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C #1-98L
SB #6-98

JOEL DAVION,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
ETHEL WILLIAMS DAVION,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, January 7, 1998

For the Petitioner-Appellant, Joel Davion, pro se

For the Respondent-Respondent, Ethel Williams Davion, pro se

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

May 6, 1998

Date of mailing MAY 08 1998

C #1-98L
SB #6-98

JOEL DAVION,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
ETHEL WILLIAMS DAVION,	:	DECISION ON MOTION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, January 7, 1998

Decided by the State Board of Education, May 6, 1998

For the Petitioner-Appellant, Joel Davion, pro se

For the Respondent-Respondent, Ethel Williams Davion, pro se

The State Board of Education denies the petitioner's request to reconsider its decision of May 6, 1998 in this matter.

August 5, 1998

Date of mailing AUG 07 1998

2-98

EDU # 4176-94
C # 152-95
SB # 70-95
APP. DIV. # A-653-95T5
EDU # 164-97
C # 633-97R
SB # 2-98
APP. DIV. #A-5978-98T2

WHASUN LEE, as parent and guardian of V.L., and ALBERT LEE, individually,

PETITIONERS-APPELLANTS,

V.

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

RESPONDENT-CROSS/APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, May 11, 1995

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

Remanded by the Appellate Division, October 9, 1996

Remanded by the State Board of Education, December 4, 1996

Decided by the Commissioner of Education, December 8, 1997

Decided by the State Board of Education, June 2, 1999

Remanded by the Appellate Division, August 7, 2000

For the Petitioners-Appellants, Kalac, Newman, Lavender & Campbell (Peter P. Kalac, Esq., of Counsel)

For the Respondent-Cross/Appellant, Reusille, Mausner, Carotenuto, Barger & Steel (Martin M. Barger, Esq., of Counsel)

This protracted case began in 1994 when Whasun Lee (hereinafter "petitioner" or "Mrs. Lee") filed a petition of appeal with the Commissioner of Education challenging the

determination of the Board of Education of the Township of Holmdel (hereinafter "Board" or "Holmdel Board") that her children were not entitled to a free public education in the Holmdel district. The Board filed a counterclaim seeking reimbursement for tuition for the period from October 1987 through January 1994.[1]

The petitioner and her family had been domiciled in Holmdel until October 1987, when they moved to Colts Neck. However, they retained their house in Holmdel until 1989, when they sold it and bought a condominium in Holmdel. The petitioner alleged that she had purchased the condominium after she had been told by the superintendent of the Holmdel school district, Dr. Timothy Brennan, that ownership of property in Holmdel was sufficient to allow her children to continue to attend school in that district free of charge. The petitioner's children continued to attend public school in Holmdel, although the family was domiciled in Colts Neck during all times relevant to this case.

The petitioner contended that she was not obligated to pay tuition to the Holmdel district because school officials in Holmdel had been aware of the family's change in domicile in 1987. The petitioner maintained that when school officials were advised of the situation in 1989, they had led her to believe that purchasing a property in Holmdel would be enough to entitle her children to a free public education in that district. She further contended that school officials had not made it clear to her until January 1994 that ownership of the condominium was not alone sufficient to create such an entitlement. At that time, the petitioner and her children took up part-time residency during the week at the condominium.

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[1] During the proceedings in the Office of Administrative Law, the Board increased its request to include tuition through June 1995.

On March 24, 1995, an Administrative Law Judge ("ALJ") concluded that equitable principles precluded the Board from collecting tuition from the petitioner for the period between October 1987 and the date when the petitioner sold her house in Holmdel in 1989.[2] The ALJ, however, concluded that the petitioner was responsible for tuition to Holmdel from the date when she sold her house until December 1993.

On May 11, 1995, the Commissioner adopted in part and modified in part the ALJ's recommendation. The Commissioner observed initially that the petitioner's children had not been entitled to a free public education in Holmdel since their domicile had been in Colts Neck during the entire period relevant to this litigation. However, he concluded that equitable estoppel applied so as to prevent the Holmdel Board from collecting tuition for the period between October 1987 and December 1989, finding that the Board had acquiesced to the situation during that period. The Commissioner concluded that equitable estoppel should not be applied to excuse the petitioner from her obligation to pay tuition to the Holmdel Board after that date, finding that the petitioner had been aware in December 1989 that her children were no longer entitled to attend school in Holmdel free of charge. Consequently, he assessed tuition for the period from January 1990 through June 1995.

On September 6, 1995, we affirmed the Commissioner's decision.

On October 9, 1996, the Appellate Division remanded for further proceedings. The Court found that this agency had not adequately resolved whether the petitioner had understood that owning property in Holmdel did not alone entitle her children to attend school in the district free of charge. The Court explained:

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[2] The record does not specify the exact date of the sale.

> Were the ALJ's conclusion that the Lees were "fully aware [as of December 1989]...they were no longer entitled to attend the schools in Holmdel free of charge" supported by her findings of facts and the record, we could not quarrel therewith or, more importantly, with the Commissioner's and the State Board's acceptance of that conclusion. [Citations omitted.]....
>
> That conclusion, however, is supported by no more than the ALJ's factual finding that on December 12, 1989, after the Lees had sold their first Holmdel property, Dr. Brennan met with Mrs. Lee. According to him, he at that point "clearly articulated...his position that [the Lees] had to use the condominium [in Holmdel] as a residence in some meaningful fashion" and that "it would be 'proof positive' that they were not living there if he were to find out that the property was rented to someone else." [Footnote omitted.]
>
> The difficulty with saddling the Lees with an unclean hands label premised upon this testimony of Dr. Brennan is not our disagreement with the ALJ's acceptance therewith, even though we might question that. Rather, it arises from the ALJ's simultaneous recognition of Mrs. Lee's very different version of that December 12, 1989 meeting.[5]
>
> [5] It is undisputed that there was a decided language barrier between Dr. Brennan and Mrs. Lee, who speaks Korean and does not speak English fluently or even well. Mrs. Lee did bring with her to the meeting a friend, Mrs. Chu, whose native language is Chinese and who does speak English well. Dr. Brennan, however, acknowledged that the conversation between Mrs. Chu and Mrs. Lee during this critical meeting was not understandable to him. Mrs. Lee testified that she understood Dr. Brennan to tell her that she would have to "buy right away to own something....Then you could continue to the – the Holmdel – Holmdel school."

Appellate Division's Decision of October 9, 1996, slip op. at 6-10.

Finding that neither the ALJ, the Commissioner or the State Board had focused on the petitioner's understanding of what Dr. Brennan allegedly had told her at their December 1989 meeting, the Court observed that the petitioner could not have been a "wrongdoer" if she did not comprehend what Brennan allegedly had told her. The Court found that there was some support, beyond the petitioner's own testimony to that effect, "to suggest that lack of understanding, as well as her continued reasonable reliance

upon what she thought Brennan was telling her." Id. at 8. Consequently, the Court concluded that additional factual findings were required concerning the petitioner's understanding of the December 1989 meeting, adding that "If she did not comprehend that what she had previously been led to believe was sufficient, i.e., property ownership and payment of taxes, in fact was not sufficient, she cannot have 'unclean hands.' If she did, then the application of that concept would not be inappropriate." Id. at 10.

The Court therefore remanded this matter to the State Board for additional factual findings and for determination of whether the doctrine of "unclean hands" barred the petitioner from equitably estopping the Board from collecting tuition for the period from January 1990 to January 1994. The Court also remanded for consideration of whether equitable estoppel should preclude Holmdel from collecting tuition for the period from January 1994 to June 1995. The Court affirmed the State Board's determination that equitable estoppel applied so as to preclude Holmdel from collecting tuition for the period between October 1987 and December 1989.

Simply stated, the task on remand was to ascertain whether it would be fair under the circumstances to charge the petitioner tuition for the period after December 1989. On December 4, 1996, we remanded this matter to the Commissioner for such proceedings as might be required to fulfill the terms of the Court's decision.

The Commissioner transmitted the matter to the Office of Administrative Law. On October 21, 1997, following additional hearings on remand, which included the testimony of the petitioner and Julia Chu, the real estate agent who had assisted the petitioner in purchasing and renting out the Holmdel condominium, the ALJ determined that equitable estoppel would not apply so as to prevent the Board from collecting tuition for the period after December 1989. The ALJ explained that:

[The petitioner] finally testified that the first time Dr. Brennan told her she had to own property and be a taxpayer was the fall of 1989 when she sold the first house. I FIND Mrs. Lee's testimony in this regard incredible. Nothing Dr. Brennan ever said to Mrs. Lee could reasonably have caused her to believe that she could send her children to school wherever her children wanted to go. Mrs. Lee's testimony on November 2, 1994 reflected her understanding of Dr. Brennan's reasoning for permitting the boys to return to the district, i.e., the Lee's still owned their house in Holmdel. The fact that she withdrew the boys from respondent's district and enrolled the boys in the Colts Neck school system when she first moved there in 1987, and when the boys clearly did not wish to leave the Holmdel schools, also reflects that she did not believe she could send them wherever she wanted to regardless of where she lived. I FIND that when she sold the first Holmdel house sometime during 1989, at that point she knew that the boys were not entitled to continue to attend the Holmdel schools free of charge. After she sold the first house and for some period of time thereafter, she owned no property in Holmdel and was not a taxpayer in Holmdel. Nevertheless, as I have previously articulated, she did not remove her students from the district and she did not call Dr. Brennan for advice. She waited to see what, if anything, would happen and only when she received a call and a letter from the district in December 1989 advising that the children could no longer attend, did she seek Dr. Brennan's advice and purchase another piece of property in Holmdel. My statement that Mrs. Lee was "fully aware" that her sons were no longer entitled to attend school in Holmdel free of charge had nothing to do with Dr. Brennan's advice at the December 12, 1989 meeting. Mrs. Lee went into that meeting with "unclean hands." Dr. Brennan did tell her at that meeting or perhaps in a telephone conversation before the meeting that she had to purchase something else immediately. I also found as a fact based upon the testimony heard at the November 1994 hearing, however, that Dr. Brennan told her not to rent the condominium because that would be proof positive that she was not living there. Mrs. Lee denies that Dr. Brennan ever said that to her. Mrs. Chu denies having heard Dr. Brennan say that. Mrs. Chu was not a credible witness in this regard either, however. Mrs. Chu repeatedly testified that she could not remember a good portion of the conversation which took place on that day. She acknowledged that conversation took place between Dr. Brennan and Mrs. Lee in her presence, but she claims that she did not hear most of the conversation, and she also testified that, at the time in

> question, she had a hearing problem for which she has since had an operation. Although the Appellate Division has questioned my findings that Dr. Brennan advised Mrs. Chu and Mrs. Lee that the property could not be rented out, citing, inter alia, "the ALJ's recognition of Brennan's admission that Mrs. Lee may well have 'walked away from the conversation thinking that purchase and ownership was enough.'" The words, "may well have," were not Dr. Brennan's words, nor were they mine. Those are the Appellate Division's words, and in my opinion, they are not supported by the record.

Initial Decision on Remand, slip op. at 8-9.

The ALJ added that although "[a]nything is possible; it is not probable...that Mrs. Lee failed to understand Dr. Brennan's warning not to rent the property." Id. at 11. She therefore concluded that:

> Because Dr. Brennan advised Mrs. Lee not to rent out the condominium, and I am convinced she understood that instruction, and because notwithstanding the Lees rented out the condominium almost immediately and continuing until January 1994 when Dr. Le Glise advised them of the requirements of domicile, the equities do not weigh in favor of the Lees.

Id. at 12.

The ALJ continued:

> I have found as a fact Dr. Brennan said to Mrs. Lee, in Mrs. Chu's presence, that she had to use the condominium in some meaningful way and that it would be proof positive that she was not so using it if she rented it out. Mrs. Lee's English language difficulty manifested itself throughout the hearing with a heavy accent which makes it difficult for others to understand her. I saw little evidence that she had difficulty understanding others when they spoke to her in English. If Mrs. Chu had testified that she explained to Mrs. Lee at or after the meeting that she should not rent out the condo, that would also have been relevant evidence of Mrs. Lee's knowledge. Of course, Mrs. Chu did not so testify, but the...testimony she did give on that issue when I asked her the question directly was so evasive and unresponsive as to permit the conclusion that she did have such a conversation

> with Mrs. Lee wherein she advised Mrs. Lee that she should not rent the condo.

Id. at 14.

In sum, the ALJ found that it would be unfair under the circumstances to preclude the Board from collecting tuition from the petitioner for the period after December 1989. She therefore recommended that the petitioner be directed to pay tuition to the Holmdel Board for the period from January 1990 through June 1995.

On December 8, 1997, the Commissioner adopted in part and rejected in part the ALJ's recommendation. The Commissioner agreed that the petitioner had failed to meet her burden of showing that equitable principles should bar the Board from recovering tuition after January 1994. However, the Commissioner was "unwilling to ascribe bad faith, wrongdoing or fraudulent conduct to Mrs. Lee, in that such a label would presuppose that Mrs. Lee knew what the correct course of action would be." Commissioner's Decision on Remand, slip op. at 28. The Commissioner found that Dr. Brennan did not "possess an accurate understanding of the relevant law," id. at 25, and "did not appreciate the distinction between a residence and a domicile." Id. at 27. The Commissioner therefore directed the petitioner to reimburse the Holmdel Board for tuition only for the period from January 1994 through June 1995.

On June 2, 1999, we affirmed with clarification the Commissioner's decision on remand, concluding that the record did not permit a finding that the petitioner had understood prior to January 1994 that owning property in Holmdel did not alone entitle her children to attend school in the district free of charge. Under the circumstances, we were unable to conclude that the doctrine of "unclean hands" barred petitioner from applying equitable estoppel for the period from January 1990 to January 1994. We therefore affirmed the decision of the Commissioner directing the petitioner to reimburse

the Holmdel Board for tuition only for the period from January 1994 through June 1995. In so doing, we found that:

> The events pivotal to this issue occurred in December 1989 at a meeting between Dr. Brennan and petitioner, which was also attended by Julia Chu. Dr. Brennan testified during the initial hearing in this matter that he had misunderstood the requirements of domicile, believing that ownership of property in the district while "spending time there and living there in some sense," tr. 11/4/94, at 44, was sufficient. In essence, Dr. Brennan lowered the standard for "domicile." Indeed, he acknowledged the possibility that petitioner could have left their meeting with the understanding that owning a home and paying taxes in Holmdel would be sufficient to entitle her children to attend school in that district. Id. at 71-72.
>
> Dr. Brennan, however, also testified that he had advised petitioner that she could not rent out the Holmdel property. Petitioner denied any awareness of such an instruction. The ALJ found in favor of the Board on the basis of the testimony of Chu, who had accompanied petitioner to the meeting with Dr. Brennan and had assisted petitioner in purchasing a condominium in Holmdel and renting it out. Although the ALJ found that Chu's testimony was so evasive as to "permit the conclusion that she did have a conversation with Mrs. Lee wherein she advised Mrs. Lee that she should not rent the condo," initial decision on remand, slip op. at 14, we find, upon further review, that the evidence in support of the ALJ's conclusion is simply too tenuous to permit such a finding. Although we agree with the ALJ that Chu appears to have been evasive in responding to questioning, in the absence of other evidence supporting the conclusion that petitioner had, in fact, understood that she could not rent out the Holmdel condominium, we are unwilling to ascribe such understanding to her.

State Board's Decision on Remand, slip op. at 6-7 (footnote omitted).

On August 7, 2000, the Appellate Division affirmed that portion of the State Board's decision which determined that the petitioner was responsible for tuition for the period from January 1994 through June 1995. However, the Court reversed the State Board's determination that the petitioner was not responsible for tuition for the period

from January 1990 through January 1994 and remanded for further proceedings. The Court indicated that:

> the State Board did not explain why it rejected the ALJ's acceptance of Dr. Brennan's testimony relating to the condominium rental. Instead, the Board, in essence, concluded that it could not accept Dr. Brennan's testimony concerning Mrs. Lee's understanding that she could not rent the condominium, without some corroborating evidence. Given the ALJ's strong credibility determinations, we question whether that conclusion was supported by sufficient credible evidence.

Appellate Division's Decision of August 7, 2000, slip op. at 13.

The Court stressed that:

> the Board must recognize and give due weight to the ALJ's unique position and ability to make demeanor based judgments. Because of the manner in which the State Board chose to "clarify" the Commissioner's decision, we cannot conclude that the Board gave either adequate weight to the ALJ's credibility findings, or fully explained why the ALJ's credibility findings were unacceptable.

Id. at 14.

The Court remanded so that the State Board could "reconsider its decision in light of its obligation to give due deference to the ALJ's credibility determinations." Id. at 13.

By letter dated October 3, 2000, the Director of the State Board Appeals Office notified the parties that the Legal Committee had determined to provide them with the opportunity to submit briefs on this issue. Both parties filed timely briefs. In her brief, the petitioner contends that the State Board can give proper deference to the ALJ's credibility determinations and still find that equitable estoppel applies to the period from January 1990 through January 1994. The Board urges adoption of the ALJ's conclusions.

We have reviewed the supplemental briefs and carefully re-examined the record in light of the Appellate Division's directive. We are aware of our obligation to accord due consideration to the fact that the Administrative Law Judge had the opportunity to observe these witnesses. See Quinlan v. Board of Education of North Bergen Township 73 N.J. Super. 42, 50-54 (App. Div. 1962). However, we are not bound by the ALJ's assessments of the substance of the testimony or her evaluation of the factors bearing upon credibility. E.g., In the Matter of the Tenure Hearing of Barry Deetz, decided by the State Board of Education, November 7, 1984, aff'd, Docket #A-1264-84T5 (App. Div. 1985), certif. denied, 101 N.J. 321 (1986). Our responsibility as the ultimate administrative fact-finder and decision-maker in matters arising under the education laws, Matter of Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), certif. denied, 121 N.J. 615 (1990); Dore v. Board of Educ., 185 N.J. Super. 447, 452 (App. Div. 1982), is to weigh the evidence and to make an independent finding of fact on the record presented, giving due regard to the opportunity of the ALJ to observe the witnesses and evaluate their credibility. In the Matter of the Tenure Hearing of Patrick Caporaso, Docket #A-2498-87T7 (App. Div. 1988), citing In re Masiello, 25 N.J. 590 (1958).

For the reasons that follow, evaluation of the testimony leads us to set aside the credibility determinations of the ALJ. Upon review of the record, we conclude, as we did in our previous decision, that the Board has not established that the petitioner understood prior to her meeting with Dr. LeGlise in January 1994 that owning property in Holmdel did not alone entitle her children to attend school in the district free of

charge. Consequently, we conclude once again that the petitioner is not responsible for tuition for the period from January 1990 to January 1994.[3]

Again, the limited issue before us is whether the petitioner understood after her December 1989 meeting with Dr. Brennan that owning property in Holmdel did not alone entitle her children to attend school in the district free of charge. Hence, our task on this remand remains the same as in the last remand.

