq., for respondent

Record Closed: July 25, 1995

Decided: September 11, 1995

BEFORE **MUMTAZ BARI-BROWN, ALJ**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, the Board of Education of the City of Irvington, Essex County (Board) certified tenure charges against respondent, Nathan Purnell, a custodian employed by the Board. The Board filed charges of conduct unbecoming, insubordination, incompetence, incapacity and other just cause against Purnell. The Board submits that Purnell's conduct warrants his dismissal from employment as a tenured custodian. N.J.S.A. 18A:6-10.

The Commissioner transmitted the matter to the Office of Administrative Law (OAL) on October 6, 1994 for a determination as a contested case pursuant to *N.J.S.A. 52:14B-1-15* and *N.J.S.A. 52:14F-1 to 13*. Hearings were held on March 2, 3, 1995 and on May 11, 1995. The parties filed post hearing briefs and the record closed on July 25, 1995.

SUMMARY OF THE CHARGES

The Board filed seven charges of unbecoming conduct, insubordination, incompetence, incapacity and other just cause against Purnell. The charges were as follows:

1. Charges One, Two, Three and Five allege that during numerous occasions throughout school years 1990-1991, 1991-1992, 1992-1993, and 1993-1994, Purnell persistently failed to complete his assigned custodial duties and tasks in a satisfactory manner in contravention of the directives from his supervisors.
2. Charge four alleges that on April 21, 1993, Purnell intentionally threw a set of keys at supervisor, Larry Graham, in response to being advised that his cleaning duties were incomplete and unsatisfactory.
3. Charge Six alleges that on November 30, 1993 and on other occasions throughout the 1993-94 school year, Purnell sexually and physically harassed Theresa Avella, a teacher at Chancellor Avenue School, by making unprofessional, inappropriate, threatening and suggestive remarks to Avella.
4. Charge Seven alleges that on or about June 3, 1994 and on other occasions throughout the 1993-94 school year, Purnell sexually and physically harassed Christine Miller, a dental clerk, by making

inappropriate, threatening and suggestive remarks, and inappropriate physical contact with Miller.

STIPULATED FACTS

The following stipulation of relevant facts are adopted as **FACT**:

1. The Irvington Board of Education (Board) is a body politic and corporate, organized and existing and by virtue of the laws in the State of New Jersey, *N.J.S.A. 18A:11-1*, and entrusted with maintaining and conducting the schools of the Irvington School District.
2. On or about November 19, 1989, Nathan Purnell Jr., was employed by the Board as a Night Janitor at Frank Morrell High School effective November 1, 1989 to February 1, 1990.
3. On or about February 21, 1990, Mr. Purnell was granted a contract extension for the position of Night Janitor at Frank Morrell High School effective February 1, 1990 through June 30, 1990.
4. On or about November 25, 1991, Mr. Purnell was transferred to the Chancellor Avenue School from the High School. Thereafter, on or about June 23, 1992, Mr. Purnell signed a contract for the position of custodian at the Chancellor Avenue School, effective July 1, 1992 through June 30, 1993.
5. On or about March 1, 1993, Mr. Purnell was temporarily transferred to the Augusta Street School from the Chancellor Avenue School.
6. At various times during July and August of the 1993-94 school year, Mr. Purnell also was temporarily assigned custodial duties at the Union Avenue School.
7. On or about October 25, 1993, Mr. Purnell was transferred back from the Augusta Street School to the Chancellor Avenue School as a Night Custodian.

8. On or about June 15, 1994, the Board voted to accept the recommendation of Superintendent, Dr. Rodgers M. Lewis, and approved the denial of Mr. Purnell's 1994-95 employment and adjustment salary increments effective July 1, 1994.
9. Further, as part of that resolution, the Board suspended Mr. Purnell with pay, pending further review.
10. On or about July 21, 1994, the Superintendent filed sworn tenure charges of unbecoming conduct, insubordination, incompetence, incapacity and other just cause together with a sworn statement of evidence in support of the charges against Mr. Purnell, with Mr. John D'Angelo, then the Board Secretary of the Irvington Board of Education. A copy of the charges were also served upon Mr. Purnell, as well as his attorney, pursuant to Mr. Purnell's request.
11. On or about August 31, 1994, after consideration of the charges and evidence against Mr. Purnell, together with his attorney's written and oral submissions, the Board determined to proceed to certify the charges to the Commissioner of Education for a hearing pursuant to *N.J.S.A. 18A:6-10 et seq.*
12. Further, at that meeting, the Board determined to suspend Mr. Purnell without pay pursuant to *N.J.S.A. 18A:6-14.*
13. Thereafter, on September 1, 1994, the above charges, together with the sworn statement of evidence, and a certificate of determination were filed by the Board with the Commissioner of Education.
14. On or about September 24, 1994, an answer was filed on behalf of Mr. Purnell, denying the charges.
15. Mr. Purnell is a tenured employee of the Irvington Board of Education.

SUMMARY OF EVIDENCE

Petitioner presented seven witnesses and respondent presented four witnesses.

Charges One, Two, Three and Five:

The Board alleges that on numerous occasions between 1990 to 1994, Purnell persistently failed to complete his assigned custodial duties and tasks in a satisfactory manner in contravention of the directives from his supervisors.

Henry Lewis, the Night Supervisor at Irvington High School, supervised Purnell between November 1989 to 1991. Lewis testified about Purnell's performance. Generally, Purnell's work was not up to par. He failed to adequately clean his assigned area. For example, when he was assigned to sweep the stairwells and floors he would leave the debris on the floor. On one occasion Purnell was assigned to the gym area to set up equipment for a school function. He refused to help the other employee and told Lewis that he was did not feel like working. Lewis informed his supervisor about the incident and sent Purnell home.

On another occasion, Purnell refused to carry out Lewis' directive to clean the gym. Lewis often found Purnell sitting in the classroom either talking with a teacher, listening to the radio in the dark, or sleeping instead of doing his assigned work. When Lewis confronted Purnell about not doing his work, Purnell did not argue with him; he would "go ahead and do things." Purnell would complete his task only when Lewis instructed him to do them.

Lewis documented several incidents regarding Purnell's performance. On August 27, 1990, Purnell was written up for insubordination because he failed to follow Lewis' directives to clear the gym for cleaning. (P-1). On January 25, 1991, Lewis informed Purnell that his job performance left "a lot to be desired." and that other supervisors whom Purnell had worked under had previously pointed out deficiencies in his work. Purnell failed to mop the stair landings, remove graffiti from the walls and had been sent home for refusing to work. After working for over one year, Purnell failed "to

make any attempt to improve” (P-3). Based on respondent’s performance, Lewis recommended that disciplinary action be taken against Purnell. *Id.*

Thereafter, Purnell received several verbal warnings and memorandums regarding his poor job performance. On October 8, 1991, Don Lozito, Head Custodian, and Lewis complained to Frank Roth, Assistant Supervisor about Purnell’s poor performance and attitude towards work. Lozito and Lewis requested assistance from Roth. (P-6).

Frank Roth, Assistant Supervisor of Building and Grounds, was formerly the assistant head custodian at Irvington High School. In August 1990, Roth recommended that Purnell’s contract for employment not be renewed “unless Mr. Purnell begins immediately to cooperate with his supervisor and the rest of the staff”. (P-2). Roth met with Purnell on October 25, 1991. They discussed Purnell’s attitude and job performance. Purnell responded that he would improve his job performance. Thereafter, in October 1991, he was transferred to Chancellor Avenue School.

James Washington, Principal of Chancellor Avenue School (Chancellor), testified about Purnell’s work performance. On Purnell’s first day of work, Washington and the head custodian, Joseph Ambrosico, met with respondent to describe his duties. Ambrosico was Purnell’s immediate supervisor on the night shift. Approximately six months after Purnell began working at Chancellor, Ambrosico reported several deficiencies in Purnell’s work performance. Purnell complained to Washington that he was harassed by Ambrosico and believed Ambrosico’s criticism was unfair. Washington met with Purnell and Ambrosico to discuss the matter but did not reach any conclusions on Purnell’s harassment charge. Instead, Roger Monel, the Assistant Board Secretary and the Affirmative Action Officer for the Irvington Public Schools, investigated Purnell’s charges of harassment. Purnell failed to attend any of the meetings scheduled by Monel. Washington decided however, to directly supervise Purnell. He believed that his direct supervision would allow Purnell to improve his job

performance and it would give Washington an opportunity to evaluate Purnell's performance.

Washington observed deficiencies in Purnell's work performance. For example, trash bags were left near the doors and materials which had been swept into a pile were not picked up. On another occasion, Purnell failed to carry out his assignment to clean the stage of the auditorium. Consequently, other custodians on the morning shift had to do Purnell's work. Washington met with Purnell and informed him that his "working station" did not meet the "desired cleanliness" and also sent him a memorandum about his failure to perform his assigned duties. (P-8).

On March 1, 1993, Purnell was transferred to Augustus Street School and assigned to work under the supervision of head custodian Larry Graham. Purnell's duties were to clean the classrooms, bathrooms, corridors and the walls in the school's main building and annex. On April 20, 1993, Graham inspected Purnell's work at the annex. Graham then showed him that the girls' toilet, the teachers' toilet, and the corridor had not been cleaned. Purnell became very "angry" and threw the keys at Graham (P-10). Graham reported Purnell's poor work performance and the incident with the keys to the school principal, Kevin West and Roger Monel. (P-9; P-10). Purnell was charged with insubordination for throwing the keys at Graham. Additionally, Monel informed Purnell that his work would be monitored daily. Monel also warned Purnell that if he did not perform his duties properly, disciplinary action would be taken against him. (P-11). On May 26, 1993, West requested that Purnell be transferred from Augustus School because of continued unsatisfactory performance. (P-13).

Also, on May 26, 1993, Frank Roth, Assistant Supervisor of Buildings and Grounds, and Graham inspected Purnell's work area. The inspection revealed that neither the girls' nor the boys' bathrooms had not been cleaned, seven classrooms had not been swept or dusted, and the corridors had not been swept or mopped. Moreover,

debris from the prior day had been left on the floor. Roth also reminded Purnell about the previous notice advising him that his job performance was unacceptable and that his work would be monitored on a daily basis. See P-11. Roth concluded that Purnell's job performance was unacceptable and gave him thirty days to improve his work. Roth also notified Purnell that his "[f]ailure to comply will result in disciplinary action". (P-14).

On May 27, 1993, Roth again spoke with Purnell about his work performance. Roth's report states that Purnell claimed that his work was "perfect" and that "someone else is putting dirt in place after he cleans". (P-15). Also on May 27, Roth and Graham inspected Purnell's work area. The halls were swept but not mopped, the classrooms were swept but not mopped, and the girls' and boys' bathrooms were not cleaned. (*Id.*).

On October 25, 1993, Purnell was reassigned to Chancellor Avenue School. His job performance did not improve. Purnell was written up because he failed to properly remove snow, (P-20), he failed to adequately clean his assigned areas, (P-21; P-22), and he failed to attend meetings with the building principal to review his "scheduled worksites and the required duties for each area". (P-23).

Purnell was born in 1960 and received a vocational education. Purnell maintained that during his first year with the Board, he got along well with his supervisor, Henry Lewis. He did not recall if he was reprimanded for sleeping on the job or listening to the radio instead of working. Purnell claimed that initially he was not given adequate supplies to do his job, e.g., new brooms and a face mask. Purnell denied throwing the keys at Graham but he conceded that they had a dispute about whether he cleaned his work areas. Purnell admittedly became "very annoyed" about the way Graham spoke to him. He maintained however, that he threw the keys on the ground, not at Graham.

Purnell declared firmly that he performed his job duties well and that he did the best that he could do. Indeed, each year of his employment, except school year 1994-95, the Board evaluated his performance and approved his merit salary increment.

Rebecca Watford Dunmoire is a security guard assigned to Chancellor. Dunmoire and Purnell previously worked together as bus attendants at the Department of Transportation and they were friends. At Chancellor, she monitors and mingles with the pupils during their lunch and recess periods. She has also observed Purnell sweep the floors, clean the halls, and shovel the snow. Evelyn L Simmonds is a third grade teacher at Chancellor. Purnell was assigned to clean her classroom. She described him as very friendly and enjoyed his conversation.

Paul Gaynor is the head custodian at Florence Avenue School. In 1988, Gaynor and Purnell were custodians assigned to Chancellor. Their duties were to clean their assigned areas and secure the building. There were no specific times during the night shift when custodians are required to take their lunch breaks. Gaynor and Purnell worked on separate floors and did not see each other often during their work shift. Thus, he could not testify about Purnell's performance. They argued however, because Purnell did not always want to do his job. For example, Purnell refused to close the windows in the classrooms. Purnell believed that it was the teacher's job to close the windows. Purnell became angry when he was asked to shut them and walked out the building. Gaynor reported the incident to their supervisor.

Charge Six:

The Board alleges that Purnell sexually and physically harassed Theresa Avella, a teacher at Chancellor Avenue School, by making unprofessional, inappropriate, threatening and suggestive remarks to Avella.

Avella is a teacher at Chancellor Avenue School. Purnell was assign to clean her classroom. On several occasions, Avella was completing administrative tasks in her classroom after school when Purnell entered the room. He would spend three to eight minutes doing his work. They would exchange pleasantries about music and religion and then he left. Avella recalled that on the last day of school in June 1993, while her coworkers were in the hallway saying good-by before summer vacation, Purnell approached her and said "Oh, by the way, I have a crush on you". Avella's did not respond to his remark or encourage further discussion on the subject.

The second incident occurred while Purnell was cleaning her room. Purnell spoke to Avella about her music band and remarked that she may meet someone else. She interpreted his comment to suggest that they had something between them. Nevertheless, they continued to have brief conversations whenever she was present while Purnell cleaned her classroom.

In January 1994, Purnell entered Avella's room while she was "killing time" and stated "I'm not going to give up on you until I make you my wife." Avella responded that her feelings towards him was friendship. Avella reported the incidents Washington, the school principal. (P-18). Thereafter, Washington met with Purnell several times about Avella's complaint. Washington informed Purnell about the seriousness of this matter and advised him to refrain from "such actions" and from speaking to Avella. Washington then reported the matter to Rogel Monel, the Assistant Secretary to the Board and the Affirmative Action Officer, and recommended that Purnell met with Monel. (P-19). Although Washington directed Purnell to clean Avella's classroom after she left the building, he continued to approach her in her classroom and initiate conversations. (P-25; P-26; P-27).

Purnell conceded that he often spoke to the teachers when he cleaned their classrooms. His initial conversation with Avella was spontaneous. Later conversations were about religious books. He loaned her one of his books, the New World Order

written by Pat Robertson. Purnell also conceded that he told Avella that he had a crush on her. He explained that Avella was a nice person and that he believed that she did not take his statement seriously but was flattered by his remark. After making the statement Purnell recalled that he "went on about my business and she went on about her business." Purnell maintained that he never pursued Avella for a date. He denied telling Avella that he wanted her to be his wife. After his meetings with Washington about Avella's complaint, Purnell denied having any further conversations with her.

Charge Seven:

The Board alleges that Purnell sexually and physically harassed Christine Miller, a dental clerk, by making inappropriate, threatening and suggestive remarks, and inappropriate physical contact with Miller.

Christine Miller, a dental clerk, performs clerical duties for four dentists employed by the Board. Her home school is Chancellor Avenue. Miller and Purnell exchanged small pleasantries, e.g., "Hell-o", as he cleaned her office. On June 3, 1994 at approximately 3:45pm, Purnell entered the room to empty the waste basket and spoke to her. Miller was talking on the telephone. Purnell tried to get her attention by patting her arm. Miller abruptly pulled away and told him not to touch her. He then walked across the room to empty a basket, returned to her desk "within inches of me and began to stare and smile at me." P-28. Miller ended the telephone conversation and reported the incident to the principal, the superintendent, and the affirmative action officer. Purnell confronted Miller and Washington in the hallway. He accused Miller of prejudice and became irate.

Miller stated that she was upset by Purnell's conduct and felt threatened. Miller also stated that Purnell annoyed her. On three or four prior occasions Purnell had come into her office and tried to get her attention when she was on the telephone and

did not want to be disturbed. On another occasion he also patted her shoulder to get her attention. Miller "was cool" and brushed him off.

Purnell recounted the incident differently. He went into the office to empty the waste basket. Miller was on the telephone and blocking his way. He then "lightly tapped politely" Miller on her shoulder and asked her to move out of his way.

DISCUSSION AND CONCLUSIONS

A tenured employee is protected "in their employment when they are subject to unfair and improper attacks, when they are unable to perform efficiently because of conditions not of their own making or beyond their control." *In re Tenure Hearing of Joseph A Maraeta, Township of Riverside*, 1966 S.L.D. 77, *aff'd* State Board of Education 1966 S.L.D. 106. Moreover, charges against a tenured employee may not be examined in a vacuum, but must be considered in any events leading up to the allegations made against the employee which may help to explain the situation. *In re Tenure Hearing of Romaroli, School District of Willingborough*, 1975 S.L.D. 352.

On the other hand, the Commission has not hesitated to terminate custodians based on their failure to perform specific cleaning functions. *In re Tenure Hearing of David Riddick*, 93 N.J.A.R. 2d (EDU) 345, 350. A tenured custodian may be terminated for inefficiency, incapacity, unbecoming conduct, or other just cause. N.J.S.A. 18A:6-10.

Petitioner has the burden of proof by a preponderance of the credible evidence. *Atkinson v. Parsekian* 37 N.J. 143 (1962). The term "burden of proof" refers to the "burden of persuasion". The burden of persuasion entails more than merely producing evidence to establish a state of equilibrium with respect to whether a certain fact exists. This tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of the truth."

Jackson v D.L. & W.R.R., 111 N.J.L. 487, 490 (E. & A. 1933). Preponderance is the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. *State v. Lewis*, 67 N.J. 47 (1975). The evidence must be such as to lead a reasonable cautious mind to a given conclusion. *Bornstein v. Metropolitan Bottling Co.*, 26 N.J. 263 (1958). Where the standard is reasonable probability, that is, preponderance of the evidence, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." *Loew v Union Beach*, 56 N.J. Super. 93, 104 (App. Div. 1959).

Proof of the charges filed against Purnell depend on large part the credibility of the witnesses. In an administrative proceeding, testimony may be disbelieved, but it may not be disregarded. *Middletown Tp. v Murdoch*, 73 N.J. Super. 511 (App. Div. 1962). Moreover, the trier of fact is not bound to believe the testimony of any witness and may accept or reject, in whole or in part, the testimony. *Application of Howard Sav. Bank*, 143 N.J. Super. 1 (App. Div. 1976).

One factor to consider to determine which party's version of the incident has the "reasonable probability of truth" is that the "interest, motive, biases or prejudice of a witness may affect his credibility and justify [the trier of fact], whose providence it is to pass upon the credibility of an interested witness, in disbelieving his testimony." *State v Salimone*, 19 N.J. Super. 600, 608 (App. Div. 1952). Further, "[a] trier of fact may reject testimony because it is inherently incredible, or because it is overborne by other testimony." *Congleton v Pura-Tex Stone Corp.*, 53 N.J. Super. 282, 287 (App. Div. 1958).

Charges One, Two, Three and Five:

Based on a review of the incidents documented by Purnell's supervisors and the opportunity to observe the demeanor of each witness who testified about Purnell's

performance, I **CONCLUDE** that the Board has demonstrated by a preponderance of the credible evidence that during numerous occasions between 1990 to 1994, Purnell persistently failed to complete his assigned custodial duties and tasks in a satisfactory manner in contravention of the directives from his supervisors. The Board's witnesses, Lewis, Graham, Roth, Ambrosico, and Washington gave credible accounts of Purnell's conduct. Contrary to Purnell's belief that people were out to get him, I am persuaded by the candid statements of those who supervised his daily tasks that Purnell was given notice when his work was deficient or incomplete. Moreover, he was given several warnings and chances to improve his work habits.

I have also considered Purnell's annual performance ratings. The Board did not dispute that he received several merit pay raises and ratings of "above average" and "average" during the period of time that he was written up for insubordination and poor job performance. An annual increment is not a statutory right; it is a reward for good performance. These ratings give a false impression that respondent's performance was acceptable. Moreover, the performance ratings and salary increments undermine the legitimacy of the supervisors' reports which criticize Purnell for his poor work performance and the Board's authority to take disciplinary action against him. Indeed, the Board's allegations that between 1990 to 1994, Purnell persistently failed to complete his assigned custodial duties and tasks in a satisfactory manner in contravention of the directives from his supervisors are inconsistent with its decision to wait until June 15, 1994 to deny Purnell his employment and adjustment salary increments. Notwithstanding the blatant discrepancies between the evaluation report and the incident reports, I am persuaded that the numerous incident reports, not the annual evaluation and merit increments, represent an accurate account of Purnell's work performance. Indeed, the witnesses who reviewed Purnell's daily work assignments and wrote detailed incident reports contiguously with the specific events provided a more trustworthy version of his performance than customary performance evaluations conducted in the regular course of business.

Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as a common experience and observation of mankind can approve as probable under the circumstances.

Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954); *In re Perone*, 5 N.J. 514, 522 (1950).

Charges Six and Seven:

The Board alleges that Purnell sexually and physically harassed Theresa Avella, a teacher at Chancellor Avenue School, and Christine Miller, a dental clerk, by making unprofessional, inappropriate, threatening and suggestive remarks to them. Specifically, the Board argues that "Purnell engaged in a course of sexual harassment directed at fellow employees, Theresa Avella and Christine Miller. He created a hostile work environment, which made these employees extremely uncomfortable and fearful for their own being." Petitioner's Brief at 9.

Hostile work environment sexual harassment occurs when a fellow employee harasses an employee because of her sex to the point that the working environment becomes hostile. *Lehman v Toys R Us*, 132 N.J. 587, 601. (1963). In *Lehman* the Court noted that in most hostile work environment claims, harassing conduct is unwelcome sexual touching and comments. "However, the harassing conduct need not be sexual in nature; rather, its defining characteristic is that the harassment occurs because of the victim's sex." *Id.* at 602. The Court also recognized the confusion concerning what sorts of conduct constitutes hostile work environment sexual harassment. Indeed, sexual harassment is inherently a transaction between two people. The perceptions of the person being harassed are often quite different from those of the person accused of doing the harassing, and it may not be immediately obvious which perspective is the appropriate one for determining whether sexual harassment has occurred. The differences in perceptions may derive in part from generation and sex differences. For instance, an employee may comment on another employee's physical appearance, and the recipient may feel angry and humiliated,

even though the employee who made the comment genuinely intended the remark as a compliment. Thus, the court established a four prong test to determine and examine a claim of hostile work environment sexual harassment. The petitioner must prove that:

“the complained-of conduct (1) would not have occurred *but for* the employee's gender; and it was (2) *severe or pervasive* enough to make a (3) *reasonable woman* believe that (4) the conditions of employment are altered and the *working environment is hostile or abuse.*” *Id.* at 604-604.

Notably, the third prong, reasonable woman, is an objective standard which was chosen for three reasons: first, because it “better focuses the court’s attention on the nature and legality of the conduct rather than on the reaction of the individual plaintiff”; second, because it provides for flexibility as community standards evolve in interpreting harassment; and third, because the purpose of the Law Against Discrimination (LAD) is to eliminate real harassment. *Lehman, supra.*, 132 *N.J.* at 612. Moreover, the Court specifically noted that although the subjective reaction of the plaintiff is relevant to compensatory damages, “a plaintiff’s subjective response is not an element of hostile work environment sexual harassment cause of action.” *Id.* at 613. Here, the Board has not raised a claim under New Jersey’s LAD and therefore, respondent’s conduct will not be considered under that law.

I have been guided however, by the reasons underlying the four prong test in *Lehman* to examine whether respondent’s conduct towards Avella and Miller constituted conduct unbecoming. I have also carefully observed Purnell’s demeanor under oath and his overall deportment during the hearing. When he was seated at counsel’s table with his attorney, Purnell had to be cautioned several times about his inappropriate conduct. He would frequently engage in “child-like” and immature behavior. He also exhibited spontaneous gestures to show that he disagreed with the testimonies being presented by the Board witnesses. For example, he muttered and made conspicuous facial expressions when the witnesses presented their versions of the incidents underlying the tenure charges. The Board correctly noted that when

Purnell testified about the events, he imitated Miller's crying "in a loud and obnoxious voice." Petitioner's Brief at 4.

I am persuaded by Avella's candid testimony that the incidents occurred as she described. The record reflects that Purnell was written up for talking to other teachers, e.g., Mr. Braunstein, instead of working. Avella was a polite and friendly coworker. She was candid about her relationship with Purnell. Avella would spend several minutes in casual conversation with Purnell while he cleaned her classroom. They discussed common interests such as music and religion. Indeed, when Avella expressed some interest in learning about Purnell's religious belief, he loaned her a book. When he first told her that he had a "crush" on her, she did not "return his feelings" but quickly brushed him off. During the following school year, Purnell made other remarks which she perceived as either a romantic or flirtatious overture and inappropriate. When Avella reported the incidents to the building principal, Mr. Washington directed Purnell to refrain from having further encounters with Avella and to not work on the second floor when she was in her classroom #209. Although Washington also informed respondent of the seriousness of the matter, Purnell refused to comply with these straight forward instructions. (P-29).

Miller reported that on numerous occasions when she was using the telephone in her office, Purnell tried to get her attention "by either loudly talking to me, standing over me for a period of time or by physically 'patting' my arm or shoulder." (P-28). She also reported that she made several attempts to inform him that, "I do not wish to be disturbed while I am on the phone nor do I wish to be touched by him no matter what the gesture is." *Id.* Washington reported the incident which occurred on June 3, 1994, as follows:

[A]t approximately 3:45 PM, Ms. Miller (Dental Clerk) was confronted by Mr. Purnell as she worked in the nurses office. During this moment Mr. Purnell touched Ms. Miller. Ms. Miller informed Mr. Purnell she did not care to be touched. Ms. Miller later reported this incident verbally to me. Mr. Purnell re-entered the Medical Office as I was holding a discussion with Ms. Miller. He interrupted and made charges of teachers showing

prejudice. Ms. Miller again stated to Mr. Purnell her desire not to be touched. At that moment, Mr. Purnell lunged toward Ms. Miller. I physically restrained Mr. Purnell as he continually attempted to move past me toward Ms. Miller. Mr. Purnell was visibly agitated and out of control. In order to calm this situation, Mr. Purnell was ordered to leave the building. [P-29].

Based on Purnell's job performance and his actions towards the personnel, Washington recommended that he be dismissed from employment. *Id.*

In the Matter of the Tenure Hearing of Joseph McDougall, 1974 S.L.D. 170 the Commission spoke about the important position held by a school custodian:

A school janitor occupies a position of trust and responsibility necessitating high standards of dependability and morality. His functions far exceed opening and closing the school house and keeping it clean and tidy. The safety and welfare of the children may depend on the proper discharge of his duties. *Id. at 178*

Based on the whole of the evidence, I **CONCLUDE** that notwithstanding repeated warnings and opportunities to correct his deficiencies, respondent did not improve his job performance. I further **CONCLUDE** that respondent continued to approach coworkers after one had complained about his inappropriate remarks and another told him not to "pat" or touch her on her shoulder or arm to get her attention. I **CONCLUDE** that respondent's conduct toward Avella and Miller were unprofessional and inappropriate. I also **CONCLUDE** that while respondent was employed by the Board between 1990 and 1994, he engaged in a pattern of unbecoming conduct, insubordination, and incompetence. Therefore, I **CONCLUDE** respondent's conduct warrants his dismissal as a custodian with the Irvington Public Schools.

It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Sept 14, 1995
DATE

Sept. 15, 1995
DATE

SEP 18 1995
DATE

Mumtaz Bari Brown
MUMTAZ BARI BROWN, ALJ

Receipt Acknowledged:

Deborah N. Antonucci
DEPARTMENT OF EDUCATION

Mailed to Parties:

Jeff S. Mann
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

Henry Lewis
Lawrence Graham
Theresa Avella
Frank Roth
Christine Miller
James D. Washington
Joseph Ambrusico

For Respondent:

Paul Gaynor
Evelyn Simmons
Rebecca Watford Dunmore

Exhibits:

- P-1 Memorandum from Henry Lewis to Frank Roth regarding the insubordination of Nathan Purnell dated August 27, 1990.
- P-2 Memorandum from Frank Roth to Ed Klemm regarding Nathan Purnell's refusal to work dated August 28, 1990.
- P-3 Memorandum from Henry Lewis to Nathan Purnell regarding poor work performance dated January 25, 1991.
- P-4 Memorandum from Henry Lewis to Frank Roth regarding the insubordination of Nathan Purnell dated February 21, 1991.
- P-5 Memorandum of Ed Klemm chronolizing discussions of incidents of insubordination with Nathan Purnell dated October 8, 1991.
- P-6 Memorandum from Don Lozito and Henry Lewis to Frank Roth regarding Purnell's poor job performance, attitude and insubordination dated October 8, 1991.
- P-7 Memorandum from Frank Roth to Nathan Purnell regarding Purnell's poor job

performance dated October 22, 1991.

- P-8 Memorandum from James Washington to Nathan Purnell regarding failure to complete Auditorium cleaning duties dated January 29, 1993.
- P-9 Memorandum from Larry Graham to Nathan Purnell dated April 21, 1993 regarding his poor work on April 20, 1993.
- P-10 Memorandum from Larry Graham to Mr. Monel dated April 22, 1993 regarding insubordination and the April 21, 1993 key throwing incident.
- P-11 Memorandum from Roger Monel to Nathan Purnell dated April 26, 1993 regarding insubordination and the April 21, 1993 key throwing incident.
- P-12 Memorandum from Larry Graham to Nathan Purnell regarding a failure to complete job duties dated May 25, 1993.
- P-13 Memorandum from Kevin West to Roger Monel regarding the unsatisfactory performance of Nathan Purnell dated May 26, 1993.
- P-14 Memorandum from Frank Roth to Nathan Purnell regarding unsatisfactory performance; including a 30-day job improvement plan and job procedures for cleaning bathrooms, halls and classrooms dated May 26, 1993.
- P-15 Report of Frank Roth summarizing his meeting with Nathan Purnell to discuss his improvement plans and the inspection of Purnell's work dated May 27, 1993.
- P-16 Memorandum from Hector Acevedo to Frank Aiello regarding Purnell's failure to return to work after lunch at the Union avenue School dated August 30, 1993.
- P-17 Memorandum from Roger Monel to Nathan Purnell regarding transfer of Nathan Purnell to the Augusta Street School from the Chancellor Avenue School dated October 22, 1993.
- P-18 Memorandum from Theresa Avella to James Washington regarding incidents of sexual harassment by Nathan Purnell dated January 31, 1994.
- P-19 Memorandum from James Washington to Roger Monel regarding Nathan Purnell's harassment of Theresa Avella dated February 3, 1994.
- P-20 Memorandum from Frank Roth to Nathan Purnell regarding his failure to remove snow dated March 4, 1994.
- P-21 Memorandum from James Washington to Nathan Purnell regarding poor job performance dated March 23, 1994.

- P-22 Memorandum from James Washington to Nathan Purnell regarding improperly performed custodial duties dated April 13, 1994.
- P-23 Memorandum from James Washington to Nathan Purnell regarding a failure to attend a meeting and a failure to complete job duties dated April 14, 1994.
- P-24 Memorandum from James Washington to Belinda Smiley regarding recommendation to withhold the increment of Nathan Purnell dated April 21, 1994.
- P-25 Letter from Theresa Avella to James Washington dated May 4, 1994 regarding an incident of harassment by Nathan Purnell of April 29, 1994.
- P-26 Letter from Theresa Avella to James Washington expressing concern regarding harassment by Nathan Purnell dated May 20, 1994.
- P-27 Letter from Theresa Avella to James Washington regarding continued harassment by Nathan Purnell dated May 25, 1994.
- P-28 Letter from Christine A. Miller to Dr. Rodgers M. Lewis dated June 6, 1994 regarding harassment by Nathan Purnell on June 3, 1994.
- P-29 Letter from James D. Washington to Dr. Rodgers M. Lewis regarding Nathan Purnell dated June 6, 1994.
- P-30 Police Report filed by Christine A. Miller dated June 10, 1994 regarding harassment by Nathan Purnell on June 3, 1994.
- P-31 Resolution approving the denial of increment and suspension with pay dated June 15, 1994.
- P-32 Correspondence from John D'Angelo to Nathan Purnell regarding denial of increment and suspension with pay dated June 16, 1994.
- P-33 Memorandum from Frank Roth to Nathan Purnell regarding temporary transfer to Augusta Street School dated February 17, 1993.
- R-1 Semi-annual Evaluation dated October 1990.
- R-2 Handwritten Log by Purnell.


IN THE MATTER OF THE TENURE :
HEARING OF NATHAN PURNELL, :
BOARD OF EDUCATION OF THE TOWN : COMMISSIONER OF EDUCATION
OF IRVINGTON, ESSEX COUNTY. :
: DECISION
_____ :

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties. It is, however, herein noted that on October 3, 1995, respondent attempted to submit, pro se, a letter generally objecting to the conduct of the OAL proceedings in this matter. Such submission was apparently without the knowledge or consent of his attorney. Nor was there any indication that it had been served on opposing counsel. By letter dated October 5, 1995, respondent's submission was returned to him and he was advised by the Acting Director of the Bureau of Controversies and Disputes that, pursuant to N.J.A.C. 1:1-5.1, a party to administrative proceedings may choose one of several options with respect to representation and that, because respondent elected throughout the course of the instant proceedings to be represented by counsel, absent notification to the Bureau of Controversies and Disputes that he is no longer represented by an attorney, respondent is unable to make submissions of any kind on his own behalf to the record of this matter.

Upon a careful and independent review of the record in this matter, which it is noted included transcripts of the three days of hearings at the OAL, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge (ALJ) that the preponderance of the credible evidence establishes that on numerous occasions between 1990 and 1994, respondent failed to complete his assigned custodial duties in a satisfactory manner and, despite repeated warnings to correct his deficiencies, he was unwilling or unable to improve his job performance. The Commissioner, likewise, concurs that respondent's behavior toward two of his female coworkers was unprofessional and inappropriate. As such, the Commissioner is in accord with the ALJ's determination that respondent's established conduct warrants his dismissal from his tenured custodial position.

Accordingly, the Commissioner adopts the recommended decision of the OAL as the final decision in this matter for the reasons clearly articulated therein. Respondent is hereby removed from his position with the Board of Education of the Town of Irvington.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

October 25, 1995
Date of Mailing, October 26, 1995

LAURENCE APGAR, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE :
CUMBERLAND COUNTY VOCATIONAL- :
TECHNICAL CENTER, CUMBERLAND :
COUNTY, :

COMMISSIONER OF EDUCATION

RESPONDENT. :

DECISION ON REMAND

AND :

IN THE MATTER OF THE TENURE :
HEARING OF LAURENCE APGAR, :
CUMBERLAND COUNTY VOCATIONAL- :
TECHNICAL CENTER, CUMBERLAND :
COUNTY. :

_____ :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2870-95

ON REMAND FROM EDU 9846-93

AGENCY REF. NO. 321-8/3

**IN THE MATTER OF THE TENURE HEARING
OF LAURENCE APGAR, CUMBERLAND COUNTY
VOCATIONAL SCHOOL DISTRICT, CUMBERLAND
COUNTY.**

Richard C. McCarthy, Esq., for petitioner, Cumberland County Vocational School District

Keith Waldman, Esq., for respondent, Laurence Apgar, (Selikoff & Cohen, attorneys)

Record Closed: August 28, 1995

Decided: September 8, 1995

BEFORE EDGAR R. HOLMES, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Laurence Apgar appealed from a tenure charge and an increment withholding action by the petitioner, Cumberland County Vocational School District at EDU 9846-93 and EDU 9845-93, consolidated. An initial decision of dismissal as to the tenure charge was rejected by the Commissioner of Education (Commissioner) on March 14, 1995 and the tenure matter was

remanded to the Office of Administrative Law (OAL) because the initial decision did not clearly reflect the basis for dismissal of the tenure charge. The dismissal of the petition challenging the withholding of an increment was accepted by the Commissioner because respondent, Laurence Apgar, did not prosecute his appeal.

The basis for dismissal of the tenure charge is the fact that Apgar is retired from the teaching profession and is receiving the maximum allowance for ordinary disability retirement. He has filed a certification indicating he is retired from teaching and has no intention of resuming a teaching career at the elementary or secondary school level.

Apgar has clearly indicated by way of a brief filed with his certification that dismissal of the tenure charge against him does not preclude, and is not intended to preclude, the Commissioner from referring the matter to the State Board of Examiners pursuant to N.J.A.C. 6:11-3.5 et seq.

Based on Apgar's retirement status, his tenured position and seniority rights at the Cumberland County Vocational School District are effectively terminated.

The petitioning Board of Education has agreed to the dismissal.

I hereby **DISMISS** the tenure appeal filed herein.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Sep 8, 1995
DATE

Edgar R. Holmes
EDGAR R. HOLMES, ALJ

Sept. 15, 1995
DATE

Receipt Acknowledged:

Neborah N. Cortanantes
DEPARTMENT OF EDUCATION

SEP 20 1995
DATE

Mailed to Parties:

Jeff S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

NONE

DOCUMENTS IN EVIDENCE

FOR PETITIONER

NONE

FOR RESPONDENT

R-1 CERTIFICATION OF LAURENCE APGAR

R-2 BRIEF IN SUPPORT THEREOF

OAL DKT. NO. EDU. 2870-95
ON REMAND FROM EDU 9845-93 AND 97846-93 (CONSOLIDATED)

LAURENCE APGAR, :
 :
 PETITIONER, :
 :
 V. :
 :
 BOARD OF EDUCATION OF THE :
 CUMBERLAND COUNTY VOCATIONAL- :
 TECHNICAL CENTER, CUMBERLAND :
 COUNTY, : COMMISSIONER OF EDUCATION
 :
 RESPONDENT. : DECISION ON REMAND
 :
 AND :
 :
 IN THE MATTER OF THE TENURE :
 HEARING OF LAURENCE APGAR, :
 CUMBERLAND COUNTY VOCATIONAL- :
 TECHNICAL CENTER, CUMBERLAND :
 COUNTY. :
 _____ :

The record of this matter and the initial decision on remand of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) Accordingly, the within consolidated matter is hereby dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

October 30, 1995
Date of Mailing, October 31, 1995

RANDALL H. ENTERLINE, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN- : DECISION

SHIP OF HILLSBOROUGH, SOMERSET :

COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioning taxpayer sought reimbursement of public funds, public admonition of the Board and directive that the Board be enjoined from distributing a newsletter which allegedly was paid for with school tax dollars and improperly advocated bond referendum approval.

ALJ found the newsletter to be very much an advocacy piece. Citing Citizens and Schettino, the ALJ ordered any Board publications explaining any bond referendum to be presented to the voters within one year of final agency action be reviewed in advance by the full Board in open session with the assistance of counsel. Findings are to be made that such materials are educational in nature, not for the purpose of swaying opinion.

Commissioner adopted initial decision with clarification. Commissioner determined that the newsletter was improperly advocative and, therefore, constituted an impermissible use of public funds, noting it is not a board's promotion of its proposed program, per se, which offends Citizens, but rather a board's one-sided presentation which does injustice to the program's dissenters. Commissioner ordered review of future Board publications as directed by ALJ.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3472-95

AGENCY DKT. NO. 54-3/95

RANDALL H. ENTERLINE,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF HILLSBOROUGH,**

Respondent.

Randall H. Enterline, petitioner, *pro se*

Stephen R. Fogarty, Esq., on behalf of respondent (Fogarty & Hara, attorneys)

Record Closed: August 8, 1995

Decided: September 11, 1995

BEFORE SOLOMON A. METZGER, ALJ:

This matter arises out of a complaint filed by petitioner with the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-9. The matter was transmitted to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14F-1 through -10. The parties filed cross-motions for summary decision and the last papers were received on August 8, 1995, after which the record closed.

The operative facts are either stipulated or undisputed. Respondent placed a bond issue before the voters on March 28, 1995, seeking approval to construct a new high school and make certain other renovations; the proposal failed. During the process respondent prepared and distributed a newsletter which petitioner, a homeowner and taxpayer in Hillsborough Township, found offensive. The issue presented is whether this expenditure advocated passage of the public question and thus exceeded respondent's authority, or whether it was merely permissible voter education. *Citizens to Protect Pub. Funds v. Board of Educ. of Parsippany-Troy Hills*, 13 N.J. 172 (1953); *Schettino v. Ridgefield Bd. of Educ.*, 93 N.J.A.R. 2d (Vol. 4A) 224 (Education).

The newsletter is eight pages long and must be reviewed in its entirety for a proper appraisal. I note here a few features that bear on the inquiry. Page one begins with the heading "Planning For Our Children's Future" and an article discussing respondent's decision to bring the matter of a new high school to the electorate. The article explains that there has been a "dramatic" increase in the number of students attending the public schools and that this trend is expected to continue. Additionally, space needs generally have increased over the years for computers, library materials and the like. An excerpt boldly printed in the center of the page states, "An approved referendum enables us to continue providing the quality education our children deserve and parents expect, while stabilizing property values for all homeowners." The last paragraph on the page submits that respondent has a "heartfelt responsibility" to deliver quality education and plan "for the future of our children," which is "what the March 28 bond referendum is all about." This article concludes on page eight.

On page two respondent briefly reviews the options it rejected and notes that a complete report of these deliberations is available at its office. On the third page respondent presents graphs showing capacity versus projected enrollment for the next five years. Petitioner points out that the first graph, which depicts this balance for the high school, creates a visual impression which is inconsistent with the data presented. Without studying the numbers a reader might conclude that enrollment will be twice capacity by the 1998-99 school year. The data shows, however, that the high school has capacity for approximately 1,350 students and will need to serve some 1,650 students in the out year. This is not a doubling of the high school population, but an increase of about 18 percent. The middle and elementary school graphs are illustrated accurately.

On pages four and five respondent shows the layout of the proposed high school. Page six reviews the tax implications of approval and an inset lists "Ten Facts About the Hillsborough Schools," where certain achievements are highlighted. For example, it shows that 87 percent of 1994 graduates continued their formal education, that per-pupil cost is the lowest in Somerset County, that the district recently received a reward for administrative efficiency from the Department of Education, that SAT scores are above the norm, and so on.

On the seventh page respondent lists persons who may be contacted for more information and in an inset notes "Ramifications of a Defeated Referendum." These include continued increases in class size, reductions in electives and extracurricular activities, higher costs if the question should have to be revisited, a possible split in the community, a tarnished image and reductions in property values. On page eight the newsletter lists polling places and, in the article continued on that page, urges people to be well informed "when casting [their] ballot[s] for the children of Hillsborough Township." This is the substance of the record.

The newsletter is very much an advocacy piece. If some of the effort is subtle, the nature of the enterprise is unveiled in the graphs on page three. Here the visual presentation of capacity versus projected enrollment at the high school does not merely cross the line between education and advocacy, but actually distorts the facts in the apparent hope that a picture will be worth a thousand words. As the graphs depicting the middle and elementary school data are accurate, the illustration inflating high school enrollment to twice capacity for 1998-99 must have been intentional. Nothing further is necessary to establish petitioner's cause, although the motive is plain in phrases like "An approved referendum enables us to continue providing the quality education our children deserve" and "responsibly planning . . . is what the March 28 bond referendum is all about." Functionally, these are exhortations to vote "yes." The inset on page six, appears intended to assure voters that respondent is doing a good job and can be trusted to wisely spend the tax money discussed on that same page. The inset on page seven, touches hot-button local concerns about property values and community image.

Petitioner argues with some justification that merely admonishing respondent is not an adequate remedy. I am not aware, however, that there is precedent for much more. In *Schettino*,

the Commissioner directed that future publications of the kind found offensive be for one year reviewed by the full Board in consultation with counsel prior to distribution. A remedy along these lines is minimally appropriate here. Thus, it is **ORDERED** that any publications by respondent explaining any bond referendum to be presented to the voters within one year of final agency action be reviewed in advance by the full Board in open session with the assistance of counsel. Findings are to be made that such materials are educational in nature and not for the purpose of swaying opinion. So **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9/14/95
DATE

Solomon A. Metzger
SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

Sept. 13, 95
DATE

Deborah N. Antonicelli
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 18 1995
DATE

Jeff S. Mason
ACTING DIRECTOR AND
OFFICE OF ADMINISTRATIVE LAW

/cae

RANDALL H. ENTERLINE, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE TOWN- : DECISION
 SHIP OF HILLSBOROUGH, SOMERSET :
 COUNTY, :
 :
 RESPONDENT. :

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Both the Board's exceptions and the reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

The Board first argues that the ALJ's conclusion that the newsletter was improperly advocative was based on an unreasonable interpretation of the facts. Here, the Board contends that its arguments before the ALJ addressed the accuracy of its data and the proper use of graphs, its failure to exhort the voters in a manner which offends Citizens, supra, its offer of positive facts in the newsletter merely as "concrete evidence" of the District's history of excellence (Board's Exceptions at p. 4) and its avoidance of language constituting "dire consequences." Yet, the Board asserts,

The A.L.J.***engaged in no discussion of the Board's arguments on these issues in his initial decision. Indeed, except for a brief explanation of his conclusion regarding the graphs, the A.L.J. failed to delineate his reasons for concluding that any of the criticized newsletter items were inappropriate. In light of the Board's

arguments***regarding the appropriateness of the newsletter components criticized by the A.L.J., and the A.L.J.'s failure to discuss the Board's positions or articulate any other bases for his conclusions that these components were improper, it appears that the A.L.J. in fact had no reasoned basis for his ultimate conclusion that the newsletter as a whole was improperly advocative.

(Board's Exceptions at p. 5)

Additionally, the Board argues that the ALJ applied an incorrect legal standard to conclude that the newsletter was an improperly partisan expenditure of public funds. Here, the Board asserts that the Citizens court acknowledged that there could be proper, as well as improper, advocacy of a referendum. (Board's Exceptions at p. 7) In addition, Citizens recognized the Board's responsibility to determine future needs and select an appropriate course of action. "An essential part of this responsibility involves making value judgments as to what future needs are more or less important***and which methods are better or worse for meeting these needs." (Board's Exceptions at p. 8) Thus, the Board reasons, a presentation of "facts" to the electorate will necessarily include these judgments and choices, together with information about how the choices were made. The Board argues, "This too will appear as advocacy of the referendum proposal's substance, but not as improper advocacy of the proposal's adoption." (Id.) In light of this distinction, the Board reviews the Commissioner's holdings in Fenton v. Sullivan, 1991 S.L.D. 677; Schettino, supra; and In the Matter of the Annual School Election Held in Old Bridge Township, 94 N.J.A.R. 2d (EDU) 230, and concludes

[I]t is clearthat improper advocacy involves direct or indirect communication regarding the casting of votes rather than the conveyance of substantive information, about a proposal or its development, which might reflect the partisanship of value judgments which were an unavoidable part of the earlier decision-making process.

The Board's newsletter***presents extensive information on the foreseeable consequences, both good and bad, of an approved

referendum as well as information about that process which developed the referendum proposal. Although this information reflected the value judgments made by the Board regarding District needs and the methods to be used to meet them, the newsletter acknowledged the autonomy of each voter by encouraging people to inform themselves about the proposal***and by encouraging greater voter turnout without suggesting how votes should be cast.

(Board's Exceptions at pp. 10, 11)

Thus, the Board affirms that the newsletter conformed with the standards of appropriate informative content set forth in relevant judicial and administrative law.

In his reply, petitioner recasts his argument as to the distortion by the Board of the data presented in the chart on page three of the newsletter depicting the contrast between high school enrollment and high school capacity. Petitioner further suggests that the record clearly supports his contention that "[t]he Board purposefully, willfully and with intent set out to promote and advocate the passage of the March 28th bond referendum." (Petitioner's Reply at p. 3)

Upon careful and independent review, the Commissioner determines that the newsletter is improperly advocative and, therefore, constitutes an impermissible use of public funds. The Commissioner acknowledges that Citizens accepts that public bodies formulating a program are not wholly restrained from advocating the program's adoption by the voters; "****when the program represents the body's judgment of what is required in the effective discharge of its responsibilities, it is not only the right but perhaps the duty of the body to endeavor to secure the assent of the voters thereto." (Citizens at 181) However, Citizens further instructs that, where there is a question as to the propriety of the use of public funds, inquiry is focused on "the extent to and manner in which the funds may *with justice to the rights of dissenters* be expended for espousal of the voter's approval of the body's judgment." (emphasis

added) (Id.) Where the use of public funds supports “***one side only in a manner which gives the dissenters no opportunity to present their side***,” such expenditure is prohibited. (Id. at 182) Thus, it is not a board’s promotion of its proposed program, per se, which offends Citizens, but rather a board’s one-sided presentation which does injustice to the program’s dissenters. To the extent the initial decision disregards such distinction, the Commissioner herein provides clarification.

As the ALJ noted, the parties filed cross-motions for summary decision (Initial Decision at p. 1); the operative facts in the instant matter are either stipulated or undisputed.¹ (Initial Decision at p. 2) The Commissioner observes that the “general tenor” of the newsletter, Schettino, supra, at 226, does not demonstrate the mere “presentation of facts,” but also offers “arguments to persuade the voters that only one side has merit***.” (Citizens at 181) In this regard, the Commissioner concurs with the ALJ that the language employed in the newsletter constitutes functional exhortations to vote “yes.” (Initial Decision at p. 3) Moreover, while the inset which highlights “Ramifications of a Defeated Referendum” contains some nonjudgmental and dispassionate language, Schettino at 226, its warnings as to the emotional ramifications of said defeat go beyond the mere recitation of “bad consequences,” as alleged by the Board.²

Accordingly, the Commissioner adopts the initial decision of the ALJ, as clarified herein, and orders that any publications by respondent explaining any bond referendum to be presented to the voters within one year of the date of this decision be reviewed in advance by the

¹ The parties stipulated as follows: “A newsletter pertaining to the referendum proposal was drafted by the Board and was distributed to the public in early March, 1995. A copy of the newsletter is attached hereto as Exhibit A.” Stipulation of Facts as filed July 25, 1995.

² “Emotionally, a defeated referendum can split a community, tarnish the image of a school district, and over time, reduce property values.” Board’s newsletter at p. 7.

full Board in an open session with the assistance of counsel, said session to include findings that such materials are educational in nature and not for the purpose of influencing opinion.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

October 30, 1995
Date of Mailing, October 31, 1995

393-95

KATHLEEN QUICK AND ELIAS L.	:	
SCHNEIDER,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWN-	:	DECISION
SHIP OF OLD BRIDGE, MIDDLESEX	:	
COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

SYNOPSIS

Petitioning Board member and her attorney sought indemnification of legal fees after Board instituted suit against her, requesting her exclusion from attendance at certain Board functions.

ALJ found that Petitioner Quick failed to establish that she acted in the discharge and performance of her public duties when she acted in the manner which forced the Board to take action which caused her to expend monies in her defense. ALJ found that she expended those monies in defense of her private interest. Thus, the ALJ concluded that she did not establish that she was entitled to reimbursement pursuant to N.J.S.A. 18A:12-20. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 01339-95S

AGENCY DKT. NO. 466-11/94

**KATHLEEN QUICK AND ELIAS L.
SCHNEIDER,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF OLD BRIDGE,
MIDDLESEX COUNTY,**

Respondent.

Elias L. Schneider, Esq., appearing *pro se* and on behalf of petitioner Kathleen Quick (Brigiani, Cohen and Schneider, attorneys)

Michael P. O'Connell, Esq., for respondent (Karcher, Salmond, Rainone and Barrett, attorneys)

Record Closed: August 16, 1995

Decided: September 12, 1995

BEFORE JEFF S. MASIN, ALJ:

This matter arises from a claim made by Kathleen Quick, a member of the respondent school board, seeking to have the Board of Education pay certain legal expenses which she incurred as a result of a lawsuit filed by the Board against Ms. Quick in which the Board sought to have her excluded from attendance at certain Board functions. She has assigned her claim to her attorney, Elias L. Schneider, Esq., who asserts his claim as part of this action.

This matter was originally filed with the Commissioner of Education by way of a Petition of Appeal (complaint) on November 3, 1994. The Commissioner transmitted the case as a contested matter to the Office of Administrative Law on February 2, 1995, pursuant to *N.J.S.A.* 52:14B-1 to -21 and *N.J.S.A.* 52:14F-1 to -13. Subsequently, a prehearing conference was held on May 16 and a Prehearing Order was issued on May 17, 1995. Counsel then submitted briefs and a stipulation of facts which was received on August 16, 1995. Counsel agreed that the matter could be resolved upon the submitted record, without the necessity of testimony. The record closed on August 16, 1995.

Essentially, the agreed upon facts reflect that Ms. Quick was one of approximately 112 plaintiffs who filed a lawsuit in the Superior Court of New Jersey, Chancery Division, on December 31, 1992, seeking to prevent a merger of the two high schools located in Old Bridge. That matter was eventually dismissed in January 1993 by Honorable John E. Bachman, *J.S.C.* Judge Bachman determined that although the Superior Court had concurrent jurisdiction in certain matters, this particular case should properly be brought before the Commissioner of Education. His determination was not appealed. The Board of Education made no attempt at that time to seek recovery of its legal fees under the Frivolous Lawsuit Statute, *N.J.S.A.* 2A:15-59.1.

In April 1993 Ms. Quick was elected to the Board of Education. In 1994 an issue arose when the Board of Education began to consider the possibility of filing a suit against Ms. Quick and the other approximately 112 plaintiffs in the original action before Judge Bachman, seeking to recover the Board's legal expenses under the Frivolous Lawsuit Statute. Ms. Quick agreed that she would recuse herself from participating in the Board's discussions and deliberations with respect to the question of whether or not to bring suit, but she insisted that rather than remove herself entirely from the Board's presence during its discussions, that she would remain in the meetings and simply not speak. The parties have stipulated that Ms. Quick based her position on advice of counsel and upon a document known as Policy Guideline #2, which was issued by the School Ethics Commission in January 1969, and which is Exhibit F, attached to the Stipulation of Facts. Both sides filed memorandum of law before Judge J. Norris Harding, who was assigned to

hear the Board's suit against Ms. Quick. In support of its legal arguments the Board relied upon *Scotch Plains-Fanwood v. Syvertsen*, 251 N.J. Super. 566 (App. Div. 1991). Judge Harding determined that the *Syvertsen* decision was authoritative and therefore entered an order requiring that Ms. Quick not attend closed session meetings of the Board where possible litigation against her was being considered.

According to the stipulation, the bill for legal services incurred by Ms. Quick for the services of her attorney, Elias L. Schneider, Esq., was \$6,218.25. The amount of that bill is not in dispute. As of the present time the Board has not filed any action under the Frivolous Lawsuit statute.

CONCLUSION

For the reasons stated below, I **CONCLUDE** that the petitioners have failed to establish that they are entitled to reimbursement for the legal expenses incurred by Ms. Quick. Since her claim fails, Mr. Schneider's fails as well, and both must be **DISMISSED**.

DISCUSSION

N.J.S.A. 18A:12-20 provides

Whenever a civil or a criminal action has been or shall be brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education, and in the case of a criminal action such action results in final disposition in favor of such person, the board of education shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom. A board of education may arrange for and maintain appropriate insurance to cover all such damages, losses and expenses.

The purpose of the above statute is to assure that persons desiring to, or serving upon, boards of education, who generally are volunteers serving without pay, are not discouraged from such service by the possibility that they will be subjected to the costs of defending against legal

actions brought against them as a result of actions which they take which arise out of and in the course of the performance of their duties as members of the board of education. *Powers v. Union City Board of Education*, 124 N.J. Super. 590 at 594 (1973).

In several decisions, the courts have analyzed the language of the statute, particularly the "arising out of and in the course of the performance of duties" phrase and have determined that "the officer must have been acting in a manner in which the [municipality] has an interest, he/she must have been acting on the discharge of a duty imposed or authority authorized by law and he/she must have acted in good faith." *Scirrotto v. Warren Hills Board of Education*, 272 N.J. Super. 391, 397 (App. Div. 1994).

In the present case, the first question to be considered is whether Ms. Quick's insistence upon remaining in the Board's presence during its discussions of the possibility of bringing suit against her and her fellow plaintiffs in the prior litigation, the action which the Board of Education saw as necessitating the filing of a lawsuit against her, was an action which arose out of and in the course of the performance of her duties as a member of the Board. At the time that Ms. Quick made it clear to the Board that she would not remove herself entirely from its closed sessions, Ms. Quick was asserting that she had a legal right to remain. She had already agreed that she would do nothing more than sit in at the meeting, based upon the instruction contained in the Guideline #2. Specifically that Guideline provided that

A recusal policy has developed from the Commission's case history which the Commission has authorized for release as a policy guideline. The Commission has authorized this release in order to clarify for school officials what is meant by the term "recusal" when it appears in decisions of the School Ethics Commission.

The Commission is determined that recusal is the abstention from discussion or voting on a matter. When one recuses himself, he is not required to leave the room because he is still an elected official to a public body, however, he may not participate in any manner whatsoever regarding the matter. The individual is not generally required to make his reasons for recusal public, however, on occasion the Commission has required individuals to make their reasons for recusal publicly known under certain circumstances.

Additionally, a school board member deemed to have a conflict requiring recusal would not be permitted to participate as a member of the public to voice an opinion on any aspect of the negotiations, at least not prior to the finality of the negotiations. By virtue of his/her board membership, that individual is no longer considered a member of the public. Thus, the Commission is likely to view any such attempt by a board member with a conflict to participate in negotiations as a violation of the School Ethics Act.

Petitioners contend that Ms. Quick meets the tests for reimbursement. First, she was a member of the Board. Secondly, she was asserting her right to be present during the Board's discussions based upon her understanding of the applicable law, including the Policy Guideline quoted above and case law, which permitted her to remain in the room with the other Board members, even though she was unable to participate in the discussions due to her conflict of interest. Third, because she was acting under advice of counsel and in conformity with the Policy Guideline and case law, she was acting in "good faith," this despite the fact that when the matter was brought before Judge Harding, he concluded that the *Syvertsen* case mandated Ms. Quick's complete removal from the closed sessions despite the previous Policy Guideline and case law. Thus, petitioner Quick argues that she has met the tests for reimbursement.

Respondent denies this. In its view, Ms. Quick was not acting for the benefit of the municipality, in fact, quite the contrary. Her refusal to recuse herself from meetings where she clearly had a conflict of interest delayed the Board from conducting the discussions and required the Board to expend substantial sums of money to litigate the issue before it could successfully force Ms. Quick's removal from the meetings. Thus, her conduct, rather than benefiting the municipality, instead acted to its detriment. Additionally, because Ms. Quick was a potential defendant in a frivolous litigation law suit on which the decision of whether or not to pursue was being discussed at these meetings, she clearly had reasons of her own for being present and was involved with her own personal interests rather than those of the Board, in forcing herself upon the Board. Under the circumstances, it can hardly be said that by refusing to remove herself and therefore forcing a law suit, that she was acting in the discharge and performance of public responsibilities. Finally, in view of the clear conflict, Ms. Quick can hardly argue that she was acting in good faith. In the face of so obvious a conflict of interest, her persistence in seeking to attend the meeting connotes bad, as opposed to good, faith.

In determining that Ms. Quick should be excluded from the Board's discussions concerning the possibility of filing a suit to recover its legal fees incurred in defending against the lawsuit filed by Ms. Quick and others concerning the merger of high schools, Judge Harding relied upon the 1991 decision in *Scotch Plains-Farwood Board of Education v. Syvertsen*, 251 N.J. Super. 567 (App. Div. 1991). There, the court, in an opinion by Judge Skillman, ruled that a Board member who had sought to remain during discussions at executive session regarding his own petition of appeal to the Commissioner of Education alleging improprieties concerning the Board's contract with the district's superintendent, was properly excluded from the sessions. The court concluded that the issue was governed by "general common law principles regarding the participation of public officials in matters in which they have a personal interest." *Scotch Plains-Farwood*, at 569. This common law standard disqualified a public official from participation in a judicial or quasi-judicial matter in which the public official had a conflicting interest that might interfere with the impartial performance of his/her public duties. Thus,

this principle requires a member of a public body to refrain from any form of participation in the deliberations or decisions of the public body relating to litigation brought by the member seeking any form of private relief against the public body."

The court exemplified the point by the example of a member who had filed suit against the Board seeking money damages for an alleged tort. Such a member would be disqualified from attending executive sessions at which the case was discussed. Interestingly, the situation presented in the matter upon which Judge Harding ruled presented a case where the Board was considering the possibility of suing one of its members for a money award, that is, for the legal fees which the Board had incurred in the defense of a suit which she and others had filed against the Board. These discussions as to this potential case of a Board seeking money damages against Ms. Quick was really no different than the example presented by Judge Skillman.

It is difficult to conceive that Ms. Quick's action which necessitated the Board's suit to force her removal from its executive session was conduct which was undertaken "on the discharge of a duty imposed or authority authorized by law." Further, it is difficult to find that she was acting for or on behalf of the Board when she insisted upon remaining in the executive session,

despite what was unquestionably a serious conflict of interest between her public and her private roles. In cases which have considered the circumstances under which a governmental body is obligated to reimburse or otherwise pay for the costs of defense of a lawsuit brought against a public official or employee, the courts have traditionally looked to see whether the official was acting “in furtherance” of the governmental body’s work. In *Errington v. Mansfield Township Board of Education*, 81 N.J. Super. 414 (App. Div. 1963), where a school board member sought payment of the costs of defense of a libel action, the court stated

The general rule seems to be that to warrant defense at the public expense, when a public official is sued individually for libel, it must be shown that he *was performing in good faith a duty of his office or position in furtherance of the work of the board* for which he was purportedly acting. *Id.*, at 420. (Emphasis added).

An earlier decision characterized the inquiry as whether the public official was acting in a manner which required the expenditure of the monies “for a town purpose.” *State, Bradley v. Council of Hammonton*, 38 N.J.L. 430, 431 (Sup. Ct. 1876). Distinguishing between those instances where the purpose upon which the official acted was “public or municipal,” as opposed to “one which is private,” requires a case-by-case analysis. In *Cobb v. City of Cape May et als.*, the court cited the discussion at 64 C.J.S. Municipal Corporations, §183.56, pp. 334-335, which identifies as criteria for testing the purpose as “the existing conditions with respect to the objects sought to be accomplished, the degree and manner in which that object affects the public welfare, and the nature and character of the things to be done” The comment recognizes that at times the result of this testing will be that there were, or at least appear to have been, mixed purposes, some part public and some part private. However, “. . . if the result is chiefly that of a private benefit, an incidental or even ostensible public purpose will not” support the expenditure of the public funds. *Id.*

The Superior Court ruling which barred Ms. Quick from attending the executive sessions at which the Board was to consider the issue of whether to sue her and others simply recognized the all too obvious fact that whatever the language of the Policy Guideline, the realities of the situation presented were such that the possible defendant in the contemplated action for reimbursement had no business at a meeting which was intended to explore and possibly decide

upon a lawsuit against her, and that the serious conflict of interest reasonably necessitated that Ms. Quick not be permitted to attend. Given this ruling, it is clear that Ms. Quick's attendance at the meeting would have been predominantly for a private, as opposed to a public purpose. The Board was required to expend funds to assure that Ms. Quick's private interests were not placed above the public's. She was required to expend funds to defend her private interest in being able to attend and observe the Board's discussions. While in theory she might also have some limited public purpose in monitoring the way in which the Board of which she was a member determined to act, and possibly to spend its money in pursuit of reimbursement, nevertheless her public purpose in attending would have been incidental to her private and conflicting interest, as clearly recognized by Judge Harding. Therefore, in accord with the principles recited above, I **FIND** that Ms. Quick has failed to establish that she acted in the discharge and performance of her public duties when she acted in the manner which forced the Board to take action which caused her to expend monies in her defense. I **FIND** that she expended those monies in defense of her private, as opposed to any public, interest. Thus, I **CONCLUDE** that she has not established that she is entitled to reimbursement pursuant to the standards established in *N.J.S.A.* 18A:12-20. The application for reimbursement is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

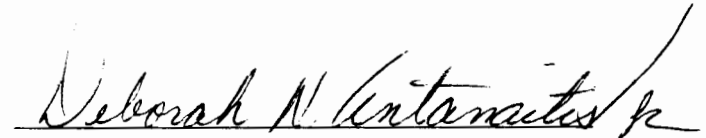
Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 12, 1995
DATE


JEFF S. MASIN, ALJ

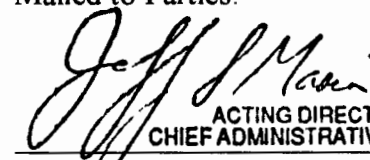
Receipt Acknowledged:

Sept. 13, 1995
DATE


DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 18 1995
DATE


**ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**
OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

JOINT EXHIBITS

J-1 Stipulation of Facts, with attached exhibits:

Exhibit A-Amended Complaint, *Varrial, et als. v. Board of Education of the Township of Old Bridge*, DKT. No. C-364-92

Exhibit B-Order to Show Cause, dated March 23, 1994, with attachments

Exhibit C-Letter dated January 25, 1994

Exhibit D-Letter dated February 25, 1994

Exhibit E-Certification of Defendant, signed by Kathleen Quick on April 5, 1994, with attachments

Exhibit F-Policy Guideline #2, dated January 1969

Exhibit G-Memo of Law In Opposition To Plaintiff's Order to Show Cause, filed by Mr. Schneider in Superior Court action, dated March 29, 1994, with attachments

KATHLEEN QUICK AND ELIAS L. :
SCHNEIDER, :
 :
 PETITIONERS, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE TOWN- : DECISION
 SHIP OF OLD BRIDGE, MIDDLESEX :
 COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioners' exceptions and the reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioners assert, inter alia,¹ that on appeal, the trial judge's decision, as well as the findings of fact, are not entitled to any special deference when a matter is decided on a Stipulation of Facts without oral argument. Petitioners argue that since no witnesses were heard and the same record is before the Commissioner as was before the Administrative Law Judge (ALJ), the Commissioner is not bound by any findings of fact or inferences made by the ALJ.

Petitioners next warrant that the ALJ improperly concluded that Petitioner Quick's actions were done in bad faith. (Petitioner's Exceptions at p. 5) Here, petitioners reiterate that Ms. Quick acted responsibly when she determined to follow both Policy Guideline #2 and her attorney's advice. Petitioners reason that Ms. Quick's decision to

¹ To the extent petitioners' exceptions merely recast arguments made before the ALJ, they are not reviewed herein.

forgo appeal of Judge Harding's decision excluding her from the Board sessions in question was also a responsible act on her part. Petitioners argue that the ALJ's inference that Ms. Quick was improperly motivated is belied by the record.

Petitioners further contend that the ALJ's decision impedes public policy, inasmuch as it puts local board members on notice that, should they attempt strict adherence to the Guidelines and a Guideline "****is either wrong or not clear in specifying exceptions, then the Board member will be deprived of the benefit of the Statute that guarantees reimbursement of his legal fees in defending the suit." (Petitioners' Exceptions at p. 7)

Finally, petitioners affirm that the statute (N.J.S.A. 18A:12-20) does not prohibit reimbursement when litigation is initiated against a board member as the result of the board member's actions; the statute does not qualify the nature of the litigation or offer exclusions. Thus, petitioners conclude that Ms. Quick meets the terms for reimbursement as set forth in the statute.


Relying on its submissions to the ALJ, the Board urges that the initial decision be upheld.

Upon careful and independent review, the Commissioner concurs with the conclusion of the ALJ that Petitioner Quick has not established entitlement to reimbursement in accordance with the standards set forth in N.J.S.A. 18A:12-20; consequently, the claim of Petitioner Schneider fails as well. In this regard, the Commissioner finds petitioners' exceptions to be without merit, noting in particular the lack of foundation for their claim that "the ALJ made a huge leap of logic and came to the conclusion *** that Mrs. Quick's actions were done in 'Bad Faith.'" (Petitioners' Exceptions at p. 5) Moreover, the Commissioner is mindful that Policy Guideline #2 concerns conflicts arising pursuant to the School Ethics Act, which require

recusal, inasmuch as the School Ethics Commission was established to enforce said Act. (See N.J.S.A. 18A:12-21 et seq.) Thus, petitioners' reliance on said Guideline, under these circumstances, is misplaced. Finally, the Commissioner agrees that Ms. Quick has failed to establish that the Board's action in filing suit against her was one "arising out of and in the course of the performance of [her] duties," N.J.S.A. 18A:12-20. As the ALJ appropriately found, Ms. Quick's attendance at the Board meeting "would have been predominately for a private, as opposed to a public purpose" and she "failed to establish that she acted in the discharge and performance of her public duties" when she insisted on remaining in the meetings, thereby forcing the Board to take action against her which caused her to expend monies in her defense. (Initial Decision at p. 8)

Accordingly, the initial decision of the Office of Administrative Law is adopted for the reasons expressed therein, and the within petition is dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

EDU #1339-95S
C # 393-95
SB # 105-95

KATHLEEN QUICK AND ELIAS L. :
 SCHNEIDER, :
 PETITIONERS-APPELLANTS, :
 V. : STATE BOARD OF EDUCATION
 BOARD OF EDUCATION OF THE : DECISION
 TOWNSHIP OF OLD BRIDGE, :
 MIDDLESEX COUNTY, :
 RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, October 30, 1995

For the Petitioners-Appellants, Brigiani, Cohen & Schneider (Elias L. Schneider, Esq., of Counsel)

For the Respondent-Respondent, Karcher, Salmond, Ronan & Rainon (Michael P. O'Connell, Esq., of Counsel)

Kathleen Quick (hereinafter "petitioner"), a member of the Board of Education of the Township of Old Bridge (hereinafter "Board" or "Old Bridge Board") filed a petition of appeal with the Commissioner of Education alleging that the Board was required to reimburse her for legal expenses she had incurred as the result of having to defend against a civil complaint filed against her by the Old Bridge Board in March 1994.¹

¹ Petitioner indicates that Elias L. Schneider, her legal counsel, "was assigned the claim for collection purposes only," petition of appeal, at 3, and joined in the petition "solely to insure that all parties in interest are before this agency, and so that complete relief may be granted." *Id.* We note, however, that the interest protected by N.J.S.A. 18A:12-20 is that of the board member, and not the board member's counsel. Consequently, any relief granted under the statute is limited to the board member.

12/4/96

As stipulated by the parties, the facts giving rise to petitioner's claim are as follows. On December 31, 1992, prior to her election to the Board, petitioner was one of approximately 112 citizens who filed a lawsuit in Superior Court, Chancery Division, seeking to prevent the reconfiguration of the two high schools in the district. Judge John E. Bachman dismissed that suit in January 1993, finding that the case should properly have been brought before the Commissioner of Education. No appeal was filed from that determination.

Petitioner was subsequently elected to the Old Bridge Board in April 1993. Later that year, the Board contemplated taking legal action under the Frivolous Lawsuit Statute, N.J.S.A. 2A:15-59.1, against the 112 plaintiffs in the earlier suit to attempt to recover its legal expenses. Although petitioner agreed to recuse herself from all of the Board's discussions and deliberations with respect to such possible action, she refused the Board's request to leave the room during its closed session meetings in which such possible litigation was discussed. Petitioner's decision to stay during these meetings was based upon advice of counsel and Policy Guideline #2 issued by the School Ethics Commission.²

On March 23, 1994, the Board filed a civil complaint against petitioner in Superior Court, Chancery Division, seeking an order directing petitioner to remove herself from any closed session discussions held by the Board in which these possible litigation claims were discussed. Judge J. Norris Harding thereafter entered an order, in reliance upon Scotch Plains-Fanwood v. Syvertsen, 251 N.J. Super. 566 (App. Div.

² Policy Guideline #2 clarified the term "recusal" when used in decisions of the School Ethics Commission, indicating that a board member recusing himself was not required to leave the room since he was still an elected official to a public body, but could not participate in any manner whatsoever regarding the matter.

1991), enjoining petitioner from attending closed session meetings of the Board in which such possible litigation claims were discussed.³

On November 3, 1994, petitioner filed the instant petition, requesting indemnification under N.J.S.A. 18A:12-20 for her legal expenses incurred in defense of that action.

On September 12, 1995, an Administrative Law Judge ("ALJ") recommended dismissing the petition, concluding that petitioner had not established her entitlement to indemnification. The ALJ found that any public purpose for petitioner's attendance at Board meetings during which the possible legal action was discussed would have been incidental to her private interest since she had been one of the 112 plaintiffs in the reconfiguration challenge. Consequently, he concluded that petitioner had failed to establish that she had been acting in the discharge and performance of her public duties when she insisted on remaining in those meetings.

On October 30, 1995, the Commissioner adopted the ALJ's findings and conclusions, and dismissed the petition. The Commissioner agreed that petitioner had "failed to establish that the Board's action in filing suit against her was one 'arising out of and in the course of the performance of [her] duties,' N.J.S.A. 18A:12-20." Commissioner's Decision, slip op. at 13.

Petitioner filed the instant appeal to the State Board.

After a thorough review of the record, we reverse the decision of the Commissioner. In view of the liberal construction which applies in civil litigation under

³ Although the parties have not provided a copy of Judge Harding's order, we note that the Appellate Division in Syvertsen affirmed the agency's determination that a school board member who had filed legal action against his board alleging that it had engaged in certain wrongful acts in relation to its contract with the district's superintendent could properly be excluded from the board's executive sessions at which litigation strategy for defending against the suit he had brought was discussed.

common law and N.J.S.A. 18A:12-20, Powers v. Union City Bd. of Ed., 124 N.J. Super. 590, 595-97 (Law Div. 1973), aff'd o.b., 127 N.J. Super. 294 (App. Div. 1974), certif. denied, 65 N.J. 575 (1974), we conclude that petitioner has established her entitlement to indemnification under the facts of this particular case. Notwithstanding that Judge Harding ultimately issued an order enjoining petitioner from attending those closed session meetings in which other members of the Board planned to discuss the possibility of initiating litigation against the group of 112 district residents which included petitioner, we find that petitioner's actions arose out of and in the course of the performance of her duties as a member of that Board.

N.J.S.A. 18A:12-20 provides, in pertinent part:

Whenever a civil or a criminal action has been or shall be brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education, and in the case of a criminal action such action results in final disposition in favor of such person, the board of education shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom....

This case is complicated by the fact that it arose from the interplay of several actual and potential legal actions. The first such action had been initiated by the group of 112 citizens, which included petitioner prior to her election to the Board, challenging the Board's determination to reconfigure the district's high schools. The Board thereafter contemplated taking legal action against those 112 citizens in order to recover its legal expenses incurred in defending that challenge. It was the possibility of taking this action that the Board had planned to discuss in the closed session meetings that gave rise to the matter now before us. The Board filed a civil complaint against

petitioner in March 1994 challenging her presence at those meetings. It is the costs of defending herself against this particular action for which petitioner now seeks indemnification.

We emphasize in that regard that, in contrast to the standards governing indemnification in criminal actions, N.J.S.A. 18A:12-20 does not require that a board member seeking reimbursement for the costs incurred in defending against a civil action must prevail in that action in order to be entitled to indemnification. Thus, notwithstanding Judge Harding's determination that petitioner was legally mistaken in her belief that she could remain in those meetings, petitioner would be entitled to reimbursement if her actions in asserting her right to remain during the closed session meetings at issue arose "out of and in the course of the performance of [her] duties" as a member of the Board. In this respect, we stress that "[t]he purpose of [N.J.S.A. 18A:12-20] is to make manifest the implied power of boards of education to provide for the legal defense of a member of the board who is sued individually for some action taken by him in furtherance of his prescribed duties." Errington v. Mansfield Tp. Bd. of Ed., 100 N.J. Super. 130, 137-38 (App. Div. 1968).

There can be no dispute that petitioner's duties as a member of the Old Bridge Board included her attendance at board meetings, including closed session meetings. In asserting her right to remain in closed session meetings in which other members of that Board planned to discuss the possibility of initiating litigation against the group of 112 citizens that had challenged the reconfiguration of the district's high schools, petitioner, as the parties have stipulated, acted upon the advice of counsel and on the basis of Policy Guideline #2, supra, issued by the School Ethics Commission.

The validity of that advice is not at issue here. Nonetheless, we note that in granting the Board's request to enjoin petitioner from attending those closed session meetings, Judge Harding acted on the basis of his understanding of our agency's determination in Syvertsen, supra, which was affirmed by the Appellate Division. However, the underlying facts in Syvertsen were significantly different than the situation which confronted petitioner herein when the Board sought to exclude her from its meetings. First, Syvertsen involved an individual who had been a member of the district board at the time the litigation under discussion had been filed. In addition, it was the board member in that case who had initiated the litigation at issue. Under those circumstances, both the Commissioner and the State Board concluded that the board member could be excluded from those portions of the board's executive sessions in which it discussed the strategy it would follow in defending itself from the suit he had initiated. The Appellate Division affirmed, expressing its belief that "the public body may discuss litigation strategy in executive session, outside the presence of the dissident member who has brought the action...." Syvertsen, supra, at 569.

In the instant case, it was the Board which was contemplating bringing legal action against 112 of its citizens, including petitioner, who, prior to her election to the Board, had participated in the legal challenge to the Board's plan to reconfigure the district's high schools. The discussion from which the Board sought petitioner's removal concerned the possibility of taking legal action against that group under the Frivolous Lawsuit Statute in order to attempt to recover the Board's legal expenses. In stark contrast to Syvertsen, petitioner in this case had no control over whether such litigation would be initiated. Furthermore, we reiterate that petitioner had agreed not to

participate in any of the Board's deliberations concerning the possibility of such a suit, and we note that the Board did not, in fact, bring an action against any of the citizens who had participated in the reconfiguration challenge.

Given the liberal construction that must be given to N.J.S.A. 18A:12-20 in the context of civil litigation, we conclude that the Board's March 1994 legal action against petitioner arose out of and in the course of her duties as a member of the Board, and that she is therefore entitled to be indemnified for the costs of that defense. Moreover, as a matter of policy, we believe it is critical that differing views and opinions be freely expressed and fully represented within the public bodies that are responsible for educational governance. Were we to deny petitioner's claim in this instance, we would be acting in contradiction of this policy. Further, such a determination would have a chilling effect on members of district boards who may hold views that are contrary to the views of the majority, and might also discourage citizens who hold such views from even seeking membership on a district board.