Resolving that issue is complicated by the fact that the petitioner is Korean and, as even the ALJ observed, has an "English language difficulty [which] manifested itself throughout the hearing with a heavy accent which makes it difficult for others to understand her." Initial Decision on Remand, slip op. at 14. Although the ALJ indicated that she had seen little evidence that the petitioner had difficulty understanding others when they spoke to her in English, id., she acknowledged during the hearing on remand that "there were a number of places in the transcripts [from the 1994 hearing] where either [the petitioner] didn't understand [her counsel's] question and...it had to be rephrased or repeated, or mine and it had to be rephrased or repeated." Tr. 4/28/97, at 44-45. Consequently, the ALJ granted the petitioner's counsel's request to allow an interpreter to be used for the petitioner's testimony during the proceedings on remand.

During those proceedings, Julia Chu, the real estate agent who accompanied the petitioner to the December 1989 meeting with Dr. Brennan, testified that she spoke Chinese and did not speak Korean. Id. at 16. Consequently, her conversations with the petitioner were always in English, and they often had difficulty understanding each other. Id. at 16-17, 21-22. As a result, they had to repeat statements and sometimes

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[3] We reiterate that the instant remand was limited by the Appellate Division to the period between January 1990 and January 1994.

used gestures and body language in order to be understood. Id. at 22. The petitioner also testified that she and Mrs. Chu conversed only in English. Tr. 11/4/94, at 124. Mrs. Chu did not recall Dr. Brennan using the phrase "proof positive" during their December 1989 meeting and, from her testimony at the hearing, it was apparent that she did not understand the meaning of that phrase. Tr. 4/28/97, at 23.

Furthermore, although Dr. Brennan testified that he was "absolutely sure – as sure as I can be" that the petitioner understood that it would be "proof positive" that her family was not living in Holmdel if they rented out the property, tr. 11/4/94, at 22, he also indicated that he had difficulty communicating with the petitioner, stating in a deposition that he had trouble understanding her 75% of the time. Id. at 20, 57. Brennan was also of the impression that the petitioner and Mrs. Chu were not always speaking to each other in English. The explanation for this impression might be that, as observed by the ALJ, "Mrs. Lee's accent is so heavy that when she speaks quickly it can sound like a foreign language." Initial Decision, slip op. at 8. The record reveals that both the ALJ and the counsel for the Board occasionally misunderstood the petitioner during the hearing. See, e.g., Tr. 11/4/94, at 124-28; Tr. 11/2/94, at 37, 90.

We find no basis for accepting as fact, on the basis of Dr. Brennan's belief, that the petitioner understood that she could not rent out the Holmdel condominium. In addition, our exhaustive review of the record casts doubts on the credibility of Brennan. Dennis Bye, the Director of Guidance in the Holmdel district, testified that it was common knowledge among the faculty that the Lees were not living in Holmdel and that he had informed Dr. Brennan on at least two separate occasions at administrative meetings that they were residing in Colts Neck. Tr. 11/3/94, at 25-32. He added that he was "surprised" that Dr. Brennan "didn't react more, you know, want to ferret out more

information." Id. at 30. Bye expected that Brennan would be more "vigilant perhaps about the way he reacted in terms of this is not right; we should do something about it. It was more a calm kind of response." Id. at 32.

Dr. Richard White, a high school principal in the district, confirmed that Dennis Bye had brought the issue to Dr. Brennan's attention at administrative meetings. He indicated that "Dr. Brennan's reply to that usually was well, that's a special case, or something. It was just put aside." Id. at 44. White testified that it was "a running joke with us because [Dr. Brennan] had just gotten through explaining residency and that sort of thing, yet here was a case that was obviously in contradiction to what he was saying." Id. He added that:

> So, frequently, you know, glances would be exchanged around the table, that sort of thing. Let me put it this way: If it had been anybody other than Dennis Bye asking questions, because Dennis Bye had a reputation among us as a very sincere kind of guy, if any one of the rest of us had asked that question, we would have know very well among each other that that person was doing nothing but baiting the superintendent on this one.
>
> Dennis Bye was particularly concerned about this because his office was usually the one that made initial contact with new students. As they came in, they went and got registered and got assigned a counselor, that sort of thing. So, I think Bye brought this up very sincerely. He wanted to make sure that he — that his office came under no criticism for having missed a step at this kind of thing.

Id. at 44-45.

Dr. White recalled that Dr. Brennan had called him in 1987 or 1988 to inform him that the petitioner's children were returning to the district from Colts Neck and that Brennan had instructed him to re-register the petitioner's son with "no questions asked." Id. at 41. He indicated that Dr. Brennan had expressed pride in the fact that the petitioner's children wanted to return to the district. Id. at 42.

In contrast to the testimony of Dr. White, Dr. Brennan could not recall ever referring to the Lees as a special case, adding that he had never even thought of them that way. Tr. 11/4/94, at 30. Nor did he recall Dennis Bye ever telling him that the Lees were not living in Holmdel. Id. at 34-35. In addition, he had no recollection of speaking with Dr. White about re-registering the petitioner's children when they returned to the Holmdel district. Id. at 35-38. While testifying during these proceedings, Brennan avowed that he was just "beginning to think" that the petitioner had attempted to deceive him. Id. at 46-47.

Dr. Susan LeGlise, who began her employment as superintendent in Holmdel in July 1993, testified that Bye, White and another administrator had told her in October or November 1993 about the situation involving the Lees. Tr. 11/2/94, at 19. She subsequently called Dr. Brennan to find out whether there was "some arrangement" with the Lees so as to allow their children to attend school in Holmdel despite the fact that they were living in Colts Neck. Dr. Brennan assured her that there was "absolutely not" an arrangement. However, Dr. LeGlise asserted that, after reading a transcript of Brennan's deposition in this matter, she was convinced that he had not been truthful with her, stating that "there was definitely a difference in what was said to me and what I read in the transcript." Id. at 22.

Dr. LeGlise also disputed a number of Dr. Brennan's contentions regarding their phone conversation. LeGlise testified that, contrary to Brennan's testimony during his deposition in September 1994, he had not explained the law of domicile to her during that conversation, had not told her that there were several families with children attending school in the district who also had residences in other towns, and had not

asked her if she considered it "a big deal" that the Lees were not living in Holmdel. Id. at 22-25.

In addition, Dr. LeGlise indicated that during her meeting with the petitioner in January 1994, she had made it quite clear that the petitioner had to be legally domiciled in Holmdel in order for her children to receive a free public education in the district. LeGlise stated that she had "explained that at least three or four times in different ways, but using the terms legally domiciled and then explaining them." Id. at 25-26. The petitioner acknowledged that Dr. LeGlise had told her that she had to move into the condominium, and that she and her sons had started sleeping there during the week shortly thereafter. Id. at 55-56, 65-66.

We find particularly troubling the inconsistencies between Dr. Brennan's testimony and the testimony of Dr. White, Dr. LeGlise and Dennis Bye, as well as Dr. Brennan's apparent inability to recall pivotal events surrounding the petitioner and her children. We emphasize in that regard that White corroborated Bye's assertion that he had told Brennan on several occasions that the Lees were not living in Holmdel. Our concerns are compounded by LeGlise's assertion that she was convinced that Brennan had not been truthful with her when he told her that he did not have a special arrangement with the Lees.

Other evidence in the record further reinforces our conclusion. Although the petitioner did not in any way conceal the fact that she was living in Colts Neck, Dr. Brennan testified that he was not aware at any time during his superintendency, which lasted until January 1993, that the petitioner and her family were not domiciled in Holmdel. Tr. 11/4/94, at 49-50. We observe in that respect that, although Dr. Brennan insisted that he had told the petitioner in 1989 that she could not rent out the

condominium, he acknowledged that he did not make any effort thereafter to assure that she had not done so. Id. at 95. In that regard, Dr. Brennan conceded that, although he was in charge of administering the district's residency and domicile policy, had received several anonymous phone calls telling him that the Lees were living in Colts Neck, and had been informed by several administrators and a member of the Holmdel Board that the Lees were not domiciled in Holmdel, he had never checked the student files of the petitioner's children, which at all relevant times showed both an address and phone number in Colts Neck. Id. at 47-48. Nor, despite the information he was receiving, did he ever send out an investigator to verify that the Lees were living in Holmdel. Id. at 57. He indicated that the first time he learned that the Lees were domiciled in Colts Neck was when he received the phone call from Dr. LeGlise in 1993. Id. at 49-50. Brennan's explanation was that his "procedures did not handle this situation effectively." Id. at 50. At the same time, he was advising his administrators to be on the lookout for "angle-shooters," i.e., families sending their children to school in Holmdel even though they were domiciled elsewhere. Id. at 18-19.

The testimony of Bye, White and LeGlise, along with Dr. Brennan's acknowledged inaction regarding the Lees in the face of notification from administrators and a Board member that they were not living in the district, casts a shadow of such magnitude over Brennan's testimony that we cannot credit it. Our concerns are further heightened by the fact that the petitioner stopped renting out the condominium and started making use of it after Dr. LeGlise clearly explained to her in January 1994 that she had to live in Holmdel in order for her sons to attend school in the district. Tr. 11/3/94, at 58; Tr. 11/2/94, at 55. See infra, at 19-20. Moreover, the record reveals that Dr. Brennan permitted the petitioner's children to attend school in Holmdel after his

December 12, 1989 meeting with the petitioner on the basis of an agreement to purchase the condominium even though she did not yet own the property and settlement would not be for several months.[4]

Ordinarily, Dr. Brennan's conduct would preclude the Board from collecting tuition from the petitioner during that period. However, if the petitioner was told and if she understood that she could not rent out the Holmdel condominium, then, notwithstanding Dr. Brennan's apparent acquiescence to the situation, the petitioner would have "unclean hands" and the Board would be able to collect tuition from her.

The doctrine of "unclean hands" is an equitable defense which "embraces the principle that a court should not grant equitable relief to a party who is a wrongdoer with respect to the subject matter of the suit." Pellitteri v. Pellitteri, 266 N.J. Super. 56 (App. Div. 1993), citing Faustin v. Lewis, 85 N.J. 507 (1981). The burden of establishing "unclean hands" rests upon the complaining party. Piper v. Piper, 13 N.J. Misc. 68 (Ch. 1934).

As the Appellate Division pointed out in its decision of October 9, 1996:

> Mrs. Lee could not have been a "wrongdoer" if she did not comprehend what Brennan says he told her in December 1989. And there is some support, beyond her own testimony to that effect, to suggest that lack of understanding, as well as her continued reasonable reliance upon what she thought Brennan was telling her. For one thing, it is undisputed that on the day of this conversation, she immediately and without the usual cautionary measures a buyer would take, purchased a condominium in Holmdel and presented the contract to Mr. Brennan a few days later. He accepted it as sufficient to continue the children in the school district, despite the fact that the closing was some months in the future. Moreover, subsequently in January 1994 when the new Superintendent, Susan Le Glise, finally made clear to

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[4] The record indicates that the Lees made settlement on the condominium on February 28, 1990, 2½ months after the petitioner's meeting with Dr. Brennan. Tr. 11/4/94, at 100.

> Mrs. Lee that simply owning property and paying property taxes was not enough,[6] she and her sons immediately commenced their residency of the Holmdel property. There is no reason to think that had Mrs. Lee been so clearly told in December 1989, she would not have done the same then.
>
> [6] In response to whether she discussed what was required during that meeting, Ms. Le Glise said:
>
> > Yes. I discussed it and kept going back to it a number of times during that. Because that was the point I wanted to make, that they had to be legally domiciled in Holmdel in order to attend the schools with a free and public education. So I kept going back to that. I would define it, explain it, explain what it meant to the taxpayers, not – you know, to have people from Holmdel attending the schools, the fact of overcrowding in our schools and what the State law said in that area. And I explained that at least three or four times in different ways, but using the terms legally domiciled and then explaining them.
>
> Implicit in her efforts to explain to Mrs. Lee the concept of domicile "at least three or four times," is, one might infer, a recognition that that concept was not, theretofore, understood.

Appellate Division's Decision of October 9, 1996, slip op. at 8-9.

The Court added that if the petitioner had left the meeting with Dr. Brennan believing that owning a property and paying property taxes in Holmdel was sufficient to allow her children to attend school in the district, then "we are hardpressed to agree that the concept of 'unclean hands' could fairly be applied to prevent the application of equitable estoppel beyond December 1989....If she did not comprehend that what she had previously been led to believe was sufficient, i.e., property ownership and payment of taxes, in fact was not sufficient, she cannot have 'unclean hands.'" Id. at 9-10.

As previously stated, we are not bound by the ALJ's assessment of the substance of the testimony or her evaluation of the factors bearing upon credibility. Dr. Brennan's conduct during the relevant period, when considered in conjunction with the testimony of Dr. LeGlise, Dr. White and Dennis Bye, casts significant doubts on his credibility. This, in turn, casts doubts on the veracity of his testimony that he had told

the petitioner that she could not rent out the Holmdel condominium. It also calls into question the accuracy of his testimony that he was "absolutely sure" that the petitioner understood that instruction. In this regard, we observe that Dr. Brennan did not at any point during his testimony articulate the basis for his belief that the petitioner understood that she could not rent out the property, indicating only that there was "absolutely no doubt in my mind that Mrs. Chu understood that" since "she seemed to have a – a great knowledge of real estate," tr. 11/4/94, at 95, and that there was "[j]ust something about the exchange in the office that day." Id. Brennan added, however, that the petitioner and Mrs. Chu "were speaking I think at – at times in the language other than English." Id.

We stress that the only direct evidence that Dr. Brennan told the petitioner that she could not rent out the Holmdel condominium came from Brennan himself. In addition, although Dr. Brennan testified that he was certain that the petitioner understood such instruction, he also acknowledged that he had difficulty communicating with her, id. at 20, had trouble understanding her 75% of the time, id. at 57, and didn't always understand the exchanges between the petitioner and Mrs. Chu during his December 1989 meeting with them, believing that they were not always conversing in English. Id. at 72, 95. Moreover, it is undisputed, as we pointed out in our decision of June 2, 1999, that Brennan had, in essence, lowered the standard for "domicile" for the petitioner and had permitted her sons to attend school in Holmdel even while the district's records reflected an address and phone number in Colts Neck.

Under the circumstances detailed herein, we find that exclusive reliance on Dr. Brennan's contention that the petitioner understood that she could not rent out the condominium would be untenable. We stress again in that regard that Brennan

acknowledged that it was "conceivable" that the petitioner had left their meeting with the understanding that owning property in Holmdel and being a taxpayer was sufficient to entitle her children to a free public education in the district. Given these circumstances, we are unwilling to ascribe to petitioner the understanding that she could not rent out the property.

Thus, even giving due weight to the ALJ's unique position to make demeanor-based judgments, we are unable to conclude on this record that the doctrine of "unclean hands" could fairly be applied so as to prevent the application of equitable estoppel for the period between January 1990 and January 1994. We therefore once again concur with the Commissioner's determination in his decision on remand of December 8, 1997 that the Board is precluded on equitable grounds from collecting tuition from the petitioner for that period.

Edward Taylor abstained.

July 2, 2002

Date of mailing JUL 05 2002

10-98

10-98

W.F., on behalf of minor child, L.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

JANUARY 14, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11675-96
Agency Dkt. No. 473-10/96

W.F. ON BEHALF OF MINOR L.K.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY
Respondent.

Walter J. Tencza, Esq., for petitioner

Anthony V. D'Elia, Esq., for respondent
(Cooper, Rose & English, attorneys)

Record Closed: November 17, 1997 Decided: December 3, 1997

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

STATEMENT OF CASE

This case was transmitted to the Office of Administrative Law (OAL) on December 23, 1996 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

The parties entered into an agreement and have prepared a stipulation of settlement which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to a settlement of this matter.

2. The agreement fully disposes of all issues in controversy and is consistent with the law.

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 3, 1997
DATE

Mumtaz Bari Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

12/5/97
DATE

DAP
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 8 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

NOV 17 2 29 PM '97

WALTER J. TENCZA, ESQ.
40 PASSAIC AVENUE
P. O. BOX 358
PASSAIC, NEW JERSEY 07055
(201) 779-0450
Attorney for Petitioner,
Walentyna Filatow

WALENTYNA FILATOW, Petitioner, - vs - BOARD OF EDUCATION OF THE CITY OF CLIFTON, Respondent.	) BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY) STATE OF NEW JERSEY OAL DOCKET NO.: EDUOS 11675-96N) AGENCY DOCKET NO. 473-10/96) STIPULATION OF SETTLEMENT

THIS MATTER having come on to be heard before the Honorable Mumtaz Bari-Brown on October 27, 1997 and having been carried to a future date on the basis that same might be resolved between the parties, and the parties having resolved same as follows, to wit: Respondent, Board of Education of the City of Clifton, Passaic County, having reconsidered its position and determined to allow the Appellant's granddaughter, Lucyna Kedziera to continue as a student in Clifton High School, and having waived any objection to her doing so and the necessity of this matter going forward to trial being thereby obviated, and the parties having consented to the mutual dismissal of this matter;

IT IS on this day of , 1997;

ORDERED that this matter be and the same is hereby dismissed.

MUMTAX BARI-BROWN, J.O.A.L.

We consent to the ~~form and~~ entry of the ~~within~~ Order:

Walter J. Tencza
Attorney for Petitioner

11-4-97

Anthony V. C'Elia
Attorney for Respondent

OAL DKT. NO. EDU 11675-96
AGENCY DKT. NO. 473-10/96

W.F., on behalf of minor child, L.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

JANUARY 14, 1998
DATE OF MAILING JANUARY 14, 1998

11-98

11-98

IN THE MATTER OF THE TENURE	:	
HEARING OF IRENE JACKSON,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF OLD BRIDGE, MIDDLESEX COUNTY.	:	DECISION
	:	

JANUARY 14, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6532-97

AGENCY DKT. NO. 253-7/97

IN THE MATTER OF THE TENURE HEARING OF IRENE JACKSON, BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY

Francis X. Journick, Jr., Esq., for the petitioner, Township of Old Bridge (Wilentz, Goldman & Spitzer, attorneys)

Gail Oxfeld-Kanef, Esq., for respondent, Irene Jackson (Balk, Oxfeld, Mandell and Cohen, attorneys)

Record Closed: December 17, 1997 Decided: December 18, 1997

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

This matter concerns the tenure charges filed by the Board of Education of the Township of Old Bridge, Middlesex County against the respondent, Irene Jackson, for insubordination and inability/failure to perform her job duties. The petitioner requested a hearing and the matter was transmitted to the Office of Administrative Law on August 6, 1997, pursuant to N.J.S.A. 52:14F-1 to -15 and N.J.S.A. 52:14B-1 to -13.

A telephone conference took place on November 20, 1997. During that conference, I was informed by both parties that they were discussing a settlement. The attached stipulation sets forth the terms of the settlement, and is incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

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

December 18, 1997
DATE

BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

Dec. 19, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 23 1997
DATE

OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

None

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
90 Woodbridge Center Drive
P.O. Box 10
Woodbridge, New Jersey 07095-0958
(908) 636-8000
Attorneys for Petitioner
Old Bridge Board of Education

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET NO. EDU-06532-97S
AGENCY REF. NO. 253-7/97

BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY, Petitioner, v. IRENE JACKSON, Respondent.	On Referral from the Commissioner of Education **STIPULATION OF SETTLEMENT**

WHEREAS, petitioner, Board of Education of the Township of Old Bridge (the "Board"), filed a Statement of Tenure Charges and Statement of Evidence Under Oath (the "Tenure Charges") with the Commissioner of Education seeking, among other relief, the termination of the Board's employment of respondent, Irene Jackson; and

WHEREAS, respondent timely filed an answer to the Tenure Charges denying the allegations contained therein and

disputing the Board's entitlement to the termination of respondent's employment or other relief; and

WHEREAS, the Board and respondent have conferred with respect to this matter and have mutually agreed upon certain terms by which this matter may be settled, such terms being set forth in this Stipulation of Settlement; and

WHEREAS, the settlement of this matter and the dismissal of the Tenure Charges is in the public interest and consistent with the policies of the Commissioner of Education because the Board will save the expense of prosecuting the Tenure Charges, and since respondent is a non-certificated employee who is retiring from her employment and the Commissioner need not consider whether any additional remedies, such as the revocation of any certificate issued by the Commissioner, the settlement and dismissal of this matter is appropriate;

IT IS hereby stipulated and agreed by and between the Board and respondent as follows:

1. Respondent shall and hereby does resign from the employ of the Board effective as of June 30, 1997. In consideration of respondent's retirement, the Board shall pay respondent her salary through June 30, 1997, plus two additional month's of salary, plus the value of four (4) vacation days.

2. Respondent hereby waives all rights to continued employment or reemployment by the Board, including but not

limited to any and all rights based on tenure and/or seniority and any and all rights to be recalled to employment by the Board or appear on any recall or other list of employees eligible for employment or reemployment by the Board. Respondent also hereby waives and releases any and all claims, whether known or unknown, against the Board which arise out of or relate to her employment by the Board, including but not limited to claims for unpaid salary or other employment benefits. Similarly, the Board hereby waives and releases any and all claims, whether known or unknown, against respondent which arise out of or relate to her employment by the Board.

3. This Stipulation of Settlement is subject to and contingent upon approval by the Board, such approval to be in the form of a resolution adopted by the Board. This Stipulation of Settlement is also subject to and conditioned upon approval by the Commissioner of Education.

4. Nothing in this Stipulation of Settlement shall constitute an admission of law or fact by either the Board or respondent.

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
Attorneys for Petitioner
Old Bridge Board of Education

By: _____
FRANCIS X. JOURNICK, JR.
DATED: November 20, 1997

BALK, OXFELD, MANDELL & COHEN
Attorneys for Respondent
Irene Jackson

By: _____
GAIL OXFELD-KANEF
DATED: November , 1997

OAL DKT. NO. EDU 6532-97
AGENCY DKT. NO. 253-7/97

IN THE MATTER OF THE TENURE	:	
HEARING OF IRENE JACKSON,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF OLD BRIDGE, MIDDLESEX COUNTY.	:	DECISION
	:	

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

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

COMMISSIONER OF EDUCATION

JANUARY 14, 1998
DATE OF MAILING JANUARY 14, 1998

(SB) 11-98

SB #11-98

GUTTENBERG EDUCATION ASSOCIATION AND ZENAIDA FRANQUI,	:	
APPELLANTS,	:	
V.	:	
LEO F. KLAGHOLZ, COMMISSIONER OF EDUCATION,	:	STATE BOARD OF EDUCATION
RESPONDENT,	:	DECISION
AND	:	
BOARD OF EDUCATION OF THE BOROUGH OF GUTTENBERG, HUDSON COUNTY,	:	
RESPONDENT.	:	

Equivalency granted by the Commissioner of Education, January 9, 1998

For the Appellants, Zazzali, Zazzali, Fagella & Nowak (Richard A. Friedman, Esq., of Counsel)

For the Respondent Leo F. Klagholz, Commissioner of Education, Nancy Kaplen, Assistant Attorney General (Terri A. Cutrera, Deputy Attorney General, on the brief) (Peter Verniero, Attorney General of New Jersey)

For the Respondent Board of Education of the Borough of Guttenberg, Giblin & Giblin (John L. Schettino, Esq., of Counsel)

This is an appeal from an equivalency granted to the Board of Education of the Borough of Guttenberg (hereinafter "Board" or "Guttenberg Board") by the Commissioner of Education pursuant to N.J.A.C. 6:3A-1.1 et seq. By adopting these regulations, which became effective on July 3, 1995, the State Board of Education

MARCH 3, 1999

delegated to the Commissioner the authority to approve on a case-by-case basis applications made by district boards for waivers or equivalencies with respect to the other administrative rules adopted by the State Board pursuant to the Administrative Procedures Act.[1]

In this instance, the Commissioner approved the Guttenberg Board's application for an equivalency. The Commissioner's approval letter indicated that the grant was for an equivalency of N.J.A.C. 6:29-3.3(c) to "[p]ermit persons with a county substitute certificate and subject matter expertise to provide world language instruction."[2] The Board's application represented that it had approved Berlitz International, Inc. as its "World Language teacher" and that it was seeking an equivalency "because the Berlitz teacher/program is not certified...." The application further stated that the Board was

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[1] An equivalency is defined in the regulations as "the granting of approval to achieve the intent of a specific rule through an alternate means that is different from, yet judged to be comparable to or as effective as, those prescribed within the rule." N.J.A.C. 6:3A-1.2.

In contrast, a waiver is defined as "the granting of approval to avoid compliance, either with the specific procedures or the substantive requirements of a specific rule for reasons that are judged educationally, organizationally, and fiscally sound." Id.

[2] N.J.A.C. 6:29-3.3, "Athletics personnel," provides:

(a) Any person not certified as a teacher and not in the employ of a district board of education shall not be permitted to organize public school pupils during school time or during any recess in the school day for purposes of instruction, or coaching or for conducting games, events or contests in physical education or athletics.

(b) School districts shall be permitted to employ any holder of a New Jersey teaching certificate to work in the interscholastic athletic program provided that the position has been advertised.

(c) In the event there is no qualified and certified applicant, the holder of a county substitute certificate is authorized to serve as an athletic coach in the district in which he or she is employed for a designated sports season, provided that:

1. The district chief school administrator demonstrates to the county superintendent that:

i. The vacant coaching position had been advertised; and

ii. There was no qualified applicant based on the written standards of the district board of education;

2. The district chief school administrator will provide a letter to the county superintendent attesting to the prospective employee's knowledge and experience in the sport in which he or she will coach; and

3. Approval of the county superintendent shall be obtained prior to such employment by the district board of education. The 20-day limitation noted in N.J.A.C. 6:11-4.4(i) shall not apply to such coaching situations.

seeking an equivalency "of the requirement that currently exists which permits substitutes (certified) to replace academic classroom teachers."

The Commissioner granted the equivalency on January 9, 1998 for a period of three years and indicated that the Guttenberg Board could submit a request for continuation of the equivalency at the end of that period.

A notice of appeal challenging the equivalency was filed with the State Board on February 4, 1998. Appellants are the Guttenberg Education Association and an individual resident and taxpayer from Guttenberg. Appellants challenged the legality of the Guttenberg Board's proposal to assign individuals possessing only county substitute certificates to deliver world language instruction and to subcontract with Berlitz to engage the services of such individuals.[3]

On August 14, 1998, counsel for the appellants submitted a proposed settlement to the State Board.[4] The proposed settlement stated that the equivalency granted by the Commissioner was moot because the Guttenberg Board "presently is not employing any person with a county substitute certificate to teach any foreign or world languages courses as allowed by the Commissioner's grant of the appealed from equivalency." The proposed settlement indicated that litigation would be premature and preserved the

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[3] We note that the question of whether the Board could properly subcontract with a private vendor to provide instructional services was raised by this appeal only to the extent that the Board's application for an equivalency indicated that the individuals to be provided to the district by Berlitz would not possess standard instructional certification. We further note that the specific issue of the legality of providing foreign language instruction by subcontracting with a private vendor for instructional services was directly challenged by a petition of appeal which appellants had filed with the Commissioner of Education on November 13, 1997. Appellants indicate in their brief that this petition is still pending.

[4] The settlement agreement had been executed by Berlitz International, Inc. and a Deputy Attorney General representing Commissioner Klagholz, as well as by the appellants and the Guttenberg Board.

appellant's right to reinstate the appeal in the event the Guttenberg Board determined to "use the equivalency."

Inasmuch as the Commissioner had granted the equivalency for a three-year period and had indicated that it could be continued beyond that period, and given our understanding that certification requirements would not be waived by the Commissioner under the equivalency and waiver process adopted by the State Board, N.J.A.C. 6:3A-1.1 et seq., our Legal Committee found that it could not recommend the settlement for approval by the State Board without resolving whether the equivalency at issue authorized the Board to set aside certification requirements that would otherwise apply. Accordingly, the Committee requested the parties to brief this question.

Counsel for the Guttenberg Board advised us by letter dated November 17, 1998 that the Board was not filing a brief on this question because "this matter is no longer an issue in the Guttenberg School District." Both the counsel for appellants and a Deputy Attorney General representing Commissioner Klagholz filed briefs on the issue.

We have reviewed the arguments of counsel. We have carefully considered those arguments in the context of the framework established by the education statutes which assure the provision of an adequate education to New Jersey's children by both the State and local systems. On this basis, we have concluded that the responsibility of the State Board of Education for the general supervision of public education, N.J.S.A. 18A:4-10, and for the enforcement of the education laws of this state, N.J.S.A. 18A:4-15, preclude us from permitting the Commissioner to exercise the authority we have delegated to him by the adoption of N.J.A.C. 6:3A-1.1 et seq. to set aside certification requirements that would otherwise apply. In that the equivalency granted

by the Commissioner in this case would have such an effect, we conclude that it is invalid.

The Commissioner in this instance indicated that he was granting the Board an equivalency to N.J.A.C. 6:29-3.3(c). That regulatory provision authorizes the holder of a county substitute certificate to serve as an athletic coach in the district in which he or she is employed when there is no "qualified and certified" applicant. As clarified by the Deputy Attorney General, "the Commissioner intended [by issuing this equivalency] to extend the service period of persons with county substitute certificates and foreign language expertise to encompass an entire school year." Commissioner's Brief, at 5. Thus, she argues, the Commissioner did not set aside certification requirements in this case. The Deputy Attorney General further argues that the grant was justified because it was "not granted to any particular individual, but rather was granted to meet the school district's need to develop a world language program." Id. at 6.

The Deputy Attorney General's characterization misconstrues the equivalency. This equivalency expressly authorizes the district to engage an individual possessing only a county substitute certificate to provide instructional services beyond the twenty days permitted by N.J.A.C. 6:11-4.5(c). In point of fact, it was for this purpose that the district sought the equivalency. Since a county substitute certificate is not a teaching certificate and does not constitute appropriate certification issued by the State Board of Examiners pursuant to N.J.S.A. 18A:6-38, the equivalency granted by the Commissioner operates to set aside the certification requirements for service as a foreign language teacher specified by N.J.A.C. 6:11-6.3(a)(9). See N.J.A.C. 6:11-6.1 (each teaching endorsement is required for corresponding teaching assignment). The

fact that the equivalency authorizes any individual holding a county substitute certificate to provide such instructional services, rather than waiving certification requirements with respect to a particular individual, does not alter the fact that the applicable certification requirements were waived by the grant of this equivalency. Compare N.J.A.C. 6:11-4.5 (Individual with 60 semester-hours from an accredited college may obtain county substitute certificate issued by county superintendent authorizing day-to-day substitute teaching in the county which grants the certificate) with N.J.A.C. 6:11-3.11 (applicants for teaching certificate, except vocational, must possess baccalaureate degree from accredited institution of higher learning) and N.J.A.C. 6:11-3.1 et seq. (teacher preparation programs, substitution of alternate education, and qualifications for issuance of standard certifications).

In this respect, we stress that because there is no "appropriate" certification required for service as an athletic coach, athletic coaches are not teaching staff members within the meaning of N.J.S.A. 18A:1-1. Hence, an individual cannot achieve tenure under N.J.S.A. 18A:28-5 by virtue of service in that capacity. In contrast, as reflected by N.J.A.C. 6:11-6.3(a)(9), employment as a foreign language teacher is of such character that the qualifications for such service require appropriate certification. Hence, foreign language teachers are teaching staff members as defined by N.J.S.A. 18A:1-1 and may achieve tenure pursuant to N.J.S.A. 18A:28-5 on the basis of their service in such assignments. See, e.g., Spiewak v. Board of Educ. of Rutherford, 90 N.J. 63 (1982).

Nor can Guttenberg's need to develop a world language program justify using the equivalency and waiver process provided by N.J.A.C. 6:3A-1.1 et seq. to set aside

certification requirements. Rather, as reflected by N.J.A.C. 6:11-4.3, the regulatory process provides the proper course to be followed in the event that teacher shortages develop in a particular subject area. In this respect, we emphasize that in contrast to the discretion afforded by N.J.A.C. 6:3A-1.1 et seq., alternative methods provided in the certification rules were carefully designed to assure the integrity of the standards embodied in those rules. N.J.A.C. 6:11-3.23 through N.J.A.C. 6:11-30 (substitution of alternative education and/or experience for required preparation).

We again stress that certification requirements establish the threshold qualifications for teaching staff members employed in the public school system throughout the state. N.J.S.A. 18A:1-1; N.J.S.A. 18A:26-2. As such, and under the current statutory framework embodied in Title 18A, the certification process is critical to assuring the provision of a thorough and efficient education. As the Deputy Attorney General recognized in her brief, an equivalency or waiver cannot properly be granted under N.J.A.C. 6:3A-1.1 et seq. when the provision of a thorough and efficient education might be compromised. Commissioner's Brief, at 4. Since certification requirements are at the core of the current structure governing the delivery of all education programs under our jurisdiction, setting aside the standards embodied in our certification rules necessarily risks such a compromise.

It was not our intention to create such a risk when we adopted N.J.A.C. 6:3A-1.1 et seq. Hence, we did not contemplate that the Commissioner would exercise the authority we delegated to grant equivalencies like the one involved herein. Therefore, by our decision today, we invalidate the equivalency granted by the Commissioner in

this case. Given our determination, we need not pass upon the validity of the settlement proposal submitted to us by the parties.

March 3, 1999

Date of mailing MAR 05 1999

(SB) 12-98

SB #12-98

IN THE MATTER OF THE DENIAL OF :
THE CHARTER SCHOOL APPLICATION : STATE BOARD OF EDUCATION
OF THE ERNEST L. BOYER CHARTER : DECISION
BASIC SCHOOL, CAMDEN COUNTY. :

Decided by the Commissioner of Education, January 21, 1998

For the Appellant, Shirley M. Williams, pro se

The Ernest L. Boyer Charter Basic School (hereinafter "appellant") filed an appeal to the State Board of Education from a letter decision of the Commissioner of Education dated January 21, 1998 denying its application to establish a charter school in the 1998-99 academic year. The Commissioner indicated that the application needed to be strengthened in the following areas: Goals and objectives not innovative; discriminatory admissions policy; no link between curriculum and New Jersey Core Curriculum Content Standards; extensive partnership with National Institute for Integrated Family Services to provide curriculum development, policy development, coordination and advocacy; excessive non-instructional costs; and budget with year-end deficit.

We have considered the arguments made by appellant in light of the record provided to us on behalf of the Commissioner, including the reviewers' recommendation to deny the application. On the basis of this review, we conclude that appellant has

3/4/98

failed to demonstrate an entitlement to establish a charter school pursuant to N.J.S.A. 18A:36A-1 et seq. Therefore, the State Board of Education affirms the Commissioner's decision to deny appellant the grant of a charter for 1998-99.

March 4, 1998

Date of mailing MAR 0 6 1998

13-98

IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM WENISCH,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF UNION CITY, HUDSON COUNTY.	:	
	:	

SYNOPSIS

Board certified tenure charges against respondent janitor for alleged unbecoming conduct and other just cause. Respondent contended that the Board failed to provide the opportunity to respond to the charges as guaranteed by *N.J.S.A.* 18A:6-11 and *N.J.A.C.* 6:24-5.1.

ALJ found that as the Board failed to give the within respondent the 15-day period in which to respond to the charges and presented no sufficient reason to justify the relaxation of the applicable rule, its failure to comply with *N.J.A.C.* 6:24-5.1(b)3 was a fatal defect. ALJ dismissed the tenure charges and ordered the Board to reinstate respondent to his tenured position with full salary and emoluments as of the date of suspension without pay.

Commissioner adopted findings and determination in initial decision as his own and directed reinstatement with compensation.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7333-97
AGENCY DKT. NO. 174-5/97

IN THE MATTER OF THE TENURE HEARING OF WILLIAM WENISCH, BOARD OF EDUCATION OF THE CITY OF UNION CITY, HUDSON COUNTY.

Louis C. Rosen, Esq., for the Board of Education of the City of Union City
(Patiño-Treat and Rosen, attorneys)

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

Record Closed: November 20, 1997 Decided: December 2, 1997

BEFORE **RICHARD McGILL,** ALJ:

William Wenisch (respondent) filed a motion seeking dismissal of tenure charges which the Board of Education of the City of Union City (petitioner) filed with the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-11. In support of the motion, respondent contends that petitioner failed to provide the opportunity to respond to the charges guaranteed by *N.J.S.A.* 18A:6-11 and *N.J.A.C.* 6:24-5.1. Petitioner opposes the motion.

PROCEDURAL HISTORY

Petitioner filed the charges with the Commissioner of Education on May 29, 1997. In response to the charges, respondent filed a motion to dismiss on June 20, 1997, and petitioner submitted a response on July 7, 1997. The matter was transmitted to the Office of Administrative Law on July 23, 1997, for determination as a contested case. A prehearing conference was held on November 19, 1997, and a prehearing order was issued on November 20, 1997.

ISSUE

The issues in regard to the motion to dismiss are whether petitioner failed to comply with a procedural requirement to give respondent fifteen days to respond to the charges before making a determination whether to certify the charges to the Commissioner of Education and, if so, whether the charges should be dismissed. Petitioner contends: (1) that it complied with the pertinent procedural requirement, (2) that if it did not comply, then the rule should be relaxed, and (3) that the circumstances in any event do not warrant dismissal of the charges.