We therefore reverse the decision of the Commissioner and direct the Board to reimburse petitioner for her legal expenses, which were stipulated by the parties to be \$6,218.25, incurred in defense of the civil proceedings brought against her by the Board in March 1994.

S. David Brandt and Robert A. Woodruff opposed.

Attorney exceptions are noted.

December 4, 1996

Date of mailing DEC 06 1996

394-95

394-95

IN THE MATTER OF THE TENURE :
HEARING OF KEVIN HUGUENIN, BOARD :
OF EDUCATION OF THE CITY OF :
ORANGE TOWNSHIP, ESSEX COUNTY. :
_____ :

COMMISSIONER OF EDUCATION
DECISION

November 2, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2041-95

AGENCY DKT. NO. 18-1/95

**IN THE MATTER OF THE TENURE
HEARING OF KEVIN HUGUENIN,
BOARD OF EDUCATION OF THE
CITY OF ORANGE, TOWNSHIP,
ESSEX COUNTY,**

Thomas Ashley, Esq., for petitioner
(Ashley & Charles, attorneys)

Louis P. Bucceri, Esq., for respondent
(Bucceri & Pincus, attorneys)

Record Closed: September 14, 1995

Decided: September 15, 1995

BEFORE IRENE JONES, ALJ:

This matter was transmitted to the Office of Administrative Law on February 24, 1995 for determination as a contested case, pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The parties have agreed to a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement is in the public interest and fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9/15/95
DATE

Irene Jones
IRENE JONES, ALJ

Sept. 20, 1995
DATE

Receipt Acknowledged:

Deborah N. Antomates/se
DEPARTMENT OF EDUCATION

SEP 21 1995
DATE

Mailed to Parties:
Jeff S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sej

BUCCHERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(201) 773-5665
Counsel for Respondent

IN THE MATTER OF THE : BEFORE THE COMMISSIONER OF
EDUCATION/OFFICE OF
TENURE HEARING OF : ADMINISTRATIVE LAW
KEVIN HUGUENIN, BOARD OF : AGENCY REF. NO. 18-1/95
O.A.L. DOCKET NO. EDU 2041-95
EDUCATION OF THE CITY OF :
ORANGE TOWNSHIP, :
ESSEX COUNTY. : **SETTLEMENT AGREEMENT**

The parties to this proceeding, desiring an amicable resolution of this litigation, stipulate and agree as follows:

1. Effective June 30, 1995, the petitioner, Orange Board of Education (hereinafter the "Board"), abolished all custodial positions in its district as a result of subcontracting.

2. Since Kevin Huguenin was employed by the Board as a custodian up until his suspension on tenure charges on January 17, 1995, the pending tenure charges are now moot. There is no position to return Mr. Huguenin to or from which he could be removed by the Commissioner of Education.

3. There is an outstanding issue and motion as to Mr. Huguenin's salary entitlement which the parties also wish to resolve.

4. Mr. Huguenin agrees to sign a general release of the Board, its agents and employees (attached), excluding only his right to Unemployment benefits, and to waive and abandon any and all rights to salary, tenure, seniority or recall in the Orange School District, in return for the Board's compliance with this Agreement.

5. The Board agrees:

(a) To pay Mr. Huguenin two (2) month's salary within 30 days of the approval of this settlement by the Commissioner of Education. Said payment will be considered back salary for the months of July and August, 1995. It will be subject to normal payroll deductions.

(b) To not oppose Mr. Huguenin's application for Unemployment benefits.

(c) To treat Mr. Huguenin's termination as part of the general lay-off of June 30, 1995, except that he shall have no rights to be recalled if custodial positions are recreated.

(d) Agree, hereby, to the withdrawal and dismissal of the pending tenure charges as moot due to the abolition of all custodial positions.

6. The parties acknowledge that the pending charges, which include allegations of a lack of qualifications, absenteeism, tardiness, incapacity,

insubordination and a failure to complete assigned tasks, are fully resolved by this Agreement and that this settlement is in the public interest.

7. Both parties have had an opportunity to consult with counsel as to this Agreement and sign it of their own free will and understanding of its terms.

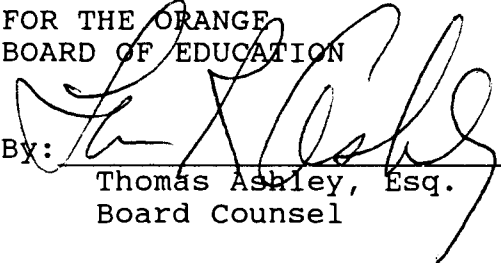
8. Both parties acknowledge that this settlement must be approved by the Administrative Law Judge and the Commissioner of Education. If it is not approved, the parties will be returned to the status quo existing at the time when the Agreement was signed.


Kevin Huguenin


Louis P. Bucceri, Witness

Dated: 9/14/95

FOR THE ORANGE
BOARD OF EDUCATION

By: 
Thomas Ashley, Esq.
Board Counsel

Dated:

RELEASE

This Release, dated September 14, 1995, is given

BY the Releasor(s)

KEVIN HUGUENIN, residing at 414 Amherst Street,
East Orange, New Jersey 07018

referred to as "I".

TO

THE BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP
with offices at 369 Main Street, Orange, New Jersey 07050,
its officers, members, agents and employees,

referred to as "You".

If more than one person signs this Release, "I" shall mean each person who signs this Release.

1. Release. I release and give up any and all claims and rights which I may have against you. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. I specifically release the following claims:

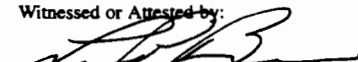
Any and all claims of discrimination, breach of contract, tortious conduct, as well as any and all claims to tenure, seniority, re-employment, recall, based upon the preferred eligible list, or recall as to any position of employment with the Orange Board of Education. I also waive any claim to back salary or benefits, except that I do not waive my rights to two month's back salary under the Settlement Agreement signed with this Release and I do not waive my rights to Unemployment benefits.


2. Payment. I have been paid a total of \$ 1.00 and other good/ and valuable consideration, in full payment for making this Release. I agree that I will not seek anything further including any other payment from you.

3. Who is Bound. I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. Signatures. I understand and agree to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal is affixed.

Witnessed or Attested by:


Louis P. Bucceri

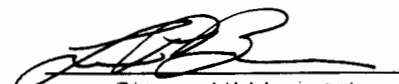

Kevin Huguenin (Seal)

----- (Seal)

STATE OF NEW JERSEY, COUNTY OF *ESSER* SS.:
I CERTIFY that on September 14¹⁹ 95

KEVIN HUGUENIN
personally came before me and stated to my satisfaction that this person (or if more than one, each person):

- (a) was the maker of the attached instrument; and
- (b) executed this instrument as his or her own act.


(Print name and title below signature)
Louis P. Bucceri
An Attorney at Law of the
State of New Jersey

OAL DKT. NO. EDU 2041-95

IN THE MATTER OF THE TENURE :
HEARING OF KEVIN HUGUENIN, BOARD :
OF EDUCATION OF THE CITY OF : COMMISSIONER OF EDUCATION
ORANGE TOWNSHIP, ESSEX COUNTY. :
_____ :
: DECISION

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

November 2, 1995
Date of mailing, November 3, 1995

CAVIT ELECTRIC CO., INC., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN- : DECISION
SHIP OF LEBANON, HUNTERDON :
COUNTY AND O'NEILL ELECTRIC, :
RESPONDENTS. :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 8552-95

AGENCY DKT. NO. 337-8/95

CAVIT ELECTRIC CO., INC.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF LEBANON, HUNTERDON
COUNTY AND O'NEILL ELECTRIC,**

Respondents.

No appearance by or on behalf of petitioner

Richard E. Wenger, Esq., on behalf of respondent, O'Neill Electric (Hedinger & Lawless, attorneys)

Wesley L. Lance, Esq., on behalf of respondent, Township of Lebanon

Record Closed: September 27, 1995

Decided: September 27, 1995

BEFORE SOLOMON A. METZGER, ALJ:

This matter arises out of a petition filed with the Commissioner of Education seeking emergent relief by way of injunction. The matter was transmitted to the Office of Administrative

Law on September 19, 1995 and a hearing was set down for September 27, 1995. Notice was provided to petitioner by facsimile and federal express mail at the address provided. On the scheduled hearing date petitioner did not appear. Based on the foregoing, it is my conclusion that petitioner no longer wishes to proceed and it is **ORDERED** that this Petition be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DATE

9/27/95


SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

DATE

9/29/95

DNA
DEPARTMENT OF EDUCATION

DATE

OCT 04 1995

Mailed to Parties:


ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cae

CAVIT ELECTRIC CO., INC., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN- : DECISION
SHIP OF LEBANON, HUNTERDON :
COUNTY AND O'NEILL ELECTRIC, :
RESPONDENTS. :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record, the Commissioner concurs with the Administrative Law Judge that dismissal of this matter was appropriate based on petitioner's failure to comply with court rules. The Commissioner finds that after receiving proper notice, petitioner's failure to appear for a hearing in the within matter sufficiently warranted dismissal of the instant case.

Accordingly, the Commissioner affirms the initial decision of the Office of Administrative Law dismissing the within Petition of Appeal with prejudice.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

PARKER CLAPP, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION

TOWNSHIP OF SOUTH BRUNSWICK, :

MIDDLESEX COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner, tenured teaching staff member, contended the Board failed to recognize his seniority rights, improperly reducing him to a half-time position.

In light of testimony and documents presented, the ALJ found that petitioner's seniority was properly calculated. ALJ concluded that for the six-week period in contention, petitioner was properly reduced from a full-time to a half-time position. Petition was dismissed.

Commissioner remanded matter for further proceedings to clarify the nature and purpose of the course in automotive technology to which petitioner lays claim, so as to determine the requisite certificate in light of Sefcik and, to the extent such determination may alter the seniority calculations necessary to determine petitioner's tenure right as asserted, to revise such computations.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9623-94

AGENCY DKT. NO. 355-8/94

PARKER CLAPP,

Petitioner,

v.

**BOARD OF EDUCATION
OF THE TOWNSHIP OF
SOUTH BRUNSWICK,**

Respondent.

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

Robert J. Merryman, Esq., for respondent (Carroll and Weiss, attorneys)

Record Closed: September 15, 1995

Decided: September 20, 1995

BEFORE BRUCE R. CAMPBELL, ALJ:

Parker Clapp, petitioner, claimed certain seniority rights and alleged they were violated by the respondent South Brunswick Township Board of Education.

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 through -15 and

N.J.S.A. 52:14F-1 through -13. A prehearing conference was held on December 13, 1994 and, among other things, it was settled that the issues to be resolved are whether the petitioner has the seniority rights he asserts, whether those rights were violated by the Board and to what relief, if any, he is entitled.

Clapp contends that the South Brunswick Board of Education refused to recognize his seniority rights and has arbitrarily, capriciously and unreasonably reduced him to a half-time position. He also asserts that persons with lesser seniority or lacking the proper endorsement are teaching courses he is entitled to teach.

On March 9, 1995, the Board moved for summary decision. The petitioner filed opposing papers and the Board responded. In an order dated April 17, 1995, I determined that the related matters of tenure, seniority, employment history and certificates and endorsements were not sufficiently clear to allow a determination of the bases of affidavits. I ordered testimony and relevant documents to be produced.

On the second branch of the motion, that the Teacher of Industrial Arts endorsement is sufficient to enable the holder to teach the range of auto-related courses, I found for the Board.

Hearing was held on September 15, 1995, at the North Brunswick Municipal Complex on the limited issue of service and seniority. The petitioner produced no witnesses; the Board produced one witness.

The Board's Director of Personnel testified that it is among his duties to maintain employment records. The witness knows the petitioner. Clapp teaches automobile mechanics at the high school. Two other persons, Franklin and Wisnefski also taught industrial arts at the high school at the relevant time.

Because of lowering enrollments, the Board eliminated courses in woodworking, metals, and mechanical drawing. Franklin held the appropriate certificates and endorsements and was the most senior of the three persons.

The witness calculated the service and seniority of the three teachers. He determined Franklin was most senior, Wisnefski was next and Clapp was least senior. He presented this information to the Board. The Board then voted to abolish the full-time Skilled Trades Automobile Mechanics course. It created a one half-time automobile mechanics course and assigned it to Clapp. The remaining courses in the department were taught by Franklin and Wisnefski.

On October 16, 1994, Franklin began a leave of absence and, ultimately, retired. Clapp was returned to a full-time position effective that date. Thus, the period in contention is approximately six weeks.

The witness also testified about compiling the three teachers' work histories. Wisnefski served continuously, but not always in a full-time position, from September 1976. It was necessary to convert his service to full-time equivalent (FTE) service. Wisnefski also had military service for which he received credit (J-3). [See, N.J.S.A. 18A:29-11.]

Clapp's employment history was similarly calculated (J-2). The witness then created a comparison of Wisnefski's and Clapp's employment histories (R-1).

From the testimony and the documents presented, I **FIND** that the seniority of Franklin, Wisnefski, and Clapp was properly calculated in this matter. There was no dispute that Franklin was the most senior of the three. Franklin has left the employ of the South Brunswick Board and Clapp has been returned to a full-time position. However, Wisnefski is senior to Clapp, albeit by .1 years. I **CONCLUDE**, therefore, that for the six-week period in contention here, Parker Clapp was properly reduced from a full-time to a half-time position. The action complained of in no way harmed any of Clapp's tenure and seniority rights.

The certification question having been determined in my order of April 17, 1995, there is no longer any justiciable issue before me. Accordingly, the petition of appeal is **DISMISSED**. It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

20 SEPTEMBER 1995
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, AJJ

Receipt Acknowledged:

9/21/95
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 25 1995
DATE

Jeff S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cad

WITNESSES

For Respondent:

Michael Lacey

EXHIBITS

Respondent's Exhibits:

R-1 Comparison of employment histories, Theodore Wisnefski and Parker Clapp

Joint Exhibits:

J-1 Department of Defense Form 214, Theodore Wisnefski, September 15, 1964

J-2 Personnel Record, Parker Clapp, April 1977 - present

J-3 Personnel Record, Theodore Wisnefski, September 1976 - present

PARKER CLAPP, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 TOWNSHIP OF SOUTH BRUNSWICK, :
 MIDDLESEX COUNTY, :
 :
 RESPONDENT. :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioner's exceptions reiterate arguments presented in his brief before the ALJ. Inasmuch as these arguments were fully and fairly considered by the ALJ, they are not recounted herein.

Respondent, noting that petitioner's exceptions are "simply a resubmission" of his brief presented before the ALJ (Respondent's Reply at p. 1), highlights petitioner's failure to dispute the ALJ's findings regarding the calculation of seniority in this matter. Thus, respondent reasons, "****the only issue on which petitioner files exceptions is the issue of the required certification or endorsement for the position of automotive technology." (Id.) Here, respondent argues that the ALJ properly determined in his earlier decision granting summary judgment that the Teacher of Industrial Arts endorsement is sufficient to enable the holder to teach a range of

auto-related courses. Moreover, respondent asserts that “***petitioner relied solely on his own opinion” in taking a position to the contrary. (Id. at p. 2)

Finally, respondent cites Thomas v. Board of Education of Morris Township, 89 N.J. Super. 327, 332 (App. Div. 1965); Kopera v. West Orange Board of Education, 69 N.J. Super. 288, 294 (App. Div. 1960); and Quinlan v. Board of Education of North Bergen Township, 73 N.J. Super. 40, 46-47 (App. Div. 1962) for the principle that a board’s action is entitled to a presumption of correctness, and will not be disturbed absent a showing that such decision was arbitrary, capricious or unreasonable. (Respondent’s Reply at p. 2) Respondent concludes that petitioner failed to meet his burden, and, therefore, urges that the Commissioner affirm the decision of the ALJ.

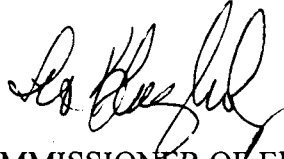
Upon careful and independent review, the Commissioner finds that resolution of the issue of the required certification for the position of teacher of automotive technology, together with the attendant seniority calculations necessary to decide petitioner’s tenure claim, rests on a determination of the nature and purpose of the disputed course, in light of the Commissioner’s holding in George Sefcik v. Board of Education of the Red Bank Regional High School District, Monmouth County, decided July 17, 1995. As such cannot be ascertained from the record herein, the Commissioner determines that additional fact-finding and analysis is necessary.

In this regard, the within matter is remanded for further proceedings which should, through either testimony or stipulated facts, clarify the nature and purpose of the course in automotive technology to which petitioner lays claim, so as to determine the requisite certificate in light of Sefcik, supra, and, to the extent such determination may alter the seniority

calculations necessary to determine petitioner's tenure right as asserted, to revise such computations.

Accordingly, for the reasons expressed herein, the instant matter is hereby remanded to the Office of Administrative Law for further testimony, argument and recommendation, consistent with the parameters set forth above.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

NOVEMBER 6, 1995
DATE OF MAILING NOVEMBER 6, 1995

(398-95)

175-96R

PARKER CLAPP, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION ON REMAND

TOWNSHIP OF SOUTH BRUNSWICK, :

MIDDLESEX COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner, tenured teaching staff member, contended the Board failed to recognize his seniority rights, improperly reducing him to a half-time position.

ALJ initially dismissed petition, finding that petitioner's seniority was properly calculated and that for the six-week period in contention, petitioner was properly reduced from a full-time to a half-time position.

Commissioner remanded matter for further proceedings to clarify the nature and purpose of the course in automotive technology to which petitioner lays claim, so as to determine the requisite certificate in light of *Sefcik* and any resulting revised seniority calculations.

On remand, ALJ found that Automotive Service I, the course to which petitioner lays claim, is a general course and may properly be taught by the holder of a number of endorsements. Thus, ALJ concluded petitioner was properly reduced for period in question. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10609-95

AGENCY DKT. NO. 355-8/94

(ON REMAND 9623-94)

PARKER CLAPP,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF SOUTH BRUNSWICK,**

Respondent.

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

Robert J. Merryman, Esq., for respondent (Carroll & Weiss, attorneys)

Record Closed: February 20, 1996

Decided: March 18, 1996

BEFORE BRUCE R. CAMPBELL, ALJ:

Parker Clapp, petitioner, a tenured teaching staff member employed by the South Brunswick Township Board of Education, alleged that the Board failed to recognize his seniority rights and improperly reduced him to a half-time position.

This matter was opened before Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case pursuant *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13. An initial decision issued on September 20, 1995. The decision determined that the seniority of three persons involved, Franklin, Wisnefski and Clapp, was properly calculated. Franklin was found to be the most senior of the three. He has left the employ of the Board and Clapp has been returned to a full-time position. Wisnefski was found senior to Clapp, albeit by .1 years. The decision concluded that for the six-week period in contention, Clapp was properly reduced from a full-time to a half-time position.

The matter is remanded to clarify the nature and purpose of the course in automotive technology to which the petitioner lays claim. This will enable a determination of the requisite certificate in light of *Sefcik v. Red Bank Regional High School Dis. Bd. of Ed.*, 95 *N.J.A.R.* 2d. (EDU) 467.

By letter dated February 1, 1996, I directed submission of a stipulation of facts. Counsel were informed that I would adopt it for purposes of deciding the remaining issue in the case. The submission was timely received and provides as follows:

1. There are currently four courses in the South Brunswick School District in the area of Automotive Technology.
2. These four courses are Automotive Technology I, Automotive Technology II, Advanced Automotive Technology, and Automotive Technology Semester I. Automotive Technology Semester I is a new one-half year course started in the 1995-96 school year.
3. During the 1994-95 school year there were three courses in the Automotive area. Automotive Service I which was renamed as Automotive Technology I, Automotive Service II which was renamed as Automotive Technology II, and Advanced Automotive Service which was renamed as Advanced Automotive Technology.
4. Automotive Service I is a single period course. Automotive Service II is a single period course. Advanced Automotive Service is a double period course.

5. Automotive Service I is an introductory course designed to give a student some basic knowledge and skills in the safety, operation and maintenance of automotive related equipment. The course is also a prerequisite for more advanced courses in Automotive Service II and/or Advanced Service.

6. Automotive Service I is not listed by the South Brunswick School District with the New Jersey Department of Education as a vocational course.

7. Automotive Service I is an instructional course. It is not designed to train or prepare a student for paid or unpaid employment in a particular occupation or field.

8. At the time petitioner's position was reduced to half time in June, 1994, as part of a reduction in force, the only course previously taught by him which was assigned to another instructor was Automotive Service I. This course was assigned to Joseph Franklin.

9. Joseph Franklin is certified as Teacher of Industrial Arts, who at the time of the reduction in force had been teaching the Industrial Arts area for approximately thirty-one (31) years.

10. Attached hereto as Exhibit J-1 is a course description for a number of courses including the Automotive Service I course for the 1994-95 school year. The course description was in effect at the time of the reduction in force which is the subject of this proceeding.

Exhibit J-1, referred to above, states that Automotive Service I is available to grades 10, 11 and 12. The course is described as follows:

This is an introductory course that allows the students to secure basic knowledge and skill in safety, operation and maintenance of automotive-related equipment. Through classroom instruction and hands-on experiences in the laboratory students will learn the

operation and maintenance of the automobile engine, transmission, brakes and electrical system.

There are no prerequisite listed for the course.

The remand is to determine the nature and purpose of the course in automotive technology to which the petitioner lays claim and to determine the requisite certificate in light of *Sefcik*, above. Should that determination alter the seniority calculation already made, that calculation shall be revised.

Automotive Service I is an introductory course apparently open to all high school students. It is not designated vocational and there are no listed prerequisites. From the brief description, it is an imminently practical course in basic automobile safety, operation and maintenance. It appears designed for all students who do or will drive automobiles. There is nothing in the course description to suggest that a high degree of automotive expertise is required of the teacher. Therefore, the advise of the county office of the New Jersey Department of Education to the Board that an auto mechanics teacher must hold a Teacher of Industrial Arts, Secondary School Teacher of Power Mechanics, Secondary School Teacher of Auto Mechanics, Auto Mechanics or Automotive Technology endorsement in order to teach the Auto Mechanics classes not only comports with common experience and common sense, it also illustrates abundantly that any of those endorsements would be appropriate for the person teaching the relatively elementary Automotive Service I.

The order of remand seeks clarification of the nature and purpose of the course to which the petitioner lays claim. The nature and purpose of the course have been established. The requisite certificate, in consideration of the relatively elementary nature of the course, would be any of the endorsements, the county office of the State Department of Education advised the district its automotive course teachers should hold. Where the Board has relied on advice from the New Jersey Department of Education, it should not bear the burden of proving that the information is correct. In any event, each of the above mentioned endorsements would subsume certification to teach Automotive Service I.

In summary, I **FIND**:

1. Automobile Service I is an introductory, general course open to all high school students;
2. The course is less technical than all other automotive courses identified;
3. As the district was advised by the county office of the Department of Education, a holder of any of the following endorsements may teach the course:
 - Teacher of Industrial Arts
 - Secondary School Teacher of Power Mechanics
 - Secondary School Teacher of Auto Mechanics
 - Auto Mechanics
 - Automotive Technology;
4. At the time of the RIF, the three members of the department held appropriate certificates and endorsements;
5. Any of the certificates and endorsements held by the department members would subsume the requirements to teach Automotive Service I;
6. The matter was decided purely on seniority;
7. Seniority was correctly determined.

Unlike, *Sefcik*, above, this case does not involve certification requirements in specific trades. Trades certificates are narrowly tailored to subject matter and do not entitle the holder to teach outside that area. By contrast, Automotive Service I is a general course and may properly be taught by the holder of any of the above recited endorsements.

I **CONCLUDE** that for the six-week period in contention here, Parker Clapp was properly reduced from a full-time to a half-time position. The action complained of impaired none of Clapp's tenure and seniority rights. Accordingly, the petition of appeal is **DISMISSED**. It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

18 MARCH 1996
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

3/21/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 26 1996
DATE

Barbara A. Hamed
OFFICE OF ADMINISTRATIVE LAW

/cat

WITNESSES

None

EXHIBITS

Joint Exhibits:

- J-1 Department of Defense Form 214, Theodore Wisnefski, September 15, 1964
- J-2 Personnel Record, Parker Clapp, April 1977 - present
- J-3 Personnel Record, Theodore Wisnefski, September 1976 - present
- J-4 Excerpt, course descriptions

For Petitioner:

None

For Respondent:

- R-1 Comparison of employment histories, Theodore Wisnefski and Parker Clapp

PARKER CLAPP, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION ON REMAND
 TOWNSHIP OF SOUTH BRUNSWICK,
 MIDDLESEX COUNTY, :
 :
 RESPONDENT. :

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Petitioner asserts that the conclusions of the Administrative Law Judge (ALJ) "are assumptions made *** without the benefit of a plenary hearing," and as such, the ALJ "had no information except excerpts of course descriptions, upon which to base his decision.***" (Petitioner's Exceptions at pp. 1, 2) Petitioner further contends that the ALJ "ignored [his] Certification with Exhibits" which were previously submitted and which petitioner incorporates herein by reference. Therefore, petitioner maintains that the Automotive Service I course (now named Automotive Technology I) is more sophisticated than determined by the ALJ, and that the Commissioner should again remand this matter with instructions that a plenary hearing be conducted. (*Id.* at p. 2)

In response, the Board avers,

After remand, and at the direction of Judge Campbell, respondent prepared and submitted a stipulation of facts setting out a description of the specific course taught by petitioner which had been assigned to a more senior teacher at the time of the reduction in force. Petitioner did not object to the stipulation of facts submitted to Judge Campbell and this stipulation, along with the course description, J-4, was relied upon by Judge Campbell in making his decision.

Therefore, it is undisputed what course was assigned to another teacher at the time of the reduction in force; it is undisputed that the teacher who was assigned to teach the Automotive Service I course was certified as Teacher of Industrial Arts and had thirty-one years of seniority; it is undisputed that prior to effectuating the reduction in force the Director of Personnel checked with the office of the County Superintendent for Middlesex County to determine the certification required for the course; and it is undisputed that the County Office advised that certification as Teacher of Industrial Arts would qualify an individual to teach Automotive Service I. (Board's Reply Exceptions at pp. 1, 2)


The Board contends that petitioner fails to present a factual or legal basis for disturbing the ALJ's initial decision. (*Id.* at p. 2) That petitioner asserts "the course is 'more sophisticated' than the Administrative Law Judge found *** is not the determinative factor," the Board affirms. (*Id.*) Rather, the Board contends, the issue herein is whether the Automotive Service I course is a "vocational" course or an "instructional" course. (*Id.*) The Board maintains that the course is an introductory instructional course and, as such, the ALJ's finding as to requisite certification, giving due deference to the advice of the County Superintendent, "****is fully supported by the facts and the evidence presented." (*Id.*)

Upon careful and independent review of the record in this matter, the Commissioner finds petitioner's exception arguments to be without merit. Where petitioner stipulated that the Automotive Service I course "is an introductory course designed to give a

student some basic knowledge and skills in the safety, operation and maintenance of automotive related equipment,” and where petitioner further agreed that the course is instructional, rather than designed to prepare students for employment in a particular occupation (Initial Decision at p. 3), his assertion that the ALJ failed to procure evidence necessary to ascertain “the skill [level] or degree of difficulty of the course” must fail. (Petitioner’s Exceptions at p. 2)

Accordingly, the initial decision of the OAL is adopted for the reasons expressed therein and the within petition is dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MAY 6, 1996

DATE OF MAILING MAY 6, 1996

IN THE MATTER OF THE TENURE :
 HEARING OF JOAN DEMPSTER, BOARD :
 OF EDUCATION OF THE CITY OF : COMMISSIONER OF EDUCATION
 TRENTON, MERCER COUNTY. :
 _____ :
 :

DECISION

SYNOPSIS

Board certified tenure charges of unbecoming conduct, misbehavior and official misconduct against respondent, Information Systems Control Specialist. Following certification of charges, Board contended respondent did not acquire tenure as a clerk and matter could be dismissed.

Citing Barnes, the ALJ concluded respondent's responsibilities were not primarily clerical in nature. Thus, ALJ concluded respondent was not a tenured employee at the time the tenure charges were filed against her. ALJ ordered matter dismissed.

Commissioner adopted initial decision as his own.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING

MOTION FOR SUMMARY DECISION

OAL DKT. NO. EDU 8078-94

AGENCY DKT. NO. 319-8/94

**IN THE MATTER OF THE TENURE
HEARING OF JOAN DEMPSTER,
BOARD OF EDUCATION OF THE
CITY OF TRENTON, MERCER
COUNTY**

Thomas W. Sumners, Jr., Esq., for the petitioner, Board of Education of the City of Trenton (Sumners, Council, George and Dortch, attorneys)

Richard A. Friedman, Esq., for the respondent, Joan Dempster (Zazzali, Zazzali, Fagella and Nowak, attorneys)

Record Closed: July 12, 1995

Decided: August 25, 1995

BEFORE BEATRICE S. TYLUTKI, ALJ:

This matter concerns the tenure charges filed against the respondent, Joan Dempster, with the Commissioner of Education (Commissioner) on August 1, 1994. The matter was transmitted to the Office of Administrative Law on August 19, 1994, for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

There was a prehearing conference on November 2, 1994, and at that time, Thomas Summers, Jr., Esq., on behalf of the petitioner, the Board of Education of the City of Trenton (Board), stated that the Board now takes the position that the respondent could not obtain tenure while holding the position of an information systems control specialist. The respondent disagreed and it was decided that I would render a decision on this issue based on a stipulation of facts and briefs prior to any consideration of the tenure charges filed against Ms. Dempster.

A motion for summary decision was filed by the petitioner. The petitioner alleges that Ms. Dempster is not a tenured employee since a person in her position cannot acquire tenure, and therefore the Commissioner lacks jurisdiction and the matter should be dismissed.

The respondent opposes the motion and argues that the respondent holds a clerical position and has tenure.

After briefs and a stipulation of facts were submitted by the parties, I had a telephone conference with the parties on June 15, 1995, and I informed them that I needed more information regarding Ms. Dempster's job responsibilities before I could decide the motion. Rather than present any witnesses, the parties asked for time to submit additional information about Ms. Dempster's job responsibilities. The petitioner submitted the affidavit of Robert Lawrence on June 22, 1995, and the respondent submitted letters on July 11, and July 12, 1995. The record in the matter closed on July 12, 1995.

For purposes of the motion, the parties have stipulated that:

1. Petitioner, Board of Education of the City of Trenton, Mercer County (the "Board"), is subject to the tenure laws of the State of New Jersey as set forth in Title 18A of the New Jersey Statutes Annotated.
2. Respondent, Joan Dempster, has been employed by the Board as an Information Systems Control Specialist since June 15, 1987.

3. Respondent asserts that she has obtained tenure as an Information Systems Control Specialist pursuant to the N.J.S.A. 18A:17-2.
4. On or about May 3, 1994, the Board certified tenure charges against the Respondent in which the Board did not admit Respondent had tenure, and alleged, among other things, that she was guilty of conduct unbecoming of an Information Systems Control Specialist, misbehavior and official misconduct.
5. On or about August 12, 1994, the Respondent filed a timely answer denying the tenure charges and asserting that she has tenure.

The job description for Ms. Dempster's position (attached to the stipulation of facts as Exhibit A) contains the following general job summary:

Responsible for operating and controlling digital computing equipment by means of a peripheral console device or auxiliary control panel, and preparing the computer for program processing for the satisfactory completion of each scheduled computer operation.

Also, the job description states that the position requires a high school education, three years' experience operating a mainframe computer, no special certification or license, and the ability to work independently. The following job responsibilities are listed in the job description:

A. Operates and maintains all computer equipment

1. Operates console keyboard or control panel, initializing the computer systems for each program in accordance with operating instructions and preparing peripheral computer program equipment with forms and disk files.
2. Monitors console messages and reacts according to directions from system software and/or application programs; takes corrective action as defined in operating instructions and verifies that reports and other outputs are completed before release from the computer room.

3. Notifies the Director of Information Services of equipment or program malfunctions.

4. Assumes responsibility for all computer printer and system upkeep, and all inventory and ordering of computer supplies.

B. Produces and/or develops reports for the various departments within the District

1. Interprets report requests from the various departments within the District.

2. Develops a working knowledge of the District's computer systems and applications in order to develop and generate new reports as needed.

3. Diagnoses causes for interruptions in computer processing.

4. Ensures time recording procedures for the running of all reports.

C. Serves as a data processing and computer systems resource within the District

1. Verifies that all necessary files and data have been submitted to the computer room, recognizes deficiencies in source documents and returns them for correction and/or completion.

2. Troubleshoots and coordinates data entry functions for system departments, and assists with problems in the usage of systems applications.

3. Runs computer/software equipment checks as requested and performs back-up and other preventative data entry services (e.g. proper forms and disk pack utilization) for the various departments within the District as needed.

D. Behavioral Expectations

1. Upholds the philosophies/values of the Trenton Board of Education.

2. Exercises safe and appropriate work habits.

a. demonstrates knowledge of and follows all prescribed safety policies/procedures.

b. demonstrates general knowledge of work processes within skill area.

3. Promotes positive inside and outside relations.
 - a. works in consultation with the Director of Information Services and other Departments as needed to ensure that computer reports and data control issues are handled in a smooth and timely manner.

E. Other

1. Performs other related duties and responsibilities as assigned by the Director of Information Services.

In his affidavit, Robert Lawrence, the director of information systems for the Board, indicates that he is responsible for the supervision of the school district's computer department and he is Ms. Dempster's supervisor. According to Mr. Lawrence, the respondent's job responsibilities are accurately reflected in the job description. He stated that it is the respondent's responsibility "to operate and monitor the School District's computer system which covers payroll, accounting, personnel and student records," and that it is the responsibility of the respondent to make sure data is properly input, to handle problems, and to make appropriate changes. Also, Mr. Lawrence stated that the respondent rarely inputs any data, does not handle or type any correspondence, and does not answer the telephone or schedule appointments for supervisors.

Richard A. Friedman, Esq., on behalf of the respondent, concurs that the respondent's job responsibilities are correctly outlined in the job description. According to Mr. Friedman, the respondent's prime responsibility is to operate and monitor the computer payroll system.

In support of the motion for summary decision, Mr. Sumners argued that the courts have held that the tenure statute should be narrowly construed and that tenure should be provided only for the positions set forth in the statute, citing Capella v. Board of Educ., Camden County Voc. Tech. Sch., 145 N.J. Super. 209, 214 (App. Div. 1976), Moresh v. Bayonne Bd. of Educ., 52 N.J. Super. 105, 111 (App. Div. 1958), and Lascari v. Board of Educ. of Lodi, 36 N.J. Super. 426, 430 (App. Div. 1955). Mr. Friedman disagreed and argued that that courts have held that the tenure statute should be liberally construed, citing Barnes v. Board of Educ. of Jersey City, 85 N.J. Super. 42 (App. Div. 1964).

Having reviewed the case law, I agree with Mr. Sumners's argument that the law clearly limits tenure to the specified statutory positions. However, since the position of "clerk" is not defined by the statute, I agree with the parties that it is necessary to consider the job responsibilities performed in order to determine whether the respondent's position falls within the clerk classification. I disagree with Mr. Friedman's argument that the court in Barnes intended to give the term "clerk" a broad interpretation, to extend the meaning beyond what is generally accepted to be a clerical position.

Mr. Sumners argued that the respondent's position is not a clerical position pursuant to the tenure statute, N.J.S.A. 18A:17-2. He noted that a "clerk" is commonly a person who keeps records, attends to correspondence or filing, and manages routine and detail work within the traditional office setting, citing definitions of "clerk" from the American Heritage Dictionary (Second College Edition 1985) and Webster's New Collegiate Dictionary (1977). Mr. Sumners stated that the respondent's job responsibilities require her to perform technical duties, not routine office work; it is her responsibility to diagnose and correct computer problems, prepare computer programs, analyze systems operations, and make independent determinations regarding steps to be taken to promote efficiency. The clerical duty of inputting the information into the computer is performed by other employees. Mr. Sumners argued that the court in Barnes clearly indicated that tenure protection should not be provided to all office workers without regard to the nature of their job responsibilities, but only to those employees who carried out clerical functions.

In support of its argument, the Board noted that the respondent is not covered by the collective bargaining agreement pertaining to secretarial and clerical positions, namely, the Trenton Educational Secretaries Association bargaining agreement; rather, she is covered by the collective bargaining agreement pertaining to persons holding technical titles, namely, the Trenton Business and Technical Employees' Association bargaining agreement. Mr. Friedman argued, and I agree, that the respondent's collective bargaining unit is not relevant to the issue of whether the respondent has tenure as a clerk. The issue is solely statutory, and since tenure rights cannot be waived by collective bargaining, the contract agreements between the unions and the Board are not relevant to the issue. Further, according to Mr. Friedman, recognized clerical positions are covered by the Trenton Business and Technical Employees' Association bargaining agreement.

Mr. Friedman argued that the courts have recognized that a wide range of titles can fall within the clerical classification and that the classifications of secretary and clerk are not synonymous, citing Barnes, supra, 85 N.J. Super. 42; Beute v. Board of Educ. of North Arlington, Comm'r Decision (September 14, 1981), aff'd, State Bd. of Educ. (February 3, 1982); and Ramage v. Board of Educ. of Franklin, Comm'r Decision (April 13, 1983), aff'd, State Bd. of Educ. (January 4, 1984), aff'd, No. A-2762-83T2 (App. Div. Jan. 31, 1985). He asserted that computers are now common in the workplace and are replacing older ways of keeping records, and that the use of computers does not alter the clerical nature of the work performed. Mr. Friedman argued that the respondent's duties are primarily clerical in nature; she does not have a managerial position, does not supervise any employees, and does not have the power to make decisions regarding substantial matters.

Having reviewed the arguments of the parties, I agree with the petitioner's position and I **CONCLUDE** that the respondent's responsibilities are not primarily clerical in nature. The respondent's responsibilities include analyzing systems operations and making independent determinations, independently producing reports, diagnosing computer system problems, and maintaining computer equipment. These duties do not fall into the category of responsibilities which normally would be considered to be clerical in nature. Therefore, I **CONCLUDE** that Ms. Dempster was not a tenured employee at the time the tenure charges were filed against her, and I **ORDER** that this matter be dismissed.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 25, 1995
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

8/25/95
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 31 1995
DATE

Jeff M. Miller
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

None

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

IN THE MATTER OF THE TENURE :
HEARING OF JOAN DEMPSTER, BOARD :
OF EDUCATION OF THE CITY OF : COMMISSIONER OF EDUCATION
TRENTON, MERCER COUNTY. :
DECISION
_____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Respondent's exceptions and the Board's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Respondent objects to the Administrative Law Judge's (ALJ) determination that she did not acquire tenure as a clerk. In support of her objection, respondent refers to, and incorporates by reference, her Brief filed before the ALJ in opposition to petitioner's Motion for Summary Decision. Respondent also asserts that the ALJ's determination in this matter narrowly construed the tenure statutes, contrary to the holding in Barnes, supra. Additionally, respondent reiterates that her job duties were no more sophisticated than the duties performed by the petitioners in Beute, supra, and Ramage, supra. Thus, respondent urges that the Commissioner reverse the decision of the ALJ.

The Board also relies upon, and incorporates by reference, its Brief as filed before the ALJ in support of its Motion to Dismiss Respondent's Petition of Appeal. In so doing, the Board asserts that the ALJ applied the appropriate legal standard and recognized that the nature

of respondent's job functions were determinative of the issues herein.¹ The Board again argues that respondent's functions were technical functions, and respondent's attempt to equate those functions with an employee's utilization of a computer to carry out clerical functions is without legal or factual basis. Thus, the Board counsels against adopting the overly expansive view offered by respondent.

Upon careful and independent review, the Commissioner concurs with the ALJ that respondent's job functions were not basically clerical in nature. See Barnes at 45. In so finding, the Commissioner notes that neither his decision nor the ALJ's, contrary to respondent's assertion, is based on the mere fact that respondent's position requires the use of a computer. (Respondent's Brief at p. 10) Rather, the Commissioner determines that the particular facts on record herein do not permit a finding that respondent's position comes within the scope of the Barnes decision, which may not be so broadly interpreted as to permit characterization of virtually any nonsecretarial, office-related function as "clerical."

Accordingly, the initial decision of the Office of Administrative Law is adopted for the reasons expressed therein, and the within petition is dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

¹ The Board notes that the parties are in full agreement as to the specific job functions performed by respondent. (Board's Reply at p. 2)

401-95

L.T., on behalf of her minor child, D.T., :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE CITY : DECISION
 OF LONG BRANCH, MONMOUTH :
 COUNTY, :
 RESPONDENT. :

SYNOPSIS

Petitioning parent contended her child, D.T., a tenth grader who was expelled for his involvement in a fistfight with another student (a teacher was also assaulted in the fight), was expelled in violation of his due process rights. (N.J.S.A. 18A:37-2.1 and 37-5) Petitioner sought immediate reinstatement of D.T. to regular enrollment in the Board's schools.

ALJ determined that D.T. had to be readmitted to school as his expulsion hearing was neither timely scheduled nor conducted in a procedurally correct manner. Citing Goss, the ALJ found that D.T. may not be expelled from school except in accord with statute and local Board policy. ALJ ordered D.T. readmitted to school contingent upon his compliance with the rules of the school and acceptable patterns of conduct.

Commissioner adopted findings and determination in initial decision as his own and ordered D.T. readmitted in compliance with ALJ's directives.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6877-95

AGENCY DKT. NO. 197-6/95

**L.T., ON BEHALF OF HER
MINOR CHILD D.T.,**

Petitioner,

v.

**LONG BRANCH CITY BOARD OF
EDUCATION, MONMOUTH COUNTY,**

Respondent.

Ann B. Bradley, Esq., for petitioner (Stokes & Throckmorton, attorneys)

Arsen Zartarian, Esq., for respondent, Board of Education of the School District of Long Branch (McOmber and McOmber, attorneys)

Record Closed: September 5, 1995

Decided: September 13, 1995

BEFORE DANIEL B. MCKEOWN, ALJ t/a:

L.T., on behalf of her 15 year old minor child D.T. (petitioners) who until his expulsion was a student in the tenth grade of the Long Branch Public Schools, alleges the Long Branch Board of Education (Board) violated his statutory due process under N.J.S.A. 18A:37-2.1 and N.J.S.A. 18A:37-5 with respect to its expulsion action. Petitioners demand the immediate reinstatement of D.T. to regular enrollment as a student in the Long Branch schools. The Board

denies it violated D.T.'s procedural due process rights under the cited statutes. It asserts petitioners failed to state a claim upon which relief could or should be granted. It also asserts D.T. voluntarily withdrew from its public schools thereby tendering the matter moot. After the matter was transferred July 3, 1995, to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14B-1 through -15 and N.J.S.A. 52:14F-1 through -13, a hearing was scheduled and conducted August 10, 1995 at the Shrewsbury Township Municipal Building. After written summations were filed, the record closed September 5, 1995.

The conclusion is reached in this initial decision that D.T.'s procedural due process rights were violated by the board as is alleged.

BACKGROUND FACTS

The following background facts of the matter are not in dispute between the parties except as otherwise noted. On January 18, 1995 a fistfight erupted in the high school cafeteria around midday between D.T. and another student. While the combatants were throwing punches at each other a teacher who was present in the cafeteria at the time, Walter Jeffrey Propert, attempted to separate the two and stop the fight. Mr. Propert, unfortunately, was hit in his face, "right beneath the nose" and again "in the right eye orbit", as well as "banging his lower rib cage on a table, having his right shin cut open on a chair and having one of the combatants teeth puncture his forearm. (J-2) Other adults who were present intervened and pulled the students away from each other. He subsequently went home. In an incident report (J-2) filed on January 22, 1995, Mr. Propert does not identify either combatant by name nor whom of the two punched him or whose teeth punctured his forearm. Mr. Propert was taken to the school nurse's office and then to "a doctor" to be examined.

Lawrence DiRienzo, the then assistant principal, was at a principal's meeting with detectives, who were present on other matters at about the time the fight started. When word of the fight reached the meeting, DiRienzo and others went to the cafeteria but by the time he got there, DiRienzo says he did not see any part of the fight or of Mr. Propert being punched or bitten. He began asking the 20 or so students and three other teachers who were present what had happened. He took his own personal notes of their responses from which he made a summary

report the following day to the principal, John T. Crotty. DiRienzo did not have with him at the time he gave testimony in this matter the notes he made of the responses received, although the notes (R-1) were submitted August 30, 1995. Written statements of the student witnesses were not taken, nor were the students called to testify.

The detectives in the principal's meeting at the time the fight occurred and presumably who assisted in regaining control of the cafeteria determined to take D.T. into police custody soon after order was restored. In the meantime, either DiRienzo or someone else at his or the principal's direction telephoned D.T.'s mother, L.T., and advised her of what had occurred and that D.T. was taken into police custody. D.T.'s mother went to police headquarters to inquire of her son. D.T. was released into her custody.

The day after the fight, January 19, 1995, DiRienzo advised the principal in writing:

My interviews with a number of students who observed the fight in the cafeteria during period 4 on January 18, 1995 confirms the report that Mr. Propert was struck repeatedly by [D.T.], Grade 10, while Mr. Propert was intervening and attempting to separate the two students who were in the midst of a violent fight. ([D.T.] and [J.J.]

Students observed [D.T.] hit Mr. Propert in the face and observed Mr. Propert being knocked to the floor in the melee. One student suggested that [D.T.] was attempting to strike the other student, but Mr. Propert was 'in the way' so he received the bulk of the blows meant for the other student.

(C-1)

It is noted that the referenced "students" were not identified to D.T. or to his mother.

The same day, January 19, 1995, principal Crotty advised L.T. in writing as follows:

This letter will serve to confirm your telephone call and your conference with Mr. DiRienzo on January 18th and 19th. I regret to inform you that it has become necessary to suspend [D.] from school for a period of ten (10) days, January 18th through and including February 1st . . . because [D.] was involved in an extremely violent fight in the cafeteria and injured the teacher who

attempted to intervene and separate [D.] and the other student. In addition, as you are aware, the teacher was bitten by one of the students during the fight; therefore, medical testing is required of both students and the nurse has given you all of the necessary information to complete this testing. . .

Please be advised that a Principal's Panel Hearing is now required and has been scheduled for 10:00 a.m., Thursday, February 2nd, in my office. [D.] is to attend the hearing with you . . .

(J-1)

It is noted that the 'medical testing' showed it was the other student, not D. whose teeth punctured Mr. Propert's forearm.

Principal Crotty testified that he made the decision to suspend D.T. for ten days because of the gravity of the matter occurring in an educational setting, and the fact that a student was involved which, to him, represented a 'hostility for authority'. The other student who was involved in the fistfight January 18 was also suspended for ten days, but was readmitted to regular school attendance immediately thereafter. Principal Crotty explained that his investigation revealed to him that the other student involved J.J.,

. . . historically avoided the cafeteria because of the ridicule and chatting he was receiving by some of the students involved here, and, in fact, had gone down to the cafeteria that day and ridicule and chatting continued. There was nothing that showed us that he [J.J.] provoked it or was involved in the verbal confrontation, but we didn't say whether there was serious provocation, and we did see that he did abide by the supervisor's directions, even if it required hands-on, which it was the supervisor did grab the student first, but . . .

[And} I advised the parents [of D.T.] and the people that were in attendance [at the Principal's Panel Hearing on February 2].

(Tr. 55, 56)

Principal Crotty explained that the purpose of the Principal's Panel Hearing, which he says is authorized by Board policy (R-2) as submitted by counsel on August 30, is to:

... review the seriousness of this incident [by reviewing] his [D.T.'s] attendance, grades and historical record, and then we would consider the action that the panel would take. The panel is empowered to return the student to school with no sanctions. The panel is empowered to return a student to class or school with some type of sanctions or the panel is empowered to recommend to the Board of [E]ducation for expulsion from the school district [thereby continuing the suspension already imposed until the Board gets to the matter (Tr. 60)].

(Tr. 56)

In anticipation of the "Principal's Panel Hearing" principal Crotty kept in close contact with assistant principal DiRienzo and with the teacher who was punched to insure he had the facts right. The teacher who was punched was not present at the "hearing" on February 2, 1995 although a guidance counselor, a learning disability teacher-consultant, Crotty, DiRienzo, D.T. and his mother were present. The thrust of this proceeding was for principal Crotty to ask D.T. what had happened, for D.T. to respond, and for the principal to ask him more questions. Neither a stenographer nor audio tape recorder were used during this hearing and no one took and kept notes. At the end of this meeting, L.T. was advised by principal Crotty that the recommendation of the Panel to the Superintendent and hence to the Board was for D.T.'s expulsion. It is noted that assistant principal DiRienzo says the expulsion recommendation was reached by the Panel as a whole. However, the record is absent any evidence which would show the "Panel" took a recess to discuss the recommendation before L. T. was so informed; rather, the evidence suggests that the principal determined that that would be the panel's recommendation. Crotty acknowledged the recommended expulsion was his "unilateral" decision. (Tr. 91) And, whatever the guidance counselor, and learning disability teacher learned at the Principal's Panel Hearing was what principal Crotty or assistant principal DiRienzo said occurred, and from the questioning of D.T. by Crotty.) (Tr. 113)

The principal memorialized the recommendation in a letter (J-3) sent L.T. on February 3, 1995 in which he further advised:

The recommendation is made after a review of [D.'s] discipline record indicated that he had a history of violent behavior which culminated in a fighting incident in the cafeteria on January 18,

1995 where [D.] punched the teacher supervisor a number of times, knocking him to the ground.

While awaiting the hearing by the Board of Education, [D.] will be provided with a Home Instruction program. While on Home instruction, [D.] is to remain off school grounds and may not attend any athletic contests or school activities . . .

(J-3)

It is noted that the discipline record (J-10,p. 5) of D.T., excluding the present expulsion and apparently as relied upon by principal Crotty and eventually by the Board as one basis for the present controverted discipline, shows that during November 1993 a teacher/administrative conference occurred because D.T. was to have had a "confrontation" with another student in a hallway and he was to have refused to follow a teacher's direction, and during December 1993 he was to have engaged in "violent behavior", "horseplay" and "fighting in the boys' locker room for which he was suspended 3 days, one of which was in-school suspension and the other 2 days were out-of-school suspension.

D.T.'s discipline record also shows that during February 1994 he received "central detention" for being tardy to school three times; he received Saturday detention during March 1994 for engaging in "disruptive behavior" in math class, which he does not recall, and he failed to serve a teacher-imposed detention; he received central detention during June 1994 for engaging in "excessive tardiness" to school; he received a Saturday detention during October 1994 for being unprepared for physical education on seven occasions; and, he received a three day in-school suspension during November 1994 for being "insubordinate" and "disrespectful" to an assistant principal. (Tr. 145)

While L.T. was notified at the "Panel" hearing on February 2 that the recommendation for expulsion of D.T. was to be made and the very next day had a letter sent her memorializing that recommendation, and she was also told by that letter that D.T. would continue on suspension until the matter was resolved and he had been out-of-school on suspension since he was taken into custody the afternoon of January 18, the actual recommendation for expulsion was not forwarded to the Superintendent's office by principal Crotty until February 8, 1995. (J-4)

One week later, February 15, the assistant superintendent of schools notified L.T. of the recommendation for expulsion and that a panel of the Board would conduct a hearing on February 21. L.T. was also advised.

. . . [Y]ou may present to the Board such matters as you deem relevant to this proposed expulsion.

You are further advised that you may be represented by an attorney at this hearing. Failure to attend shall permit the Board to act upon the recommendation for expulsion without further notice. You will be given the opportunity to present your defense or written affidavits of witnesses in your behalf.

Additionally, you may request in advance of the hearing the names of witnesses whose testimony will be presented to the Board in support of the recommendation for expulsion. If you so request, you will be given an opportunity to cross-examine these witnesses at the time of the hearing.

(J-5)

In response to the question "what started the fight between these two pupils? [Tr. 91]," principal Crotty responded as follows:

I think that D.T. intimidated the other boy to the point where there was words exchanged and they squared off. I personally, I think that there was another incident where I thought D.T. went too far with another student he hit in the school . . . [b]ut I think that there was not a visible incident that provoked it, other than the fact that the one student would not even attend the cafeteria, took a pass every day from a teacher so he could avoid the cafeteria, and finally

on this day, that teacher was absent, he was down at the cafeteria, and he was hit.

(Tr. 92)

Principal Crotty acknowledges he has no evidence to show who actually started the fight by words or actions - only his personal opinion based on what others personally told him none of whom actually witnessed what had occurred but all of whom told him what was said to them.

According to a "Hearing Report Form" (J-7) for which no witness was called who could identify the purpose of the document or the use to which it was put, if any, on February 21, or indeed if the form was used at all, it does suggest that the Board panel which conducted the hearing on February 21, 1995 consisted of four of the nine members.

The form consists of a section for student identification which in this instance identified D.T., followed by a section for the student's classification, if any, which in this case reports that D.T. is not classified, followed by a section for additional information regarding the matter requiring Board attention. In this case, additional information contained within this form states as follows:

[D.T.] is a sophomore at the Long Branch High School. During his two years at the High School, [D.] has been suspended from school on two occasions. He has received in-school suspension, Saturday detention and central detention a total of 6 occasions.

Of the out-of-school suspensions, both incidents involved physical altercations with either fellow students or a teacher.

On January 18, 1995, [D.T.] and another student were involved in a fight in the High School cafeteria. Mr. Walter Propert, teacher on lunchroom duty, attempted to break up the fight. Mr. Propert was punched in the mouth and over his right eye.

[D.T.] admitted to the members of the Board Hearing panel that he did in fact punch Mr. Propert. This action by [D.] resulted in a recommendation for expulsion by the Hearing Panel.

(J-7)

The remaining sections identify the date of what is referred to as the Board Committee Hearing, which is reported as February 21, 1995, 6:00 p.m.; a section identifying those who were present and on this form it is reported that only the following persons were present: The superintendent, regular Board counsel, four Board members, principal Crotty, assistant principal DiRienzo, a learning disability teacher-consultant, and L.T. and D.T. Subsections two and three which reports others in attendance are blank. However, principal Crotty specifically testified that teacher Propert was present at this Board Panel hearing. (Tr. 90) There then follows a section for the Board panel recommendation to the full Board which, in this case, is reported as "Board members recommended expulsion-this will be the Committee's recommendation to the whole Board at the next Board of Education meeting." (Id.)

The remaining sections included space for a date the panel or committee, whichever it is called, would make a presentation of ostensibly its findings based on evidence received at the "panel hearing" is blank; and space for identifying the action taken by the full Board which is blank; and, space for the date of full Board action which is blank. It is also important to note that those sections of the form which are completed as described in full above are typewritten, without date or the typist's initials, and without any explanation of how, when, where, by whom, or why the form is used.

Minutes of a meeting of the Board conducted March 14, 1995 - approximately 40 school days after D.T. was initially suspended from school on January 19 - show the Board considered the following motion:

Motion was made by Mr. Knox, seconded by Mr. Tricules and carried by roll call vote for the expulsion of "D.T." from the Long Branch High School. Ayes (7), Nays (0), Absent (2) Mr. Owens and Mr. Kaplan.

(J-8, p.3)

The minutes do not reveal any discussion was had among Board members before or after the motion was made regarding what its panel or committee learned at the hearing it conducted

February 21, or what the panel told the full Board. Indeed, there is nothing in this record to disclose that the panel ever filed a report of the hearing it conducted, orally or in writing, with the full Board. There is no evidence to show the manner, means, or mode of how, if at all, the panel communicated with the full Board regarding the February 21 hearing or its recommendation.

Nevertheless, the assistant superintendent notified L.T. in writing on March 15, 1995 that

...
After a painstaking discussion and careful examination of the facts regarding the [Board's] Hearing Panel's recommendation for expulsion of your son [D.T.] from the Long Branch High School, the Board of Education voted to expel your son effective immediately.

During our discussion this morning, I began to outline to you several options for your son's continued education and his ultimate attainment of a high school diploma.

... I encourage you to contact Dr. Kupersmith at the High School Guidance office who will be happy to help you make arrangements to have [D.] enroll and participate in any of the following programs.

[Here follows a recommended list of two specific adult education programs, a general equivalency degree program at a vocational school, another such program at a rehabilitation site, and the Job Corps general equivalency program at Edison.]

(Emphasis added)

Prior to a recitation of the facts as established by the testimony of D.T. and his mother, L.T., it is noted that the Board disavows further obligation to D.T. in regard to his education, either in providing him an educational opportunity in its public schools or in financing any of the "alternatives" mentioned above by the assistant superintendent. It also disavows any obligation to provide him home instruction in any manner.

With respect to the home instruction provided D.T. during his 40 school day suspension before expulsion, and according to the Board's learning disability teacher-consultant, a member of

its child study team who was present at the "Principal's Panel Hearing" on February 2, the home instruction provided D.T. during his exclusion from regular school attendance between January 19 and March 14 when the Board determined to expel him from regular enrollment consisted of a total of two hours of mathematics, science, social studies and English on January 26, 1995. On January 27, 1995, the home instructor became ill and was hospitalized. Home instruction for D.T. ceased. Home instruction was provided between February 13 and 21; it ceased on February 21. Principal Crotty testified that while he does not know when home instruction started for D.T., or if it ever did, he is certain that D.T. was not eligible for that service until at least after February 2 - according to "Board policy."

It is also noted that D.T. was evaluated by the Board's Child Study Team between February 2, the date of the Principal's Panel Hearing, and February 10 when an outside psychiatric evaluation was performed. (See, J-12, pp. 1-2) Part of that referenced Exhibit includes a case manager's report which, perhaps coincidentally, is dated February 10 - the very date the psychiatric evaluation (J-12, pp. 20-21) was performed, but which as a written report is not dated. It must also be noted that the case manager is the same learning disability teacher-consultant who attended the Principal's Panel Hearing report states, in part, as follows:

The Child Study Team does not find the student [D.T.] eligible for classification. Furthermore, the CST does not find causality in regard to [D.T.'s] behavior during the incident which led to his recommendation for expulsion . . .

Behaviorally, student [D.T.] displays immature, impulsive behavior and uses poor judgment (sic). However, this does not warrant classification as Emotionally Disturbed. The Child Study Team recommends the student consider counseling to work out any behavioral issues interfering with his functioning as a productive citizen on a daily basis.

(J-12, at p. 6)

Finally, It is noted that the other student who was involved in the fistfight January 18 was suspended for ten days and readmitted to regular school attendance.

D.T. testified he is 15 years of age. His birthday is September 17. He lives with his mother, his father lives in Red Bank which is a Monmouth County community in the area of Long Branch. He denies, even though he was not so charged being a "gang member", and he denies engaging in "beating up people". He says that on January 18 he was on his way to the cafeteria when he overheard J.J., the other student involved in the fistcuffs, talking to someone else that he was having sexual relations with D.T.'s girlfriend. J.J. is supposed to be a "friend" of D.T.'s. According to D.T., his girlfriend told those assembled she was not having sexual relations with J.J. and also said to J.J.: "You're nothing but a virgin!" D.T. testified he did not tease, torment, nor taunt J.J. D.T. says that J.J. swung at him first and that he began to defend himself. D.T. testified that he did not at any time see a teacher attempting to break up the fight which ensued; that when one becomes engaged in a fistfight one does not look at who is nearby. D.T. denies intentionally punching the teacher. D.T. says he, in fact, was no match for J.J. because he lost the fight.; he received a "black-eye".

When D.T. and J.J. were finally separated, D.T. says an aide took him to the office where he was told he had struck a teacher. He was then taken to the assistant principal to whom he gave a written statement of what had occurred, though he did not receive a copy of the statement he gave. Next, D.T. was taken to the principal and was told again he struck a teacher. D.T. says he stated in the presence of the principal, assistant principal and the detectives who were present that he did not know a teacher was present or that he had struck a teacher. As he was being taken to police headquarters by the detectives, D.T. says that that is when the assistant principal telephoned his mother, L.T.

D.T. and the mother attended the Principal's Panel Hearing on February 2. The principal, assistant principals, guidance counselor and the learning disability teacher-consultant who were present, relied upon the prior statements of the asserted witnesses and "others", none of whom were present at the time, and their respective questioning of him during the proceeding. D.T. and his mother were told at the conclusion of this proceeding of the necessary of a child study team evaluation which, with the approval of L.T. began that very day, ostensibly because D.T.'s expulsion was to be sought.

In the meantime, D.T. testified he began receiving home instruction a "few days" before February 2 after which it stopped. He then called the high school and personally arranged for class work be sent him so that he would not fall too far behind in his studies.

Nonetheless, D.T. says he knew he was facing a difficult situation. He explains school officials believed he intentionally struck a teacher, despite the fact he knows he did not do so intentionally. He reasoned that even if he did what people say he did but could show it was not deliberate and if he were to be accepted back into Long Branch High School, he would have a difficult time of trying to live down the stigma of people, particularly teachers, saying he had struck a teacher. Consequently, he and his mother decided that he should withdraw from the Long Branch schools before the Board acted to expel him, live with his father in Red Bank during the regular school year, and enroll in Red Bank Regional High School where he could get a fresh start. (See J-11, pp. 1-2) D.T. withdrew from Long Branch on February 21, 1995 and sometime thereafter attempted to enroll at Red Bank Regional.

D.T. and his mother explained that when Red Bank school officials contacted Long Branch school officials as D.T. and his mother sat in the Red Bank official's office awaiting to complete the transfer, Long Branch advised Red Bank that D.T. was in the midst of an expulsion proceeding. Upon receiving such word, Red Bank advised D.T. and his mother that the school would not enroll him until the expulsion proceeding in Long Branch was completed without regard, it is noted, to whether he was a legal resident of its district. D.T. says he learned at the same time from Red Bank officials of the pending meeting of March 14 when the full Board was to consider his expulsion. He says he was never notified of that meeting by Long Branch school officials.

With respect to whatever charges were filed against him by the Long Branch police all such charges were dismissed following an appearance before the Juvenile Conference Committee on May 1, 1995. D.T. says that at the meeting a Ms. Phillipiano whom he identifies as "someone from the school" testified that she was present when D.T. was told for the first time on January 18 a teacher was present and that he, D.T., struck the teacher. D.T. also testified that Ms. Phillipiano said it was evident by the look on his face upon being told of the presence of the teacher that he was surprised that a teacher was present.

There is no evidence to dispute D.T.'s testimony.

L.T., D.T.'s mother, learned of the fight and accusations against her son by telephone call from assistant principal DiRienzo. He told her of the incident and that D.T. was then being taken to police headquarters in custody. She and two relatives proceeded to headquarters. There, a Detective Castle took a statement from D.T. and advised that he would be charged with assault and that there would probably be an expulsion hearing at school. The following day L.T. went to school and met with DiRienzo who read to her from "two reports" he had regarding the incident the day before. L.T. was also advised D.T. was suspended from school for ten days, after which a Principal's Panel Hearing was to be convened.

On February 21 the day of the Board hearing, she and D.T. decided that he would be better off if he would just go live with his father in Red Bank so he could transfer to Red Bank Regional High School to get a fresh start. However, when L.T. was told on some subsequent but uncertain date by Red Bank officials that the Long Branch Board was to meet in March regarding the expulsion of D.T. and would not be accepted in Red Bank under that condition, D.T. was "re-enrolled" in Long Branch.

There is no evidence to dispute L.T.'s testimony.

It was noted earlier that Board counsel submitted Board policy which addresses pupil suspension and expulsion and due process for pupils. (R-2) He also submitted accompanying administrative regulations intended to implement the policy. The policy states that pupils who indulge in disruptive behavior may be suspended or expelled and provides a nonexhaustive list of disruptive behavior. The policy then warns that any pupil "who commits an assault (as defined by N.J.S.A. 2C:12-1) upon a teacher . . . shall be immediately suspended from school according to the procedural due process, and expulsion proceedings shall be begun no later than 21 calendar days from the date of the pupil's suspension." (Emphasis in original) Any such suspension for assault on a teacher may not, under the Board's own policy, be continued beyond 21 days without Board action. (R-2, p. 2)

The Board's policy governing due process for pupils provides in significant part as follows:

It is the policy of the board of education that in the case of a suspension of ten (10) days or less, the student is entitled to an informal hearing by a school official(s). If the suspension is longer than ten (10) days, the student is entitled to a full hearing within twenty-one days from the start of the suspension . . .

The following procedural guidelines will govern the hearing:

1. *Written notice of charges against students shall be supplied to the student and his/her parent . . .*
...
4. *A record shall be kept of the hearing.*
5. *The findings and recommendation of the hearing officer (or panel) shall be reduced to writing and sent to the student and his/her parent . . .*

(Emphasis added) (R-2, p. 7)

Local administrative regulations governing expulsion recommendations to be made to the Board provide, among other requirements, that when a student is suspended pending a recommendation for expulsion the student is to be placed on home instruction *immediately* and such instruction shall continue until the Board acts on the recommendation. (R-2, p. 16)

There is a section in the policy which addresses the Board panel hearing which requires, in part, that at the conclusion of this hearing an assistant superintendent will prepare a summary of the hearing and the panel's recommendations for consideration by the full Board. (R-2, p. 18)

DISCUSSION

The evidence shows D.J. was summarily suspended from school on January 18, 1995 by principal Crotty because he “. . . was involved in an extremely violent fight in the cafeteria on January 18th [and] . . . repeatedly struck and injured the teacher who attempted to intervene and separate [D.J.] and the other student” and the teacher “was bitten” by one of the students. (J-1) Crotty’s belief was based on what assistant principal DiRienzo told him he learned from speaking with students and teachers who were to have witnessed the incident. Crotty did not personally speak with the students nor were written statements taken from them. Neither the students nor teachers were identified to D.J. before his suspension nor are they identified in this record, except for the teacher who was the victim. The teacher subsequently reported that one of the two combatants had struck him but without identifying which of the two. When D.J. was taken to the principal’s office following the incident, he was told by the assistant principal, the principal, and the detectives that he had struck a teacher. D.J.’s testimony that he did not know a teacher was present during the fight or that he struck a teacher is unrefuted in this record. The evidence shows that D.J. did not bite the teacher; the other student did.

This initial suspension was for ten days, although the number of days between January 18 and February 1, inclusive, is 15 days. The so-called ten day suspension was extended unilaterally by principal Crotty as the result of a purported Principal’s panel hearing on February 2 which consisted of questioning D.J. This proceeding had no witnesses other than D.J. and his mother who attempted to persuade principal Crotty that he did not know he struck a teacher and to allow him back to school. There is no evidence to show that any of the asserted eyewitnesses appeared before the panel, other than principal Crotty who shared with those in attendance that J.J. was blameless in the confrontation with D.J.. However, J.J. did not appear before the panel to explain to it his role in the fight.

Principal Crotty announced his decision at the very conclusion of the February 2 proceeding, without having discussed what the panel members had learned, that D.J.’s suspension would continue and the recommendation for his expulsion was to be forwarded to the Board. It is noted that the recommendation to the board through an assistant superintendent for expulsion was not made by Crotty until February 8, six days later.

Then seven days later, on February 15, the assistant superintendent forwarded the recommendation to the Board 19 days after D.J. was told his suspension was continued and 32 days after his initial suspension. four members of the nine member Board were appointed to conduct the February 21 hearing, which was 38 days after the initial "10" day suspension. Teacher Propert was to have testified before this four member Board panel. The panel did not file a written report of the hearing with the full Board, nor was the hearing recorded in any manner. consequently, findings reached by the panel cannot be reviewed. Twenty-one days later, on March 14, or 59 days after his initial suspension, the Board by a 7-0 vote adopted a motion to expel D.T. from its public schools. D.T. has received no instruction from the Long Branch Board of Education since February 21, 1995.

ARGUMENTS OF THE PARTIES

D.J. relies upon G.F. v. Board of Education of Washington Township, 1 N.J.A.R. 55 (1979) that his due process rights were violated because the Board failed to provide him a written notice of charges, a written list of witnesses, a written statement of his right to cross-examine, and a written statement of his right to enter his own defense and his right to legal counsel. He contends that the notices he did receive were all couched in permissive terms and therefore were improper. D.J. notes that the Board panel which heard the matter failed to record the proceeding in any manner and that there is no record of any report being given to the full Board at any time.

D.J. also argues that his due process rights were violated by the Board's violation of N.J.S.A. 18A:37-2.1 and as had been ruled upon in R.R. v. the Board of Education of the Shore Regional High School, 109 N.J. Super. 337 (Chan. Div. 1970) which requires expulsion proceedings to occur before the local board of education no later than 21 calendar days following the day on which the pupil is suspended. In this case, D.J. says the Board did not act for more than 50 days after his suspension. Finally, but without any evidence in this record to support him, D.J. says the Board had to have violated N.J.S.A. 18A:37-5 by his suspension continuing longer than the second regular meeting of the board. He also fails to fully recite the statute of reference in its pertinent part which modifies the section he quotes by providing "... unless [the suspension] is continued by action of the board ..."

The Board argues that its determination to expel petitioner must be affirmed upon the principle that it must deal swiftly and effectively with pupils who wittingly or unwittingly jeopardize the safety and well-being of a pupil population and school staff and cites H.A. v. Board of Education of Warren Hills Regional School District, 1976 S.L.D. 336, 340. It notes that N.J.S.A. 18A:37-2.1 authorizes it to act swiftly and absent a showing that due process was denied or that it acted arbitrary or capricious, its actions carry the presumption of correctness and must be affirmed.

The Board contends it did not violate D.J.'s due process rights because he was given a timely hearing under the statute. It says that the Board panel hearing of February 21 was within 21 days of the end of petitioner's initial suspension on February 1 and, moreover, he was then given a principal's panel hearing on February 2. The Board panel hearing, it says, was before the local board as is required and that petitioner has not presented any authority which requires such a hearing to be before the full Board. It is noted the Board has presented no authority to establish that less than a majority of its full membership, or a quorum of the board, may officially act for it in matters which the legislature designates such authority to the local board of education.

The remaining arguments of the Board have been reviewed including D.J. being given notice of his opportunity to secure the names of witnesses "whose testimony will be presented to the Board in support of the recommendation for expulsion", that his withdrawal from Long Branch materially altered the timelines of the expulsion procedure, and that even if a hypertechnical violation of D.J.'s due process rights occurred its determination to expel him should still be affirmed.

ANALYSIS

The statute, N.J.S.A. 18A:37-2.1, provides that

Any pupil who commits an assault, as defined pursuant to N.J.S.A. 2C:12-1, upon a teacher . . . acting in the performance of his duties and in a situation where his authority to so act is apparent . . . shall be immediately suspended from school consistent with procedural

due process pending expulsion proceeding before the local board of education . . . no later than 21 calendar days following the day on which the pupil is suspended.

The statute requires the expulsion proceeding before the local board of education to be held 21 calendar days following the day the pupil is suspended for the asserted misbehavior. Even if the board panel constitutes an “expulsion proceeding before the local board of education”, which in the circumstances of this case is doubtful, the hearing date of February 21 is 34 days following the day on which D.J. was suspended. No justification for the delay has been offered by the Board. Moreover, the Board as a whole did not act on the matter until March 14, 21 days after its panel hearing. When the full Board did act it did so without benefit of a transcript of its panel’s hearing or of a written report from the panel.

The Commissioner of Education has held in regard to a pupil suspension matter that a local board may “. . . of necessity delegate some procedural matters to a committee or to school administrators for the purpose of determining facts and developing recommendations . . .” as has occurred in this case. E.H. v. Board of Education of the City of Trenton, 1972 S.L.D. 475, 478. However, he also pointed out that following a hearing on an expulsion matter by less than a majority “the Board as a whole must receive and consider either the transcript or a detailed written report of the hearing, prior to taking any final action against the affected pupil id. (Emphasis added) That did not occur in this case. (See, also Tibbs v. Bd. of Ed. of Township of Franklin, 114 N.J. Super 287 (App. Div. 1971) and cases cited therein.)

The procedural due process requirement of the statute necessary for the Board to withdraw D.J.’s right to a free, public, thorough and efficient program of education requires fundamentally fair procedures to determine whether the misconduct occurred. Goss v. Lopez, 419 US 565, 42 L Ed 2d 725., 95 S Ct 729 (1975). In E.H. v. Board of Education of the City of Trenton, supra, the commissioner said:

The record is barren of any evidence that the Board, apart from the two [here it is four] members who conducted the hearing, had any detailed knowledge of petitioner’s testimony or that of the witnesses who testified in petitioner’s behalf or against him. In that

vacuum of knowledge, the decision made by vote of the whole Board can only be judged to be arbitrary.

Accordingly, and in consideration of the fact that petitioner has already been suspended from school attendance for a period comprising almost one year, the Commissioner directs that petitioner be readmitted to the same academic program in which he was enrolled at the time of his suspension. This direction is given conditionally and is grounded on the supposition that petitioner will conform to the rules of his school and exhibit acceptable patterns of conduct. If he does not, the Board is free to proceed in the manner discussed, supra, to exercise those powers of suspension or expulsion granted to it by statutory prescription. (at p. 478)

The Board's own policy and guidelines to implement the policy requires (1) that if a suspension is to last for more than ten days the pupil is entitled to a full hearing within 21 days from the start of the suspension, and (2) that a record shall be kept of the hearing. As noted above, neither was done in this case. Consequently, it cannot be said on the evidence in this record that D.J. was granted fundamentally fair procedures by the Board's vote of 7-0 to expel because not all 7 members were present at the hearing and no record was provided the absent members as an alternative.

Accordingly, and in consideration of the fact, D.J. has already missed close to six months of school time, the Long Branch Board of Education is directed to conditionally readmit him to the same academic program in which he was enrolled at the time of his suspension. D.J.'s continued admission in the Long Branch schools is contingent upon his compliance with the rules of the school and acceptable patterns of conduct.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 13, 1995
DATE

Daniel B. McKeown
DANIEL B. MCKEOWN, ALJ t/a

9/18/95
DATE

Receipt Acknowledged:

Deborah N. Centanaitis/jc
DEPARTMENT OF EDUCATION

SEP 21 1995
DATE

Mailed to Parties:

Jeff S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

km

DOCUMENTS IN EVIDENCE

- C-1 Memorandum, January 19, 1995
- J-1 Letter, January 19, 1995
- J-2 Incident Report, January 18, 1995
- J-3 Letter, February 3, 1995
- J-4 Memorandum, February 8, 1995
- J-5 Letter, February 15, 1995
- J-6 Expulsion Hearing Checklist
- J-7 Hearing Report Form
- J-8 Minutes, March 14, 1995
- J-9 Letter, March 15, 1995
- J-10 Letter, December 22, 1993
- J-11 Withdrawal
- J-12 Academic Record

- R-1 Assistant principal's Summary
- R-2 Board Policy

L.T., on behalf of her minor child, D.T., :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE CITY : DECISION
 OF LONG BRANCH, MONMOUTH :
 COUNTY, :
 :
 RESPONDENT. :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge that, pursuant to N.J.S.A. 18A:37-2.1 and applicable Board policy, D.T. must be readmitted to school as his expulsion hearing was neither timely scheduled nor conducted in a procedurally correct manner. As set forth in Goss v. Lopez, supra, in order for the Board to withdraw D.T.'s right to a free, public, thorough and efficient program of education, due process requires fundamentally fair procedures to determine whether the alleged misconduct occurred. The Commissioner finds that D.T. was entitled to procedural due process and may not be expelled from school except in accord with statute and local Board policy.

Accordingly, for the reasons well-expressed therein, the Commissioner affirms the initial decision of the Office of Administrative Law ordering that D.T. be immediately readmitted

to school, contingent on the supposition that D.T. will conform to the rules of his school and exhibit acceptable patterns of conduct.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

NOVEMBER 6, 1995

DATE OF MAILING NOVEMBER 8, 1995 - 24 -

BETSEY ROACH, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN- : DECISION
SHIP OF SOUTH ORANGE-MAPLEWOOD,
ESSEX COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioning school employee alleged she acquired tenure in a clerical position under N.J.S.A. 18A:17-2(b). She alleged the Board violated her tenure rights when it reduced her audio visual delivery position to half time and terminated her clerical aide position while retaining nontenured individuals in clerical positions. The Board contended petitioner served as an aide and, thus, did not achieve tenure under the cited statute.

ALJ concluded that petitioner acquired tenure in a clerical position and was entitled to preference in filling one of the new clerical positions created by the Board. ALJ determined petitioner met the requirements of N.J.S.A. 18A:17-2(b) as she was employed by the Board continuously for over ten years. Citing Rossi, inter alia, the ALJ found petitioner's job duties were predominantly clerical in nature; her title of media aide (clerical) was inherently ambiguous and equally suggestive of a clerk's duties as of an aide's duties; and the Board never obtained approval of the county superintendent for establishment of a paraprofessional position known as a media aide. Moreover, the ALJ found since the matter involved interpretation of tenure statutes, the dispute fell squarely within the Commissioner's proper jurisdiction. ALJ ordered petitioner restored to a full-time, ten-month clerical position with compensation.

Commissioner concurred with the ALJ that this matter was within his jurisdiction and adopted the initial decision as his own. Commissioner ordered petitioner restored to an appropriate position by virtue of her tenure rights under N.J.S.A. 18A:17-2(b).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8315-93

AGENCY DKT. NO. 287-7/93

BETSEY ROACH,

Petitioner,

v.

**SCHOOL DISTRICT OF SOUTH
ORANGE-MAPLEWOOD,**

Respondent,

Richard J. Kaplow, Esq., for petitioner

Joanne L. Butler, Esq., for respondent
(Young, Dimiero & Sayovitz, attorneys)

Record Closed: December 21, 1994

Decided: August 21, 1994

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

Statement of the Case

This is an appeal by a school employee who contends that she acquired tenure rights to a "clerical position" under *N.J.S.A. 18A:17-2(b)*. She alleges that her employer violated her tenure rights by reducing her employment from full to part time for 1993-94. Over a ten-year period, petitioner held a variety of jobs with confusing titles, such as "audiovisual library technician," "media aide (clerical)" and "media aide (delivery/support)." South Orange-Maplewood School District claims that petitioner served as an "aide" and thus did not achieve tenure under the cited statute. Alternatively, the district maintains that petitioner does not possess appropriate

qualifications for the full-time positions she seeks and that the Commissioner of Education lacks jurisdiction to decide issues governed by collective negotiations.