LAW AND ANALYSIS

The procedural requirements in regard to tenure charges are set forth in *N.J.S.A.* 18A:6-11 and *N.J.A.C.* 6:24-5.1. Any charge against a tenured employee shall be filed the board of education in writing and accompanied by a written statement of evidence under oath. *N.J.S.A.* 18A:6-11, *N.J.A.C.* 6:24-5.1(b)1. The board of education shall provide the employee with a copy of the charge and the statement of evidence. *N.J.S.A.* 18A:6-11. The charges shall be transmitted to the tenured employee within three working days of the date they were filed with the board of education. *N.J.A.C.* 6:24-5.1(b)2. Proof of mailing or hand delivery shall constitute proof of transmittal. *Ibid.* The employee must be given an opportunity to submit a written statement of position and a written statement of evidence under oath with respect to the charges. *N.J.S.A.* 18A:6-11. The employee has fifteen days from receipt of the tenure charges to make the submission. *N.J.A.C.* 6:24-5.1(b)3. Upon expiration of the fifteen-day period, the board of

education shall determine whether there is probable cause to credit the evidence in support of the charges and whether such charges, if credited, are sufficient to warrant dismissal or reduction of salary. *N.J.S.A.* 18A:6-11, *N.J.A.C.* 6:24-5.1(b)4.

A certification by respondent in support of the motion to dismiss sets forth the following sequence of events. The tenure charges were hand-delivered to respondent by Board Secretary Carl Johnson on May 15, 1997. At that time, Johnson indicated that he received the charges in his office on May 12, 1997. The papers which respondent received on May 15, 1997, stated that they were mailed to him on May 12, 1997. However, respondent never received such papers by mail. On May 28, 1997, respondent was informed that petitioner had certified tenure charges against him to the Commissioner of Education and that he had been suspended without pay pending disposition of the charges. On June 2, 1997, respondent received a copy of the resolution certifying the charges, indicating that petitioner had certified the tenure charges and suspended him without pay on May 27, 1997. This action occurred less than fifteen days after respondent received the tenure charges on May 15, 1997.

Respondent argues that his fifteen-day period in which to respond began on May 15, 1997, when the charges were hand-delivered to him. Further, by certifying the charges on May 27, 1997, petitioner denied respondent the full fifteen days to submit his response as mandated by *N.J.A.C.* 6:24-5.1(b)3. Therefore, respondent requests dismissal of the charges, reinstatement and back pay.

Petitioner raises several arguments in opposition to the motion. First, petitioner contends that it complied with *N.J.S.A.* 18A:6-11 and *N.J.A.C.* 6:24-5.1. Second, petitioner maintains that if necessary, the rules should be relaxed in this case pursuant to *N.J.A.C.* 6:24-1.15. Third, any technical noncompliance with the rules does not warrant dismissal of the charges.

Petitioner sets forth the following course of events. On May 12, 1997, petitioner mailed the tenure charges and statement of evidence to respondent at his last known address. This mailing was never returned as undeliverable. On that same date, petitioner attempted to hand-

deliver the charges to respondent but could not do so because respondent was absent due to illness. On May 13, 1997, petitioner attempted to hand-deliver the charges to respondent at his home. The occupant stated that respondent did not live there. Petitioner then attempted to hand-deliver the charges to respondent at an address given by the occupant, but again respondent could not be located at that address. Respondent never notified petitioner of any change of address. On May 15, 1997, respondent was served with tenure charges at work, when he attempted to pick up his paycheck. Petitioner certified the tenure charges on May 27, 1997, which according to petitioner is more than fifteen days after the mailing to respondent's last known address. Respondent subsequently requested that petitioner send mail to the very same address to which petitioner sent the mailing of May 12, 1997.

Petitioner's first argument is that it complied with the procedural requirements set forth in *N.J.A.C.* 6:24-5.1(b)2 and 3. Petitioner emphasizes that it mailed the tenure charges to respondent on May 12, 1997, at his last known address. Petitioner cites *N.J.A.C.* 6:24-5.1(b)2 for two propositions. First, petitioner must transmit the charges to the employee within three working days of the date they were filed with the board of education. Second, proof of mailing constitutes proof of transmittal. Petitioner also cites *N.J.A.C.* 1:1-7.1 for the proposition that service is complete upon mailing.

Petitioner's argument establishes that it complied with *N.J.A.C.* 6:24-5.1(b)2, which requires transmittal of charges within three days of the filing thereof with the board of education. Proof of mailing on May 12, 1997, would constitute proof of transmittal on that date. The difficulty with this argument is that it does not establish compliance with *N.J.A.C.* 6:24-5.1(b)3, which requires that the tenured employee will have the opportunity to submit a written statement of position and a written statement of evidence within fifteen days of receipt of the tenure charges. The fact that petitioner mailed the charges to respondent on May 12, 1997, certainly does not establish that respondent received them on that date. In fact, the mailing on May 12, 1997, suggests that respondent would have received the charges on a subsequent date. In view of the fact that petitioner certified the tenure charges on May 27, 1997, it would be necessary for respondent to receive the tenure charges no later than May 12, 1997, in order for him to have

fifteen days in which to submit a response. It follows that the mailing on May 12, 1997, does not establish that petitioner complied with *N.J.A.C.* 6:24-5.1(b)3, which requires that the employee be given fifteen days in which to respond to the tenure charges.

Petitioner attempted to hand-deliver the charges on May 12 and 13, 1997, prior to actually doing so on May 15, 1997. It is undisputed that respondent did not actually receive hand delivery of the charges on May 12 or 13, 1997. Petitioner attributes the fact that it could not hand-deliver the charges to respondent on May 13, 1997, to his failure to advise of a change of address. Nonetheless, the fact remains that respondent did not receive the charges on May 13, 1997, which would have been one day too late in any event, but rather received them on May 15, 1997, which was only twelve days prior to petitioner's certification of charges. It follows that petitioner did not provide respondent with a fifteen-day period in which to submit his response to the charges and therefore did not comply with *N.J.A.C.* 6:24-5.1(b)3.

Petitioner next argues that it is permissible to relax the rules pursuant to *N.J.A.C.* 6:24-1.15 and *N.J.A.C.* 1:1-1.3(b). In accordance with *N.J.A.C.* 6:24-1.15, the rules may be relaxed where strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice. Similarly under *N.J.A.C.* 1:1-1.3, rules may be relaxed to prevent unfairness or injustice. In support of this argument, petitioner refers to transmittal by mail on May 12, 1997, the attempts to hand-deliver the charges on May 12, and 13, 1997, the lack of notice of a change of address, and the fact that on May 28, 1997, respondent requested that petitioner send mail to the same address that it originally sent the charges on May 12, 1997.

The applicable rule is *N.J.A.C.* 6:24-1.15, which provides that rules may be relaxed where strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice. Petitioner's argument is unpersuasive for three reasons. First, respondent received a copy of the charges only three days after they were filed with the board of education. Thus, any fault which may be attributed to respondent such as failure to advise of a change of address did not cause a significant delay in the process. Second, the only way that respondent could have received the charges in a timely fashion relative to a determination on May 27, 1997, would be to hand-deliver

the charges on May 12, 1997. Respondent happened to be absent from work on that date. Therefore, the other attempts to serve respondent with the charges would have been untimely relative to a determination on May 27, 1997. Since petitioner knew that respondent actually received the charges on May 15, 1997, it was incumbent upon petitioner to change the date for the determination of probable cause. By simply waiting a few days before making its determination of probable cause, petitioner would have allowed respondent the full fifteen days to submit his response to the charges. Third, as discussed below, the remedy for failure to provide the fifteen-day period for a response is a dismissal without prejudice. Thereafter, petitioner will be able to initiate tenure charges again. Thus, petitioner will not be permanently foreclosed from presenting its case. Therefore, I **CONCLUDE** that provision of *N.J.A.C.* 6:24-5.1(b)3 requiring a fifteen-day period for the employee's response should not be relaxed under the circumstances of this case.

Lastly, petitioner argues that dismissal is not warranted for insubstantial technical failures to comply with procedural requirements. In support of this argument, petitioner cites *Matter of Tenure Hearing of Cowan*, 224 *N.J.Super.* 737 (App. Div. 1988), where tenure charges were not dismissed due to a defective certification.

In *In the Matter of the Tenure Hearing of Carol Beam*, 93 *N.J.A.R.*2d (EDU) 320, charges were dismissed without prejudice due to procedural deficiencies including failure to give the employee fifteen days to respond to the charges. Petitioner argues that the situation in *Beam* was more egregious in that there were multiple failures to comply with procedural requirements. However, it is clear that failure to provide the fifteen-day period for the employee to submit a response was viewed as a fatal defect. *Id.* at 321. Likewise in this case, the failure to give respondent the fifteen-day period in which to respond to the charges is a fatal defect. Under the circumstances, I **CONCLUDE** that the tenure charges in this matter should be dismissed without prejudice. Respondent's requests for reinstatement and back pay should be resolved in accordance with *N.J.S.A.* 18A:6-14.

Accordingly, it is **ORDERED** that the tenure charges against respondent are dismissed without prejudice.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Dec. 2, 1997
DATE

RICHARD McGILL, ALJ

Receipt Acknowledged:

12/8/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 8 1997
DATE

Barbara A Harnek
OFFICE OF ADMINISTRATIVE LAW

am

OAL DKT. NO. EDU 7333-97
AGENCY DKT. NO. 174-5/97

IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM WENISCH,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF UNION CITY, HUDSON COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of the Board, reiterating arguments advanced before the Administrative Law Judge (ALJ), and reply exceptions of respondent were timely filed pursuant to *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in making his determination herein.

Upon his careful and independent review of the record, the Commissioner concurs with the findings and conclusion of the ALJ that, because the Board acted to certify the within tenure charges prior to the expiration of 15 days from the date upon which respondent received the charges in violation of *N.J.S.A.* 18A:6-11 and *N.J.A.C.* 6:24-5.1(b)3, such charges must be dismissed as procedurally deficient, without prejudice to the Board's right to reconsider them following proper compliance with the applicable statute and regulation. The Commissioner, likewise, agrees with the ALJ that, notwithstanding the Board's urging to the contrary in its exceptions, the circumstances existing in this matter do not warrant a relaxing of the rule pursuant to *N.J.A.C.* 6:24-1.15.

Accordingly, the initial decision of the OAL dismissing the instant tenure charges, without prejudice, is affirmed for the reasons expressed therein. The Board is directed to reinstate respondent to his tenured position and pay his full salary and emoluments as of May 27, 1997, when it suspended him without pay.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

JANUARY 15, 1998
DATE OF MAILING JANUARY 15, 1998

13-98

EDU #7333-97
C # 13-98
SB # 15-98

IN THE MATTER OF THE TENURE :
HEARING OF WILLIAM WENISCH, : STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
UNION CITY, HUDSON COUNTY. :

Decided by the Commissioner of Education, January 15, 1998

For the Petitioner-Appellant, Louis C. Rosen, Esq.

For the Respondent-Respondent, Bucceri & Pincus (Gregory T. Syrek, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. Compare with In the Matter of the Tenure Hearing of John Wilson, decided by the State Board of Education, April 1, 1998, appeal pending, App. Div.

Sam Podietz did not participate in deliberations in this matter.

July 1, 1998

Date of decision JUL 06 1998

(SB) 13-98

SB #13-98

IN THE MATTER OF THE GRANT OF THE:

CHARTER SCHOOL APPLICATION OF : STATE BOARD OF EDUCATION

THE GREATER BRUNSWICK CHARTER : DECISION

SCHOOL, MIDDLESEX COUNTY. :

Decided by the Commissioner of Education, January 21, 1998

For the Appellant, Apruzzese, McDermott, Mastro & Murphy (James L. Plosia, Esq., of Counsel)

For the Respondent, Bucca & Campisano (Benjamin S. Bucca, Jr., Esq., of Counsel)

For the Participant Commissioner of Education, Michelle L. Miller, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

This is one of fourteen appeals from contingent approvals given by the Commissioner of Education to applications submitted to obtain charters to operate charter schools pursuant to the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 et seq. We have presumed the validity of the statute and implementing regulations for purposes of determining whether a specific applicant should be permitted to proceed in this process. Hence, for purposes of this review, we have focused on whether the appeal raises concerns of such character as to preclude the grant of a charter or has revealed circumstances which must be addressed before the proposed school can become operational.

April 1, 1998

In support of its appeal, the Highland Park Board of Education (hereinafter "Board") contends that the Commissioner's decision should be reversed because the administrative process was flawed and the Commissioner's approval of the application submitted by the proposed Greater Brunswick Charter School was in violation of both statute and regulation. The Board argues that there is no statutory basis for the approval of a regional charter school and that the Commissioner improperly permitted the proposed school to alter its region of residence on the basis of proposed regulations after the application was approved. The Board further argues that the Commissioner failed to consider the financial and racial impact of the proposed school on the district.

We find that the Board has not shown that the substance of the application is such that we should set aside the Commissioner's determination that the proposed charter school may continue the process which would allow it to become operative if the Commissioner grants it final approval. In so concluding, we note that the Board has challenged the Commissioner's subsequent approval of the proposed school's amendment of its region of residence by a separate appeal, which is currently pending before the State Board.

Margaret M. Bennett abstained.

April 1, 1998

Date of mailing APR 0 3 1998

(SB) 13-98

SB #13-98

IN THE MATTER OF THE GRANT OF THE:

CHARTER SCHOOL APPLICATION OF : STATE BOARD OF EDUCATION

THE GREATER BRUNSWICK CHARTER : DECISION ON MOTION

SCHOOL, MIDDLESEX COUNTY. :

Decided by the Commissioner of Education, January 21, 1998

Decided by the State Board of Education, April 1, 1998

For the Appellant, Apruzzese, McDermott, Mastro & Murphy (James L. Plosia, Esq., of Counsel)

For the Respondent, Bucca & Campisano (Benjamin S. Bucca, Jr., Esq., of Counsel)

For the Participant Commissioner of Education, Michelle L. Miller, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

Inasmuch as the Highland Park Board of Education's application fails to meet the standards that would entitle it to relief under Crowe v. De Gioia, 90 N.J. 126 (1982), we deny its motion for a stay.

Margaret Bennett abstained.

May 6, 1998

Date of mailing MAY 08 1998

14-98

14-98

IN THE MATTER OF THE TENURE	:	
HEARING OF SIGMUND KARDAS,	:	
SCHOOL DISTRICT OF THE CITY	:	COMMISSIONER OF EDUCATION
OF TRENTON, MERCER COUNTY.	:	DECISION
	:	

JANUARY 15, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 254-97
AGENCY DKT. NO. 592-12/96

CITY OF TRENTON,
COUNTY OF MERCER,
Petitioner,
v.
SIGMUND KARDAS,
Respondent.

Thomas W. Sumners, Jr., Esq., for petitioner (Sumners Council George & Dortch, attorneys)

Richard A. Friedman, Esq., for respondent (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Record Closed: December 1, 1997 Decided: December 8, 1997

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

The within matter was commenced on December 17, 1996 by the Board of Education of the City of Trenton (hereinafter petitioner) with the filing of tenure charges in accordance with the requirements of N.J.S.A. 18A:6-11 against Sigmund Kardas (hereinafter respondent). Petitioner certified charges alleging unbecoming conduct and excessive absenteeism. On January 6, 1997, respondent filed an answer denying the charges, and on January 15, 1997 the matter was transmitted to the Office of Administrative Law on for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13. A prehearing conference was conducted on March 12, 1997 at which time the parties advised that they were engaged in settlement negotiations. Hearing dates were scheduled for October 15 and October 21, 1997. Prior to the scheduled

hearing dates the parties advised that they had reached agreement and would be submitting a stipulation for the approval of the undersigned and the Commissioner of Education. The executed agreement which was received on December 1, 1997, is attached hereto and made a part hereof as if set forth at length.

I have reviewed the record and the terms of settlement and I **CONCLUDE** that in view of all of the circumstances, it would not be improper for the Commissioner of Education to approve the settlement as an appropriate voluntary resolution of this matter entirely consistent with the law and the philosophy in Cardonick v. Board of Education of the Borough of Brooklawn, EDU 7093-81, 7094-81 and 100-82, decided April 6, 1993 by the State Board of Education. The parties have set forth in their written settlement agreement all of the circumstances which have caused petitioner to concluded that a hearing on the merits in this matter would probably not serve the public interest. Respondent has retired on ordinary disability retirement benefits granted by the Teachers' Pension and Annuity Fund, effective December 1, 1997. The agreement provides for no additional payment of public monies to respondent. Resolution of this matter prior to a hearing will avoid the necessity for expenditure of petitioner's limited economic resources and will permit petitioner to avoid having to produce student witnesses. Respondent's disability makes it very unlikely that he will ever obtain employment as a teacher in any other district, and in any event N.J.A.C. 6:11-3.5 requires petitioner's chief school administrator to notify the State Board of Examiners of the alleged conduct in cases in which teaching staff members accused of unbecoming conduct, resign or retire from their positions before tenure proceedings have been concluded. Pursuant to that regulation if the Board of Examiners determines to issue an order to show cause, it is the responsibility of the district to cooperate with the Board of Examiners in ascertaining and presenting the facts underlying the allegations.

Under all of the circumstances, the proposed settlement agreement and stipulation of dismissal appear to be an appropriate resolution of the matter.

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P. O. Box 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 8, 1997
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

12/11/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 12 1997
DATE

Barbara A Hennel
OFFICE OF ADMINISTRATIVE LAW

cc

SUMNERS COUNCIL GEORGE & DORTCH, P.C.
120 Sanhican Drive, Suite 300
Trenton, New Jersey 08618
(609) 393-6604
Attorneys for the Petitioner, Trenton Board of Education

IN THE MATTER OF THE TENURE CHARGES AGAINST SIGMUND KARDAS, SCHOOL DISTRICT OF THE CITY OF TRENTON, COUNTY OF MERCER.	:	BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY OAL Docket No. EDUTH 00254-97S Agency Ref. No. 592-12/96
	:	**SETTLEMENT AGREEMENT**

This Settlement Agreement is made between the Petitioner, Board of Education of the City of Trenton ("Board"), and Respondent, Sigmund Kardas.

WHEREAS, the Board filed tenure charges with the Commissioner of Education, Agency Docket No. 592-12/96, OAL Docket No. EDUTH 00254-97S; and

WHEREAS, the charges allege that Respondent took one of his 8th grade students out of two of her classes without parental permission or administrative approval and had her accompany him to a Guidance Counselor's office where he provided the student with the name and telephone number of a newspaper reporter to discuss the student's science project, which was removed from display at the School District's Science Fair, comparing the strength of condoms, but since the reporter was not available, Respondent thereafter arranged for a reporter and news photographer to meet with the student following dismissal time resulting in a newspaper article with student's photograph addressing the decision by Respondent's superior removing the science project from public display; and

WHEREAS, the charges allege that during the 1995-96 school year, Respondent continued a pattern of excessive absenteeism by being absent 18-1/2 school days as of March 31, 1996; and

WHEREAS, the charges allege that Respondent refused to follow administrative

directives in preparing substitute plans and executing daily sign-in/sign-out and temporary absence from building sheets; and

WHEREAS, the charges allege that Respondent made jokes with sexual innuendos in his class causing four female students to feel uncomfortable; and

WHEREAS, the parties acknowledge there is substantial evidence which is relevant to and warrant this Settlement Agreement, in particular that:

1. Respondent has been employed by the Board since September 1982 and prior to the allegations of unbecoming conduct in the 1995-96 school year, there have been no such allegations of inappropriate conduct towards or dealing with students;

2. The allegations against Respondent of unbecoming conduct occurred during a short time period of April 18, 1996 - April 24, 1996, and prior to that time, there have been no allegations that Respondent engaged in unbecoming conduct;

3. Respondent has agreed to accept disciplinary action in the form of 120 da suspension without pay, from December 9, 1996 through April 8, 1997;

4. Respondent denies the above charges and further asserts mitigating circumstances, including the absence of Board policy regarding administrative approval for students or teachers to speak to newspaper reports, no student was taken out of or missed any class time, all science project titles had been reviewed by administration prior to the display of such projects, absences were due to a physical handicap which has resulted in his disability retirement, failure of administration to consider the reasons for his absences, the number of absent days was not excessive and were within the days allowed by statute and/or collective bargaining agreement, no jokes with sexual innuendos were ever made towards students, and there were never any allegations of improper touches, advances, or harassment of students;

5. Respondent understands that the Commissioner of Education has the author

pursuant to ***N.J.A.C.*** 6:11-3.6 to refer tenure decisions to the State Board of Examiners for possible revocation of his certificate;

6. The Board of Trustees of the Teachers' Pensions and Annuity Fund approved Respondent's disability retirement benefits;

7. The expeditious resolution of this matter will save both parties the cost and uncertainty of continued litigation.

THEREFORE, in consideration of the foregoing, the parties agree that the matter should be resolved based upon the following terms:

1. Respondent will not receive back pay for any of the 120 day period of suspension without pay which occurred between December 9, 1996 and April 8, 1997.

2. Petitioner will retire from employment with the Board effective December 1, 1997.

3. The Board agrees to dismiss the tenure charges against Respondent.

4. The parties agree and covenant that neither party, nor any person, organization, or other entity on their behalf will file any charge, claim, lawsuit against either party based upon the fact that the Board filed tenure charges or that Respondent defended against those charges.

5. The parties recognize that each of them had input into drafting this Agreement and agree that if there should arise a dispute as to its terms, this Agreement shall not be construed against either party based upon the identity of its drafter(s).

6. The parties understand that this Agreement is contingent upon the approval of Administrative Law Judge M. Kathleen Duncan and the Commissioner of Education, and if such approval is denied, the terms and contents of this Agreement shall not be admissible in any legal or administrative proceedings of any nature, and will be without prejudice to their positions in such proceedings, and that in such event the parties may again attempt to settle the matter in a

manner which is satisfactory to the Commissioner of Education.

7. Respondent requests that the tenure hearing be held in abeyance in order to obtain approval of this Settlement Agreement by Administrative Law Judge M. Kathleen Duncan and the Commissioner of Education, and he agrees that in accordance with ***N.J.S.A.*** 18A:6-14, he is not entitled to salary payments after December 1, 1997, the anticipated effective date of his retirement; however, if the Administrative Law Judge and/or Commissioner of Education reject this Agreement, he is entitled to salary payments from the date of the rejection of this Agreement until the time it takes for the Commissioner to render a decision on the merits of the tenure charges.

8. The parties warrant that this Agreement is entered into voluntarily, without any duress, or without any other promises or agreement not expressed herein, and with the understanding that neither party is compelled to do so, and that by entering into this Agreement each party waives their right to a hearing and disposition on the merits of the charges.

11/24/97
Date

Charles Milewski, Board Secretary
Trenton Board of Education, Petitioner

11/24/97
Date

Stephanie Moyer, President
Trenton Board of Education, Petitioner

21 November 1997
Date

Sigmund Kardas
Respondent

11-21-97
Date

Richard A. Friedman, Esq.
Attorney for Respondent

OAL DKT. NO. EDU 254-97
AGENCY DKT. NO. 592-12/96

IN THE MATTER OF THE TENURE	:	
HEARING OF SIGMUND KARDAS,	:	
SCHOOL DISTRICT OF THE CITY	:	COMMISSIONER OF EDUCATION
OF TRENTON, MERCER COUNTY.	:	DECISION
	:	

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

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement, and to the Board's compliance with *N.J.A.C.* 6:11-3.5, which requires, upon the resignation of a teaching staff member accused of unbecoming conduct prior to the conclusion of the tenure proceedings, that the chief school administrator notify the State Board of Examiners of the alleged conduct, and that the district cooperate, should the board elect to take action against the staff member's certificate. By copy of this decision, the State Board of Examiners is notified of the within matter and circumstances underlying the settlement.

COMMISSIONER OF EDUCATION

JANUARY 15, 1998
DATE OF MAILING JANUARY 15, 1998

(SB) 14-98

SB #14-98

IN THE MATTER OF THE GRANT OF THE:

CHARTER SCHOOL APPLICATION OF : STATE BOARD OF EDUCATION

THE ENGLEWOOD ON THE PALISADES : DECISION

CHARTER SCHOOL, BERGEN COUNTY. :

Decided by the Commissioner of Education, January 21, 1998

For the Appellant, Mauro, Savo, Camerino & Grant (Eric Martin Bernstein, Esq., of Counsel)

For the Respondent, Mary L. Zaks, pro se

For the Participant Commissioner of Education, Arlene G. Lutz, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

This is one of fourteen appeals from contingent approvals given by the Commissioner of Education to applications submitted to obtain charters to operate charter schools pursuant to the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 et seq. We have presumed the validity of the statute and implementing regulations for purposes of determining whether a specific applicant should be permitted to proceed in this process. Hence, for purposes of this review, we have focused on whether the appeal raises concerns of such character as to preclude the grant of a charter or has revealed circumstances which must be addressed before the proposed school can become operational.

April 1, 1998

In support of its appeal, the Board of Education of the City of Englewood (hereinafter "Board") contends that the Commissioner's decision should be reversed because the application submitted by the proposed Englewood on the Palisades Charter School does not comply with the statutory requirements of the Charter School Act. It also argues that the financial loss to the school district will have an educational impact and that the grant of a charter will exacerbate the racial imbalance in the school district.

We find that the Board has not shown that the substance of the application is such that we should set aside the Commissioner's determination that the proposed charter school may continue the process which would allow it to become operative if the Commissioner grants it final approval. Moreover, the Board's arguments with regard to racial impact are speculative at this point in the absence of actual enrollment data. However, given the racial composition of Englewood's student population, the Commissioner should review the racial composition of the student population of the proposed Englewood on the Palisades Charter School before granting final approval.

Margaret M. Bennett abstained.

April 1, 1998

Date of mailing APR 0 3 1998

(SB) 14-98

SB #14-98

IN THE MATTER OF THE GRANT OF THE:

CHARTER SCHOOL APPLICATION OF : STATE BOARD OF EDUCATION

THE ENGLEWOOD ON THE PALISADES : DECISION ON MOTION

CHARTER SCHOOL, BERGEN COUNTY. :

Decided by the Commissioner of Education, January 21, 1998

Decided by the State Board of Education, April 1, 1998

For the Appellant, Mauro, Savo, Camerino & Grant (Eric Martin Bernstein, Esq., of Counsel)

For the Respondent, Mary L. Zaks, pro se

For the Participant Commissioner of Education, Arlene G. Lutz, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

Inasmuch as the Englewood Board of Education's application fails to meet the standards that would entitle it to relief under Crowe v. De Gioia, 90 N.J. 126 (1982), we deny its motion for a stay.

June 3, 1998

Date of mailing JUN 05 1998

(SB) 16-98

SB #16-98

IN THE MATTER OF THE GRANT OF THE:

CHARTER SCHOOL APPLICATION OF : STATE BOARD OF EDUCATION

THE OCEAN CITY chARTer-TECHnical : DECISION

HIGH SCHOOL FOR THE PERFORMING :

ARTS, CAPE MAY COUNTY. :

Decided by the Commissioner of Education, January 21, 1998

For the Appellant, Taht, Stanton & McCrosson (Michael P. Stanton, Esq., of Counsel)

For the Respondent, Griffith & Carlucci (Gary R. Griffith, Esq., of Counsel)

For the Participant Commissioner of Education, Michelle Miller, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

For the Intervenors, G.F., pro se and C.H., pro se

This is one of fourteen appeals from contingent approvals given by the Commissioner of Education to applications submitted to obtain charters to operate charter schools pursuant to the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 et seq. We have presumed the validity of the statute and implementing regulations for purposes of determining whether a specific applicant should be permitted to proceed in this process. Hence, for purposes of this review, we have focused on whether the appeal raises concerns of such character as to preclude the grant of a charter or has revealed circumstances which must be addressed before the proposed school can become operational.

April 1, 1998

In support of its appeal, the Ocean City Board of Education (hereinafter "Board") contends that the Commissioner's decision should be reversed because the proposed school's application violates the Charter School Act in several respects, including that, contrary to N.J.S.A. 18A:36A-7, the proposed school's admissions/promotions policy discriminates on the basis of intellectual ability. The Board further contends that the Charter School Act is unconstitutional because it violates every child's right to a thorough and efficient education, divests local taxpayers of procedural due process relating to the use of public funds, allows for private use of public funds, and is so lacking in standards as to constitute an unconstitutional delegation of the Legislature's power. In addition, a motion to intervene has been filed by the parents of children attending school in the district. By their motion, Intervenors challenge the validity of approving the inclusion of an eighth-grade class in the proposed charter high school for one year.

We find that the Board has not shown that the substance of the application is such that we should set aside the Commissioner's determination that the proposed charter school may continue the process which would allow it to become operative if the Commissioner grants it final approval. However, we refer back to the Commissioner the question of whether his approval should properly include an eighth-grade class for the first year of the proposed charter high school's operation. The Commissioner should also review the admissions/promotions policy of the proposed school in light of concerns raised by the Board before granting final approval.

Margaret M. Bennett abstained.

April 1, 1998

Date of mailing APR 0 3 1998

17-98

IN THE MATTER OF SHERI SCOZZARO,	:	
FAIRFIELD TOWNSHIP BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, ESSEX COUNTY.	:	DECISION
	:	

JANUARY 21, 1998

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket No.: C09-97**
SHERI SCOZZARO,	:	
FAIRFIELD BOARD OF EDUCATION	:	**DECISION**
ESSEX COUNTY	:	

PROCEDURAL HISTORY

This matter arises from a complaint filed by Gerald Cohen on April 22, 1997. Therein he alleges that Sheri Scozzaro, a Fairfield Township board member, voted for her daughter to be a substitute teacher in June 1995 and June 1996 in violation of the School Ethics Act, N.J.S.A. 18A:12-21 et seq. Ms. Scozzaro filed her answer with the School Ethics Commission on May 29, 1997, admitting to the votes but denying that they violated the School Ethics Act.

The Commission advised the parties that it would discuss this matter at its meeting of September 23, 1997. At that time, the Commission found probable cause to credit the allegations that Sheri Scozzaro violated N.J.S.A. 18A:12-24(c) of the School Ethics Act when she voted for the appointment of her daughter as a substitute teacher in June 1995 and June 1996. The Commission dismissed the charges under N.J.S.A. 18A:12-24(b) of the School Ethics Act, which requires proof that Ms. Scozzaro used her official position to secure unwarranted employment for her daughter. There was no evidence that the daughter was undeserving of the appointment or unqualified to substitute teach, such that the Commission would consider the employment to be "unwarranted".

The Commission determined that the material facts of the case were undisputed. Thus, rather than send the case to the Office of Administrative Law, the Commission requested that the respondent file a written statement by October 20, 1997, setting forth why she should not be found in violation of the School Ethics Act as a result of the two votes in question. The Commission received her written statement on October 20, 1997, and considered it in rendering this opinion on November 25, 1997.

FACTS

The Commission found the following facts to be undisputed. Ms. Scozzaro was a Fairfield board member from May 1994 to the present. Complainant Gerald Cohen was a Fairfield board member from May 1994 to April 1997. Ms. Scozzaro has a daughter whom the superintendent placed on a list of five candidates for approval as substitute

teachers in February 1995. Ms. Scozzaro abstained from voting on that list. On June 13, 1995, and June 25, 1996, the superintendent again placed the daughter's name on a list of substitutes for approval. Ms. Scozzaro voted in favor of the list approving her daughter to be a substitute teacher for the Fairfield School District in June 1995 and 1996. The board approved both substitute lists by a unanimous vote.

Ms. Scozzaro states in her answer that she was not aware that her daughter's name was included in the substitute teacher list in June 1995 and June 1996 and she did not think to review the lists for inclusion of her daughter's name. Further, she states that the agendas for those dates contained over thirty items and the substitute lists were not part of them. Rather, the lists had been forwarded earlier as part of the Superintendent's packet. She states that if she had known of her daughter's inclusion on those lists, she would have abstained as she had done in February 1995. She adds that she had no reason to believe that her daughter would be on the lists again since she was in college for the summer and the school year. Last, she states that no one, including the complainant, brought these votes to her attention at any time prior to the filing of the complaint.

Ms. Scozzaro adds in her written statement that although her daughter was included on the district's list of substitute teachers, she resided in Maryland where she was a full time student from September 1992 to December 1996. During this time, she only worked as a substitute teacher in Fairfield on two occasions, May 29, 1996 and June 7, 1996. The district's records confirm these dates. Upon graduation, her daughter established residence in Maryland.

ANALYSIS

The issue before the Commission is whether Ms. Scozzaro violated N.J.S.A. 18A:12-24(c) of the School Ethics Act by voting in favor of the substitute lists that included her daughter.

In her written statement, Ms. Scozzaro submits that the Commission should not find her in violation of the Act because she was unaware that her daughter's name was included on the June 1995 and June 1996 substitute lists. She urges the Commission to conclude that hers was not the type of conduct that the Legislature intended to punish. Also, she does not believe that she had a personal involvement that would reasonably be expected to impair her objectivity in voting on the substitute list.

N.J.S.A. 18A:12-24(c) of the School Ethics Act provides:

> No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

The Commission agrees that Ms. Scozzaro's daughter is not a member of Ms. Scozzaro's "immediate family" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act. However, as set forth in the Commission's prior decision, In the Matter of Matilda Touw, C16-96, a school official is not only prohibited from voting on matters in which her immediate family member has a financial or personal involvement, but on any matter in which **she** has a direct or indirect financial or personal involvement. The Commission also agrees that Ms. Scozzaro did not have a direct or indirect *financial* involvement with her daughter's approval as a substitute. Her daughter was independent and Ms. Scozzaro did not have a financial stake in her approval.

The Commission does find, however, that Ms. Scozzaro had a personal involvement with her daughter's employment as a substitute that might reasonably be expected to impair her objectivity or independence of judgment. Ms. Scozzaro had the ultimate responsibility to know and understand upon what she is voting. The fact that the substitute lists were sent to her before the meeting hurts her argument more than it helps. During the meeting, a board secretary may try to move swiftly through an agenda allowing little time to read names. However, if the substitute lists are sent to her as part of the Superintendent's packet, she has a duty to scrutinize the items therein carefully prior to the meeting. Indeed, that is the purpose of forwarding the lists ahead of time. Her failure to abstain from voting on the substitute lists or to have her daughter considered separately so that she could vote on the substitute lists violated section 24(c) of the Act.

The Commission rejects the argument that her personal involvement was not reasonably expected to impair her objectivity. Clearly, when a board member votes in favor of his or her child's employment, it is the type of vote reasonably expected to impair his or her objectivity. Even where, as here, the board member did not know that her daughter's name was on the list, subsection (c) of the Act views conflicts from the perspective of what the public might reasonably expect, not her subjective intent. Thus, the Commission concludes that respondent voted on a matter in which she had an indirect personal involvement that might reasonably be expected to impair her objectivity or independence of judgment.

CONCLUSION

For all the foregoing reasons, the Commission concludes that Sheri Scozzaro violated N.J.S.A. 18A:12-24(c) of the School Ethics Act when she voted on the lists approving her daughter as a substitute. In doing so, the Commission recommends that the Commissioner of Education impose the lowest sanction of reprimand. In making the recommendation, the Commission has considered the fact that Ms. Scozzaro abstained the first time that her daughter was on the list, which gives credibility to her statement that she would have done so in June 1995 and June 1996 if she had been more diligent. As stated above however, she is responsible to know what she is voting upon, especially

when the public could perceive that she is voting on a matter in which she has a personal involvement. Thus, some disciplinary sanction is necessary.

Upon adoption of this decision by a formal resolution of the School Ethics Commission, the matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.



Paul C. Garbarini
Chairperson

Resolution Adopting Decision -- C09-97

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof and has considered the testimony of the respondent; and

Whereas, the Commission found probable cause to credit the allegations in the complaint and invited respondent to file a written statement in response; and

Whereas, the Commission has reviewed respondent's written statement and now concludes that respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act; and

Whereas, the Commission has reviewed the proposed decision of its staff setting forth the reasons for its conclusion; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby finds that Sheri Scozzaro has violated the School Ethics Act and recommends that the Commissioner impose a sanction of reprimand; and

Be it Further Resolved that the Commission adopts the enclosed decision referenced as its decision in this matter.

Paul C. Garbarini, Chairman

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on November 25, 1997.

Lisa James-Beavers
Executive Director

[c0997dec/c:lisa/decisions]

AGENCY DKT. NO. 462-12/97

IN THE MATTER OF SHERI SCOZZARO,	:	
FAIRFIELD TOWNSHIP BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, ESSEX COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission have been reviewed. Comments of Ms. Scozzaro accepting the Commission's recommended sanction were submitted to the Commissioner.

Upon a thorough review of the record, the Commissioner accepts the Commission's recommendation that reprimand is the appropriate penalty in this matter, in view of the Commission's determination, which is not reviewable by the Commissioner herein, that a violation of the School Ethics Act occurred under the circumstances set forth in the decision.

Accordingly, IT IS HEREBY ORDERED that Sheri Scozzaro be reprimanded as a school official found to have violated the School Ethics Act.