Procedural History

On July 27, 1993, petitioner Betsey Roach ("Roach") filed a verified petition with the Commissioner of Education seeking restoration to a full-time clerical position, together with back pay and lost benefits. Respondent Board of Education of the South Orange-Maplewood School District ("Board") filed an answer of August 30, 1993. Subsequently, on September 1, 1993, the Commissioner forwarded the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held hearings on six days ending on October 26, 1994. Witnesses and exhibits are listed in the appendix. Both parties filed post-hearing briefs on December 21, 1994.

Findings of Fact

Many of the background facts are undisputed. **I FIND:**

Betsey Roach was hired by the South Orange-Maplewood school district in August 1983. Her initial job title was "audiovisual library technician."¹ Roach did not apply for the job, but was "solicited" for the twelve-month position by the school administration. A contemporaneous job description prepared by the district's then personnel director summarizes the responsibilities of "audiovisual library technician" as "manag[ing] district's central audio visual library." No prior experience was necessary. Requirements for this title did not include attainment of a college degree or teaching certificate, but only a high school diploma, "ability and interest in working with people" and "organizational & clerical aptitude." Roach, however, happens to hold a bachelor degree in art history and a county certificate as a substitute teacher. Although Roach lacks formal training in computer science, she displayed a natural talent in handling computers. Mary Sciaino, a librarian in one of the district's elementary schools, described Roach as a computer "whiz" who showed her "a lot of little tricks" on the computer. In an early evaluation, the evaluator noted that Roach also has "a knack for organizing" and commended her for having reorganized the district's extensive media

¹ Board minutes approving her original appointment designate Roach's title as "audio visual tech." Somehow the district began using the designation "audiovisual *library* technician" to distinguish Roach's job from other audiovisual technicians.

collection. Commenting on the routine nature of her job function, the evaluator stated that "Betsey is capable of a more challenging position."

Roach's duties as audiovisual library technician primarily involved gathering videotapes, films and other instructional materials requested by teachers, delivering these requested items to various school buildings, picking them up after use and performing simple maintenance tasks such as untangling twisted tapes, cleaning cassettes or splicing broken film. Another of her duties was to maintain a listing of materials in circulation and in the archives. Stationed in the Instructional Resource Center at Columbia High School, she was expected to travel to all elementary schools to deliver supplies and equipment. Her former supervisor, Charles Bihler, characterized the job as "a diverse one," which entailed "overseeing of the media library, delivering media to the six elementary schools and assisting with the inventory and maintenance of our large stock of audio visual equipment." Because her arrival in the district coincided with the delivery of new Apple IIE computers, she became actively involved in unpacking them, recording serial numbers and helping to connect the parts. In the evenings she worked at home, keypunching information from the library's card catalogs into the computer's data base. Incidentally, Roach is asserting tenure rights to a clerical rather than a secretarial position. She does not claim to have performed typically secretarial tasks, such as typing letters, opening mail, or answering telephones.²

It is important to distinguish Roach's job as audiovisual *library* technician from that of a related but different position with a similar title. South Orange Maplewood also employed an "audiovisual *repair* technician," whose basic responsibility was to maintain and repair electronic devices like VCRs, film projectors and cable television equipment. (Emphasis added.) That particular job requires a more technical background, which Roach admittedly does not possess. Nonetheless, the two types of audiovisual technicians were paid on the same salary scale. One of the underlying themes emerging from the hearing is the belief by some district officials that Roach was grossly overpaid in light of the unskilled nature of her work.³ Of course, the appropriateness of Roach's compensation is essentially a matter for collective

²District witnesses made a big point of the fact that Roach refused to answer telephones at the resource center, apparently because she felt it was not properly part of her job duties. Even if true, that factor has little, if any, bearing on whether she served as a clerk or an aide.

³Alfred Ramey, field representative for Roach's bargaining unit, indicated that some audiovisual technicians were actually earning more than teachers.

negotiations, distinct from the separate legal issue of whether she possesses tenure entitlement to current clerical positions.

Roach's title and duties remained virtually unchanged for the first six years, although her involvement with computers intensified as the district's record-keeping operations became increasingly automated. In 1987 Marge Mingin replaced Charles Bihler as director of media services. Soon thereafter, in 1989, the department underwent its first major reorganization. Initially, at least, the number of openings in media services expanded. Effective December 1, 1989, the Board abolished Roach's old title of "audiovisual library technician" and created a new twelve-month position entitled "media aide (clerical)." Qualifications for this new title included "knowledge of and ability to operate automated library circulations systems and computer programs (word processing, spread-sheet, data base)" and a demonstrated "service attitude in contacts with students, faculty and the general public." Duties in the official job description included developing and maintaining "all holdings within the automated library/IRC computer system" and providing "secretarial/clerical support services for all district libraries and [the] Instructional Resource Center."

On January 8, 1990, the Board adopted a resolution appointing Betsey Roach as the "media aide (clerical)." At the same time, the Board created a new part-time position entitled "media aide (delivery/support personnel)" and hired a college student for this lesser job. Basically, the media aide (delivery/support) position would be responsible for many of the menial tasks previously performed by Roach, such as delivering audiovisual materials to the different school, keeping records of all deliveries, and doing minor cleaning and repair work.⁴ As Roach saw it, her old position was "split" and it now took "one-and-a half people to do the work I formerly did as one position." Mingin had told her it would be beneficial to "relieve" her of delivery responsibilities so she could concentrate on more challenging tasks. Insofar as the record reflects, neither of the "media aide" job titles were approved by the county superintendent of schools. Myron Blasi, district personnel director at the time the titles were adopted, has no recollection that the district ever sought approval for these titles, although he acknowledged that such application "would have gone out of my office."

Marge Mingin explained that the purpose for creation of the media aide (clerical) position was to convert the school library's 140,000 holdings from card catalog to

⁴Meanwhile, the "audiovisual repair technician" title was also abolished and the duties transferred essentially intact to the new title of "district media technician (senior)".

computer disk. South Orange-Maplewood school district had switched to MS-DOS computers and had installed commercially-prepared software for tracking library inventory and circulation. Information on new acquisitions could be fed directly into the system, but school librarians wanted to customize the records on the district's existing holdings. There were several methods of accomplishing this "retrospective conversion," including manual entry and the use of a Machine Readable Catalog ("MARC") record system. In the beginning, Roach went to one elementary school library, consulted the card catalogs and shelf cards, and manually keyboarded the information into the data base. Later, she began using more sophisticated electronic techniques as they became available. Utilizing a prepackaged program called "Bibliofile," Roach selected pertinent information from compact disks and edited the information in accordance with Mingin's directions. Once the editing was complete, she visited various elementary and middle schools to "upload" the information into the data base. According to Mingin, Roach knew that media aide (clerical) position was only a temporary or "sunset" position, since all school libraries were scheduled to be fully automated by 1994-95. As the conversion progressed, Roach occasionally joked that she "was working herself out of a job."

During the succeeding academic years, the parties submitted several disputes concerning salary and employment terms to negotiated grievance procedures. In or about March 1990, the Board unilaterally reduced Roach's annual salary from \$33,300 to \$19,000. By an opinion dated September 14, 1990, an arbitrator sustained Roach's grievance and restored her full salary for the remaining three months of the 1989-90 school year. Meanwhile, however, the Board notified Roach that it was reducing her media aide (clerical) position to half time for 1990-91 for "budgetary reasons." Prior to the commencement of the arbitration proceeding, the parties entered into a written settlement on February 27, 1991. Pursuant to this agreement, the two split positions were recombined under separate titles for the remainder of 1990-91.⁵ Roach was reinstated to full-time employment as of March 6, 1991 and the college student serving as media aide (delivery/support) was terminated on sixty-days notice. As a practical matter, Roach never actually made any deliveries during 1990-91 because the college student continued working for two more months. Furthermore, as part of the settlement, the Board promised that if the media aide positions were reduced, "Roach shall have preference to such position that remains, before anyone else is hired for same."

⁵ It should be noted that the media aide (clerical) title was for twelve months, whereas the media aide (delivery/support) title was only for ten months.

Just one month later, in April 1991, the Board voted again to reduce Roach's position from full to half-time as a "media aide clerical" for 1991-92. Her bargaining unit representative promptly objected that the Board's action violated the understanding reached in the recent settlement. For the month of July 1991, Roach worked in this half-time position. Ultimately, in September 1991, the parties entered into another settlement agreement, whereby Roach would remain half-time as "media aide (clerical)" and half-time as "media aide (delivery/support)" for the 1991-92 school year. She continued in this dual role for entire 1992-93 year as well.

South Orange-Maplewood District's media department underwent its second major reorganization in Spring 1993. Ostensibly, the changes were the result of intensive study by community leaders and were designed to adapt the district's curricula to recent technological advances such as fiber optics, closed circuit television, satellite systems and on-line communications. Again the Board acted to reduce Roach's position from full to half time for 1993-94, this time, however, by abolishing the "media aide (clerical)" position and continuing her more menial "media aide (delivery/support)" position. Indeed, Roach was the only employee in the media department who suffered loss of employment due to these modernization plans. While Mingin originally testified that three other positions were "cut" because of budget constraints, it turned out that the Board had merely refused her request to add three new positions. Moreover, the district hired four nontenured persons for new jobs which Roach contends should have first been offered to her. Specifically, Roach is not claiming that she should continue in her media aide (clerical) function, even though the retrospective conversion is nearly finished and the position is no longer necessary. Rather, she asserts that two newly-created positions in the district are "clerical" in nature and, therefore, that she has a tenure right to a full-time position. Dr. Joseph Duchesneau, a human resources consultant who helped the Board negotiate the salary guide, admitted that the two new positions were put on the same pay scale as the former "media clerical" position.

Roach made formal application for one of the two new positions, entitled "library media aide (middle school)." Like Roach's previously-held positions, the new title does not require a college degree or teaching certificate. Instead, the job description calls for "essential knowlege" of MS-DOS and Macintosh operating systems and application programs; the ability to "interact in a positive manner with administrators, staff, students and parents;" and understanding of basic library procedures. Emphasis on the ability

to work with others is reminiscent of similar qualifications for Roach's earlier jobs, most notably that an audiovisual library technician had to have "ability and interest in working with people" and a media aide (clerical) must exhibit a "service attitude" in her dealings with people. Although the Board acknowledges that Roach "possesses a high degree of computer knowledge," (respondent's brief, at 32), it nonetheless suggests that Roach lacks knowledge of more modern technologies. But the primary reason given for rejecting Roach's application was that she supposedly has poor interpersonal skills. Mingin described the library media aide as a "front line position" involving direct dealing with teachers and students. While Mingin received several complaints from staff members about Roach's brusqueness, she never took any formal disciplinary action against her. In her only written evaluation of Roach's performance, Mingin wrote encouragingly that "Betsey has made major strides in this [area of interpersonal relations] with patrons; she now needs to focus her efforts with the IRC staff."

A great many of the duties performed by a "library media aide (middle school)" are similar to those for which Roach was responsible in her old job titles, including "enter[ing], maintain[ing] and updat[ing] bibliographic records;" "creat[ing], maintain[ing] and transfer[ing] database files;" "schedul[ing] usage of equipment;" "chang[ing] bulbs and [doing] minor repairs," "distribut[ing] audio-visual software;" "maintain[ing] inventory;" assist[ing] staff with usage of audio-visual equipment;" and "prepar[ing] library collection for automation." Other simple tasks, such as preparing purchase orders, assisting in shelving books and answering the telephone are easily learned without special training. In light of the rapidly changing technology, virtually anyone working in the computer field has to learn new programs and adapt to new ways of doing things..

Without offering the position to Roach, the Board hired Lorraine Croston as library media aide for the Maplewood Middle School and Suzane Metz as library media aide for the South Orange Middle School. Lorraine Croston had been a part-time secretary in the district and also had unspecified experience in private industry. Ironically, Roach had once instructed Croston in the use of the district's computer system when Croston was working as a parent volunteer in one of the elementary schools. Susan Metz had been a substitute secretary in the middle school library. She had no known background in computers, but has "the facility to learn." Neither one was particularly proficient in HyperCard or the other applications which the district plans on using in its libraries

The other new job title to which Roach makes claim is designated "technology instructional aide-elementary school" It too does not require a college degree or any certificate. However, the job requires "comprehensive knowledge of, and experience with, all educational technologies (TV, computer, CD-ROM, electronic mail)" and "expertise in operation, maintenance and repair" of computer and network systems. In addition, an important qualification is "strong interpersonal skills, including patience with novice users." Duties include "[a]ctively working with students and teachers to facilitate technology-integrated classroom assignments" and "[a]ssisting staff and students in set-up, use, safety requirements and care of equipment and materials." Mingin added that the technology instructional aide works "directly with the teacher" in the classroom and acts as "a teacher's aide." Persons hired by the district to fill the position of "technology instructional aide" do not appear to possess greater technical credentials than Roach. Marion Power, assigned as technology instructional aide to Seth Boydon School, was previously a lunch room aide in the district. Gail Martone, assigned to South Mountain School, was a substitute teacher.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Roach has acquired tenure in a clerical position and is entitled to preference in filling one of the new clerical positions created by the Board.

N.J.S.A. 18A:17-2(b) grants tenure to "[a]ny person holding any secretarial or clerical position" in a school district after "expiration of a period of employment of three consecutive calendar years in the district" or "[e]mployment for three consecutive academic years, together with employment at the beginning of the next succeeding academic year[.]" Since Roach has been continuously employed by the Board in one capacity or another for over ten years, there can be no doubt that she satisfies the three-year time requirement for tenure. But the Board insists that Roach does not have tenure because she never served "in a clerical position" within the meaning of the statute.

Appellate authority has broadly interpreted the scope of *N.J.S.A. 18A:17-2(b)*. Rejecting the argument that the words "secretarial" and "clerical" are synonymous, the court held that "the phrase 'clerical position' was intended to extend the statutory protection coverage beyond secretarial employment." *Barnes v. Jersey City Bd. of Educ.*, 85 *N.J. Super.* 42, 45 (App. Div. 1964). More importantly, the court declared

that since tenure statutes are intended to secure efficient public service by protecting public employees in their employment, "the widest range should be given to the applicability of the law." *Barnes*, at 45.

Generally, the dictionary definition of "clerk" is "one employed (as in a business office) to keep records or accounts or to perform more or less routine office tasks." *Websters New International Dictionary* 421 (3d ed. 1976). See also, *Random House College Dictionary* 251 (Rev. ed. 1984), defining "clerk" as "a person employed, as in an office, to keep records, accounts, files, handle correspondence, or the like." Courts too have defined "clerk" in terms of "one employed to keep records or accounts; a scribe; an accountant." *State ex rel. City of Cincinnati v. Urner*, 147 Ohio St. 305, 70 N.E. 2d 881, 883 (Sup. Ct. 1947). Clerical assistants are usually minor functionaries "acting under the supervision of an official of higher rank or grade." Cf. *Sullivan v. McOsker*, 84 N.J.L. 380, 382 (E. & A. 1912) (warden selected and appointed by county sheriff).

Some school law decisions in New Jersey draw a distinction between "clerks" who are eligible for tenure and "aides" who are not. Recently, in *Berardi v. Orange-Maplewood Sch. Dist.*, OAL Dkt. EDU 7531-94 (April 11, 1995), *adopted*, (Comm'r May 30, 1995), the Commissioner of Education ruled that a so-called "clerical aide" in the same South Orange-Maplewood school district is a "clerk" rather than an "aide." Proofs established that a clerical aide's duties included checking student attendance, reporting absences to parents, recording incoming telephone messages, sorting mail, writing detention slips, and doing filing and photocopying for teachers. Considering "the nature of her job duties" and the broad definitional range of clerical duties, the Commissioner determined that Berardi has statutory tenure protection. *Berardi*, slip op. at 12.

Similarly, in *Jacobsen v. Union City Bd. of Educ.*, OAL Dkt. EDU 10340-82 (Aug. 1, 1983), *adopted*, (Comm'r Sept. 16, 1983), *aff'd* (St. Bd. Feb. 1, 1984), the Commissioner decided that a "library assistant clerk" attained tenure in a clerical position. A library assistant clerk's duties consisted of "typing of cards and records, filing, ordering films, maintaining records of the library collection, typing of records used in the annual report, opening mail, keeping records on the use of the library and book and magazine circulation, and performing, on occasion, clerical duties in the school office." *Jacobsen*, slip op. at 8. Additional indications that the position is clerical include use of the word "clerk" in the job title, budgeting of her salary on the line item

for secretarial and clerical assistants, and the absence of county superintendent approval for an aide position. While the administrative law judge had given dispositive weight to the title designation, the Commissioner examined all of the factors, particularly "whether her duties were basically clerical in nature." *Jacobsen*, at 14. In so doing, the Commissioner acted consistently with the well-established principle that actual duties rather than title are controlling and that substance should prevail over form. See *Quinlan v. North Bergen Twp. Bd. of Educ.*, 73 N.J. Super. 40, 49-50 (App. Div. 1962). Accord, *Veimeister v. Prospect Park Bd. of Educ.*, 5 N.J. Super. 215, 218 (App. Div. 1949); *Beaute v. North Arlington Bd. of Educ.*, OAL Dkt. EDU 0295-80 (July 28, 1981), *adopted*, (Comm'r Sept. 14, 1981), *aff'd* (St. Bd. Feb. 3, 1982).

In one unreported decision, the Commissioner found that a "learning resource center aide" was properly categorized as an "aide" position and, thus, ineligible for tenure. *Rossi v. Willingboro Twp. Bd. of Educ.*, Agency Dkt. 294-8/78 (Sept. 24, 1980), *adopted* (Comm'r Nov. 7, 1990), *aff'd* (Aug. 5, 1981). Every one of Rossi's duties involved *assisting* others in tasks that were largely clerical, such as processing books, supplies and materials, preparing student displays and supplementary instructional information, checking out and retrieving library materials, performing housekeeping chores, and cataloging and taking care of audiovisual materials in the resource center. Significantly, the county superintendent had approved the title as an aide position. N.J.A.C. 6:11-4.6 mandates that:

School aides and/or classroom aides, assisting in the supervision of pupil activities under the direction of a principal, teacher or other designated certified professional personnel, shall be approved by the county superintendent of schools.

Accordingly, the Commissioner determined that a "learning resource center aide" is a paraprofessional who assists the librarian and teaching staff, much like a classroom aide helps certified teachers or a nurse's aide helps a licensed school nurse. As the name implies, an aide's primary function is to aid professionals by relieving them of easy or repetitive tasks which do not require extensive training and expertise.

Applied to the present situation, the case law strongly supports the conclusion that Roach served "in a clerical position." First and foremost, her duties, especially delivering audiovisual materials to and from school buildings, doing maintenance work and simple repairs, keeping inventory, cataloging the district's holdings and inputting

data into the new computer system, were predominantly clerical in nature. That alone justifies treatment of her position as clerical. Certainly, her job responsibilities fell within the "wide range" of tenure protection envisioned by the Appellate Division in *Barnes*. Second, her title "media aide (clerical)" was inherently ambiguous and equally suggestive of a clerk's duties as of an aide's duties. Unlike *Rossi*, this is not a case in which the school board had "unfailingly categorize[d] her as an aide." (slip op. at 5). Her title is more reminiscent of the "clerical aide" title in *Berardi*, which the Commissioner regarded as a clerical position. Third, as far as the record reflects, the Board never obtained approval of the county superintendent for establishment of a paraprofessional position known as "media aide." Notwithstanding that Roach worked under the supervision of someone else (like everyone else in the district, other than the chief school administrator who reports directly to the Board), she had her own unique duties to perform and did not merely assist others in performing their professional responsibilities. Consequently, she was not an "aide" in the sense that term is used in *N.J.A.C. 6:11-4.6*.

It is readily apparent from the record that the Board manipulated Roach's job title and assignments in an attempt to divest her of tenure protection. Many of the duties of the new "library media aide" are Roach's old duties carried over under a different name and most of the rest are a natural extension of work she previously performed in her clerical position. To a lesser degree, the same may be said of the new "technology instructional aide" position as well, although it also has elements characteristic of a classroom aide's position.⁶ Roach has at least as much technical knowledge and experience with computers as any of her successors. If the Board had legitimate concerns about Roach's interpersonal skills (which were as much a requirement of her prior positions as the newly-created ones), then it should have brought formal disciplinary charges against her, rather than trying to circumvent her tenure rights by redefining her job title.

Finally, the Board challenges the Commissioner's subject matter jurisdiction, arguing that secretarial and clerical employees, even those with tenure under *N.J.S.A. 18A:17-2(b)*, do not enjoy the seniority protection available to certified teaching staff members, except insofar as conferred under a collective negotiating agreement. Here, however, Roach's rights arise not by virtue of seniority, but because the Board has hired *nontenured* employees to do clerical work for which she possesses the necessary

⁶The record does not disclose whether or not the district sought county superintendent approval of the "technology instructional aide" position.

skills and qualifications. Succintly stated, an employee with statutory tenure is entitled to retention as against a nontenured employee. *Capodilupo v. West Orange Twp. Bd. of Educ.*, 218 N.J. Super 510 (App. Div. 1987). Seniority provides a mechanism for ranking job rights among *tenured* teaching staff members, but does not create comparable rights for nontenured employees. *Bednar v. Westwood Bd. of Educ.*, 221 N.J. Super. 239 (App. Div. 1987). See also *Sheridan v. Ridgefield Park Bd. of Educ.*, 1976 S.L.D. 995 (Comm'r Dec. 17, 1976), holding that, despite the absence of applicable seniority standards, a tenured secretary has a greater right to a secretarial position than a non-tenured secretary. Since the matter involves interpretation of the tenure statutes, the present dispute falls squarely within the Commissioner's proper jurisdiction. N.J.S.A. 18A:6-9.

Order

It is **ORDERED** that the South Orange-Maplewood Board of Education immediately restore Betsey Roach to a full-time ten-month clerical position, together with back pay and lost benefits from the date of the reduction.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Aug. 21, 1995
DATE

Ken R. Springer
KEN R. SPRINGER, A.J.

8/22/95
DATE

Receipt Acknowledged:
[Signature]
DEPARTMENT OF EDUCATION

AUG 23 1995
DATE

Mailed to Parties:
[Signature]
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

List of Witnesses

1. Betsey Roach, media aide, South Orange-Maplewood School District
2. Geraldine Renz, retired office manager and secretary, South Orange-Maplewood school district
3. Renee Gruenwald, special education teacher, South Orange-Maplewood school district
4. Mary Scianino, elementary school librarian, South Orange-Maplewood school district
5. Al Ramey, NJEA field representative
6. Marge Mingin, director of media and technology, South Orange-Maplewood school district
7. Patrick Attanasio, audio-visual coordinator, South Orange-Maplewood school district
8. Myron Blasi, former assistant superintendent for personnel, South Orange-Maplewood school district
9. Dr. Joseph Duchesneu, Human Resources consultant

List of Exhibits

No.	Description
J-1	Board Meeting Minutes of the South Orange-Maplewood school district, dated April 26, 1993
J-2	Board Meeting Minutes of the South Orange-Maplewood school district, dated February 22, 1993
J-3	Board Meeting Minutes of the South Orange-Maplewood school district, dated November 16, 1992
J-4	Board Meeting Minutes of the South Orange-Maplewood school district, dated May 18, 1992
J-5	Board Meeting Minutes of the South Orange-Maplewood school district, dated August 26, 1991
J-6	Board Meeting Minutes of the South Orange-Maplewood school district, dated April 22, 1991
J-7	Board Meeting Minutes of the South Orange-Maplewood school district, dated March 18, 1991
J-8	Board Meeting Minutes of the South Orange-Maplewood school district, dated October 1, 1990
J-9	Board Meeting Minutes of the South Orange-Maplewood school district, dated March 19, 1990
J-10	Board Meeting Minutes of the South Orange-Maplewood school district, dated February 26, 1990

- J-11 Board Meeting Minutes of the South Orange-Maplewood school district, dated January 22, 1990
- J-12 Board Meeting Minutes of the South Orange-Maplewood school district, dated January 8, 1990
- J-13 Board Meeting Minutes of the South Orange-Maplewood school district, dated October 23, 1989
- J-14 Board Meeting Minutes of the South Orange-Maplewood school district, dated August 1, 1983
- Salary Guides
- J-16 Salary Guides for the South Orange-Maplewood school district for the 1992-95 contract
- J-17 Salary Guides for the South Orange-Maplewood school district for the 1990-92 contract
- J-18 Salary Guides for the South Orange-Maplewood school district for the 1988-90 contract
- J-19 Job Description for Library Media Aide (Middle Schools), dated June 2, 1993
- J-20 Job Description for Technology Instructional Aide (Elementary Schools), dated May 19, 1993
- J-21 Job Description for District media technician (Senior), dated July 1989
- J-22 Job Description for Media Aide (Delivery/Support personnel), dated July 1989
- J-23 Job Description for Media Aide (Clerical), dated July 1989

- J-24 Job Description for Media Aide (Clerical), dated December 1988
- J-25 Job Description for Clerical Aide
- J-26 Job Description for Secretary S-3, 10 months
- J-27 Job Description for Data Secretary S-3, 12 months
- J-28 Job Description for Secretary Library-Main Office, S-3, 10 months
- J-29 Employment Contract for 1993-94
- J-30 Employment Contract for September 1, 1992 to June 30, 1993
(Delivery Aide)
- J-31 Employment Contract for July 1, 1992 to June 30, 1993
(Media Aide)
- J-31 Employment Contract for July 1, 1992 to June 30, 1993 (Media
Clerical Aide/Delivery IRC)
- J-32 Employment Contract for July 1, 1992 to June 30, 1993
(Media Clerical Aide/Delivery IRC)
- J-33 Employment Contract for September 1, 1991 to June 30, 1992
- J-34 Employment Contract for March 6, 1991 to June 30, 1991
- J-35 Employment Contract for July 1, 1990 to June 30, 1991
- J-35(a) Employment Contract for July 1, 1990 to June 30, 1991
- J-36 Employment Contract for July 1, 1989 to June 30, 1990
- J-37 Employment Contract for July 1, 1988 to June 30, 1989
- J-38 Employment Contract for 1987-88

- J-39 Employment Contract for July 1, 1986 to June 30, 1987
- J-40 Employment Contract for 1985-86
- J-41 Employment Contract for 1984-85
- J-42 Employment Contract for August 1, 1983 to June 30, 1984
- J-43 Letter, Duchesneau to Roach, dated September 10, 1993
- J-44 Letter, Duchesneau to Roach, dated August 25, 1993
- J-45 Negotiated changes in SOMEA contract, dated August 25, 1993
- J-46 Letter, Roach to Board, dated August 16, 1993
- J-47 Summary of conferences Re: New Titles, dated July 30, 1993
- J-48 Letter, Gruenwald to Duchesneau, dated July 28, 1993
- J-49 Memo, Duchesneau to all staff re: Vacancies, dated May 20, 1993
- J-50 Memo, Rosenberg to Roach, dated April 27, 1993
- J-51 1992-1995 - Language changes
- J-52 Memo, Mingin to Roach, dated November 11, 1992
- J-53 Letter, Blasi to Roach, dated April 23, 1991
- J-54 Letter, Blasi to Roach, dated April 23, 1991
- J-55 Letter, Blasi to Roach, dated March 20, 1991
- J-56 Letter, Blasi to Roach, dated October 2, 1990

- J-57 Letter, Blasi to Roach, dated May 22, 1990
- J-58 Letter, Blasi to Roach, dated March 20, 1990
- J-59 Letter, Blasi to Roach, dated February 27, 1990
- J-60 Letter, Blasi to Roach, dated January 9, 1990
- J-61 IRC delivery schedule, dated January 4, 1990
- J-62 Memo, Blasi to staff, dated November 30, 1989
- J-63 Letter, Blasi to Roach, dated November 21, 1989
- J-64 Performance evaluation, dated April 5, 1989
- J-65 Performance evaluation, dated May 4, 1987
- J-66 Letter, Blasi to Roach, dated October 1, 1986
- J-67 Letter, Bihler to Roach, dated November 15, 1983
- J-68 List of duties (4 pgs) - undated
- P-1 Copy of twenty four notices of opportunity to apply for intervention or participation status
- P-2 Job posting for "audio visual library technician," dated June 8, 1983
- P-3 Letter to Betsey Roach from Charles H. Bihler, dated November 15, 1993
- P-4 Handwritten settlement agreement between the Board of Education for the South Orange-Maplewood School District and the South Orange-Maplewood Education Association, February 27, 1991

- P-5 Letter to Joanne L. Butler, Esq. from Sanford R. Oxfeld, Esq., dated June 6, 1991
- P-6 Chart of the employment history of Betsey Roach, prepared at the hearing on July 25, 1994
- P-7 Document entitled "Bibilofile Operation," undated
- P-8 Catalog of educational media, dated 1992-94
- P-9 Id. Instructional resource center statistical profile, dated 1988
- P-10 Id. Catalog of educational media, dated May 1984
- P-11 Arbitrator's opinion and award in the arbitration entitled South Orange-Maplewood board of education and South Orange-Maplewood education association, Dkt. No. AR-90-383, dated September 14, 1990
- R-1 Job description for "AV technician with specialization in electronics," dated April 1980

BETSEY ROACH, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE TOWN- : DECISION
 SHIP OF SOUTH ORANGE-MAPLEWOOD,
 ESSEX COUNTY, :
 :
 RESPONDENT. :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The Board’s exceptions were timely filed in accordance with N.J.A.C. 1:1-18.4 and N.J.A.C. 1:1-18.8. However, petitioner’s reply exceptions were untimely, pursuant to N.J.A.C. 1:1-18.4(d) and, consequently, were not considered.

The Board’s exceptions initially assert that the finding that petitioner held a clerical position, subject to tenure, rather than an aide’s position, ignores critical facts and applicable case law. Specifically, the Board contends that the Administrative Law Judge (ALJ) disregarded critical aspects of the Commissioner’s determination in Rossi, supra. There, “***[t]he Commissioner acknowledged that some of the duties of Petitioner Rossi were clearly clerical ***and some clearly were not clerical, and concluded that even if clerical duties predominate, the position was not necessarily a clerical one.***” (Board’s Exceptions at p. 3) The Board maintains that the evidence presented at the within hearing established that the nature of the duties in question in Rossi “***were even more typically clerical in nature than Petitioner

Roach's herein." (Id.) Yet, in Rossi, petitioner was found to hold an aide's position. Moreover, the Board attests that the ALJ dilutes the significance of the job title by disregarding "****the import of the Commissioner's acknowledgment in Rossi that the petitioner therein had been clearly identified as an 'LRC Aide' in board of education minutes thus making it clear what her position was at all times." (Id.) The Board affirms that, in the instant matter, petitioner's "clerical and delivery jobs have been consistently identified as 'aide' positions****." (Id.)

The Board further cites Cummins v. Board of Education of the Township of North Bergen, 1975 S.L.D. 271, 272-273 (1975) and Beute v. Board of Education of the Borough of North Arlington, Commissioner's Decision No. 395-81 (September 14, 1981), aff'd State Board (February 3, 1982) (unreported), to argue that the ALJ "has improperly extended the recognition of 'clerical' beyond even what is concluded in the more expansive definitions recognized in Commissioner's Decisions throughout the years." (Board's Exceptions at p. 4) In the instant matter, the Board attests that the evidence adduced at the hearing confirmed that petitioner actually refused to perform many of the "clerical" duties recognized by the Commissioner in prior decisions.

The Board additionally argues that the ALJ has crossed the jurisdictional line between the Commissioner of Education and the Public Employment Relations Commission (PERC) in that the within matter is not properly subject to review by the Commissioner of Education. The Board asserts that, to the extent the ALJ permitted testimony concerning previous arbitrations between the parties, such testimony "****constituted an attempt to obfuscate the issues in the pending matter concerning only Petitioner's entitlement, if any, to the protections of tenure." (Id. at p. 6) Further, the Board alleges that petitioner's claim of

entitlement to the new positions of Library Media Aide (Middle Schools) and Technology Instructional Aide (Elementary Schools) represents a misplaced reliance upon a provision in her February 27, 1991 settlement agreement which granted petitioner, in the event that the Media Aide positions were to be reduced, a “preference to such position that remains***.” (Id.) However, the Board maintains that this provision concerned only the then existing positions of Media Aide (Clerical) and Media Aide (Delivery/Support), and not any subsequent positions involving media-related duties. Nor, the Board continues, does this settlement agreement create an entitlement which can be litigated before the Commissioner of Education; rather, “[p]etitioner was obligated to pursue this issue before PERC.” (Id.)

Finally, the Board argues that, were the Commissioner to conclude that petitioner is entitled to the protection of tenure based on her past employment with the District, such protection cannot properly extend to the Library Media Aide (Middle Schools) and Technology Instructional Aide (Elementary Schools), since these positions “differ vastly from those previously held by Petitioner.” (Board’s Exceptions at p. 7) The Board argues that case law establishes that a person possessing clerical tenure is entitled only to positions for which she is qualified, and petitioner is not qualified for these positions. The Board, therefore, urges that the ALJ erred in concluding that the two new positions include many of the duties petitioner previously performed. Instead, the Board asserts that the testimony adduced at the within hearing establishes that the two new “positions were wholly distinguishable” from those previously held by petitioner, and petitioner does not possess the essential qualifications for the new positions. Specifically, the Board maintains that petitioner does not possess the requisite interpersonal skills with staff and students, a qualification which the initial decision minimized,

notwithstanding the unrefuted testimony “***that Petitioner was counseled on numerous occasions concerning her inability to interact with persons.” (Id. at pp. 7, 8)

Upon careful and independent review, the Commissioner concurs with the ALJ’s conclusion that, under the particular circumstances herein, “***[petitioner’s] job responsibilities fell within the ‘wide range’ of tenure protection envisioned by the Appellate Division in Barnes” (Initial Decision at p. 11), and that, therefore, she is entitled to preference in filling one of the new clerical positions created by the Board. (Id. at p. 8) In so concluding, the Commissioner finds that, notwithstanding the Board’s assertions, Rossi, supra, is not determinative in this matter. Rather, Petitioner Rossi’s job responsibilities, as noted by the ALJ, involved assisting others in performing tasks¹, functions which are attributed to school or classroom aides, as per N.J.A.C. 6:11-4.6. (Initial Decision at p. 10) Further, as the ALJ indicates and the Board does not dispute, the record reflects that neither the Media Aide (Clerical) position nor the Media Aide (Delivery) position was approved by the County Superintendent pursuant to N.J.A.C. 6:11-4.6(c), which requires a district to submit for approval the job description, duties and qualifications for each school aide or classroom aide to be employed.

Moreover, while the ALJ in Rossi, supra, found that supporting documentation clearly identified petitioner therein as an LRC Aide, and, “[i]t is clear what petitioner’s position at all times was,” Rossi at p. 7, the ALJ herein properly finds that petitioner’s title as Media Aide

¹ Rossi’s job responsibilities as LRC aide were as follows: “1. To assist with processing books, supplies, materials, magazines, journals, newspapers in the Resource Center. 2. To assist with preparation of displays to motivate student interest and to provide supplementary instructional information. 3. To assist in checking out and retrieving of materials. 4. To assist instructional staff with preparation of special bibliographies and reading lists. 5. To care for the housekeeping duties of the Resource Center. 6. To assist with roll taking. 7. To assist with general typing. 8. To assist with collecting and filing of free materials. 9. To assist with cataloguing and care of audio visual materials in the Resource Center. 10. To assist pupils with locating books and materials applicable to their individual needs.” Rossi v. Board of Education of the Township of Willingboro, Agency Dkt. No. 294-8/78 (September 24, 1980), adopted (Commissioner November 7, 1980), aff’d (August 5, 1981) (slip op. at p. 6)

(clerical) was “inherently ambiguous and equally suggestive of a clerk’s duties as of an aide’s duties. Unlike Rossi, this is not a case in which the school board had ‘unfailingly categorize[d]’ her as an aide.” (Initial Decision at p. 11)² The Commissioner recognizes that “[t]he duties performed, rather than the title of the position” are controlling and “we should look to substance rather than form.” (Beute, supra, at p. 14)

Finally, the Commissioner concurs with the ALJ that, inasmuch as this matter involves the interpretation of tenure statutes, it is within his jurisdiction.

Accordingly, the Commissioner adopts the initial decision of the Office of Administrative Law and orders that petitioner be restored to an appropriate position by virtue of her tenure rights under N.J.S.A. 18A: 17-2(b).

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

² Here, the Commissioner notes that the Board’s own submissions characterize petitioner’s jobs as “clerical and delivery jobs” which carried the title “aide.” (Board’s Exceptions at p. 3)

ULYSSES GREEN, :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE TOWN- : DECISION
 SHIP OF UNION, UNION COUNTY, :
 RESPONDENT. :
 _____ :

November 6, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

OAL DKT. NO. EDU 1644-94
AGENCY DKT. NO. 412-12/93

ULYSSES GREEN,

Petitioner,

v.

**BOARD OF EDUCATION OF
THE TOWNSHIP OF UNION,**

Respondent.

Donald D. Vanarelli, Esq., for petitioner

Steven F. Dorry, Esq., for respondent
(Hurley & Vasios, attorneys)

E. Robert Levy, Esq., for respondent
(Levy, Lybeck, Bertele & Jaworski, attorneys)

Record Closed: September 19, 1995

Decided: September 19, 1995

BEFORE RICHARD McGILL, ALJ:

Ulysses Green filed a petition with the Commissioner of Education, alleging violations of various provisions of the education laws by the Board of Education of the Township of Union (respondent) and requesting relief which included reinstatement to the position of

JROTC instructor, back pay, emoluments, attorney's fees and damages. A portion of the petition is based upon a request for reimbursement of attorney's fees and other costs and expenses related to the defense of criminal charges pursuant to *N.J.S.A.* 18A:16-6.1. The matter was transmitted to the Office of Administrative Law on February 22, 1994 for determination as a contested case.

Ulysses Green and Eleanor Green filed a related complaint and an amended complaint in the Superior Court of New Jersey, Law Division, Union County, bearing Civil Action No. UNN-L-007448-93 (the "lawsuit"). The lawsuit makes claims against various defendants including the respondent in this proceeding.

Prior to hearing, the parties agreed to a settlement which resolves both this administrative proceeding and the lawsuit in Superior Court. The parties have submitted settlement papers which include a stipulation of dismissal with prejudice, correspondence dated September 3, 1995 from petitioner's attorney, a release and a confidential settlement agreement. Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have agreed to the settlement as evidenced by their signatures or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Sept. 19, 1995
DATE

Richard McGill
RICHARD MCGILL, ALJ

9/21/95
DATE

Receipt Acknowledged:
DNA
DEPARTMENT OF EDUCATION

SEP 22 1995
DATE

Mailed to Parties:
Jeff Mani
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

am

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
SEP 19 11 39 AM '95

LAW OFFICES
Hurley & Vasios
A PROFESSIONAL CORPORATION
SHORT HILLS PLAZA
636 MORRIS TURNPIKE
SHORT HILLS, N.J. 07078-2678
(201) 467-1300
FAX (201) 467-7587

DANIEL M. HURLEY*
JAMES A. VASIOS*
THOMAS J. KELLY, JR.*
ROWENA M. DURÁN+*
DEBRA V. URBANOWICZ-PANDOS
LAUREN M. STROLLO

ROBERT W. THOMPSON
STEVEN H. DANIELS
PATRICIA M. BASS
DAVID R. COSGROVE+
LISA G. MAYER
MICHAEL R. SPEER
BENJAMIN H. HAFTEL†
SEAN C. SHEELY+

JUDITH B. DEER
PATRICK M. METZ
DENNIS B. A'BRIEN
ELIZABETH A. DALY
STEVEN F. DORRY#
NAOMI E. LINDER+
PATRICK J. SWEENEY

LEONARD ROSENSTEIN+
LEWIS B. COHN
OF COUNSEL

* CERTIFIED CIVIL TRIAL ATTORNEY
+ MEMBER OF N.J. & N.Y. BAR
o MEMBER OF N.J., MD. & D.C. BAR
MEMBER OF N.J. & PA. BAR
† MEMBER OF N.J. & D.C. BAR

September 18, 1995

Honorable Richard McGill, A.L.J.
Essex County Court House
185 Washington Street
Newark, New Jersey 07102

Re: Ulysses Green, et al. v. Dominick Farnoli, et al.
Our File No: 12.08335-DMH
Docket No. UNN-L-007448-93

Dear Judge McGill:

Enclosed please find an original and two copies of the following documents:

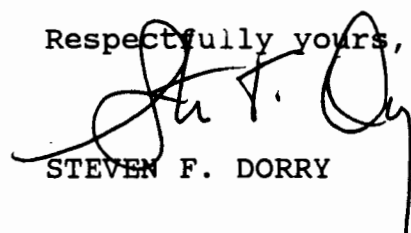
1. Stipulation of Dismissal with Prejudice as to the Petition of Appeal on Case No 412-12/93;
2. Correspondence dated September 3, 1995 from plaintiff's counsel redacting paragraphs 22 and 23 in the Confidential Settlement Agreement;
3. Release and Confidential Settlement Agreement.

The enclosed documents represent the entire settlement agreement between the parties. The settlement total is \$25,000.

Would you kindly file same and return a "filed" copy in the envelope enclosed.

Should you have any questions, please feel free to contact me.

Respectfully yours,



STEVEN F. DORRY

SFD:ml
Enclosure

cc: Donald D. Vanarelli, Esq.
E. Robert Levy, Esq.

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
SEP 19 11 39 AM '95

HURLEY & VASIOS

A PROFESSIONAL CORPORATION
636 MORRIS TURNPIKE
SHORT HILLS, N.J. 07078
(201) 467-1300

Attorneys for Respondent, Union Township Board of Education
File: 10.08472-DMH

ULYSSES GREEN,

Petitioner,

vs.

UNION TOWNSHIP BOARD OF
EDUCATION,

Respondent.

BEFORE THE COMMISSIONER OF
EDUCATION

CASE NO. 412-12/93

PETITION OF APPEAL
STIPULATION OF DISMISSAL
WITH PREJUDICE

The matter in difference in the above-entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and hereby is dismissed with prejudice and without costs in favor of or against either party.

Dated:

Donald D. Vanarelli

DONALD D. VANARELLI
Attorney for Petitioner

Daniel M. Hurley

DANIEL M. HURLEY
Attorney for Respondent

E. Robert Levy

E. ROBERT LEVY
Attorney for Respondent as to
Punitive Damages

DONALD D. VANARELLI

ATTORNEY AT LAW

211 NORTH AVENUE EAST

WESTFIELD, NEW JERSEY 07090-1444

ADMITTED TO PRACTICE LAW
IN NEW JERSEY & NEW YORK

TELEPHONE: (908) 232-7400

FACSIMILE: (908) 232-7214

SOMERSET COUNTY OFFICE
COURTYARDS AT PLUCKEMIN
318 RT 206 N. SUITE A-2A
P.O. Box 181
PLUCKEMIN, NJ 07978
658-5511

September 3, 1995

**VIA FACSIMILE TRANSMISSION
(201-467-7587) and REGULAR MAIL**Steven Dorry, Esq.
Hurley & Vasios, P.C.
636 Morris Turnpike
Short Hills, NJ 07078-2678**Re: Green vs. Union Township Board of Education
Docket No. UNN-L-007448-93
Case No. 412-12/93**

Dear Mr. Dorry:

Thank you for your letter dated August 31, 1995. I have discussed the matter with my clients. As a result, please be advised that plaintiffs agree to redact paragraphs 22 and 23 from the Confidential Settlement Agreement. Notwithstanding the redaction, however, both you and Mr. Levy indicated that payment of the settlement proceeds would be expedited. Accordingly, be advised that I will seek Court intervention immediately if I do not receive the proceeds within ten (10) days from the date of this letter.

Further, although paragraph 23 is also redacted, we agreed that the net settlement payment will be \$25,000.00, and that neither party would treat the settlement as wages.

That concludes the matter. Since a substantial period of time has passed since the parties settled, please make payment of the settlement proceeds immediately.

Very truly yours,



Donald D. Vanarelli

c: E. Robert Levy, Esq. (Via fax & regular mail)
Ulysses & Elnora Green

RELEASE

This Release dated July , 1995, is given
BY the Releasor(s) ULYSSES GREEN and ELNORA GREEN, referred to as "I",

TO UNION TOWNSHIP BOARD OF EDUCATION; DOMINICK FARGNOLI, individually and as President of the Board of Education of Union Township; ROBERT EVERETT, individually and as Vice-President of the Board of Education of Union Township; ROBERT BERGEN, individually and in his official capacity as Assistant Superintendent of Schools of Union Township, JAMES CAULFIELD, individually and in his official capacity as Superintendent of Schools of Union Township, MAX FELDMAN, LESLIE COLE, MICHAEL CALLEO, STEVEN EDWARDS, ALEX PASTUSHENKO AND GARY RESTIVO, all individually and in their official capacities as members of the Board of Education of Union Township; and all other officials, officers and employees of the Union Township Board of Education, in their capacities as public officials, public servants and individually, referred to as "You", if more than one persons signs this Release, "I" shall mean each person who signs this Release.

1. **Release.** I hereby release and give up any and all claims and rights which I may have against you. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. I specifically release the following claims:

(a) For any and all claims which were or could have been alleged in an action entitled Ulysses Green v. Union Township Board of Education bearing OAL Docket Number EDUOR 01644-94N and Agency Reference Number 412-12/93 instituted in the Office of Administrative Law in Newark, New Jersey;

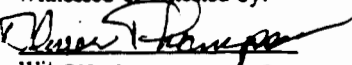
(b) For any and all claims which were or could have been alleged in an action entitled Ulysses Green and Elnora Green v. Union Township Board of Education, Dominick Fagnoli, Robert Everett, Robert Bergen, James Caulfield, Max Feldman, Leslie Cole, Steven Edwards, Michael Calleo, Alex Pastushenko and Gary Restivo bearing Docket Number UNN-L-007448-93 instituted in the Superior Court of New Jersey, Law Division, Union County.

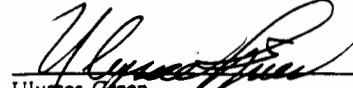

This payment is made in settlement of disputed claims to save further costs of litigation and it is not nor shall it be construed as an admission of liability on the part of any of the defendants as to any of the allegations made in the complaint, or any amendments thereto. This Release is subject to the terms and conditions of the Confidential Settlement Agreement attached hereto as Rider A.

2. **Payment.** I have been paid a total of \$25,000 in full payment for making this Release. I agree that I will not seek anything further including any other payment from you.

3. **Who is Bound.** I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. **Signatures.** I understand and agree to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal affixed.

Witnessed or Attested by:

WITNESSED BY: DANIEL M. HURLEY
Notary Public of New Jersey
My Commission Expires Mar. 9, 2000
Prepared by:
DANIEL M. HURLEY

 (Seal)
Ulysses Green
 (Seal)
Elnora Green

RIDER A

CONFIDENTIAL SETTLEMENT AGREEMENT

WHEREAS, the plaintiffs, Ulysses Green and Elnora Green, and the defendants, Union Township Board of Education, Dominick Fargnoli, Robert Everett, Robert Bergen, James Caulfield, Max Feldman, Leslie Cole, Steven Edwards, Michael Calleo, Alex Pastushenko, Gary Restivo and all other officials, officers and employees of the Union Township Board of Education in their capacities as public officials, public servants, and individually, have agreed to resolve the differences between them; and

WHEREAS, plaintiffs, Ulysses Green and Elnora Green, filed a Complaint and an Amended Complaint in the Superior Court of New Jersey, Law Division, Union County bearing Civil Action No. UNN-L-007448-93 (the "Lawsuit"), which made certain claims against the defendants, including but not limited to claims that they suffered damages allegedly caused by these defendants; and

WHEREAS, plaintiff Ulysses Green, has filed a Petition of Appeal in the Office of Administrative Law bearing OAL Docket No. EDUOR 01644-94N and Agency Reference No. 412-12/93 (the "Petition"), which made certain claims against the defendant, Union Township Board of Education for damages allegedly caused by the defendant, Union Township Board of Education; and

WHEREAS, the Lawsuit and Petition contain claims under various statutory and common-law theories and seek compensatory and punitive damages, and attorney's fees; and

WHEREAS, defendants have denied the allegations of the Lawsuit and Petition and continue to deny any and all liability for all past, present and future acts which might give rise to claims by Ulysses Green and Elnora Green for entitlement to any relief against the above named defendants;

WHEREAS, the parties realize the uncertainty and time-consuming nature of litigation and desire to avoid spending additional time and incurring additional expenses in litigation; and

WHEREAS, the parties hereto have reached a settlement of their differences which is embodied in this Confidential Settlement Agreement and acknowledge that this Confidential Settlement Agreement resolves all differences between and among the parties; and

WHEREAS, the parties desire to terminate all aspects of the Lawsuit and Petition and any and all claims which plaintiffs may have against the defendants caused by, due to, arising out of or directly or indirectly relating to the subject matter and claims asserted in the Lawsuit and Petition;

NOW, THEREFORE, in consideration of the mutual promises contained herein, plaintiffs and defendants, intending to be legally bound hereby agree as follows:

1. The Lawsuit presently pending in the Superior Court of New Jersey, Law Division, Union County, bearing Civil Action No. UNN-L-007448-93 (the "Lawsuit") is hereby settled in all respects as more particularly set forth in the within the Confidential Settlement Agreement;

2. The Petition presently pending in the Office of Administrative Law, bearing OAL Docket No. EDUOR 01644-94N and Agency Reference No., 412-12/93 (the "Petition") is hereby settled in all respects as more particularly set forth in the within Confidential Settlement Agreement.

3. The parties expressly intend that this Settlement Agreement shall include any claims for the award or assessment of compensatory and punitive damages, attorneys' fees and costs which might be recoverable under any law or court rule;

4. The terms and conditions of this Confidential Settlement Agreement, all the discussions leading to this Confidential Settlement Agreement, or any subsidiary undertakings required by this Confidential Settlement Agreement, including but not limited to the fact of payment and the amount being paid hereunder by defendants, shall be held strictly confidential by the plaintiffs and their counsel and shall be protected from disclosure as against all the world;

5. The terms and conditions of the Confidential Settlement Agreement, all the discussions leading to this Confidential Settlement Agreement, or any subsidiary undertakings required by this Confidential Settlement Agreement, including but not limited to the fact of payment and the amount being paid hereunder by defendants, shall not, without prior written consent of defendants to the plaintiffs, be disclosed to any person or entity other than the parties, their counsel and such employees, servants or agents of the defendants or their insurers who have a

need to know this information in order to do their jobs or to perform the promises herein set forth;

6. The parties may make such disclosure as is reasonably requested in response to inquiry of any Federal and State taxing authority;

7. In the event any of the defendants believe or have information that plaintiffs or plaintiffs' counsel have violated any of the terms or conditions stipulated herein, the aggrieved party or parties shall notify the alleged offending party or parties of the suspected breach of this Confidential Settlement Agreement, as soon as possible, by written notice to the offending party's counsel by Certified Mail, Return Receipt Requested. If counsel for any of the parties is no longer actively engaged in the practice of law, then the parties themselves shall be given notice at their last known address.

The allegedly offending party shall then have 10 days to respond to such notice. If the response is unsatisfactory to the aggrieved party or parties, the alleged offender(s) may be subject to an order to show cause why they should not be held in contempt by a Judge of the Superior Court of New Jersey;

8. If any such disclosure of the terms or conditions of the within shall occur, an application for contempt, including vacation of the non-disclosure provisions of this document, may be made to the Court. In the event that any party must institute legal proceedings to enforce the provisions hereof, or to obtain damages for the breach hereof, the prevailing party shall be

entitled to make application for the recovery of the reasonable legal fees and costs incurred in connection therewith; also,

9. There shall be no disclosure whatsoever by the plaintiffs or plaintiffs' counsel of any discovery which was propounded and exchanged between the parties. However, should there be a request for information by subpoena or otherwise from anyone, plaintiffs shall be obligated to advise defendants' counsel as set forth in the "notice" provisions of paragraph 7 of this document;

10. Disclosure of any confidential material by one party shall not release any of the remaining parties from their obligations under this Confidential Settlement Agreement and shall not constitute a basis for any disclosure by any of the other parties;

11. The execution of this Confidential Settlement Agreement shall not be construed as an admission of liability or violation of Federal, state, municipal or administrative laws, rules or regulations for any actions alleged in the Complaint, Amended Complaint or Petition of Appeal; and

12. It is agreed that, in consideration of the plaintiffs' agreement to dismiss the claims in the Lawsuit and Petition against defendants, to sign this Confidential Settlement Agreement, to execute the Release annexed hereto and the other undertakings herein, the plaintiffs shall receive the sum of Twenty-Five Thousand Dollars (\$25,000), with payment forthcoming and contributed in such amount as previously agreed upon and

accepted by the respective representatives for the parties on July 12, 1995;

13. Pursuant to the Release previously signed by the plaintiffs, Ulysses Green and Elnora Green, release each named defendant in all capacities, and also releases the heirs, executors, successors, assigns, employees, agents, representatives and attorneys of each such defendant from all claims, losses, causes of action, costs, damages, expenses, attorneys' fees, liabilities, indemnities, subrogation (contractual or equitable), duties and obligations (except only as otherwise expressly specified in this Confidential Settlement Agreement) of any nature whatsoever (hereinafter collectively referred to as "claims");

14. Plaintiffs, Ulysses Green and Elnora Green, shall not bring any lawsuit or administrative proceeding, in contract, tort or otherwise, against any of the defendants, their heirs, executors, successors, assigns, employees, agents, representatives and attorneys, before any tribunal, including any administrative tribunal or any court of the United States of America and State of New Jersey, for any action, event, omission or inaction in any way related to the factual circumstances surrounding the allegations set forth in the Complaint, Amended Complaint and Petition of Appeal filed in this case;

15. This Confidential Settlement Agreement shall inure to the benefit of, and be binding upon, the parties hereto, and their heirs, executors, representatives, successors and assigns;

16. The plaintiffs, Ulysses Green and Elnora Green acknowledge that they have relied upon the advice and representation of counsel selected by them respecting the legal liability of the parties hereby released;

17. The plaintiffs confirm they fully understand the meaning and intent of this Confidential Settlement Agreement. The plaintiffs further state and represent that they have had an opportunity to fully discuss and review the terms of this Confidential Settlement Agreement with their attorney and that he has done so. Plaintiffs further state and represent that they have carefully read this Confidential Settlement Agreement and the Release, understand the contents thereof, freely and voluntarily assent to all the terms and conditions thereof, and sign the same as their own free act;

18. To the extent this Agreement provides for future activity, it shall be controlled by and interpreted pursuant to the Laws of the State of New Jersey;

19. In the event it is determined that any provision hereof is violative of any law or rule, each provision shall be deemed severable, and the illegality of any provision shall cause the same to be deleted here from and shall not affect the balance of the provisions hereof;

20. This Confidential Settlement Agreement, the Release annexed hereto and the Stipulation of Dismissals constitute the entire Agreement between the parties and supersede any previous

agreements, promises, representations, warranties, understandings and negotiations, whether written or oral, between the parties hereto with respect to the subject matter hereof. It is further understood and agreed that no agreement, promises, representations, warranties and understandings have been made or reached by or between any of the parties hereto respecting the subject matter hereof other than those which are expressly contained herein and cannot be modified except by operation of law or upon the written agreement of all signatories;

21. The parties may execute this agreement on separate counterparts.

22. The payment to plaintiffs set forth in Paragraph 12 of this agreement shall be made no later than ten (10) days after the signed agreement is received by counsel for defendants.

23. The parties agree that the monies paid to plaintiffs hereunder are paid to compensate plaintiffs for the tort injuries suffered by them as alleged in the lawsuits asserted against defendants. It is the parties' understanding that no taxes are due and owing to any governmental taxing authority as a result of the payment made hereunder. No monies shall be withheld by defendants for the payment of taxes or for any other reason.

IN WITNESS WHEREOF, the parties intending to be legally bound hereby, have entered into this Settlement Agreement as of the day and year first written above.

WITNESSETH:

Dated: July 1995

Charles Lamer

Ulysses Green
ULYSSES GREEN

Elnora B Green
ELNORA GREEN

DONALD VANARELLI, ESQ.
Attorney for Plaintiffs

By Donald D Vanarelli
DONALD VANARELLI

Dated:

8/28/95

HURLEY & VASIOS
Attorneys for Defendants

By Daniel M Hurley
DANIEL M. HURLEY

Dated:

LEVY, LYBECK, BERTELE & JAWORSKI
Attorneys for Defendants
(as to punitive damages only)

By E. Robert Levy
E. ROBERT LEVY

Dated: 8/15/95

ULYSSES GREEN, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE TOWN- : DECISION
 SHIP OF UNION, UNION COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record and initial decision incorporating a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner is unable to accept the written settlement in its present form to the extent that the language of the settlement on its face does not appear to contemplate that the settlement document will become a matter of public record as contested matters before the Commissioner generally are, pursuant to N.J.S.A. 18A:6-9, once transmitted to the Office of Administrative Law pursuant to N.J.A.C. 6:24-1.1 and N.J.A.C. 1:1-1 et seq.

Accordingly, this matter is remanded to the Office of Administrative Law for revision of the settlement terms or other appropriate action.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

November 6, 1995
Date of Mailing, November 8, 1995

ALVIN FRANCIS, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE CITY : DECISION
 OF TRENTON, MERCER COUNTY, :
 :
 RESPONDENT. :
 _____ :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01338-95S

AGENCY DKT. NO. 461-11/94

ALVIN FRANCIS,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
CITY OF TRENTON, MERCER
COUNTY,**

Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzali, Fagella and Nowak,
attorneys)

Thomas W. Sumners, Jr., Esq., for respondent (Sumners, Council, George and Dortch,
attorneys)

Record Closed: September 26, 1995

Decided: September 27, 1995

BEFORE **JEFF S. MASIN, ALJ:**

This matter was transmitted to the Office of Administrative Law from the Department of Education, ("DOE") on February 2, 1995, for a hearing, pursuant to *N.J.S.A. 52:14B-1 to -21* and *N.J.S.A. 52:14F-1 to -13*.

This matter arises from a Petition of Appeal of Alvin Francis ("petitioner"), dated November 10, 1994, to the Commissioner of Education for consideration of a controversy which

arose between the petitioner and the Board of Education of the City of Trenton, Mercer County, ("respondent").

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement and Dismissal indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND**:


1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

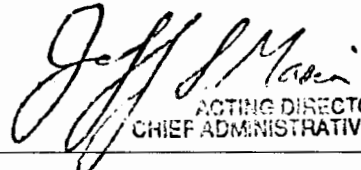
September 27, 1995
DATE


JEFF S. MASIN, ALJ
Receipt Acknowledged:

9/29/95
DATE

DNA
DEPARTMENT OF EDUCATION

OCT 04 1995
DATE
mjm
Attachment

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

RECEIVED

SEP 26 1 25 PM '95

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioner

ALVIN FRANCIS,	:	BEFORE THE OFFICE OF
	:	ADMINISTRATIVE LAW
Petitioner,	:	
	:	
v.	:	STIPULATION OF SETTLEMENT
	:	AND DISMISSAL
BOARD OF EDUCATION OF THE CITY OF:	:	
TRENTON, MERCER COUNTY,	:	OAL DOCKET NO. EDU-1338-95S
	:	
Respondent.	:	
	:	

The parties hereby agree that the within matter shall be deemed settled and withdrawn, subject to the following conditions.

1. Petitioner Alvin Francis, effective July 1, 1995 has been appointed to a 12-month position, on Step 4, Guide D of the collective bargaining agreement between Respondent and the Trenton Business and Technical Employees Association, at the annual salary of \$18,199.00, which is subject to adjustment pending the results of collective negotiations for the 1995-96 school year and thereafter.

2. In consideration of said appointment and salary rate, Petitioner agrees to withdraw the within petition of appeal and waives all claim for back pay.

3. Notwithstanding the above or anything to the contrary, this settlement agreement shall be deemed null, void, and of no

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

force or effect if Petitioner's 12-month employment is abolished, reduced, or terminated prior to July 1, 1996, and in such event the within petition of appeal shall be restored to active status, and shall be deemed to have been timely filed.

4. This agreement shall not preclude Respondent from taking any future action with respect to Petitioner's employment after July 1, 1996, provided that such action is otherwise lawful and permitted by the applicable collective bargaining agreement and by Petitioner's contract. However, this agreement shall not require Respondent to take any such action, nor shall this agreement be construed as a waiver of any legal rights that Petitioner may have if his 12-month position or employment is reduced, abolished or terminated.

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
Attorneys for Petitioner

Dated: 8/25/95

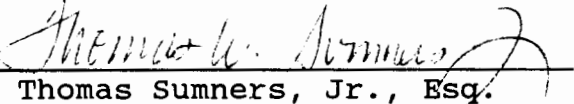
By: 
Richard A. Friedman, Esq.

Dated: 8-29-95


By: 
Alvin Francis

Summers, Council, George & Dortch
Attorneys for Respondent

Dated: September 11, 1995

By: 
Thomas Summers, Jr., Esq.

Dated: September 11, 1995

By: 
Alexander Brown, Board President


ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

ALVIN FRANCIS, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE CITY : DECISION
 OF TRENTON, MERCER COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The Commissioner notes, however, that the terms of the settlement appear to have already been effectuated through petitioner's appointment to a 12-month position, effective July 1, 1995, and admonishes the parties that settlements of controverted matters are of no force or effect and may not be implemented absent the Commissioner's approval, pursuant to N.J.A.C. 1:1-19.1.

Accordingly, the matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

November 6, 1995

Date of Mailing November 8, 1995

BOARD OF EDUCATION OF THE TOWN :
OF KEARNY, HUDSON COUNTY, :

PETITIONER, :

V. :

GLADYS CARTOGENA, F/K/A GLADYS :
MAYSONET, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

Nov. 6, 1995

BOARD OF EDUCATION OF THE TOWN	:	
OF KEARNY, HUDSON COUNTY,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	
	:	DECISION
GLADYS CARTOGENA, F/K/A GLADYS	:	
MAYSONET,	:	
	:	
RESPONDENT.	:	

For the Board, Kenneth P. Davie, Esq. (Cifelli & Davie)

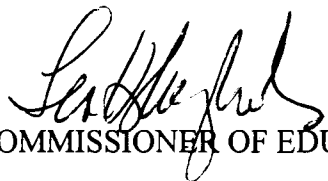
This matter having been opened before the Commissioner of Education on January 6, 1995, by way of a Petition of Appeal alleging respondent failed to pay the District outstanding tuition for her minor child's illegal attendance at the petitioning School District; and

The Commissioner having directed respondent to file an Answer to the Petition on January 26, 1995, again, on March 9, 1995 and, again, by letter sent by both regular and certified mail on April 20, 1995 and yet, again, on June 8, 1995 to respondent's address in Jersey City; and

The latter communication having been returned as Addressee Unknown, and accordingly resent by both regular and certified mail on July 24, 1995 to respondent's address in Kearny, and that letter having been returned as Unclaimed; and

Respondent having failed as of this date to comply with the directives of the Commissioner, so that each count of the charges against her is deemed to be admitted pursuant to N.J.A.C. 6:24-1.4; now therefore

IT IS ORDERED this _____ day of November 1995 that summary judgment shall be granted to the Board and Gladys Cartogena is hereby assessed tuition in the amount of \$11,123.42 covering the period of her child's illegal attendance in the public schools of the Town of Kearny.


COMMISSIONER OF EDUCATION

November 6, 1995

Date of Mailing November 8, 1995

W.Q. AND C.Q., on behalf of their son, K.Q., :

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE :
HUNTERDON REGIONAL HIGH SCHOOL :
DISTRICT, HUNTERDON COUNTY, :

DECISION

RESPONDENT. :

November 6, 1995

Date of Mailing November 9, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4317-95

AGENCY DKT. NO. 67-3/95

W.Q. AND C. Q.

ON BEHALF OF THEIR SON, K.Q.,

Petitioners,

v.

BOARD OF EDUCATION,

HUNTERDON REGIONAL HIGH

SCHOOL DISTRICT,

Respondent.

Joe E. Strauss, Esq., on behalf of petitioners (Strauss & Tauriello, attorneys)

James P. Granello, Esq., on behalf of respondent

Record Closed: July 24, 1995

Decided: August 11, 1995

BEFORE SOLOMON A. METZGER, ALJ:

This matter arises out of respondent's decision to expel K.Q. Petitioners requested a hearing pursuant to *N.J.S.A.* 18A:6-9 and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13. The case

was submitted on the record created before respondent and the OAL record closed on July 24, 1995, with receipt of legal memoranda.

The facts are undisputed. On Friday, November 18, 1994, at approximately 7:35 a.m., Jennifer A. Spieker, a vice-principal at respondent's high school, received a complaint from a student who said that he had seen K.Q. with a gun. She contacted Richard Schneebeli, another vice-principal, and a Mrs. Charles and within a few minutes they went to K.Q.'s classroom and brought him out. They searched his locker and found no gun. They did find three facsimile Chinese stars in his bookbag. These were sharp sheet-metal copies of the types of weapons popularized in kung fu movies. K.Q. explained that he had been pushed in the hallway a few times by T., a sophomore, and the Chinese stars were for protection. He had not sought the assistance of any school personnel about this problem, and had only revealed his dilemma to his parents a day or two earlier; his father had planned to call the school that day. When the administrators asked K.Q. if he had any knowledge concerning a gun at school that morning, he offered that W.M., another student, had a gun.

A BB gun was found in W.M.'s bookbag inside a folded brown grocery bag. When W.M. was asked where he had gotten the gun, he stated that he had received it from J.H., another student, on the school bus and was planning to use it in his backyard for target practice. He said that he had asked K.Q. to go to the front of the bus, get the bag from J.H. and give it to him. J.H. owned the gun and he, W.M., was to use it. The police were called and they determined that the gun was loaded and cocked with the safety on.

K.Q.'s teachers testified that they had no previous difficulty with him and that he appeared to be an average student.

J.H. testified that W.M. had pestered him for a week about the BB gun and although he was reluctant to lend it to him, he finally relented; he wrapped it in a brown shopping bag so no one would see it. J.H. sits toward the front of the bus and K.Q. and W.M. sit toward the back. J.H. handed the bag to K.Q. for delivery to W.M. He did not tell K.Q. what was in the bag and does not think that K.Q. asked. He did not load the gun, although it may have been loaded, and he did not cock it. He does not know what happened after he handed the bag to K.Q.

W.M. testified that he gets on the bus before K.Q. and on November 18, 1994, he sat near the window. When K.Q. got on the bus he sat in the aisle seat next to him. After J.H. boarded the bus and sat down about three seats in front of them, W.M. asked K.Q. to get a bag for him from J.H. K.Q. did so, returned and gave the bag to W.M. without looking inside. W.M. testified that he had not disclosed the contents of the bag to K.Q. in advance. Once W.M. accepted the bag he opened it, and at that point K.Q. did see the gun. He had on a previous occasion told K.Q. that he had urged J.H. to lend him the BB gun. The gun was loaded when he got it and he cocked it on the bus to get it ready for use later in the day when he went home. He and K.Q. are friends.

W.Q. testified that his son K.Q. had been a good student in middle school, was the most valuable player on his eighth-grade baseball team and has never been in any trouble. During the summer of 1994 K.Q. used scissors to cut Chinese stars out of sheet metal that was in their attic, and he flung the stars at cardboard boxes in the backyard until he became bored with them and stopped. W.Q. testified that he learned the day before this incident that K.Q. was being bothered by T., who had also harassed him in middle school. He was planning to call the school the day of the incident. K.Q. thought that if he simply brandished the Chinese stars in front of T., he would back off. K.Q. was a kung fu movie enthusiast. W.Q. testified that real Chinese stars are sharper and heavier than the facsimiles that his son produced; they did not fly very well.

C.Q. is K.Q.'s mother. She testified that if K.Q. is expelled from respondent's school, he will attend Sandhill School. There are ten students in the school and there is no normal school environment academically or socially. K.Q. has never been out of the mainstream and is not a classified student. Her son has already served a five-day suspension and was sentenced in juvenile court to counseling and community service.

K.Q. testified that W.M. asked him to get a bag from J.H., who was sitting a few seats in front of them on the school bus, and he did not know that there was a gun in the bag. W.M. had previously mentioned that he was going to borrow a BB gun from J.H., but he did not pay much attention to this and he has never used a BB gun himself. When W.M. showed him the gun, he was "appalled" and told W.M. to put it away. He said nothing to the authorities, but just went directly to his first class from the bus. K.Q. testified that he did not construct the Chinese stars as

weapons, they were just for playing around. He brought them to school to unnerve T., in case he bothered him again. T. has since been spoken to by a school counselor and the problem has been resolved. K.Q. testified that he plans to go to college and study computer programming. He and W.M. had no intention of using the gun and Chinese stars together to scare or confront T. This is the substance of the record.

Respondent's decision to expel K.Q. carries with it a presumption of validity and petitioners must show that this response was arbitrary and capricious. *Thomas v. Board of Educ. of Morris Tp.*, 89 N.J. Super. 327, 332 (App. Div. 1965); *Kopera v. West Orange Board of Educ.*, 60 N.J. Super. 288, 294 (App. Div. 1960). This has been done. The proofs reveal that K.Q. transferred a brown paper bag from J.H. to W.M. on the school bus. K.Q. denies any knowledge of the bag's content at the time of the transfer and both J.H. and W.M. corroborate this story. They have little interest in supporting K.Q.; to the contrary, his culpability might have served to diminish their entanglement. Moreover, W.M. told the same story when first confronted by school authorities, before there was any opportunity for contrivance. Thus, it appears that K.Q.'s only failure here was his decision to go on to class without reporting what he had seen.

The Chinese stars are another matter. They may not have been of high quality as weapons, but they were sharp metal objects and could have done harm in the circumstance under which K.Q. planned to use them. Their presence in school was a clear violation of policy (*see* Policy 5114, attached to both briefs).

The record contains no fact-finding by respondent and it is not entirely clear how it reached its expulsion decision. Counsel argues that it is no coincidence that the BB gun and the Chinese stars were in school on the same day and that respondent could have inferred that K.Q. and W.M. were planning to confront T. with these weapons. It is for this reason that W.M. cocked the gun on the school bus even though he was not going home for target practice until the end of the school day. The only support for this theory in the record is that the BB gun and the Chinese stars were brought to school on the same day. Otherwise, no witness testified to this and the only reference to it came in a question from respondent's attorney to K.Q., who denied it. Thus, even if respondent were thinking along these lines, the record does not reasonably permit

the coupling of these events. J.H. testified that W.M. had been asking him all week for the BB gun; it happens that he brought it in on this day.

Expulsion is the most serious punishment available to respondent and should be reserved for grave violations of school policy. The briefs reveal that W.M. was expelled and that J.H., apparently a classified student, received a five-day suspension. W.M.'s punishment seems appropriate; I cannot comment on J.H.'s discipline as I do not know how his handicap may have been factored into respondent's evaluation. K.Q. has no prior history of difficulty with school authorities, either in high school or in middle school. He appears to be an average student with aspirations toward higher education. To place him in a school that his mother describes, without contradiction, as educational purgatory could deleteriously effect his future plans. From this record, it appears that K.Q. acted immaturely, first by failing to inform his parents and school authorities timely that he was being harassed and then by attempting to redress the problem with his Chinese stars. His response is not, however, all that irregular for a fourteen-year-old boy. From this record the matter is no more sinister than this, and expulsion would be a disproportionate remedy. Moreover, K.Q. has already been suspended for five days in connection with this incident and has been through juvenile court, which imposed a sanction of counseling and community service.

Based on the foregoing, it is **ORDERED** that K.Q. be suspended for an additional ten school days.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/11/95
DATE

Solomon A. Metzger
SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

8/14/95
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 18 1995
DATE

Jeff S. Main
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cae

LIST OF EXHIBITS

On behalf of Petitioner:

None.

On behalf of Respondent:

None.

LIST OF WITNESSES

On behalf of Petitioner:

None.

On behalf of Respondent:

None.

95 OCT 10 PM 3:27

STRAUSS & TAURIELLO
Newmarket Building
63 Main Street
Flemington, New Jersey 08822
(908) 782-1115
Attorneys for Plaintiff,

K.Q. :
 :
 Plaintiff, :
 :
 v. :
 :
 BOARD OF EDUCATION OF :
 HUNTERDON CENTRAL REGIONAL :
 HIGH SCHOOL :
 :
 Defendant. :
 :

STIPULATION OF SETTLEMENT

THIS MATTER coming on the application of Strauss and Tauriello, attorney for appellant, (Joe E. Strauss, appearing) for K.Q. and his parents, Willard and Cindy Quinn, James Granello, Esquire, attorney for Hunterdon Central Regional Board of Education, appearing and the parties having pending before the Commissioner of Education exceptions to and cross exceptions to the recommended decision of the Honorable Solomon A. Metzger, Administrative Law Judge and the parties having discussed the matter and now desire and seek the consent of the Commissioner of Education for the entry of the within Stipulation of Settlement as follows:

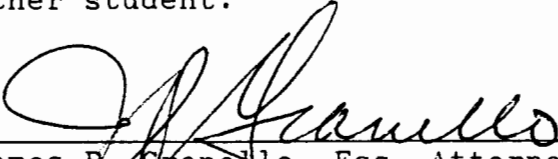
1. The parties agree that any record of expulsion referred to in K.Q.'s school record shall be totally and completely eliminated. The period of time that K.Q. was out of school (not officially suspended) shall be deemed a period of removal or exclusion.

2. K.Q. shall be deemed to have suffered all sanctions relating to the incident occurring on November 18, 1994 and, therefore, was fully reinstated as a student with all rights, privileges and obligations at the Hunterdon Central Regional High School on September 5, 1995.

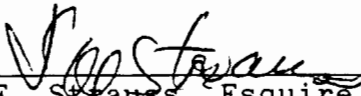
3. K.Q. has voluntarily entered into an agreement with the Hunterdon Regional Central High School has set forth in a Contract dated September 5, 1995. (See attached Exhibit "A"). The parties agree that this Contract has been undertaken by K. Q. and the school authorities in good faith with the understanding that this is intended to be part of a self-motivating tool to assist K.Q. and his teachers and K.Q.'s reintegration in the school system.

4. Questions relating to rank in class and similar issues shall be resolved directly between K.Q. and Mr. & Mrs. Quinn with the appropriate school administrators.

5. In all respects there shall be no special treatment or sanctions applicable to K.Q. that shall be different than is applicable to any other student.

By: 
James F. Granello, Esq. Attorney for
Hunterdon Central Regional Board of Education


Strauss & Tauriello

By: 
Joe E. Strauss, Esquire, Attorney for
K.Q. and Mr. & Mrs. Willard Quinn

W.Q. AND C.Q., on behalf of their son, K.Q., :
PETITIONERS, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
HUNTERDON REGIONAL HIGH SCHOOL
DISTRICT, HUNTERDON COUNTY, :
RESPONDENT. :

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Since the time of filing of the initial decision, the parties entered into a joint stipulation of settlement, which was subsequently submitted to the Commissioner of Education for review and approval.

Upon such review, the Commissioner modifies the initial decision to approve the settlement terms and adopts the settlement as the final decision in this matter.¹ The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

¹ In accepting the settlement agreement, the Commissioner of Education specifically makes no determination as to the initial decision's findings and conclusions on the merits.

November 6, 1995

Date of Mailing November 9, 1995 - 8 -

ROBERT B. SCHENCK AND ELIZABETH :
SCHENCK, on behalf of their minor child,
A.S. :

PETITIONERS, :

COMMISSIONER OF EDUCATION

V. :

DECISION

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF NORTH BRUNSWICK, :
MIDDLESEX COUNTY, :

RESPONDENT. :

November 6, 1995

Date of Mailing November 9, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2322-95

AGENCY DKT. NO. 15-1/95

**ROBERT B. SCHENCK AND
ELIZABETH SCHENCK, ON
BEHALF OF THEIR MINOR
DAUGHTER, A.S.,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF NORTH BRUNSWICK,
MIDDLESEX COUNTY,**

Respondent.

Robert and Elizabeth Schenck, petitioners, pro se

Anthony B. Vignuolo, Esq., for respondent (Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, attorneys)

Record Closed: September 18, 1995

Decided: September 26, 1995

BEFORE M. KATHLEEN DUNCAN, ALJ:

This matter was transmitted to the Office of Administrative Law on March 3, 1995, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does

OAL DKT. NO. EDU 2322-95

not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Sept 26, 1995

DATE

M. Kathleen Duncan

M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

Oct. 3, 1995

Deborah N. Antaresis

DEPARTMENT OF EDUCATION

Mailed to Parties:

Jeff S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT 06 1995

DATE

OFFICE OF ADMINISTRATIVE LAW

cc

RECEIVED
OFFICE OF N.J.
ADMIN. LAW
3 02 PM '95

BORRUS, GOLDIN, FOLEY, VIGNUOLO, HYMAN & STAHL
A Professional Corporation
2875 U.S. Highway #1
P.O. Box 7463
North Brunswick, New Jersey 08902
(908) 422-1000
Attorneys for Respondent

_____	:	BEFORE THE COMMISSIONER
	:	OF EDUCATION OF NEW JERSEY
Petitioner	:	
	:	
ROBERT B. SCHENCK and ELIZABETH	:	
SCHENCK on behalf of their	:	DOCKET NO. 15-1/95
daughter, ANGELA C. SCHENCK	:	
vs.	:	
	:	
Respondent	:	Civil Action
	:	
NORTH BRUNSWICK TOWNSHIP BOARD	:	STIPULATION OF SETTLEMENT
OF EDUCATION	:	
	:	
_____	:	

This matter having been amicably adjusted by and between the parties, it is hereby stipulated and agreed as follows:

1. That the quarterly grade for Angela Schenck for College Preparatory English III for the first quarter of the 1994-1995 school year is hereby amended to a grade of "B" instead of a grade of "C".
2. The Board acknowledges that the prior grade was improperly calculated as the result of a mathematical error.