COMMISSIONER OF EDUCATION

JANUARY 21, 1998
DATE OF MAILING JANUARY 21, 1998

(SB) 17-98

SB #17-98

IN THE MATTER OF THE GRANT OF :
THE CHARTER SCHOOL APPLICATION : STATE BOARD OF EDUCATION
OF THE FRANKLIN CHARTER SCHOOL, : DECISION
SOMERSET COUNTY. :

Decided by the Commissioner of Education, January 21, 1998

For the Appellant, Carroll & Weiss (Russell Weiss, Jr., Esq., of Counsel)

For the Respondent, McCarter & English (David C. Apy, Esq., of Counsel)

For the Participant Commissioner of Education, Geraldine Callahan, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

This is one of fourteen appeals from contingent approvals given by the Commissioner of Education to applications submitted to obtain charters to operate charter schools pursuant to the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 et seq. We have presumed the validity of the statute and implementing regulations for purposes of determining whether a specific applicant should be permitted to proceed in this process. Hence, for purposes of this review, we have focused on whether the appeal raises concerns of such character as to preclude the grant of a charter or has revealed circumstances which must be addressed before the proposed school can become operational.

In support of its appeal, the Franklin Township Board of Education (hereinafter "Board") contends that the Commissioner's decision must be reversed because the

April 1, 1998

failure of the application to include information regarding a facility is in direct violation of the Charter School Act and precludes approval as a matter of law. The Board further contends that approval is precluded because the Department of Education's review process revealed significant deficiencies which have not been corrected. The Board also argues that the Commissioner lacks the authority to grant a conditional charter and that the fiscal impact of the Charter School Act on public school districts violates the constitutional requirement for the provision of a thorough and efficient education. Additionally, the Board asserts that the Charter School Act is an unconstitutional delegation of legislative authority to a private body and denies equal protection to the students who remain in the public school and to their parents.

We find that the Board has not shown that the substance of the application is such that we should set aside the Commissioner's determination that the proposed charter school may continue the process which would allow it to become operative if the Commissioner grants it final approval.

Margaret M. Bennett abstained.

April 1, 1998

Date of mailing APR 0 3 1998

18-98

18-98 SEC

IN THE MATTER OF DELORES MAUGERI,	:	
BERGENFIELD BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, BERGEN COUNTY.	:	DECISION
	:	

JANUARY 21, 1998

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
DELORES MAUGERI, *BERGENFIELD BOARD OF EDUCATION, BERGEN COUNTY*	:	**Docket No.: C01-97**
	:	**DECISION**

PROCEDURAL HISTORY

The Commission set forth the complete procedural history of this case in its probable cause decision within In the Matter of John Galish, Joseph Amara and Delores Maugeri, C01-97 (September 23, 1997). The Commission incorporates that procedural history herein by reference.

In its September 23, 1997, determination, the Commission found probable cause to credit the allegation that Delores Maugeri violated N.J.S.A. 18A:12-24(c) of the School Ethics Act by voting on her daughter's appointment to a short-term substitute position. Because the Commission determined that no material facts were in dispute, the Commission invited Ms. Maugeri to file a written statement with the Commission setting forth the reasons that it should not find her in violation of the School Ethics Act. On October 14, 1997, respondent filed her written statement with the Commission setting forth reasons that it should not find her in violation of the School Ethics Act. The Commission rendered this decision at its meeting of October 28, 1997.

FACTS

The undisputed facts are as follows. On February 13, 1996, the Bergenfield Board of Education voted to approve the Superintendent's recommendation to appoint respondent's daughter as a physical education teacher effective March 1, 1996. Delores Maugeri abstained on this vote. Although her daughter was scheduled to begin working on March 1, 1996, the teacher occupying the position decided to leave early. Thus, the school administration was without a physical education teacher available for the period from February 21 to February 29, 1996, a period of seven school days. Since the board had already approved the daughter's permanent employment effective March 1, 1996, the administration decided that the individual most appropriate to serve as the interim teacher was the daughter. Accordingly, the daughter assumed the post of physical education teacher on February 21, 1996. Respondent's daughter is emancipated.

Since the board had not appointed the daughter for the seven February school days that the daughter had taught, the board had to take action to ratify those days. The board could have amended the initial motion to change the effective date of the appointment to February 21.

Instead, the school administrator recommended that the daughter be placed on the substitute list, retroactively, for the period of February 21 to February 29, 1996. The board accepted that recommendation and placed her name on a list of substitutes for the March 12, 1996, board meeting. The list referred to substitutes for the March 1996 period. Only the daughter's name appeared on the list as a retroactive appointment for February.

On March 12, 1996, Delores Maugeri voted on the approval of the substitute list that included the name of her daughter. She indicated that she was unaware that her daughter's name appeared on the substitute list because she knew that the board had appointed her daughter to a teaching position effective March 1, 1996. At that time, she abstained from that vote.

ANALYSIS

Complainant alleges that respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act by voting for her daughter to be a short-term substitute within the district. Subsection (c) reads:

> No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

The Commission has carefully reviewed the facts of this case and has concluded that the respondent had the responsibility as a board member to read the agenda and to know that her daughter was on the substitute list. The Commission recognizes that the daughter was hired as a teacher, not as a substitute, at the February meeting and that Ms. Maugeri abstained on the vote to hire her as a teacher. However, at the March meeting, when her daughter was placed on a substitute list to ensure that she received payment for the days she worked before her effective date of teaching, Ms. Maugeri should have known of that agenda item. Although her vote on the list was an oversight, she was still acting in her official capacity in a matter in which she had a personal involvement that might reasonably be expected to impair her objectivity. Therefore, the Commission finds that respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act.

DECISION

For the foregoing reasons, the Commission concludes that respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act. Because of the circumstances surrounding Ms. Maugeri's vote for her daughter's appointment as a short-term substitute, the Commission believes that the lowest possible sanction is appropriate. Therefore, the Commission recommends that the Commissioner of Education impose a sanction of reprimand.

Upon adoption of this decision by a formal resolution of the School Ethics Commission, the matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, PO Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini
Chairperson

Resolution Adopting Decision -- C01-97

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof and has considered the arguments raised by parties in subsequent submissions; and

Whereas, the Commission initially found probable cause to credit the allegations that respondent violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq. and determined that there were no facts in dispute; and

Whereas the Commission reviewed the written statement submitted by counsel and now concludes that respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act; and

Whereas, the Commission has reviewed the proposed decision of its staff; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on October 28, 1997.

Lisa James-Beavers
Executive Director

AGENCY DKT. NO. 416-10/97

IN THE MATTER OF DELORES MAUGERI,	:	
BERGENFIELD BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, BERGEN COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission ("Commission") have been reviewed. No comments were filed by respondent.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that a reprimand is the appropriate penalty in this matter, in view of the Commission's determination that a violation of *N.J.S.A.* 18A:12-24(c) occurred and that some penalty, from among those prescribed at *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6:3-9.19(c), is warranted. *

Accordingly, IT IS HEREBY ORDERED that Delores Maugeri be reprimanded by the Board for violating the School Ethics Act.

COMMISSIONER OF EDUCATION

* The determination of the Commission as to violation of the Act is not reviewable by the Commissioner herein, pursuant to *N.J.S.A.* 18A:12-29(c). Therefore, this decision is limited to a review of the recommended penalty and its implementation.

(SB) 18-98

SB #18-98

IN THE MATTER OF THE GRANT OF :
THE CHARTER SCHOOL APPLICATION : STATE BOARD OF EDUCATION
OF THE EAST ORANGE COMMUNITY : DECISION
CHARTER SCHOOL, ESSEX COUNTY. :

Decided by the Commissioner of Education, January 21, 1998

For the Appellant, McOmber & McOmber (Arsen Zartarian, Esq., of Counsel)

For the Respondent, Robert Taylor, Esq.

For the Participant Commissioner of Education, Arlene G. Lutz, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

This is one of fourteen appeals from contingent approvals given by the Commissioner of Education to applications submitted to obtain charters to operate charter schools pursuant to the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 et seq. We have presumed the validity of the statute and implementing regulations for purposes of determining whether a specific applicant should be permitted to proceed in this process. Hence, for purposes of this review, we have focused on whether the appeal raises concerns of such character as to preclude the grant of a charter or has revealed circumstances which must be addressed before the proposed school can become operational.

In support of its appeal, the Board of Education of the City of East Orange (hereinafter "Board") contends that the Commissioner's decision should be reversed

April 1, 1998

because, contrary to the Charter School Act's intent, the proposed East Orange Community Charter School is offering only a "back to basics" program and is not encouraging different and innovative learning methods. The Board also argues that the proposed school is impermissibly entangled with the East Orange Child Development Corporation and that the Charter School Act violates due process because it makes no provision for a hearing before the State Board rules on an appeal from the Commissioner's approval of a charter school application. The Board further contends that the regulations adopted by the State Board are deficient in that they provide no standards for the evaluation of charter school applications. It also maintains that the Charter School Act violates the Equal Protection Clause of the New Jersey Constitution because it exempts charter schools from rules applicable to other public schools without considering the financial, racial and educational impact of the grant of a charter on those other public schools.

We find that the Board has not shown that the substance of the proposed East Orange Community Charter School's application is such that we should set aside the Commissioner's determination that it may continue the process which would allow it to become operative if the Commissioner grants it final approval.

Margaret M. Bennett abstained.

April 1, 1998

Date of mailing APR 03 1998

(SB) 18-98

SB #18-98

IN THE MATTER OF THE GRANT OF :
THE CHARTER SCHOOL APPLICATION : STATE BOARD OF EDUCATION
OF THE EAST ORANGE COMMUNITY : DECISION ON MOTION
CHARTER SCHOOL, ESSEX COUNTY. :

Decided by the Commissioner of Education, January 21, 1998

Decided by the State Board of Education, April 1, 1998

For the Appellant, Kenney & Gross (Michael J. Gross, Esq., of Counsel)

For the Respondent, Robert Taylor, Esq.

For the Participant Commissioner of Education, Arlene G. Lutz, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

Inasmuch as the East Orange Board of Education's application fails to meet the standards that would entitle it to relief under Crowe v. De Gioia, 90 N.J. 126 (1982), we deny its motion for a stay.

June 3, 1998

Date of mailing JUN 03 1998

19-98

19-98 SEC

IN THE MATTER OF DAVID W. FULLER,	:	
IRVINGTON TOWNSHIP BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, ESSEX COUNTY.	:	DECISION
	:	

JANUARY 21, 1998

IN THE MATTER OF
DAVID W. FULLER,
Irvington Township Board of Education,
Essex County

School Ethics Commission
Docket No. C32-95

DECISION

PROCEDURAL HISTORY

This matter comes before the School Ethics Commission (Commission) by way of complaint filed with the Commission on August 24, 1995 by Irvington Board of Education (Board) member Cathy Southerland against Board member David W. Fuller. In her complaint, Ms. Southerland alleges that Mr. Fuller violated the School Ethics Act (Act), specifically N.J.S.A. 18A:12-24 (a) and (c), by holding simultaneously the positions of Board member and Township of Irvington Business Administrator. Complainant further alleges that Mr. Fuller violated the Act because, as Township Business Administrator, he should have been aware of the transfer of approximately $3.9 million in interest from the School Construction Fund to the Township.

Mr. Fuller filed his answer by letter dated December 19, 1995 and received by the Commission on January 2, 1996. In his answer, Mr. Fuller denies that serving as both Board member and Township Business Administrator violates the Act. Mr. Fuller notes that the complaint does not contain any allegations that he, or anyone related to him , does business with the Township. In support of his position, Mr. Fuller cites N.J.S.A. 18A:12-2 , which allows school employees to sit on municipal governing bodies. Mr. Fuller further denies the allegations that he knew or should have known about the transfer of funds from the School Construction Fund to the Township.

By letter dated June 4, 1997, the Commission requested Mr. Fuller to appear before the Commission at its June 27, 1997 meeting to provide information to the Commission as part of its investigation. The Commission also sent a letter dated June 4, 1997 to Ms. Southerland advising her that the Commission would be considering her complaint at its June 27, 1997 meeting and that she could attend to provide information if she so desired. Mr. Fuller appeared with counsel. Ms. Southerland did not attend.

By letter dated September 25, 1997 and adopted by the Commission at its September 23, 1997 meeting, the Commission advised Mr. Fuller that it was dismissing the allegations concerning his knowledge of the transfer of funds, but that it had found probable cause to credit the allegations that Mr. Fuller violated the Act by serving in the dual capacity as Board member and Township Business Administrator. The Commission advised Mr. Fuller that serving in both capacities may violate N.J.S.A. 18A:12-24(a), (c) and (d). The Commission further found that the material facts were undisputed and, therefore, advised Mr. Fuller that he could provide a written submission to the Commission setting forth his position on the matter. The letter also advised Mr. Fuller that if he felt that there were material facts in dispute such that would necessitate an evidentiary hearing, he should set forth such facts and explain his position as to why they are

material to a detennination in this matter. Finally, the letter advised Mr. Fuller that he should address the issue of sanction if the Commission should find a violation.

Mr. Fuller submitted his papers by letter dated October 13, 1997 and received by the Commission on October 14, 1997. In his submission, he argues that are material facts in dispute and that the Commission should conduct an evidentiary hearing. Mr. Fuller further argues that it does not violate that Act for him to serve simultaneously as a Board member and Township Business Administrator. The Commission has considered Mr. Fuller's submission and reaches the within conclusion.

FACTS

Based on the pleadings, the information provided by the testimony on June 27, 1997 and the Commission's investigation into this matter, the following material facts are not in dispute. Mr. Fuller began employment as the Township Business Administrator in 1990. As of this date, he still holds that position. Township Business Administrator is a paid, full time position. Article VII, Sec. 5-6.3 et seq., of the Irvington Code establishes the Department of Administration and sets forth the responsibilities and duties of the Township Business Administrator. The Township has had financial difficulties and presently the State is monitoring the Township's finances.

Mr. Fuller was appointed to the Board by the Mayor in 1991 and served as Board president in 1991. At the time of his appointment, the Irvington School District was a Type I district. In 1995, the District changed from a Type I district to a Type II district. Mr. Fuller remains on the Board as an appointed member and his term is due to expire in 1998. As a Board member, Mr. Fuller has served on the Board's four standing committees, specifically, Finance; Buildings and Grounds; Personnel and Bylaws, Policy and Curriculum.

ANALYSIS

Initially, the Commission will consider Mr. Fuller's arguments that an evidentiary hearing is necessary because there are material facts in dispute. Mr. Fuller sets forth six questions that he believes raise material factual disputes. Of those six, four specifically involve facts surrounding the transfer of the $3.9 million from the School Construction Fund to the Township.[1] The Commission dismissed the allegations concerning Mr. Fuller's knowledge of the transfer of funds. The Commission found that the allegations that Mr. Fuller violated the Act simply because he knew or should have known about the transfer as Township Business Administrator did not amount to a possible violation of the Act. The Commission did note in its probable cause decision that the possibility that Mr. Fuller may obtain information in his capacity as Township Business Administrator that could be necessary or useful to the Board could be illustrative of why it may not be appropriate for him to hold both positions and that Ms. Southerland's allegations concerning the

[1]The four that involve the transfer of funds are those Mr Fuller has numbered 2, 3, 4 and 5 on page two of his submission.

transfer of funds really went to that issue. This does not mean, however, that an evidentiary hearing needs to be held into the specifics of the transfer. The Commission does not need to know the facts surrounding the transfer to determine whether Mr. Fuller may serve as both Board member and Township Business Administrator.

Mr. Fuller also argues that an evidentiary hearing needs to be held to determine his exact duties as Township Business Administrator. The Commission disagrees. Mr. Fuller's duties and responsibilities as a business administrator are set forth in Title 40 and the Irvington Code. The Commission can determine whether there is a conflict of interest under the Act by evaluating the statutory and regulatory requirements. Whether Mr. Fuller may perform duties above and beyond those set forth in relevant statutes or municipal code is not essential to a determination as the Commission can resolve the issue based on the statutes and code.

Finally, Mr. Fuller argues that an evidentiary hearing should be held to determine whether he or other Board members have "...abstained from or absented themselves from votes involving potential conflicts?" Mr. Fuller does not explain how he feels this inquiry is relevant to a resolution of the issue at hand. The Commission does not see its relevancy. What Mr. Fuller or other Board members may have done in regard to other situations where they may have had a conflict is not relevant to a determination of whether Mr. Fuller can sit as a Board member while he is Township Business Administrator. Likewise, it is not relevant to a possible sanction since the issue to be resolved is whether Mr. Fuller may serve in the dual capacities. If the conclusion is that he may not, then the appropriate remedy is that he must give up one of his positions.

In its probable cause decision, the Commission found that there was probable cause that Mr. Fuller's holding of the two positions in question violates N.J.S.A. 18A:12-24(a), (c) and (d). In his submission to the Commission, Mr. Fuller does not address each section specifically. Rather, he argues generally that none of the provisions apply because neither the Board or the municipality have any control or supervision over the other. Mr. Fuller further argues that there is no violation because he has no personal interest in the municipality as opposed to the district. In support of his arguments, Mr. Fuller points out that over the six years that he has served in both capacities, this complaint is the only time a conflict of interest has been alleged against him. Regarding the school construction project, Mr. Fuller notes that he voted in favor of the financing, which he states was in the best interests of the district. Since it was the municipality that was to incur the debt, Mr. Fuller claims that this demonstrates that his position as Township Business Administrator cannot be said to influence his decisions as a Board member. It is Mr. Fuller's position that any potential conflict of interest can be cured by recusal on individual matters.

After consideration of the three above cited sections, the Commission finds that N.J.S.A. 18A:12-24(d) is the provision that is relevant to whether Mr. Fuller can serve simultaneously as a Board member and Township Business Administrator. N.J.S.A. 18A:12-24(d) provides:

> No school official shall undertake any employment or service, whether compensated or not, which might reasonably be expected to

prejudice his independence of judgment in the exercise of his official duties.

This provision prohibits a school official from holding employment which might reasonably be expected to interfere with the exercise of his duties as a school official. This provision, and the Act as a whole, is intended to prohibit the appearance of impropriety as well as actual conflicts of interest. N.J.S.A. 18A:12-22. Thus, Mr. Fuller's argument that his position as Township Business Administrator did not influence his vote on the school construction project is not determinative as to whether he may hold both positions. The issue is whether the public could reasonably perceive that Mr. Fuller's independence of judgement is prejudiced and whether the conflicts are so pervasive that Mr Fuller cannot hold both positions under N.J.S.A. 18A:12-24(d). After considering the duties and responsibilities of both positions, the Commission concludes that Mr. Fuller cannot hold both positions.

As the Township Business Administrator, Mr. Fuller performs his duties under the supervision, direction and control of the Mayor. N.J.S.A. 40:69A-40(c). Pursuant to N.J.S.A. 40:69A-44, Mr. Fuller is the head of the Department of Administration and is required to :

(a) Assist in the preparation of the budget;

(b) Administer a centralized purchasing system;

(c) Be responsible for the development and administration of a sound personnel system; and

(d) Perform such other duties as council may prescribe.

The municipal council also may authorize the business administrator to supervise other municipal departments. N.J.S.A. 40:69A-44(e). In this case, the Irvington Town Council has adopted the Irvington Code which sets forth the duties of the business administrator and those duties are identical to those set forth in N.J.S.A. 40:69A-44(a) to (d). Article VII, Sec. 5-69.

One of the most public responsibilities of Mr. Fuller, as well as all business administrators, is to assist the Mayor in the preparation of the municipal budget. The mayor is responsible for preparing the municipal budget with the assistance of the business administrator. N.J.S.A. 40:69A-44(a) and 45. While the council ultimately has the responsibility to adopt the budget, it is the budget recommended by the mayor and business administrator that the council considers. N.J.S.A. 40:69A-46. Mr. Fuller, as Township Business Administrator, is vitally interested and involved in the preparation and passage of the municipal budget. Not only is it his responsibility to assist in the preparation of the overall budget, but he also must take into account the needs of the Department of Administration of which he is head. Likewise, the public is concerned about the municipal budget because it will address the provision of municipal services and affect local property taxes. Taxpayers interests logically are the maintenance of municipal services at the lowest possible cost so that local property taxes can be set at an acceptable level.

Thus, Mr Fuller, as Township Business Administrator, must balance his interests as Department of Administration head, overall municipal needs and the taxpayers interests in achieving an acceptable level of property taxes. He is very much involved in the financial situation of the Township.

As a Board member, Mr. Fuller is involved with the school budget. N.J.S.A. 18A: 22-7 . As a Board member, he must vote on the school budget. Also, many decisions he makes as a Board member ultimately could impact the school budget. For example, decisions on class size, curriculum and school programs could have an effect on the school budget. The Commission recognizes that the municipal budget and the school budget are separate and that the Town Council only would become involved with the school budget in the event the voters defeat the school budget. N.J.S.A. 18A:22-37. In this case, however, we are dealing with a situation where the individual who is intimately involved with municipal finances and whose employment may depend upon keeping taxes at a low level, is called upon as a Board member to make school decisions that will affect taxes and that may have financial implications for municipal residents. Under these circumstances, the public could reasonably perceive that Mr. Fuller may be making decisions as a Board member with his employment as Township Business Administrator in mind rather than the interests of the district. Additionally, Mr. Fuller was appointed to the Board by the Mayor and is under the control and supervision of the Mayor as Township Business Administrator. The public could reasonably perceive that given this, Mr. Fuller may act to advance the Mayor's interests and policies rather acting in the interests of the district. Recusal on matters that may affect taxes is not. feasible as such matters would be far reaching. The conflict of interest is so pervasive that N.J.S.A. 18A:12-24(d) would prohibit the holding of both positions.

The New Jersey Supreme Court has explained the common law doctrine of incompatibility of offices as a situation where there is "...a conflict or inconsistency in functions of an office." Reilly v. Ozzard, 33 N.J. 529, 542 (1960). As the court noted, it is found where the duties of one office clash with another, inviting the individual to prefer one obligation over the other. Ibid. While not exactly on point since Reilly involved the common law doctrine and here the Commission is addressing a comprehensive statutory scheme on ethics, Reilly is nonetheless instructive. As discussed above, it is the Commission's conclusion that Mr Fuller's duties as Board member can reasonably be perceived to clash with his employment as Township Business Administrator.

The Commission is aware that the Township of Irvington has suffered financial difficulties that necessitated the intervention of the Department of Community Affairs. Given the State's involvement, Mr. Fuller's duties may be more limited. This, however, does not alleviate the perceived conflict. Indeed, it could exacerbate it. The public could reasonably perceive that, given the Township's financial difficulties, and Mr. Fuller's responsibilities as Township Business Administrator, he may tempted to make school decisions with an eye towards the Township's finances.

The Commission notes that in making this decision, it is not finding that Mr. Fuller disregarded the interests of the district when acting as a Board member. As explained previously, the Act addresses the appearance of impropriety as well as actual conflicts. In this case, the

Commission finds that there could be a reasonable perception of a conflict of interest.[2] The Commission notes that this decision is based on the particular facts of this case.

DECISION

For the foregoing reasons, the Commission finds that pursuant to N.J.S.A. 18A:12-24(d), Mr. Fuller may not serve as both a Board member and Township Business Administrator. This situation is slightly different from other violations since in most other situations, the Commission can address the particular action which occurred and impose an appropriate sanction. In this case, however, it is not a particular act, such as a vote, that the Commission is addressing. Rather, the Commission has found that Mr. Fuller may not serve as a Board member while he is Township Business Administrator. Under these circumstances, the Commission recommends to the Commisisoner that Mr. Fuller be removed from the Board unless he resigns one of his positions within thirteen days.

Upon the Commission's adoption of this decision by a fomal resolution, the matter shall be transmitted to the Commissioner of Education for action on the Commission's sanction recommendation pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, PO Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." Alternatively, Mr. Fuller may advise the Commissioner within the same time period that he has resigned from one of his positions. A copy of any comments filed must be sent to the School Ethics Commission and complainant.

Paul C. Garbarini

Paul C. Garbarini
Chairperson

[2]Although not mentioned in his written submission, in his answer, Mr. Fuller states that the holding of both positions does not violate the Act because N.J.S.A. 18:12-2 allows school employees to sit on municipal governing bodies. The Commission questions the applicability of that provision to the facts of this case where Mr. Fuller seeks to hold both positions in the same municipality. In any event, the Commission is deciding this matter under the Act. Jurisdiction to interpret N.J.S.A. 18A:12-2 lies with the Commissioner of Education.

Resolution Adopting Decision -- C32-95

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof and if applicable, has considered the arguments raised by parties in subsequent submissions; and

Whereas, the Commission finds that respondent David Fuller violated N.J.S.A. 18A:12-24(d) of the School Ethics Act by serving as both a member of the Irvington Board of Education and the Irvington Township Business Administrator; and

Whereas, the Commission concludes that the appropriate sanction for the violation is to remove Mr. Fuller from his position as board member if he fails to resign from one of those positions within 13 days and recommends such sanction to the Commissioner of Education; and

Whereas, the Commission has reviewed the proposed decision of its staff; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on November 25, 1997.

Lisa James-Beavers
Executive Director

AGENCY DOCKET NO. 472-12/97

IN THE MATTER OF DAVID W. FULLER,	:	
IRVINGTON TOWNSHIP BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, ESSEX COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission finding that Mr. Fuller violated the School Ethics Act, *N.J.S.A.* 18A:12-24(d), by his service as both a Board member and Township business administrator and recommending a penalty of removal from the Board if he failed to resign from one of these positions by December 16, 1997, has been reviewed. Upon issuance of the decision of the School Ethics Commission, Mr. Fuller was accorded thirteen days to file written comments with respect to the recommended penalty for the Commissioner's consideration. Mr. Fuller's comments were timely filed in accordance with the established timeline.

Mr. Fuller's comments dispute the substantive determination of the School Ethics Commission, that his simultaneous service as a Board member and Township business administrator violates the School Ethics Act, a determination which the Commissioner of Education is not empowered to review, in that his jurisdiction is solely limited to reviewing the sanction, if any, to be imposed following the finding of a violation by the Commission.

By letter dated December 17, 1997, from the Director of the Bureau of Controversies and Disputes, which was transmitted via facsimile to counsel for Mr. Fuller, counsel was directed to advise, via return facsimile, whether Mr. Fuller had resigned from one of

his positions as directed in the Commission's letter dated December 3, 1997. Counsel's response to this inquiry was that Mr. Fuller had not resigned either of his positions.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that removal from his Board position is the appropriate penalty in view of the Commission's determination that, pursuant to *N.J.S.A.* 18A:12-24(d), Mr. Fuller may not serve as both a Board member and Township business administrator.

Accordingly, IT IS HEREBY ORDERED that David W. Fuller is removed from the Board of Education of the Township of Irvington as of the date of this decision.

COMMISSIONER OF EDUCATION

JANUARY 21, 1998
DATE OF MAILING JANUARY 21, 1998

(SB) 19-98

SB #19-98

IN THE MATTER OF THE GRANT OF THE:

CHARTER SCHOOL APPLICATION OF	:	STATE BOARD OF EDUCATION
THE RED BANK CHARTER SCHOOL,	:	DECISION
MONMOUTH COUNTY.	:	

Decided by the Commissioner of Education, January 21, 1998

For the Appellant, McOmber & McOmber (Arsen Zartarian, Esq., of Counsel)

For the Respondent, McCarter & English (David C. Apy, Esq., of Counsel)

For the Participant Commissioner of Education, Geraldine Callahan, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

This is one of fourteen appeals from contingent approvals given by the Commissioner of Education to applications submitted to obtain charters to operate charter schools pursuant to the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 et seq. We have presumed the validity of the statute and implementing regulations for purposes of determining whether a specific applicant should be permitted to proceed in this process. Hence, for purposes of this review, we have focused on whether the appeal raises concerns of such character as to preclude the grant of a charter or has revealed circumstances which must be addressed before the proposed school can become operational.

In support of its appeal, the Board of Education of the Borough of Red Bank (hereinafter "Board") contends that the Commissioner's decision should be reversed

April 1, 1998

because he approved the application on the basis of components that had been evaluated as inadequate by the Department of Education's reviewers. The Board further contends that identification of the Trinity Episcopal Church as the proposed facility for the charter school violates the New Jersey Constitution and is contrary to the Charter School Act. The Board argues that the Commissioner violated its due process rights and that the regulations are deficient in that they do not provide any standards for evaluating charter school applications. The Board also argues that the failure to consider the financial, racial and educational impact of a charter school violates the Equal Protection Clause of the New Jersey Constitution and that the grant of a charter in this case will violate the New Jersey Law Against Discrimination, Title VI of the Civil Rights Act and the Equal Educational Opportunities Act.

We find that the Board has not shown that the substance of the application is such that we should set aside the Commissioner's determination that the proposed charter school may continue the process which would allow it to become operative if the Commissioner grants it final approval. Moreover, the Board's arguments with regard to racial impact are speculative at this point in the absence of actual enrollment data. However, given the racial composition of Red Bank, the Commissioner should review the racial composition of the student population of the Red Bank Charter School before granting final approval.

Margaret M. Bennett and Wendel S. Daniels abstained.

April 1, 1998

Date of mailing APR 03 1998

(SB) 19-98

SB #19-98

IN THE MATTER OF THE GRANT OF THE:

CHARTER SCHOOL APPLICATION OF : STATE BOARD OF EDUCATION

THE RED BANK CHARTER SCHOOL, : DECISION ON MOTION

MONMOUTH COUNTY. :

Decided by the Commissioner of Education, January 21, 1998

Decided by the State Board of Education, April 1, 1998

For the Appellant, Kenney & Gross (Michael J. Gross, Esq., of Counsel)

For the Respondent, McCarter & English (David C. Apy, Esq., of Counsel)

For the Participant Commissioner of Education, Geraldine Callahan, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

Inasmuch as the Red Bank Board of Education's application fails to meet the standards that would entitle it to relief under Crowe v. De Gioia, 90 N.J. 126 (1982), we deny its motion for a stay.

Wendel E. Daniels abstained.

June 3, 1998

Date of mailing [illegible]

20-98

20-98 SEC

IN THE MATTER OF BARBARA RONE,	:	
SOUTH AMBOY BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
MIDDLESEX COUNTY.	:	DECISION
	:	

JANUARY 21, 1998

IN THE MATTER OF	:	**Before the School Ethics Commission**
BARBARA RONE, *SOUTH AMBOY BOARD OF EDUCATION, MIDDLESEX COUNTY*	:	**Docket No.: C03-97** **DECISION**

PROCEDURAL HISTORY

This matter arises from a claim that South Amboy board member Barbara Rone violated the School Ethics Act, "Act," N.J.S.A. 18A:12-21 et seq. Complainant Dr. Robert Dicker, Superintendent of the South Amboy school district, filed this complaint on February 5, 1997. Therein, he alleges that South Amboy Board of Education member Barbara Rone violated the Act when she voted on matters concerning him. Barbara Rone filed her answer to the complaint on February 26, 1997. Therein, she denies that she violated N.J.S.A. 18A:12-24(b) or (c) of the Act.

By decision dated July 23, 1997, the Commission found probable cause to credit the allegations that she should have abstained on a resolution to hire a special counsel to investigate him. However, the Commission dismissed the allegations in Count Two of the complaint. This count alleged that Ms. Rone should have abstained on voting for Dr. Dicker's bills presented at the September, October, November and December 1996 meetings of the Board. The bills were for his reimbursement for attendance at conferences and county superintendent roundtable meetings and meals and other expenses in connection with his attendance. Respondent voted against each of the reimbursements.

FACTS

After submission of written statements, the Commission finds that the parties consent to the following material facts of this case.

1. Prior to the 1996-97 school year, respondent Ms. Rone filed a criminal complaint against Dr. Dicker.

2. According to the official transcript, respondent testified in the municipal court proceeding that she had voted against Dr. Dicker's appointment to become superintendent in April 1995 because she believed that there was someone within the district who was better for the job. In the probable cause determination, the Commission found the transcript to constitute the accurate version of what Ms. Rone said at the municipal proceeding.

3. Although the municipal court judge found complainant guilty of harassment, the Superior Court of New Jersey-Law Division vacated that decision. The Honorable Joyce Munkasci, J.S.C., then entered an order finding complainant not guilty of the charges.

4. After the entry of the above order finding complainant not guilty, the complainant sought indemnification for the legal fees and expenses incurred in defending the criminal action pursuant to N.J.S.A. 18A:16-6.1.

5. Prior to the board meeting at which the board was to discuss the payment of complainant's legal fees, complainant's counsel sent a letter to board attorney Clark W. Convery, Esq., notifying him that respondent has a conflict of interest that precludes her from voting on matters concerning the superintendent. in any matter dealing with the superintendent pursuant to N.J.S.A. 18A:12-24(c).

6. In that same letter, Dr. Dicker's counsel notified Mr. Convery that Dr. Dicker is considering bringing a civil action against respondent as a result of her false accusations against him.

7. As a result of the above letter and the advice of Board counsel, respondent abstained from one vote regarding the payment of complainant's legal fees.

8. Respondent abstained from other votes regarding the reimbursement of expenses incurred by Dr. Dicker.

9. The Board set forth a resolution to hire a special counsel to:

(1) Review the conduct of the superintendent and report to the board with any recommendations as to appropriate disciplinary actions, if any:

(2) Review and advise the board with regard to the superintendent's claim for reimbursement of attorney's fees resulting from criminal charges filed against him in the South Amboy Municipal Court and subsequent appeal:

(3) Review and advise the board as to the validity of the claims made in the letter dated January 17, 1997, from counsel representing the superintendent seeking to restrict the board members' voting rights and to further advise as to appropriate action in connection with said claims.

10. Respondent voted in the affirmative on the above resolution at the Board's meeting on January 27, 1997.

11. The resolution passed by a vote of five to two. with seven members present and voting.

12. There are nine members on the South Amboy Board of Education.

13. The resolution needed a majority of four votes to pass.

Complainant alleged that respondent's conduct set forth above violated N.J.S.A. 18A:12-24(c) and N.J.S.A. 18A:12-24(b) respectively. The Commission found probable cause to credit the allegations that respondent violated N.J.S.A. 18A:12-24(c) only and dismissed the charge that respondent violated subsection (b).

ANALYSIS

The issue now before the Commission is whether respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act when she voted on the above resolution to hire special counsel.

N.J.S.A. 18A:12-24(c) of the School Ethics Act sets forth:

> No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

Complainant contends that the litigation between him and Ms. Rone constituted a direct personal involvement that might reasonably be expected to impair her objectivity in voting on the resolution to hire special counsel to investigate his conduct and his request for attorney's fees incurred in defending the municipal court matter. The Commission agrees and now finds that respondent violated N.J.S.A. 18A:12-24(c) when she voted on the resolution to hire special counsel.

Respondent argued in a post-meeting submission that her voting on a resolution to hire special counsel differs from voting to actually discipline the superintendent or deny his request for attorneys' fees. She notes that she abstained on both of those votes. Respondent states that the purpose of hiring the special counsel is to have an independent, impartial person assist the board in determining what, if any, action it should take regarding the matter. Respondent further states in response to the Commission's probable cause finding that, "it would be curious, indeed incongruous, were the Commission to conclude that a Board member's 'independence of judgment' had been impaired by her voting to obtain independent judgment and advice from a disinterested source." The Commission disagrees.

The appointment of a special counsel in this instance was directly related to respondent's municipal court proceeding against the superintendent. Particularly troubling to the Commission is the first item of the resolution. It clearly authorizes the special counsel to review the conduct

of the superintendent and report to the board with any recommendations for disciplinary action. Ms. Rone would not explain what she understood that section to mean when the Commission questioned her. Thus, it must be interpreted by its plain meaning. The Commission finds that Ms. Rone had a direct personal involvement in the appointment of the special counsel to review the superintendent's conduct that might reasonably be expected to impair her objectivity or independence of judgment. Respondent's argument that she was only voting to appoint someone who is neutral to look into the matter fails because it is irrelevant that the special counsel would be neutral. She should have abstained because the matter involved a legal dispute in which she was an adversary of the superintendent. In addition, she had an alternative course of action. That alternative was to put the matter to rest since the courts had already ruled on the matter. By her vote, she succeeded in continuing a matter that would have been concluded otherwise.

Respondent also argues that the Commission should not find her in violation of subsection (c) because the motion to adopt the resolution to appoint special counsel would have succeeded without her vote. The Commission finds this argument unpersuasive. The Commission has not ruled that a vote does not violate the Ethics Act if it was not the deciding vote. In Scannella v. Scudillo, 95 N.J.A.R. 2d (EDU) 190 (1995), the Commission considered the fact that Ms. Scudillo cast the deciding vote in its decision because she had abstained when the board did not need her vote to pass the motion she wanted. She decided to vote when the motion would have failed without her vote. In cases in which the respondent does not cast the deciding vote, such information can only mitigate the penalty. The Commission shall discuss the recommended penalty below. The Commission finds that respondent violated N.J.S.A. 18A:12-24(c) of the Act when she voted in favor of the resolution to appoint special counsel review and investigate the conduct of the superintendent.