ROBERT B. SCHENCK, Pro Se, Petitioner


ELIZABETH SCHENCK, Pro Se, Petitioner

BORRUS, GOLDIN, FOLEY, VIGNUOLO,
HYMAN & STAHL, P.C.
Attorneys for Respondent



ANTHONY B. VIGNUOLO

Dated:


9/10/98

P:\USERS\ABU\WP51\PLEADING\SCENCK.STP

ROBERT B. SCHENCK AND ELIZABETH :
SCHENCK, on behalf of their minor child,
A.S. :
PETITIONERS, :
COMMISSIONER OF EDUCATION
V. :
DECISION
BOARD OF EDUCATION OF THE TOWN- :
SHIP OF NORTH BRUNSWICK, :
MIDDLESEX COUNTY, :
RESPONDENT. :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

November 6, 1995

Date of Mailing November 9, 1995

408-95

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION HELD IN THE :
 SCHOOL DISTRICT OF TOMS RIVER : COMMISSIONER OF EDUCATION
 REGIONAL HIGH SCHOOL, OCEAN : DECISION
 COUNTY. :
 _____ :

November 6, 1995

Date of Mailing November 9, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4708-95

AGENCY DKT. NO. 105-4/95

**IN THE MATTER OF THE
ANNUAL SCHOOL ELECTION
HELD IN THE SCHOOL DISTRICT
OF TOMS RIVER REGIONAL HIGH
SCHOOL, OCEAN COUNTY.**

Michael J. Hrehovcik, petitioner, pro se

Thomas E. Monahan, Esq., for respondent Board of Education of Toms River Regional High School District (Gilmore & Monahan, attorneys)

Dina R. Khajezadeh, Esq., for respondent-intervenor Ocean County Clerk (John C. Sahradnik, Assistant County Counsel, attorney)

Record Closed: September 20, 1995

Decided: October 3, 1995

BEFORE M. KATHLEEN DUNCAN, ALJ:

Pursuant to the written request of defeated candidate Michael J. Hrehovcik in accordance with N.J.S.A. 18A:14-63.12, the Commissioner of Education determined to conduct an inquiry into the annual school election held on April 18, 1995 in the Toms River Regional High School District.

On May 10, 1995, the matter was transmitted to the Office of Administrative Law pursuant to N.J.S.A. 52:14F-1 to -13. A hearing was scheduled for July 12, 1995 at the Trenton office of the Office of Administrative Law. That date was adjourned, however, and the matter was rescheduled for August 8, 1995 because of petitioner's failure to provide answers to interrogatories and because the Ocean County Clerk had expressed an interest in intervening as a party respondent to address the question of the Commissioner's jurisdiction over absentee ballots. By letter order entered July 5, 1995, the unopposed application of the Ocean County Clerk for leave to intervene as a party respondent was granted. Thereafter, all parties submitted letter memoranda concerning the issue of the Commissioner's jurisdiction over absentee ballots. By order entered August 7, 1995, copy attached, the undersigned dismissed any allegations in the matter which relate to those who voted only by absentee ballot for the reasons expressed in the letter memoranda of the Toms River Regional High School District and the Ocean County Clerk, copies of which are attached hereto and made a part hereof as if set forth herein at length. The August 8, 1995 hearing date was adjourned and petitioner was directed to put in writing and forward to opposing counsel and to the undersigned administrative law judge a summary setting forth each and every fact he intended to rely upon to establish that violations occurred which affected the outcome of the election. The order also directed petitioner, if he still desired answers to interrogatories from the Toms River Regional High School district, to write out specific questions and send them to counsel with a copy to the undersigned.

Having heard nothing further from petitioner, on September 8, 1995 the undersigned wrote to him as follows:

To date I have received nothing from you in response to my August 7, 1995 letter order. Please have whatever you wish for me to consider on my desk by 5 p.m. on September 20, 1995. If I receive nothing from you, I will conclude that you are no longer interested in pursuing this matter, and I will dismiss the case for lack of prosecution.

Nothing was received from petitioner by the deadline specified in the letter, 5 p.m. on September 20, 1995. On September 26, 1995, at 4:37 p.m., petitioner transmitted to the undersigned by facsimile a copy of a letter addressed to opposing counsel, Thomas E. Monahan, Esquire, dated September 21, 1995, reciting in pertinent:

In accordance with the August 7, 1995 letter order of Judge Duncan, following is a summary of the facts upon which I will rely to establish violations which effected (sic) the election outcome. . . .

Petitioner's letter then sets forth ten enumerated paragraphs containing factual assertions upon which he intended to rely and the letter closes, "By separate letter, I will forward you my interrogatories".

Based upon all of the foregoing, I am hereby dismissing this matter for lack of prosecution by petitioner, Michael J. Hrehovcik. Mr. Hrehovcik ignored the deadline set forth in my September 8, 1995 letter. Furthermore, even if I had not sent that letter establishing the outside deadline, his failure to provide the information until September 26, 1995 or to promulgate interrogatories clearly indicates a lack of due diligence on his part. This is an election matter; the transmittal from the Commissioner of Education to the Office of Administrative Law, dated May 10, 1995, included a specific request for priority scheduling. That request was honored when I scheduled the matter for hearing on July 12, 1995. Because of petitioner's failure to supply responsive answers to interrogatories to counsel for the Board of Education, the hearing date had to be adjourned on two separate occasions. Petitioner's April 20, 1995 letter to the Commissioner requesting this hearing sets forth complaints related almost exclusively to absentee ballots. That letter provided:

As a defeated candidate for a seat on the Toms River Regional School Board, I have reason to believe due to the unprecedented number of absentee ballots (905) and the fact that the tally of these ballots (Baxter 798; Hrehovcik 107) did not follow the trend of the general election (Hrehovcik 2,810; Baxter 2, 478) but were in direct contradiction to that of the voting machines, a pattern of

election abuse may have existed in the recent school board election. Therefore, I am contesting the election, asking for a recount and requesting verification of the absentee ballots. I also request that you initiate an investigation concerning the dissemination, preparation, potential duplication, and other misuse of these absentee ballots. I am requesting a recount because there was no way poll workers were able to check whether those who voted by absentee ballots also voted at the polls.

I have proof of several questionable election practices and incidents that will justify these claims and would further request a meeting with you to discuss these improprieties.

This letter is being sent to you today to comply with the law which states that all requests must be sent to your office within five days of the election and a check for \$34 is enclosed to fulfill the requirement of 18A:14-63.6. If there is anything further required to perfect my request, please let me know immediately.

Your expedient reply is appreciated.

After I advised all parties during a telephone conference call on August 4, 1995 of my determination that issues concerning absentee ballots were within the jurisdiction of the Superior Court and the Ocean County Clerk, I directed petitioner (and confirmed this directive in writing on August 7, 1995) to set forth any facts which were not related to absentee ballots and upon which he would rely if a hearing were to be held in the within matter. The purpose of this directive was to determine whether there were any other remaining issues over which the Commissioner did have jurisdiction. Petitioner did not comply with my directive nor communicate with me in any way until September 26, 1995. Election matters require prompt closure so that school boards may proceed with the business statutorily delegated to them with reasonable assurance that the board members voting on such actions are those duly elected by the voters. In these type matters case law has made abundantly clear that any irregularities or violations established must be the producing cause of a result which otherwise would not have occurred.

The rule in our State is firmly established that if any irregularity or any other deviation from the election law by the election officials is to be adjudged to have the effect of invalidating a vote or an election, where the statute does not so expressly provide, there must be a connection between such irregularity and the result of the election; that is, the irregularity must be the producing cause of illegal votes which would not have been cast or of defeating legal votes which would have been counted, had the irregularity not taken place, and to an extent to challenge or change the result of the election; or it must be shown that the irregularity in some other way influenced the election so as to have repressed a full and free expression of the popular will . . . *In re Wene*, 26 N.J. Super. 363, 383 (Law Div. 1953), *aff'd sub nom. Wene v. Meyner*, 13 N.J. 185 (1953)

The burden of establishing, with a reasonable degree of certainty, that violations have altered the election outcome which otherwise would have resulted is upon petitioner. *In re Application of Moffat*, 142 N. J. Super. 217, 224 (App. Div. 1976), *certif. den. sub nom. Princeton Twp. v. Bleiman*, 71 N.J. 527 (1976).

Even if I were to consider petitioner's untimely September 26, 1995 submission to me, which I specifically herein decline to do, it is impossible to see how any of the irregularities cited by petitioner, even if they in fact occurred, could have affected the election outcome. Furthermore, it does not appear that petitioner took any action to correct or arrest or redress the violations or violators at the time of the alleged occurrences; without specific evidence that 360 people would have voted differently but for the cited irregularities, petitioner's litany of complaints to the Commissioner after the fact may not be utilized to overturn the election simply because he does not like the results. Petitioner is not without a remedy to address any alleged wrongful conduct of the winning candidate or others; forums exist in both the civil and criminal courts to hear such grievances. The purpose of ordering a new election is not to punish successful wrongdoers; only where it is reasonably certain that election results do not express the will of the people will a new election be ordered. Even if all the facts set forth in petitioner's ten enumerated paragraphs could be established by a preponderance of the competent and credible

evidence, he would not be able to establish the necessary prerequisites for ordering a new election.

For the reasons set forth above, the within matter is hereby **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 3, 1995
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

October 5, 1995
DATE

D. Antonicato /k
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 11 1995
DATE

Jeff S. Main
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
CN 049
Trenton, New Jersey 08625
(609) 588-6633

M. Kathleen Duncan
Administrative Law Judge

August 7, 1995

Michael J. Hrehovcik
313 Cokes Drive
Toms River, New Jersey 08753

Thomas E. Monahan, Esquire
Gilmore & Monahan
10 Allen Street
P. O. Box 1540
Toms River, New Jersey 08754

Dina R. Khajezadeh, Esquire
Berry, Kagan, Sahradnik & Kotzas
212 Hooper Avenue
P. O. Box 757
Toms River, New Jersey 08754

RE: In the Matter of the Annual School Election
Held in the School District of Toms River
Regional High School, Ocean County
OAL DKT. NO. EDU 4708-95
AGENCY DKT. NO. 105-4/95

LETTER ORDER

Dear Mr. Hrehovcik and Counsel:

As I indicated during our telephone conference call on August 4, 1995, I have reviewed your respective letter memoranda concerning the Commissioner's jurisdiction over issues related to absentee ballots and I have concluded that the Commissioner lacks jurisdiction over such issues. Accordingly, it is hereby **ORDERED** that any allegations in the matter which relate to those who voted only by absentee ballot are hereby **DISMISSED**.

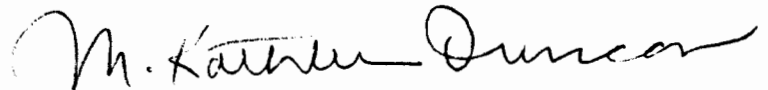
This will further confirm that I have adjourned the August 8, 1995 hearing date in this matter, and I have directed Mr. Hrehovcik to put in writing and forward to Mr. Monahan and to me a summary setting forth each and every fact he will rely upon to establish that violations occurred which affected the outcome of the election; this summary must include names, dates, and specifically described acts of wrongdoing. I will then review the summary to determine whether any issues remain in this case which require a plenary hearing, and will schedule another date, only

August 7, 1995

if necessary. Finally, if Mr. Hrehovcik still desires answers to interrogatories from Mr. Monahan's client, he should write out specific questions and send them to Mr. Monahan, with a copy to me. I will then schedule a conference call to advise you which, if any, of the questions must be answered. If your understanding from our conference call differs in any respect from the foregoing, please advise immediately.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** either upon interlocutory review, pursuant to N.J.A.C. 1:1-14.10, or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

Very truly yours,



M. KATHLEEN DUNCAN
Administrative Law Judge

MKD:cc

BY FACSIMILE AND REGULAR MAIL

RECEIVED
STATE OF N.J.
OFFICE OF ADM. LAW

GILMORE & MONAHAN

A PROFESSIONAL CORPORATION
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CHARLES W. HUTCHINSON

*Certified Civil Trial Attorney

THOMAS M. SAVON*

ANNEMARIE WILLIAMS*

STEPHEN K. FORAN

GUY P. RYAN**

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**Member N.J. & Fla. Bars

July 31, 1995

Honorable M. Kathleen Duncan
Administrative Law Judge
State of New Jersey, Office of Administrative Law
9 Quakerbridge Plaza
CN 049
Trenton, NJ 08625

**RE: In the Matter of the Annual School Election
Held in the School District of Toms River
Regional High School, Ocean County
OAL Docket No. EDU 4708-95
Agency Docket No. 105-4/95**

Dear Judge Duncan:

The issue has arisen as to the Commissioner of Education's jurisdiction over absentee ballots. Please accept this letter memorandum in support of the Toms River Regional School Board's position that in fact, both the statutory law and case law clearly reveal that the Commissioner is without jurisdiction over this issue.

School elections are specifically addressed within Chapter 14 of Title 18A of the New Jersey Statutes. The issue of absentee ballots is not addressed anywhere within the purview of that chapter. The recount provisions of the School Election Law provides that "Any defeated candidate...may...apply to the Commissioner of Education for a recount of votes cast at the election, whether by paper ballots or by voting machines." (*N.J.S.A.* 14:63.2) Again, it should be stressed that there is no mention of absentee ballots within the recount provisions of the statute. In fact, the statute specifically provides:

The recount procedure in a school election shall be conducted according to the procedure prescribed in Title 19 of the revised statutes, except as otherwise provided in Title 18A of the New Jersey Statutes. (*N.J.S.A.* 18A:14-63.14)

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COUNSELLORS AT LAW

Hon. M. Kathleen Duncan
July 31, 1995
Page 2

Thus, inasmuch as the issue of absentee ballots is not addressed within Title 18A, the law dictates that the provisions of Title 19, dealing with elections, shall govern.

N.J.S.A. 19:57-24 specifically provides for the determination of disputed absentee ballots as follows:

Disputes as to the qualifications of military service or civilian absentee voters to vote or as to whether or not or how any such military or civilian absentee ballots shall be counted in such elections shall be referred to the Superior Court for determination.

A review of the statutory law makes it abundantly clear that the Commissioner of Education is without jurisdiction over the issue of absentee ballots. Since the issue of absentee ballots is not specifically addressed within Title 18A, the provisions of Title 19 must govern and Title 19 provides that the Superior Court has jurisdiction over the issue of absentee ballots.

Several school board cases have also dealt directly with this issue, and each has unequivocally decided that the Commissioner of Education is without jurisdiction.

In the Matter of the Annual School Election Held in the Borough of Rutherford, Bergen County, 74 S.L.D. 381, the Commission received a request from a defeated candidate to recheck the totals of the election. The Commissioner authorized his representative to conduct a recheck of the totals on the voting machines used in the election, but the candidate's request for a recount of the absentee ballots was denied. The decision held:

The basis for this determination was grounded on the fact that the Commissioner has consistently held in past decisions that he is without authority to make any determination with respect to the results for the counting of absentee ballots...The procedures for counting such absentee votes are set forth in Title 19 of the New Jersey Statutes governing elections...must accept the certification of the County Board of Elections, which was previously made to the Secretary of the Board of Education and included in the vote totals of a school election as required by *N.J.S.A. 18A:14-28*. (See also: *In the Recount of Cast at the Annual School Election in the Township of Monroe, Gloucester County*, 1957-58 S.L.D. 79; *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Borough*

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Hon. M. Kathleen Duncan

July 31, 1995

Page 3

of Little Ferry, County of Bergen, 1960-61 S.L.D. 203; In the Matter of the Annual School Election held in the School District of the Township of Monroe, Gloucester County, 1973 S.L.D. 212, aff'd 74 S.L.D. 1413.

In the Matter of the Recount of Ballots Cast at the Annual School Election in the Borough of Little Ferry, County of Bergen, 1960-61 S.L.D. 203, it was held that:

The canvass of absentee ballots is not within the authority of the Commissioner of Education, whose jurisdiction is limited to controversies and disputes arising under the school laws. Procedures relating to absentee ballots are set forth in Title 19, governing elections.

The Commissioner's jurisdiction is clearly established by statute, which provides that the "the Commissioner shall have jurisdiction to hear and determine... all controversies and disputes arising under the school laws..." (*N.J.S.A. 18A:6-9*)

Finally, the fact that the Commissioner is without jurisdiction in such issues is firmly established in light of the age of the cases cited and in view of the fact that they have not been overturned.

In conclusion, the statutory, as well as case law, leave no room for interpretation. The Commissioner of Education is without authority as to the recount of absentee ballots. The recount of absentee ballots are strictly governed by Title 19 and fall within the jurisdiction of the Superior Court.

Respectfully yours,



ANNEMARIE WILLIAMS
For the Firm

AMW/rm

cc: Mr. Michael J. Hrehovcik
Mr. Robert Ciliento, Asst. Superintendent/Board Secretary
Dina R. Khajezadeh, Esq.

RECEIVED

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* New Jersey & Florida Bars
**Certified Civil Trial Attorney

Via Facsimile and Regular Mail

August 1, 1995

HONORABLE M. KATHLEEN DUNCAN, ALJ
State of New Jersey
Office of Administrative Law
9 Quakerbridge Plaza
CN 049
Trenton, New Jersey 08625

Re: In the Matter of the Annual School Election
Held in the School District of Toms River
Regional High School, Ocean County
OAL Docket No. EDU 4708-95
Agency Docket No. 105-4/95

Dear Judge Duncan:

As Your Honor is aware, this office represents the Ocean County Clerk in the above matter. Pursuant to your request, this letter memorandum is submitted in support of the Ocean County Clerk's position that the Commissioner of Education has no jurisdiction in a dispute concerning the validity of absentee ballots cast in a school election.

N.J.S.A. 18A:14-63.14 provides:

"The recount procedure in a school election shall be conducted according to the procedure prescribed in Title 19 of the Revised Statutes, except as otherwise provided in Title 18A of the New Jersey Statutes."

N.J.S.A. 19:57-24 provides, in pertinent part:

"Disputes as to the qualifications of military

HONORABLE M. KATHLEEN DUNCAN, ALJ

August 1, 1995

Page 2

service or civilian absentee voters to vote or as to whether or not or how any such military or civilian absentee ballot shall be counted in such election shall be referred to the Superior Court for determination."

N.J.S.A. 19:28-1 further provides:

"When any candidate at any election shall have reason to believe that an error has been made by any district board or any board of canvassers in counting the vote or declaring the vote of any election, he may, on or before the second Saturday following such election, or declaration of any board of canvassers, apply to a judge of the Superior Court assigned to the county wherein such district or districts are located, for a recount of the votes cast at the election in any district or districts ..."

Significantly, Title 18A does not provide a procedure for the recount of absentee ballots cast at a school election. As such, any challenge to the validity of absentee ballots cast in a school board election properly falls within the jurisdiction of the Superior Court pursuant to N.J.S.A. 19:57-24. Accordingly, the Commissioner of Education has no jurisdiction over this issue.

The Commissioner of Education has also consistently held that he has no jurisdiction over the counting of absentee ballots. Thus, in the case of I/M/O the Annual School Election Held in the School District of the Township of Monroe, Gloucester County, 1973 S.L.D. 212, aff'd, State Board of Education, 1974 S.L.D. 1413, the Commissioner of Education held that he is without authority to make any determination with respect to the results of the counting of the absentee ballots. As stated by the Commissioner, "The canvass of absentee ballots is not within the authority of the Commissioner of Education whose jurisdiction is limited to controversies and disputes arising under the school law. (N.J.S.A. 18A:6-9). Procedures for the counting of absentee votes are set forth in Title 19, governing elections." (emphasis in original) Township of Monroe, supra at 216.

As such, the Commissioner found that the Petitioner's complaint concerning the votes cast by absentee ballot was not a controversy under the school law and was not cognizable by the Commissioner of Education. He further concluded that he must accept the certification of the Gloucester County Board of Elections, as previously received by the Secretary of the Board of

HONORABLE M. KATHLEEN DUNCAN, ALJ
August 1, 1995
Page 3

Education of the Township of Monroe and included in the vote totals of the election as required by N.J.S.A. 18A:14-28. The cases of I/M/O the Annual School Election Held in the School District of the Borough of Rutherford, Bergen County, 1974 S.L.D. 381 and I/M/O the Annual School Election Held in the School District of Willingboro, Burlington County, OAL Docket No. 2018-80 (decided 4/21/80), aff'd State Board of Education, 1980 S.L.D. ___ (decided 7/2/80), are in accord. See also I/M/O the Annual School Election Held in the School District of the Borough of Fairview, Bergen County, 1981 S.L.D. ___ (decided 5/13/81) (Commissioner of Education has no power or jurisdictional authority to adjudicate disputes arising out of the counting, canvassing or allocation of civilian absentee ballots.)

Based upon all of the foregoing authorities, I would respectfully submit that the Commissioner of Education has no jurisdiction over the issue of the validity of the absentee ballots and, therefore, the Complaint should be dismissed as to this issue.

Respectfully submitted,



JOHN C. SAHRADNIK

JCS/emg

cc: Thomas Monahan, Esq. (via facsimile and regular mail)
Michael J. Hrehovcik (via regular mail)
M. Dean Haines (via interoffice mail)

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE :
SCHOOL DISTRICT OF TOMS RIVER : COMMISSIONER OF EDUCATION
REGIONAL HIGH SCHOOL, OCEAN : DECISION
COUNTY. :

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review, the Commissioner concurs with the initial decision of the ALJ that the petition herein is properly dismissed for failure to prosecute. Petitioner was notified, upon filing his request for an inquiry into alleged violations of election procedures, that this matter would be transmitted to the OAL for appropriate proceedings¹ and he would bear the burden of proving that the allegations he advanced against the Board affected the outcome of the election. However, as set forth by the ALJ, petitioner has demonstrated a lack of due diligence in pursuing his claims.

¹ While petitioner's initial letter to the Commissioner largely concerned alleged improprieties surrounding the casting of absentee ballots, the letter further stated, "****I also request that you initiate an investigation concerning the dissemination, preparation, potential duplication, and other misuse of these absentee ballots.****" Petitioner was apprised that this matter would proceed before the Commissioner only to the extent these allegations implicated the role of the Board pursuant to N.J.S.A. 18A:14-1 et seq.

Accordingly, for the reasons expressed in the initial decision, the within petition is dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

November 6, 1995

Date of Mailing November 9, 1995

409-95

JOHN BRANDI, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN- : DECISION
SHIP OF PARSIPPANY-TROY HILLS, :
MORRIS COUNTY, :
RESPONDENT. :

NOVEMBER 13, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11558-94

AGENCY DKT. NO. 420-10/94

JOHN BRANDI,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF PARSIPPANY-
TROY HILLS, MORRIS COUNTY,**

Respondent.

Arnold S. Cohen, Esq., attorney for petitioner (Balk, Oxfeld, Mandell & Cohen, attorneys)

Henry N. Luther, III, Esq., attorney for respondent (Dillon, Bitar & Luther, attorneys)

Record Closed: September 18, 1995

Decided: September 28, 1995

BEFORE MARIE P. SIMONELLI, A.L.J.

Petitioner appealed respondent's transfer of petitioner from ParsIPPany High School to three elementary schools in the district.

The matter was transmitted to the Office of Administrative Law and scheduled for a hearing on September 6, 1995.

Prior to the scheduled hearing date, the parties agreed to settle this matter. On September 18, 1995, they submitted the attached Settlement Agreement, dated September 15, 1995, which sets forth the terms of the settlement.

I have reviewed the record and settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.


I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 EAST STATE STREET, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the Judge and to the other parties.

Sept. 28, 1995

DATE



MARIE P. SIMONELLI, A.L.J.

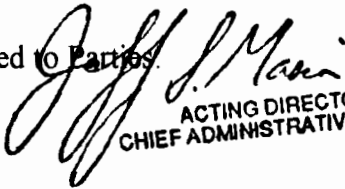
Receipt Acknowledged:

10/4/95

DATE

DNA

DEPARTMENT OF EDUCATION

Mailed to Parties

**ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**

OCT 19 1995

DATE

OFFICE OF ADMINISTRATIVE LAW

TO

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Attorneys for Petitioner

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Attorneys for Respondent

JOHN BRANDI,

Petitioner,

-vs-

PARSIPPANY TROY HILLS
BOARD OF EDUCATION,

Respondent.

OFFICE OF ADMINISTRATIVE LAW
STATE OF NEW JERSEY

OAL DOCKET NO: EDU 11558-94
AGENCY DOCKET NO: 420-10/94

SETTLEMENT AGREEMENT

The parties to the above-matter, having amicably resolved same, it is agreed as follows:

1. The Petition of Appeal is withdrawn;
2. The transfer of Mr. John Brandi from the Parsippany High School effective the start of the 1994-95 school year stands;
3. The Board's present practice for entertaining transfer requests will be followed as to the petitioner. Under this practice, in the Spring of the school year, an employee requesting a transfer will make a written request to the Office of Assistant Superintendent, and the request will be given due consideration. When a vacancy occurs during the course of the school year, there will be an internal posting, prior to any external advertising, and all employees who apply for a transfer in writing will be given due consideration for the position;
4. The Petition of Appeal is withdrawn without prejudice to

the right of the petitioner to pursue any pending or contemplated civil actions, and this settlement agreement, or the terms thereof, cannot be used as evidence in any such action, including John Brandi v. Parsippany Troy Hills Board of Education and Dr. Timothy Brennan, Docket No. MRS L-1568-95; and

5. This settlement fully resolves the dispute in this action.

BALK, OXFELD, MANDELL and COHEN
ATTORNEYS FOR PETITIONER, JOHN BRANDI

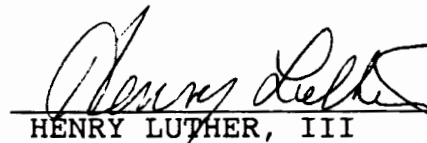
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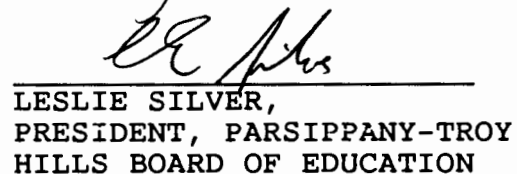

ARNOLD SHEP COHEN


JOHN BRANDI, PETITIONER

DILLON, BITAR, LUTHER
ATTORNEYS FOR RESPONDENT,
PARSIPPANY-TROY HILLS
BOARD OF EDUCATION

BY:


HENRY LUTHER, III


LESLIE SILVER,
PRESIDENT, PARPIPPANY-TROY
HILLS BOARD OF EDUCATION

DATED: September / 5 , 1995

OAL DKT. NO. EDU 11558-94

JOHN BRANDI,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWN-	:	DECISION
SHIP OF PARSIPPANY-TROY HILLS,	:	
MORRIS COUNTY,	:	
	:	
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

NOVEMBER 13, 1995

DATE OF MAILING NOVEMBER 13, 1995 - 4 -

W.Y. AND G.Y., on behalf of their minor
child, R.Y., :

PETITIONERS, :

V. :

BOARD OF EDUCATION OF THE TOWN-
SHIP OF MONTCLAIR, ESSEX COUNTY, :

RESPONDENT. :

_____ :

COMMISSIONER OF EDUCATION

DECISION



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 0836-95

AGENCY DKT. NO. 476-12/94

W.Y. and G.Y.,

Petitioners,

v.

**MONTCLAIR BOARD OF
EDUCATION,**

Respondent,

Phillip Dowdell, Esq., for petitioner

Brenda C. Liss, Esq., for respondent
(McCarter & English, attorney)

Record Closed: October 5, 1995

Decided: October 5, 1995

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

Statement of the Case

This matter was transmitted to the Office of Administrative Law on January 24, 1995, for determination as a contested case, pursuant to *N.J.S.A. 14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the terms of settlement and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 5, 1995
DATE

Ken R. Springer
KEN R. SPRINGER, A.J.

Receipt Acknowledged:

October 10, 1995
DATE

Deborah N. Antoinettes
DEPARTMENT OF EDUCATION

Mailed to Parties: Jeff Mann
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT 12 1995
DATE

OFFICE OF ADMINISTRATIVE LAW

al

PHILLIP DOWDELL, ESQ.
79 PATERSON STREET
P.O. BOX 828
NEW BRUNSWICK, NEW JERSEY 08903
ATTORNEY FOR PETITIONERS

RECEIVED
STATE
OFFICE OF ADMINISTRATIVE LAW
OCT 4 11 51 PM '95

W.Y and G.Y.,
PETITIONERS, :

v. : STATE OF NEW JERSEY

BD. OF ED. OF THE TWP. OF MONTCLAIR : OFFICE OF ADMINISTRATIVE
RESPONDENT : LAW
:
OAL DKT. NO. EDOUS 836-
95N
:
STIPULATION OF
SETTLEMENT AND
DISMISSAL

WHEREAS, this matter having come before the Office of Administrative Law on the petition of W.Y. and G.Y. (hereinafter, "Petitioners") concerning the denial by the Board of Education of the Township of Montclair (hereinafter, "Respondent") of Petitioners request that their daughter, R.Y., be provided an education free of charge in the Montclair School District pursuant to N.J.S.A. 18A:38-1 et seq.; and

WHEREAS, the Petitioners and Respondent (collectively, the "Parties") hereto want to resolve the pending petition without the necessity and expense of further action;

NOW, THEREFORE, in consideration of the promises and mutual obligations set forth herein, the Parties hereby agree as follows:

1. SETTLEMENT AMOUNT. Petitioners hereby agree to pay Respondent the total sum of TWO THOUSAND THREE HUNDRED FIFTEEN DOLLARS (\$2,315.00) in full satisfaction of the tuition requirements for R.Y. for the 1994-1995 school year.

2. METHOD OF PAYMENT. The means of payment shall be made by check, money order or cashiers check. Petitioners shall make payment to the "Board of Education of the Township of Montclair." After the full SETTLEMENT AMOUNT is received by Respondent it shall acknowledge same by forwarding correspondence to the Petitioners' attorney of record that stipulates the full amount of the agreed upon tuition requirement has been paid.

3. RELEASE OF CLAIMS. This Stipulation of Settlement and Dismissal shall operate as a complete and final disposition of the petition of Petitioners and of the efforts of Respondent to seek any further tuition requirements from G.Y and W.Y. relative to their daughter, R.Y.. Upon Petitioners fulfillment of their obligations herein Respondent agrees to release and forever discharge Petitioners, and their successors and assigns, from any and all claims arising from the attendance of R.Y. at the Montclair High School and Petitioners agree to release and forever discharge Respondent, and their successors and assigns, from any and all actions taken by same in seeking tuition from them relative to their daughter, R.Y..

4. ADMISSIONS. The Parties agree that nothing set forth herein constitutes any admissions of fact or determinations of law.

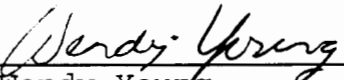
5. REPRESENTATIONS AND ACKNOWLEDGEMENTS. The Parties herein represent and acknowledge that they have the advice of counsel concerning this Stipulation of Settlement and Dismissal, have a full understanding of the promises and mutual obligations set forth herein, and shall abide by same until this matter is disposed of in the manner set forth herein. The Parties acknowledge that this Stipulation of Settlement and Dismissal, and the allegations, claims and facts regarding same, is subject to all applicable state and federal laws and regulations concerning privacy and confidentiality and each shall not disclose any information related to same unless ordered to by a court of competent jurisdiction.

IN WITNESS WHEREOF that the Parties have caused this Stipulation of Settlement and Dismissal to be executed.

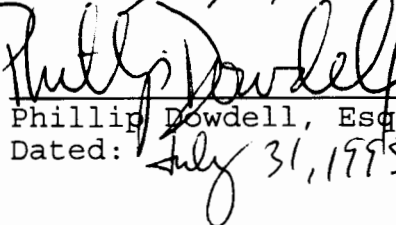
FOR PETITIONERS



Gary Young
Dated:

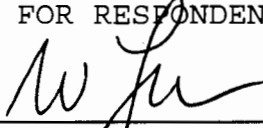


Wendy Young
Dated: July 31, 1995

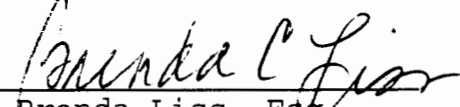


Phillip Dowdell, Esq.
Dated: July 31, 1995

FOR RESPONDENT



William Librera
Dated:



Brenda Liss, Esq.
Dated:

OAL DKT. NO. EDU 0836-95

W.Y. AND G.Y., on behalf of their minor :
child, R.Y., :
 :
PETITIONERS, :
 :
V. : COMMISSIONER OF EDUCATION
 :
BOARD OF EDUCATION OF THE TOWN- : DECISION
SHIP OF MONTCLAIR, ESSEX COUNTY, :
 :
RESPONDENT. :
 :
_____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

NOVEMBER 13, 1995

DATE OF MAILING NOVEMBER 13, 1995

EDWARD C. MUELLER, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

FRANK PANNUCCI, JOHN PAREDES, :
AND THE BOARD OF EDUCATION OF :
THE TOWNSHIP OF BRICK, OCEAN :
COUNTY, :

DECISION

RESPONDENTS. :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2152-95

AGENCY DKT. NO. 482-12/94

EDWARD C. MUELLER,

Petitioner,

v.

**FRANK PANNUCCI, JOHN PAREDES,
AND THE BRICK TOWNSHIP BOARD
OF EDUCATION,**

Respondents.

Edward C. Mueller, pro se

Nicholas Montenegro, Esq., for respondent (Wilbert & Montenegro, attorneys)

Record Closed: October 4, 1995

Decided: October 5, 1995

BEFORE JOHN R. TASSINI, ALJ:

STATEMENT OF THE CASE

The petitioner claims that the vote of the Brick Township Board of Education (BOE) approving a contract between the BOE and the Brick Township Education Association (BTEA) should be invalidated and voided.

The petitioner unreasonably refused to commit himself to a date for participation in a telephone conference for discussion of a schedule for discovery and a hearing of this case. Thereafter, the petitioner was notified in writing that he should send written consent to participation in such a conference on a proposed date or that, in the alternative, he should send a written explanation as to why he would be unavailable on the proposed date and that he should provide dates when he would be available for such a conference. The petitioner was further notified that, if his written consent, explanation, etc., was not received, it would be assumed that he was unwilling to participate in such a conference and his petition would be dismissed. The petitioner unreasonably failed to send any written consent, explanation, etc., and unreasonably failed to send other notice that he would be available for such a conference. Consequently, the petition is dismissed. N.J.A.C. 1:1-14.6, -14.14.

PROCEDURAL HISTORY
AND FINDINGS OF FACT

Since at least 1993, the petitioner has forwarded letters and other documents to the New Jersey Department of Education wherein he has criticized the BOE and its members individually and wherein he has demanded various kinds of relief. This case concerns the petitioner's "Amended Petition," filed on January 17, 1995, and his "2nd Amended Petition," filed in September 1995. However, a review of the petitioner's actions before those dates is useful for an understanding of the nature of the case.

In the petitioner's February 12, 1993 letter to the New Jersey Department of Education, he stated that he "intend[ed] to appeal . . . the Department's restoration" of money to the BOE's 1992-93 budget. ALJ-1. In the Department's February 17, 1993 letter to the petitioner, it notified him that only the BOE and the Brick Township governing body had standing to so appeal. ALJ-2.

In the petitioner's August 29, 1994 letter to the Ocean County superintendent of schools, he referred to "two matters of protest with regard to actions of the [BOE]": First, the petitioner

wrote that the BOE had notified him that he could use the copy of the Department of Education rules maintained in the BOE's office; however, the petitioner (apparently, then a BOE member) asked the Department to "require" the BOE to supply each member of the BOE with a copy of the rules. Second, the petitioner referred to "Pannucci v. Mueller," "a complaint now pending" wherein BOE member Pannucci sought "to disqualify [the petitioner's] seat on the [BOE]"; the petitioner alleged that he had made a motion that the BOE "provide [to him] defense counsel of [his] choice" to defend the complaint; the petitioner alleged that Mr. Pannucci had voted against the motion, so that the BOE's vote was "3-3" and the motion failed; and the petitioner "ask[ed] that the Department disqualify Mr. Pannucci's vote and require the [BOE] to provide defense counsel as requested." ALJ-3. By the Department's September 9, 1994 letter to the petitioner, it notified him, first, that it had no authority to require the BOE to supply a copy of the rules to each BOE member and, second, that to seek an adjudication of the vote on such a motion, he should file a petition pursuant to N.J.A.C. 6:24-1.1 et seq. ALJ-4.

In the petitioner's (untitled) petition, forwarded to the Department by way of his December 15, 1994 letter, he alleged that, during the BOE's November 3, 1994 meeting, BOE members Pannucci and John Paredes "used undue influence . . . in voting on a contract agreement between the [BTEA] . . . and the [BOE]" and that Mr. Pannucci and Mr. Paredes "participated in a design to disenfranchise . . . politically franchised residents of the School District" and he demanded various actions and orders by the Commissioner of the Department of Education. ALJ-5. In the Department's December 30, 1994 letter to the petitioner, it notified him that because of the nature of his allegations and claims, he would need to name the BOE as an additional respondent. ALJ-6, N.J.S.A. 18A:6-9.

In the petitioner's "Amended Petition," filed with the Department on January 17, 1995, he added the BOE as a respondent. The "Amended Petition" involves the following: During the BOE's November 3, 1994 meeting, the BOE voted to approve a BOE/BTEA contract. Relative to this vote, the petitioner alleges the following: (1) Mr. Pannucci and Mr. Paredes engaged in "undue influence." (2) Mr. Pannucci and Mr. Paredes "participated in a design" to "[consent] to [the] vote on [the] contract on the same day the contract was approved by the . . . BTEA," and, thereby, the "details of the contract [were] withheld from residents and the media" and

“meaningful input from residents and certain members of the [BOE]” was prevented. (3) The BOE violated its “policy” (a “Bylaw”), such that certain BOE members were “denied facts or materials required for the proper performance of his/her duties to which s/he is legally entitled.” The petitioner’s claims for relief include the following: (1) The vote/approval of the BOE/BTEA contract should be invalidated and voided. (2) The votes (relative to the BOE/BTEA contract) of Pannucci and Paredes should be invalidated and voided. (3) The Commissioner of Education should “promulgate in summary fashion the status of all employees of New Jersey School Districts who are also members of a New Jersey local Board of Education with regard to their right, . . . in voting upon employment contracts in their districts.” ALJ-7.

On February 3, 1995, the BOE’s answer and defenses were filed with the Department of Education. ALJ-9. The Department transmitted the matter to the Office of Administrative Law (OAL) where, on February 28, 1995, it was filed as a contested case. N.J.S.A. 52:14B-2(b). By my letter dated April 28, 1995, I notified the parties that the case had been assigned to me; and I set a discovery schedule, a date for a telephone conference and a date for a hearing.

In the BOE’s attorney’s January 31, 1995 letter, he notified the petitioner that, because he had failed to name the BTEA, a necessary party, the BOE would move for relief in that regard. ALJ-8, N.J.A.C. 1:1-1.3(a), R. 4:6-2(f). In my letter dated April 28, 1995, I notified the petitioner that I would treat the BOE’s attorney’s January 31, 1995 letter as notice of a motion to dismiss the petition and that, by May 12, 1995, the petitioner should file any papers in opposition to the BOE’s motion. ALJ-10. In my May 25, 1995 letter, relative to the petitioner’s claims “(1)” and “(2),” I notified him that the BTEA appeared to have a direct interest in the case, etc.; that, consistent with N.J.A.C. 1:1-1.3(a), R. 4:6-2(f) and R. 4:28-1, the BOE had moved to dismiss the petition for failure to join the BTEA, an indispensable party; that (despite my April 28, 1995 letter) I had received no response from the petitioner to the BOE’s motion; and that I would extend to June 9, 1995 the petitioner’s time to respond to the BOE’s motion. ALJ-11. In my May 25, 1995 letter, I also notified the petitioner, that, because, pursuant to the Administrative Procedure Act, rule making procedure (and not this case) appeared appropriate relative to his claim “(3),” the letter constituted notice of my motion to dismiss claim “(3),” and, by June 9, 1995, the petitioner should file any papers in response to that motion. ALJ-11, N.J.A.C. 1:1-

1.3(a), R. 4:6-2(a). On June 16 and 20, 1995, the petitioner's papers were filed in opposition to the BOE's motion and, on June 30, 1995, the BOE's letter brief was filed in support of its motion to dismiss the petition for failure to name the BTEA as a party. ALJ-1, ALJ-13. In my August 9, 1995 letter order, I wrote the following:

Claims "(1)" and "(2)"

A person who or entity which is subject to service of process shall be joined as a party to a case if, (1) in the person's or entity's absence complete relief cannot be accorded, or (2) the person or entity is situated such that the disposition of the case in the person's or entity's absence may as a practical matter impair or impede the person's or entity's ability to protect that interest. N.J.A.C. 1:1-1.3(a), R. 4:28-1.

Claims "(1)" and "(2)" seek invalidation and voidance of the contract between the BOE and [BTEA]; such relief will affect the BTEA's interests; and, as a matter of notice, due process and fairness, the BTEA should have an opportunity to appear and protect its interests in this case.

Failure to join a necessary or indispensable party may be asserted as a defense; however, a claim which involves a substantial public issue should not be dismissed on such a procedural basis and the better practice is to amend the claim, adding the necessary party. R. 4:6-2(f); Hyland v. Kirkman, 157 N.J. Super. 565, 577 (Ch. Div. 1978); Ewing Twp. v. Mathesius, 189 N.J. Super. 530, 535 (Law Div. 1983), aff'd, 193 N.J. Super. 65 (App. Div.), certif. denied, 96 N.J. 320 (1984).

Consistent with the above, the BOE's motion to dismiss the claims is DENIED; however, I ORDER that, by September 11, 1995, the [petitioner] will prepare an amended petition (statement of claims), adding the BTEA as a party; the [petitioner] will file the amended petition in the OAL; and he will serve copies of the amended petition upon all the parties, personally or by mail return receipt requested.

Claim "(3)"

An administrative rule is an "agency statement of general applicability and continuing effect that implements or interprets law of policy, or describes the organization, procedure or practice requirements of any agency." N.J.S.A. 52:14B-2(e). See also

Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313, 331-32 (1984).

Because of a rule's broad regulatory sweep, pursuant to the Administrative Procedure Act (APA), its promulgation is by way of procedures that give notice and opportunity to be heard to the regulated community. Promulgation is not by way of a particular contested case involving limited parties. See N.J.S.A. 52:14B-1 et seq.

Claim "(3)" demands that the Commissioner of Education "promulgate in summary fashion the status of all employees of New Jersey School Districts who are also members of a New Jersey local Board of Education with regard to their rights, or lacking thereof, in voting upon employment contracts in their districts."

Claim "(3)" demands promulgation of a rule; it is inappropriate in this contested case and it is **DISMISSED WITH PREJUDICE.**

[ALJ-14.]

By September 14, 1995, the petitioner had not filed a second amended petition in the OAL and, on that date, the petitioner, the BOE's attorney and I engaged in a telephone conference and the petitioner represented that he would file the amended petition, after which a schedule for discovery and a hearing would be needed. The "2nd Amended Petition" was filed in the OAL and, in the petitioner's September 17, 1995 letter, he represented that all of the respondents of the "2nd Amended Petition" had been served with it. ALJ-15, ALJ-16.

In my September 15, 1995 letter to the petitioner, I recited the following:

Today, my secretary spoke with you in an attempt to arrange a date for a conference by telephone which is necessary to discuss reasonable dates for discovery and a hearing for this case. She tells me that she advised you that a date in November or December is necessary for this purpose and that you refused to give her a date on which you will be available for a conference.

This is notice to you of the following: On November 21, 1995 at 4 p.m. the above-noted conference by telephone will be held. . . . If, by September 29, 1995, I do not receive from you a written consent to participation in the conference call or a

reasonable excuse for your unavailability on November 21, 1995 and dates in November when you will be available, I will assume that you are unwilling to participate in such a conference and I will dismiss your petition. N.J.A.C. 1:1-14.6, -14.14.

[ALJ-17.]

To date, no written consent, explanation, etc., has been received from the petitioner; however, a few days before September 29, 1995, the petitioner telephoned and stated to my secretary that he was unable to say whether he could be available for a conference on November 21, 1995, or any other day in November. The petitioner gave no reasonable excuse for his unavailability. ALJ-18.

CONCLUSIONS OF LAW

In litigation, administrative adjudication and dispute resolution generally, to assure notice, due process and fairness, a party must cooperate and participate in the development of a reasonable schedule that may include a conference, appearance, etc. A party's failure and/or refusal to so cooperate and participate may deprive an adverse party of the opportunity to discover facts, protect its interest, etc. Consistent with these notions, a judge may schedule conferences, appearances and hearings and the judge may take such other actions as necessary for the expeditious and fair conduct of the case. N.J.A.C. 1:1-14.6. Consistent with these notions also, where a party unreasonably fails to cooperate and comply with the judge's directions relative to, e.g., conference scheduling, his or her claim for relief (petition) may be dismissed. N.J.A.C. 1:1-14.14.

Despite notice to the petitioner that his petition would be dismissed for failure and/or refusal to confirm that he will make himself available for a scheduling conference, he has unreasonably failed to provide such confirmation. The petitioner has resisted compliance with reasonable scheduling and adjudication requirements and, consistent with the above-noted notions, his petition must be dismissed.

ORDER

I **ORDER** the petition **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

OCTOBER 25, 1995
DATE

John R. Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

10/11/95
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 16 1995
DATE

Jeff S. Mason
**ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

ALJ's Exhibits:

- ALJ-1 Petitioner's letter, dated February 12, 1993
- ALJ-2 Department of Education's letter, dated February 17, 1993
- ALJ-3 Petitioner's letter, dated August 29, 1994
- ALJ-4 Department of Education's letter, dated September 9, 1994
- ALJ-5 "Petition," dated December 8, 1994
- ALJ-6 Department of Education's letter, dated December 30, 1994
- ALJ-7 Amended Petition, filed January 17, 1995
- ALJ-8 BOE's attorney's letter, dated January 31, 1995
- ALJ-9 BOE's Answer and Defenses, filed February 3, 1995
- ALJ-10 ALJ's letter, dated April 28, 1995
- ALJ-11 ALJ's letter, dated May 25, 1995
- ALJ-12 Petitioner's "Memorandum in Brief," etc., filed June 16 & 20, 1995
- ALJ-13 BOE's letter brief, dated June 29, 1995
- ALJ-14 ALJ's letter order, dated August 9, 1995
- ALJ-15 "2nd Amended Petition," filed in the Department of Education on September 12, 1995 and in the OAL on September 18, 1995
- ALJ-16 Petitioner's letter, dated September 17, 1995
- ALJ-17 ALJ's letter/notice, dated September 15, 1995
- ALJ-18 ALJ's letter, dated October 4, 1995


EDWARD C. MUELLER,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
FRANK PANNUCCI, JOHN PAREDES,	:	
AND THE BOARD OF EDUCATION OF	:	DECISION
THE TOWNSHIP OF BRICK, OCEAN	:	
COUNTY,	:	
	:	
RESPONDENTS.	:	
_____	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review, the Commissioner concurs with the conclusion of the ALJ that the petition herein is properly dismissed for petitioner's unreasonable failure to comply with the orders and directives of the ALJ.

Accordingly, the recommended decision of the Office of Administrative Law is adopted as the final decision in this matter, and the within petition is hereby dismissed.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

NOVEMBER 15, 1995
 DATE OF MAILING NOVEMBER 15, 1995

DOREEN PERANIO,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
BOROUGH OF TOTOWA, PASSAIC	:	
COUNTY,	:	
	:	
RESPONDENT.	:	



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7547-94

AGENCY DKT. NO. 280-7/94

DOREEN PERANIO,

Petitioner,

v.

BOARD OF EDUCATION,

BOROUGH OF TOTOWA,

Respondent.

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

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

Record Closed: October 2, 1995

Decided: October 13, 1995

BEFORE DIANA C. SUKOVICH, ALJ:

On July 12, 1994, petitioner filed a petition with the Department of Education (DOE). Respondent filed an answer on July 26, 1994. The DOE transmitted the matter to the Office of Administrative Law on August 5, 1994 for determination as a contested case, pursuant to *N.J.S.A. 52:14F-1 to -13*.

Conferences were conducted throughout the proceedings, and at the request of the parties, the matter was placed on the inactive list in March 1995. The parties ultimately reached a resolution of the matter, and filed an executed settlement agreement on October 2, 1995, on which date the record was closed. Attached herewith is a copy of the settlement agreement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 17, 1995
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

10/17/95
DATE

DNR
DEPARTMENT OF EDUCATION

Mailed to Parties:
Jeff J. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT 17 1995
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OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
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BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(201) 773-5665
Counsel for Petitioner

DOREEN PERANIO,	:	BEFORE THE COMMISSIONER
	:	OF EDUCATION/OFFICE OF
Petitioner,	:	ADMINISTRATIVE LAW
	:	
v.	:	AGENCY REF. NO. 280-7/94
	:	O.A.L. DOCKET NO. EDU 7372-94
TOTOWA BOARD OF EDUCATION,	:	
	:	
Respondent.	:	SETTLEMENT AGREEMENT

Doreen Peranio (hereinafter "Ms. Peranio"), residing at 93 Renaissance Drive, Clifton, New Jersey 07013, and the Totowa Board of Education (hereinafter the "Board"), with offices at 294 Totowa Road, Totowa, New Jersey 07512-2697, hereby stipulate and agree as follows:

1. In return for compliance with this Agreement, Ms. Peranio agrees to the dismissal of the above-captioned litigation, with prejudice.

2. The Board agrees to:

(a) rehire Ms. Peranio as a full-time tenured teaching staff member for the 1995-96 school year at Step 7 of the collectively negotiated salary guide for teachers for the 1995-96 school year;

(b) pay Ms. Peranio mitigated back salary in the amount of Three Thousand Three Hundred Forty Dollars (\$3,340.00) for the 1994-95 school year. Said money shall be subject to all normal payroll deductions. The net amount shall be paid within 30 days of the approval of this Agreement by the Commissioner of Education; and

(c) retroactively credit Ms. Peranio's seniority for the 1994-95 school year in the elementary category.

3. Ms. Peranio acknowledges that she has hereby been advised in writing that she has the right to consult with an attorney or a representative of her own choosing prior to signing this Agreement and that she signs this Agreement as her own voluntary act and deed, and that she fully understands the terms enumerated herein.


4. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Agreement and bind the Board to its terms.

5. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

6. Nothing in this Agreement shall be deemed to constitute precedent, past practice or policy as to the rights of any employee, now or in the future, other than Ms. Peranio.

7. This Agreement is subject to the approval of the Office of Administrative law and the Commissioner of Education. If not so approved, it will be null and void.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.




Louis P. Bucceri, Esq.

Dated: 8/2/95




Doreen Peranio

TOTOWA BOARD OF EDUCATION

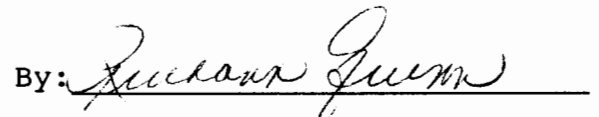


Allan P. Dzwilewski, Esq.

Dated: 9/19/95

By: 

Board President


By: 

Board Secretary

DOREEN PERANIO, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
BOROUGH OF TOTOWA, PASSAIC :
COUNTY, :
RESPONDENT. :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

416-95

P. DARRELL MAIETTA,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWN-	:	DECISION
SHIP OF MORRIS, MORRIS COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2824-95

AGENCY DKT. NO. 28-2/95

P. DARRELL MAIETTA,

Petitioner,

v.

MORRIS SCHOOL DISTRICT

BOARD OF EDUCATION,

Respondent.

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

Fredric J. Sirota, Esq., for respondent
(Wiley, Malehorn and Sirota, attorneys)

Record Closed: October 2, 1995

Decided: October 16, 1995

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

On February 17, 1995, P. Darrell Maietta, petitioner, filed a verified petition of appeal with the Commissioner of Education. The petitioner alleged that the Morris School District's (respondent), declaration that petitioner had abandoned his position on January 5, 1995, and its refusal to allow petitioner to utilize his sick days after January 1, 1995, constituted a reduction in compensation in violation of petitioner's

tenure rights pursuant to *N.J.S.A. 18A:28-5* and *N.J.S.A. 18A:6 -10*, as well as a deprivation of his sick leave rights pursuant to *N.J.S.A. 18A:30-1 to -8*. On March 3, 1995, respondent filed an answer requesting that the verified petition be dismissed and alleging separate defenses. On March 15, 1995, the Department of Education, Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

After notice to all parties, a telephone prehearing conference was held on June 1, 1995, at which time the issues were isolated and a hearing scheduled for December 5, 6, 7 and 8, 1995, at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey 07102.

Subsequent thereto, settlement conferences were held and a settlement was reached. As a result, the hearing was adjourned.

The parties have agreed to settle this matter and have prepared the attached settlement agreement, indicating the terms of settlement.

I have reviewed the record and the terms of settlement and **FIND:**

1. The parties have voluntarily agreed to the settlement, as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 16, 1995
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

10/18/95
DATE

DNA
DEPARTMENT OF EDUCATION

OCT. 18 1995
DATE

Mailed to Parties: [Signature]
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

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BUCCHERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(201) 773-5665
Counsel for Petitioner

P. DARRELL MAIETTA, : BEFORE THE COMMISSIONER
 : OF EDUCATION/OFFICE OF
Petitioner, : ADMINISTRATIVE LAW

v. : AGENCY REF. NO. 28-2/95
 : O.A.L. DOCKET NO. EDU 2824-95N

MORRIS SCHOOL DISTRICT :
BOARD OF EDUCATION, :
 :
Respondent. : **SETTLEMENT AGREEMENT**

The Board of Education of the Morris School District (hereinafter the "District") and P. Darrell Maietta, hereby enter into this Agreement to resolve the differences between them.

1. In return for compliance with this Agreement, Mr. Maietta agrees to permanently and irrevocably resign from his position as a teaching staff member and guidance counselor in the District effective June 30, 1996. The letter of resignation signed by Mr. Maietta is hereby appended to this Agreement as Exhibit "A." By doing so, Mr. Maietta waives any and all rights to tenure, seniority, recall or reinstatement, as well as any of the benefits or emoluments of his employment as of that date, except his pension rights.

2. Mr. Maietta further agrees to dismiss the litigation known as P. Darrell Maietta v. Board of Education of the Morris School District, Agency Dkt. No. 28-2/95, O.A.L. Dkt. No. EDU 2824-95 currently pending before the New Jersey Office of Administrative Law.

3. The District will pay Mr. Maietta full back salary, at his 1994-95 salary rate, for the period January 1, 1995 through June 30, 1995. Said payment shall be subject to all normal deductions, including pension contributions for the period January 1, 1995 through June 30, 1995. The District will comply with N.J.A.C. 17:3-6.6(c) in transferring said contributions to the pension fund.

The net back salary amount due to Mr. Maietta will be paid to him within 30 days of receipt of the decision of the Commissioner of Education approving this settlement.

4. The District will place Mr. Maietta on a leave of absence effective September 1, 1995, through June 30, 1996. During that leave, Mr. Maietta will be paid in the normal course as is any other teacher. The salary rate to be paid will be one-half (1/2) of his 1995-96 salary.

5. During the leave period, the District shall continue to provide the medical, and other health insurance coverages it now provides to Mr. Maietta pursuant to the collective negotiations agreement in effect between the District

and the Education Association of Morris. However, no other benefits shall accrue to Mr. Maietta during this period, such as sick days, personal days, and bereavement days that would otherwise accrue during the life of this Agreement. It is specifically understood that any other accumulated benefits, whether to sick leave or otherwise, shall be consumed during the period of such leave, and Mr. Maietta shall not claim entitlement to these benefits or their cash equivalent.

Pension contributions shall be deducted from Mr. Maietta's salary during his leave in an amount equivalent to what his normal contribution would be during a period when he was receiving full salary, at the rate of his 1995-96 salary (N.J.A.C. 17:3-4.2 and N.J.A.C. 17:3-6.6(b)). The District makes no representation as to the amount of pension benefits, if any, Mr. Maietta shall accrue or ultimately receive. This Agreement shall in no way be contingent upon Mr. Maietta's receiving pension benefits. In the event that the Teachers' Pension and Annuity Fund shall refuse to accept said payments for pension credit, the District shall not be held responsible and this Agreement shall remain in full force and effect.

6. Mr. Maietta shall not be eligible for sick leave payment for any unused sick leave remaining after his leave of absence. All rights to reimbursement as to accrued leave time are hereby waived. Similarly, any rights to incentive or bonus payments under the collective agreement are waived.

7. The parties shall exchange mutual general releases in the forms attached hereto. Each party will retain the right to enforce this Agreement.

8. Mr. Maietta acknowledges that he has hereby been advised in writing that he has the right to consult with an attorney or a representative of his own choosing prior to signing this Agreement and that he signs this Agreement as his own voluntary act and deed, and that he fully understands the duties and obligations enumerated herein.

9. The undersigned representatives of the District hereby acknowledge that they have been duly authorized by the District to sign this Agreement and bind the District to its terms.

10. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.


11. Nothing in this Agreement shall be deemed to constitute precedent, past practice or policy as to the rights of any employee, now or in the future, other than Mr. Maietta.

12. The District shall process any application for retirement benefits filed by Mr. Maietta in the normal manner for such processing.

13. A proceeding to enforce the terms of this Agreement shall be the exclusive remedy in the event it is breached.

14. This Agreement is subject to the approval of the Office of Administrative law and the Commissioner of Education. If not so approved, it will be null and void.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.



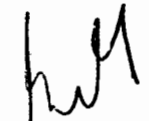
Louis P. Succeri, Esq.




P. Darrell Maietta

Dated: 8/16/95

BOARD OF EDUCATION OF THE
MORRIS SCHOOL DISTRICT



Fredric J. Sirota, Esq.

By: 

Board President

Dated: 9/28/95



Board Secretary

P. DARRELL MAIETTA
75 LAKE ROAD
MORRISTOWN, NEW JERSEY 07960

AUGUST 9, 1995

Dwight Pfennig, Superintendent of Schools
Morris School District
Normandy Parkway
Morristown, NJ 07960

Re: Letter of Resignation

Dear Dr. Pfennig:

Pursuant to the terms of the Agreement between the Morris School District and myself, I hereby irrevocably resign my position as a teaching staff member and guidance counselor effective June 30, 1996.

Very truly yours,



P. Darrell Maietta

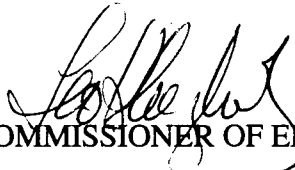
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EXHIBIT "A"

P. DARRELL MAIETTA, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE TOWN- : DECISION
 SHIP OF MORRIS, MORRIS COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

417-95

OAL DKT. NO. EDU 8143-94

ELISSA A. KISH, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION

BOROUGH OF ELMWOOD PARK, :

BERGEN COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner contended that the Board's action in abolishing her supervisory position violated her tenure and seniority rights and, further, that the Board failed to comply with the terms of a prior settlement agreement pertinent to the transfer of pension contributions to the Teacher's Pension and Annuity Fund.

Following review of the 1993 settlement agreement and job descriptions, and citing Spiewak, inter alia, ALJ concluded that petitioner had a greater entitlement to the position of Facilitator/Subject Supervisor than the individual appointed thereto by the Board for the period September 1, 1994 through September 30, 1995 and that she was entitled to compensation, as well as related emoluments and seniority credits for that period. ALJ concluded that petitioner should be reinstated to that position from September 1, 1994, with reimbursement of a \$3,000 annual stipend for the 1994-95 school year and a \$3,000 annual stipend, pro-rated, for the period from September 1, 1995 to September 30, 1995, with related emoluments, including pension contributions and seniority credits. Moreover, ALJ concluded that petitioner had not met her burden by a preponderance of credible evidence of proving her claims related to pension credits. Therefore, these claims were dismissed.

Commissioner concurred with findings and determination of ALJ and directed compensation.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8143-94
AGENCY DKT. NO. 317-7/94

ELISSA A. KISH,

Petitioner,

v.

ELMWOOD PARK BOARD OF EDUCATION,

Respondent.

Louis P. Bucceri, Esq., for petitioner

(Bucceri and Pincus, attorneys)

Matthew P. DeMaria, Esq., for respondent

Record Closed: September 5, 1995

Decided: October 19, 1995

BEFORE **DIANA C. SUKOVICH, ALJ:**

PROCEDURAL HISTORY

On July 28, 1994, Elissa A. Kish (Kish or petitioner) filed a petition with the Department of Education (DOE) seeking relief from the Elmwood Park Board of Education (Board or respondent). The Board filed an answer on August 19, 1994. The

DOE transmitted the matter to the Office of Administrative Law on August 23, 1994 for determination as a contested case pursuant to *N.J.S.A. 52:14F-1 to -13*.

A telephone conference was conducted on December 2, 1994, and a hearing was scheduled for May 3, 1995. The hearing was adjourned at the request of the parties based upon an agreement that the matter would be decided on stipulated facts and cross-motions for summary judgment.

A stipulation of facts and exhibits was filed on July 18, 1995. Kish and respondent filed initial briefs on July 18, and August 17, 1995, respectively. Petitioner filed a reply brief on September 5, 1995, on which date the record was closed.

NATURE OF THE CASE

Petitioner alleges that respondent violated her tenure and/or seniority rights regarding a supervisory position with the Board and that respondent failed to comply with the terms of a prior settlement agreement pertinent to the transfer of pension contributions to the Teacher's Pension and Annuity Fund (TPAF). Kish also alleges that respondent threatened to withhold salary checks as a means of coercing information from her. Kish requests that the Board be required to immediately reemploy her in a supervisory capacity, retroactively compensate her for any and all salary, benefits, and seniority credit lost as a result of respondent's actions, and communicate with the TPAF to correct the crediting of pension contributions, to reflect credit for the period of September 1, 1991 to April 30, 1993, and that respondent be ordered to cease and desist from withholding or threatening to withhold salary checks as a means of "coercing information from employees." Respondent denies all the allegations.

The issues, broadly articulated, are whether petitioner is entitled to reemployment in a supervisory capacity and to retroactive compensation; whether respondent has failed to comply with the terms of a prior settlement agreement and, if

so, what remedy should be granted to petitioner; and whether petitioner has demonstrated improper actions by the Board vis-à-vis Kish or any other employees of respondent.

STIPULATIONS

The parties agreed to the following stipulations:

1. Petitioner has been employed by respondent as follows:

<u>Year</u>	<u>Position</u>
1980-81	Supervisor of Instruction (K-12) Math, Science, Business Education
1981-82	Supervisor of Instruction (K-12) Math, Science, Business Education
1982-83	Supervisor of Instruction (K-12) Math, Science, Business Education
1983-84	Supervisor of Instruction (K-12) Math, Science, Business Education
1984-85	Supervisor of Instruction (K-12) Math, Science, Business Education
9/85-11/85	Supervisor of Instruction (K-12) Math, Science, Business Education
11/85-6/86	Supervisor of Instruction Industrial Arts, Home Economics, Music, Art, Foreign Language

1986-87	Supervisor of Instruction Industrial Arts, Home Economics, Music, Art, Foreign Language
1987-88	Supervisor of Instruction Industrial Arts, Home Economics, Music, Art, Foreign Language
1988-89	Supervisor of Instruction Industrial Arts, Home Economics, Music, Art, Foreign Language
1989-90	Supervisor of Instruction Industrial Arts, Home Economics, Music, Art, Foreign Language
1990-91	rified
1991-92	rified (retroactively employed, see Exhibit R-1)
9/92-4/30/93	rified (retroactively employed, see Exhibit R-1)
5/1/93 - 6/30/93	Reading Resource Teacher/ Facilitator Generalist
1993-94	Reading Resource Teacher/ Facilitator Generalist

2. Petitioner holds the following educational certificates and endorsements:

	<u>Issued</u>
Reading Specialist	6/78
Nursery School	12/76
Speech, Arts & Dramatics	12/76
Elementary (K-8)	5/66
Principal	12/76
Supervisor	12/76
School Administrator	7/80

3. Throughout her period of employment up until June 30, 1994, petitioner has held a position which required supervisory certification although, at times, teaching duties were performed in addition to her supervisory function.

4. Effective for the 1991-92 school year, respondent created the position of Facilitator.
5. A Facilitator position requires supervisory certification.
6. Petitioner filed an action known as *Elissa A. Kish v. Board of Education of the Borough of Elmwood Park*, OAL Dkt. No. EDU 2317-92, Agency No. 72-3/92, claiming a facilitator position.
7. The parties entered into a settlement agreement, which is Exhibit J-1. The settlement was approved by the Commissioner of the DOE (Commissioner) on June 22, 1993.
8. By letter of May 4, 1994, petitioner was advised that her Facilitator position was to be abolished and that she would be assigned as a teacher for 1994-95. Respondent adopted such a resolution on May 9, 1994. (Exhibit R-7).
9. On or about May 1, 1994, respondent published and posted notices indicating an available vacancy for the position of Facilitator/Subject Supervisor (High School Science) (Exhibits R-2 and R-3).
10. For the 1994-95 school year, petitioner was employed as a teacher by respondent.
11. Respondent hired a new employee who had never previously worked in the district to serve in the posted position of Facilitator for the 1994-95 school year. That individual was not tenured and did not achieve tenure in the district before or during the 1994-95 school year.
12. The job description for the position of Subject Supervisor as it existed in 1988 is Exhibit R-4.
13. The job description for the position Reading Resource Teacher/Teacher/Facilitator Generalist held by petitioner from May 1, 1993 through June 30, 1993, is as stated in Exhibit R-5.
14. The job description for Facilitator as utilized during the 1994-95 school year is as stated in Exhibit R-6.
15. By virtue of the abolition of her Facilitator position, petitioner lost salary in the amount of \$3,000.00 for the 1994-95 school year.
16. Respondent's high school building houses grades 6 through 12, wherein there is a middle school grades 6 through 8, established in 1994; and a high school, grades 9 through 12.

17. The nontenured individual hired as Facilitator in the science subject area taught three biology classes and two laboratory periods during 1994-95, as well as performing his Facilitator duties.

18. Upon the abolishment of the position of Reading Resource Teacher/Facilitator Generalist, administrative functions previously performed by petitioner in that job were completed by on-staff administrative personnel and the Director of Curriculum.

FINDINGS OF FACT

Based upon a review of the exhibits, I **FIND** the following to be facts.

The 1993 settlement agreement provided, in pertinent part, that Kish would be assigned, as of May 1, 1993, to the position of Reading Resource Teacher/Facilitator Generalist, which position had been approved by the County of Bergen Superintendent and which would require a supervisor's certificate and was considered a supervisory position for tenure purposes. Kish's work year and work load as a Facilitator would be the same as for other Facilitator positions. Respondent would take "all necessary measures" to notify the TPAF that Kish had been reemployed retroactive to the date on which the Facilitator position was created, *i.e.*, September 1, 1991, and would "make all appropriate contributions from that date forward so as to provide to Petitioner employment credit from September 1, 1991 to May 1, 1993." (Exhibit J-1, p.2). In the event that the position of Reading Resource Teacher/Facilitator Generalist was abolished while Kish was employed in such capacity, respondent would recognize petitioner's seniority in the district and assign her to such category of position in which she had seniority and, if it were determined that Kish did not have seniority to any existing category of position, respondent would continue to employ her as a classroom teacher at a salary based on the top of the teachers' salary guide until Kish acquired twenty-five years of service in contribution to the TPAF. In consideration therefore, Kish agreed to tender her resignation from her employment with the Board, effective upon the completion of twenty-five years of service in contribution to the TPAF.

The May 1, 1994 postings for the position of Facilitator/Subject Supervisor (High School Science) stated that a "supervisory certificate" was required. (Exhibits R-2 and R-3).

The May 9, 1994 resolution stated that the position of Reading Resource Teacher/Facilitator Generalist was abolished "due to the reorganization of the Middle School and for economy, effective the 1994-95 school year." (Exhibit R-7A).

The job description for the position Reading Resource Teacher/Facilitator Generalist was approved December 22, 1992 and was revised March 10, 1993.

DISCUSSION

Respondent argues that petitioner's action is barred by the principle of *res judicata* and the terms of the applicable stipulation of settlement as well as by waiver. Kish argues that each of these is an affirmative defense which must be specifically pled and the Board cannot raise them at this point in the case, not having done so previously. Kish also argues that *res judicata* is not applicable.

Although petitioner's arguments in this respect have merit, I am persuaded that the substantive issues raised by the parties in their briefs should be addressed. Petitioner is clearly not barred from raising issues which essentially focus on employment subsequent to abolishment of the position of Reading Resource Teacher/Facilitator Generalist, as contemplated by the stipulation of settlement. The verified petition and respondent's answer thereto clearly raised issues regarding interpretation and application of the settlement agreement. I am therefore persuaded that although the Board did not specifically raise issues termed as waiver and release, the substantive issues pertinent to the settlement agreement should be determined.

The Commissioner generally has jurisdiction to hear and determine all controversies and disputes arising under the school laws. *N.J.S.A. 18A:6-9.*

No teaching staff member shall be employed in the public schools unless he/she is the holder of a valid certificate. *N.J.S.A. 18A:26-2*. The services of teaching staff members, as well as any other employees in positions requiring appropriate certificates issued by the Board of Examiners, shall be under tenure during good behavior and efficiency, and such individuals shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such staff member or other good cause. *N.J.S.A. 18A:28-5 (Supp. 1995)*. Tenure attaches after employment in a district by a local board for three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose, three consecutive academic years, together with employment at the beginning of the next succeeding academic year, or the equivalent of more than three academic years within a period of any four consecutive years. *Ibid.* However, a local board of education can reduce the number of teaching staff members employed in a district whenever, in its judgment, it is advisable to abolish such position for reasons of economy, because of a reduction in the number of pupils, because of a change in the administrative or supervisory organization of the district, or for other good cause. *Id.* at § 9.

As petitioner argues, Kish clearly acquired tenure in the supervisory category, having been employed for at least three consecutive years in supervisory positions. In addition, Kish has had a supervisory certification since 1976. Although not explicitly addressed in the stipulations or the parties' briefs, it is also reasonable to infer that petitioner has tenure as an elementary teacher. The parties stipulated that throughout her period of employment until June 30, 1994, Kish has held positions requiring, at times, teaching duties. In addition, she was employed as a teacher for the 1994-95 school year. The job description for the position which petitioner held during 1988 required a teacher certification, as did the position which petitioner held from May 1, 1993 through June 30, 1993. The fact that supervisory positions held by petitioner may not have been on a full-time basis but were performed in addition to teaching functions is not determinative. All teaching staff members who work in positions for which a certificate is required, who hold valid certificates, and who have worked the required number of years are eligible for tenure unless they fall within an explicit statutory

exception. Remedial and supplemental teachers, even those reimbursed on an hourly basis, are afforded tenure pursuant to *N.J.S.A. 18A:28-5*. *Spiewak v. Rutherford Bd. of Ed.*, 90 *N.J.* 63 (1982) (*Spiewak*).

The Board argues that because the stipulation of settlement specifically references seniority, and not tenure, in addressing a situation involving abolishment of the position of Reading Resource Teacher/Facilitator Generalist, petitioner may advance claims only on the basis of seniority, not tenure rights. I am not persuaded by this argument.

Seniority only applies to certain rights of tenured personnel and has meaning only when a reduction in the employment force is necessary. *Philip Howley and Dewey Bookholdt v. Ewing Twp. Bd. of Ed.*, 1982 *S.L.D.* 1328, *aff'd* 1983 *S.L.D.* 1554. Dismissals pursuant to *N.J.S.A. 18A:28-9* must be made on the basis of seniority. *N.J.S.A. 18A:28-10*. However, seniority cannot limit a tenured employee's rights over nontenured individuals. *Mueller v. Hunterdon Central Regional High School District Bd. of Ed.*, 93 *N.J.A.R. 2nd.* (Vol. 4A) 419 (Dept. of Ed.) (*Mueller*).

An agreement to settle a law suit is a contract which, like all contracts, may be freely entered into and which a court will generally honor and enforce. *Pascarella v. Bruck*, 190 *N.J. Super.* 118 (App. Div. 1983) *cert. den.*, 94 *N.J.* 600 (1983). However, the parties cannot by stipulation abrogate petitioner's tenure rights. Tenure is a mandatory term and condition of employment which supersedes contractual terms. As such, the tenure provisions of *N.J.S.A. 18A:28-5* may not be waived or bargained away. *Spiewak, supra*, 90 *N.J.* 63 "Tenure is a 'statutory right' imposed upon a teacher's contractual employment [which]. . . may not be forfeited or waived." *Spiewak* at 77 (citations omitted). An individual may voluntarily relinquish a position, but may not waive his/her tenure rights while keeping his/her position. *Lange v. Bd. of Ed. of Bor. of Audobon*, 26 *N.J. Super.* 83 (App. Div. 1953). As Kish argues, even a change in duties does not constitute a relinquishment of tenure if some tenurable duties are assigned to an individual. *Quinlan v. Bd. of Ed. of North Bergen Tp.*, 73 *N.J. Super.* 40 (App. Div. 1962).

As petitioner argues, however, the pertinent stipulation does not address the waiver or relinquishment of tenure rights in general. It is therefore reasonable to interpret the stipulation as not affecting petitioner's tenure rights in the event of abolishment of the position of Reading Resource Teacher/Facilitator Generalist. Such construction is consistent with the applicable legal principles, which cannot be superseded by the stipulation.

It is reasonable to conclude that petitioner has the qualifications stated in the job description for the position of Staff Development Departmental Facilitator. The qualifications are substantially similar to those stated in the job description for Instructional Supervisor - Multi-Discipline. It is therefore reasonable to infer that petitioner has a master's degree as well as the required experience. As Kish argues, her tenure rights as a supervisor required her employment in the position in question vis-à-vis a nontenured individual. A detailed comparison of the applicable job descriptions is therefore not necessary. Respondent does not argue that the position in question requires special expertise not reflected in the stated qualifications. In any event, such an argument would not be persuasive within the context of this case. In *Herbert v. Bd. of Ed. of the Tp. of Middletown*, 1990 S.L.D. 1759 (State Board), *aff'd* No. A-318-90T1 (App. Div. May 22, 1991), a supervisor subject to a reduction in force claimed the position of Supervisor of Special Services, which position dealt with the supervision of special education. The board of education argued that Herbert had no special education certification or experience. However, the job description included no requirement as to instructional certification or special education training. *Herbert* at 1761, n. 2. The State Board of Education affirmed the Commissioner's decision awarding Herbert the position in question based on his tenure as a supervisor, noting that:

Although the education laws permit a district board to establish qualifications beyond the threshold qualifications established by statute and regulation for employment in or promotion to a particular assignment, the desire to employ or retain individuals with such additional qualifications cannot defeat the tenure and seniority rights conferred by

statute on teaching staff members. . . . [citation omitted] To hold otherwise would vitiate legislatively-created rights by permitting the creation of positions distinct for tenure and seniority purposes based on distinctions and subject area beyond those made by the certification regulations.

[*Herbert, supra* at 1761]

As petitioner argues, the description of the Facilitator position is substantially overlapped by the instructional supervisor description. However, it is not necessary to perform such an analysis. *Herbert, supra*. The job description for the position of Staff Development Departmental Facilitator does not include instruction of students as a responsibility. In addition, the position postings state only a requirement for a supervisory certification.

Petitioner asserts in her initial brief that although she could not have functioned as a high school biology teacher, as the nontenured Facilitator did, it is clear that that individual did so in addition to his Facilitator duties. These matters are not addressed in the stipulated facts nor documents. However, they are not material to a determination of the issues presented. The Facilitator job description and postings do not include instruction of students as a responsibility. It is also not necessary to reach the merits of petitioner's assertion that nothing would have prevented the nontenured Facilitator from teaching classes while petitioner performed a Facilitator function in his place and that she could have performed teaching duties in the high school building under her K-8 certificate. It is noteworthy, though, as petitioner argues, that from 1980 until 1985, she held the position of Supervisor of Instruction (K-12), Math, Science, and Business Education.

Respondent advances arguments pertaining to the alleged reasons the Board entered into the settlement in question, specifically arguing that it sought to gain control over the positions in which petitioner would continue in its employ and that the job description was revised in March 1993 "with Petitioner and the settlement in mind, and Petitioner knew that to be the case." (Respondent's brief, p. 8). I am not persuaded by these arguments. Any alleged motivation on the part of the Board in agreeing to the

settlement, as well as the reasons for and nature of the revision of the job description in question, are not addressed in the stipulated facts nor documents. In addition, Kish's argument that respondent benefited from the stipulation because of her agreement to resign upon completing twenty-five years of pension-eligible service has merit on its face. In any event, as discussed hereinabove, petitioner's tenure rights could not be abrogated by the stipulation.

A tenured individual has the ultimate burden when contesting an action by a board of education of demonstrating that his/her rights were violated and that he/she suffered harm so as to entitle him/her to redress. *James Parker and Joseph Pellegrino, v. Bd. of Ed., Matawan-Aberdeen Regional School District, 1990 S.L.D. 1778*. A prevailing individual contesting local board action is entitled to appointment to an available position, back pay, and other economic emoluments of employment, including appropriate pension fund adjustments. *Mueller, supra*.

I am persuaded that petitioner has demonstrated her entitlement to the position of Facilitator/Subject Supervisor, until the time she completed twenty-five years of pension-eligible service. Kish states in her reply brief that consistent with the pertinent stipulation, she would resign on September 30, 1995. However, the date on which she completed twenty-five years of service is not addressed in the stipulated facts nor documents. In the absence of an objection filed on behalf of respondent, I will utilize the September 30, 1995 date as the operative one.

Petitioner's requested relief of reemployment in a supervisory capacity and retroactive compensation for all salary, benefits, and seniority credit lost as a result of the Board's action in appointing a nontenured individual to the position in question should be granted. Petitioner is entitled to retroactive salary in the amount of \$3,000 for the 1994-95 school year as well as related benefits and seniority credits. In

addition, as argued in Kish's reply brief, she is entitled to a \$3,000 annual stipend for the 1994-95 school year and a \$3,000 annual stipend, prorated, for the period from September 1, 1995 to September 30, 1995.

The stipulated facts and documents and the briefs filed by the parties do not address petitioner's claims that the lack of an argued pension credit for the period September 1, 1991 to May 1, 1993 is the direct result of the action or inaction of respondent with respect to its duty to transfer pension contributions to the TPAF in a manner designed to inform the fund of the period of time to which the contributions relate. The stipulations and briefs also do not address petitioner's claims that agents of respondent threatened her regarding the withholding of petitioner's salary checks. Petitioner has not met her burden of proof regarding these claims, and I am persuaded that they should be dismissed.

CONCLUSIONS

I **CONCLUDE** that petitioner had a greater entitlement to the position of Facilitator/Subject Supervisor than the individual appointed thereto by respondent for the period September 1, 1994 through September 30, 1995 and that she is therefore entitled to compensation, as well as related emoluments and seniority credits, for that period. I therefore **CONCLUDE** that petitioner should be reinstated to that position for the period from September 1, 1994, with reimbursement of a \$3,000 annual stipend for the 1994-95 school year and a \$3,000 annual stipend, pro rated, for the period from September 1, 1995 to September 30, 1995, with related emoluments, including pension contributions and seniority credits. In addition, I **CONCLUDE** that petitioner has not met her burden by a preponderance of the credible evidence of proving her claims that the lack of a pension credit to Kish's pension account for the period September 1, 1991 to May 1, 1993 is the direct result of action or inaction of respondent regarding its duty

to transfer pension contributions to the TPAF in a manner designed to inform the fund as to the period of time to which the contributions relate nor petitioner's claims that agents of respondent threatened her regarding the withholding of petitioner's salary checks and that such claims should therefore be dismissed.

ORDERS

It is hereby **ORDERED** that petitioner is deemed to have entitlement to the position of Facilitator/Subject Supervisor for the period from September 1, 1994 to September 30, 1995, that she be awarded compensation for that time period, in the amount of a \$3,000 annual stipend for the 1994-95 school year and a \$3,000 annual stipend, prorated, for the period September 1, 1995 to September 30, 1995, and that petitioner be awarded associated emoluments, including seniority credits and pension contributions, for the periods in question. It is also **ORDERED** that petitioner's claims that her pension account has not been credited for the period September 1, 1991 to May 1, 1993 because of action or inaction by respondent regarding its duty to transfer pension contributions to the TPAF pertinent to the period of time to which the contributions relate and her claims that respondent's agents threatened her regarding the withholding of her salary checks be and are hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 19, 1995
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

10/23/95
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

Jerry S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT 26 1995
DATE

OFFICE OF ADMINISTRATIVE LAW

njf

APPENDIX

Exhibits in Evidence:

- J-1 Stipulation of Settlement

- R-2 Postings
- R-3 Memorandum dated May 2, 1994
- R-4 Job Description for Instructional Supervisor - Multi-Discipline
- R-5 Job Description for Reading Resource Teacher/Facilitator Generalist
- R-6 Job Description for Staff Development Departmental Facilitator
- R-7 Letter dated May 4, 1994
- R-7A Resolution of May 4, 1994

ELISSA A. KISH, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 BOROUGH OF ELMWOOD PARK, :
 BERGEN COUNTY, :
 :
 RESPONDENT. :


The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that petitioner is entitled to compensation, as well as related emoluments and seniority credits, for the period September 1, 1994 through September 30, 1995¹. Petitioner is due reinstatement to the position of Facilitator/Subject Supervisor for the period September 1, 1994 through September 30, 1995, with reimbursement of a \$3,000 annual stipend for the 1994-95 school year and a \$3,000 annual stipend to be pro-rated for the period September 1, 1995 through September 30, 1995. (Initial Decision at p. 13) Further, the Commissioner concurs that petitioner's remaining claims are properly dismissed.

¹ The Commissioner notes that the ALJ finds September 30, 1995 to be the operative date of petitioner's resignation. (Initial Decision at p. 12)

Accordingly, the initial decision of the Office of Administrative Law is adopted for the reasons expressed therein.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

NOVEMBER 17, 1995

DATE OF MAILING NOVEMBER 20, 1995

ROBERT GROOVER,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
BORDENTOWN REGIONAL SCHOOL	:	
DISTRICT, BURLINGTON COUNTY,	:	
	:	
RESPONDENT.	:	



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12480-94

AGENCY DKT. NO. 445-11/94

ROBERT GROOVER,

Petitioner,

v.

**BOARD OF EDUCATION OF
THE BORDENTOWN REGIONAL
SCHOOL DISTRICT, BURLINGTON
COUNTY,**

Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak,
attorneys)

Frank Cavallo, Esq., for respondent (Law Office of Stephen J. Mushinski, attorney)

Record Closed: October 10, 1995

Decided: October 19, 1995

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

This matter was transmitted to the Office of Administrative Law on December 29, 1994, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a written agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

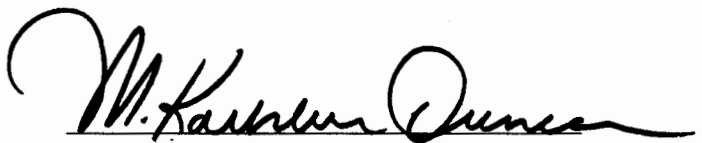
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with **the COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Oct. 19, 1995
DATE


M. KATHLEEN DUNCAN, ALJ


Receipt Acknowledged:

10/23/95
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 26 1995
DATE


ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

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STATE OF N.J.
OFFICE OF ADM. LAW

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STEPHEN J. MUSHINSKI, ESQ.
Moorestown Office Center
110 Marter Avenue, Suite 411
Moorestown, NJ 08057
(609) 866-1005

Attorney for

ROBERT GROOVER,	:	OFFICE OF ADMINISTRATIVE LAW
	:	
Petitioner,	:	
	:	
v.	:	OAL DOCKET NO: EDU-12480-94S
	:	
BOARD OF EDUCATION OF	:	AGENCY REF. NO: 445-11-94
BORDENTOWN REGIONAL HIGH	:	
SCHOOL DISTRICT, BURLINGTON	:	
COUNTY	:	SETTLEMENT AGREEMENT
Respondent.	:	
	:	

BACKGROUND

1. The Petitioner, Robert Groover, filed a Petition of Appeal on November 4, 1994.
2. On December 15, 1994, the Respondent, Board of Education of Bordentown Regional School District, Burlington County, filed an Answer to the Petition of Appeal.
3. Subsequent to the filing of the Petition of Appeal and the Answer to the Petition of Appeal the parties through their respective attorneys have entered into comprehensive settlement negotiations in an effort to amicably resolve this dispute. The parties have through their respective attorneys agreed to resolve this matter under and subject to the terms of the following Settlement Agreement.

AGREEMENT

The parties to this Agreement, intending to be legally

bound, agree as follows:

1. The Board of Education of Bordentown Regional School District, Burlington County, shall pay to the Petitioner, Robert Groover, the sum of \$3,500.00 in lieu of the stipend for the extracurricular position of head girl's varsity basketball coach for the 1994-95 school year.

2. The Board of Education of the Bordentown Regional School District shall appoint the Petitioner to the position of head girls varsity basketball coach for the 1995-96 school year, at a stipend of \$5,242.00.

3. The Petition of Appeal and the Answer with affirmative defenses shall be withdrawn and dismissed, with prejudice.

WHEREAS, the parties acknowledge that each has received satisfactory independent legal advice at his or its own selection, that each fully understands the terms and conditions of this Agreement, that each has been fully informed as to his or its legal rights and obligations and that each is signing this agreement freely and voluntarily;

IN WITNESS WHEREOF, the parties have hereunto set their seals on this 27th day of ~~June~~^{SEPTEMBER}, 1995.

Attest:

Paigula Slower
Secretary

Pauline Slower

President, Bordentown Regional School District Board of Education

Robert Groover
ROBERT GROOVER

Stephen M. Mushinski
STEPHEN M. MUSHINSKI, ESQ.
Attorney for Respondent

Richard A. Friedman
RICHARD A. FRIEDMAN, ESQ.
Attorney for Petitioner

ROBERT GROOVER,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
BORDENTOWN REGIONAL SCHOOL	:	
DISTRICT, BURLINGTON COUNTY,	:	
	:	
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


 COMMISSIONER OF EDUCATION

NOVEMBER 17, 1995
DATE OF MAILING NOVEMBER 20, 1995

419-95

NORMA C. POLLARD, :

PETITIONER, :

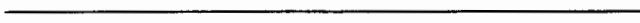
V. :

COMMISSIONER OF EDUCATION

STATE-OPERATED SCHOOL DISTRICT :
OF THE CITY OF PATERSON, PASSAIC :
COUNTY, :

DECISION

RESPONDENT. :





State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8804-95⁹⁴

AGENCY DKT. NO. 309-7/94

NORMA C. POLLARD,

Petitioner,

v.

**STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF PATERSON,**

Respondent,

Harold N. Springstead, Esq., for petitioner
(Springstead & Maurice, attorneys)

Gregory J. Johnson, Esq., for respondent

Record Closed: October 18, 1995

Decided: October 18, 1995

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

Statement of the Case

This matter was transmitted to the Office of Administrative Law on September 13, 1994, for determination as a contested case, pursuant to *N.J.S.A. 14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The parties have agreed to settle this matter and have prepared the attached stipulation setting forth the terms of settlement.

I have reviewed the record and the terms of settlement and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Oct. 18, 1995
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Oct. 20, 1995
DATE

Receipt Acknowledged:
[Signature]
DEPARTMENT OF EDUCATION

OCT 23 1995
DATE

Mailed to Parties:
[Signature]
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

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OFFICE OF ADMINISTRATIVE LAW
OCT 18 8 58 PM '95

SPRINGSTEAD & MAURICE, ESQS.
39 Hudson Street
Hackensack, New Jersey 07601
(201) 487-1414
Attorney for Petitioner

NORMA C. POLLARD,
Petitioner,

BEFORE THE COMMISSIONER OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW

vs.

Docket No. EDU 8804-94

STATE-OPERATED SCHOOL
DISTRICT OF THE CITY OF
PATERSON, PASSAIC COUNTY,

STIPULATION OF SETTLEMENT

Respondent.

The parties, the petitioner Norma C. Pollard ("Petitioner" or "Pollard") and respondent State Operated School District of the City of Paterson ("Respondent" or "District")

1. On or about July 20, 1994, the petitioner, tenured teacher, filed a Petition of Appeal with the Commissioner of Education claiming the respondent's action withholding her salary increment for the 1994-95 school year was arbitrary and capricious.

2. The respondent filed an Answer to the Petition denying the petitioner's claims on or about July 28, 1994.

3. On or about June 23, 1994, the State District Superintendent Dr. Laval S. Wilson, certified tenure charges against the respondent. After a plenary hearing,


Administrative Law Judge Elinor Reiner issued an Initial Decision sustaining the Charges and recommending the petitioner's dismissal from her teaching position. On June 29, 1994, the Commissioner affirmed the decision and ordered the petitioner dismissed.

4. On or about July 19, 1995, the respondent filed a Motion to Dismiss with Administrative Law Judge Kenneth Springer, asserting that the case is moot based upon the principles res judicata and collateral estoppel.

5. On or about June 29, 1995, the petitioner Pollard filed an Appeal of her dismissal with the State Board of Education in the case entitled IMO of the Tenure Hearing of Norma Pollard, State Operated School District of the City of Paterson, Docket No. 81-95.


6. The parties agree that the Petition is now moot and should be dismissed without prejudice. If the petitioner Pollard prevails in her appeal the State Board or Appellate Courts to reverse the Commissioner's decision or the punishment is modified so as to permit petitioner to return to employment by the respondent, she shall be entitled to reinstate her Petition to contest the increment withholding within 90 days of the reversal.

For Petitioner:




Harold N. Springstead, Esq.
Attorney for Norma Pollard

For the State Operated School District of
The City of Paterson



Gregory G. Johnson, Esq.



Louis M. Flora, Esq.

Dated: October 1, 1995

NORMA C. POLLARD, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 STATE-OPERATED SCHOOL DISTRICT : DECISION
 OF THE CITY OF PATERSON, PASSAIC :
 COUNTY, :
 :
 RESPONDENT. :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

E.R., on behalf of minor child, A.K. :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE SOUTH :
ORANGE AND MAPLEWOOD SCHOOL :
DISTRICT, ESSEX COUNTY, :

DECISION ON MOTION

RESPONDENT. :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON MOTION
FOR
EMERGENCY RELIEF

OAL DKT. NO.: EDU 11985-95

Agency Ref. No. 430-11/95

E.R., on behalf of minor child A.K.,
Petitioner,

v.

BOARD OF EDUCATION OF SOUTH
ORANGE-MAPLEWOOD SCHOOL DISTRICT,
Respondent.

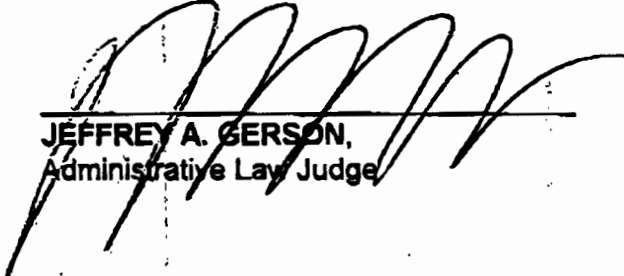
This matter having been brought before the Office of Administrative Law on November 8, 1995, on petitioner's motion for emergency relief for "readmission" of petitioner into the South Orange-Maplewood School District; Laurence H. Olive, Esq., appearing for petitioner; and Joanne L. Butler, Esq., of Young, Dimiero & Sayovitz, P.C., appearing for respondent, South Orange-Maplewood School District Board of Education;

And the Court having considered the testimony, exhibits and arguments presented by the parties; and for the reasons stated on the record at the emergency hearing held on November 13, 1995; and for good cause demonstrated;

IT IS ORDERED, on this 14th day of November 1995, that petitioner's motion for emergency relief BE (and is hereby) GRANTED.

Pursuant to 20 U.S.C.A. §1415(e) and 34 C.F.R. §300.509 (1993), this Order is final and appealable by filing a complaint and bringing a civil action either in the Superior Court of New Jersey or in a District Court of the United States 20 U.S.C.A. §1415(e)2, 34 C.F.R. §300.511. If either party feels that this decision is not being fully implemented, this concern should be communicated in writing to the Director, Department of Education, Bureau of Controversies and Disputes.

NOV 1995
DATE


JEFFREY A. GERSON,
Administrative Law Judge

/g

95 NOV 14 PM 3:23

LAURENCE H. OLIVE, Esq.
460 Bloomfield Avenue
Montclair, NJ 07042
201-746-6623
Attorney for Petitioner
EVERETTE RANDOLPH,

OAL DKT. NO. EDU-11985-95

Petitioner,

v.

SCHOOL DISTRICT OF SOUTH
ORANGE AND MAPLEWOOD,

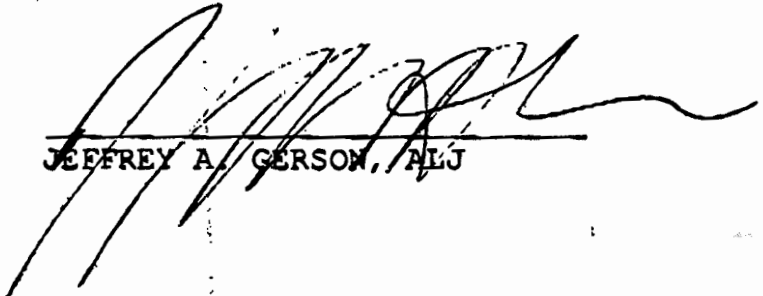
ORDER

Respondent

This matter having been opened to the Court, the Honorable Jeffrey A. Gerson presiding on a motion for emergent relief by Laurence H. Olive, Esq., attorney for the petitioner, and the respondent having been represented by Young, Dimiero & Sayovitz, P.C., Joanne L. Butler, Esq. appearing thereto in opposition, and the Court having considered the moving papers and argument of counsel,

IT IS on this 19 day of November, 1995

ORDERED that the pupil, A.K. be immediately reinstated into the respondent school district pending the outcome of the final hearing on the merits.



JEFFREY A. GERSON, ALJ

E.R., on behalf of minor child, A.K. :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH : DECISION ON MOTION
ORANGE AND MAPLEWOOD SCHOOL :
DISTRICT, ESSEX COUNTY, :
RESPONDENT. :

The record of this matter, including the audio recording of proceedings on motion, and the initial order of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and petitioner's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Respondent's exceptions essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ), again contending, inter alia, that petitioner's child should not be admitted to attend school in the South Orange and Maplewood School District, since the petition was filed beyond the 21-day statute of limitations set forth at N.J.S.A. 18A:38-1 and the statute of limitations is intended to require prompt action and bar review to those who violate it. (Board's Exceptions at p. 1) Further, the Board contends that waiver of the statute of limitations requires a specific analysis which respondent contends to be absent in the within matter. (Id. at p. 2)

In reply, petitioner argues that the ALJ's initial decision was correct and should be adopted in its entirety and that to find otherwise would subject the student, A.K., to harm and turmoil. (Petitioner's Reply Exceptions at p. 1)

Upon a careful and independent review of these arguments and the tape of the hearing conducted at OAL, the Commissioner concurs with the findings and conclusions of the ALJ granting emergent relief in this matter. The Commissioner finds that based on the particular factual circumstances operative herein, the record is sufficient to demonstrate that petitioner has met the standards for emergent relief as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982).

Accordingly, the Motion for Emergent Relief is granted and A.K. is hereby ordered to be readmitted to school in the South Orange and Maplewood School District during the pendency of an expedited hearing on the merits of this matter at OAL.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

BARBARA SKLUTE, FAYE MOUNTFORD :
AND JAN OLIVER, :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

: DECISION
BOARD OF EDUCATION OF THE CITY :
OF TRENTON, MERCER COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioners, three tenured school secretaries, sought a determination that the Board impermissibly reduced their salaries in violation of the tenure law, N.J.S.A. 18A:17-2.

ALJ concluded that since the overpayments made to petitioners occurred only in connection with their part-time duties at the Board's adult evening school, the Board did not reduce any compensation protected by the tenure laws. (Spiewak and N.J.S.A. 18A:17-2) ALJ found that the Board had not only the right, but also the responsibility, to correct its error and recoup the monies. Petitioners' motion for summary decision was denied. The Board's motion for summary decision affirming its actions and dismissing the matter was granted.

Commissioner found that the part-time evening school positions were separate and distinct from the full-time secretarial positions held by petitioners with the Board and that petitioners did not acquire tenure in their positions as part-time adult evening school secretaries in accordance with N.J.S.A. 18A:17-2. Accordingly, the Commissioner denied petitioners' motion for summary decision and dismissed the petition.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 9852-94

AGENCY DKT. NO. 346-8/94

**BARBARA SKLUTE, FAYE MOUNTFORD
AND JAN OLIVER,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE CITY
OF TRENTON, MERCER COUNTY,**

Respondent.

Kathleen A. Naprstek, Esq., for petitioners (Zazzali, Zazzali, Fagella & Nowak,
attorneys)

Thomas W. Sumners, Jr., Esq., and Giuffre M. Hollingsworth, Esq., for respondent
(Sumners, Council, George & Dortch, attorneys)

Record Closed: September 11, 1995

Decided: October 18, 1995

BEFORE M. KATHLEEN DUNCAN, ALJ:

This matter commenced on August 16, 1994, when Barbara Sklute, Faye Mountford and Jan Oliver (hereinafter petitioners) filed a petition of appeal with the Commissioner of Education seeking a determination that the Board of Education of the City of Trenton (hereinafter

respondent) had impermissibly reduced their salaries in violation of the tenure law N.J.S.A. 18A:17-2. An answer was filed on behalf of respondent on September 21, 1994, and on October 7, 1994 the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13.

A prehearing conference was conducted on February 28, 1995 at which time it was determined that the parties would submit cross-motions for summary decision. Petitioners' motion and supporting papers were received on April 17, 1995. Respondent's cross-motion and supporting papers were received on April 20, 1995. A reply on behalf of petitioners was received on May 1, 1995 and a reply on behalf of respondent was received on May 2, 1995. Oral argument on the cross-motions was conducted on July 7, 1995. As a result thereof, respondent filed supplemental papers including the affidavit of Anita McLaurin on July 24, 1995. Petitioners filed a supplemental letter memorandum on July 25, 1995. Oral argument continued by telephone conference call on July 27, 1995. Thereafter respondent filed an additional letter memorandum on August 10, 1995. No response having been filed on behalf of petitioners, the record closed on September 11, 1995.

FINDINGS OF FACT

In conjunction with their initial written submissions, the parties submitted the following joint stipulation of facts:

1. Petitioners Barbara Sklute, Faye Mountford and Jan Oliver are school secretaries employed by respondent Board of Education of the City of Trenton, Mercer County. Each petitioner acquired tenure as a secretary in the employ of respondent under N.J.S.A. 18A:17-2.
2. At a meeting of the Board held on September 23, 1993, respondent approved the appointment of petitioners to the positions of part-time Senior Secretary assigned to the Adult Evening High School, effective September 1, 1993 through June 30, 1994. These appointments were in addition to petitioners' regular secretarial positions.

3. On or about June 3, 1994 petitioner Barbara Sklute received her regular payroll check which also included the sum of \$732.42 as payment for services rendered in the position of part-time Senior Secretary assigned to the Adult Evening High School.
4. On or about June 3, 1994 petitioner Faye Mountford received her regular payroll check which also included the sum of \$657.72 as payment for services rendered in the position of part-time Senior Secretary assigned to the Adult Evening High School.
5. On or about June 3, 1994 petitioner Jan Oliver received her regular payroll check which also included the sum of \$573.84 as payment for services rendered in the position of part-time Senior Secretary assigned to the Adult Evening High School.
6. On or about June 8, 1994 each petitioner was advised by Respondent that she had received an overpayment in her June 3, 1994 payroll check.
7. Pursuant to an interoffice memo dated June 8, 1994, petitioner Barbara Sklute was advised that she received an overpayment in her June 3, 1994 payroll check in the amount of \$244.14.
8. Pursuant to an interoffice memo dated June 8, 1994, petitioner Faye Mountford was advised that she received an overpayment in her June 3, 1994 payroll check in the amount of \$219.12.
9. Pursuant to an interoffice memo dated June 8, 1994, petitioner Jan Oliver was advised that she received an overpayment in her June 3, 1994 payroll check in the amount of \$191.28.
10. Deductions were thereafter made from petitioners' payroll checks dated June 17, 1994 to recover these overpayments.
11. On August 16, 1994 petitioners filed a Petition of Appeal with the Commissioner of Education. Respondent filed an answer on September 21, 1994 and the matter was

transferred to the Office of Administrative Law as a contested matter.

In addition to the foregoing, the following relevant undisputed facts appear from subsequent written submissions and oral argument on the record.

The petitioners were each assigned to the Adult Evening School, three evenings per week and were required to work four hours per evening. The petitioners' compensation for these duties varied based upon their seniority in the district. Petitioner Mountford was paid at a rate of \$18.27 per hour; petitioner Sklute was paid \$18.78 per hour and petitioner Oliver was paid at \$15.94 per hour. Earnings received by petitioners as a result of performance of their duties in the Adult Evening School were identified separately on their payroll stubs from their contract salaries as tenured secretaries. When each petitioner's earnings for the pay period May 14, 1994 to May 27, 1994 were calculated, an error was made when the payroll office used a rate of time-and-a-half instead of the per hour rate. Accordingly, petitioner Sklute received an overpayment of \$244.14 in the pay check issued June 3, 1994; petitioner Mountford received an overpayment in the amount of \$219.12 in that check and petitioner Oliver received an overpayment of \$191.28. When respondent deducted the amounts of the overpayments from the compensation paid to petitioners in checks issued on June 17, 1994, the deductions were made from the amounts received in connection with petitioners' part-time job responsibilities in the Evening High School; the amounts attributable to their regular contract earnings were not affected.

APPLICABLE LAW AND DISCUSSION

N.J.A.C. 1:1-12.5, the rule governing motions for summary decision, provides:

(b) The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary

the ALJ properly recognized that this principle, as defined in case law, rests upon the tenure rights of the affected employees, petitioners assert that the ALJ incorrectly found said principle inapplicable to the instant matter. Instead, petitioners argue that Capella, supra, on which the ALJ bases her conclusion that tenure does not extend to positions held in such optional programs as an adult evening school, has been effectively overruled by the court in Spiewak, supra. (Id. at p. 3) Moreover, petitioners assert

***In Raboli v. Board of Education of the Bergen County Vocational Technical Schools, Bergen County, 1983 S.L.D. 196, the Commissioner upheld the ALJ's determination that administrators in an adult vocational education program who were properly certified and served in their positions for the requisite period of time had acquired tenure in those positions. In making his decision, the ALJ noted that, although such a program is permissive rather than mandatory, "once a Board exercises its discretionary authority, it is then required to be consistent with New Jersey statutes and regulations of the State Board of Education" including the interpretation of N.J.S.A. 18A:28-5 set forth in Spiewak, Raboli, 1983 S.L.D. at 207. (Id. at p. 4)

Petitioners, therefore, conclude that the Board's actions to recoup their overpayments in the instant matter were violative of their rights as tenured employees and urge the Commissioner to reverse the decision of the ALJ.

In its reply, the Board maintains that the Legislature has not afforded tenure protection to persons holding part-time positions in adult evening school programs. The Board argues that the cases cited in petitioners' exceptions, specifically, Raboli, supra and Milwit v. Board of Education of the City of Jersey City, 1988 S.L.D. 11, involved circumstances distinguishable from the instant matter in that these cases involve duly certified teachers, some having held tenure-eligible positions in the regular education program, who were serving in a full-time capacity in an adult educational program. Additionally, the Board challenges, these

“***decisions did not expressly find that Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982) overturned Capella v. Board of Ed. of Camden Vocational and Technical School, 145 N.J. Super. 209 (App. Div. 1976).” (Board’s Reply at p. 2) Moreover, the Board indicates that the Commissioner in Rabolli declined to reject Capella, and, instead, distinguished between persons employed in full-time and part-time capacities, while acknowledging the continued applicability of Capella. (Id.) Thus, the Board concludes, the decision in Capella has not been overturned as it pertains to part-time employees in adult evening school programs (Id. at p. 3), and the Commissioner should, therefore, uphold the initial decision of the ALJ.

Upon careful and independent review, the Commissioner determines to adopt the initial decision of the ALJ denying petitioners’ motion for summary decision and dismissing the Petition of Appeal, for the reasons set forth below. Initially, the Commissioner notes that the part-time positions at the adult evening school were advertised each year (Petitioners’ Exceptions at p. 2) and petitioners were duly appointed to those positions by the Board. (Initial Decision at p. 2) Additionally, the amounts due petitioners for performance of their part-time duties at the adult evening school were identified separately on their payroll stubs from their contracted salaries as (full-time) tenured secretaries. (Id. at p. 4) Further, when the Board deducted the amounts of the overpayments from the compensation paid petitioners, such deductions were made from the amounts received in connection with their part-time duties in the adult evening school. (Id.) Thus, there appears to be no dispute, and the Commissioner so finds, that the part-time evening school positions were separate and distinct from the full-time secretarial positions held by petitioners with the Board, notwithstanding the single paycheck received by petitioners for administrative efficiency.

The Commissioner further recognizes the line of cases standing for the proposition that a board's recoupment of erroneous overpayments implicates the tenure statutes, inasmuch as such recoupment may be determined to be a reduction in compensation. The Commissioner also recognizes that N.J.S.A. 18A:17-2, the operative statute herein, prohibits such reduction in compensation for secretaries who have acquired tenure, absent a finding of neglect, misbehavior or other offense. However, the Commissioner finds that petitioners herein have not acquired tenure in their positions as part-time adult evening school secretaries in accordance with N.J.S.A. 18A:17-2. That statute offers the protections of tenure to "[a]ny secretary ***who has or shall have devoted his *full-time* to the duties of his office and has or shall have served therein for three consecutive calendar years***." (emphasis added) Inasmuch as petitioners' serve *part-time* in their roles as secretaries in the adult evening school, they have not acquired tenure under N.J.S.A. 18A:17-2 in those positions.¹ Doris A. Walsh v. Borough of Laurel Springs Board of Education, decided May 14, 1992. Here, the statutory language is clear and unambiguous; as Spiewak instructs, it is the intent of the Legislature which controls. Having so determined, it is unnecessary for the Commissioner to reach the issue of tenure protection for school secretaries as it pertains to employment in an optional evening school program.


Inasmuch as the petitioners do not have tenure rights in their part-time secretarial positions in the adult evening school, the ALJ properly found that the Board's recoupment of its

¹ The ALJ states, "Respondent also correctly notes that a part-time employee may attain tenure as long as the school laws operate to assign tenure to the underlying position (Lichtman v. Ridgwood Bd. of Ed., 93 N.J. 363 (1983))***." (Initial Decision at p. 7) However, Lichtman adjudicated the rights and benefits of *teachers* holding part-time positions, and as such, analyzed a statute which is not applicable to the instant matter. The Lichtman court specifically held, "***that a tenured part-time *teaching staff member* with proper certification can claim, as against a non-tenured applicant, seniority rights in seeking appointment to a full-time position***." (emphasis added) Lichtman at 364.

overpayments "did not reduce any compensation protected by the tenure laws" and, thus, was entirely appropriate. (Initial Decision at pp. 7, 8)

Accordingly, the Commissioner adopts the ALJ's denial of petitioners' motion for summary decision and dismisses the within matter for the reasons expressed herein.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

423-95

EDU #9852-94
C # 423-95
SB # 1-96

BARBARA SKLUTE, FAYE MOUNTFORD :
AND JAN OLIVER,

PETITIONERS-APPELLANTS,

V.

STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE CITY
OF TRENTON, MERCER COUNTY,

DECISION

RESPONDENT-RESPONDENT.

Decided by the Commissioner of Education, December 1, 1995

For the Petitioners-Appellants, Zazzali, Zazzali, Fagella & Nowak (Kathleen A. Naprstek, Esq., of Counsel)

For the Respondent-Respondent, Sumners, Council, George & Dortch (Thomas W. Sumners, Jr., Esq. and Guiffre M. Hollingsworth, Esq., of Counsel)

Barbara Sklute, Faye Mountford and Jan Oliver (hereinafter "petitioners"), school secretaries employed by the Board of Education of the City of Trenton (hereinafter "Board"), filed a petition of appeal with the Commissioner of Education alleging that the Board had improperly reduced their salaries in violation of their tenure rights. As stipulated by the parties, each of the petitioners had acquired tenure in the district as a secretary under N.J.S.A. 18A:17-2.

FEB. 2, 2000

In September 1993, the Board assigned the petitioners to the Adult Evening High School as part-time senior secretaries for the period from September 1, 1993 through June 30, 1994. These assignments were in addition to petitioners' regular full-time secretarial positions in the district. The petitioners' salaries for their duties at the evening school were established by the Board as follows: Sklute was to be paid at a rate of \$18.78 per hour, Mountford was to be paid \$18.27 per hour, and Oliver was to be paid \$15.95 per hour. Although the petitioners each received a single paycheck covering all of their secretarial responsibilities in the district, earnings they received as a result of the performance of their duties at the evening school were identified separately on their pay stubs. Thus, the petitioners received their regular paychecks which also included an additional sum as payment for services rendered at the evening school.

On June 8, 1994, the petitioners were advised by the Board that they had received an overpayment in their June 3, 1994 paychecks. Petitioner Sklute was advised that she had received an overpayment in the amount of \$244.14, petitioner Mountford was advised that she had received an overpayment of \$219.12, and petitioner Oliver was advised that she had received an overpayment of \$191.28. The overpayments occurred when the district's payroll office erroneously used a rate of time-and-a-half instead of the per-hour rate in calculating the petitioners' earnings at the evening school for the pay period running from May 14 to May 27, 1994. In order to recoup these overpayments, the Board deducted the amount of the overpayments from petitioners' paychecks dated June 17, 1994. The deductions were made from the amounts received by the petitioners in connection with their assignments at the evening school. Petitioners contend that the

Board's action constituted a reduction in compensation in violation of their tenure rights acquired under N.J.S.A. 18A:17-2.¹

During the proceedings in the Office of Administrative Law, the parties submitted cross-motions for summary decision. On October 18, 1995, an administrative law judge ("ALJ") recommended granting the Board's motion for summary decision and dismissing the petition. The ALJ concluded that the petitioners had no tenure rights in their part-time evening school assignments. Consequently, since the overpayments occurred only in connection with the petitioners' duties at the evening school and the recoupment of those overpayments affected only subsequent earnings attributable to the evening school assignments, the ALJ determined that the Board had not reduced any compensation protected by the tenure laws.

On December 1, 1995, the Commissioner adopted the ALJ's findings and conclusions and dismissed the petition. The Commissioner agreed that the petitioners' evening school assignments were separate and distinct from their full-time secretarial positions and that the petitioners had not achieved tenure in their evening school assignments. As a result, the Board could reduce the portion of their paychecks attributable to the evening school assignments in order to recoup an overpayment made in

¹ N.J.S.A. 18A:17-2 provides in pertinent part:

c. Any person, who has acquired, or shall hereafter acquire, tenure in any secretarial or clerical office, position or employment under the board of education of a school district and has been appointed district clerk or secretary, or shall hereafter be appointed secretary of said district, as such secretary, shall hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title.

connection with those assignments without violating the tenure rights acquired by the petitioners in their full-time secretarial positions.

The petitioners filed the instant appeal to the State Board.

After a thorough review of the record, we affirm the Commissioner's determination to dismiss the petition, but modify his analysis. Under the circumstances, we find it unnecessary to determine whether the petitioners had tenure rights in their part-time assignments at the adult evening school.

The facts herein are analogous to the situation in Trenton Education Association, et al. v. Board of Education of the City of Trenton, decided by the State Board of Education, December 1, 1999, in which we determined that the Trenton board had not violated the tenure rights of its custodial employees when it reduced six of their bi-weekly paychecks during the 1992-93 school year in order to recoup an overpayment. The overpayment in that case had not resulted from action by the Trenton board in erroneously placing the custodians on the negotiated salary guide or incorrectly establishing their salaries under the terms of that guide. Rather, the board had erred in calculating the specific amounts to be included in the custodians' bi-weekly paychecks based on their established annual salaries. Nor was there any indication in that case that the custodial employees had received compensation for the 1992-93 school year which was less than the amount established by the board under the terms of the district's negotiated guide or as set forth in that guide. Under those circumstances, we concluded that the Trenton board's action in recouping the overpayments by reducing the custodians bi-weekly paychecks during the course of the year did not constitute an impermissible reduction in compensation as contemplated by N.J.S.A. 18A:17-3 and 17-4.

Similarly, it is undisputed in the instant case that the overpayments did not result from the incorrect establishment of the petitioners' salaries in their part-time evening school assignments. Rather, the district's payroll office erroneously used a time-and-a-half rate in calculating the petitioners' earnings in those assignments for one two-week period. Pursuant to our determination in Trenton Education Association, supra, the tenure laws do not prohibit the Board from recovering such an overpayment by reducing the petitioners' paychecks. Thus, under the particular circumstances presented herein, we conclude that the Board's action in deducting the amount of the overpayment from subsequent paychecks issued to the petitioners, regardless of whether they had tenure rights in the evening school assignments, did not constitute an impermissible reduction in compensation.

We therefore affirm the Commissioner's determination to dismiss the petition, but do so for the reasons expressed herein.

Attorney exceptions are noted.

February 2, 2000

Date of mailing FEB 04 2000

424-95

424-95

CAVIT ELECTRIC COMPANY, INC., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT : DECISION
OF THE CITY OF PATERSON, PASSAIC :
COUNTY :
RESPONDENT. :

DECEMBER 5, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 9803-95

Agency #269-6/95

CAVIT ELECTRIC COMPANY, INC.,

Petitioner,

v.

**STATE OPERATED SCHOOL DISTRICT
OF THE CITY OF PATERSON, PASSAIC
COUNTY,**

Respondent.

Cavit Oncul, pro se, petitioner

Louis M. Florai, Esq., for respondent
(General Counsel, Legal Department, Paterson Public Schools)

Record Closed: September 29, 1995

Decided: October 19, 1995

BEFORE JEFFREY A. GERSON, ALJ

In this matter, petitioner appealed to the Commissioner of Education alleging that the Paterson Board of Education violated proper bidding procedure in awarding contract for school projects.

After referral to the Office of Administrative Law (OAL), a hearing was held on September 14, 1995, for emergency relief pursuant to *N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13* and, petitioner indicated that he would seek counsel and notify the court no later that September 29, 1995. During that time, petitioner did not contact the OAL.

Accordingly, I **CONCLUDE** that the petitioner has relinquished his right to be heard in this matter. Under such circumstances, I **ORDER** that petitioner's appeal from the determination of the Department of Education be **DISMISSED**.

I hereby **FILE** my initial decision with **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.


This recommended decision may be adopted, modified or rejected by **THE COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties

OCT 19 95
DATE

10/24/95
DATE

OCT 27 1995
DATE
/g

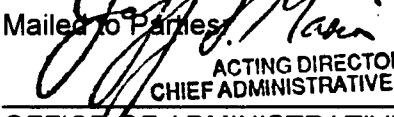


JEFFREY A. GERSON, ALJ

Mailed to Department of Education

DVA

DEPARTMENT OF EDUCATION

Mailed to Parties


ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

ADDENDUM

Order requesting dismissal.

SEP 26 11 11 AM '95

LOUIS M. FLORA, ESQ.
General Counsel
Paterson Public Schools
33-35 Church Street
Paterson, New Jersey 07505
(201) 881-6229

CAVIT ELECTRIC COMPANY, INC., : BEFORE THE COMMISSIONER OF
THE DEPARTMENT OF EDUCATION
Petitioner, : OF NEW JERSEY
OAL DKT. NO. EDUOT 09803-95N
vs. : AGENCY REF. NO.: 269-6/95

THE PATERSON BOARD OF EDUCATION:
AND DYNAMIC ELECTRIC, A
DIVISION OF ZANGARI ELECTRICAL : CIVIL ACTION
ENTERPRISES, INC., : ORDER

Respondents. :
:

This matter having come before the Office of
Administrative Law on September 14, 1995 by way of a request
for emergent relief on behalf of Petitioner and the tribunal
having heard the argument of the Respondents, Paterson Board
of Education and Dynamic Electric, Inc., through their
counsel and of Petitioner through its officer appearing pro-
se does for good cause shown on this 29 day of September
1995,

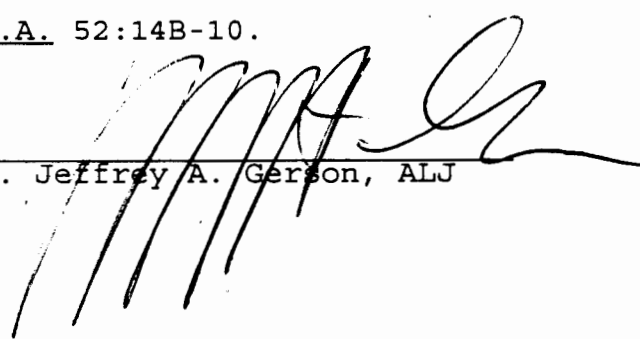
ORDER AS FOLLOWS:

2.

1. Petitioner shall consult with counsel of its choosing and so notify the Respondent Paterson Board of Education and this tribunal no later than 9/29/95 if the Petitioner intends to proceed with its request for emergent relief.

2. Should the Petitioner fail to so notify this tribunal and Paterson Board of Education of its intention to proceed by 9/29/95, then the request for emergent relief shall be dismissed.

This recommended Order may be adopted, modified or rejected by the Commissioner of the Department of Education, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.


Hon. Jeffrey A. Gerson, ALJ


CAVIT ELECTRIC COMPANY, INC., :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 STATE-OPERATED SCHOOL DISTRICT : DECISION
 OF THE CITY OF PATERSON, PASSAIC :
 COUNTY :
 RESPONDENT. :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record, the Commissioner concurs with the Administrative Law Judge (ALJ) that dismissal of this matter was proper based on petitioner's failure to comply with court rules. The Commissioner finds that after receiving proper notice, petitioner's failure to notify the ALJ within the prescribed timeline of his intent to pursue this appeal sufficiently warranted dismissal of the instant case.

Accordingly, the Commissioner affirms the initial decision of the Office of Administrative Law dismissing the within Petition of Appeal with prejudice.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

DECEMBER 5, 1995
DATE OF MAILING DECEMBER 5, 1995

LILY H. ROWE,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF ELIZABETH, UNION COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

LILY H. ROWE, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE CITY : DECISION
 OF ELIZABETH, UNION COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION


427-95

JOSEPH G. TORRONE, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE TOWN- : DECISION
 SHIP OF HOWELL, MONMOUTH :
 COUNTY, :
 :
 RESPONDENT. :

JOSEPH G. TORRONE, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE TOWN- : DECISION
 SHIP OF HOWELL, MONMOUTH :
 COUNTY, :
 :
 RESPONDENT. :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

DECEMBER 6, 1995

DATE OF MAILING DECEMBER 6, 1995

428-95

428-95

EILEEN DI GIOVANNI, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY :
OF RAHWAY, UNION COUNTY, AND :
ANTHONY CAVANNA, SUPERINTENDENT, :

DECISION

RESPONDENTS. :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9539-94

AGENCY DKT. NO. 7-1/94

EILEEN DIGIOVANNI,

Petitioner,

v.

**BOARD OF EDUCATION OF THE CITY
OF RAHWAY AND ANTHONY CAVANNA,
SUPERINTENDENT, UNION COUNTY**

Respondent.

Thomas P. Vitolo, Esq., for petitioner
(Yauch, Peterpaul, Clark & Vitolo, attorneys)

Howard M. Nirenberg, Esq., for respondent
(Ostrager, Fieldman, Kachman and Nirenberg, attorneys)

Record Closed: September 28, 1995

Decided: October 24, 1995

BEFORE **MUMTAZ BARI-BROWN, ALJ:**

This matter was transmitted to the Office of Administrative Law on September 28, 1994, for determination as a contested case, pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The parties have agreed to a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Oct 24, 1995
DATE

Mumtaz Bari-Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

10/30/95
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties: J. J. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT 30 1995
DATE

OFFICE OF ADMINISTRATIVE LAW

cb

EILEEN DI GIOVANNI, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY : DECISION

OF RAHWAY, UNION COUNTY, AND :


ANTHONY CAVANNA, SUPERINTENDENT, :

RESPONDENTS. :

The record and initial decision incorporating a joint stipulation of settlement rendered by the Office of Administrative Law (OAL) have been reviewed.

The Commissioner is unable to accept the written settlement in its present form to the extent that the language of the settlement, which specifically states in Paragraph 9 that “***confidentiality is an important and valuable part of the settlement,***” does not appear to contemplate that the settlement document will become a matter of public record as contested matters before the Commissioner generally are pursuant to N.J.S.A. 18A:6-9, when transmitted to the OAL pursuant to N.J.A.C. 6:24-1.1 and N.J.A.C. 1:1-1 et seq. Accordingly, this matter is remanded to the OAL for revision of the settlement terms or other appropriate action.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

(428-95)
529-96

EILEEN DI GIOVANNI, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY :
OF RAHWAY, UNION COUNTY AND :
ANTHONY CAVANNA, SUPERINTENDENT, :

DECISION

RESPONDENTS. :


_____ :

OAL DKT. NO. EDU 12387-95
AGENCY DKT. NO. 7-1/94

EILEEN DI GIOVANNI, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE CITY : DECISION
 OF RAHWAY, UNION COUNTY AND :
 ANTHONY CAVANNA, SUPERINTENDENT, :
 :
 RESPONDENTS. :
 _____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

429-95

429-95

BOARD OF EDUCATION OF THE
BOROUGH OF BELLMAWR, CAMDEN
COUNTY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE SCHOOL
DISTRICT OF WOODBURY, GLOUCESTER
COUNTY,

RESPONDENT.

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COMMISSIONER OF EDUCATION

DECISION

DECEMBER 6, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2368-95

AGENCY DKT. NO. 483-12/94

**BOARD OF EDUCATION OF THE BOROUGH
OF BELLMAWR, CAMDEN COUNTY,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE SCHOOL
DISTRICT OF WOODBURY, GLOUCESTER
COUNTY,**

Respondent.

John Wade, Esq., for petitioner, (Ferreri & Wade, attorneys)

John L. White, Esq., for respondent, (Labrum & Doak, attorneys)

Record Closed: October 31, 1995

Decided: November 1, 1995

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

This matter was transmitted to the Office of Administrative Law on March 6, 1995, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, which by law is authorized to make a final decision in this matter. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Nov 1, 1995
DATE

Lillard E. Law
LILLARD E. LAW, ALJ *erh*

Receipt Acknowledged:

Nov. 13, 1995
DATE

D. N. Antanaitis / jr
Department of Education

Mailed to Parties:

NOV 16 1995
DATE

Joanne M. Restivo
OFFICE OF ADMINISTRATIVE LAW

lmh

FERRERI & WADE
Oct 31 11 50 AM '95

FERRERI & WADE, P.C.
1250 Chews Landing Road
Laurel Springs, NJ 08021
609-346-2800
Attorneys for Petitioner

BELLMAWR BOARD OF
EDUCATION

vs.

WOODBURY BOARD OF
EDUCATION

: OFFICE OF ADMINISTRATIVE LAW
:
: OAL DOCKET NO. EDUOS 02368-95S
:
: AGENCY REFERENCE NO. 483-12/94
:
: STIPULATION OF SETTLEMENT

WHEREAS, Petitioner Bellmawr Board of Education (hereinafter "Bellmawr") did file a verified complaint before the Commissioner of Education of New Jersey requesting a determination of a dispute that had arisen between Bellmawr and the Woodbury Board of Education (hereinafter "Woodbury") as to homelessness status of two minor children, Joshua Crane and Christopher Fisher; and

WHEREAS, after exchanging discovery information between themselves the parties, through their respective counsel, have reached an amicable agreement;

NOW, THEREFORE, the parties desire to enter into this Stipulation of Settlement in accordance with the terms listed below:

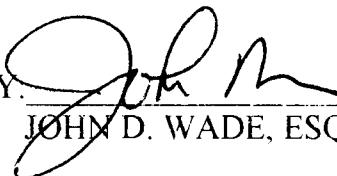
1. Bellmawr agrees to compensate Woodbury in the aggregate sum of \$4,800.00, said sum to represent full and final payment for tuition and any other

related costs incident to the attendance of both Joshua Crane and Christopher Fisher in the Woodbury School System.

2. Woodbury agrees to waive any and all claims to any ASAA reimbursement which may be recovered by Bellmawr in reimbursement through the State of New Jersey.

3. Both Woodbury and Bellmawr waive any other claim for relief cited by either party in the pleadings, it being the intention of both parties that the above terms shall constitute full and final settlement of the herein action.

FERRERI & WADE, P.C.
Attorneys for Petitioner

BY: 
JOHN D. WADE, ESQUIRE

LABRUM & DOAK
Attorneys for Respondent


BY: 
JOHN L. WHITE, ESQUIRE

Dated: 10-25-95

BOARD OF EDUCATION OF THE :
BOROUGH OF BELLMAWR, CAMDEN :
COUNTY, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCHOOL : DECISION
DISTRICT OF WOODBURY, GLOUCESTER :
COUNTY, :
RESPONDENT. :
_____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

DECEMBER 6, 1995
DATE OF MAILING DECEMBER 7, 1995

IN THE MATTER OF THE TENURE :
 HEARING OF GREG MOLINARO, :
 SCHOOL DISTRICT OF THE TOWNSHIP : COMMISSIONER OF EDUCATION
 OF PARSIPPANY-TROY HILLS, MORRIS : DECISION
 COUNTY. :
 _____ :

SYNOPSIS

Board certified tenure charges of incapacity, incompetence and unbecoming conduct against respondent, middle school science teacher.

Having considered testimony of witnesses and exhibits presented, the ALJ concluded that the Board demonstrated by a preponderance of credible evidence the charges of incapacity and incompetence by his chronic absenteeism and his inability to perform his teaching functions. Moreover, the ALJ concluded that the telephone calls he made to a stranger constituted unbecoming conduct, noting that each of the charges separately constituted cause for dismissal of respondent from his tenured position.

Commissioner concurred with findings and determination in initial decision and ordered respondent dismissed from his tenured teaching position as of the date of his decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 12074-94

AGENCY DKT. NO. 438-11/94

**BOARD OF EDUCATION OF THE
TOWNSHIP OF PARSIPPANY-TROY HILLS,**

Petitioner,

v.

GREG MOLINARO,

Respondent.

Henry N. Luther III, Esq., Steven F. Ritardi, Esq., and Marie-Laurence Fabian,
Esq., for petitioner
(Dillon, Bitar & Luther, attorneys)

David B. Friedman, Esq., for respondent
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: September 7, 1995

Decided: October 23, 1995

BEFORE DIANA C. SUKOVICH, ALJ:

PROCEDURAL HISTORY

On November 15, 1994, the Board of Education of the Township of Parsippány-Troy Hills (Board or petitioner) filed an amended certification of tenure charges against Greg Molinaro (Molinaro or respondent) with the State Department of Education (DOE). Molinaro filed an answer on December 9, 1994. The DOE transmitted the matter to the Office of Administrative Law on December 15, 1994 for determination as a contested case pursuant to *N.J.S.A. 52:14F-1 to -13*.

Telephone conferences were conducted throughout the proceedings. Hearings were scheduled for July 24 through July 27, 1995.

Respondent's counsel represented on the record on July 24, 1995 that Molinaro had decided to proffer a resignation from his position, provided that there was a determination by this judge that if such proffer were accepted, the tenure charges would be deemed moot. Oral argument was conducted on July 24, 1995, and I ruled that a resignation, even if not conditional, would not moot the tenure charges. That ruling is incorporated herein.

The hearing was thereupon adjourned to give respondent time to consider and file an interlocutory appeal. Respondent did not do so, and hearings were held on July 25 through 27, 1995. Post-hearing briefs were filed on August 25, 1995. Subsequent to further communications with the parties, the record was closed on September 7, 1995.

NATURE OF THE PROCEEDINGS

On October 24, 1994, the Board determined that probable cause existed to credit tenure charges against respondent and that the charges were of sufficient severity that, if found to be true, to warrant Molinaro's dismissal as a tenured teaching staff member. The Board charged respondent with incapacity, incompetence, and unbecoming conduct. More specifically, the tenure charges state that Molinaro engaged in chronic absenteeism, displayed and continued to display totally inadequate teaching and classroom management skills, even after repeated assistance, support, warnings, and increment withholdings, and that he made a series of sexually harassing telephone calls to Elizabeth Indano (Indano) during the period August 19 through August 23, 1994. In the latter respect, the tenure charges reference an investigation by the Stanhope Police Department in August 1994. The Board also suspended respondent without pay, pending resolution of the matter.

The issues to be determined, broadly articulated, are whether petitioner has demonstrated, by a preponderance of the credible evidence, the charges and, if so, what discipline, if any, should be imposed on Molinaro.

STIPULATION

Molinaro was arrested on August 23, 1995 in Stanhope for making obscene telephone calls. The parties stipulated that he pled guilty in the Stanhope Municipal Court to the following charge:

within the jurisdiction of this court and with purpose to harass Elizabeth Indano engaged in the course of alarming conduct or of a repeatedly committed acts with the purpose to alarm or seriously annoy Elizabeth Indano, specifically by making telephone calls containing explicit sexually oriented comments, in violation of N.J.S.A. 2C:33-4.

FINDINGS OF FACT

Based upon a review of the entire record, including credibility assessments of the witnesses, I **FIND** the following to be facts.

Molinaro, who is 48 years old, has been employed by respondent since September 1970 as a middle school science teacher. Throughout his term of employment, respondent has taught at Central Middle School (Central). During the school years ending 1992, 1993 and 1994, Molinaro also taught at the Brooklawn Middle School (Brooklawn). During those three school years, he taught three classes daily at Central and two classes per day at Brooklawn. For the school year ending 1994, Molinaro taught a total of thirty-nine students at Central and fifty-eight students at Brooklawn. Molinaro is currently a tenured teacher with respondent. There are approximately 600 teachers in the district.

Angelo Guiliana (Guiliana) is the principal of Central, having served in that capacity since 1986. Guiliana's duties include observing and evaluating classroom teachers assigned to Central. Eugene Vasile (Vasile) is petitioner's director of personnel.

During the three school years that Molinaro taught at both Central and Brooklawn, he was observed at both schools. Observations were conducted by Guiliana at Central, James Simes (Simes), the science supervisor, at both Central and Brooklawn, and Ken Graham (Graham), Brooklawn's principal, at Brooklawn. Pursuant to Board policy, Guiliana was deemed primarily responsible for the evaluation of Molinaro because respondent spent the majority of his teaching time at Central. Guiliana was therefore responsible for the year-end performance evaluations in all of the school years at issue in the current matter.

Indana is thirty-four years old. She resides with her husband and two minor children in Stanhope. Neither Indano, nor any member of her family, has been employed or affiliated with respondent. She is not employed outside of the home.

On August 19, 1994, a Friday, at approximately 12:00 p.m., Molinaro called Indano, speaking with her on the telephone. He asked if she knew who he was, and she responded in the negative. Because he was whispering and there was noise in the background, she had difficulty hearing him. Indano asked Molinaro what his name was. He did not provide it but said: "You know why and why I whisper--someone might hear. You know who. I have to go." (Indano's direct testimony).¹ Indano initially thought that someone, possibly her husband, was playing a trick on her.

Molinaro thereafter called Indano three additional times on August 19, 1994, whispering each time. The content of his communications became more graphic and sexual in nature, and Indano subsequently began to become concerned and fearful.

¹ The transcript of the hearing held on July 26, 1995 was not available to this judge.

Molinaro called a second time at approximately 1:00 p.m., inquiring of Indano who was home with her and where she was located in the house. She responded that her children were home and that she was near a bathroom. At this point, she still thought someone was playing a joke on her. Molinaro then asked what Indano was wearing, and she responded that she was dressed in shorts and a shirt. He asked if she could take her clothes off and hung up.

The content of Molinaro's telephone conversations became more disturbing during the third and fourth calls. During one of those, he described what he had allegedly done to someone who looked like Indano, someone who had the same color hair as that of Indano, which is a reddish/coppertone color. More specifically, Molinaro told Indano that he had previously met a woman who looked like her while he was at a mall with a friend, brought the woman to his house, and while he was in a closet, observed his friend and the woman engaging in anal sex. During the latter calls, Molinaro also again asked who was home with Indano and requested that she remove her clothes and touch herself. By this time, Indano was trying to keep Molinaro on the telephone as long as possible to try to recognize his voice or notice a possible clue to his identity. She still could not believe that it was a stranger.

Indano told her husband of the calls when he returned home from work that evening, inquiring if he had been involved with playing a joke on her. He replied that he knew nothing of the calls. It then "hit her" that a stranger had called, and she began feeling frightened and "despondent." (*Ibid.*) The next morning, Indano called the Stanhope police department and was advised to push certain buttons on her telephone to trace any subsequent calls.

Molinaro again called Indano on August 22, 1994, at approximately 7:30 a.m. He asked if she were home alone, if she had felt "horny" over the weekend; Molinaro called Indano a total of three or four times on August 22.

During the first call, he also asked her if she did anything about "being horny," and if she would meet him. (*Ibid.*) She replied that she would not because she was afraid, and he responded that she did not have to be afraid, he was "a nice guy." (*Ibid.*) During one of the telephone calls, Molinaro also asked Indano if she "did other guys." (*Ibid.*) He spoke in a "whispering" tone of voice.

Indano did not immediately hang up because she was still trying to identify him and felt "desperate" about the situation. (*Ibid.*) Indano tried to initiate a tracer on the first phone call, but pushed the wrong buttons on her telephone. She subsequently called the Stanhope police department and, in response, Police Chief Douglas Waldron (Waldron) came to her home and had a caller identification mechanism installed on the phone. Waldron also requested assistance from the Sussex County Sheriff's Department in the investigation. A sheriff's officer was assigned to Indano's residence. Subsequent calls from Molinaro to Indano during the evening of August 22, 1994 were traced to local public phones.

A sheriff's officer was present at Indano's home during the day on August 23, 1994. Indano did not receive any telephone calls from Molinaro at that time.

Respondent called Indano at approximately 10:00 p.m. on August 23, 1994. Indano made efforts to keep him on the line as long as possible in order to trace the call. Molinaro asked who was at Indano's residence that day, and she replied that her husband was home. Molinaro then asked "Did you do it with him" and what she had done during the day. (*Ibid.*) She replied that she had gone to the mall, and Molinaro again asked what she had done. Indano stated that she had tried on clothes. Molinaro asked her to undress and touch herself while they were talking. She responded that she would not, and he stated: "You know what I want you to do." Indano's perception, based on the sound of Molinaro's voice, was that he was masturbating while he was speaking to her. His voice was "shuddering." (*Ibid.*) However, he did not tell her that he was doing so. At that point, he hung up.

The call was traced to a public phone in the parking lot of a Days Inn on Route 46 in Roxbury, New Jersey (Roxbury). While Indano was talking to Molinaro, her husband and Raymond Elliot (Elliot), a neighbor and family friend, determined that the call was coming from the Days Inn, left the house, and called the Stanhope police department with this information. When the calls first commenced, Elliot had compiled an extensive list of telephone numbers assigned to local public telephones; he and Mr. Indano utilized this list to determine the location from which the call was coming on the evening of August 23, 1994.

Waldron was largely responsible for the Stanhope police department's investigation of Indano's complaints. The Detective Bureau, as well as a uniformed officer, assisted Waldron on the evening of August 23, 1994. While Indano continued to speak to Molinaro, Waldron, after receiving the call from Mr. Indano identifying the location of the public telephone, dispatched Patrolman Charles Zweigle (Zweigle) to the Days Inn. Waldron then left for the same location, arriving after Zweigle. Three or four Roxbury police officers were present.

Upon arrival, Zweigle pulled onto the shoulder of the road, in view of two pay phones located in the parking lot of the Days Inn. He observed Molinaro driving a Jeep Cherokee away from one of the phones, toward Zweigle's vehicle. The jeep turned and attempted to leave through the entrance to the lot. Zweigle initiated a motor vehicle stop, and other officers arrived at this time. Zweigle noted in a report regarding the incident that he (Zweigle) observed that the zipper of Molinaro's pants were open and that respondent was holding a white rag, which Molinaro subsequently placed on the front passenger seat before exiting the vehicle, at which time he also zipped his pants. Zweigle advised Molinaro of the latter's rights. The white rag was taken by police personnel as evidence, and the jeep was impounded.

When Waldron arrived, Zweigle told Waldron what had happened. Waldron then also advised Molinaro of respondent's rights and asked Molinaro what he had been doing. Respondent did not directly reply, but indicated that he was returning from

attendance at Little League games in Pennsylvania and was calling friends. Waldron arrested Molinaro, and respondent was transported to the Stanhope police station, where he was again informed of his rights and was also informed of the nature of the police investigation. He was charged with violations of *N.J.S.A.* 2C:33-4, 12-1(A)(3), and 34-2(A)(1)(A). Waldron asked respondent if he had made the calls in question. Molinaro did not directly reply, indicating that he was not trying to hurt anyone. He also stated that he wanted to go home and "think things over" and return several days later. (Waldron's direct testimony) Molinaro repeatedly referenced his prior activities as an umpire of various sports events and the many individuals whom he knew.

Elliot and other friends encouraged Indano to be present in court on the day when Molinaro pled guilty. She could not make herself go.

Subsequent to the calls in question, Indano formed a belief that the caller was someone who knew who she was and/or had previously seen her. These conclusions were based upon references during the calls to the color of her hair and her resemblance to other individuals. During one of the calls on one of the dates in question, Molinaro had asked Indano if her hair was the same color as her pubic hair and stated that he knew of other women who looked like her. The Indanos had a business sign in front of their home with their telephone number. Indano thought that Molinaro had perhaps seen her walking in the vicinity of her house and noted the telephone number. Police reports filed regarding communications from Indano stated that she had indicated to police officials that the caller had told her that he knew who she was, where she lived, how many children she had, and where she was at certain times. The Stanhope police department treated Indano's complaints as involving a possible stalker.

Approximately ten days after the calls, Indano was hospitalized because of a desire to commit suicide. She was diagnosed as suffering from depression and post-traumatic stress syndrome, at least in part, related to the calls in question. She subsequently commenced therapy, which is still continuing, in part for other reasons.

She feels that she was "violated" and cannot trust anyone. She is still fearful for her children to be alone outside. (Indano's redirect testimony).

Elliot and his family have known the Indanos for several years. Prior to the calls in question, his perception was that Indano was an "easygoing," "trusting," "innocent," individual. He has noted "marked changes" in her personality since the incident in question. To his perception, Indano is now "very leery" of others. Although she walked a lot in the past, she is now fearful of doing so. She appears "intimidated" whenever the phone rings. Indano still maintains a caller identification mechanism on her phone and lets it ring four to five times before answering. (*Ibid.*)

Guiliana has known Molinaro for eight years as a result of respondent's employment as a teacher at Central. At the middle school level in the district, science is heavily laboratory-oriented, involving much student/teacher interaction. The curriculum for middle school students requires that they have a minimum of four to five labs, which can last anywhere from two to three days, during a marking period, at least one a week.

Guiliana was assigned to Central initially for the 1986-87 school year. He observed Molinaro at Least five times. He concluded that Molinaro generally had difficulty in performing as a teacher in a lab-oriented environment. From then on, he and other personnel worked with Molinaro to help respondent incorporate labs into the curriculum. At that point, the middle school science program was essentially not a laboratory approach; it was either demonstration or paperwork given to the students. Molinaro generally consumed ten to fifteen minutes, out of a forty-minute lesson for introduction, a matter usually covered by teachers in several minutes.

Guiliana first evaluated respondent on approximately September 23, 1986, providing comments apparently of a negative nature, which was difficult for Molinaro ". . . to swallow after seventeen years. I think he could have been a little more tactful

starting out with me." (Transcript, 7/27/95, p.5). Guiliana met with respondent on May 1, 1987 regarding general concerns.

Simes and possibly a Mr. O'Harra ('O'Harra), the vice principal at Central, also observed Molinaro during that school year. After the first observation, Guiliana adhered to a clinical approach, pursuant to which Guiliana met with Molinaro prior to a lesson. Respondent would describe the goals and objectives of the lesson, the two mutually planned it, and Guiliana would subsequently observe the class during which it was presented and then subsequently confer with respondent. (Transcript, 7/25/95, p. 75).

O'Harra, who was also part of the evaluation process, functioned as the disciplinarian at Central. O'Harra sent Guiliana a memorandum dated May 19, 1987, which constituted a report of a summary conference conducted by O'Harra with Molinaro prior to a formal observation and the subsequent evaluation of such observation. The issues noted and discussed with Molinaro included lateness of respondent and students, classes not commencing promptly, the absence of a statement of a lesson objective or other introductory remarks, the provision of only a very brief exchange between respondent and the class, followed by work from a book or a mimeographed sheet, and no real summary of the current day's work. The materials were collected with little or no comment. The report noted that respondent had communicated to O'Harra that Molinaro felt that with O'Harra's support and direction, respondent could make progress in correcting the deficiencies noted. The report was prepared at Guiliana's direction and constituted an observation which was included in Molinaro's formal year-end evaluation.

In June of 1987, Guiliana prepared a Performance Evaluation Report (PER) pertinent to Molinaro's performance and evaluations during the 1986-87 school year. As of that time, Guiliana and others had been working with Molinaro to assist him in utilizing instructional techniques to focus students on class tasks. As noted in the applicable PER, respondent had made efforts to improve his approach to eighth-grade

students, had developed single concept lessons, and had expended efforts to incorporate more laboratory activities into the classroom. However, Guiliana noted in the PER that if significant improvement in the planning and implementing of teaching strategies were not made during the next school year, a loss of increment would be considered. The PER noted that respondent was to work with a supervisor and the principal on a regular basis to develop effective lessons and check-points for monitoring success. The comments also noted that Molinaro had attempted to improve his approach to discipline. Guiliana rated respondent as exhibiting conditionally acceptable performance in planning and organizing and implementation and interaction; as exceeding acceptable performance, in evaluation and record keeping; and acceptable performance, in professional relations/growth. Regarding professional relationship and growth, the only suggestion was for Molinaro to take an in-service professional course, which he did not do. The overall recommendation was for reemployment with an increment.

Planning and organization address a lesson plan developed by a teacher prior to implementation of a class. Implementation, as indicated by the term itself, involves effectuation of the lesson. Record keeping pertains to maintenance of an actual record of test results or evaluations and recordation of grade equivalents for each marking period. Professional relations and growth address what an individual employee does to maintain himself/herself professionally. Evaluation of a teacher's implementation and interaction involves rating his/her classroom management and organization of the material during a lesson or interaction with students. Evaluation of respondent in these areas as conditionally acceptable indicated that Molinaro had to make significant improvement. In Guiliana's view, the conditional acceptable performance was therefore carried over to the 1987-88 school year so that respondent would have an opportunity to demonstrate improvement. PERs are year-end evaluations based on formal evaluations done throughout the school year, conferences, input from students and parents, etc.

Molinaro did not complete the 1986-87 school year, having to take a medical leave of absence, commencing May 7, 1987, because of an ear surgery. He did not return to school that year. He utilized all sick time accumulated as of that point. Respondent was unmarried during his first eleven years of employment with respondent and did not take family illness days from 1970 to 1980. Consistent with respondent's practices, administrators held conferences with Molinaro regarding each PER performed over the years. A copy of the June 1987 evaluation was mailed to Molinaro, probably over the summer.

During the first half of the 1987-88 school year, Molinaro performed satisfactorily. However, he never performed well regarding planning and implementation. Observations were conducted on October 7, 1987, October 23, 1987, December 8, 1987, February 11, 1987, and March 9, 1988.

Informal conferences were held with respondent prior to March 14, 1988 to discuss patterns of problems and the possibility of a withholding of an increment. A formal conference was conducted on March 14, 1988. The formal observations resulted in notations and discussions of patterns of problems. Informal observations, which were announced or unannounced, were a "clinical-type of supervision" for the purpose of gathering data. Conferences were conducted with respondent prior to the observations with a view towards identifying any problems. (*Id.* at p. 88). This approach provided respondent with an opportunity to correct any problems before the class observation. Respondent did not improve his performance regarding planning, organization, implementation, and inaction during the 1987-88 school year.

The 1987-88 school year commenced with a conference held among Molinaro, Guiliana, and Simes. It was agreed that the latter two individuals would provide direct in-service for the development of laboratories and the implementation of such. On a weekly basis, either Guiliana or Simes met with Molinaro to review respondent's plans for his classes. Simes or Guiliana then observed the class in question. This process continued for more than six weeks. Ultimately, Simes and Guiliana "backed away"

because they "... had to have him do it on his own." (Transcript 7/25/95, p. 18). At that point, Molinaro reverted to a non-laboratory approach in his classes, and the problems experienced during the prior school year reemerged. Large amounts of non-instructional time were spent in class, during which discipline problems developed. Molinaro again evidenced an inability to plan and implement a laboratory approach, to commence a class in a timely fashion, and to end a class properly. At the most, there were ten minutes of actual instructional time during an individual class, the other 30 minutes being unrelated to the objectives of the lesson. Molinaro, similar to the prior year, did not have enough academic indicators during a marking term. A review of his records evidenced one test for a five-week period. Molinaro's record keeping showed no academic indicators for the third marking period, *i.e.*, there was no evidence of tests being assessed or given, no quizzes, no laboratory reports, etc. The administration gave Molinaro time to redo his grade book, but respondent never submitted an upgraded record book.

Several communications and conferences occurred during March of 1988 pertaining to respondent. On March 14, 1988, Molinaro attended a conference with Simes, Deloris McGreevy (McGreevy), a union representative, and Guiliana. The observation of March 9, 1988, as well as a recommendation for withholding an increment for the 1988-89 school year, were discussed. Deficiencies in classroom management and instruction were delineated, as were excessive administrative time to initiate classroom activity or active management of the class, an indication in Molinaro's record book of only one academic grade at a point in time past the mid-marking period, and a lack of apparent planning for lessons. The discussion focused on perceived difficulties of the administration which had been noted in the previous school year as well as in September 1987 and which still continued. Management communicated concern regarding a lack of management control by respondent of students, resulting in a situation in which students left class before dismissal time, students came to class five to ten minutes late, and an inability by Molinaro to implement the laboratory approach. Another focal point of the conference was the absence of grades for half of a marking period for Molinaro's five classes. Respondent's policy in this respect is to

have a minimum of ten academic indicators per marking period. A report of the March 14, 1988 conference was written in conjunction with McGreevy. Molinaro was given ten days in which to verify his record keeping and have at least two or three formal observations. At the end of that time, an additional assessment was planned to determine Molinaro's future status.

Guiliana communicated with a Dr. Perlett (Perlett), respondent's assistant superintendent in charge of instruction, by memorandum dated March 23, 1988, regarding the possibility of withholding an increment for respondent. Guiliana summarized observations, evaluations, and conferences in this respect. Prior observations, as reflected in the March 23, 1988 memorandum, also revealed general situations in which students paid no heed to Molinaro's directions. To Guiliana's observations, ". . . it would be as if the room were empty and he was giving directions and there was no one there to respond to it." (*Id.* at p. 28). Guiliana's conclusions in this respect were based on his own observations of Molinaro and those of O'Harra, as communicated by O'Harra. By memorandum dated March 29, 1988 to a Mrs. Krawitz, the district's superintendent, Guiliana recommended that Molinaro have his increment withheld in the 1988-89 school year.

Problems persisted through the Spring of 1988. The instructional program was especially lacking for Molinaro's eighth-grade classes. Lesson plans were not included in Molinaro's records, and there was no focus on an objective. Even minimal instruction was not occurring. During class time, students engaged in inappropriate behaviors, such as walking around the room. Molinaro disregarded the behavior and did not make efforts to correct it.

Respondent did not complete the 1987-88 school year. In mid-April 1988, Guiliana advised Molinaro, at a meeting between the two, that after having checked with the superintendent, Guiliana believed that if Molinaro took a medical leave, respondent could have the rest of the year off with salary. Guiliana indicated that he believed respondent needed a rest. Molinaro contemplated ear surgery at that time,

providing a physician's documentation for medical leave to the district, at Guiliana's request. He was paid in full from mid-April 1988 through June 1988. However, ear surgery actually did not come to fruition.

On June 23, 1988, Guiliana completed a PER regarding Molinaro for the 1987-88 school year, in which the observed problems were noted. Guiliana rated respondent's planning and organization, implementation and interaction, and evaluation and record keeping as exhibiting a consistently unacceptable performance; and respondent's professional relations and growth, as unacceptable performance. The recommendation was for reemployment with the withholding of an increment.

Molinaro was suspended with pay for the 1988-89 and 1989-90 school years because of then pending tenure charges. When Molinaro returned to his teaching assignments in September 1990, the administration at Central advised him that ". . . we would start anew and from scratch." (*Id.* at p. 33). Guiliana determined that respondent's performance during the 1990-91 school year warranted a recommendation for loss of an increment; such action was not taken, however, because of the prior absences. The recommendation at the end of the 1990-91 school year was to reemploy Molinaro with an increment. However, respondent's implementation and interaction with students was deemed to be conditionally acceptable and not of sufficient improvement over the last PER.

Guiliana completed a PER for the 1990-91 school year in May of 1991, in which the noted deficiencies were stated. A lack of sufficient laboratory presentations were noted, as well as Molinaro's teaching technique of presenting instructional material in a lecture-style manner, in contradistinction to the stated curriculum. The performance areas needing improvement/development were stated as the need for planning to focus on student outcomes, maintenance of content proficiencies, instructionally based student management, the use of cooperative learning activities, the need for maximization of instructional time, especially at the beginning and end of classes, and a need for significant improvement in planning and implementation. Guiliana rated

Molinaro as having acceptable performance in the areas of planning and organization, evaluation and record keeping, and professional relations and growth and as having conditionally acceptable performance in the area of implementation and interaction. The PER also noted that an initial evaluation during the next school year would be completed by December 1991 and that any recommendation for an increment for the 1992-93 school term would be based on the noted recommendations. The overall recommendation was for reemployment with an increment.

Respondent exhibited the same pattern for the 1991-92 school year that had been employed during the 1987-88 school year. The administration provided an extensive amount of in-service to Molinaro, commencing in September 1991. Many observations were conducted during the first half of the school year, and respondent's performance generally improved. Respondent's plan books were evaluated on a weekly basis, and Molinaro exhibited a willingness to follow suggestions. During this school year, as well as during the 1987-88 school year, Molinaro was provided with individual supervision well beyond that given to other teachers in the district. This was done by Guiliana and Simes, who were involved in individual lesson planning. Conferences were conducted prior to a lesson being implemented, observation of the lesson was performed, and a conference was thereafter conducted with respondent. Guiliana is required to conduct one formal observation of teachers annually. At the most, two formal observations during a school year are generally conducted.

On the whole, although 1991-92 was a "troublesome year," Molinaro "succeeded." (*Id.* at p. 77). It was one of his more successful school years. Respondent's father died on May 30, 1992, causing respondent to be absent for a period of time.

The improvement in Molinaro's performance was reflected in the PER for the 1991-92 school year, which was completed by Guiliana in May of 1992. The PER noted Molarino's willingness to accept suggestions but also the need for more parental communication and student participation, although progress had been demonstrated in

the latter respect. Guiliana also noted that respondent's overall management of his classes was good but that with "more demanding students, more attention was needed to planning for activities to maintain focus and time on tasks." Guiliana also noted in the PER that the academic indicators were varied and that there was a need for professional development. Guiliana rated respondent's performance pertinent to evaluation and record keeping as consistently superior and his performance relevant to planning and organization, implementation and interaction, and professional relations and growth as acceptable. The overall recommendation was for reemployment with an increment. (Exhibit P-6).

Respondent commenced the 1992-93 school year in a fashion similar to that during the prior school year, and he progressed satisfactorily through mid-year. Molinaro was observed on a regular basis because, at least in part, of a belief in the administration that he had had a good year the prior school year because of close intervention. In fact, Molinaro was the only teacher for whom Guiliana was responsible whose plan book was reviewed weekly by Guiliana.

Subsequent to the mid-break, after Christmas 1992, Molinaro began exhibiting a pattern of dealing with students which he had previously demonstrated. Instead of disciplining students as needed, he dismissed them from class unsupervised, sending them to the library or allowing them to wander in the hallways. Molinaro also brought an entire class to the library, leaving them there for full classroom periods. Ultimately, the librarian advised the administration of the situation, complaining that she was in essence becoming a teacher for the classes. This situation continued for approximately one week. In addition, students did not report to his classes. Molinaro did not seek the intervention of Guiliana or the vice principal. Molinaro's manner of dealing with student's needing discipline was not acceptable from the administration's viewpoint. Guiliana was concerned about the possible outcome of a lack of supervision of students. This situation existed for a period of time, resulting in close observation by Guiliana and other supervisors.

Guiliana also noted that respondent again began exhibiting a pattern of a lack of focus and a non-laboratory approach in his classes. To Guiliana's perception, respondent lacked the ". . . energy level to sustain the day-by-day activities . . ." (Transcript 7/25/95, p. 36). These patterns continued through the spring 1993 vacation.

Students were disruptive in Molinaro's classes. Instead of identifying problems with the administration, the guidance office or disciplining students through detention or other means, Molinaro would send children from the classroom. Administrative personnel would find students playing volley ball in the gymnasium and also find them in the lunch room. Students were in a variety of locations without permission. When this situation emerged as a pattern, the administration commenced having conferences with Molinaro. Towards the end of the school year, students of Molinaro, as well as parents, started expressing concerns to the administration regarding what was occurring in Molinaro's classrooms. Parents complained that their children were not learning. Students were advising the administration that student behavior in the classrooms was so unruly that it was impossible for learning or teaching to occur. An array of services were available to deal with problems. The approach utilized by teachers was to communicate with the parents of students who were not performing well in class or to communicate regarding the students with the guidance office. Other methods of discipline included sending students to the administrative" office. Molinaro rarely, if ever, did so.

Guiliana conferred with respondent regarding the situation in April of 1993. Molinaro was informed by the administration that there were problems with liability of having students under his direct supervision unsupervised. Respondent told Guiliana: "I can't do this any more, I just can't do this. I'm getting very anxious and I just -- I just can't do it." (*Id.* at p. 37). At that point, the administration secured a month-two-month-substitute who was on call.

During the last week of April and all of May 1993, Molinaro was absent from his classes more than twenty days. On many occasions, respondent came to school indicating that he just could not teach; a substitute was assigned to his classes. On some days respondent would call in, and on others he would not. Respondent was not charged with sick days but he did not perform any duties on those days. Molinaro was absent for twenty days in May. Commencing on approximately June 1, 1993, he was on a leave of absence. In effect, from the spring break until the end of the school year, Molinaro did not perform any teaching duties.

During this general time period, Molinaro told Guiliana that respondent wanted to resign. Guiliana and Vasile also spoke with respondent's spouse on several occasions, recommending that respondent talk with Vasile about whether or not Molinaro should resign or take other action. From the administration's viewpoint, however, they needed to have a teacher to provide education in a consistent manner for students.

Molinaro did not teach his classes at Central, other than for two days, the fourth marking period in the 1992-93 school year, *i.e.*, April through the end of June 1993. Subsequent to the spring 1993 vacation, the administration had a month-to-month-substitute on call who was assigned to Molinaro's classes whenever he was not present. As a general manner, a month-to-month-substitute is assigned to Central on a daily basis. The substitute is given a specific assignment based upon teacher absences. Because the administration never knew whether respondent would call in or be present, Guiliana instructed the substitute to report to Central daily and to be responsible for Molinaro's classes if respondent were not present. The substitute was not a certified science teacher. Molinaro's students had virtually no instruction during the third marking period and did not have the services of a regular certified science teacher for the entire fourth marking period.

Vasile never advised respondent in writing that there were problems with Molinaro's attendance. However, as Vasile began having discussions with Molinaro, he discussed Molinaro's attendance problems.

Vasile discussed respondent's attendance record with Molinaro during the Spring of 1993. Respondent appeared to be disturbed, having had a conversation with Guiliana regarding Molinaro's performance and attendance. Respondent spoke with Vasile several times, telling Vasile that he (respondent) was experiencing difficulties with reporting to work. Vasile told respondent that Vasile would try to find a way to help Molinaro deal with whatever was troubling him. They periodically discussed the possibility of Molinaro obtaining counseling. By the end of May 1993, Vasile was uncertain regarding Molinaro's intent. Respondent had indicated at various times that he would or would not be requesting a leave of absence. He eventually did. Respondent did not complete the 1992-93 school year because of stresses related to his employment as well as his personal life, including marital problems, which he had been experiencing for some eight years. During this time, respondent ". . . struggled going to work each day." (*Id.* at p. 16). Molinaro met with Guiliana and Vasile, noting that his accumulated sick leave had been utilized and that he needed income in order to support his children. Vasile subsequently advised Molinaro that there was nothing Vasile could do but grant an unpaid leave and that Molinaro would have to pay for his medical benefits during the summer. Molinaro agreed, realizing that "that he was . . . the one who doesn't want to return, go to work for a period." (*Id.* at p.18).

Respondent required that Molinaro undergo a psychiatric evaluation to assess the situation, which evaluation was performed, as a condition to a leave of absence. Respondent was ultimately evaluated by a Dr. Saw (Saw), who was associated with Morristown Memorial Hospital. Respondent was granted a leave of absence in June 1993. The Board had receipt of Saw's report by August 30 of that year. Saw reported to the district that because respondent was receiving counseling and apparently had his anxiety symptoms under control, there was no particular contra-indication to respondent returning to school for the 1993-94 school year. During the summer, Vasile

had communicated to Molinaro that if there were psychiatric approval for a return to work, the Board would reimburse Molinaro for the cost of summer medical benefits, which was done, at a cost of approximately \$693 per month.

Respondent's attendance record for 1992-93 reflects 14 unauthorized absences, *i.e.*, absences without any kind of approval. However, the absences from June 1 through June 25, 1993 should have been leaves of absence as they were approved, unpaid leaves at the time.

In June 1993, Guiliana prepared a PER for Molinaro for the 1992-93 school year. Respondent was on a leave of absence at that time. However, Guiliana had spoken with respondent prior to June 1993, in approximately March 1993, at which time Molinaro was informed that there would be a recommendation for withholding of an increment.

The PER, which was mailed to respondent, summarized Molinaro's performance and noted strengths and weaknesses during the school year. Guiliana rated Molinaro's performance as consistently unacceptable in all areas. The formal recommendation was for reemployment with a withholding of an increment.

Molinaro commenced the 1993-94 school year in a positive manner. He exhibited a "very assertive approach towards dealing with problems, dealing with administration, a very proactive position." (*Id.* at p. 47). Molinaro met with Guiliana weekly. Molinaro also made efforts to speak with Guiliana, to at least some extent, on a daily basis. This situation existed for approximately six weeks. Guiliana did not meet with other teachers on a regularly scheduled basis. He did so with respondent because of a perception that it constituted a therapeutic interaction which assisted respondent. Molinaro seemed to react positively to the weekly meetings. During these meetings, respondent referenced interactions with his (Molinaro's) psychologist or counselor.

A Mr. Carnathan (Carnathan), who was then a vice principal at Central, was directed by Guiliana to observe Molinaro's classrooms periodically, from December 1993 onward. Carnathan was stationed in Molinaro's classrooms or in the hallway outside at least at the beginning and part of every class that Molinaro taught.

Simes observed respondent at Central on October 19, 1993. The pertinent PER rates all applicable evaluation categories as being evident. Although the written comments contained some suggestions, they overall evidenced a well structured lesson presented in a professional manner and appropriate responses by the students.

Simes performed an observation of respondent at Brooklawn on December 6, 1993. He rated respondent in the pertinent PER as exhibiting the presence of all indicators in the pertinent areas which were applicable. The comments stated that Molinaro presented a well organized lesson and interacted well with the students and that the students responded appropriately.

Graham observed respondent on December 7, 1993 at Brooklawn and prepared a PER regarding his observation on December 9, 1993. He rated Molinaro as exhibiting all necessary indicators in the pertinent categories that were applicable. The written comments indicated that Molinaro performed well and that the students reacted appropriately. Comments pertaining to a post-observation conference noted, in part, that the class "although large, contains a nice group of students" and concluded that respondent should ". . . keep up the good work!" (Exhibit R-2, p.2).

Simes observed respondent on March 23, 1994 at Brooklawn. All applicable subcategories were evidenced. Comments overall were complimentary, indicating that Molinaro presented a well structured lesson, that the students reacted appropriately and behaved well, and that the students engaged in cooperative behavior.

By April of 1994, respondent's performance at Central had substantially deteriorated. Although he was present at school, he had lost all ability to maintain any

order in his classrooms. Students came and went to and from his classes at will. Administrative personnel had to look for them throughout the building. The situation was in marked contrast to the results of a preliminary evaluation which had been conducted in December of 1993, which indicated that Molinaro was performing well. The expectation of the administration was that he would continue to do so throughout the school year. However, by April 1994, the prior pattern of problems manifested itself. Molinaro was exhibiting, to Guiliana's perception, a high anxiety level and inability to come to school. Respondent periodically informed Guiliana that Molinaro would get into his automobile, attempt to report to work, and would not be able to. On those occasions, he would simply not appear.

Formal and informal observations were conducted through April. Guiliana observed students in Molinaro's classrooms behaving as if no adult were present. Inappropriate behaviors of students included throwing books from one corner of the classroom to another, splashing water at the class while Molinaro was next to a water fountain showing a film strip, students making announcements on the public address (PA) system, *i.e.*, calling down to the office via the PA system and cursing, walking on desks and throwing things at window. Visits to Molinaro's classrooms in response to such occurrences were met by respondent stating that it must have been an accident, no students called from his classes. At this point, Guiliana became concerned about a complete lack of any authority in respondent's classrooms, acting as a restraint on students from unsafe behaviors. Guiliana went into all of respondent's classes, informing the students that if for any reason the students were let out of the class by respondent, or if any students' name were given to the administration by Molinaro, Guiliana would exclude such students from the classroom for the remainder of the year. However, Molinaro never sent any students to the office, nor mentioned any to Guiliana as exhibiting inappropriate behavior.

A student in one of respondent's classes was hit by a book on June 7, 1994. Molinaro was absent on June 8, 1994 for approximately one week. Upon his return to the classroom, Mark Grey (Grey), a substitute teacher who had been placed in his

advising them of what had happened. Guillian and Vasile also read reports of the arrest in newspapers. Molinaro met with Vasile and Krawitz on September 1, 1994. The Superintendent told Molinaro that respondent was suspended with pay until the Board could consider charges, which would likely be brought. Respondent subsequently suspended Molinaro based on tenure charges. On October 6, 1994, Vasile certified tenure charges against respondent. Respondent has been suspended with pay since approximately February 1, 1995.

Molinaro was absent 33 days during the 1992-93 school year. He had accumulated 19 1/2 sick leave days. He had 14 unauthorized days of absence. During June of 1993, he was granted a leave of absence, rendering the prior 14 days of unauthorized absence as being deemed to be an authorized absence. Molinaro was present on ten days in May 1993 when he did not teach. The available substitute took over his classes. However, Molinaro was not charged with sick days and it is reasonable to infer, received salary for those days. They were recorded as administrative days on his attendance record.

In general, teachers in the district are awarded salary increments based on their progress along respondent's salary guide, moving from one step to the next, as well as for any adjustments made to the salary guide as the result of collective bargaining. Respondent withheld Molinaro's salary and adjustment increments in 1988, 1992-93, and 1994-95.

Molinaro's students at Brooklawn were generally better behaved than those at Central. He imposed some discipline on Brooklawn students, including detention and communicating with parents and administrative personnel. The administration at Central never received reports of inappropriate student behavior in respondent's classes at Brooklawn, and a substitute was not assigned to his classes at that school. During his last year at Brooklawn, in approximately March of 1994, Graham would periodically tell Molinaro: "Yeah, he would say things. I need help, but it was just like a

report thing.” (*Id.* at p.49). During his years of employment with respondent, Molinaro felt more comfortable interacting with Vasile than with Guiliana.

Molinaro was required to attend counseling sessions as a condition of probation. He is currently continuing counseling at the Carrier Foundation in New Jersey (Carrier), which he commenced prior to the arrest. The program initially consisted of a three-hour psychiatric evaluation. Respondent attends weekly out-patient counseling sessions. Molinaro, who has two minor children, is currently separated from his family. At the current time, Molinaro plans to continue with the sessions at Carrier indefinitely. Molinaro has had extensive experience coaching various softball teams in the community during the past twenty years.

DISCUSSION

The Commissioner of the DOE generally has jurisdiction to hear and determine controversies and disputes arising under the local school laws. *N.J.S.A. 18A:6-9*.

A tenured local school employee shall not be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct, “or other just cause.” *Id.* at §§ 6-10.

A charge of incompetence requires proof that the individual in question, regardless of the assistance offered by certified supervisors, does not have the ability or capacity to be an effective teacher. *In the Matter of the Tenure hearing of April Renee Bradley*, 1990 S.L.D. 818 (*Bradley*). The State Board of Education (State Board), although reversing the Commissioner’s ultimate conclusion, agreed with the standard utilized by the Commissioner. 1991 S.L.D. at 2522-2523. The State Board noted that the nature of a teacher’s entire years of service is relevant to whether or not he/she lacks the ability to be an effective teacher. *Id.* at 2524.

The Commissioner in *Newark Bd. of Ed. v. Burnside*, 13 N.J.R. 867 (Oct. 25, 1988) (*Burnside*) upheld a determination that a local school board had proven charges of incompetence and unprofessional conduct pertinent to charges that the respondent was unable to control and educate students despite supervisor conferences, had made insulting and degrading remarks about students, had gotten into arguments with students, and that students engaged in fighting and left the classroom. An evaluation of such charges is a matter of total impression "based upon observations made over a period of time." *Burnside* at 886. However, the need to remove a teacher may be demonstrated by one incident, "if sufficiently flagrant." *In Re Fulcomer*, 93 N.J. Super. 404, 421 (App. Div. 1967) (*Fulcomer*).

In determining the appropriateness of a teacher's fitness, it has been noted that teachers must exercise ' . . . a degree of self-restraint and control behavior rarely requisite to other types of employment.' *In Re Tyler*, 13 N.J.A.R. 297, 309 (citation omitted). 'While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self-control.' *In the Matter of the Tenure Hearing of Thomas Appleby, School District of Vineland, Cumberland County*, 1969 S.L.D. 159, 173, *aff'd*, State Board 1970 S.L.D. 448 (citation omitted) (*Appleby*).

The burden of proof in a case such as this is upon petitioner by a preponderance of the credible evidence. *Atkinson v. Parsekian*, 37 N.J. 143 (1962). If charges are proven, factors relevant to a determination of penalty include the nature and length of a teacher's prior service. *Tyler, supra*. In determining the discipline which should be imposed in cases involving unbecoming conduct, specifically, the Commissioner considers the nature and circumstances of the incident in question, the individual's prior record and current attitude, and the likelihood that the behavior in question will recur. *In the Matter of the Tenure Hearing of Frederick L. Ostergren, School District of Franklin Township, Somerset County*, 1966 S.L.D. 185. ". . . each such matter must be judged in the light of its particular circumstances. The kind and degree of penalty will necessarily vary according to the specific problem." *In the Matter*

of the Tenure Hearing of William H. Kittell, School District of the Borough of Little Silver, Monmouth County, 1972 S.L.D. 531, 541.

Discipline may be imposed upon a tenured employee for unbecoming conduct even if such conduct did not occur in the course of a teacher's employment. *In the Matter of the Tenure Hearing of Robert H. Beam, School District of the Borough of Sayreville, 1973 S.L.D. 157 (Beam)*. However, a "single, isolated incident" may not be sufficient to warrant dismissal. *Id.* at 164. *The Town of West Orange, Board of Education v. Martin Lieb, 1985 S.L.D. 933 (Lieb)* involved a criminal charge which was downgraded to a violation of *N.J.S.A. 2C:14-4*, lewdness. The underlying offense was that Lieb had contact with an undercover police officer's genital area. The Commissioner upheld a determination by the presiding administrative law judge (ALJ) that Lieb's conduct constituted unbecoming conduct but that termination was too harsh in light of "one fleeting instance of bad judgment," noting that Lieb was undergoing stress at the time in question, the findings and conclusions of the board's psychiatrist, and Lieb's long and successful career as a public school teacher, as well as his standing in the community and family. *Lieb* at 943. However, in certain circumstances, a single incident can be sufficient to support dismissal of a tenured employee. *South Orange-Maple Wood Board of Education v. Simonic, 1986 S.L.D. 3117 (1986)*. As the presiding ALJ noted in *Paul v. New Jersey State Department of Education, 91 N.J.R. 2nd (EDU) 46 (Paul)*:

Under its general police powers, the State has the right to impose reasonable restrictions on various occupations in order to protect the public health and safety . . . Protection of the public is particularly vital in the school environment . . . *Paul* at 47 (citation omitted).

Teachers ". . . teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher." *In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County, 1974 S.L.D. 97, 98-99 (Tordo)*. A teacher's obligation to

comport himself/herself responsibly is not confined to the hours when school is in session. "Being a teacher requires *inter alia*, a consistently intense dedication to civility and respect for people as human beings." (*Beam* at 163).

Chronic or excessive absenteeism may constitute both "incapacity 'and unbecoming conduct,' as well as 'just cause,' such as to warrant dismissal." *In the Matter of the Tenure Hearing of Jerome Kacprowicz*, 93 N.J.A.R. 2nd (EDU) 147, 151 (*Kacprowicz*). Excessive absenteeism constitutes valid grounds for dismissal of a tenured teacher even if the absences were excused or caused by legitimate reasons of personal illness or were approved leave or sick days to which the teacher was entitled and even if the teacher's classroom performance was sufficient. *Ibid*. There are no absolute standards regarding when an absence becomes chronic or excessive. However, ". . . this boundary is crossed when the performance of students begins to suffer." *In the Matter of the Tenure Hearing of Monica Meade-Stephens*, 92 N.J.A.R. 2nd (EDU) 550, 553. It is not necessary, however, for a school district to prove a direct correlation between student achievement and teacher attendance in order to validate concerns about the effects of a teacher's absence on the educational program. *Kacprowicz, supra*.

Despite the fact that the offense to which Molinaro pled guilty is classified as a petty disorderly persons offense, it is clear that the underlying facts constituted egregious conduct by respondent.² The telephone communications contained graphic sexual references and implications of possible threats. The incidents were initially investigated as a possible stalking offense by the Stanhope Police Department and caused Indano great distress, resulting in continuing effects. I am persuaded that the conduct in question constituted unbecoming conduct.

² N.J.S.A. 2C:33-4 provides that a person commits a petty disorderly persons offense if, with purpose to harass another, he makes or causes to be made communications anonymously or at extremely inconvenient hours, or in offensively coarse language or in any other manner likely to cause annoyance or alarm; subjects another to striking, kicking, shoving or other offenses touching or threatening to do so; or engages in any other course of alarming conduct of repeatedly committed acts with a purpose to alarm or seriously annoy another.

Respondent's arguments that his actions do not touch his employment in any way whatsoever and as such do not merit unbecoming conduct are without merit. *Beam, supra*. In addition, respondent's conduct is not consistent with the demeanor with which a public school teacher is expected to comport himself/herself. In fact, the Commissioner determined in the prior tenure proceeding involving respondent that similar behavior constituted unbecoming conduct. The Commissioner's determination that dismissal was too harsh a penalty was based, at least in part, upon the fact that the charges involved a single instance of such misconduct. *In the Matter of the Tenure Hearing of Greg Molinaro, School District of the Township of Parsippany-Troy Hills*, OAL Dkt. No. 9108-88, Commissioner's Decision June 26, 1989. As the Board argues, the fact that respondent subsequently engaged in similar, if not more serious, conduct argues persuasively for dismissal.

A teacher who violates the public trust must expect dismissal or other severe penalty. *Tordo, supra* at 99. Notwithstanding respondent's long tenure with petitioner, I am persuaded that the acts underlying the conduct of respondent in relation to Indano constitute unbecoming conduct justifying dismissal. Respondent's prognosis in counseling at this time is not clear from the record. Although respondent appeared to be remorseful and cognizant of the impact his actions had on Indano, his testimony at the hearing to a large extent focused upon himself and did not evidence an in-depth realization of the seriousness of his actions. Respondent referenced a belief that his actions were related to prior feelings that he was "lonely" and could not, for whatever reason, turn to other individuals, family, friends, and colleagues, for help. Respondent testified in this respect:

. . . It's the saddest thing I've faced in my life, to say this is what I did because I was lonely.

The way she said it was exactly the way I said it. She talked to me. I wanted to talk to her, I guess, and she didn't hang up. I don't know what to say.

It's hard for me to face that. It saddens me that I did that. I know it's wrong. I know I should have been accountable, responsible, mature enough to handle myself, not to make calls like that.

I tried to deal with it alone and I couldn't. I didn't hurt anybody further. Yes, maybe I hurt this lady, but I would never hurt anybody. I love children." (Transcript, 7/27/95, pp.44-45)

Respondent also stated: "I'll remember for the rest of my life the only thing that got me emotional - is to admit to anyone I called a stranger because I was lonely." (*Id.* at p.69).

The question is whether an individual who has made harassing and sexually intimidating phone calls to another individual over a period of time on at least two separate occasions should be employed in a public school district. I am persuaded that he should not. It is also reasonable to infer from the record that respondent has had unresolved problems which may be of a psychological or psychiatric nature for some time as evidenced by his prior inability to deal with the daily demands of his employment.

Petitioner has also demonstrated by a preponderance of the credible evidence the charge of incapacity relating to respondent's teaching performance. Molinaro evidenced an inability to plan and implement a science curriculum as mandated by the district as early as the 1986-87 school year. In addition, from that time onward, respondent was unable to efficiently utilize a classroom period for academic purposes at Central. Respondent was on notice at the end of the 1986-87 school year that if his performance did not significantly improve, he might suffer loss of an increment.

Molinaro showed some improvement during the 1987-88 school year. However, as the Board argues, he was able to do so only with the concentrated assistance of Guiliana and Simes and was unable to sustain such improvement on his own. His performance deteriorated towards the end of the school year, a pattern which was to

repeat itself. In addition, Molinaro's records indicated few academic indicators for his students at Central. It is reasonable to infer that the disruptive conduct of his students was related to Molinaro's unsatisfactory teaching abilities and poor classroom management. Conferences and the threat of an increment withholding noticed respondent that he needed to again significantly improve his performance. By the end of the school year, respondent's classroom performance had deteriorated.

Although Molinaro's performance improved somewhat during 1990-91, albeit after an extended absence from the school environment, the year-end PER still outlined areas needing improvement. Notwithstanding, Guiliana did not recommend an increment withholding in order to allow Molinaro to have a fresh start at Central.

Molinaro improved significantly during the 1991-92 school year, again, however, with intensive support, then reverted to a pattern of commencing the school year well only to deteriorate as the year went by during the 1992-93 school year. He had no control over his classroom and appeared not to be able to function in a school environment, as evidenced by his communications with administrative personnel and his absences. The same pattern was evident during the 1993-94 school year, when Molinaro again had intensive support. The situation deteriorated, however, to such an extent that the safety of students was at risk.

I am persuaded that respondent has demonstrated incapacity. Respondent's performance over an extended period of time at Central did not evidence the necessary ability to teach the science curriculum nor to maintain discipline among students. Respondent received intensive support from administrative personnel, including Guiliana. The level of attention given to him cannot reasonably be expected to continue indefinitely. In addition, he was given specific critiques, and lesser discipline was previously imposed. For whatever reason, respondent was incapable of performing his functions.

In the Matter of Tenure Hearing of Cowan, 224 N.J. Super. 737 (App. Div. 1988) (*Cowan*) involved certification charges against a tenured employee, including eleven charges of alleged misconduct occurring between 1974 and 1984. The Commissioner, confirming an initial decision of an ALJ, found that over ten years, the appellant had committed various acts of verbal and physical abuse of students. The court affirmed dismissal, noting that the administration had dealt with each incident as it occurred, finally forwarding to the Commissioner charges that resulted in dismissal. The court rejected a contention that earlier charges were too stale to be the basis for a finding of unbecoming conduct. It noted in this respect that appellant was informed contemporaneously of each instance of alleged misconduct and that the local board's responses were "measured, supportive, continuing and patient, until it finally realized that appellant's temper is uncontrollable. He could not have been surprised by the charges, nor could he have mistaken the local board's forbearance as acquiescence." *Cowan* at 742 (citation omitted).

Although *Cowan* involved unbecoming conduct, the court's reasoning is persuasive in the current matter. Petitioner dealt each school year for a substantial period of time with Molinaro as problems arose. He was spoken to by superiors, warned, and when deemed appropriate, recommended for increments. In addition, Guiliana and Simes spent an inordinate amount of time assisting respondent. The Board even made efforts to accommodate respondent by removing him from classroom duties so that he could retire with twenty-five years of service. To my mind, the Board could have imposed more stringent disciplinary actions sooner than it did. However, as the court noted in *Cowan*, respondent's patience should not be viewed as acquiescence,

Molinaro's perception that the students at Brooklawn were better behaved than those at Central and the fact that he appeared to perform more satisfactorily at Brooklawn are not determinative. As a public school teacher, respondent was required to satisfactorily present a science curriculum to all students for whom he was responsible. In addition, there is nothing in the record to suggest any extraordinary

characteristics of the students at Central, and a substitute was able to effectively deal with the students after only several days. Guiliana supported Molinaro's position vis-à-vis the students. For whatever reason, Molinaro was incapable of effectively dealing with them.

I am also persuaded that petitioner's practice of having the focal point of evaluation of a teacher who is assigned to more than one school within the facility where the teacher spends most of his time is reasonable. Finally, I am not persuaded by the implication in respondent's testimony that his problems were somehow related to the manner in which Guiliana dealt with respondent. In fact, the record supports a conclusion that Guiliana was extremely supportive, as evidenced by the recommendations to grant increments, the assistance provided, and the supportive actions taken when respondent returned after being absent from the school for two years because of pending tenure charges. I am persuaded that the Board has demonstrated incapacity and incompetence warranting dismissal.

I am also persuaded that the Board has demonstrated excessive absenteeism by respondent justifying dismissal. As the Board argues, respondent's pattern of absences is interrelated with issues of incapacity. Petitioner's negative impact on his students, who did not have the services of a certified science teacher for the entire fourth marking period during the 1992-93 school year, also is evidenced by Molinaro's attendance during the 1993-94 school year, resulting in the assignment of a substitute on a regular basis. Respondent was on notice at that time that his attendance had to improve.

Respondent's argument that the granting of a leave of absence in 1993 by the Board is inconsistent with a tenure charge of chronic absenteeism is not persuasive nor are Molinaro's argument regarding an alleged lack of notice regarding absenteeism for any school year other than 1992-93. As noted in *Kacprowicz, supra*, ". . . it is clear that the District did consider the particular circumstances of his absences . . . as well as the actual impact of his past absences and the potential impact of his anticipated absences

before deciding to seek his removal.” *Kacprowicz* at 153. As the Commissioner noted in *Kacprowicz*:

Neither can respondent rely on the fact that prior warnings and expressions of concern were not couched specifically in terms of ‘continuity of instructions’ or related to possible filing of tenure charges to claim that he had no warning of problems with his attendance or potential consequences for his employment based on those problems.

Similarly ingenious is the notion that the actions of a highly detailed, widely disseminated written attendance policy somehow exonerates respondent from recognizing that the repeated absence of a teacher from his classroom, however legitimate, will have negative impact on instruction and compromise the basic purpose of the district and the most fundamental obligation of an educator to his student. *Kacprowicz* at 153.

I am persuaded that the Board has demonstrated chronic and excessive absenteeism by Molinaro and that such absenteeism constitutes unbecoming conduct, incompetence and just cause for dismissal.

CONCLUSIONS

I **CONCLUDE** that the Board has demonstrated by a preponderance of the credible evidence the charges of incapacity and incompetence pertinent to Molinaro’s employment as a teacher at Central, chronic absenteeism constituting incapacity, and unbecoming conduct pertinent to the telephone calls made by respondent to Indano. I also **CONCLUDE** that each of the charges separately constitutes cause for dismissal and that such discipline should be imposed.

ORDERS

It is hereby **ORDERED** that all tenure charges of the Board against Molinaro be and are hereby **AFFIRMED** and that respondent’s employment as a teacher in the district be and is hereby terminated.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, 225 East State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 23, 1995

DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

10/25/95

DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties: Jeff J. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT 27 1995

DATE

OFFICE OF ADMINISTRATIVE LAW

njf/al

APPENDIX

LIST OF WITNESSES

For Petitioner:

Eugene Vasile
Angelo Guiliana
Mark Grey
Elizabeth Indano
Raymond Elliot
Dennis Waldron

For Respondent:

Greg Molinaro

LIST OF EXHIBITS IN EVIDENCE

- P-1a Tenure charges
- P-1b Eugene Vasile's statement Re: tenure charges
- P-1c Angelo Guiliana's statement Re: Grey tenure charges
- P-3 PER dated June 1987
- P-4 PER dated June 1988
- P-5 PER dated May 1991
- P-6 PER dated May 1992
- P-7 PER dated June 1993
- P-8 PER with response dated June 1994
- P-9 Memorandum of May 1987
- P-10 Memorandum dated March 23, 1988
- P-11 Summary conference report, dated March 14, 1998
- P-12 Memorandum dated March 29, 1988
- P-13 Memorandum dated June 7, 1994
- P-15 Stanhope Police Department office incident report dated August 20, 1994
- P-16 Stanhope Police Department supplementary report dated August 22, 1995
- P-17 Stanhope Police Department supplementary report dated August 24, 1995
- P-18 Stanhope Police Department arrest report
- P-19 Stanhope Police Department supplementary report dated August 23, 1994
- P-20 Stanhope Police Department property and evidence record dated August 23 1994
- P-21 Stanhope Police Department report dated August 24, 1994
- P-22 Letter dated June 4, 1993

- R-1 Teacher observation report dated December 6, 1993
- R-2 Teacher observation form dated December 7, 1993
- R-3 Teacher observation form dated March 23, 1994
- R-4 Teacher observation form dated October 19, 1993

IN THE MATTER OF THE TENURE :
HEARING OF GREG MOLINARO, :
SCHOOL DISTRICT OF THE TOWNSHIP : COMMISSIONER OF EDUCATION
OF PARSIPPANY-TROY HILLS, MORRIS : DECISION
COUNTY. :
_____ :

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of respondent (hereinafter "Molinaro") and the Board's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Molinaro's exceptions present a verbatim recitation of arguments advanced before the Administrative Law Judge (ALJ) in his post-hearing brief. The Commissioner determines that these arguments were fully and fairly considered and addressed by the ALJ in her initial decision and, therefore, need not be herein reiterated.

Upon a careful and independent review of the instant record, including exceptions and replies of the parties and transcripts of the July 25 and July 27, 1995 hearings at the OAL,* the Commissioner concurs with the findings and conclusions of the ALJ that the Board has sustained its burden of proof with respect to its tenure charges of incapacity, incompetence and

*Although the initial decision indicates that hearings in this matter were conducted on July 24, 1995 through July 27, 1995, transcripts of only the two days herein noted were included in the record.

unbecoming conduct against Molinaro. The Commissioner further agrees that the appropriate penalty in this matter is Molinaro's termination from his tenured position.

Accordingly, for the reasons well stated by the ALJ in her initial decision, the Commissioner affirms that Greg Molinaro shall be dismissed from his tenured teaching position in the school district of Parsippany-Troy Hills as of the date of this decision. He further directs that this matter be forwarded to the State Board of Examiners pursuant to N.J.A.C. 6:11-3.6(a)(1) for action against Molinaro's certificate as the Board deems appropriate.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

DECEMBER 6, 1995

DATE OF MAILING DECEMBER 7, 1995

431-95M

CHRIS SHUSTER,
PETITIONER,

V.

BOARD OF EDUCATION OF THE
TOWNSHIP OF MONTGOMERY,
SOMERSET COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION
DECISION ON MOTION

December 6, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

**ORDER DENYING MOTION
FOR SUMMARY DECISION**
OAL DKT. NO. EDU 8772-95
AGENCY DKT. NO. 334-8/95

CHRIS SHUSTER,
Petitioner,
v.

**BOARD OF EDUCATION OF THE TOWNSHIP
OF MONTGOMERY, SOMERSET COUNTY,**
Respondent.

Chris Shuster, petitioner, pro se
David W. Carroll, Esq., for respondent (Carroll & Weiss, attorneys)

FOR JOHN R. TASSINI, ALJ:

STATEMENT OF THE CASE

sed upon the recommendations of an ad hoc committee, architects for the Montgomery
board of Education (BOE) prepared schematics for construction of a new, two-story
ol. The BOE presented the two-story schematics to the public; relative to a
oposing authorization of bonds to pay for such construction, the BOE mailed to
s brochures with copies of the two-story schematics; and the BOE placed copies

attempted to demonstrate that he met the standards for the granting of a motion for an injunction. On September 27, 1995, the BOE's answer to the petition was filed with the Department. The Department transmitted the matter to the Office of Administrative Law (OAL) where, on September 28, 1995, it was filed as a contested case. N.J.S.A. 52:14B-2(b). The OAL's clerk construed the petitioner's letter as a motion for emergent injunction of the BOE and mailed to the parties notice that, on October 5, 1995, the "motion" would be argued. On October 5, 1995, the parties appeared and the motion was argued; on October 6, 1995, I issued an order denying the petitioner's motion; and, on October 23, 1995, the Commissioner issued a Decision on Motion, concurring with my order. On October 18, 1995, the BOE filed and served papers in support of its motion for summary decision and on November 1, 1995, the petitioner's responding papers were filed.

FINDINGS OF FACT

The area served by the Montgomery Township school district is being developed. Consequently, the area's population is growing and is expected to continue to grow more and this has caused increasing demands for governmental services, including school services. The petitioner is a resident of the area served by the school district.

In 1993, the BOE created a "Building Project Ad-Hoc Committee," including members of the community, the BOE and the school administration. The committee's mission was to study the need for increased school services; collect information; and, based upon criteria including "completion time, flexibility to meet changing population and program needs, site availability and cost," to prepare a report including a recommended a plan of action to "resolve current facilities problems and meet the long-term needs of the students and the community." P-1, N.J.S.A. 18A:33-1. At the BOE's September 7, 1994 meeting, it accepted the committee's report which recommended a substantial construction project, including construction of a new middle school with features including "a configuration that permits clustering of academic classrooms by grade level" and serving 800 students. P-1, P-2, R-1

The BOE retained architects Faridy Thorne Fraytak, P.C., who, based upon the committee's recommendations and expectations (such as the amount of land available at a given

431-95M

CHRIS SHUSTER,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION ON MOTION
	:	
BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF MONTGOMERY,	:	
SOMERSET COUNTY,	:	
	:	
RESPONDENT.	:	
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December 6, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING MOTION
FOR SUMMARY DECISION

OAL DKT. NO. EDU 8772-95

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CHRIS SHUSTER,

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**BOARD OF EDUCATION OF THE TOWNSHIP
OF MONTGOMERY, SOMERSET COUNTY,**

Respondent.

Chris Shuster, petitioner, pro se

David W. Carroll, Esq., for respondent (Carroll & Weiss, attorneys)

BEFORE JOHN R. TASSINI, ALJ:

STATEMENT OF THE CASE

Based upon the recommendations of an ad hoc committee, architects for the Montgomery Township Board of Education (BOE) prepared schematics for construction of a new, two-story middle school. The BOE presented the two-story schematics to the public; relative to a referendum proposing authorization of bonds to pay for such construction, the BOE mailed to Township voters brochures with copies of the two-story schematics; and the BOE placed copies

attempted to demonstrate that he met the standards for the granting of a motion for an injunction. On September 27, 1995, the BOE's answer to the petition was filed with the Department. The Department transmitted the matter to the Office of Administrative Law (OAL) where, on September 28, 1995, it was filed as a contested case. N.J.S.A. 52:14B-2(b). The OAL's clerk construed the petitioner's letter as a motion for emergent injunction of the BOE and mailed to the parties notice that, on October 5, 1995, the "motion" would be argued. On October 5, 1995, the parties appeared and the motion was argued; on October 6, 1995, I issued an order denying the petitioner's motion; and, on October 23, 1995, the Commissioner issued a Decision on Motion, concurring with my order. On October 18, 1995, the BOE filed and served papers in support of its motion for summary decision and on November 1, 1995, the petitioner's responding papers were filed.

FINDINGS OF FACT

The area served by the Montgomery Township school district is being developed. Consequently, the area's population is growing and is expected to continue to grow more and this has caused increasing demands for governmental services, including school services. The petitioner is a resident of the area served by the school district.

In 1993, the BOE created a "Building Project Ad-Hoc Committee," including members of the community, the BOE and the school administration. The committee's mission was to study the need for increased school services; collect information; and, based upon criteria including "completion time, flexibility to meet changing population and program needs, site availability and cost," to prepare a report including a recommended a plan of action to "resolve current facilities problems and meet the long-term needs of the students and the community." P-1, N.J.S.A. 18A:33-1. At the BOE's September 7, 1994 meeting, it accepted the committee's report which recommended a substantial construction project, including construction of a new middle school with features including "a configuration that permits clustering of academic classrooms by grade level" and serving 800 students. P-1, P-2, R-1

The BOE retained architects Faridy Thorne Fraytak, P.C., who, based upon the committee's recommendations and expectations (such as the amount of land available at a given



site), prepared plans, including schematics for a new, two-story middle school. P-1, P-2. During the BOE's September 19, 1994 meeting, Superintendent of Schools Jamie Savedoff presented drawings showing how the new middle school could be situated on a site owned by the BOE. P -15.

The BOE obtained the Department's approval of the plans, including the schematics for the new, two-story middle school. N.J.A.C. 6:22-1.1 The BOE has estimated the total cost of the project to be over \$32,000,000, of which the cost of construction of the new middle school is estimated to be about \$17,000,000 and, at the BOE's October 10, 1994 meeting, it passed a resolution providing for a special school district referendum election to be held on November 29, 1995, during which election, the following proposal would be submitted:

The [BOE] is authorized (a) to provide for [1] the construction of an addition to connect the Burnt Hill Road School and the Orchard Road School to provide core facilities and the renovation of and the construction of additions to each school to provide additional space, other interior improvements and additional parking, [2] the construction of renovations and additions to the High School to provide for science laboratories, locker room and auditorium improvements and [3] the construction of a new middle school on land owned by the [BOE], including play fields and, [4] for all of the above, including play fields and, for installation of equipment and furnishings and related work, and (b) to issue bonds of the School District for such purpose in the principal amount of \$31,368,000.

[R-1, emphasis added.]

Faridy Thorne Fraytak presented to the BOE an outline entitled "Techniques for Referendum Promotion" and, between October 10, 1994 and November 29, 1995, the project was the subject of public debate. P-16. The BOE Vice President and chairman of the BOE Building Committee, in a letter published in the October 21, 1994 edition of The Princeton Packet, a local newspaper, characterized the proposed buildings' plans as "preliminary schematics." P-3. During the BOE's October 24, 1994 meeting, superintendent Savedoff stated that the schematics [were] based upon the educational specifications previously approved by the [BOE] and approved by the Department;" however, he also stated that they

“may be and probably [would] be altered at a later date when the staff becomes involved in the process. The intent of these plans is to show that there is sufficient space to accommodate the plans and spatial relationships.

[R-3.]

During the BOE’s October 24, 1994 meeting also, Jamil Faridy, a partner of Faridy Thorne Fraytak, presented to the public plans for the project, including the “schematics” showing the two-story “proposed middle school layout” and he described the two-story schematics as having design “flexibility” to accommodate future demographic projections and shifts in grade populations. P-4, P-14, R-3. A BOE member, in a letter published in the November 18, 1994 edition of The Princeton Packet, wrote that the “plan recommended by the ad hoc facilities committee and approved by the [BOE] is the most effective option available to meet our district’s needs” and she urged voter approval of the proposal. P-5. Superintendent Savidoff, in a letter published in the November 18, 1994 edition of The Princeton Packet, wrote, “The plan is not vague, rather it is quite detailed. The educational specifications upon which the architect’s drawings are based are several hundred pages of detailed descriptions of every space to be built renovated or modified.” P-6.

Prior to the referendum, the BOE mailed to voters a “referendum brochure” which referred, e.g., to the current enrollment and “need” for additional facilities for current and/or expected enrollment; (if the referendum was not approved and the project did not go forward) the possibility of a “disruptive” “split session plan;” the “cost” of available options; etc. The brochure also included copies of the plans for the project, including the schematics for the new, two-story middle school. P-7, P-14.

On November 29, 1994, copies of the plans for the project, including schematics for the new, two-story middle school, were placed at the polling place, so that voters would see them before they voted, and the voters approved the referendum. P-8.

The BOE has represented that, following approval of the referendum, it learned that a Freshwater Wetlands Protection Act ruling made more land available for the new middle school



site than was expected when the two-story schematics were prepared. N.J.S.A. 13:9B-8. That is to say, the school's footprint no longer needs to be limited to that of the two-story schematics and could be enlarged as in a one-story plan.

The BOE and its consultants reconsidered the matter and the BOE directed its architect to prepare a one-story plan for the new middle school. During the BOE's March 27, 1995 meeting, it presented and endorsed the new, one-story plan; the BOE and public considered the one-story plan relative to "future growth capacity, total square footage, student capacity of building, seating capacity of the cafeteria and gymnasium, location, flexible classroom space, location and use of the science rooms, [and] location of student lockers;" and there was "extensive discussion" of whether the new, one-story plans were "significantly different" than the two-story schematics. Mr. Faridy stated that, the one-story plans, "although different in shape and appearance, address the educational specifications and provide the same number of classrooms and other areas as before." P-9, P-14, R-4.

During the BOE's April 24, 1995 and May 22, 1995 meetings, the questions of significant differences between the two-story and one-story plans were again discussed; the referendum process and the question of commitment to specific plans were discussed; and, by a vote of seven to one, the BOE approved the new one-story plans for the middle school (and effectively abandoned the two-story schematics.) R-5.

The BOE has represented that construction of the school according to the one-story plan is expected to cost approximately the same amount of money as construction according to the two-story schematics and the one-story plan provides for expansion, including expansion by way of second stories that can be added later. However, the petitioner has submitted the certification of Anthony Baionno, an architect, licensed in the State of New Jersey, wherein Mr. Baionno has stated that he will provide a "report that will reflect significant differences between the (two-story and one-story) designs" relative to (a) "the original cost to build," (b) "the cost to operate," (c) "the cost to maintain" and (d) "the cost to renovate (add classrooms)." P-17.

Material pending litigation relative to a construction project to be financed by BOE thirty-year bonds must be described in a preliminary disclosure document which is typically released two

ONE STORY NO. EDO 8772-95

weeks prior to the sale and a sale of such bonds is scheduled for November 15, 1995. Presently, bond interest rates are low; however, the BOE's bond counsel has speculated that, "If the bond sale is postponed and rates go higher, there could be a significant cost impact on the proposed financing" by way of the bonds. R-7, emphasis added. The bond counsel has not set forth the circumstances that would necessitate the postponement nor has she stated, with probability, whether and when interest rates may rise.

CONCLUSIONS OF LAW

To succeed in his claim, the petitioner must prove, by a preponderance of the competent and credible evidence, that (1) the two-story schematics were incorporated into the referendum proposal, such that the voters' approval was substantially based upon those schematics and (2) that construction of the new middle school pursuant to the one-story plans is significantly different from construction pursuant to the two-story schematics, such that it will contravene the will of the referendum voters. Durgin v. Brown, 37 N.J. 189, 197-98 (1962); Borough of Farmingdale v. Board of Education of the Borough of Farmingdale, 81 SLD 130; N.J.S.A. 52:14B-10(c).

To succeed in its motion for summary decision, the BOE must prove that there is no genuine issue of material fact which necessitates a hearing and, in considering such a motion, all reasonable inferences must be drawn in favor of the objector, whose papers are to be indulgently treated. That is to say, the determination of whether there is a genuine issue of material fact requires consideration of whether the materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. N.J.A.C. 1:1-12.5; R. 4:46-1; Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954); In re Robros Recycling Corp., 226 N.J. Super. 343, 350 (App. Div.), certif. denied, 113 N.J. 638 (1988); Brill v. The Guardian Life Insurance Company of America et al., A-123, October 24, 1995.

(1) The project's plans, including the two-story plan, were publicly characterized as (merely) "preliminary" and the proposal, as stated, did not incorporate or refer to a particular

plan. However, the BOE obtained the Department's approval of the two-story schematics; presented and mailed the two-story schematics to the voters; and presented the two-story schematics at the referendum polling place. Consequently, the BOE virtually incorporated the two-story schematics into the proposal and presented the two-story schematic as a substantial basis of the vote on the proposal.

(2) Given the architect's certification submitted by the petitioner, there are genuine material issues of fact as to whether, between two-story and one-story construction, there are significant differences relative to (a) "the original cost to build," (b) "the cost to operate," (c) "the cost to maintain" and (d) "the cost to renovate (add classrooms)." P-17. Consequently, there is a genuine issue of material fact as to whether construction according to the one-story plan would contravene the voters' approval of the proposal and the BOE's motion must be denied.

ORDERS

I DENY WITHOUT PREJUDICE the BOE's motion for summary decision.

By November 8, 1995, the petitioner will serve his architect's report upon the BOE's attorney.

On or before November 15, 1995, the parties and their experts will confer and attempt to develop a plan for construction of the new, middle school that will address the petitioner's concerns, in order to avoid the costs that will result from full litigation of this case.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, either upon interlocutory review, pursuant to N.J.A.C. 1:1-14.10, or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

2 NOVEMBER 1995
DATE

Bruce R. Campbell ALJ
FOR JOHN R. TASSINI, ALJ

EXHIBITS

Petitioner's:

- P-1 Montgomery Township Schools, Building Project Ad-Hoc Committee, report
- P-2 Plans for Montgomery Middle School, by Faridy Thorne Fraytak, P.C., 1994
- P-3 Letter of Vice President of the BOE, appearing in The Princeton Packet, October 21, 1994
- P-4 Newspaper article "\$31 Million Plan Pays a Courtesy Call," The Princeton Packet, November 11, 1994
- P-5 Letter of member of the BOE, appearing in The Princeton Packet, November 18, 1994
- P-6 Letter of Superintendent of Schools, appearing in The Princeton Packet, November 22, 1994
- P-7 BOE's "Bond Referendum Information," forwarded to voters before the November 29, 1994 vote.
- P-8 Photograph of bond referendum polling place, showing proposed school plans, November 29, 1994.
- P-9 Plan for Montgomery Middle School, by Faridy Thorne Fraytak, P.C., 1995
- P-10 Borough of Farmingdale v. Board of Education of the Borough of Farmingdale, 81 SLD 173 (1980)
- P-11 Board of Ed. of Belvidere v. Bosco, 138 N.J. Super. 368 (Law Div. 1975)
- P-12 Plans for Montgomery Middle School, by Faridy Thorne Fraytak, P.C., 1994 & 1995
- P-13 "Supplement to Petition, dated October 4, 1995
- P-14 Certification of Orsini
- P-15 Affidavit of Mekjian
- P-16 "Techniques for Referendum Promotion," by Faridy Thorne Fraytak
- P-17 Certification of Baionno

Respondent's:

- R-1 Certification of Savedoff
- R-2 Exerpt from minutes of BOE's October 10, 1994 meeting, including "PROPOSAL NUMBER 1," to provide for construction of a new middle school, etc.

- R-3 Exerpt from minutes of BOE's October 24, 1994 meeting
- R-4 Exerpt from minutes of BOE's March 27, 1995 and April 24, 1995 meetings
- R-5 Exerpt from minutes of BOE's May 22, 1995
- R-6 Certification of Faridy
- R-7 Certification of Kahn

CHRIS SHUSTER, :
 :
 PETITIONER, : COMMISSIONER OF EDUCATION
 :
 V. : DECISION ON MOTION
 :
 BOARD OF EDUCATION OF THE :
 TOWNSHIP OF MONTGOMERY, :
 SOMERSET COUNTY, :
 :
 RESPONDENT. :
 :
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This matter comes before the Commissioner by way of respondent Board of Education's request for interlocutory review, pursuant to N.J.A.C. 1:1-1.14, of the ALJ's order denying the Board's motion for summary judgment in the above-captioned matter. The parties having made the requisite filings, and the Commissioner having determined to grant the requested review, the ALJ's decision is affirmed as set forth below, with modification to the initial order's directive regarding conference of the parties for the purpose of developing a revised school building plan.

In its request for interlocutory review, the Board argues that the fact that its final building plan differs from its initial proposal is not determinative of the Board's having thwarted the will of the voters and violated the referendum approved by them, as the Board cannot reasonably be bound by what of necessity are preliminary plans; rather, it must honor, as it has herein, the general outline of a building project and a limitation on the amount of money to be spent for it. Kearby v. Board of Education of the Borough of Watchung, 1963 S.L.D. 73 The Board further takes issue with the ALJ's conclusion that its original plan was "virtually incorporated" into the referendum question, although it also contends that, even if this were so, the Board would still not be bound to its specific original plan as a matter of law. Finally, the Board objects to the ALJ's conference order on numerous grounds, including lack of notice, lack

of legal basis for requiring settlement negotiations, and usurpation of the Board's managerial prerogative and its role as the peoples' elected representative body.

In reply, petitioner contends that, contrary to the Board's selective representation, both Kearby, supra, and the subsequent cases cited by the ALJ stand for the proposition that while a board of education may not be bound to particular plans, it cannot depart from its original concept to such a degree as to effectuate a breach of faith with the taxpayers who have committed themselves to indebtedness based on substantially different plans. Moreover, these precedents establish that any determination of whether or not the plans at issue *are* substantially different, and, thus, whether or not a breach with the voters has occurred, must be made on a case-by-case basis in view of the particular operative facts. Petitioner further claims that the present matter is distinguishable from Kearby, on which the Board relies, and is in reality closer in its fact pattern to Farmingdale, supra, as cited by the ALJ. Finally, petitioner concurs with several of the Board's reservations about the ALJ's conference order, and himself believes it to be both unclear and impracticable in its present form, notwithstanding that he is amenable to an alternative order from the Commissioner.


Upon review and consideration, the Commissioner concurs with the ALJ that, given petitioner's specific allegations and supporting certifications, this matter clearly raises genuine issues of material fact that preclude its being decided on a summary basis. Moreover, this determination is not dependent on a finding that the Board "virtually incorporated" the two-story building plan into its referendum question; rather, it is sufficient to find that this plan was clearly the basis upon which voters made their decision to approve or disapprove the question, so that factual examination of alleged substantial difference between the two-story and final plans is plainly material to resolution of the within dispute and may not be accomplished on papers at this point in proceedings.

The Commissioner does not, however, concur in the ALJ's directive that the parties and their experts must confer and attempt to develop a plan for construction of the new middle school that will address petitioner's concerns. While settlement efforts are always to be encouraged and facilitated, and are not to be precluded by the Commissioner's ruling herein should the parties wish to engage in them, the Commissioner finds no basis in law or equity on which to order the Board, the representative body to which governance of the school district is

expressly entrusted by statute, to effectively surrender its prerogative to proceed with its schematics as planned, unless and until such time as they may be shown through the within proceeding to be beyond the scope of the authorizing referendum as claimed by petitioner.

Accordingly, the initial order of the ALJ denying the Board's motion for summary judgment, without prejudice, is affirmed for the reasons expressed therein, so that further proceedings shall next ensue, as expeditiously as possible in view of the nature of the appeal, as directed by the ALJ. The order for conference and development of a revised plan, however, is rejected without prejudice to any attempt by the parties to resolve the within controversy on a voluntary basis.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

432-95

JULIUS CARRICARTE, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY : DECISION

OF UNION, HUDSON COUNTY, :

RESPONDENT. :

DECEMBER 6, 1995

JULIUS CARRICARTE, :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE CITY : DECISION
 OF UNION, HUDSON COUNTY, :
 RESPONDENT. :
 _____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

ROSALIND BUSH, CAESAR CASALE, :
MOSES E. COBB AND WILLIE J. YOUNG, :

PETITIONERS, :

COMMISSIONER OF EDUCATION

V. :

DECISION

BOARD OF EDUCATION OF THE CITY :
OF NEWARK, ESSEX COUNTY, :

RESPONDENT. :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

WITHDRAWAL

OAL DKT. NO. EDU 12190-94

AGENCY DKT. No. 437-11/94

(CONSOLIDATED)

(Formerly, EDU 12190-94, 12191-

94, 12192-94, 12193-94 and 12194-94)

**ROSALIND BUSH, CAESAR CASALE,
MOSES E. COBB, and WILLIE J. YOUNG,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE CITY
OF NEWARK, ESSEX COUNTY,**

Respondent

Anthony P. Sciarillo, Esq., for petitioners

Gregory G. Johnson, Esq., for respondent, State Operated School District for the City of Newark, formerly Board of Education of the City of Newark, Essex County

Record Closed: October 11, 1995

Decided: November 6, 1995

BEFORE ARNOLD SAMUELS, ALJ:

In October 1993 the four petitioners, tenured principals in the City of Newark School District, filed petitions alleging that they had been transferred and reassigned to duties other than those they had been performing as principals, in violation of their tenure and seniority rights. After transmittal of the disputes to the Office of Administrative Law (OAL) by the Commissioner of Education for hearing and determination as contested cases, an Initial Decision and Order on Motion for Summary Decision was rendered in favor of the petitioners. It was ordered that the petitioners' applications for summary decision were granted, and it was further ordered that each of the petitioners should be restored to the position of principal. See, OAL DKT. NOS. EDU 10947-93, 10943-93, 10946-93 and 10917-93. See also, Initial Decision dated July 25, 1994.

The Commissioner of Education adopted the findings and determination of the Initial Decision in a Decision dated September 2, 1994.

On November 2, 1994, the four petitioners filed an Order to Show Cause with the Commissioner of Education, accompanied by petitions and applications for interim relief, alleging that the respondent Board had failed to comply with the previous decisions and orders.

On December 19, 1994, the Commissioner of Education transmitted the above matters to the OAL for proceedings that would determine whether the petitioners had been restored to their tenured positions, as ordered; and if not, to further affirm and order compliance with the Commissioner's previous decision.

Following a series of status conferences and appearances by counsel, an order was entered affirming the September 2, 1994 decision of the Commissioner of Education. The Newark Board of Education was directed to immediately and fully implement that decision in substance as well as in form. A hearing was scheduled for May 15, 1995, if the order had not been fully complied with by that date.

Full compliance did not proceed with dispatch, and counsel appeared for the scheduled hearing on May 15, 1995. It was then agreed by counsel that a second order needed to be entered that would establish a schedule for compliance. Therefore, in an order dated June 14, 1995 it was stated that respondent had not fully implemented nor complied with the order dated April 27, 1995, and that the allegations of the original complaints remained valid and outstanding. The respondent was directed to immediately and fully implement the prior orders and to furnish written proof of such compliance. An additional status conference and hearing day was scheduled if further enforcement was needed.

In the interim, the Newark Board of Education was divested by the State of control of the City's public schools, and the State Operated School District for the City of Newark was established. Some managerial delays resulted, necessitating additional status conferences on August 26, and September 7, 1995. An additional hearing day also was held on October 12, 1995. It was finally determined, at that time, that each of the four petitioners had been assigned to positions as principals. The assignments were confirmed in written advice to this judge and to counsel for the petitioners by letter dated October 13, 1995 from the attorney for the State Operated School District for the City of Newark. A copy of that letter is attached to and made a part hereof.

Having reviewed and considered the issues involved in the transmittal of this matter to the OAL by the Commissioner of Education, it is **CONCLUDED** that the respondent has now complied with the decision of the Commissioner of Education dated September 2, 1994 and with the preceding order of the Office of Administrative Law dated April 27, 1995. Each of the petitioners has been restored to the position of principal. The petitioners have therefore agreed to withdraw their petitions for enforcement and compliance with the aforesaid decisions and orders.

It is therefore **ORDERED** that the withdrawals by petitioners' be approved and this matter dismissed.

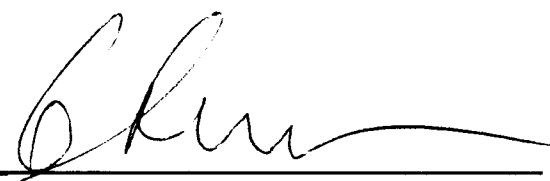
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 6, 1995

DATE

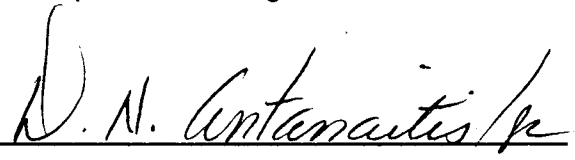


ARNOLD SAMUELS, ALJ

Receipt Acknowledged:


Nov. 13, 1995

DATE



DEPARTMENT OF EDUCATION

Mailed to Parties:


ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 15 1995

DATE

OFFICE OF ADMINISTRATIVE LAW

sej

OAL DKT. NOS. EDU 12190-94, 12191-94, 12192-94, 12193-94 AND 12194-94
CONSOLIDATED

ROSALIND BUSH, CAESAR CASALE, :
MOSES E. COBB AND WILLIE J. YOUNG, :
PETITIONERS, :
COMMISSIONER OF EDUCATION
V. :
DECISION
BOARD OF EDUCATION OF THE CITY :
OF NEWARK, ESSEX COUNTY, :
RESPONDENT. :

The record and initial decision approving withdrawal of the within matter transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 17:27-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

DECEMBER 11, 1995
DATE OF MAILING DECEMBER 12, 1995

G.J. AND E.J., on behalf of their minor child, :
T.J., :

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE :
NORTHERN HIGHLANDS REGIONAL :
HIGH SCHOOL DISTRICT ET AL., :
BERGEN COUNTY, :

DECISION

RESPONDENTS. :

G.J. AND E.J., on behalf of their minor child, :
T.J., :
PETITIONERS, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
NORTHERN HIGHLANDS REGIONAL :
HIGH SCHOOL DISTRICT ET AL., :
BERGEN COUNTY, :
RESPONDENTS. :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

:
COMMISSIONER OF EDUCATION

December 12, 1995

Date of Mailing, December 13, 1995

B.M. AND B.M., on behalf of their minor
child, J.M. :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWN-
SHIP OF DEPTFORD, GLOUCESTER
COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

December 12, 1995

B.M. AND B.M., on behalf of their minor child, J.M. :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY, : DECISION
 :
 RESPONDENT. :
 _____ :

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

December 12, 1995
Date of Mailing, December 13, 1995

BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,

PETITIONER,

V.

J.R. AND THE BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Pursuant to N.J.S.A. 18A:38-1, petitioning Board sought tuition and removal of J.N., a student with multiple disabilities who allegedly resided in a different district.

ALJ found that J.N.'s grandparents did provide a substantial portion of the financial support of J.N., that J.N.'s mother was not capable of providing care for him due to family hardship, and that J.N. lives with his grandparents because of his needs and not for the convenience of his grandparents. Therefore, in that J.N. and his grandparents satisfied the criteria set forth in N.J.S.A. 18A:38-1(b)(1), the ALJ ordered petitioner to continue to provide a free public education to J.N. Having concluded that petitioner was responsible for J.N.'s education, the ALJ found that it was not necessary to consider other issues raised in petitioner's appeal, i.e., the tuition issue or whether the Individuals with Disabilities Education Act was applicable in this matter.

Commissioner concurred with the findings and determination in the initial decision. Petition was dismissed.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5546-95

AGENCY DKT. NO. 87-4/95

**BOARD OF EDUCATION OF
THE TOWNSHIP OF EAST
BRUNSWICK,**

Petitioner,

v.

**J.R. AND THE BOARD OF
EDUCATION OF THE
TOWNSHIP OF EDISON,**

Respondents.

Robin T. McMahon, Esq., for the Board of Education of the Township of East Brunswick (Martin R. Pachman, attorney)

Mark L. Stanton, Esq., for J.R. (Stanton and Stieh, attorneys)

Robert J. Reilly III, Esq., for the Board of Education of the Township of Edison (Fitzpatrick, Reilly, Supple and Gaul, attorneys)

Record Closed: October 6, 1995

Decided: November 3, 1995

BEFORE BEATRICE S. TYLUTKI, ALJ:

The petitioner, the Board of Education of the Township of East Brunswick (Brunswick Board), filed an amended petition with the Commissioner of Education (Commissioner) on May 5, 1995, seeking a determination that J.R. and her minor son J.N. are domiciled in Edison and

therefore J.N. is not entitled to a free public education paid for by the Brunswick Board. The petitioner asks that the Commissioner assess one or both of the respondents the tuition costs for the period that J.N. has been allegedly domiciled in Edison. Both respondents denied the allegations contained in the amended petition, and on May 26, 1995, the Commissioner transferred the matter to the Office of Administrative Law to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

I had telephone conferences with the parties on June 28, 1995, and August 30, 1995, at which time it was decided that Mark L. Stanton, Esq., on behalf of J.R., would submit a motion for summary decision, and if I determined that the matter could not be resolved by the motion, the hearing would take place on October 26, 1995. I received briefs from the parties, and I informed the parties that I would render an initial decision based on the briefs. The record closed on October 6, 1995.

FACTUAL FINDINGS

I **FIND** that the pertinent facts in this matter are not in dispute.

J.N. was born on May 14, 1984, and since his birth J.N. has lived with his maternal grandparents in East Brunswick. J.R. lived with her parents in East Brunswick when her son was born and she continued to live there until she remarried and moved to Edison in September 1993. J.N. continues to live with his maternal grandparents in East Brunswick while his mother and stepfather live in Edison.

J.N. has multiple disabilities. He is neurologically impaired, blind and incontinent, which requires him to wear diapers. He has a kidney disease called renal tubular acidosis which requires medical care including daily medicine. J.N. needs twenty-four-hour care.

J.N. is a classified student in the petitioner's school district, and has attended the Lakeview School in Edison since 1987. The petitioner provides transportation to the school.

J.R. is in the U.S. Army Reserves on active duty. She has had personal medical problems since March 1992 and she may need further hospitalization and an operation (R14, R-19). J.R.'s husband is employed as a full-time superintendent for a garden apartment complex (approximately 900 apartments) in Edison and his job requires him to live on site and be on twenty-four-hour call (R-18). Although financially J.R. and her husband can support J.N., they cannot give him the extensive care he needs. According to J.R., there are no day-care centers that will accept J.N. because of his problems. J.R. visits her son at her parents' home and sometimes takes him to Edison for the weekend or on trips.

As stated, J.N. lives with his maternal grandparents, and they provide him with twenty-four-hour care. J.N.'s school states that all of its contacts are with his grandparents; the grandparents have nurtured the child and provided all additional home instruction and therapy (R-10). The grandparents also support J.N., except that J.N.'s medical, prescription drug and dental bills are covered by his parents' insurance policies. J.R. pays for some of J.N.'s clothes and his diapers.

J.R. is divorced from J.N.'s father and she has custody of their son. J.N.'s father contributes support payments which J.R. puts into a bank account for J.N. J.R. has given her mother a power of attorney to take care of her son (R-17).

J.R. claimed her son as a dependent on her 1993 federal and state income tax forms (R-8). J.N. was claimed as a dependent by his maternal grandparents on their 1994 federal and state income tax forms.

When the Brunswick Board found out in October 1994 that J.N. was living with his grandparents and his mother was living in Edison, it requested that J.R. and her mother, P.H., complete its standard affidavit forms for pupils living apart from parents. The Brunswick Board initially received forms that were not signed, not notarized and not submitted in a timely manner (R-2, R-5). Representatives of the Brunswick Board met with J.R. and P.H. regarding the domicile of J.N. on February 16, 1995.

ARGUMENTS OF THE PARTIES

In his motion for summary decision on behalf of J.R., Mark Stanton argued that J.N. is domiciled in East Brunswick since it is the intention of his mother and maternal grandparents that his permanent home be there now and for the unlimited future. Stanton recognized that traditionally the courts have held that the domicile of an unemancipated child is that of his or her father, V.R. on behalf of A.R. v. Board of Education of the Boro of Hamburg, 2 N.J.A.R. 283 (Education 1980), except where the child is living with the mother after the parents are divorced or legally separated, Edwards v. Edwards, 8 N.J. Super. 547 (Ch. Div. 1950). However, Stanton argued that the New Jersey courts have recognized that the determination of domicile must be flexible and adaptable to the facts in any given case, Board of Education of Little Egg Harbor v. Boards of Education, 145 N.J. Super. 1 (App. Div. 1975) (Morgan, J.A.D., dissenting), rev'd (adopting dissenting opinion), 71 N.J. 537 (1976).

Based on the facts in this matter, Stanton argued that J.N. clearly is domiciled in East Brunswick. Further, he indicated that J.R. considers East Brunswick her domicile and it is her intent that eventually she and her husband will live with her parents in East Brunswick.

In addition, Stanton argued that pursuant to the provisions of N.J.S.A. 18A:38-1(b)(1), East Brunswick is required to educate J.N. This statutory provision provides:

Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose

of receiving a free public education within the district. The statement shall be accompanied by documentation to support the validity of the sworn statements, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child.

Stanton stated that P.H., the maternal grandmother, has filed affidavits stating that J.N. lives with her and her husband and they support him gratis as if he were their own child. P.H. and her husband have assumed all personal obligations for J.N. relative to his school requirements and they intend to keep and support J.N. gratis for a period longer than one school term. In response to the petitioner's position that N.J.S.A. 18A:38-1(b)(1) is not applicable since J.N.'s medical, prescription drug, and dental insurance are provided for by his parents and since J.N.'s father makes support payments, Stanton argued that the statute does not require the grandparents to pay all of J.N.'s expenses, and that the support payments are placed in a bank account and are not used by the grandparents to support J.N.

Also, Stanton addressed the petitioner's assertion that the requirements in N.J.S.A. 18A:38-1(b)(1) have not been satisfied since J.R. claimed her son as a dependent on her 1993 federal and state income tax returns. He argued that the definition of dependent for tax purposes does not apply to all other areas of the law. Since for approximately nine months in 1993 J.R. lived in East Brunswick and presumably supported her child, Mr. Stanton argued that she was entitled to take her child as a dependent for that tax year since she provided more than 50 percent of the support for J.N. The situation changed in calendar year 1994 and the grandparents claimed J.N. as a dependent on their federal and state income tax returns for 1994, and will do so for 1995.

Lastly, Stanton argued that even if it were determined that J.N. was domiciled in Edison since September 1993, J.R. should not be assessed tuition for the period of time that her son was ineligible for free public education in East Brunswick. Stanton argued that N.J.S.A. 18A:38-1(b)(2) is not applicable since J.N. has multiple disabilities and is covered by federal law, the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1400 et seq. Since the IDEA

provides that all children with disabilities have the right to a free appropriate public education, Stanton argued that J.R. cannot be held financially responsible for the education of her child and any tuition payments due must be paid by the Board of Education of the Township of Edison (Edison Board). See 20 U.S.C.A. § 1412; Roxbury Township Bd. of Educ. v. West Milford, N.J. Super. (App. Div. 1995) (slip op.); Rabinowitz v. New Jersey State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982).

Robert J. Reilly III, Esq., on behalf of the Edison Board, filed a cross-motion for summary decision and argued that J.N. is domiciled in East Brunswick. In his brief, Mr. Reilly reiterated most of the arguments set forth in Mr. Stanton's brief as to the domicile of J.N. Mr. Reilly argued that if it is determined that J.N. is domiciled in Edison, then the tuition assessment should be against the parent pursuant to N.J.S.A. 18A:38-1(b)(2), and that there is no authority to assess tuition costs against the Edison Board.

Robin T. McMahon, Esq., on behalf of the Brunswick Board, also filed a cross-motion for summary decision and argued that J.N. is not domiciled in East Brunswick, citing D.W. v. Greater Egg Harbor Regional Board of Education, 95 N.J.A.R. 2d (EDU) 225. In that case, D.W. lived with his grandmother and attended school where she lived, and neither of his divorced parents were domiciled in the school district. D.W.'s father continued to financially support D.W. and D.W. lived with the grandmother because of her disability. McMahon recognized that in several administrative determinations the pupil's domicile was determined to be the same as the grandparent's; however, in those cases the grandparents had legal custody, G.C. v. Board of Education of Union City, 1986 S.L.D. 2219, and K.C.K. and K.W.K. v. Board of Education of Scotch Plains-Fanwood, 1985 S.L.D. 1622.

In this case, McMahon noted that J.N.'s maternal grandparents are not his legal guardians and that J.R. continues to support J.N. by paying his medical, prescription drug and dental bills and providing him with clothing and diapers. According to McMahon, the fact that J.R. did not claim her son as a dependent in 1994 is not dispositive since J.R. was aware that she would be meeting with the petitioner regarding this matter when she was preparing her 1994 state and federal income tax returns.

In addition, McMahon argued that even though J.R. and her husband have busy work schedules, J.R. has presented no evidence to show that she could not get a modification of her work schedule so that she could take care of J.N. or that she could not afford child care services for the time she was working and J.N. was not in school.

McMahon noted that the representation in J.R.'s brief that she plans to move back to East Brunswick does not appear in any of her certifications and she has submitted no proof that her move to Edison is temporary. Even if J.R. has some vague idea of moving back to East Brunswick at some future unspecified date, she is domiciled in Edison. See Matter of Unanue, 255 N.J. Super. 362 (Law Div. 1991).

Lastly, McMahon argued that the Commissioner has broad statutory powers and can order the Edison Board as the responsible school district to pay the tuition for the period that J.N. was not entitled to free public education in East Brunswick. See Kaprow v. Board of Educ. of Berkeley Twp., 255 N.J. Super. 76 (App. Div. 1992), aff'd, 131 N.J. 572 (1993).

CONCLUSIONS OF LAW

I agree with the arguments of J.R. and the Edison Board and I **CONCLUDE** that the Brunswick Board is responsible for the free public education of J.N. pursuant to the provisions of N.J.S.A. 18A:38-1(b)(1). J.N. and his grandparents meet the criteria set forth in this statute. It was clearly established by the facts that J.N.'s grandparents are domiciled within the petitioner's school district and have assumed all the obligations for J.N. relative to his school requirement, and that J.N. is not residing with them solely for the purpose of receiving a free public education in East Brunswick. Pursuant to the provisions of N.J.S.A. 18A:38-1(b)(1), it is not necessary that J.N.'s grandparents provide all of the financial support for J.N. gratis, and the facts in this case show that the grandparents do provide a substantial portion of the financial support for J.N. Also pursuant to the statute, I **CONCLUDE** that J.N.'s mother is not capable of providing care for him due to family hardship. The petitioner's suggestion that J.R. can secure day care for J.N. is unrealistic in light of his needs, and the facts clearly show that J.N. is living with his grandparents because of his disabilities and not simply for the convenience of his mother.

In addition, I **CONCLUDE** that the facts in the cases cited by the petitioner to support its position that J.N. is domiciled in Edison are distinguishable from the facts in this matter. Contrary to the facts in D.W. v. Greater Egg Harbor Regional Board of Education, J.N. lives with his grandparents because of his needs and not for the convenience of his grandparents. Although I agree with the petitioner that the fact that the grandparents had custody was an important consideration in both G.C. v. Board of Education of Union City and K.C.K. and K.W.K. v. Board of Education of Scotch Plains-Fanwood, custody is not a requirement pursuant to N.J.S.A. 18A:38-1(b)(1). As to the petitioner's argument regarding the domicile of J.R., I agree that J.R.'s plans to move back to East Brunswick are vague and that she is currently domiciled in Edison.

Since I have concluded that the Brunswick Board is responsible for the education of J.N. pursuant to N.J.S.A. 18A:38-1(b)(1), it is not necessary for me to consider the tuition issue or whether the IDEA is applicable in this matter.

Therefore I **ORDER** that the Brunswick Board continue to provide a free public education to J.N.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 3, 1995
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Nov. 8, 1995
DATE

Receipt Acknowledged:
D. Antanaitis
DEPARTMENT OF EDUCATION

NOV 14 1995
DATE

Mailed to Parties:
Jeff S. Main
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

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EXHIBITS ADMITTED INTO EVIDENCE:

For Petitioner:

- P-1 J.R.'s responses to interrogatories submitted by the Board of Education of East Brunswick

For Respondent J.R.:

- R-1 Certification of J.R., dated August 28, 1995
- R-2 Affidavit of J.R. (not dated and not signed)
- R-3 Letter from J.R., dated October 14, 1994
- R-4 United States Armed Forces Identification Card of J.R.
- R-5 Affidavit of P.H. (not dated and not notarized)
- R-6 Cards indicating that P.H. is registered with the Senior Center in East Brunswick and is a registered voter of East Brunswick
- R-7 Affidavit of P.H., dated December 30, 1994
- R-8 Bill for the preparation of the 1993 federal and state income tax form of J.R. and her husband, and the tax forms
- R-9 1994 federal and state income tax forms of J.R. and her husband
- R-10 Letter from Lynn Sikorski, Director of the Lakeview School, dated February 15, 1995
- R-11 Letter from Susi Bartha, the Child Study Team Case Manager, to P.H. and her husband, dated February 9, 1995
- R-12 Letter from Joseph J. Jankowski, Esq., to Robin T. McMahon, Esq., dated May 9, 1995
- R-13 Letter from Mark L. Stanton, Esq., to Joseph J. Jankowski, Esq., dated May 18, 1995
- R-14 Statement regarding J.R.'s medical problems, dated February 15, 1995

Exhibits R-1 to R-18 are listed in the order that they appear in J.R.'s filing dated August 28, 1995. I have numbered the exhibits consequentially as "R" exhibits even though they are given a different designation in the August 28, 1995 filing and in the briefs.

- R-15 Letter from Dr. Donald Korn regarding J.N., dated February 15, 1995
- R-16 Doctor's certificate of absence regarding J.N.
- R-17 Power of attorney signed by J.R., dated August 25, 1987
- R-18 Letter from Bruce Withrow, dated February 9, 1995
- R-19 Supplemental Certification of J.R., dated September 22, 1995

For Respondent Board of Education of the Township of Edison:

None

WITNESSES:

None

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF EAST BRUNSWICK, MIDDLESEX :
COUNTY, :

PETITIONER, :

COMMISSIONER OF EDUCATION

V. :

DECISION

J.R. AND THE BOARD OF EDUCATION :
OF THE TOWNSHIP OF EDISON, :
MIDDLESEX COUNTY, :

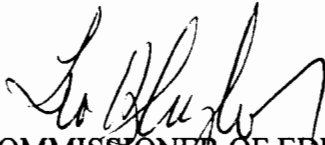
RESPONDENTS. :

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge (ALJ) that J.N. and his grandparents satisfy the criteria set forth in N.J.S.A. 18A:38-1(b)(1) and, as such, the East Brunswick Board of Education is responsible for the free public education of J.N. The Commissioner further concurs with the ALJ that, in light of this determination, it is not necessary to consider the tuition issue or whether the Individuals with Disabilities Education Act (IDEA) is applicable in this matter.

Accordingly, the initial decision of the OAL is affirmed for the reasons clearly expressed therein. The within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE
BOROUGH OF BUENA, ATLANTIC
COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF
EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board sought to vacate Department of Education's finding that the Board was responsible for the educational expenses of student O.D., whose adoptive parents (living in Buena) surrendered parental rights prior to O.D.'s placement by DYFS at Ranch Hope School for Boys. Board contended that the State of New Jersey was liable for O.D.'s educational expenses.

ALJ found and concluded that since O.D.'s adoptive parents complied with the statute governing Surrender of Parental Rights and lost all contact with O.D. as a matter of law, it was irrelevant that they reside in Buena since they have no obligation to furnish O.D. with support, maintenance or education and neither does Buena. Because the district of residence could not be determined according to the criteria contained in N.J.S.A. 18A:7B-12, the responsibility for O.D.'s tuition during the 1993-94 school year rests with the State. The ALJ reversed the Department's determination that Buena was responsible for O.D.'s tuition for the 1993-94 school year.

Commissioner adopted findings and determination in initial decision as his own.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 12473-94

AGENCY DKT. NO. 408-10/94

**BOARD OF EDUCATION OF THE BOROUGH
OF BUENA, ATLANTIC COUNTY,**

Petitioner,

v.

**NEW JERSEY DEPARTMENT OF
EDUCATION,**

Respondent.

Michael D. Capizola, Esq., for petitioner, (Capizola, Fineman & Lapham, attorneys)

Pamela Katten, Deputy Attorney General, for respondent, (Deborah T. Portiz,
Attorney General of New Jersey, attorney)

Record Closed: September 15, 1995

Decided: October 27, 1995

BEFORE EDGAR R. HOLMES, ALJ:

**STATEMENT OF THE CASE
AND PROCEDURAL HISTORY**

The New Jersey Department of Education (DOE), respondent, determined that educational expenses for O.D. were to be paid by the Borough of Buena Board of Education (BOE), petitioner for, the 1993-94 school year, in the amount of \$17,733.84. The BOE seeks relief from the imposition of financial liability and contends that the State of New Jersey is liable for the educational expenses and not the BOE.

The matter was transmitted to the Office of Administrative Law (OAL) to be heard as a contested case pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, the act creating the OAL, N.J.S.A. 52:14F-1 to -13 and the law granting the Commissioner jurisdiction over controversies and disputes under school law. N.J.S.A. 18A:6-9.

The facts are not in dispute and the parties have submitted a joint stipulation of facts which is attached as Exhibit A and made a part of this initial decision.

The operative facts are as follows:

The adoptive parents of O.D. executed a Surrender of Custody and consent to Adoption Agreement expressly terminating their parental rights on April 18, 1991.

The Division of Youth and Family Services (DYFS) placed O.D. under a Long Term Foster Care Agreement with the M. family with whom he had resided prior to his adoption. The M. family then moved to South Carolina on February 28, 1992. In South Carolina O.D.'s behavior deteriorated and he was placed in another foster home in that State.

On February 5, 1993, O.D., returned to New Jersey and in March 1993, DYFS placed him in a private shelter until October 20, 1993, when he was placed by DYFS at Ranch Hope School for Boys. It is the tuition at Ranch Hope School which is in dispute.

The DOE determined that Buena BOE was responsible for O.D.'s tuition at Ranch Hope because on January 28, 1992, the D. family, which had executed the surrender of O.D. some nine months earlier in Gloucester County, moved to Buena Township. There is also language in the Surrender document executed by the D. family which the DOE also relied upon in making this determination. In addition to the Surrender of Custody and Consent to Adoption of O.D. by other persons, the document, prepared by DYFS, also asserts that "I understand that I cannot be relieved completely of obligations for support, education, and maintenance of said child except upon adoption of said child by other person or persons"

While the language supports the DOE's position, the language is not itself supported by the statutes governing adoption or by case law and is contrary to that law. In 1993 the statute governing Surrender described the surrender as a "relinquishment of such person's parental rights in or guardianship or custody of the child named" Such surrender shall be valid and binding N.J.S.A. 9:3-41.

The language was amended effective April 27, 1994, to state the matter even more forcefully so that it accorded with decisional law. The amended language required that the person relinquishing custody be informed that the surrender document ... "means the permanent end of the relationship and all contact between the parent and child" and that it "shall be irrevocable except at the discretion of the approved agency taking such surrender or upon order or judgment of a court of competent jurisdiction setting aside such surrender upon proof of fraud, duress or misrepresentation by the approved agency" N.J.S.A. 9:31-41 effective April 27, 1994.

The paragraph relied upon by the DOE in the Surrender document is mere surplusage. The DOE treats it as a promise. However, termination of a parents rights cannot be effected by contract, only by a Surrender in compliance with the statute. In the Matter of Baby M., 109 N.J. 396, 444 (1988).

Petitioner's brief carefully scrutinizes the statute which requires the state, rather than a local school district, to pay the educational costs of children under certain circumstances.

The hierarchy of N.J.S.A. 18A:7B-12 is thus as follows:

1. Foster parents residence; if none, then
2. Child's residence, but if child is institutionalized, then
3. Present residence of parent or guardian, but if none
4. The child's last residence prior to admission, or if homeless
5. Last parental residence prior to homelessness, and if none of the above, then
6. the State.

This logical hierarchy determines a nexus of the child or the child's parents with a residence of parent or child except that it does not burden districts with institutions by using the institution as a residence. There is no nexus with Buena. The child never lived there, the child's parents never lived there, the foster parents never lived there, the child never attended school there - there is no nexus and the fact that former parents now live in Buena Vista Township is irrelevant. It is not only logically irrelevant, it is legally irrelevant because N.J.S.A. 18A:7B-12 does not say the "present district of residence of the former parent," but "of the parent." The D.s' are not the parent and the section does not apply. Buena Regional School District is not responsible for funding; the State or some other district is responsible.

The petitioner also argues that the respondent is barred by laches. This point is moot because the matter has been decided on other grounds. Nevertheless, had the petitioner been found liable, no argument for laches would obtain because the DOE actually made the determination during the very school year for which it sought to impose liability upon the petitioner. This is not laches but the very opposite of laches; a prompt determination.

Nevertheless, I **FIND and CONCLUDE** that the adoptive parents of O.D. complied with the statute governing Surrender of Parental Rights and lost all contact with O.D. as a matter of law. It is therefore irrelevant that they now reside in the Buena School District since they have no obligation to furnish O.D. with support, maintenance, or education. Neither therefore, does the Buena School District. According to the statute, the responsibility for O.D.'s tuition during the 1993-94 school year rests with the State since the district of residence cannot be determined according to the criteria contained in N.J.S.A. 18A:7B-12.

I **REVERSE** the determination of the respondent that the Buena School District is responsible for the educational expense of O.D. for the 1993-94 school year.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10/27/95
DATE

Edgar R. Holmes
EDGAR R. HOLMES, ALJ

11/1/95
DATE

Receipt Acknowledged:
[Signature]
DEPARTMENT OF EDUCATION

NOV 06 1995
DATE

Mailed to Parties:
Jeff S. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

NONE

DOCUMENTS IN EVIDENCE

JOINT EXHIBITS:

J-1 STIPULATION OF FACTS

BOARD OF EDUCATION OF THE :
BOROUGH OF BUENA, ATLANTIC :
COUNTY, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF :
EDUCATION, :
RESPONDENT. :
_____ :

DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Respondent's exceptions and petitioner's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Respondent asserts that the Administrative Law Judge (ALJ) erred in finding that the responsibility for O.D's tuition for the 1993-94 school year rests with the State. Essentially recasting its argument as shaped before the ALJ, respondent affirms that the Surrender of Custody and Consent to Adoption Agreement executed by the D. family in 1991, as an adoptive family, did not completely relieve them of their obligations for support, education and maintenance of O.D. (Respondent's Exceptions at p. 2) Rather, citing N.J.S.A. 9:3-50, respondent warrants that the D. family would not be so relieved, except upon the subsequent readoption of O.D. Respondent continues, "Despite any mention in the statute [N.J.S.A. 9:3-41] of severance of all legal or financial responsibility, the ALJ found that such obligations were

discharged upon surrender.” (Id. at p. 3) Respondent maintains that petitioner’s reliance on N.J.S.A. 9:3-41 is erroneous in that “[i]t does not address the legal responsibility for financial support or contemplate the responsibilities of *adoptive* parents after the surrender of custody.” (emphasis added) (Id. at p. 5) Thus, respondent concludes that, pursuant to the continuing legal responsibility for support, education and maintenance until such time as readoption may take place, the Department of Education correctly looked to the “present district of residence” of the D. family, Buena Vista Township, to assign responsibility for O.D.’s tuition for 1993-94. (N.J.S.A. 18A:7B-12(b))

Petitioner contends that the operative statute is N.J.S.A. 9:2-16 which states that

a properly executed surrender to an approved agency shall be valid whether or not the person giving the same is a minor and shall be irrevocable except at the discretion of the approved agency making such surrender or upon order or judgment of a court of competent jurisdiction, setting aside such surrender upon proof of fraud, duress or misrepresentation.

(Petitioner’s Reply at p. 2)

Such surrender, petitioner argues, severs the parental relationship, and “***there is no authority anywhere in the law to require continuing support.” (Id.) Thus, petitioner concludes, the ALJ properly determined that the language added to the surrender agreement is ineffective and fails to provide the nexus necessary to impose upon petitioner the burden for O.D.’s 1993-94 educational program costs. (Id. at pp. 2, 3)

Upon careful and independent review, the Commissioner finds that the ALJ properly concluded that “[a]ccording to the statute, the responsibility for O.D.’s tuition during the 1993-94 school year rests with the State since the district of residence cannot be determined according to the criteria contained in N.J.S.A. 18A:7B-12.” (Initial Decision at p. 4) In so

finding, the Commissioner concurs with the ALJ that respondent's arguments with respect to the effect of the Surrender of Custody and Consent to Adoption Agreement are unpersuasive.

Accordingly, the initial decision of the ALJ reversing respondent's determination that petitioner is responsible for O.D.'s educational expenses for the 1993-94 school year is adopted for the reasons expressed therein.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

December 15, 1995
Date of Mailing, December 15, 1995

DEBORAH ULRICH, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE :
 MONMOUTH COUNTY VOCATIONAL :
 SCHOOL DISTRICT, MONMOUTH :
 COUNTY, :

RESPONDENT. :

DECISION

SYNOPSIS

Petitioner, tenured teaching staff member who was rified in 1994-95 school year, alleged Board employed nontenured or less senior staff in subject areas where she was certified, thereby violating her tenure and seniority rights. Petitioner held teaching endorsements in Elementary Education and Teacher of Vocational-Technical related subjects.

ALJ concluded that because all courses taught in respondent's District by nontenured personnel or those less senior than petitioner were taught for high school credit, there were no courses to which petitioner could claim entitlement under her elementary education endorsement. Citing Proebstle and New Jersey regulations, ALJ concluded that petitioner was not entitled to exercise her tenure rights under her vocational-technical related subjects endorsement to claim math and science positions as holders of that endorsement are authorized to teach vocational-technical related subjects only in the area of his or her state-approved occupational experience. Moreover, ALJ concluded that petitioner's endorsements did not authorize her to teach drafting or design and, accordingly, she was not entitled to claim the Computer Assisted Drafting and Design courses taught by nontenured industrial arts teachers. ALJ concluded petitioner was not entitled to the relief she sought. Petition was dismissed.

Commissioner concurred with ALJ that petitioner did not establish entitlement to teach any of the courses in the District herein at issue. Commissioner adopted findings and determination in the initial decision as his own.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7180-94

AGENCY DKT. NO. 254-6/94

DEBORAH ULRICH,

Petitioner,

v.

**BOARD OF EDUCATION OF
THE MONMOUTH COUNTY
VOCATIONAL SCHOOL DISTRICT,
MONMOUTH COUNTY,**

Respondent.

Stephen B. Hunter, Esq., for petitioner (Klausner, Hunter & Seid, attorneys)

Sanford D. Brown, Esq., for respondent (Cerrato, Dawes, Collins, Saker, & Brown, attorneys)

Record Closed: September 19, 1995

Decided: November 3, 1995*

BEFORE M. KATHLEEN DUNCAN, ALJ:

* Extensions of time for filing the Initial Decision were requested and granted, pursuant to N.J.S.A. 52:14B-10(c).

This matter commenced on June 21, 1994 when Deborah Ulrich (hereinafter petitioner) filed a petition with the Commissioner of Education seeking a determination that the Monmouth County Vocational School District (hereinafter respondent) had violated her tenure and seniority rights and an order reinstating her to a full-time instructional position with back pay and benefits. An answer on behalf of respondent was filed on July 13, 1994, and on July 27, 1994 the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13.

A prehearing conference was conducted on October 24, 1994 at which time the following was identified as the issue for determination at hearing:

Does petitioner possess an endorsement appropriate for any position filled by a non-tenured or less senior tenured teacher for school year 1994-95 in respondent's district?

Hearing dates were scheduled for January 19 and 20, 1995 at the Trenton office of the Office of Administrative Law. Under cover letter dated January 13, 1995, petitioner filed a motion for summary decision and supporting brief. During a conference call on January 17, 1995 the undersigned indicated that the motion brief would be considered after the hearing along with any other post-hearing submissions. The January dates were adjourned, and the matter was rescheduled and was conducted on March 15 and 16, 1995. Following the close of testimony, the record remained open for the receipt of written submissions. A brief on behalf of respondent was received on May 1, 1995. Petitioner's post-hearing brief was received on May 2, 1995. A reply brief on behalf of respondent was received on May 11, 1995, as was petitioner's reply letter memorandum, whereupon the record closed. The record was reopened at respondent's request for the purpose of marking into evidence several exhibits which had been marked at the hearing for identification only. Exhibits R-3 through R-14 were received and marked into evidence without objection on September 19, 1995, whereupon the record closed again.

FINDINGS OF FACT

Most of the facts relevant to a determination of this matter are not in dispute and I therefore **FIND** the following as uncontested facts.

On or about December 23, 1987, respondent posted and advertised a new position opening for February 1, 1988. The posting listed the job title as "Teacher of Computer Related Instruction/Graphic/Commercial Arts" and requested the following qualifications:

Qualifications: Regular New Jersey Teacher Certificate
(Secondary Endorsement) with varied
computer background and three years
work experience

OR

High School Diploma or Equivalent
Minimum three years of appropriate occupational
work experience
Must be eligible for New Jersey Teaching Certificate

OR

College Degree B.A./B.S.
Minimum two years of appropriate work experience

A July 25, 1985 memorandum to Chief School Administrators from Leo Klagholz, then Director of Teacher Preparation and Certification, concerning teachers of computer education provided in pertinent part:

In order to meet instructional needs in computer education in September 1985 and in response to your questions concerning who is authorized to teach, guidelines are being recommended to you as an interim measure that should allow you to attract and retain competent teachers in computer education and at the same time provide a level of statewide standardization for qualifications. The guidelines are based on the recommendations made by the task force. The guideline that teachers of computer education must hold a New Jersey instructional certificate (of any kind) is binding. However, those guidelines regarding specific preparation are not binding in any way; we only suggest that you consult these guidelines in assigning persons to teach computer education.

1. At the elementary school level teachers who hold the endorsement Teacher of elementary Education may be assigned to teach computer education or to use computers as an instructional tool.
2. Teachers who hold any instructional endorsement may use the computer as an instructional tool to enhance instruction at any grade level.
3. Teachers who hold any instructional endorsement and who have some preparation in computer education may teach courses in this area at the secondary level. The following preparation was considered important by the task force:
 - a. Programming languages (including Basic) types of
 - b. Computer organization, and/or computer architecture
 - c. Data Structures

When petitioner applied for the above-referenced position, she possessed a standard instructional certificate with an elementary education endorsement, only. She also had several years experience as a computer/software trainer in the business world, and on the basis of this experience and in accordance with the procedures established by the County Superintendent of Schools, in February 1988 she applied for an endorsement which would permit her to teach at the secondary level: Teacher of vocational-technical related subjects. The requirements for obtaining this endorsement, as published by the Bureau of Teacher Certification in 1976, were marked as P-25 in evidence and are attached hereto and made a part hereof as if set forth herein at length. A memorandum issued by the Monmouth County Superintendent of Schools on January 15, 1987 had advised all Chief School Administrators of high school districts of the criteria which would be used for the review of occupational experience for instructional endorsements; the information sheet concerning the endorsement Teacher of Vocational Technical-Related Subjects stated "Occupation must be specified" and further provided:

TWO YEARS OF OCCUPATIONAL EXPERIENCE ARE REQUIRED FOR CERTIFICATION.

The "STATEMENT OF PRACTICAL EXPERIENCE" submitted by the applicant and employer(s) must include recent occupational experience and an EXACT description of tasks performed on the job. If any component is part-time, specific information including hours per week, weeks per year, and an EXACT description of duties are required.

TYPES OF APPROPRIATE OCCUPATIONAL EXPERIENCES ARE DETERMINED BY THE COMMITTEE ON CERTIFICATION, DIVISION OF VOCATIONAL EDUCATION:

Refer to the specific occupation listed under Agricultural Occupation; Marketing Education, Production, Personal or Service Occupations; Skilled Trades; or Technical Occupations.

OCCUPATIONAL EXPERIENCES NOT APPROPRIATE FOR CERTIFICATION:

Teaching within the occupational area CANNOT be applied toward the occupational experience requirements of this endorsement.

Accordingly, the application materials which were submitted to the Monmouth County Superintendent's office recited that petitioner would be teaching "Vocational-Related Subjects-Computer" commencing in September 1988 and included two statements of practical experience, one describing the duties performed by petitioner from 1984 to 1986 when she was employed by Duplifax, Inc., as a trainer for office automation products and another describing the duties she performed from October 1986 to February 1988 when she was employed by Computerland of Eatontown as a software instructor. The State Board of Examiners issued a standard Teacher of Vocational-Technical Related Subjects endorsement to petitioner in December 1988.

The employment contract offered to petitioner for March 1, 1988 to June 30, 1988 and signed by her on February 11, 1988, indicated that she had been employed to "teach Vocational Related Subjects/Computer" as did similar contracts for 1988-89, signed on June 9, 1988 and for 1989-90 signed on August 10, 1989. The contract for 1990-91 recited that petitioner was being employed to "teach Visual Communications" and the contract for 1991-92 said she was employed to "teach computer-related subjects". The 1992-93 and 1993-94 contracts described her employment as "Visual Communications Teacher".

During the years petitioner taught in respondent's district, she worked with the commercial art teacher and the graphic arts-printing teacher; she taught courses entitled "Visual Communications/Computer", "Desktop Publishing", "Computer Arts" and "Computer Literacy".

By letter dated April 7, 1994 respondent's superintendent advised petitioner as follows:

Please be advised that on Thursday, April 14, 1994, at the regular monthly meeting of the Board of Education, the Board, in closed session, will be reviewing personnel that may be affected by elimination of programs and/or reduction of force.

I will be recommending to the Board that the certified position of Teacher of Vocational-Technical Related subjects be eliminated for the 1994-95 school year. Since your teaching seniority is

exclusively in Teacher of Vocational-Technical Related Subjects, it will be necessary to recommend to the Board that your contract be terminated as of June 30, 1994.

Please be further advised that should you desire the said discussion take place in public, you must inform me in writing no later than 11:00 a.m. on Wednesday, April 13, 1994.

If you wish to meet with me prior to the Board meeting, please contact my office for an appointment.

At its regular meeting on August 14, 1994, respondent voted to abolish the position of Teacher of Vocational-Technical Related Subjects and by letter dated April 15, 1994, it notified petitioner that her position had been abolished and her contract would not be renewed for 1994-95. The within matter followed. This concludes the recitation of contested facts.

Petitioner testified that upon reviewing the curriculum materials for various math courses currently being taught by non-tenured or less senior staff under math endorsements and various science courses currently being taught by non-tenured or less senior staff under one or another of the science endorsements, she felt very comfortable regarding her ability to teach certain math and science vocational-related courses. She also testified that after a review of the curriculum courses for Math I, II, and III (now taught by a non-tenured teacher with a math endorsement) she felt competent to teach these basic math concepts. She further testified that her review of the High Technology Computer Assisted Drafting and Design curriculum as well as information received from the two non-tenured teachers of those courses, indicated that the courses were computer instructional-related courses which she could teach.

Respondent's Superintendent of Schools, Brian D. McAndrew, Ed. D., testified that at the time petitioner was hired in 1988 neither the then commercial arts teacher nor the graphics arts/printing teacher had any expertise in the use of computers. Accordingly, the district was looking for a teacher proficient in the use of computers to complement the newly joined Commercial Art/Graphics Arts/Printing Department in a program entitled Visual

Communications. Respondent had hoped that this newly synthesized unit would generate student interest in the area of visual communications. Unfortunately, over the years enrollment in the classes declined to the point where in 1994 respondent felt it necessary to reduce the number of teachers in the unit. At that time both the commercial art teacher, Judith Sgombick, who had been newly employed in September 1993, following the retirement of the previous commercial art teacher, and the graphic arts-printing teacher, James Sabino, were proficient in the use of computers in the classroom. Since both the commercial art and graphic arts-printing courses are substantive courses which utilize computers as a tool, but require occupational endorsements and expertise in the technical fields which petitioner did not have, respondent had no choice but to eliminate petitioner's position rather than one of the other two, he explained.

William P. Hoey, Jr., Assistant Superintendent for respondent, testified that after petitioner's position was eliminated, some of what she had previously taught was incorporated into the classes taught by the commercial art teacher and the graphic arts/printing teacher. Each teacher now spends ten to twenty percent of his or her teaching time teaching Desktop Publishing (computer software) applications. Mr. Hoey also testified that there are no remedial math courses being taught in the district; basic skills instruction, not for high school credit, is provided on a pull-out basis by Christine Burger, a tenured teaching staff member with more seniority than petitioner. All remaining math and science courses carry high school credit, he indicated, and there are no other teachers in the district teaching under the Teacher of Vocational-Technical Related Subjects endorsement. He further testified that the five credits of applied math and five credits of applied science components of the Shared Time occupational preparedness courses were integrated within the occupational curriculum and were inseparable from the other components of the courses taught by the various occupational teachers.

APPLICABLE LAW AND DISCUSSION

Any teaching staff member, tenured or otherwise, employed in the public schools must be "the holder of a valid certificate to teach, administer, direct or supervise the teaching, instruction,

or educational guidance of . . . pupils in such public schools . . .” N.J.S.A. 18A:26-2. Certificates are issued by the State Board of Examiners pursuant to rules and regulations prescribed by the State Board of Education. N.J.S.A. 18A:6-38. A comprehensive set of regulations, N.J.A.C. 6:11-1.1 to 6:11-11.20, describes the various certificates which may be issued and the various endorsements which may be obtained under each certificate, sets forth the requirements for obtaining a particular certificate and endorsement, designates which certificates and endorsements are required for which positions, prescribes requirements for teacher education programs, etc. The State Board of Examiners issues only three standard educational certificates: The Instructional Certificate, the Administrative Certificate and the Educational Services Certificate. N.J.A.C. 6:11-2.3. All other “certificates” sometimes referred to in case law are actually “endorsements” on one of the foregoing three certificates. The fields in which teaching endorsements may be issued on a New Jersey Instructional Certificate are listed at N.J.A.C. 6:11-6.2. N.J.A.C. 6:11-6.1 concerning authorizations in general provides in pertinent part:

- (a) Each teaching endorsement is required for the corresponding teaching assignment. Each endorsement is valid for all levels, except that the elementary endorsement is valid for grades nursery through eight.
- (b) Teachers with elementary endorsements are not permitted to devote more than one-half time to teaching art, music, health, home economics, industrial arts, or physical education in elementary grades. Teachers with elementary endorsements are authorized to teach the common branch subjects, such as reading, writing, arithmetic, and spelling in the secondary school, grades seven through 12.

Endorsements which may be issued on New Jersey Administrative Certificates and those which may be issued on Educational Services Certificates are listed elsewhere in the regulations and are not relevant to the within matter. Once a teaching staff member has obtained tenure in any position under a particular certificate, that educator may extend his or her tenure rights to all

other positions under that certificate for which s/he holds the appropriate endorsement, with the exception of those positions specifically enumerated in N.J.S.A. 18A:28-5; the only way to obtain tenure in a position specifically enumerated in N.J.S.A. 18A:28-5 is by fulfilling the criteria specified in that statute or in N.J.S.A. 18A:28-6. See Dennery v. Board of Educ., 131 N.J. 626, 634 (1993); Ellicott v. Board of Educ., 251 N.J. Super. 342, 349 (App. Div. 1991) and cases cited therein. Pursuant to the statutory and regulatory scheme, and the foregoing case law, when petitioner's position as teacher of Vocational Technical-Related Subjects/Computer was abolished, petitioner was entitled to transfer her tenure rights earned in that position to all other positions under her instructional certificate for which she held an appropriate endorsement.

The relevant inquiry regarding certification is not what a person can teach, but what a person may teach. The answer must be found in the regulations and the case law, not in a review of the endorsement holder's college transcript. Accordingly, in the context of tenure and seniority rights following a RIF, any discussion concerning who is more suited to teach a particular course or who is more qualified is unnecessary and inappropriate. If the rified teacher has an endorsement which authorizes, i.e., permits, her to teach a course, she may exercise her tenure and seniority rights to claim it.

The two endorsements on petitioner's Instructional Certificate and their corresponding authorizations are listed in N.J.A.C. 6:11-6.2 as follows:

- (a) Teaching endorsements and authorizations are listed below:

6. Elementary education: This endorsement authorizes the holder to serve as elementary school teacher in grades nursery through eight in all public schools. Teachers with elementary endorsements are not permitted to devote more than one half time to teaching art, music, health, home economics, industrial arts, or physical education in the elementary grades. Teachers with elementary endorsements are authorized to teach the common branch subjects such as

reading, writing, arithmetic, and spelling in the secondary school;

29. Teacher of vocational-technical related subjects: This endorsement authorizes the holder to teach those subjects utilized in skill and technical trades such as math, science, related theory.

Petitioner asserts that her elementary education endorsement entitles her to teach courses entitled Math I, Math II and Math III, currently taught by a non-tenured teacher with a math endorsement. Petitioner has reviewed the curriculum guides for those courses and she argues that the course content is equivalent to common branch * arithmetic. In Old Bridge Education Association v. Board of Education of the Township of Old Bridge, 1985 S.L.D. 1150, aff'd. State Board 1987 S.L.D. 2663, the administrative law judge discussed extensively the tenure and seniority rights of holders of elementary education endorsements who had taught common branch subjects in the secondary school. She concluded that only teachers with English endorsements could be assigned to teach a Compensatory Education communications skills course in grades 9 through 12 because the course was clearly high school English and high school credit was awarded to students in the course. With respect to the Compensatory Education math course taught in grades 9 through 12, the administrative law judge expressed a strong suspicion that the course required a teacher of mathematics endorsement since it included more than arithmetic, i.e., pre-algebra and pre-geometry. However, because there was insufficient information in the record concerning the computational skills course and because it was not clear from the record whether in fact high school credit was awarded to students in the Compensatory Education math class, she recommended that the Commissioner of Education direct Department of Education personnel with the appropriate expertise to review the course content for the purposes of determining the appropriate endorsement. On August 8, 1985, when the Commissioner of Education rendered his

* Although a search of statutory and code provisions has revealed no definition for the term "common branch subjects", the term is thought to have originated with early educators who wrote about "the tree of knowledge" whose common branches were reading, writing and arithmetic.

final decision in the case, he declined to render a determination with respect to the appropriate endorsement for the Compensatory Education communications courses and stated that he did not “perceive a need to review the Compensatory Education mathematics courses as stated by the judge in that pre-algebra and pre-geometry skills fall within the scope and sequence of mathematics traditionally associated with the upper grades of K through 8.” *Id.* at 1209. A few months later, however, by memorandum dated December 31, 1985, the same Commissioner advised all Chief School Administrators in part, as follows:

At the December 4, 1985 meeting of the State Board of Education, I recommended to the board the passing scores for the grade nine High School Proficiency Test . . .

According to New Jersey law and the Administrative Code, the state board must approve the HSPT passing scores. I will recommend that they do so at the January 8, 1986 meeting . . .

The attached information addresses questions about the impact of the HSPT on instructional programs. The information is organized in a question and answer format.

I am providing you with this material at this time so that you can estimate the number of pupils likely to be eligible for compensatory services in 1986-87 . . . In addition, critical questions dealing with . . . certification . . . are addressed in the attached paper. I trust that these clarifications will prove useful as you develop you 1986-87 instructional program . . .

The question and answer format attachment to the December 31, 1985 letter memorandum set forth in question number 12, “What certification is required to teach in various types of elementary or secondary remedial programs?” The answer proffered, among other things, the following:

Communications and Computation courses, which are utilized to fulfill the state’s graduation requirements (e.g. one year of communication for each year of enrollment up to four credit years and two credit years of computation) may not be taught by a

teacher with an elementary certificate [elementary endorsement on an instructional certificate]. These courses must be taught either by a subject matter certified teacher (English or mathematics) or by a teacher with dual certification (e.g. English/Elementary, English/Reading, Mathematics/Elementary). . . .

See Sontupe and Upper Freehold Regional Education Association, v. Saul Cooperman, Commissioner of Education and Board of Education of the Upper Freehold Regional School District, 1987 S.L.D. 706, aff'd. State Board of Education 1987 S.L.D. 717, aff'd. Superior Court of New Jersey Appellate Division, A-239-87T8, unreported opinion, May 31, 1988, wherein the court noted:

There is no relief which can be granted petitioner at this point because regulations adopted in December 1986 effectively formalize the policy that elementary teachers may not teach courses which count toward the minimum high school graduation requirements. N.J.A.C. 6:8-7.1(c). English and mathematics can only be taught by teachers with those specific endorsements. N.J.A.C. 6:11-6.2(a)7 and 14. Elementary teachers are not authorized to teach English or mathematics. N.J.A.C. 6:11-6.2(a)6. Thus, the result of the new regulations appears to be that courses taught by elementary teachers may not be counted toward fulfillment of the minimum high school graduation requirements.

In South River Education Assn. v. Bd. of Educ. of Borough of South River, 1984 S.L.D. 1531, relied upon by petitioner, the grade level at issue was grade eight. This level is specifically authorized under the elementary education endorsement, and, accordingly, South River lends nothing to a determination of the issues herein.

Accordingly, I **CONCLUDE** that because all courses taught in respondent's district by non-tenured personnel or those less senior than petitioner are taught for high school credit there are no courses which petitioner may exercise her tenure rights under her elementary education endorsement to claim.

Petitioner also asserts that the clear language describing authorizations for holders of the teacher of vocational technical related subjects endorsement entitles her to teach any vocationally related math or science course currently taught by non-tenured or less senior personnel in respondent's district. Preliminary, I note that the language of N.J.A.C. 6:11-6.2(a)29 differs from the language in the three previous endorsements listed. Each of those endorsements states, "This endorsement authorizes the holder to teach vocational courses (26) (or skilled trade courses (27) or technical occupation courses (28)) in the area of his or her state approved occupational experience in all public schools." The reason for this difference in language is nowhere apparent. Since N.J.A.C. 6:11-8.1 describing vocational educational certification requirements, effective until August 31, 1992, requires a minimum of 2 years of approved occupational experience for the issuance of the vocational-technical related subjects endorsement and since that occupational experience, in whatever field, is clearly the basis for the issuance of the endorsement, I **CONCLUDE** that holders of the endorsement are in fact authorized to teach vocational-technical related subjects only in the area of his or her state-approved occupational experience, notwithstanding the language difference in the regulations. This conclusion is supported by the description of requirements for issuance of the endorsement published by the State Department of Education, Bureau of Teacher Certification, in 1976 which was marked as P-25 in evidence and is attached hereto. A review of those requirements reveals that the endorsement may be awarded to candidates whose program of college studies included "45 semester-hour credits including study in at least four of the following areas: English, Fine and practical Arts, Foreign language, Mathematics, Music, Philosophy, Psychology, Science, Social Studies." (emphasis added) Accordingly, a student could avoid mathematics courses and science courses altogether and still obtain this endorsement. Clearly, therefore, the words "such as" in N.J.A.C. 6:11-6.2(a)29 cannot mean "including." They must simply mean "by way of example". Furthermore, as the 1987 memorandum sent to all school administrators by the Monmouth County Superintendent of schools indicated, the area of occupational experience must be designated; the only logical reason for the designation requirement is to ascertain appropriateness of experience for the particular teaching position. See also, N.J.A.C. 6:11-8.1(d)7, where this is specifically articulated with respect to vocational-technical part-time teachers.

Proebstle v. Board of Education of the Burlington County Vocational Technical High School District, EDU 0771-82, decided by the Commissioner October 29, 1982, and cited by petitioner, does not compel a different conclusion. In that case, Robert Proebstle had been teaching general mathematics and vocational mathematics in respondent's district under his teacher of vocational technical related subjects endorsement for six years when, as a result of a reduction in force, his employment was terminated. Petitioner contended that he had greater seniority in teaching vocational mathematics than any of the six remaining teachers. It was respondent Board's position that petitioner had no seniority because he did not possess a proper endorsement to have been teaching general mathematics or vocational mathematics at any time while in its employ. The administrative law judge relied upon a certification from the Director of the Division of Field Services within the Bureau of Teacher Education and Academic Credentials in which Doctor Fred Price attested that

... a teacher certified to teach Vocational Technical related subjects would be qualified and could legally and properly teach the course Vocational Math as taught in the Burlington County Vocational Technical School District, as provided by the Course Description annexed hereto.

The administrative law judge noted that the rule under which the endorsement teacher of vocational technical related subjects is issued did not specify the related subjects and proceeded to conclude that even without Doctor Price's affidavit, since the Board had consistently assigned petitioner general mathematics courses and vocational mathematics courses or both and since the Board was aware of the endorsement possessed by petitioner, he must have been presumed qualified under that endorsement for the assignments. The burden of rebutting any such presumption was upon the Board, the judge concluded, and the Board had failed to rebut the presumption. Unfortunately, there is no discussion of the occupational experience relied upon in issuing the endorsement to Mr. Proebstle. The fact of the present litigation, as well as Proebstle, and undoubtedly others, illustrates the need for clarification of the code provisions to require

designation of the specific area of state approved occupational experience as part of the endorsement on the face of the certificate. Common sense and logic and consistency with requirements of the other vocational endorsements dictate that the related areas the holder of this endorsement may teach are those described in the required two years of occupational experience.

Accordingly, based upon the foregoing discussion, I **CONCLUDE** that petitioner is not entitled to exercise her tenure rights under her vocational technical related subjects endorsement to claim math and science positions in respondent's vocational curriculum.

Finally, petitioner claims entitlement to teach Computer Assisted Drafting and Design courses taught by non-tenured teachers holding Industrial Arts endorsements. The Industrial Arts endorsement and authorization is described at N.J.A.C. 6:11-6.2(a)13 as follows: "This endorsement authorizes the holder to teach Industrial Arts in all public schools. Industrial Arts normally includes: graphic arts, drafting, woodworking, metal working, arts and power mechanics." A review of the curriculum materials entered into evidence concerning Computer Assisted Drafting and Design, P-35 in evidence, reveals that the course is a drafting course in which computers are used as a tool rather than taught as a substantive area. Petitioner's endorsements do not authorize her to teach drafting or design and, accordingly, I **CONCLUDE** she is not entitled to claim the CAD courses taught by the two non-tenured industrial arts teachers. With respect to any tenure rights petitioner might have to teach the Desktop Publishing components which have been integrated into the assignments of the commercial art teacher and the graphic arts-printing teacher, the recent holding of the Court in Impey v. Board of Educ. of Borough of Shrewsbury, 142 N.J. 338, 399 (1995) made clear that the determination to reduce the teaching force by abolishing positions need not eliminate the services that may be related to those positions. There is no question in this matter that petitioner's position was eliminated for good faith reasons of economy and efficiency. The fact that some of the computer skills which she used to teach under her endorsement teacher of vocational technical related subjects are now being taught by the teachers of skilled trades does not violate her tenure rights. Those teachers

are entitled to teach computer skills as a tool in teaching their skilled trades pursuant to their skilled trade endorsements. See July 25, 1985 memorandum discussed at pages 3-4 above.

For all of the foregoing reasons, I **CONCLUDE** that petitioner is not entitled to the relief which she seeks and, accordingly, the petition of appeal is hereby **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Nov 3, 1995
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

11/3/95
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 13 1995
DATE

Jeff S. Maini
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

EXHIBITS IN EVIDENCE

For petitioner:

- P-1 A listing of teachers employed within the Monmouth County Vocational School District for the 1994-95 school year who are non-tenured and who are teaching Mathematics and Science subjects.
- P-2 A list of textbooks utilized, in part, by the teachers listed in P-1.
- P-3 The application materials filed on or about September 12, 1988 by Deborah Nichols (now Deborah Ulrich) regarding the acquisition of her Teacher of Vocational-Technical Related Subjects endorsement.
- P-4 An Employment Contract for Deborah Nichols dated February 11, 1988.
- P-5 An Employment contract for Deborah Nichols dated June 9, 1988.
- P-6 An Employment Contract for Deborah Nichols dated August 10, 1989.
- P-7 An Employment Contract for Deborah Nichols dated April 12, 1990.
- P-8 An Employment Contract for Deborah Ulrich dated April 11, 1991.
- P-9 A letter from Brian McAndrew, then Assistant Superintendent of Schools, to Deborah Nichols dated February 11, 1988.
- P-10 A letter dated June 9, 1988 from Edward Davey, the then Superintendent of Schools, to Deborah Nichols.
- P-11 An April 13, 1989 letter from Brian McAndrew to Deborah Nichols.

- P-12 An August 10, 1989 letter from Brian McAndrew to Deborah Nichols.
- P-13 An April 16, 1992 letter from Brian McAndrew to Deborah Ulrich.
- P-14 A July 9, 1992 letter from Brian McAndrew to Deborah Ulrich.
- P-15 An April 15, 1993 letter from Brian McAndrew to Deborah Ulrich.
- P-16 An April 7, 1994 letter from Brian McAndrew to Deborah Ulrich.
- P-17 An April 15, 1994 letter from Brian McAndrew to Deborah Ulrich.
- P-18 A letter dated November 7, 1990 from William Pollock to Debra Nicholas.
- P-19 A November 21, 1990 letter from William Hoey to Deborah Nichols.
- P-20 A memorandum from Mr. Scelfo, Mrs. Davis and Mr. Hirshfield to Deborah Nicholas, dated May 24, 1991.
- P-21 A July 13, 1992 letter from Brian McAndrew to Deborah Ulrich.
- P-22 A letter from Karen Murdoch to Deborah Ulrich, dated September 3, 1992.
- P-23 A March 29, 1993 letter from Brian McAndrew to Debbie Ulrich.
- P-24 A Certificate entitled Teacher of Vocational-Technical Related Subjects issued to Deborah Nichols.
- P-25 A listing for the endorsement of the Teacher of Vocational-Technical Related Subjects included in a 1976 Department of Education publication titled Certification Book.

- P-26 A listing of all certificated personnel employed in the Monmouth County Vocational School District for the 1994-95 school year listing their category of employment, certifications that they possess and their initial date of employment.
- P-27 A listing of curriculum offerings within the Monmouth County Vocational School District for the 1993-94 school year.
- P-28 An advertising supplement to the Asbury Park Press, dated January 30, 1994 titled Education for Tomorrow's Careers which is a publication of the Monmouth County Vocational School District.
- P-29 An Annual Report of the Monmouth County Vocational School District for the 1992-93 school year.
- P-30 A Skill Profile Rating Scale sheet utilized by Deborah Ulrich.
- P-31 Curriculum materials titled Tech Prep "2+2" - Visual Communication.
- P-32 Curriculum materials titled Monmouth County Vocational School District Desktop Publishing I - Tech-Prep Curriculum - dated March 14, 1994.
- P-33 A copy of a document titled Monmouth County Vocational School District Competency-Based Curriculum - Commercial Art.
- P-34 A document titled Monmouth County Vocational School District - Competency-Based Curriculum - Graphic Art and Reproductions.
- P-35 Curriculum materials entitled High Technology - CAD & Design.
- P-36 Curriculum materials entitled High Technology - Technology.
- P-37 Curriculum materials entitled Environmental Science - Grades eleven and twelve.

- P-38 Environmental Science curriculum materials.
- P-39 Curriculum materials entitled Advanced Technical Math - eleventh and twelfth grades.
- P-40 Curriculum materials regarding Tech Prep "2+2" - Technical Mathematics.
- P-41 Curriculum materials entitled Tech Prep "2+2" - Statistics.
- P-42 Curriculum materials entitled Business Math Applications - eleventh grade.
- P-43 Curriculum materials entitled Algebra I - eleventh grade.
- P-44 Curriculum materials entitled Statistics - eleventh and twelfth grades.
- P-45 Curriculum materials for Project CLASS - regarding Math I.
- P-46 Curriculum materials for Project CLASS - regarding Math II.
- P-47 Curriculum materials for Project CLASS - regarding Math III.
- P-48 Curriculum materials for the Monmouth County Vocational School District Marine Academy of Science and Technology titled Principles of Technology.
- P-49 Curriculum materials for the Marine Academy of Science and Technology titled Applied Algebra I & II.
- P-50 Curriculum materials for Visual Communications, Tech Prep 1994-95, level of instruction ICA (Commercial Art).
- P-51 Curriculum materials for Visual Communications, Tech Prep, level of instruction IICA (Commercial Art).
- P-52 Curriculum materials for Visual Communications, Tech Prep, level of instruction I & IIGA (Graphic Arts).

For respondent:

- R-1 Letter from Stephen B. Hunter to Sanford D. Brown, dated March 13, 1995 with Appendix "A" attached.
- R-2 Letter from Stephen B. Hunter to Sanford D. Brown, dated August 16, 1994 (3 pages).
- R-3 Instructional Certificate issued to Gerald Casper with related documents (5 pages)
- R-4 Memorandum from Milton G. Hughes, County Superintendent, to Chief School Administrators of High School Districts, dated January 15, 1987.
- R-5 Criteria for review of occupational experience for Instructional Endorsements (Skilled Trades-Commercial Art).
- R-6 Posting for position Teacher of Computer-Related Instruction/Graphic/Commercial Arts.
- R-7 Criteria for review of occupational experience for Instructional Endorsements (Teacher of Vocational - Technical-related subjects - occupation must be specified).
- R-8 Posting for position for Commercial Arts Teacher, dated June 3, 1993.
- R-9 Materials related to qualifications and credentials of Judith Sgombick (9 pages).
- R-10 Provisional Instructional Certificate issued to Judith A. Sgombick.
- R-11 Standard Instructional Certificate issued to Judith A. Sgombick.
- R-12 Posting for position Technology Instructor, dated January 31, 1991.
- R-13 Posting for position Technology Instructor, dated May 27, 1992.

- R-14 Instructional Certificate issued to Christine J. Panek Clark and related materials (9 pages)
- R-15 High Technology High School - Technology Teacher Information.

For The court:

- C-1 Memorandum from Leo Klagholz, Director, Teacher Preparation and Certification, to Chief School Administrators, dated July 25, 1985 (2 pages).
- C-2 Teaching schedule for Linda Grunthaner (2 pages).
- C-3 Teaching schedule for James Gleason (2 pages).

WITNESSES

For petitioner:

Deborah Ulrich

For respondent:

Brian D. McAndrew Ed. D.
William P. Hoey, Jr.
Christine Davis

CERTIFICATE: Instructional

ENDORSEMENT: Teacher of Vocational-Technical Related Subjects

AUTHORIZATION:

This endorsement authorizes the holder to teach Vocational-Technical related subjects in all public schools.

REQUIREMENTS:

- I. A bachelor's degree based upon a four-year curriculum in an accredited college
- II. Two years of approved occupational experience
- III. Successful completion of one of the following:
 - A. An approved program – a college curriculum approved by the New Jersey State Department of Education as the basis for issuing this endorsement. (See listing of New Jersey colleges and universities offering approved programs.)

OR

- B. A program of college studies including:
 - 1. General Education
 - a. 45 semester-hour credits including study in at least four of the following areas:

English	Mathematics	Psychology
Fine and practical arts	Music	Science
Foreign language	Philosophy	Social studies
 - 2. Professional Education
 - a. 15 semester-hour credits in education including study in at least four of the following areas. Starred (*) areas are required.
 - 1.) *Methods of teaching
 - 2.) *Educational psychology or equivalent
 - 3.) *Human and intercultural relations
 - 4.) Curriculum, foundations of education, student personnel services, field experiences
 - 5.) Electives
 - 3. Student Teaching
 - a. An approved student teaching program in addition to the professional education requirement
- or
- b. One of the following:
 - 1.) Three years of acceptable teaching experience in a recognized school, *or*
 - 2.) A regular, valid out-of-state certificate and official evidence of one year of successful teaching experience, *or*
 - 3.) College-supervised classroom teaching under a substandard certificate approved by the New Jersey State Department of Education
 - 4. Reading
 - a. 6 credits or 2 courses

Vocational-Technical Related Subjects (Cont.)

APPROVED PROGRAMS:

The following New Jersey colleges and universities offer approved teacher education programs for this endorsement:

- Glassboro State College: ND
- Jersey City State College: ND
- Kean College of New Jersey: U & ND
- Montclair State College: ND
- Rutgers Graduate School of Education: G
- Rutgers - University College: ND
- Trenton State College: U & ND

U - Undergraduate G - Graduate ND - Non-degree

*required areas

DEBORAH ULRICH,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	
MONMOUTH COUNTY VOCATIONAL	:	DECISION
SCHOOL DISTRICT, MONMOUTH	:	
COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioner's exceptions essentially recast and reiterate her arguments made in post-hearing submissions to the Administrative Law Judge (ALJ) which the Commissioner finds were fully and fairly considered and addressed in the initial decision. She additionally asserts that the ALJ, in reaching her conclusions in this matter, improperly interpreted and ignored the clear holdings of the key cases cited by petitioner, i.e., South River Education Association, supra, and Robert Proebstle, supra, and misconstrued the provisions of N.J.A.C. 6:11-6.1(b) and N.J.A.C. 6:11-6.2(a), all of which she contends support her entitlement to a full-time position within the District for the 1994-95 and 1995-96 school years.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusion of the ALJ that petitioner has not established entitlement to teach any of the courses in the District herein at issue. Notwithstanding petitioner's exception arguments to the contrary, the Commissioner is in accord with the ALJ's cogent analysis and discussion of the administrative regulations and case law applicable in this matter.

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter for the reasons clearly articulated therein and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

December 15, 1995
Date of Mailing, December 15, 1995

EDU #7180-94
C # 442-95
SB # 4-96

DEBORAH ULRICH,	:	
	:	
PETITIONER-APPELLANT,	:	
	:	
V.	:	STATE BOARD OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
MONMOUTH COUNTY VOCATIONAL	:	
SCHOOL DISTRICT, MONMOUTH	:	
COUNTY,	:	
	:	
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, December 15, 1995

For the Petitioner-Appellant, Klausner & Hunter (Stephen B. Hunter, Esq., of Counsel)

For the Respondent-Respondent, Cerrato, Dawes, Collins, Saker & Brown (Sanford D. Brown, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed substantially for the reasons expressed therein.¹ We reiterate that instruction for credit in science and

¹ We note that the recommended decision of the Administrative Law Judge, which was adopted by the Commissioner, cites a memorandum prepared by the Commissioner in July 1985, at which time he was serving in the position of Director of Teacher Preparation and Certification for the State Department of Education. Exhibit C-1, in evidence. That memorandum was directed to chief school administrators and simply conveyed interim non-binding guidelines, based upon the recommendations of a task force, regarding the certification required for teachers of computer education. Such document was not prepared for purposes of this litigation. Nor is there any suggestion that the introduction of that memorandum into evidence in this matter affected the Commissioner's ability to render a fair and unbiased judgment on the merits of the case. See Edison Township Education Association v. Board of Education of the Township of Edison, decided by the State Board, September 7, 1994, slip op. at 3-5, aff'd, Docket #A-895-94T1 (App. Div. 1996).

- 5/1/96

mathematics may be provided only by individuals possessing instructional certification in those specific subject fields. Smith v. Board of Education of the Morris County Vocational School District, decided by the State Board, June 7, 1995, appeal pending (App. Div.).

May 1, 1996

Date of mailing MAY 03 1996

443-95

DONNA AND DAVID HORN, on behalf of :
their minor child, J.H., :

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE :
BOROUGH OF BOGOTA, BERGEN :
COUNTY, :

DECISION

RESPONDENT. :

_____ :

December 15, 1995



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8882-94

AGENCY DKT. No. 352-8/94

**DONNA AND DAVID HORN
ON BEHALF OF THEIR MINOR
CHILD J.H.,**

Petitioners,

v.

**BOARD OF EDUCATION OF
THE BOROUGH OF BOGOTA,
BERGEN COUNTY**

Respondent.

Donna and David Horn, petitioners, pro se

Lane J. Biviano, Esq., for respondent (Scarinci & Hollenbeck, attorneys)

Record Closed: November 9, 1995

Decided: November 16, 1995

BEFORE IRENE JONES, ALJ:

This matter was transmitted to the Office of Administrative Law on September 14, 1994 for determination as a contested case, pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The parties have agreed to a settlement and have prepared a letter/stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

11/10/95
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

11/21/95
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 27 1995
DATE

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE JUDGE
OFFICE OF ADMINISTRATIVE JUDICIAL

sej

SCARINCI & HOLLENBECK
 ATTORNEYS AT LAW
 500 PLAZA DRIVE
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 SECAUCUS, NEW JERSEY 07096-3189
 Telephone: (201) 392-8900
 Attorneys for Bogota Board of Education
 Our File No. 1717.4000

HORN, DONNA and DAVID on
 behalf of child J.H.,

Petitioners,

v.

BOE of the BOROUGH OF BOGOTA,
 Bergen County,

Respondent.

STATE OF NEW JERSEY
 OFFICE OF ADMINISTRATIVE LAW
 OAL DOCKET NO. EDUOS 08882-94N
 AGENCY REFERENCE NO. 352-8/94

STIPULATION OF SETTLEMENT

It is hereby stipulated and agreed by and between the parties, Donna Horn and David Horn on behalf of child J.H. ("Horn") and the Bogota Board of Education ("Board"), hereto that the above captioned matter be and is hereby settled upon the following terms and conditions:

1. Horn hereby withdraws the petition in the above matter with prejudice, a copy of which is attached as Exhibit A.
2. Horn has executed a release from any and all claims with regard to this matter including class placement and teacher selection for their son, a copy of which is attached as Exhibit B.

3. Elise Wawrzonkiewicz will be the teacher of J.H. the son of the Horns during the 1995-1996 school year.

4. This settlement agreement is not intended to establish precedent in any future matter.

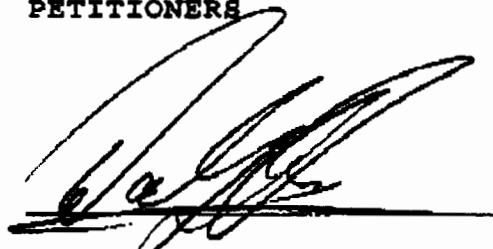
5. Horn shall not request any other relief with respect to this matter, other than that provided for by this Stipulation.

6. Horn shall not institute any appeal or any other action with respect to this matter.

7. Horn has read the above Stipulation and has had the opportunity to confer with counsel and hereby agrees to abide by the terms and conditions of this settlement agreement.

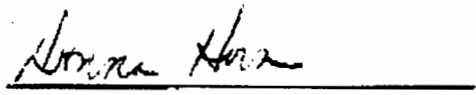
Sworn before:

PETITIONERS



DAVID HORN

Notary Public



DONNA HORN

The Honorable Irene Jones
Administrative Law Judge
State of New Jersey
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

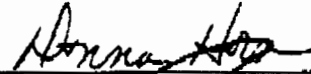
Re: Horn, Donna and David on behalf of child J.H.
v. BOE of the Borough of Bogota, Bergen County
OAL Docket No. EDUOS 08882-94N
Agency Reference No. 352-8/94
Our File No. 1717.4

Dear Judge Jones:

This is to advise you that on behalf of our child J.H. that we have released our attorney and are no longer represented by counsel. Further, of our own volition, we are withdrawing the petition with prejudice filed in the above-referenced matter.

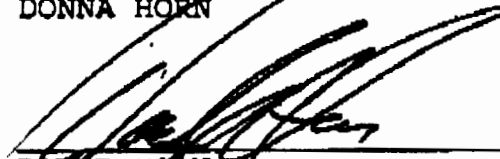
Respectfully submitted,

Date: Oct. 17, 1995



DONNA HORN

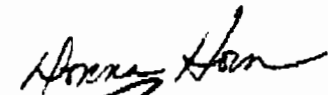
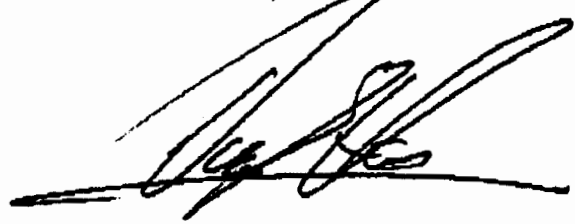
Date: 10-17-95



DAVID HORN

cl\1717-4.jones

Note: It's a shame that so much time, effort and money has been spent on this just because Mr. Montagna didn't do his job. 5th grade is over for Jonathan and we would like it noted that it was the worst school year he has ever had.

DONNA AND DAVID HORN, on behalf of :
their minor child, J.H., :
 :
PETITIONERS, :
 :
V. : COMMISSIONER OF EDUCATION
 :
BOARD OF EDUCATION OF THE : DECISION
BOROUGH OF BOGOTA, BERGEN :
COUNTY, :
 :
RESPONDENT. :
_____ :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

December 15, 1995
Date of Mailing, December 15, 1995

ANTHONY F. JAMES, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 NEW JERSEY STATE DEPARTMENT OF : DECISION ON REMAND
 EDUCATION, :
 :
 RESPONDENT. :
 _____ :

December 20, 1995

ANTHONY F. JAMES, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 NEW JERSEY STATE DEPARTMENT OF : DECISION ON REMAND
 EDUCATION, :
 :
 RESPONDENT. :
 _____ :

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to N.J.A.C. 1:1-14.4, along with copies of notifications sent to the parties by OAL on November 18, 1995, providing petitioner ten days to submit an explanation for such nonappearance, have been reviewed. The record reveals that prior to the hearing, on November 13, 1995, petitioner filed notification that he would not be present at the November 14, 1995 hearing because of job responsibilities. Further, petitioner provided reasons to the Administrative Law Judge (ALJ) as to why he should be deemed successful on the merits of his case in spite of his absence at the hearing. The Commissioner notes that although the OAL's hearing notice does not provide for briefs in lieu of a hearing absent a judge's permission, the Commissioner is mindful that petitioner was *pro se* and he forwarded a letter to the ALJ which indicates an attempt to obtain permission to submit briefs in lieu of a court appearance. In addition, petitioner filed a letter with the Commissioner of Education on November 30, 1995, requesting a new hearing date and indicating that he had

notified the ALJ that he was unable to attend his previously scheduled hearing. Accordingly, under the circumstances herein, the Commissioner determines to remand this matter to the OAL for further proceedings.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Leo P. ...", is written above the title of the Commissioner of Education.

COMMISSIONER OF EDUCATION

December 20, 1995
Date of Mailing, December 21, 1995

445-95

IN THE MATTER OF THE ANNUAL :
 SCHOOL ELECTION OF THE BOROUGH : COMMISSIONER OF EDUCATION
 OF CARTERET, MIDDLESEX COUNTY. : DECISION

_____ :

SYNOPSIS

Petitioner, defeated candidate for Board membership, alleged there were improprieties and violations of law in the conduct of the school election. Petitioner contended confidential pupil records were misused.

ALJ concluded that petitioner did not show by a preponderance of credible evidence that there had been errors or irregularities sufficient to influence the outcome of the election. ALJ, however, directed the Board to consider a policy regulating the use of personal information collected by teachers from students. Otherwise, petition was dismissed.

Commissioner adopted findings and determination in initial decision and directed Board to develop and adopt an appropriate policy, in accordance with state and federal guidelines, regulating the use of students' personal information collected by teachers.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5715-95

AGENCY DKT. NO. 146-4/95

**IN THE MATTER OF THE ANNUAL
SCHOOL ELECTION, BOROUGH OF
CARTERET, MIDDLESEX COUNTY**

Karen Ostberg, Esq., on behalf of petitioner Louis G. Mangieri

Jeffrey Meltzer, Esq., on behalf of respondent Borough of Carteret (Wilentz, Goldman & Spitzer, attorneys)

Allen P. Comba, Esq., on behalf of intervenor Sally Bonventure (Venezia and Nolan, attorneys)

Stephen E. Klausner, Esq., on behalf of intervenors Jacqueline Lygate and Nicholas DiSatro (Klausner, Hunter, Cige & Seid, attorneys)

Record Closed: October 3, 1995

Decided: November 13, 1995

BEFORE SOLOMON A. METZGER, ALJ:

This matter arises out of a complaint filed by petitioner, Louis G. Mangieri, with the Commissioner of Education seeking to have the results of the school election in the Borough of Carteret overturned pursuant to *N.J.S.A.* 18A:14-63.12 and *N.J.A.C.* 6:24-6.1 to -6.5. The matter was transmitted to the Office of Administrative Law as a contested case pursuant to

N.J.S.A. 52:14F-1 through -13. An "inquiry" was conducted on October 3, 1995, after which the record closed.

The question presented is whether there have been errors or irregularities in connection with the annual school election that warrant overturning the result. Additionally, petitioner contends that confidential pupil records were misused.

The basic facts are undisputed. On April 18, 1995, an election was held in Carteret for three seats on the board of education. Petitioner finished in fourth place, seven votes behind Sally Bonventure, who was seated.

Petitioner testified that he has lived in Carteret for thirty-four years and has served on the school board for nine years. On the evening of April 17, 1995, he received a call from George Mascaly, a Borough resident and supporter, who asked that he come listen to a telephone message and subsequent telephone conversation that he had had that evening with Ms. Jacqueline Lygate, a teacher in the district. The tape reveals that Ms. Lygate called Mr. Mascaly and initially left a message urging a vote for the three candidates who ultimately were elected to the board. In their subsequent conversation she made some comment to Mr. Mascaly about "board members messing around." Petitioner testified that he took this comment as a reference to his marital fidelity and was greatly offended. He then telephoned Ms. Lygate, who told him that she had made three calls altogether. Petitioner testified that the teachers union opposed him in this election, though it has supported him in the past. Ms. Lygate never said she was calling on behalf of the union.

George Mascaly testified that he was affronted not merely because of the politicking, but because Ms. Lygate had obtained his unlisted telephone number improperly.

Richard Greenberg is the fire superintendent in Carteret. He testified that Nicholas DiSatro, a teacher in the district, called him twice in connection with the election. He knows Mr. DiSatro and in both conversations he made clear that he did not want to discuss the election, even before Mr. DiSatro could make his preferences known. They went on to discuss other subjects of mutual interest.

Jacqueline Lygate testified that she hands out index cards to her students at the beginning of the school year and asks that they fill in their names, telephone numbers and interests. Mr. Mascaly's daughter was in her class and this is where she obtained his telephone number. Ms. Lygate testified that she made three telephone calls in all and there was no answer and no message machine at one of the numbers she called. She was not instructed by anyone to make these calls and did not discuss her plan to call with anyone.

Nicholas DiSatro has been a teacher in Carteret for sixteen years and he also maintains index cards with his students' telephone numbers, hobbies and the like. He made less than a dozen calls in connection with the election and did not remember whom he might have contacted beside Mr. Greenberg. No one instructed him to make these calls and he did not discuss his efforts with anyone. He was not aware that Ms. Lygate had made calls. This is the substance of the record.

To overturn the results of an election, petitioner must show by a preponderance of the credible evidence that there have been errors or irregularities sufficient to influence the outcome. *N.J.A.C.* 6:24-6.5. This has not been done. The margin of votes between petitioner and his nearest rival, Ms. Bonventure, is seven. There is no evidence that any votes were influenced, properly or otherwise. Ms. Lygate completed only two calls and the one to Mr. Mascaly had no impact because he was petitioner's supporter. We know little of the other call. Mr. DiSatro called Mr. Greenberg, but the election was not discussed. He made other calls but we do not know to whom and to what effect. Moreover, teachers are free to participate in the electoral process. The line is generally drawn at partisan politics. *Botkin v. Westwood*, 52 *N.J. Super.* 416, 430 (App. Div. 1958). There is no such connection here, nor is there any link to official action of any kind.

Petitioner also contends that pupil records were misused. I do not believe that the biographical data collected by Ms. Lygate and Mr. DiSatro falls within the definition of pupil records. *N.J.A.C.* 6:3-6.1, -6.2; *D.B. v. Vineland Board of Education*, 93 *N.J.A.R.* 2d (EDU) 546. Nevertheless, there was an ethical breach here. Students who supply personal facts at a teacher's request should not have to be concerned that the information will be put to a private

purpose. The use of a student's unlisted number for electioneering is a good example. Although the actions of two teachers do not make a pattern, it might be useful for the school board to develop a policy on the point.

Based on the foregoing, it is my conclusion that petitioner has failed to establish irregularities sufficient to overturn the results of the election. The school board shall, however, consider a policy regulating the use of personal information collected by teachers from students. It is **ORDERED** that this matter be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

11/13/95
DATE

Solomon A. Metzger
SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

11/15/95
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 20 1995
DATE

James M. Restivo
OFFICE OF ADMINISTRATIVE LAW

/cae

LIST OF WITNESSES

On behalf of Petitioner:

Louis G. Mangieri
Richard Greenberg

On behalf of Respondent:

Jacqueline Lygate
Nicholas DiSatro

LIST OF EXHIBITS

On behalf of Petitioner:

P-1 Copy of tape

On behalf of Respondent:

None

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION OF THE BOROUGH : COMMISSIONER OF EDUCATION
OF CARTERET, MIDDLESEX COUNTY. : DECISION
_____:

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the conclusion of the Administrative Law Judge (ALJ) that petitioner has failed to establish irregularities sufficient to overturn the results of the election and the petition is, therefore, properly dismissed.

As to petitioner's contention that pupil records were misused, the ALJ properly determined that the student information gathered by teachers on index cards (i.e., name, telephone number and interests) was not a pupil record, assuming such information was not maintained by the teachers for the purpose of second party review.¹ The Commissioner further concurs with the ALJ that use of such information for election purposes constitutes a breach of the trust between teacher and pupil that must be operative in the school environment. Moreover,

¹ N.J.A.C. 6:3-6.1 defines a pupil record as “***information related to an individual pupil gathered within or outside the school system and maintained within the school system, regardless of the physical form in which it is maintained. *Essential in this definition is the idea that any information which is maintained for the purpose of second party review is considered a pupil record.* Therefore, information recorded by any certified school personnel solely as a memory aid, not for the use of a second party, is excluded from the definition.” (emphasis added)

the Commissioner observes that state and federal guidelines provide for the disclosure of student "directory" information such as names, addresses and telephone numbers, only where said information has been *published* pursuant to parental notification and an opportunity to request that the district refrain from disclosing such information via publication. (N.J.A.C. 6:3-6.1 and 20 U.S.C.S. at 1232g(5)(b)) Consequently, notwithstanding that petitioner has not shown any violation of the statutes governing school elections, nor any basis for ordering a new school election, the Commissioner directs that the Board develop and adopt an appropriate policy, in accordance with state and federal guidelines, regulating the use of students' personal information collected by teachers.

Accordingly, the Board is so directed, and the initial decision of the Office of Administrative Law dismissing the Petition of Appeal is adopted for the reasons expressed therein.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

December 20, 1995
Date of Mailing, December 21, 1995

F.McB. and M.McB., on behalf of their minor
child, B.McB.,

PETITIONERS,

V.

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN-
SHIP OF WASHINGTON, GLOUCESTER
COUNTY,

DECISION

RESPONDENT.

SYNOPSIS

Petitioning parents contested suspension of their son, B.McB., a high school senior, from the marching band and the requirement that he undergo a psychological evaluation prior to his return to the band.

ALJ found that B.McB. was afforded due process rights required in the matter of his suspension from band activities. Moreover, the ALJ found that the actions of the Board and its agents were reasonable in that the application of discipline in this matter was directly related to the good order and best interest of the school and school activities and that the penalty was appropriate. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9121-94

AGENCY DKT. NO. 369-9/94

F.McB. AND M.McB.,

on behalf of B.McB.,

Petitioners,

v.

BOARD OF EDUCATION OF THE

TOWNSHIP OF WASHINGTON,

Respondent.

Jamie Epstein, Esq., for petitioners

Joseph F. Betley, Esq., for respondent (Capehart & Scatchard, attorneys)

Record Closed: October 13, 1995

Decided: November 14, 1995

BEFORE BRUCE R. CAMPBELL, ALJ:

B.McB., by his parents, contested his suspension from participation in the Washington Township High School marching band and the requirement by the respondent Board that he undergo a psychological evaluation prior to his return to the band.

The matter was opened before the Commissioner of Education and was transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A. 52:14B-1*

through -15 and *N.J.S.A.* 52:14F-1 through -13. The petitioners, then represented by other counsel, moved for emergent relief under *N.J.A.C.* 6:24-1.5. Oral argument on the motion was heard on September 22, 1994, at the Office of Administrative Law, Trenton. On September 23, an order issued denying the motion and ordering the matter to plenary hearing unless withdrawn.

The Commissioner of Education adopted the order as his own decision on November 10, 1994. On December 15, 1994, the judge wrote to counsel asking about the posture of the case. The petitioners decided to go forward. The matter was set down for hearing in May 1995. That date was adjourned because the respondent's attorney had a conflict. The matter was reset for September 27, 1995.

On September 6, 1995, the Commissioner of Education received two "amended petitions" by B.McB. himself. The cover letter states new counsel is being sought and asks a one-month delay of hearing and also requests the judge to recuse himself because he is "acquainted with the respondent's counsel."

The judge issued a letter order on September 12, 1995, denying both requests.

The letter order also refused to accept the amended petitions because there was no proof of service upon the Board, among other things.

The first amended petition sought 10.7 million dollars in damages and written letters of apology on grounds of discrimination based on the economic status. The second sought 1.1 million dollars for alleged deformation of character and the suspension of an unnamed respondent's teaching credentials.

The matter was heard on September 27, 1995, in the Moorestown Municipal Court. The Board moved to dismiss the two amended petitions on the grounds that there was no jurisdiction over the claims, the claims were filed beyond the 90-day limit expressed in *N.J.A.C.* 6:24-1.2(c), there had been no service on the Board, and no leave of the administrative law judge had been sought. The amended petitions were dismissed, without opposition, for all of the above reasons.

The petitioners presented testimony of B.McB., F.McB. and M.McB. The Board presented testimony of the Band Director and the High School Principal.

PAROL AND DOCUMENTARY EVIDENCE

B.McB. testified that he is a senior at Washington Township High School. In September 1994, he participated in the band music program. On August 25, 1994, he learned he was "written out of the show for 1994." He discussed the matter with James Beyer, the music director. B.McB.'s mother the director called on the following Sunday evening. The director mentioned four options. B.McB. could march as an alternate, could march in the trombone section, could wait until a spot in the saxophone section opened or he could leave the band.

B.McB. believes he was denied a starting position in the marching band because he did not attend summer band camp. Summer band camp is not required according to the band manual.

B.McB. chose to wait for an opening in the saxophone section. He continued to practice with the band, but did not play in performances.

On September 7, 1994, before practice began, B.McB. was in the school building using a pay telephone. According to the witness, Beyer approached "angrily" and told him to get off the telephone. According to B.McB., he replied, "Excuse me. I'm on the phone. I'll be off in a minute." After he finished his call, B.McB. went toward the principal's office to get the principal's assistance. He discussed the telephone incident.

Beyer told the witness to go to practice immediately following the telephone call. B.McB. stated, "I'm going to your principal to resolve this." Beyer then reportedly agreed. B.McB. discussed the matter with the principal who attempted to resolve it.

After his meeting with the principal, B.McB. left the principal's office and found Beyer in the hallway with B.McB.'s instrument. The witness says that Beyer then said, "You're in the

band, but the clock is ticking.” B.McB. stated he then began to cry. He said, “Band is going to kill me. Band is going to be the death of me.” Beyer, Principal Vandenberg and a janitor were present.

The witness and the principal returned to the principal’s office. The principal sent for a guidance counsellor. She arrived and calmed B.McB. B. left the office and went to locate his parents who were usually present at band practices. He could not locate his parents. He went to the local police station and inquired about filing a complaint.

The witness states that during the conversation with Beyer in the hallway no physical contact was made or attempted.

Following September 7, several meetings and conversations took place. On Friday, September 9, 1994, the superintendent, principal and band director met with B.McB., his parents and their attorney. School personnel said that this meeting constituted informal due process. It was stated that B.McB. had threatened to kill Beyer. No one pointed to a school manual and said “this is an infraction.” B.McB. was suspended from band until September 26. He could practice after September 26 and he could perform on or after October 8.

After being reinstated, on or about September 30, the director told B.McB. to dress. B.McB. assumed he would march on the field at half-time. He asked the band director’s assistant if this were the case. The assistant did not know. A bit later, in the Director’s office, B.McB. says the director told him, “You listen to me only.”

On that occasion, he was the only player in uniform who remained in the stands during half-time.

Before September 1994, B.McB. stated his relationship with Beyer was not smooth and that there were some incidents, but that it was not a bad relationship. The witness stayed in band until mid-December and then quit. He felt singled-out, ostracized and harassed. Staff were cold and curt to him.

B.McB. did not attend band camp in the summer of 1994. In the summer of 1993 he attended part of band camp and in the summer of 1992 he did not attend band camp at all. However, he participated fully in the band in 1992 and 1993.

B.McB. told the music director via voice mail and in a note that he would be working and could not attend camp in the summer of 1994. He had no conversation before camp with the director. He does not know what other students did not attend band camp and he does not know how many saxophone slots were available. Beyer never said to B.McB. that he did not have a starting position because he had failed to attend band camp.

Concerning the four options the music director offered to him, the witness says he was "stunned." These options would not allow full performance. He was given these options after the director said, "You're out of the band, but here are four options." The witness states he was removed from band performance, not band class.

This was an important issue to him. It was implied in the fourth option that he was out of the band. The options and conversation meant, to him, that he was no longer in the band. The options seemed inappropriate.

In response to a direct question as to whether he agreed to march in the trombone section at any time, the witness stated he never did. B.McB. stated he was being ostracized. He also stated he knows of instruments and persons being moved to accommodate the needs of performance.

He elected to be an alternate to a freshman member of the band, option one. In his mind, this was the same as option three. There were no performances in August 1994. The first performance was September 10 and F.McB. was under suspension at the time.

Although he stated he felt out of the band, he went to rehearsal the next day and sat and watched. To his way of thinking, if he marched in the trombone section it was implied that he had to play trombone.

During the rehearsal, he sat against a fence. At the next rehearsal, he did not participate. He did not sit and watch and has no recall of speaking to the director. He later attempted to tell the director why he was not participating. In the second rehearsal he attended, the witness saw that a saxophonist was on vacation. He offered to march in that position after the rehearsal, but the director declined.

The witness's recounting of the telephone incident on cross-examination differed from his testimony on direct. He stated he was on the telephone in the school at about 6 p.m. Band practice was scheduled to begin at 6:30 p.m. The band director saw him at the telephone and expressed concern that he was not at practice. B.McB. states he did not call reporters during band practice time. He stayed outside of the band room during practice and told the director why. The director went into the band room and closed the door. B.McB. became upset and went to the principal's office. He did not like leaving a spot vacant while band members were absent. B.McB. believed he should be able to fill in for absent band members.

The witness insists he was calm and not disrespectful to Beyer or to Principal Vandenberg. He expressed his concerns to the principal. He saw the director again at approximately 6:15 and was asked why he was not at practice. When the director appeared with his instrument and made the comment about the witness being in band but the clock was ticking, B.McB. became threatened and tearful. He had not done so a week earlier when, by his own account he was "kicked out" of band. The witness stated it was a cumulative thing and that he had been under constant pressure. He was angry with the band director. He put his hands to his head. He denies making any threat or derogatory remark.

At the meeting of Friday, September 9, there was no agreement that there should be some form of punishment. No school personnel showed him the section of the student manual allegedly violated. The manual spells out penalties for rule infractions. The family's attorney referred to

the student handbook and the section that reserves the right to administration to do as they see fit in a given circumstance was discussed.

B.McB. did not attend band class after suspension was imposed. He denies he said he would rather go to the library. As to a psychological evaluation, the family agreed, but would use their own psychologist. The only objection raised by the family's attorney was to the length of the suspension.

F.McB. testified that he has been active in the Band Parents Association for sometime and has enjoyed a good relationship with the director over the years.

In August 1994, the witness learned through his son that his son was "written out of the band." His wife called the band director that night. A series of meetings followed. They met with the assistant principal upon referral from the principal. They went over what had happened. The witness expressed his opinion. The witness testified at hearing that the vice principal advised him to "appease" the band director. The parents were not pleased with that reply.

They learned of the telephone incident on the night of September 7 from their son. The witness was at the high school that evening, waiting in the parking lot. At approximately 6 p.m., the director came out and asked where B. was. The witness replied that he did not know. No one could locate B.

At approximately 8 p.m., the witness's beeper indicated his son was calling him from the police station. When the witness reached his son by telephone, B. was upset and half crying. He stated, "Beyer said I threatened to kill him." B.McB. was at the police station to see if he could file charges against Beyer.

Later the same evening, the witness returned to the school. He spoke briefly to the band director who stated, "[B.] threatened to kill me." At this point B.Mc.B. slapped a locker and stated loudly that he did not make that statement.

The next day, the witness was at the principal's office when school opened. The principal explained that he had tried to calm down B. The principal stated B. did not threaten the director. No discipline was discussed. The witness also saw the janitor who was nearby on September 7.

At an informal meeting on September 9, the witness denied that the threat had been made, expressed dissatisfaction with the discipline and expressed dissatisfaction with timing of the discipline. There was no discussion of formal charges or the code of conduct. Although he had an attorney present, there was no formal questioning. There was much discussion and the attorney also denied that the threat had been made. The band director stated that he felt threatened.

The witness also stated that from August 25 through September 7, B. was upset. After September 26, when B. was reinstated to the band class, he believed that his status had been lowered. Some pupils were not speaking to B. The witness told B. not to speak to the band director while the controversy was going on. The witness had B.'s band class changed. B. dropped band at the end of the semester. There were no other problems the witness knows of while B. was in high school. He was involved in the many out-of-school activities and enjoyed good relationships with others.

The witness sought counsel because he knew before September 9 of what B. was accused. At the September 8 meeting with the principal, B. was upset. The principal told B. not to say anything he might regret. The principal observed that B. was very emotional and expressed concern about it. He did not mention the vice principal's comments about accommodating the band director to anyone in the administration.

The witness identified exhibit R-1, a letter dated September 9, 1994 from the McB.'s attorney to the superintendent. It refers to and memorializes the September 9 meeting. It is accurate to the witness's knowledge, except that he and his wife did not agree to accept the suspension from the band. However, he did not tell anyone in the district that he disagreed with the letter. He and his wife agreed to the psychological evaluation, but wanted to use their own psychologist. Both parties agreed. The psychologist's report was filed with the district and

determined that B. was not a threat to himself or others. After the suspension was served and the report submitted, B. was reinstated to band activities.

The witness does not know if the school had any written documents in its possession at the time of the meeting among parents and administrators. There was a difference of opinion as to whether there had been a threat. F.McB. was allowed to present his version of the incident, to express his opinions and to meet in private several times with his attorney.

M.McB., mother of B.McB., testified. She has been involved as a band parent for several years. In her opinion, all options offered to her son after what he describes as the outburst were punishments. When she contacted the band director, he stated that any person who did not attend band camp "is kicked out of the band." However, the director stated the four options he would provide B. The two discussed the options. At one point the director said, "Don't try to run my job as band director," or words to that effect. The witness stated, "Don't try to run my job as a mother," or words to that effect.

The witness went the next day to see the principal and was referred to the vice principal. She and her husband spent about 30 minutes with the vice principal and the meeting was not satisfactory to them.

The witness then telephoned the principal and this call led to a meeting with the superintendent, probably on September 9. B. was not told what he was charged with, no school officials said what B. had done, no conduct code was produced and there was no discussion of discipline.

The school proposed that B. be suspended from practices and performances. When readmitted, he would be behind other band members in performance skills.

At the meeting, the witness said she believed that B. did nothing wrong. However, she agreed to the psychological evaluation. She agreed, although she was first infuriated by the

suggestion, because she knows B. is all right. At hearing, she stated, "The world needed proof of my son."

Following that meeting, many telephone calls took place. At one point she requested that B. be allowed to perform on October 8. After September 26, he had been allowed to practice and was picking up the routine quickly. Ultimately, in December, B. quite band.

While the options were being discussed, B. was gloomy and crying. The witness stated she knows nothing about B.'s contacts with the media and with town political figures. She knew that B. was accused of something on September 7 because he told her. In a telephone call or a meeting with the principal later that week, she was informed that a saxophone spot "opened up." The witness also conceded that, at the meeting among parents and administrators, she was not prevented from speaking, there was a free flow of opinions and both sides took recesses to caucus. The witness also concedes that the band director never said B. was out of the band. To her, however, the options were equivalent to being kicked out. Yet, B. stayed in band until December.

The witness testified with particularity about all events to this point. She recalled that at a meeting with the band director in August, no saxophone spot was open. At a meeting between B. and the band director, the director offered a spot in the saxophone section after suspension. However, as to the meeting with the principal and the director held on Tuesday, September 6, the witness's recall suddenly became hazy. The witness believes B. never accepted any option. She cannot recall whether B. went to rehearsal on September 6 or not. The witness denied that she and her husband did not tell the principal on September 7 that B. had made a final decision.

The band director testified that the policy concerning band camp is to encourage attendance, but that attendance is not mandatory. Financial aid is made available to pupils who need it. If a band member does not attend, the director looks at the needs of the entire band, the skill level of each pupil and places each pupil as appropriate.

In August 1994, band camp was held in the third week. Upon the Director's return, he found an undated note from B.McB. stating that B. had to work during the week of camp.

On the following Saturday evening at about 11 p.m., the director received a call from M.McB. She was extremely upset and stated that B. had been ejected from band. The director replied that B.'s status was not yet determined, that it was improper to call him at that hour and that he would meet with her at school.

On Tuesday, B. appeared at approximately 5:30 p.m. Practice was scheduled to begin at 6:30 p.m. B. asked the director what his status was. The director replied that there were 12 saxophone slots filled by persons who had attended camp and knew the routine.

The director gave B.McB. options of being a position alternate, which means filling in for any person who drops out and requires rehearsal each day. Two persons learn one position in the show. A second option was to play saxophone but march in the trombone section where the director had two open spaces. B.McB. could fill one of these spaces immediately. B.McB. could also, if he wished, learn trombone. In no way does the director conceive of playing in the trombone section as being equivalent to ostracism.

The third option was that B.McB. could leave band. B. stated he was a saxophone player and wanted to stay in that section. B. took the option of playing in the saxophone spot of a pupil on vacation.

On that afternoon at about 6 p.m., the director met and spoke with M.McB. She demanded an explanation and he told her essentially what is recited in the previous paragraph. No option was acceptable to her. M.McB. accused the director of "kicking out" B. A meeting later that evening was held with the principal, parents and pupil. The parents wanted to know more about the options offered. The director explained his points in what he believes to be a positive manner. B. asked to leave the meeting. The director suggested that he march in the trombone spot so that B. could participate immediately. B. was brought back into the meeting and lost control of himself. He called this totally acceptable and engaged in loud talking and finger

pointing. He said, "I've given you professionals two weeks to work this out" or words to that effect.

On September 6, during rehearsal B.McB. was not participating, but was talking to others. The director spoke to him. F.McB. encouraged B.McB. to just fill a position. B.McB. waived a paper at the band director stating, "This is going to the Commissioner tomorrow." B.McB. then left the band area.

Later, the director went into the building and met F.McB. They talked. The director mentioned a lack of resolution of the problem and stated again that he believed one of the three options should be elected to keep B.McB. involved in the band.

At some point shortly thereafter, an assistant told the director that B.McB. was on the public telephone surrounded by a group of students. The director went to the area, and directed the other students away. He spoke with B.McB. and asked him to leave the building. B. asked if the director were kicking him out of the band. The director replied, "I'm telling you to leave the building."

On the following day, the principal received a message from B.McB. via voice mail. He accepted the option of marching in a trombone position. On Wednesday night as students were assembling for practice, a student had a personal problem. The director met with the pupil and mother for approximately 15 minutes. After that meeting, the director noticed F.McB. parked behind the high school. He asked F.McB. where B.McB. was. The parent replied that B. was inside and asked why the director wanted to know. The director stated that B.McB. had not appeared for rehearsal.

The director went into the building and found B. on the telephone. B. covered the receiver and said, "I'm on the phone." The director then went back to the parking lot to get B. McB.'s parents. He intended to tell them to take B. home. The van was not there and the director returned to the building. When he reentered, B.McB. pointed a finger at him and said, "I am talking to your principal."

The director was convinced at this point that B.McB. did not want to participate. He went into the band room and got B.'s instrument. He returned to the telephone area and found B. talking to the principal. At this point, B.McB. stated, "I'm going to kill you." The principal immediately advised him not to say anything he would regret.

B.McB. left the building with the principal following. The principal spoke to B.McB. outside the building.

B.McB. returned with his father at approximately 9:15. The father looked astonished, but said nothing. B.McB. denied making the threat.

Concerning meetings with the family and attorney, the witness stated that he told his principal about his meeting with F.McB. and concern for his own safety. At that point, the director believed B. would not participate in the band, had no interest in the band and wanted his way only. In addition to being disruptive of the band process, the director felt a real safety threat.

At the meeting among administrators, family, and family attorney, the family was concerned about what happened on Wednesday night and concerned with discipline, if any. The director's concern was with his own safety and with B.McB.'s status.

When discipline was discussed, the family and its attorney left the room. The superintendent recommended that a psychologist's report be required and the director agreed. He left disciplinary decisions to the administrators.

The superintendent asked the director how long it would take to get B.McB. prepared to participate. The director estimated it would take two weeks of practice plus a period of observation. The administrative group agreed with a two-week suspension from band based on B.'s belligerence and defiance.

Near the end of the meeting, the suspension for two weeks was announced. After September 26, the director would have two weeks to help B.McB. prepared to perform. It was estimated he would be back performing on October 8. The parents and attorney did not at this point dispute the punishment, but insisted on using their own psychologist. The superintendent had indicated the evaluation would be done by the school psychologist and this was not acceptable to the parents. The witness recalled that those were the facts and circumstances when the meeting ended.

On September 26, the director assigned an assistant to work with B.McB. He let band staff know that B.McB. was coming back and that the director was trying to get B.McB. participating as quickly as possible. A saxophone player had dropped band for medical reasons and an effort was being made to get B. into that position. On October 8, B. participated fully in band performance.

At some point, the director received a memorandum from the family's attorney alleging that B. had been pulled in and out of performance during rehearsals and had been yelled at in the presence of band members. The witness vehemently denied ever yelling at B.McB. and iterated that he had emphasized to his assistant to get B.McB. "up to speed." The assistant replied that B.McB. did not know all of the routine and the assistant pulled B.McB. from the end of the routine only.

The high school principal testified essentially as did the band director. He stated that Mr. and Mrs. McB. approached him on the evening of Tuesday, August 30, at about 6:00 p.m. He was late for an appointment and would be out of the building the next day. Accordingly, he assigned an assistant principal to meet with Mrs. McB. on the following day. On Thursday, when the principal returned to the building, he saw the assistant principal who expressed the opinion that the matter was resolved. B.McB. had accepted one of the band director's options. On Thursday and Friday, the principal and Mr. McB. tried unsuccessfully to arrange a telephone conversation. On Friday, the principal reached Mrs. McB. to set up a meeting. During the conversation, Mrs. McB. threatened "an editorial." On Tuesday, September 6, he met with the parents and band director at approximately 5:30 p.m. Mrs. McB. outlined her concerns stating

that B.McB. had not been treated fairly because he was not given a place in the saxophone section and all other options were unacceptable. The topic of B.McB. being ejected from band was never a topic of conversation at this meeting.

The principal tried to talk B.McB. into taking a spot in the trombone section. B.McB. wanted to practice with the saxophone section and at this point made the "I have given you professionals two weeks." statement.

Mr. McB. seemed to encourage the trombone option. B.McB., however, could not decide and the principal urged him to take his time.

The principal testified that on Wednesday, September 7, he got a message via voice mail from B.McB. that he would accept the option of marching the trombone section. He also received a note from Mr. McB. that B. would accept this option. Later in the day, however, B.McB. told the principal that reporters would be coming to the school. At about 6:20 p.m., B.McB. and a camera man appeared at the office. The principal asked the camera man not to take any pictures and he believes the camera man left. A little after 7:00 p.m., the principal found B.McB. in the hallway and asked him if something was the matter. B.McB. replied to the effect that the director had yelled at him and said he should not be on the telephone while he should be in practice. B. then stated that he was under a great deal of stress and was not sure if he was in band any longer.

At that point, the band director came around the corner and joined the two. The principal asked if B.McB. were still in the band. The director replied, "Yes, but the clock is ticking." At this point, B.McB. said, "I can't take it any more." He moved toward the foyer of the building and said to the principal, "Get him [the band director] away from me. I'll kill him. This is killing me."

At this point, the principal was shocked and concerned with B.McB.'s well being. B.McB. kept backing out of the building. His arms flailed and he pulled his hair. The principal cautioned him to be careful of what he said and not to make matters worse. The principal told the

music director to get a guidance counselor. He asked B.McB. to come into his office and talk. As they were speaking, a guidance counselor arrived, talked to B. and tried to calm him. They talked about marching in the trombone position and the possibility of a saxophone position opening up. B.McB. said he would think about it.

The principal asked B.McB. to leave so that he could talk to the counselor. He asked her to escort B.McB. outside, to talk to his parents, tell them what had happened and advise them that the principal would call them.

However, when the counselor went for B.McB., he was not there. The principal and counselor looked for him and for his parents but they were not to be found. He tried to telephone the McB. residence, but their telephone was experiencing problems.

On Thursday at 7:00 a.m., Mr. McB. and B.McB. were in the principal's office. The band director had told Mr. McB. on the prior evening what had happened. The principal told the father what B.McB. had said. The father replied that this was unlike B.McB. and that he did not want this to be a problem. The principal replied that he did not know B.McB. personally and would have to consult with the band director.

The principal met with the band director and a curriculum person and discussed the fact that the band director took what B.McB. said as a threat. The principal was more concerned about B.McB.'s well being. The band director reported previous concerns with B.McB. involving incidents on a band bus, incidents of defiance and hostility and, ultimately, the refusal of all options. Weighing it all, the band director was concerned.

The principal called the superintendent to advise him of this situation and called the family to say that there would be an informal due process hearing. Mr. McB. replied that he had retained an attorney and would handle the matter with the superintendent. That meeting took place the next day at approximately 1:00 p.m. The attorney spoke, in the main, for the McB.'s and the superintendent spoke for the school. School personnel referred to a verbal threat. The family's

attorney called it a verbal outburst. No discussion was stifled and each side caucused more than once.

The conclusion was a two-week suspension from band class and practice. The rationale was that school personnel were concerned about B.McB.'s state which seemed to spring from his dissatisfaction. The administration did not want to suspend B.McB. from academic classes, although it could have done. B.McB. evidenced a defiant and hostile attitude. The psychological evaluation was introduced because of the nature of B.'s comment. School personnel wanted some assurance that B.McB. was not a threat to himself or others. The band director needed to be assured that there was threat to him personally. At the same time, there was general agreement that B.McB. would need an additional two weeks training before he could perform again. The parents rejected the idea of a psychological evaluation, at no expense to them, by a Child Study Team member. They expressed that they would have the evaluation done by a psychologist of their choice. The school personnel merely asked that the person chosen to do the evaluation contact school personnel. Pending receipt of the psychological report, B.McB. would be returned to band class. B.McB. appeared at class on the twelfth. At that point, the school had no assurance that B.McB. would be evaluated. On the evening the same day, the Board was served with the parents' request for emergent relief. The principal spoke to the superintendent, the superintendent spoke to Board counsel and Board counsel spoke to the parents' than attorney.

B.McB. appeared at band class on the thirteenth, but the band director was absent. The principal decided to remove B.McB. from the band director's class as of September 14. As of September 14, B.McB. was placed in a separate room where he would practice, independently, and receive credit for class attendance. B.McB. chose not to do this and elected to go to the library during band period. This had no effect on B.McB.'s band class grade.

LEGAL ARGUMENTS

The petitioner's say that the school's action on October 25, 1994 to reduce B.McB.'s role in the band was arbitrary and capricious. Furthermore, the school's discipline on September 9, 1994 for his conduct on September 7 was improper. They insist that B.McB. was taken out of

his starting position in the band because that is what the band director wanted. The band director stated no criteria for selection or non-selection of a band member.

On or about August 25, 1994, B.McB. was taken out of his starting position in the band. This was equivalent to a form of punishment called a "time out" wherein the subject is excluded from and must observe an activity he desires to participate in. This creates further humiliation because it is observed by those who continue to participate. The effective being left out of one's peer group is a very powerful punishment. The band director, in effect, used this punishment for no reason. The band director stated he did not have the authority to discipline B.McB. The principal testified that the band director did not have the authority to discipline B.McB. However, the band director's improper conduct inflicted emotional distress on B.McB.

When the principal was asked by the Board's counsel what B.McB. said when confronted in the school hallway on September 7, 1994, the principal responded, "B.McB. said 'band is going to kill me'." Counsel was not happy with that answer and asked the principal the same question, but it was too late. B.McB. never threatened to kill anyone. The principal's testimony confirmed that. B.McB. was permitted to remain in the band director's class until B.McB.'s father suggested a change on September 21. The director and principal testified under oath that B.McB. was dangerous unless a psychologist said he was not. Nevertheless, they had no problem with B.McB. being in the band director's class.

The tribunal must find that the band director and principal acted in a silly manner. They had no problem with a boy who was supposedly a real danger to himself and others remaining in classes, in the school halls and on school property. The school's procedures are clear. A student who is a danger to himself or others is given out-of-school suspension because the school has a duty to protect the safety and welfare of its students and its personnel. In this case, the school clearly performed that duty, because they allowed B.McB. to remain in school because they knew he was not a danger to himself or others because he did not say he was going to kill himself or anyone else.

The school had no right to suspend B.McB. from band practice and require a psychological examination. The school had no right to order such a remedy which is an extreme intrusion into an individual's privacy.

In regard to the suspension, B.McB. and his parents do not ask this tribunal to substitute its judgment for that of the school, but asked the court to see whether the school followed its own rules. The school has proven it followed only its special rule in which the school gives itself the authority not to follow its own established rules.

The school must follow its established rules and the tribunal must hold them to their own rules. In this case, the school is applying a general rule to legitimize the improper discipline issued. The Code of Conduct introduction states:

Each student is guaranteed the right:

1. To be heard.
2. To have fair and consistent rules.
3. To due process procedures.

The procedures followed in this matter cannot be found in the code. B.McB. was not given oral or written notice of the charges against him. He was not given notice of the charges against him on or before the September 9, 1994 hearing.

In conclusion, the tribunal can understand why under these circumstances B.McB. was compelled to take this petition to the Commissioner. Children have the right to be treated fairly by adults and this in particular applies to their teachers and authority figures such as school administrators. B.McB. has been treated unfairly. The school has not followed its own rules and has not complied with the law. B.McB.'s demotion from the band on August 25, 1994 was arbitrary and capricious and it was at the complete whim of the band director.

B.McB. was disciplined for his reaction to emotional distress from his improper treatment and being eliminated from his starting position in the band. The school's own conduct showed B.McB. was not a danger to himself or others. Finally, the discipline was improper procedurally,

because of the school's failure to give notice of the charges and the school's failure to follow its Code of Conduct as to what was the proper discipline. Therefore, B.McB. and his parents make nominal requests for this judge to order the school to expunge the September 7, 1994 discipline from B.McB.'s records and find that B.McB.'s demotion from the band on August 25, 1994 was improper.

The Board objects to the petitioner's due process arguments because they appear nowhere in the petition or amended petition. There are no procedural or substantive due process rights at issue in the temporary suspension from an extracurricular activity. Participation in extracurricular activities is a privilege, not a right. No property interest is at stake when a board of education denies participation in extracurricular activities.

Even if, *arguendo*, there were a right to participate in after-school band activities, the undisputed facts are that the petitioners received due process far beyond what any court or the Commissioner of Education would require. B.McB. and his father were informed of the allegations of a verbal threat against the band director on the night of the incident as well as the next morning by way of a meeting with the high school principal. Both parents and the pupil testified that they knew before the informal hearing with the superintendent on September 9 what the allegations were and what the suspension was for. The amended petition admits that B.McB. had a "verbal outburst" on September 7, in the presence of the principal and band director and that the suspension and psychological examination were because of the verbal outburst.

There was a complete dialogue between petitioner's counsel and the superintendent over all issues that the petitioners felt were important, in particular, the student handbook issue. Rather than being a "set up" as perceived by M.McB., the informal hearing with the superintendent had all of the necessary elements of due process. Given that the subject matter of the informal hearing was a relatively short-term suspension from participation in after-school band activities, the due process given was more than sufficient.

Before the incident of September 7, 1994, the petitioners' dispute with the school concerned denial to B.McB. of a specific, designated starting spot in the marching band. But as

the band director testified, there are no guaranteed starting positions in the band. Much like try-outs for athletic teams, band members must earn their starting positions every year. Upper classmen or "veterans" are given no preference. Unfortunately, the petitioners assumed that simply because B.McB. had a starting position in the first line saxophone section one year, he had a right to the same spot the next year. It may have been the petitioner's misconception that B.McB.'s starting position was an entitlement that contributed to B.McB.'s excessive behavior.

Petitioners have failed to carry the burden of showing that the demand for a psychological evaluation was arbitrary or capricious under the circumstances. Rather, their case focused on second-guessing the "staging" and "harmonizing" decisions of the band director in the formation of marching schemes and B.McB.'s inclusion in such schemes. Case law is clear that the school laws vest the management of the public schools in each district board of education and its administration. The Commissioner will not intervene or substitute his judgment for that of the local board of education or administrators or teachers in the many selection processes in which they are involved.

The administration attempted to include B.McB. in the marching band to the fullest extent possible given that other students had already been assigned the available starting positions in the saxophone section. Rather than being kicked out of the band as B.McB. and his mother incredibly testified, the band director had attempted to find a place for B.McB. that could have been mutually satisfactory. The fact that the options offered to the petitioners were misperceived as punishment does not undermine the testimony that the district was trying every way possible to accommodate B.McB. and his family so that B.McB. could remain an active participant in band activities. However, M.McB. suspected every administration decision. The meeting with the superintendent on September 9 was a "set up." The options offered to B.McB. for continuation in the band were "punishments." To her, B.McB. was removed from the band and the band director did not respect her son. M.McB. testified that B.McB. was not allowed to perform until December when the suspension expired in late September and make up work would have enabled him to perform in early October. She further described the school district as "liars" and stated that only she was telling the truth.

The petitioners' chronology of events also changed between September 1994 and the present hearing. More conspicuously, B.McB.'s testimony is at odds with the consistent testimony of the band director and the principal.

The petitioners argued, but presented no evidence at all, in regard to the claim that the student handbook was applicable or, if applicable, was not followed. The petitioners bear the burden of showing arbitrary and capricious conduct. An allegation is not enough. There must be proofs.

On the issue of the psychological assessment, the parents agreed with the recommendation that one be done and offered to have the evaluation done at their own expense in order to hasten B.McB.'s chances of returning to the marching band.

Last, the Board has supplied several documents to the petitioners' counsel dealing with B.McB.'s attendance at band class after the incident on September 7. B.McB. testified that he attended the band director's sixth period class each day for the remainder of that week and the next week. However, the principal and music director testified that B.McB. attended class with the band director on Thursday, September 8, but that B.McB. was absent from class on Friday, September 9. The attendance records submitted to the petitioners' counsel shows B.McB. absent from the band director's class on Friday, September 9. This is consistent with the testimony of the principal and the band director that B.McB. was with his guidance counselor at that time. After the September 9 meeting with the superintendent, the principal testified that B.McB. was in the band director's class on Monday, September 12 and that the principal received a call later that day from F.McB. asking why B.McB. was still in that class. The principal assumed that the suspension given to B.McB. dealt only with after-school band activities. The principal then sought legal advice. On Tuesday, September 13, the band director left the building on sick leave. Nevertheless, B.McB. claims that he attended band class with the band director. B.McB. may have been there, but the band director definitely was not. For the remainder of that week, B.McB. was marked absent from the band director's class. This is consistent with the principal's testimony that arrangements had been made with counsel for B.McB. to be assigned to a room next to the music room so that he could have limited contact with the band director. This

arrangement, which was requested by the petitioners, was unsatisfactory to B.McB. and resulted in B.McB. requesting assignment to the library and then a permanent assignment to another teacher's band class as of September 26.

The Board requests that the materials sent to the petitioner's counsel be considered as part of the record herein.

DETERMINATION

Having heard and observed the witnesses as they testified and having reviewed all documents in the case, I **FIND**:

1. B.McB., a student at Washington Township High School, was a member of the school band in his freshman (1992-93) and sophomore (1993-94) years and part of his junior year (1994-95);
2. His parents were active in the band's parent auxiliary;
3. A board camp is held in August of each year, shortly before commencement of the band's performances at athletic and other events;
4. B.McB. did not attend band camp in August 1992 and participated fully in band activities in the 1992-93 school year;
5. B.McB. attended part of the band camp conducted in August 1993 and participated fully in band activities in the 1993-94 school year;
6. B.McB. did not attend band camp in August 1994;
7. B.McB. informed the band director, after band camp began, via voice mail and a note in the director's mail box that he was working and could not attend band

camp in August 1994. B.McB. has no conversations with the director before camp began;

8. On or about August 25, 1994, B.McB. learned that he was not assigned one of the twelve starting positions in the saxophone section in the marching scheme for the 1994-95 school year;
9. This news upset B.McB. and he made clear his belief that he was denied a starting position as a punishment for not attending band camp;
10. The band director offered B.McB. the options of serving as an alternate to the saxophone section, meaning he would march in performances at football games if a regular player was absent and participate in other events that did not involve marching schemes (*e.g.*, concerts, parades); of marching in the trombone section (playing saxophone) because that section had two vacant positions;
11. Another option, apparently first mentioned by B.McB., was to quit band;
12. On August 30 and 31, B.McB. attended band rehearsals, having advised the director that he would march in the trombone section;
13. Beginning on or about September 1, 1994, B.McB. attended rehearsals, but refused to participate;
14. On these occasions, B.McB. walked about school grounds, met with reporters to discuss possible legal action against the board and its agents or sit in his parents' vehicle watching the practice;
15. On September 7, before practice, the director was informed that B.McB. had appeared, stated "If anybody is looking for me, I'm on the field," and left;

16. The director went to look for B.McB.;
17. He saw the McB.'s vehicle in the school parking lot, approached it and inquired of the parents whether they knew B.McB.'s whereabouts; they did not;
18. The director reentered the building and found B.McB. using a public telephone;
19. The director told B.McB. to return to practice and B.McB. sharply replied, "I am on the phone";
20. The director returned to the parking lot to enlist the aid of Mr. and Mrs. McB., but they had left;
21. The director again entered the school and approached B.McB., directing him to return to rehearsal;
22. B.McB.'s reply was that he was going to take the matter to "your principal";
23. The director went to the music room, got B.McB.'s instrument and returned to the front hall of the building;
24. When he arrived, he found the building principal advising B.McB. to return to practice;
25. B.McB. then said, "Get [the band director] away from me or I'll kill him," or words to that effect;
26. B.McB. was pulling his own hair and flailing his arms;
27. The principal told the band director to summon a guidance counselor, which the director did;

28. The principal and counselor attempted to calm B.McB.;
29. After a few moments, the principal and counselor conferred out of B.McB.'s hearing and B.McB. left the building;
30. The principal attempted to reach Mr. and Mrs. McB., but their telephone was not working;
31. At or about 7 a.m. the next morning, Mr. McB. and B.McB. appeared in the principal's office;
32. The principal told Mr. McB. of the previous evening's incident and expressed concern for B.McB.'s well being;
33. On the day following, the parents, their attorney, the superintendent, the principal and the band director met;
34. There was open and complete discussion of the recent events and each group caucused as necessary;
35. At the conclusion, the superintendent announced B.McB. would be suspended from band activities, but not classes, for two weeks and would be examined by the school psychologist because of concern for B.McB.'s well-being based on his unusual behavior;
36. The parents apparently agreed in concept, but wanted to engage their own psychologist for the examination and the school authorities agreed;

37. It was understood by the parties that following suspension, B.McB. would be afforded approximately two weeks of remedial band work and likely would be able to perform as of October 8, 1994;
38. The petitioners sought emergent relief, alleging the suspension of two week was too long and that the psychological examination requirement was arbitrary and capricious;
39. This tribunal denied the request on September 23, 1994 and the Commissioner of Education adopted the decision as his own on November 10, 1994;
40. Plenary hearing was set down for May 25, 1995, but adjourned until September 27, 1995; by consent of the parties.

The documents provided by the Board to the petitioners' counsel after hearing, while not essential, are relevant and I hereby admit them in evidence.

Some cases inevitably turn on the credibility of witnesses. A trier of fact may accept all of a witnesses' testimony, may reject it all, or may accept part and reject part, in accordance with the credibility of the witness. One factor that must be considered in a determination as to which party's version of an incident has the reasonable probability of the truth is that "the interest, motive, bias or prejudice of a witness may affect his credibility and justify the [trier of fact]; whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." *State v. Salimone*, 19 *N.J. Super.* 600, 608 (App. Div. 1952) (citations omitted), certif. den. 10 *N.J.* 316 (1952).

The testimony of B.McB. and M.McB. did not fall into the circumstance of a credible witness coupled with credible testimony. *State v. Taylor*, 38 *N.J. Super.* 6 (App. Div. 1955). B.McB. possess great verbal facility for a young man of his age. This facility approaches glibness. Bias or motive always is relevant to a determination of credibility. *In re Ungar*, 160 *N.J. Super.* 322 (App. Div. 1978).

Pupils must submit to the authority of teaching staff members and must comply with the rules that have been established by law for the governance of their schools. *N.J.S.A.* 18A:37-1. Each district board of education is empowered by *N.J.S.A.* 18A:11-1 to make, amend, and repeal rules for the management of the schools in the district. The same statute authorizes boards of education to perform all acts and to do all things, consistent with law, necessary to proper conduct of the schools of the district. It is not possible to reduce to writing every possible situation that might subject a pupil to punishment. However, any act may subject a pupil to punishment where the act is detrimental to good order and to the best interest of the school or where it adversely affects school discipline. *79 C.J.S., Schools and School Districts*, §496 at 455.

In addition to the findings set forth above, I further **FIND** that B.McB. was afforded all due process rights required in the matter of his limited suspension. He faced his accuser, he knew the nature of the accusation and had an opportunity to present his side of the story. In *Twining v. New Jersey*, 211 *U.S.* 78; 29 *Sup. Ct.* 14; 53 *L. Ed.* 97 (1908), it was held that the essential elements of due process of law are notice, an opportunity to be heard and to defend in an orderly proceeding *adapted to the nature of the case*. [Emphasis added.] By any measure, that standard has been met here.

In consideration of the foregoing, I **CONCLUDE** B.McB. was afforded due process rights required in the matter of his suspension from band activities. The actions of the board and its agents were reasonable in that the application of discipline in this matter was directly related to the good order and best interest of the school and school activities. The penalty in this matter was not unduly severe as related to the infraction.

Therefore, having considered all arguments of law put forward by the parties, I **CONCLUDE** that the petition of appeal is without merit. Accordingly, the petition is hereby **DISMISSED**. It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

14 NOVEMBER 1995
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

11/15/95
DATE

TSNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 20 1995
DATE

Joanne M. Restivo
OFFICE OF ADMINISTRATIVE LAW

/cae

LIST OF WITNESSES

For Petitioner:

B.McB.
F.McB.
M.McB.

For Respondent:

James Beyer
Joseph Vandenberg

LIST OF EXHIBITS

For Petitioner:

None

For Respondent:

- R-1 Letter, Rothmel, Esq. to Kern, September 9, 1994, 2 pp.
- R-2 Roll book, J. Beyer, Symphonic Band, Period 6, 1994-95
- R-3 Roll book, J. Lerch, Concert Band, Period 4, 1994-95
- R-4 Teacher absence form, J. Beyer, September 13, 1994
- R-5 Record of Teacher's Absences, J. Beyer, 1994-95
- R-6 Guidance notes re: B.McB., 5 pp.
- R-7 Memorandum, Schemer to Vandenberg, with attachments, September 29, 1995

F.McB. and M.McB., on behalf of their minor child, B.McB.,
PETITIONERS,
V. COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,
RESPONDENT.

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge (ALJ) that B.McB.'s suspension from band activities pending a psychological evaluation was proper under the circumstances, in that the Board's application of discipline was rationally related to the good order and best interest of the school and to the particular conduct exhibited by B.McB.

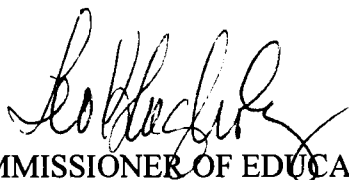
The Commissioner affirms the ALJ's factual findings in that the existing record provides no cause to challenge any of the determinations or credibility assessments made by the ALJ. Nor may the Commissioner properly reject such findings of fact without reviewing those portions of the transcript(s) where such findings were reached. Rowley v. Board of Education of

Manalapan-Englishtown, 205 N.J. Super. 65, 75 (App. Div. 1985) In re Morrison, 216 N.J. Super. 143, 159 (App. Div. 1987).¹

Finally, the Commissioner concurs with the ALJ that petitioners were provided due process by the Board and its agents in accordance with Twining, supra, since they were afforded several opportunities to be heard.

Accordingly, for the reasons expressed therein, the Commissioner affirms the initial decision of the Office of Administrative Law dismissing the within Petition of Appeal.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

¹ Additionally, it is the responsibility of those challenging such determinations to provide the Commissioner with such portions of the transcript, Morrison at 158-159, and no obligation arises for the Commissioner to review them before rendering a final decision regarding the findings and recommendations of the ALJ.

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF TEANECK, BERGEN COUNTY, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY :
OF ENGLEWOOD, BERGEN COUNTY, :
MARSHA GOODWIN, A/K/A MARSHA :
HART, AND BEVERLY HART, :

DECISION

RESPONDENTS. :



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7285-94

AGENCY DKT. No.181-6-94

**BOARD OF EDUCATION OF THE
TOWNSHIP OF TEANECK,
BERGEN COUNTY,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE
CITY OF ENGLEWOOD, BERGEN
COUNTY, MARSHA GOODWIN,
a/k/a MARSHA HART, BEVERLY HART,
Respondent.**

Joanne Butler, Esq., for petitioner
(Young, Dimero & Sayovitz, attorneys)

Allan Gutfleish, Esq., for respondent
(Gutfleish & Davis, attorneys)

Record Closed: November 14, 1995

Decided: November 16, 1995

BEFORE IRENE JONES, ALJ:

This matter was transmitted to the Office of Administrative Law on July 28, 1994 for determination as a contested case, pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The parties have agreed to a settlement and have prepared a letter/stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

11/16/95
DATE

Irene Jones
IRENE JONES, ALJ

Nov. 27, 1995
DATE

Receipt Acknowledged:
W. N. Antonellis Jr.
DEPARTMENT OF EDUCATION

NOV 27 1995
DATE

Mailed to Parties:
Jeff J. Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sej

GUTFLEISH & DAVIS
COUNSELLORS AT LAW
185 ENGLE STREET
P.O. BOX 711
ENGLEWOOD, NEW JERSEY 07631
(201) 569-4700
ATTORNEYS FOR RESPONDENT, ENGLEWOOD BOARD OF EDUCATION

FILED
Nov 14 1 01 PM '95

BOARD OF EDUCATION OF THE
TOWNSHIP OF TEANECK,
BERGEN COUNTY

Petitioner

vs.

BOARD OF EDUCATION OF THE
CITY OF ENGLEWOOD,
BERGEN COUNTY, MARSHA
GOODWIN, a/k/a MARSHA
HART, BEVERLY HART

Respondents.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET NO. EDU 07285-94 N
AGENCY REF NO.: 181-6/94

STIPULATION OF SETTLEMENT

THIS MATTER having been opened to the Court by Petitioner, Board of Education of the Township of Teaneck, Bergen County, represented by Joanne Butler, Esquire of the law firm of Young, Dimiero & Sayovitz, P.C. and the Board of Education of the City of Englewood, represented by Geraldine M. Lewis, Esquire of the law firm Gutfleish & Davis; and the Court having set dates for the hearing on April 4 and April 5, 1995; and the parties having agreed upon the terms and conditions of the entry of this Stipulation of Settlement on the terms and conditions as set forth herein;

IT IS, THEREFORE, ON THIS 10th day of November 1995,
AGREED that the Board of Education of the City of Englewood


will pay a total of \$5,000 to the Board of Education of the Township of Teaneck as full contribution to the educational costs, including tuition payments, for T.R., a special education student attending the Eugene Field School in Teaneck, for the school years 1993-94 and 1994-95 inclusive; and it is further

AGREED that the Board of Education of the City of Englewood will have no further obligation or responsibility for any costs associated with educating said student in any year prior to and including the 1994-95 school year; and it is further

AGREED and understood between the parties that by entering into this Stipulation of Settlement, the Board of Education of the Township of Teaneck hereby expressly waives any and all claims against Respondent the Board of Education of the City of Englewood it has or may have in the future with regard to all costs or expenses relating to the education of this student prior to and including the 1994-95 school year; and it is further

AGREED and understood between the parties that pursuant to statutes and regulations governing the actions of public entities, the Board of Education of the City of Englewood and the Board of Education of the Township of Teaneck must each pass a Resolution authorizing said settlement.

BOARD OF EDUCATION OF THE
TOWNSHIP OF TEANECK


Joanne L. Butler, Esq.
For the Board

BOARD OF EDUCATION OF THE
CITY OF ENGLEWOOD


Allan S. Guffeish, Esq.
For the Board

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF TEANECK, BERGEN COUNTY, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE CITY : DECISION
 OF ENGLEWOOD, BERGEN COUNTY, :
 MARSHA GOODWIN, A/K/A MARSHA :
 HART, AND BEVERLY HART, :
 :
 RESPONDENTS. :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.


COMMISSIONER OF EDUCATION

December 21, 1995
Date of Mailing, December 21, 1995

KAREN NELSON, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

STATE-OPERATED SCHOOL DISTRICT : DECISION

OF THE CITY OF PATERSON, PASSAIC :

COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioning teacher alleged she was wrongfully and arbitrarily terminated from her position.

Petition was dismissed as untimely filed as petitioner filed approximately 530 days after the District's final action to which she was objecting and presented no unusual or compelling circumstances warranting relaxation of the 90-day filing requirement mandated under N.J.A.C. 6:24-1.15.

Commissioner adopted findings and determination in initial decision as his own. Petition was dismissed.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

ORDER OF DISMISSAL

OAL DKT. NO. EDU 5714-95

KAREN NELSON,

Petitioner,

v.

STATE-OPERATED SCHOOL

DISTRICT OF THE CITY OF

PATERSON,

Respondent.

Karen Nelson, *pro se*

No appearance by or for respondent

Record Closed: October 25, 1995

Decided: November 22, 1995

BEFORE RICHARD MCGILL, ALJ:

This matter involves a petition by Karen Nelson (petitioner) in which she claims that she was terminated unfairly from the position of teacher. In essence, petitioner alleges that she was attacked by a student in her classroom on September 14, 1993, and that she was accused of gross misconduct and terminated from her position on September 24, 1993.

In its answer, the State-Operated School District of the City of Paterson (respondent) denies that the termination was unfair, arbitrary or without due process. In addition, respondent maintains that the petition is barred for failure to comply with the ninety-day time limit set forth in *N.J.A.C. 6:24-1.2*.

PROCEDURAL HISTORY

Petitioner filed her petition with the Commissioner of Education on March 7, 1995 pursuant to the Commissioner's authority to hear and determine controversies under the school laws pursuant to *N.J.S.A. 18A:6-9*. Respondent filed an answer on May 24, 1995, and the matter was transmitted to the Office of Administrative Law on June 1, 1995 for determination as a contested case.

A telephone prehearing conference was scheduled for 4:00 p.m. on October 2, 1995. At the time set for the prehearing conference, the petitioner was available for the telephone call. However, the undersigned's office could reach only an answering machine for respondent's attorney.

From a review of the file, it appeared to the undersigned that respondent's contention that the petition is barred for failure to comply with the ninety-day time set forth in *N.J.A.C. 6:24-1.2(c)* was meritorious. As a result and in the interest of prompt resolution of the matter in the event that respondent's argument was meritorious, the undersigned sent a letter dated October 5, 1995 to the parties directing that they treat the letter as a motion to dismiss the petition for failure to comply with the ninety-day time limit set forth in *N.J.A.C. 6:24-1.2(c)*. The letter further directed that the parties submit written arguments in regard to the motion no later than October 25, 1995.

Petitioner responded by letter dated October 13, 1995. No response was received from respondent. The record closed on October 25, 1995, upon expiration of the time for response to the letter dated October 5, 1995.

MOTION TO DISMISS

To initiate a contested case before the Commissioner of Education, the petitioner must file the petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, which is the subject of the requested contested case hearing. *N.J.A.C. 6:24-1.2(c)* Here, it is undisputed that petitioner was terminated by respondent by letter dated September 23, 1993, effective September 24, 1993, and that the petitioner filed the petition in this matter on March 7, 1995. Thus, the petition was filed approximately 530 days after the action in regard to which petitioner seeks an adjudication.

In her letter dated October 13, 1995, petitioner expressed the view that she was treated unfairly with respect to her termination. However, her letter does not indicate in any way that her petition was filed in a timely manner.

Based upon the above, I **CONCLUDE** that petitioner failed to file her petition within the ninety-day time limit set forth in *N.J.A.C. 6:24-1.2(c)*.

Accordingly, it is **ORDERED** that the petition in this matter be dismissed.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Nov. 22, 1995
DATE

Richard McGill
RICHARD MCGILL, ALJ

11-28-95
DATE

Receipt Acknowledged:
DNA
DEPARTMENT OF EDUCATION

NOV 28 1995
DATE

Mailed to Parties: Jeff Mason
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

am

KAREN NELSON, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 STATE-OPERATED SCHOOL DISTRICT : DECISION
 OF THE CITY OF PATERSON, PASSAIC :
 COUNTY, :
 :
 RESPONDENT. :

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. By way of exceptions, petitioner submitted a letter objecting to the dismissal of her case on the grounds of fairness and equity. She asserts that it is fundamentally unjust to invoke a procedural rule to deny a petitioner a hearing where a case has merit.

Upon a full review of the record in this matter, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge (ALJ) that the within Petition of Appeal, having been filed approximately 530 days after the final Board action to which petitioner is objecting, is untimely pursuant to the requirements of N.J.A.C. 6:24-1.2(c). The Commissioner further determines that petitioner has shown no unusual or compelling circumstances surrounding this matter which warrant relaxation of the 90-day filing requirement under N.J.A.C. 6:24-1.15. (See Kaprow v. Board of Education of Berkeley Twp., 131 N.J. 572 (1993).)

Accordingly, the initial decision of the OAL is affirmed and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

December 21, 1995
Date of Mailing, December 21, 1995

EDU #5714-95
C # 448-95 *dup*
SB # 3-96

KAREN NELSON, :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

STATE-OPERATED SCHOOL DISTRICT : DECISION
OF THE CITY OF PATERSON, PASSAIC
COUNTY, :

RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, December 21, 1995

For the Petitioner-Appellant, Karen Nelson, pro se

For the Respondent-Respondent, Gregory G. Johnson, Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. We note in so doing that petitioner has neither addressed nor provided any basis on appeal for relaxing the 90-day requirement for the filing of her petition with the Commissioner. See N.J.A.C. 6:24-1.2(c); N.J.A.C. 6:24-1.15.

We deny the State-operated District's request for an extension in filing its answer brief herein. Consequently, we have not considered the brief filed by the State-operated District in determining this matter.

April 3, 1996

Date of mailing APR 03 1996

DEC ELECTRIC, INC., :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE :
SOUTHERN GLOUCESTER COUNTY :
REGIONAL HIGH SCHOOL DISTRICT, :
GLOUCESTER COUNTY, AND USA :
ELECTRICAL CONTRACTORS, INC., :

DECISION ON MOTION

RESPONDENTS. :





State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING

EMERGENT RELIEF

OAL DKT. NO. EDU 10833-95

AGENCY DKT. NO. 451-11/95

DEC ELECTRIC, INC.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
SOUTHERN GLOUCESTER COUNTY
REGIONAL HIGH SCHOOL DISTRICT, and
USA ELECTRICAL CONTRACTORS, INC.,**

Respondents.

Richard W. Hunt, Esq., on behalf of petitioner, (Almeida & Hunt, attorneys)

Charles R. Iannuzzi, Esq., on behalf of respondent, Southern Gloucester County
Regional High School District,

Matthew A. Zabel, Esq., on behalf respondent, USA Electrical Contractors, Inc. (Zabel
and Associates, attorneys)

Record Closed: December 4, 1995

Decided: December 6, 1995

BEFORE STEVEN C. REBACK, ALJ:

OAL DKT. NO. EDC 10855-95

This matter was transmitted to the Office of Administrative Law by the Commissioner of Education (Commissioner) on November 29, 1995, as a result of the filing of a petition by DEC Electric, Inc., (DEC) seeking, among other remedies, emergent relief pursuant to *N.J.A.C. 1:1-12.6*.

Prior to the submission of the foregoing, DEC submitted directly to the Office of Administrative Law on November 17, 1995, a motion for substantially the same interim relief. Immediately thereafter respondent, Board of Education of the Southern Gloucester City Regional High School District (hereinafter "Southern Gloucester") on or about November 27, 1995 challenged the jurisdiction of the Office of Administrative Law to entertain DEC's motion, which challenge, in my opinion, was proper in that pursuant to the foregoing regulation, *N.J.A.C. 1:1-12.6*, an application for emergency relief must be made directly to the agency head - the Commissioner of Education - rather than to the Office of Administrative Law. Presumably recognizing the technical flaw in its motion, DEC submitted a supervening petition with the Commissioner of Education on November 27, 1992 which cured the jurisdictional defect and the matter was transmitted as noted. In addition, the subsequent petition also properly named as a respondent to the motion for interim relief not just Southern Gloucester (the only named respondent in the original petition) but also USA Electrical Contractors, Inc. (USA). USA did not submit a response to the motion for interim relief until moments before oral argument was conducted on December 4, 1995. Counsel for USA served both petitioner and co-respondent with the motion in advance of oral argument and presumably their arguments addressed the issues raised by Mr. Zabel. Oral argument was conducted at the Office of Administrative Law, Mercerville, New Jersey at 1:30 p.m. on December 4, 1995 at which time the record closed.

STANDARD FOR THE MOTION FOR EMERGENCY RELIEF

The standards utilized within the administrative forum in respect to motions for emergent relief are substantially the same if not identical to those applicable to temporary restraining orders or similar interim remedies within the courts. Both under *N.J.A.C. 1:1-12.6* and under well established rules within the judiciary in order for a moving party to prevail on a motion for interim relief, the moving party must demonstrate:

- (1.) The reasonably likelihood that it will prevail on the merits at a full plenary disposition of the proceedings;
- (2) immediate and irreparable harm will in all likelihood result to the moving party should the motion be denied; and
- (3) the remedies sought would be as limited in scope and temporary as is possible so as to allow the party or parties opposing the motion not to suffer undue harm.

See the seminal case of *Crowe v. De Gioia*, 90 N.J. 126, 132-33 (1982); *Wolfington Board Company Inc. v. Hunterdon Central Board of Education*, 92 N.J.A.R. 2d (EDU) 622, 624; *M.S. v. Barnegate Township Board of Education*, 93 N.J.A.R. 2d. (EDS) 16, 17]

The Court must also evaluate the relative hardship to the parties and the public interest in granting or denying relief. *Id.*

“Harm is generally considered irreparable. . . if it cannot be redressed adequately by monetary damages. In certain circumstances, severe, personal inconvenience can constitute injury justifying issuance of injunctive relief.” *Crowe* at 132-33.

The requirement that petitioner show a reasonable likelihood of success on the merits “is usually tempered by the principle that mere doubt on the claim’s validity is not an adequate basis for refusing to maintain the status quo. So frequently, emergency relief is granted to prevent a decree on the merits from becoming futile or useless by preventing the *res* from destruction or impairment.” See, 37 N.J. Practice (Lefelt, Administrative Law and Practice) sec. 196 at 204. “Indeed the point of temporary relief is to maintain the parties in substantially the same condition when the final decree is entered as they were when the litigation began.” *Crowe* at 134.

FACTS AND ANALYSIS

I shall now address with particularity the substance of the emergent relief motion brought by DEC and the remedy sought. The facts are derived from the certifications and affidavits submitted as an incident to the motion as well as from the representations of a factual nature made by counsel at oral argument following their discussion with their respective clients.

Southern Gloucester is in the process of renovating and providing additions to one of its schools, the Delsea Regional High School in Franklinville, New Jersey. The project has been divided up into phases. Phase III is or is about to be completed and phase IV which involves additional renovations and construction is scheduled to commence on or about January 3, 1996 and should be completed in or about August of that year. The initial stages of phase IV involve demolition of parts of the existing structure.

On or about October 13, 1995, Southern Gloucester gave notice that sealed bids and proposals were to be accepted for various jobs related to the phase IV construction activities. Approximately five contractors specializing in various building trades submitted bids on the November 2, 1995 submission date. DEC is an electrical contracting company as is respondent USA. Both companies submitted bids on the November 2nd, submission date. The movant's bid to complete the work was in the amount of \$878,400. USA submitted its bid on November 2, 1995 in the amount of \$675,000 and was deemed to be the lowest bidder and therefore Southern Gloucester awarded USA the electrical contract to perform the electrical work on phase IV. The contract was awarded on November 9, 1995.

Pursuant to the bidding requirement applicable to respective parties contracting with local school boards on contracts requiring public advertisements, it must be demonstrated that at the time of the submission of its bid the prospective bidder be qualified. Such qualification goes to character as well as to the capacity of the bidder to bid on the amount of the public work contract which is the subject of the bid. See *N.J.S.A.* 18A:18A-26, 27 and 29.

Based upon the undisputed factual record which was reaffirmed during oral argument, on November 2, 1995, DEC was qualified by the appropriate regulatory body within the Department of Education, the Division of Buildings/Construction (DBC). On November 2, 1995, the respondent, USA, was not qualified. USA's qualification expired on October 30, 1995. Southern Gloucester, when it received USA's bid on November 2, *knew* that USA was not qualified. The record strongly suggests that USA made a good faith effort *after* its qualification had expired to requalify by the November 2, 1995 submission date; however, that effort was unsuccessful. Based upon the facts before me at the time of oral argument, USA was qualified under statute to submit its bid for the contract at the earliest November 6, 1995.

Counsel for USA in response to my inquiry represented that the principal of USA had been qualified under different corporate names as an electrical contractor for purposes of submitting bids for school contracts for the past 16 consecutive years. No reasonable explanation was provided for USA's failure to qualify on November 2, 1995 other than the suggestion that the bureaucratic requirements for qualification had changed since prior years. I find that to be no excuse however. An electrical contractor who has been qualified for 16 consecutive years in the past has a clear duty and responsibility to apprise itself in advance of the termination of its qualification as to what it must do and when it must do it in order to meet the statutory requirements for qualification.

It is based upon USA's failure to be qualified as a bidder on November 2, 1995, the date on which bids were opened, that DEC seeks emergent relief.

DEC argues that USA's lack of qualifications on November 2, 1995 renders the contract which resulted in the award to it by Southern Gloucester a nullity. I agree.

N.J.S.A. 18A:18-26 explicitly provides in part as follows:

Every Board of Education shall require that all persons proposing to bid on any Contract requiring public advertisement for bids with the Board for public work. . . shall first be classified in accordance with Article 6 of this chapter as to the character and the amount of public work in which they shall be classified to submit bids. So long as such requirement is in effect, the Board of Education shall accept such bids only from persons qualified in accordance with such classification. [emphasis added]

It is also noted that in addition to USA not being qualified to submit on November 2, 1995, the argument offered by Mr. Hunt in support of DEC is that even when USA was qualified, on November 9, 1995, when the contract was awarded to USA, the latter's bid was materially non-responsive and its financial responsibility was questionable. He bases this argument on the factual representation that as of the date of the award of the contract, USA was only qualified for \$800,000 with \$50,000 worth of uncompleted work on its books.

It should be noted that the purpose of this proceeding is not to determine the issue of whether USA was fiscally qualified to submit bids on the contract at issue, but rather whether given that it was not qualified at all on November 2, 1995 the date on which bids were opened, the contract which it entered into with Southern Gloucester should be set aside as a nullity. Therefore, I shall not rule upon the issue of the fiscal qualification and classification of USA.

The case governing the consequence of a bidder's failure to qualify on the date on which the bid is opened is *Begraff v. Borough of Franklin*, 133 N.J. Super 415 (App. Div. 1975). The appellate division, construing the predecessor statute to N.J.S.A. 18:18A-26, N.J.S.A. 18A:18-9, and as Mr. Hunt notes at page four of his brief, held that the failure of a contractor to be qualified at the time of the opening of bids is a material defect that can neither be waived nor cured by the action of the board of education or by anyone else. The appellate division noted:

Having failed to so qualify by the date fixed for the reception of bids, plaintiff was disqualified from submitting a bid. Moreover, defendant Board of Education was without authority to accept such a bid since such qualification could not be waived by the Board. And qualification by the plaintiff after the date fixed for the submission of bids, does not satisfy the requirement of either the statute or the invitation to bid. [Citations omitted; emphasis supplied]

I agree with Mr. Hunt's conclusion that the courts of New Jersey have concluded that as a matter of law and public policy the lack of qualification of a bidder for a public school contract is a material non-curable and non-waivable defect. In my view this is not a mere technical *de minimus* oversight on the part of any bidder, including USA. The statutory framework for public contracts is clearly designed to protect the public by assuring that bidders are qualified in all relevant ways to enter into contractual obligations with local school boards and to satisfactorily perform work of various kinds, many of which directly impact upon the health, safety and welfare of school children. In addition, the laws are also designed to assure that the contractor has the fiscal integrity as well as character necessary to satisfactorily complete the job and that if for whatever reason it fails to do so, the local school district can be saved harmless.

The court in *Begraft* stated that the qualification serves "...to protect a vital and valid public interest, and to protect as well the interests of the contractors..." *Begraft* at 417. The *Begraft* court recognized that even though plaintiff had qualified by the date the contract was awarded, its failure to qualify prior to submitting the bid was a material violation which the school board could not waive.

Southern Gloucester contends that the violation was not material. In fact, it fails to see how such a breach violates the sanctity of the bidding process. According to respondent, USA had filed the necessary papers for qualification. Respondent was assured, as was USA, that its qualification was forthcoming. However, what respondent and USA overlook is that to make an exception for USA would be manifestly unfair, and would raise questions concerning the entire bidding process. "When the waiver occurs, the bidders no longer stand on a basis of equality and the advantages of competition are lost." *Hillside* at 325. That is, other bidders may have declined to submit bids because of the qualification requirement. Had they known that respondent was willing to waive this prerequisite, other bidders may have submitted bids even lower than USA. Such an outcome benefits not only the bidding process, but the public as well. *George Harms Constr. Co. v. Bor. of Lincoln Pk.*, 161 N.J. Super. 367, 377 (Law Div. 1978).

Moreover, waiving the qualification deprived the school district of any assurance that the contract would be completed. Since, USA did not meet the statutory requirements, it could decide not to fulfill its part of the bargain, basing its argument on the statutory violation. *Id.* Other courts have allowed parties to reject contracts on similar grounds. *Hillside v. Sternin*, 25 N.J. 317, 325 (1957).

Additionally, questions may linger in the minds of the public concerning the validity of the bidding process. "...the municipality cannot be permitted to breathe validity into an invalid bid by waiver. In this field it is better to leave the door tightly closed than to permit it to be ajar, thus necessitating forevermore in such cases speculation as to whether or not it was purposely left that way." *Id.* at 326.

While in the current matter, USA certainly does not appear to be an unscrupulous contractor; indeed based upon Southern Gloucester representations one must assume that the work that USA has competed for it in the past has been at the least satisfactory. Nevertheless, USA failed to meet the statutory requirements for qualification and in my view, no exceptions to the holding in *Begrift* allowing for substantial compliance or good faith effort exists. It must be left for the legislature to amend the law or for the courts to construe the statutory requirements for qualifications more liberally to allow for an exception which might apply to a scenario similar to the matter *sub judice*.

In this matter I would also note as an aside that part of the problem was created by Southern Gloucester in that it has acknowledged on the record that it knew on November 2, 1995 that USA was not qualified. In my judgment therefore, it knew, or reasonably should have known, that by accepting USA's bid it was assuming a significant risk that if USA's bid resulted in a contract there would be a strong likelihood that it would be challenged because of USA's lack of qualification. Thus, if there is any delay in respect to the commencement of the fourth phase of the project to improve the Delsea Regional High School, part of that delay is directly ascribable to the school district.

The effort by Southern Gloucester to distinguish the holding in *Begrift* and to argue that the bidder's lack of qualification on a date that bids are opened is a mere technical, minimal oversight is unsuccessful. Southern Gloucester's reliance upon the decision in *Palamar Construction, Inc. v. Township of Pennsauken*, 196 N.J. Super 241 (App. Div. 1983) is inapposite to the matter before me. In that case, the court held that a township can waive a minor or inconsequential condition of the bidding specifications under certain circumstances. Specifically and in *Palamar* the bidder had been qualified but it simply had forgotten to include the qualification statement in its bid. In the current matter, the issue is not the condition of the bidding specifications, the issue is the qualification of the bidder. As a matter of statutory law that qualification is neither minor nor inconsequential.

Accordingly, I **CONCLUDE** that on November 2, 1995, the date on which the relevant bids were opened by Southern Gloucester, USA was not a qualified bidder as required by case

law and pursuant to relevant statute, *N.J.S.A.* 18A:18-26, 27 & 29. As a consequence it is **ORDERED** that the contract awarded to USA on November 9, 1995 is null and void.

Given the foregoing conclusion however, does not result in a determination that DEC is entitled to the emergent relief requested. DEC has not and is unable to demonstrate that as a result of the nullity of the contract entered into between USA and Southern Gloucester, it has or will suffer immediate and irreparable harm. DEC does not have an entitlement to step into the shoes of USA and become the contracting party with Southern Gloucester on the contract.

Mr. Iannuzzi properly notes the significant disparity between bids - DEC's bid exceeded USA's by more than \$200,000. Clearly, the local school board not only has a right but a responsibility to see to it that in the interest of its taxpayers, bids shall be awarded to the lowest, responsible, qualified party. To conclude that because USA is disqualified and that therefore Southern Gloucester has an obligation to award the contract to DEC at a cost in excess of \$200,000, would in my judgment, take away from the school board the discretion that it must exercise in the best interests of its citizens.

Moreover, I have no way of determining in these proceedings whether DEC qualifies to meet the contract based upon the classification procedures employed under statute. I am not suggesting that DEC would not meet those classifications; I am merely stating that this is not an issue that can be decided in this emergent proceeding, nor indeed is it an issue before me.

Courts have recognized that the second lowest bidder in a contract does not have an entitlement as a matter of law to become the contracting party, particularly where there is a significant disparity between the amount of the bids. In *George Harms v. Borough of Lincoln Park*, 161 *N.J. Super* 367 (Law Div. 1978), cited by Mr. Iannuzzi in the last page of his November 27, 1995 brief (unpaginated), the court held that where the lowest bid was invalid and the next lowest bid was \$200,000 higher, the borough was directed to exercise its statutory option of rejecting all bids. I agree. Case law strongly suggests that the school board now has the option of either awarding the contract to DEC or reopening the bidding process. See also, *Richardson Engineering Company v. Rutgers, et al.*, 51 N.J. 207, 214 (1968), where it was held

that the contract award once vacated did not require the second lowest bidder was automatically entitled to the contract. If Southern Gloucester has decided to reopen the bidding process if it lost its argument in respect to the validity of the contract entered into between it and USA, as it implied it would at oral argument, petitioner has suffered no irreparable harm. Petitioner may be in an even better position than it was prior to the commencement of this litigation: DEC now has the opportunity to study the other submitted bids. Such knowledge could aid the petitioner if it decides to redraft its own bid. Therefore, in my view DEC has been unable to demonstrate under these circumstances irreparable or immediate injury.

In my judgment Mr. Hunt, in response to a hypothetical question which I placed to him, posited upon this very scenario was unpersuasive in seeking to demonstrate that harm to DEC was either irreparable or immediate. Whether DEC has a *separate* action against Southern Gloucester for damages is an issue to be resolved in another forum at another time. By this decision I express no opinion in that regard. I do, however, conclude that even if DEC did have an action for damages that would not be sufficient to entitle it to emergent relief in that monetary damages in a situation such as this would not be for harm which is either irreparable or immediate. Moreover, one might speculate that if the Commissioner of Education affirms the determination that I have arrived at, which is that the contract entered into between USA and Southern Gloucester is a nullity, DEC might very well be the lowest bidder. Under those circumstances, it would be hard to argue that DEC was damaged in any fashion.


Accordingly, I **CONCLUDE** that DEC has failed to establish that as a result of the contract entered into between USA and Southern Gloucester being a nullity, it has suffered immediate and irreparable harm.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A. 52:14B-10*.

12/6/95

DATE

tmp



STEVEN C. REBACK, ALJ

DEC ELECTRIC, INC., :
 :
 PETITIONER, :
 :
 V. :
 : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE :
 SOUTHERN GLOUCESTER COUNTY : DECISION ON MOTION
 REGIONAL HIGH SCHOOL DISTRICT, :
 GLOUCESTER COUNTY, AND USA :
 ELECTRICAL CONTRACTORS, INC., :
 :
 RESPONDENTS. :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner’s exceptions and Respondent Board’s reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.


Petitioner’s exceptions essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ), again contending, *inter alia*, that petitioner, the second lowest bidder for an electrical project, is entitled to contractual award for this project upon disqualification of the low bidder, and that should the project go out to rebid, petitioner will suffer immediate and irreparable harm in preparing and submitting a responsive bid.

In its reply, the Board argues that the ALJ’s initial decision was correct in finding that petitioner would suffer no immediate nor irreparable harm if the Board chose to rebid the project as petitioner would be entitled to participate in the rebidding process. Further, the Board contends that rebidding would not require petitioner to expend a significant amount of time and expense to prepare its new bid in that petitioner is essentially rebidding the same project. Neither, the Board avers, has petitioner demonstrated a likelihood of success on the merits.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ denying emergent relief as petitioner failed to meet the standards for such relief as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982).

Accordingly, the Motion for Emergent Relief is denied for the reasons expressed by the ALJ and this matter shall duly proceed for a hearing on the merits.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

DECEMBER 26, 1995

DATE OF MAILING DECEMBER 27, 1995

SUSAN LAPIDUS,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF SOUTH BRUNSWICK,	:	
MIDDLESEX COUNTY,	:	
	:	
RESPONDENT.	:	



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 388-95

AGENCY DKT. NO. 474-12/94

SUSAN LAPIDUS,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF SOUTH BRUNSWICK,
MIDDLESEX COUNTY,**

Respondent.

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

John E. Collins, Esq., for respondent (Carroll & Weiss, attorneys)

Record Closed: November 22, 1995

Decided: November 29, 1995

BEFORE ROBERT S. MILLER, ALJ:

This matter was transmitted to the Office of Administrative Law on January 11, 1995, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a stipulation of dismissal indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

November 29, 1995
DATE

Robert S. Miller
ROBERT S. MILLER, ALJ

12/5/95
DATE

Receipt Acknowledged:

VNA Antanaitis
DEPARTMENT OF EDUCATION

DEC 07 1995
DATE

Mailed to Parties:

Barbara A. Hamed
OFFICE OF ADMINISTRATIVE LAW

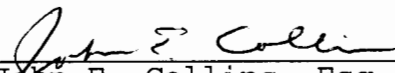
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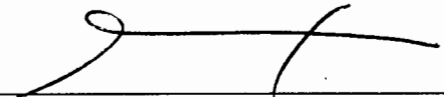
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Somerville, N.J. 08876
(908) 685-1552
Attorneys for Petitioner

SUSAN LAPIDUS : BEFORE THE COMMISSIONER OF
EDUCATION OF NEW JERSEY
Petitioner, :
vs. : OAL DOCKET NO. EDUOR 00388-95S
: AGENCY DOCKET NO. 474-12/94
BOARD OF EDUCATION OF THE :
TOWNSHIP OF SOUTH :
BRUNSWICK, MIDDLESEX COUNTY, :
Respondent. : **STIPULATION OF DISMISSAL**
: **WITH PREJUDICE**

The matter in difference in the above entitled action, having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed without costs against either party with prejudice.


by: John E. Collins, Esq.
Attorneys for Respondent
Dated:


By: Stephen E. Klausner
Attorneys for Petitioner
Dated:

SUSAN LAPIDUS, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION

TOWNSHIP OF SOUTH BRUNSWICK, :

MIDDLESEX COUNTY, :

RESPONDENT. :

The record and initial decision in the form of an acceptance of settlement rendered by the Office of Administrative Law (OAL) have been reviewed. Upon careful and independent review of the record, which includes as part of the initial decision a document identified as a Stipulation of Dismissal with Prejudice, the Commissioner finds that the terms of the proposed settlement are nowhere spread on the record. Consequently, because this case was transmitted to the OAL as a contested matter pursuant to N.J.S.A. 52:14B, the parties may not settle their controversy without the Commissioner's consideration of the terms of the settlement accord, pursuant to N.J.A.C. 1:1-19.1. Therefore, the Commissioner must remand the matter for explanation of the terms of the amicable resolution reached by the parties.

Accordingly, the instant initial decision must be rejected and the matter remanded to the Office of Administrative Law for further action consistent with this determination.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

DECEMBER 28, 1995

BOARD OF EDUCATION OF THE
TOWNSHIP OF EDISON,

PETITIONER,

V.

TOWNSHIP COUNCIL OF THE
TOWNSHIP OF EDISON,
MIDDLESEX COUNTY,

RESPONDENT.

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:

:

:

:

COMMISSIONER OF EDUCATION

DECISION

For the Board, Wilentz, Goldman & Spitzer (Joseph J. Jankowski, Esq.)

For the Council, Karcher, Salmond, Rainone & Barrett (Louis N. Rainone, Esq.)

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education on June 15, 1995 through the filing of a Petition of Appeal by the Edison Township Board of Education (Board), seeking restoration of reductions to the school budget made by the Edison Township Council (Council) pursuant to N.J.S.A. 18A:22-37 following defeat of the budget at the annual school election on April 18, 1995.

At that election, the voters rejected a public question proposing a General Fund tax levy of \$88,483,245 for the 1995-96 school year. On May 16, 1995, following consultation with the Board as required by law, the Council adopted a resolution determining to certify a General Fund tax levy of \$86,646,045 as sufficient to provide for a thorough and efficient system of education (T & E) in the District. This amount represented a reduction of \$1,837,200 from the tax levy proposed by the Board, and was effectuated through cuts in 13 line items, together with an increase in revenue from surplus, for the reasons given in the implementing resolution. By resolution dated May 18, 1995, the Board determined to appeal these reductions and duly filed the within petition.

The amounts in dispute in this appeal are as follows:

<u>Tax Levy Proposed by Board</u>		<u>Tax Levy Certified by Council</u>	
General Fund	\$88,483,245	General Fund	\$86,646,045
<u>Amount of Reduction by Council</u>		<u>Amount of Reduction in Dispute</u>	
General Fund	\$1,837,200	General Fund	\$1,837,200

An answer to the Board's petition was filed by the Council on June 30, 1995. On July 20, 1995, the parties filed their respective position statements pursuant to N.J.A.C. 6:24-7.8, followed by responsive statements on July 31, 1995 and August 1, 1995, and final summations on August 22, 1995 and August 16, 1995.

On July 17, 1995, the Middlesex County Superintendent of Schools submitted an affidavit attesting to the process that led to her recommendation, and that of the Department of Education Cap Waiver Review Panel, that the Board be granted a "Commissioner's cap waiver" in the amount of \$1,030,612 for reason of increased enrollment and special education needs pursuant to N.J.S.A. 18A:7D-28(e). This did not represent the full amount of the Board's request, which had been for \$2,932,361, and appeal was subsequently taken to the State Board of Education, which affirmed the prior determination of the Acting Commissioner directing a reallocation of \$1,901,749 to cover the remaining portion of the cap request, and to the Appellate Division, where the appeal was subsequently withdrawn by the Board.

The County Superintendent's filing of July 17, 1995, together with supplemental affidavits filed on August 17, 1995 and October 26, 1995, respectively, also set forth material events transpiring subsequent to the Council's reduction of the budget, including various requests made by the Board for fund transfers and other actions requiring county superintendent approval. These accounts and their supporting documentation are fully incorporated by reference herein; however, the following actions are noted as being especially pertinent to the present appeal: On May 25, 1995, the Board requested permission to transfer \$1,837,200 from its health benefits account to cover the reductions made by the Council pending appeal; this request was denied on May 30, 1995 and upon subsequent requests for reconsideration, and on June 21, 1995, the Board adopted a revised budget reflecting the Council's reductions. Subsequently, the Board requested and received permission to transfer \$150,000 from undesignated, unreserved surplus in

order to replace the 4.4 teaching staff positions cut by Council (Account No. 11-130-100-101) and an additional \$182,127 in the same account in order to fund a shortage caused by less than anticipated retirement breakage, for a total approved appropriation of \$332,127. A request to fund \$38,000 in middle school department head stipends (Account No. 11-000-221-102) and \$21,000 for increased negotiations costs (Account No. 11-000-230-339) through surplus was initially denied, but then granted when the surplus funds to be used were identified as the unanticipated monies generated by an expenditure freeze imposed at the end of the 1994-95 school year. Later, permission was granted to charge \$137,000 to Capital Bond Ordinance number 518.90 as follows: \$92,000 to Account No. 11-190-100-610 for equipment, \$68,400 of which was transferred to Account No. 11-000-260-441 to be used to purchase trailers as set forth below; \$25,000 to Account No. 11-000-260-340 for Environmental Remediation; and \$20,000 to Account No. 12-000-260-730 for capital outlay maintenance equipment. Finally, \$6,623 was made available to Account No. 11-000-219-104 in view of the County Superintendent's granting of permission to fund a Special Services Department Head position through IDEA grant funds; however, this amount was offset by a transfer of \$4,091 to Account No. 11-213-100-101 to cover the excess cost of two teaching positions which are now being funded through the current expense budget rather than the IDEA grant as originally proposed. Although the Board had, at the time of the closing of the record, several additional requests pending, no further action has been taken.

In addition, as the parties had previously been advised by letter from the Assistant Commissioner dated April 7, 1995 and distributed through the County Superintendent to boards and municipalities experiencing budget defeats, as part of the record of the within appeal, the Commissioner took official notice of the Board's revised budget, its June 30 financial report and its annual year-end audit, the latter two for the purpose of identifying whether the Board had underestimated in its 1995-96 budget the amount of anticipated undesignated surplus.

Upon expiration of the time for filing of the parties' responses to the County Superintendent's third (October 27) affidavit, the record of the appeal was closed.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and

efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line-item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education. Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989). With respect to appeals involving cap waivers, before the Commissioner can direct restoration of any amount of a waiver defeated by the voters, the Commissioner must determine that such amount is both fully necessary for purposes of T & E and unable to be derived from further reallocation within the base budget. Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, Bergen County, State Board decision July 7, 1993; Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, Bergen County, State Board Decision July 6, 1994.

Mindful, then, of the standards to be applied, the Commissioner makes the specific determinations set forth below.

COMMISSIONER'S DETERMINATION

Disputed Line-Item Number 1

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
2510/40	11-XXX-100-101	Instructional Salary	\$40,535,613	\$150,000

The Board argues that, notwithstanding the fact that the County Superintendent permitted the Board to subsidize the 4.4 teaching positions cut by the Council with funds from unanticipated surplus as noted above, the Council's reduction should be restored so that the \$150,000 in question may be returned to surplus and used for other budgetary needs. The Board contends that the Council ignored its programmatic needs, and that, had surplus funds not been

available to temporarily compensate, the Board would have had to eliminate the driver's education simulation program, phase out the German program, cut adaptive physical education programs, and eliminate or cut down on electives. Moreover, contrary to the Council's contention, except for 1993-94 (when an anticipated housing development did not materialize due to extraordinary circumstances), the Board has been very accurate in its enrollment projections. In addition, due to the Acting Commissioner's stance in reducing the Board's requested cap waiver, the Board is even less able to deal with enrollment influxes.

The Council argues that the Board has consistently inflated its enrollment projections over the years (an allegation which the Board strenuously denies), and that, even assuming this year's projection to be correct, the Board has in the past handled similarly large increases with fewer additional staff than the number of additions permitted by the Township's proposed budgeting level.

Upon review, the Commissioner finds that the Board's supporting documentation, as submitted both directly and through the affidavits of the County Superintendent, attest to the Board's need for the additional positions reduced by Council in order to provide T & E. However, in view of the fact that these positions have already been funded through transfer from surplus, the Commissioner sustains the reduction of \$150,000, reserving discussion of the impact of the transfer on the District's budget overall for the analysis of surplus below.

Disputed Line-Item Number 2

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
6910	11-000-230-109	Administrative Salary	\$681,864	\$40,000

The Board argues that the Acting Commissioner did not cut the position of grants writer when directing reallocation in his review of the Board's cap waiver application, supra, thereby indicating that it is necessary for T & E. The Board contends that the position is essential for permitting Edison to identify and apply for funding that will serve as a supplement to local tax revenue and State funding which is increasingly inadequate. The Board further notes that this position was created in the 1994-95 budget cycle for implementation in 1995-96, after the arrival of a new superintendent and upon District elimination of all supervisors who had formerly been responsible for grantwriting, and that grant monies obtained will far outweigh the cost of the position and will directly benefit students through provision of enhanced programs.

The Council argues that in times of economy, a position such as this is unnecessary, as grantwriting functions can be distributed among existing administrative staff. The Council further notes that the position went unfilled, hence unneeded, in 1994-95, and provides no direct services to students. The Council further notes that a determination not to require reallocation of particular funds in the cap waiver review panel process cannot be held to constitute a specific Department of Education endorsement of that item, or to supersede the Commissioner's authority and obligation under the education laws to decide appeals of defeated budget and cap waiver questions under appropriate standards of review.

Upon review, the Commissioner finds that the Board has not demonstrated this specific position to be necessary for T & E, and concurs with the Council that the Department's overall review of district staffing patterns within the context of the cap waiver review panel process cannot be held to bind the Commissioner to acceptance of the necessity of any one particular position in the context of a budget appeal. Accordingly, the reduction of \$40,000 is sustained.

Disputed Line-Item Number 3

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
7360	11-000-290-109	Other Salary	\$847,707	\$45,000

The Board again argues that the Acting Commissioner did not cut the position of human resources manager when directing reallocation in his review of the Board's cap waiver application, supra, thereby indicating that it is necessary for T & E. The Board further argues that this position was created when, as a result of 1993-94/1994-95 downsizing, the position of director of personnel (salary \$75,000) was eliminated, but certain functions requiring personnel expertise remained and could not be delegated to other staff.

The Council argues that this position, like that of grants writer, is unnecessary, as its functions can be distributed among existing administrative staff. The Council again notes that the position went unfilled in 1994-95, and provides no direct services to students.

Upon review, while again noting that the Commissioner is not bound in the present context by cap waiver review panel acceptance of a district's overall staffing patterns, particularly when the supporting documentation provided to the review panel did not indicate that the position in question was a new one, the Commissioner finds that the Board has

demonstrated the necessity of this position within the present context and the Council has not shown how personnel functions in a large district such as Edison can feasibly be distributed among existing administrators in the absence of a personnel director. Accordingly, the reduction of \$45,000 is restored.

Disputed Line-Item Number 4

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
6750	11-000-221-102	Director Salary	\$1,324,067	\$75,000

The Board argues that the Council is incorrect in its belief that the position of director of instructional services can be eliminated because its duties can be assumed by the newly created position of assistant superintendent for curriculum and instruction. The director position was specifically added in order to compensate for the loss of elementary school supervisors during a recent downsizing (see above), and is needed for adequate development and implementation of curriculum at the District's eleven elementary schools.

The Council maintains that it is willing to defer to the Board in its judgment that, as part of the District's administrative reorganization, the position of assistant superintendent for curriculum and instruction is necessary. However, if this is the case, there is no need to add an additional administrative layer by simultaneous creation of a director for instructional services, as the assistant superintendent can assist building principals with curriculum matters to the extent that they cannot handle such matters themselves.

Upon review, the Commissioner finds that the Board has not demonstrated the necessity for this position to ensure provision of T & E, particularly in view of the Department Head structure underlying the Board's request to fund stipends from surplus as set forth above. Accordingly, the reduction of \$75,000 is sustained.

Disputed Line-Item Number 5

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
7180	11-000-260-620	Energy Expense	\$1,655,000	\$150,000

The Board argues that the Council errs in accusing the Board of consistently overstating energy costs, offering a chart comparing actual expenses versus appropriations for the past three school years. The Board further contends that the Council relies heavily on costs for this past winter, which was unusually mild and cannot fairly be used as a benchmark for routine

budgeting, and that, even if the Board were to use such costs, the amount remaining after the Council's reduction would not cover expenditures.

The Council argues that, in addition to general overstating, the Board has based its 1995-96 projections not on an "average" winter, but on the winter of 1993-94, the worst in recent memory.

Upon review, the Commissioner is satisfied that the Board has demonstrated its need for these funds based on past expenditure levels, not confined to the extreme winter of 1993-94, and refuted the Council's allegation of general overbudgeting in this area. Accordingly, the reduction of \$150,000 is restored.

Disputed Line-Item Number 6

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
7420	11-000-290-290	Employee Benefits	\$8,837,654	\$150,000

The Board argues that the Council's proposed reduction is an "impossible mandate," based on the fact that the Acting Commissioner (through reallocation in the cap waiver review process) has already reduced this line item to a level that results in a shortfall. The Board is now left in a position where claims could exceed remaining balance, in that the "offset" requested by the Board, supra, was merely a temporary measure to permit the District to function during pendency of the within budget appeal.

The Council argues that there is currently a surplus in excess of \$1 million in the reserve account of Connecticut General Insurance (Cigna), the District's carrier for health insurance. The Board itself sought permission from the County Superintendent to use this entire amount to offset the Council's reductions herein, so that the Board cannot now be heard to argue that it cannot use even \$150,000 to offset this one reduction. In addition, the Council concludes that the \$405,942 in premium stabilization reserves held by the Board is not actuarially required; indeed, the Council also uses Cigna as its insurance carrier, and it has completely eliminated such funds from its own budget.

Upon review, the Commissioner finds that while the Board may wish to employ premium stabilization reserves as its standard fiscal practice, it cannot argue that such reserves, which serve as "insulation" from potential premium increases, in the full amount requested are necessary for T & E, so as to warrant restoration of the Council's reduction rather than allocation

from surplus if the Board deems such to be an appropriate use. Accordingly, the reduction of \$150,000 is sustained.

Disputed Line-Item Number 7

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
6580	11-000-219-104	Support Services	\$1,708,516	\$50,000

The Board argues that the Council's action was taken without rational basis and will prevent the District from addressing, through creation of two new positions, its ongoing problem with unduly large caseloads for child study team members, which has prevented timely evaluations and preparation of IEPs. If past patterns of losing child study team members through budget reductions and cap waiver reallocations continue, the District will not be able to meet State and federal mandates and will be faced with litigation and the need for contracting additional services on a piecemeal basis. The Board further notes that, although the Council makes reference to reducing two positions, the funds cut are sufficient for only one, thus showing a lack of rational basis for the Council's action.

The Council argues that the positions to be eliminated (additional psychologist and learning disability consultant) are not necessary for T & E and represent program expansions that should not be undertaken at a time of economic hardship. The Council further notes that, even with its proposed reduction, the Board can still hire one additional person to meet its purported needs.

Upon review, the Commissioner finds that, as the Board was able to fund two special education teaching staff positions through the current expense budget and elected to use IDEA monies to fund a Special Services Department Head position rather than additional teaching staff, the Board cannot be heard on appeal herein to claim that further current expense funds are needed to fill more teaching positions. Accordingly, the \$50,000 reduction is sustained.

Disputed Line-Item Number 8

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
7130	11-000-260-441	Rental of Buildings	\$102,900	\$92,400

The Board argues that this line item does not involve Distance Learning Labs, as contended by Council in its resolution, but rather addresses the lease-purchase of relocatable

classrooms needed for short-term accommodation of rapid increases in enrollment, the absence of which would result in cancellation of 28 middle school classes (four sections for seven periods) and concomitant enlargement of existing, already large classes. At the high school, special subject classes would have to be converted to regular classes, with concomitant loss of special courses. In addition, the Board recently requested and received permission from the County Superintendent to transfer funds for lease of four relocatable classrooms, thereby signifying the need for immediate action, as bond proceedings and subsequent construction could not be in place until 1996-97 at best and it is now too late in the year for major reassignment of 1995-96 students.

The Council argues that \$24,000 of the proposed reduction is for Distance Learning Labs, which are not necessary for T & E and should not be considered a priority in tight fiscal times, particularly when the Council has just arranged for cable TV to be provided to the District free of charge. The remaining \$68,400 is for relocatable classrooms, which the Board does not truly need in view of its historical tendency to overestimate enrollment and its planning to address facility expansion issues in the near future through an \$11 million bond referendum. Moreover, the Board has used relocatables in the past and experienced environmental difficulties, so that students should be reassigned rather than repeat this experience.

Upon review, the Commissioner notes that \$68,400 of the amount at issue has now been made available through reprogrammed bond proceeds, so that the Council’s reduction of this amount is sustained. The remaining \$24,000, however, which represents that portion of this account earmarked for Distance Learning Labs, is found necessary for development of the District’s T & E educational program, and is accordingly restored.

Disputed Line-Item Number 9

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
6950	11-000-230-530	Telephone - Postage	\$290,070	\$34,800

The Board argues that, with its proposed Distance Learning Labs, it wishes to provide students not merely with cable broadcasts in Edison’s two high schools (which is what the Council’s “cable alternative,” at line item no. 8 above, would offer), but rather with

participation in an interactive television program shared by a consortium of Middlesex County schools approved by the County Superintendent.

The Council argues, in addition to its reliance on the cable TV option mentioned at line item No. 8 above, that a new program such as this cannot be justified where the proposed school budget has been rejected by the voters and economies must be effectuated while still ensuring T & E.

Upon review, the Commissioner finds the Distance Learning Lab program to be necessary to development of the District's T & E educational program, and that the substitute proposed by the Council will not effectively meet the Board's instructional needs. Accordingly, the \$34,800 reduction is restored.

Disputed Line-Item Number 10

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
7120	11-000-260-420	Repair/Maintenance	\$798,510	\$50,000

The Board argues that the amount budgeted for maintenance and repair is less than that budgeted for 1994-95, and that the amount left after the Council's reduction will be insufficient to maintain present buildings. Buildings and other structures are in extraordinary need of repair due to the fact that the Board has never had funds for preventive maintenance. Moreover, at the time the Council made this reduction, it believed that it could reprogram old bonds in the amount of \$500,000 to address the Board's maintenance needs, which have been estimated by architects to be \$32 million. This belief has since been corrected by the Board attorney, who has advised that such bonds are no longer within the Council's jurisdiction and that a referendum would be required for change of purpose now that Edison is a Type II district.

The Council maintains that Type I bonds can be reprogrammed to cover the expenditures in this line item, and that the Board's claim to the contrary is belied by the fact that such reprogramming has occurred at least twice in recent years. In addition, some maintenance can be handled by the additional computer technician and electrician provided elsewhere in the Board's budget (account 11-000-260-109).

Upon review, the Commissioner finds that the Council does not dispute the basic need for the budgeted purposes and amounts, except for its unsupported contention that certain unspecified services can be absorbed by another line item, but merely contends that they be

funded through an alternative mechanism. That mechanism, however, is not viable for the current budget year in that, while bond proceeds may be reallocated for purposes consistent with their originally authorized usage (as occurred with trailers above), they may not be used for unrelated renovations/remodeling and other extraordinary facility costs unless expressly authorized by the voters through referendum. Accordingly, as the amount in dispute has been shown necessary for T & E, the reduction of \$50,000 is restored.

Disputed Line-Item Number 11

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
7170	11-000-260-610	General Supplies	\$573,090	\$50,000

The Board argues that the amount budgeted is less than in 1994-95, and that even that amount was insufficient to run a proper maintenance program. The reallocation from this account made by the Commissioner as part of the cap review process has made the situation even worse, so that the Board’s maintenance program now consistently operates in a crisis mode.

The Council argues, as above, that Type I bonds are available for reprogramming to cover these costs.

Upon review, the Commissioner finds that, as with Line-Item Number 11 above, the Council does not dispute the need for the budgeted purposes and amounts, but merely contends that they be funded through an alternative mechanism. Again, however, that mechanism is not viable, in that, while bond proceeds may be reallocated for purposes consistent with their originally authorized usage, they may not be used for normal repair/maintenance costs, which are considered ordinary operating expenses and, hence, are part of the current expense budget. Accordingly, as the amount in dispute has been shown necessary for provision of T & E, the reduction of \$50,000 is restored.

Disputed Line-Item Number 12

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
8290	12-000-400-710	Site Improvements	\$35,000	\$35,000

The Board argues that, due to ever-increasing bus usage in areas designed many years ago for walking students, traffic congestion near the District’s elementary schools has risen to such a degree that site modifications are necessary to alter traffic patterns.

The Council contends that what the Board actually proposes to finance are traffic studies, which can be undertaken using reprogrammed bond proceeds as above.

Upon review, while the Commissioner notes the failure of the Council's bonding argument as set forth above, he further finds that the Board has failed to demonstrate that this item is necessary for T & E. Accordingly, the reduction of \$35,000 is sustained.

Disputed Line-Item Number 13

<u>Line No.</u>	<u>Account No.</u>	<u>Description</u>	<u>Amount Budgeted</u>	<u>Amount Cut</u>
6440	11-000-213-300	Health Services	\$144,225	\$30,000

The Board argues that it has been providing free testing for strep ever since the Township Health Department stopped providing this service several years ago. Only \$12,000 was expended for this program last year because the Board had built up an inventory of supplies, which has now been depleted; hence, the increase of approximately \$30,000 over last year's budget.

The Council argues that the strep testing program provides services properly obtained through health agencies, is not cost-effective, and is not essential for provision of T & E.

Upon review, the Commissioner concurs with the Council that this item, while reflecting a worthy goal, is not necessary for provision of a T & E system of education in the district. Accordingly, the reduction of \$30,000 is sustained.

APPLICATION OF SURPLUS

The Board estimated a June 30, 1995 unreserved General Fund balance of \$1,000,000, predicated on use of a total of \$1,836,264 of the June 30, 1994 fund balance (\$500,000 budgeted fund balance plus \$1,336,264 in additional appropriations anticipated). Based on the Board's 1994-95 annual audit report, unreserved General Fund balance was underestimated by \$3,129,326, due to surplus of \$1,761,717 being generated in the 1994-95 school year. Based on the advertised 1995-96 budget statement, as set forth by the calculation below, the district has \$287,766 in excess surplus available to fund restorations, over and above the \$885,000 recommended for appropriation by the Council:

1995-96 General Fund Appropriations (\$98,551,997) x 3%	\$2,956,560
June 30, 1994 Audited Unreserved Surplus	\$2,367,609
1994-95 Surplus Generated	<u>1,761,717</u>
June 30, 1995 Audited Unreserved Surplus	\$4,129,326
Less 1995-96 Budgeted Fund Balance per Council Action	(885,000)
Remaining Unreserved, Undesignated Fund Balance	\$3,244,326
Less 3% Calculation	<u>(2,956,560)</u>
Additional Amount Available to Fund Appropriations:	\$ 287,766

The Commissioner notes that this amount, plus \$103,361, for a total of \$391,127, has already been used for additional appropriations with the permission of the County Superintendent, as noted under Procedural History above. However, in reviewing the record of this matter, the Commissioner also finds that the Board was granted permission by the County Superintendent, as noted above, to refinance \$137,000 in General Fund expenditures through proceeds from a reprogrammed bond issue, only \$68,400 of which was at issue at Line Item No. 8 above; accordingly, an additional \$68,600 in General Fund monies has been freed that can also be used to fund restorations herein. In addition, through the appropriations language of this year's State budget, the District was given a \$500,000 grant to fund bilingual education appropriations; notwithstanding that such funds have not yet been paid, they can be anticipated and considered as additional unbudgeted revenues in view of the fact that the record reflects no plan to expand bilingual education programs beyond the level budgeted. Thus, the line-item restorations made by the Commissioner herein can easily be funded through various sources of revenue available to the District, while still maintaining a sufficient surplus, without resort to additional tax levy.¹

¹ The Commissioner notes that \$932,692 in Desegregation Aid was paid to the District during the 1994-95 school year, granted by the Legislature for the express purpose of tax relief. If 1994-95 levies had been struck, districts were directed to reflect grant monies as deferred revenue in 1994-95 and include the grant as a 1995-96 General Fund revenue. The Board herein failed to follow this directive and did not reflect the monies anywhere in its 1995-96 budget; however, it did adjust the actual tax levy collected by the appropriate amount, so that no additional monies from this source are available for restoration of reductions.

SUMMARY

In summary, the Commissioner directs restoration or sustaining of the Council's line-item reductions to appropriations and increases to revenue in surplus accounts as set forth below. The Commissioner further notes that all restorations to line-item appropriations are restricted in accordance with N.J.A.C. 6:20-2A.11(b)3.

<u>Line Item</u>	<u>Description</u>	<u>Sustained</u>	<u>Restored</u>
10-303	Budgeted Fund Balance	\$ 885,000	\$ -0-
11-XXX-100-101	Instructional Salary	150,000	-0-
11-000-230-109	Administrative Salary	40,000	-0-
11-000-290-109	Other Salary	-0-	45,000
11-000-221-102	Director Salary	75,000	-0-
11-000-260-620	Energy Expense	-0-	150,000
11-000-290-290	Employee Benefits	150,000	-0-
11-000-219-104	Support Services	50,000	-0-
11-000-260-441	Rental of Buildings	68,400	24,000
11-000-230-530	Telephone - Postage	-0-	34,800
11-000-260-420	Repair/Maintenance	-0-	50,000
11-000-260-610	General Supplies	-0-	50,000
12-000-400-710	Site Improvements	35,000	-0-
11-000-213-300	Health Services	<u>30,000</u>	<u>-0-</u>
Total Line-Item Determinations:		\$1,483,400	\$ 353,800

Tax Levy Certified by Governing Body:	\$86,646,045
Restoration of Reductions:	353,800
Amount of Restoration Funded by Surplus:	(353,800)
Total Tax Levy for 1995-96:	\$86,646,045

Accordingly, the tax levy certified to the Middlesex County Board of Taxation by the Edison Township Council for 1995-96 General Fund purposes of the Edison Township Board of Education shall stand in its original amount. In addition, in view of the Board's contentions regarding its extensive facilities needs and the apparent availability of bond proceeds for possible reallocation, subject to voter approval of revised usage and the limitations of law with respect to ordinary maintenance costs, the Board is directed to consider, in consultation with the County Superintendent, the feasibility of conducting the necessary referenda so as to relieve the current

expense budget of costs which might appropriately be funded through an alternative mechanism, so as to ensure fulfillment of the Constitutional mandate without undue burden to the taxpayer.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

DECEMBER 27, 1995

DATE OF MAILING DECEMBER 28, 1995