DECISION

For the foregoing reasons the Commission finds that Ms. Rone violated the School Ethics Act, N.J.S.A. 18A:12-24(c) when she voted in favor of the resolution concerning Dr. Dicker. Pursuant to N.J.S.A. 18A:12-29(c), the Commission must now recommend a penalty to the Commissioner of Education that he can accept or modify. The Commission considers as a mitigating factor the facts that the board did not need her vote to pass the resolution. The Commission does not accept as a mitigating factor respondent's length of service on the board because it generally expects long-term board members to have more knowledge and understanding of their responsibilities under the Act. The Commission also does not consider as a mitigating factor the fact that Ms. Rone abstained on the direct vote whether to pay Dr. Dicker's legal fees. By voting on the resolution, respondent still authorized having special counsel advise the board as to whether the board should indemnify him. Without the resolution, the board would have resolved the issue. In addition, the Commission must weigh the mitigating factors against the seriousness of the offense of voting in a matter in which she had a personal involvement that might reasonably be expected to impair her objectivity.

Resolution Adopting Decision -- C03-97

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof and if applicable, has considered the arguments raised by parties in subsequent submissions; and

Whereas, the Commission finds that respondent Barbara Rone violated N.J.S.A. 18A:12-24(c) of the School Ethics Act; and

Whereas, the Commission believes that the appropriate sanction in this matter is a censure and recommends that the Commissioner of Education impose a censure; and

Whereas, the Commission has reviewed the proposed decision of its staff; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on October 28, 1997.

Lisa James-Beavers
Executive Director

For the foregoing reasons, the Commission concludes that a censure is the appropriate penalty in this case and therefore recommends to the Commissioner of Education that he impose a censure as the sanction.

Upon the Commission's adoption of this decision by a formal resolution, the matter shall be transmitted to the Commissioner of Education for action on the Commission's sanction recommendation pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, PO Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini
Chairperson

AGENCY DKT. NO. 415-10/97

IN THE MATTER OF BARBARA RONE, :

SOUTH AMBOY BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION

MIDDLESEX COUNTY. : DECISION

:

The record of this matter and the decision of the School Ethics Commission have been reviewed. Written comments regarding the recommended sanction were untimely submitted to the Commissioner.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that censure is the appropriate penalty in this matter, in view of the Commission's determination, which is not reviewable by the Commissioner herein, that a violation of the act occurred under the circumstances set forth in the decision.

IT IS HEREBY ORDERED that Barbara Rone be censured as a school official found to have violated the School Ethics Act.

COMMISSIONER OF EDUCATION

JANUARY 21, 1998
DATE OF MAILING JANUARY 21, 1998

IN THE MATTER OF BARBARA RONE, :

SOUTH AMBOY BOARD OF EDUCATION, : RESOLUTION OF CENSURE

MIDDLESEX COUNTY. :

:

WHEREAS, the South Amboy Board of Education member, Barbara Rone, was found by the School Ethics Commission to have voted in favor of a resolution to hire special counsel to investigate the conduct of the South Amboy Superintendent of Schools with respect to a legal dispute in which she was an adversary of the superintendent; and

WHEREAS, the School Ethics Commission concluded that such conduct violated *N.J.S.A.* 18A:12-24(c) of the School Ethics Act; and

WHEREAS, after considering the facts determined during the course of the investigation and Barbara Rone's testimony regarding this matter, the School Ethics Commission, in a decision dated October 28, 1997, recommended to the Commissioner of Education that he impose upon Ms. Rone the penalty of censure pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6:3-9.19(c)1; and

WHEREAS, comments with regard to this penalty were untimely filed before the Commissioner by Ms. Rone; and

WHEREAS, the Commissioner has concluded that the Commission's censure is the appropriate penalty for the aforementioned violation for the reasons set forth in the Commission's decision; now therefore

BE IT RESOLVED, that Barbara Rone is hereby censured as a school official found to have violated the School Ethics Act; and

BE IT FURTHER RESOLVED, that the South Amboy Board of Education is ordered to read this resolution at the next public meeting following its adoption by the School Ethics Commission and to post it in such places as the Board posts its public notices.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

(SB) 20-98

SB #20-98

IN THE MATTER OF THE GRANT OF THE:

CHARTER SCHOOL APPLICATION OF	:	STATE BOARD OF EDUCATION
THE PLEASANTECH ACADEMY CHAR-	:	DECISION
TER SCHOOL, ATLANTIC COUNTY.	:	

Decided by the Commissioner of Education, January 21, 1998

For the Appellant, Murray, Murray & Corrigan (Yvonne D. Catley, Esq., of Counsel)

For the Respondent, Jacobs & Jacobs (Joseph M. Jacobs, Esq., of Counsel)

For the Participant Commissioner of Education, Geraldine Callahan, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

This is one of fourteen appeals from contingent approvals given by the Commissioner of Education to applications submitted to obtain charters to operate charter schools pursuant to the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 et seq. We have presumed the validity of the statute and implementing regulations for purposes of determining whether a specific applicant should be permitted to proceed in this process. Hence, for purposes of this review, we have focused on whether the appeal raises concerns of such character as to preclude the grant of a charter or has revealed circumstances which must be addressed before the proposed school can become operational.

April 1, 1998

In support of its appeal, the Pleasantville Board of Education (hereinafter "Board") contends that the proposed school's application was deficient and should not have been approved because it did not meet the requirements of the statute. It also contends that the grant of a charter will impose an economic burden on the school district and, because Pleasantville is a special needs district, will deprive those students attending the district's schools of a thorough and efficient education.

We find that the Pleasantville Board has not shown that the substance of the application is such that we should set aside the Commissioner's determination that the proposed charter school may continue the process which would allow it to become operative if the Commissioner grants it final approval.

Margaret M. Bennett abstained.

April 1, 1998

Date of mailing APR 0 3 1998

21-98

HUGO VICARI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOLS, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, tenured principal, asserted that the Board's action suspending him without pay after issuance of an initial decision, but prior to the Commissioner's decision dismissing him from his tenured employment, violated *N.J.S.A.* 18A:6-14.

ALJ found that the Board improperly changed petitioner's suspension status to without pay. Even if the Board originally had suspended him without pay, pursuant to *N.J.S.A.* 18A:6-14, the Board was required after 120 days to resume payment of petitioner's full salary until the date of determination of the charges by the Commissioner. ALJ noted there is nothing in this statute that permitted the Board herein to discontinue payment of petitioner's full salary until the Commissioner rendered his determination. ALJ granted petitioner's motion for summary decision and ordered the Board to pay petitioner the salary to which he was entitled under *N.J.S.A.* 18A:6-14 for the period June 1 to July 22, 1996, the date on which the Commissioner rendered a final decision in his tenure matter. Moreover, the ALJ concluded that petitioner was not entitled to salary increments during his period of suspension. Board's counterclaim for return of increment monies was dismissed as the Board must seek the return of these monies in a court of competent jurisdiction.

Commissioner concurred with the ALJ that the Board was without the authority to discontinue petitioner's salary payment prior to July 22, 1996. Citing *Castaldo* and *DiPillo,* the Commissioner noted Board correctly asserted that petitioner had no legal entitlement to receive a salary amount that included an award of increments during his suspension; nor is a local board required to take formal action to withhold increments during such period. However, the Board herein increased petitioner's salary on three separate occasions, notwithstanding his suspension. Thus, the Commissioner concluded the Board was without legal authority to recover the salary increments as such action would constitute improper reduction of salary. Therefore, Commissioner modified initial decision. Commissioner directed Board to compensate petitioner for back pay and emoluments consistent with above parameters. Board's counterclaim was dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9702-96

AGENCY DKT. NO. 329-8/96

HUGO VICARI,

Petitioner,

v.

BOARD OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOL, HUDSON COUNTY,

Respondent.

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

Alexander W. Booth, Esq., for respondent (Brownstein, Booth & Barry, attorneys)

Record Closed: October 27, 1997 Decided: December 4, 1997

BEFORE **MARIE P. SIMONELLI**, A.L.J.:

STATEMENT OF THE CASE

Petitioner, Hugo Vicari (Mr. Vicari), appeals the decision of respondent, Board of the Hudson County Area Vocational-Technical School, Hudson County (the Board), to suspend him without pay after the issuance of an initial decision but before the issuance of the final decision by the Commissioner of Education (the Commissioner) in violation of *N.J.S.A.* 18A:6-14.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Mr. Vicari had been employed by the Board as a tenured principal. In August 1994, the Board had certified tenure charges against Mr. Vicari to the Commissioner and suspended him with pay. Mr. Vicari appealed those charges. On June 3, 1996, the Honorable Marylouise Lucchi-McCloud rendered an Initial Decision upholding the charges and dismissing Mr. Vicari from his tenured position. On June 19, 1996, the Board adopted a resolution to suspend Mr. Vicari without pay pending the submission of evidence that he had not received any pay or salary for any substituted employment during his period of suspension. Thereafter, the Board ceased paying Mr. Vicari's salary as of the pay period ending May 31, 1996. The Commissioner issued a final decision on July 22, 1996. Thus, Mr. Vicari received no salary from June 1 to July 22, 1996.

On August 8, 1996, Mr. Vicari filed a Verified Petition. The Board filed a Response to Petition on September 9, 1996. The Board also filed a Counterclaim for the return of all monies received by Mr. Vicari by way of salary increments during his period of suspension. Mr. Vicari filed an Answer to Counterclaim on September 13, 1996. On September 27, 1996, the Commissioner transferred the matter to the Office of Administrative Law (the OAL) for a hearing as a contested case. The OAL scheduled a hearing for October 16 and 17, 1997.

On September 30, 1997, Mr. Vicari filed a motion for summary decision. On October 27, 1997, the Board filed a cross-motion for summary decision. Mr. Vicari filed a reply to the cross-motion on October 30, 1997.

MOTION AND CROSS-MOTION FOR SUMMARY DECISION

Mr. Vicari moves for summary decision on the grounds that it was illegal for the Board to unilaterally alter his pay status from suspended with pay to suspended without pay before the issuance of a final decision by the Commissioner. Mr. Vicari argues that a Board may suspend a tenured employee without pay if the employee is indicted or if the Board suspends the employee without pay when it certifies tenure charges to the Commissioner. *N.J.S.A.* 18A:6-8.3, *N.J.S.A.*

18A:6-14. If a Board suspends an employee without pay at the time it certifies tenure charges to the Commissioner, the suspension without pay may only be for 120 days.

Mr. Vicari argues that in his case, he was not indicted and the Board did not suspend him without pay at the time it certified the charges against him to the Commissioner. Thus, he concludes that since the Board failed to exercise its discretion to suspend him without pay when it certified the charges, it had no right to do so at a subsequent time.

Mr. Vicari also claims that the Board had no right to pass a resolution suspending him without pay pending the submission of evidence that he had not received any pay or salary for any substituted employment during his period of suspension. Mr. Vicari argues that the resolution asserts a claim for mitigation that the Board never raised at the trial level of the tenure charge process. He also argues that the Board engaged in self-help and it summarily and illegally held his salary checks hostage in an effort to reopen the proceedings to create a new issue. Regardless of the Board's requirement, Mr. Vicari certified that he did not receive any income from substituted employment during his period of suspension.

The Board did not respond to the above arguments. Instead, it's attorney filed a certification stating that Mr. Vicari received a total of about $175,000 during his period of suspension. This total included a $400 increment on January 1, 1995, a $2,400 increment on July 1, 1995 and a $600 increment on January 1, 1996. The Board's attorney also stated that since an employee is not entitled to receive an increment during a period of suspension, Mr. Vicari was overpaid $3,000.

In response, Mr. Vicari argues that the Counterclaim is untimely under *N.J.A.C.* 6:24-1.2. This statute establishes a 90-day time period in which the Board can raise a claim for reimbursement of any increments paid to Mr. Vicari. In this case, the Board raised its claim for reimbursement of the three increments well after the 90-day period.

Mr. Vicari also argues that the Counterclaim violates the entire controversy doctrine and it is barred by the doctrines of laches and unclean hands. During the tenure charges proceedings,

the Board never sought reimbursement for the increments it had paid to Mr. Vicari even though it knew or should have known that the increments were being paid. In addition, Mr. Viacari has paid all taxes on the monies he received. Mr. Vicari also argues that the Board engaged in bad faith tactics and violated *N.J.S.A.* 18A:6-14 when it adopted the resolution. Finally, Mr. Vicari argues that having established and paid his salary, the Board may not reduce his salary by reclaiming it.

The Board filed no response to these additional arguments.

DISCUSSION AND CONCLUSION

The suspension of a tenured employee without pay is governed by *N.J.S.A.* 18A:6-14, which provides:

> Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made.

Pursuant to this statute, the Board has the authority to suspend a tenured employee without pay when it certifies tenure charges against that employee. Once the charges are certified, this statute allows the suspension to continue without pay for 120 calendar days after certification of the charges. This statute mandates that the resumption of the suspended employee's full salary must begin on the 121st day after the certification of the charges and must continue until the Commissioner of Education determines the charge. The Commissioner has held that the time period of suspension without pay is limited to a total of 120 calendar days, including weekends, vacations, holidays, summer vacations, and any other day falling within a period of 120 days from the commencement of the suspension. *In re Tenure Hearing of Walter Kizer,* 1974 *S.L.D.* 501; *In re Tenure Hearing of Anthony Polito,* 1974 *S.L.D.* 662; *In re Tenure Hearing of Matilda Grabert,* 1977 *S.L.D.* 163.

In this case, the Board suspended Mr. Vicari with pay in August 1994. The Board cites no statutory or case law authority whatsoever to show that it was authorized to subsequently change Mr. Vicari's status to suspend without pay. The Board, therefore, improperly changed Mr. Vicari's status as suspended without pay.

In addition, even if the Board originally had suspended Mr. Vicari without pay, pursuant to *N.J.S.A.* 18A:6-14, the Board was required to resume payment of Mr. Vicari's full salary on the 121st day after the certification of the charges to the Commissioner. This statute also required the Board to continuing paying Mr. Vicari's full salary until the date of determination of the charges by the Commissioner. There is nothing in this statute that permits the Board to discontinue payment of Mr. Vacari's full salary until the Commissioner renders his determination.

While it is clear that Mr. Vicari should have received his full salary until the Commissioner rendered his determination, the question in this case is whether or not Mr. Vicari's full salary should have included increments during his period of suspension. In arguing that it does not, the Board cites the case of *In re Anthony Castaldo*, 1986 *S.L.D.* 3026. *Castaldo* involved a remand of salary claims that had arisen during the course of the proceedings before the OAL. A suspended tenured employee had claimed entitlement to a salary during the period of his suspension, including increments. The Board had claimed that it was entitled to deduct from the monies due to the employee an amount representing contributory payments that should have been made by the employee on a lump sum payment the Board made to him in settlement of the tenure proceedings. The Board considered that lump sum payment as salary.

The Commissioner rejected the settlement and ordered the matter to proceed to a hearing on the merits. Thereafter, the employee refused to return or account for the lump sum settlement payment he had received from the Board. Thus, the Board suspended any further payment of salary until the employee repaid the settlement money. The Commissioner upheld continued denial of payment of salary. The State Board subsequently reversed the Commissioner's decision and ordered the resumption of salary payments. In so doing, the State Board concluded that the Board had no authority to withhold the employee's salary payments because the lump sum

settlement payment was not salary within the meaning of *N.J.S.A.* 18A:6-14. The State Board also concluded that *N.J.S.A.* 18A:6-14 mandates payment of salary after the 121st day of suspension and only permits an offset for sums received for substituted employment. The State Board noted that the Board could seek the return of the lump sum settlement payment in a civil action in a court of competent jurisdiction.

After the State Board had ordered the resumption of salary payment, the Commissioner rendered his decision sustaining the tenure charges and remanding the salary claims to the OAL. An administrative law judge (ALJ) subsequently found that the lump sum payment was salary. The ALJ also found that the employee was not entitled to any increments during the pendency of the tenure proceedings that had resulted in the employee's dismissal from his tenured position. Relying on *DeMarco v. Bd. of Educ. of the Boro. of Glassboro*, 1981 *S.L.D.* 1034, *aff'd*, 1982 *S.L.D.* 1471, the ALJ concluded that the annual salary to which the employee was entitled to be paid was the amount he was receiving at the time of his original suspension.

The Commissioner adopted the ALJ's determination that the employee was not entitled to salary increments and set aside the ALJ's determination that the lump sum payment was salary. The Commissioner relied on the State Board's decision that, absent a ruling by a court of competent jurisdiction, the Board could not use the lump sum payment to satisfy its statutorily prescribed duty under *N.J.S.A.* 18A:6-14.

The State Board affirmed the Commissioner's determination that the employee was not entitled to salary increments during his period of suspension. It found that the employee only was entitled to his salary from the 121st day of his suspension until the date of the Commissioner's decision. The State Board also found that the Board had no statutory authority to deduct from the salary to which the employee was entitled the amount of contributory payments that the employee would have made had the lump sum settlement payment been salary. Again, the State Board recognized that the Board would have to institute proceedings in a court of competent jurisdiction for the return of that money.

In the present case, Mr. Vicari was not entitled to salary increments during his period of suspension. He was entitled only to his salary. However, the Board paid Mr. Vicari the increments and then withheld that amount by not paying him the salary it owed him under *N.J.S.A.* 18A:6-14 from June 1 to July 22, 1996 The Board had no statutory authority to do this. It only had the authority to withhold any sums Mr. Vicari received for substituted employment. Mr. Vicari received no such sums. According to the holding in *Castaldo,* the Board must seek the return of the increment monies in a court of competent jurisdiction.

ORDER

Based upon the foregoing, it is hereby **ORDERED** as follows:

1. Mr. Vicari's motion for summary decision and hereby is **GRANTED.** The Board shall pay the Mr. Vicari the salary to which he was entitled under *N.J.S.A.* 18A:6-14 for the period June 1, to July 22, 1996; and

2. The Board's cross-motion for summary decision be and hereby is **DENIED** and its Counterclaim be and hereby is **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Dec. 4, 1997
DATE

MARIE P. SIMONELLI, A.L.J.

Receipt Acknowledged:

12/9/97
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 11 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

md

OAL DKT. NO. EDU 9702-96
AGENCY DKT. NO. 329-8/96

HUGO VICARI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOLS, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.[1]

Initially, the Commissioner concurs with the Administrative Law Judge (ALJ) that the Board was without the authority to discontinue petitioner's salary payment prior to July 22, 1996, the date on which the Commissioner rendered a final decision in the tenure matter entitled *In the Matter of the Tenure Hearing of Hugo Vicari, Hudson County Area Vocational-Technical School District, Hudson County*, 96 *N.J.A.R.* 2d (EDU) 888.

Further, the Commissioner notes that the Board is correct in asserting that petitioner had no legal entitlement to receive a salary amount that included an award of increments during his suspension following the Board's certification of tenure charges against

[1] Petitioner's exceptions are an essentially verbatim reiteration of those arguments presented to the ALJ, which, the Commissioner finds, were fully and fairly considered by her, as well.

Petitioner Vicari in October 1994. *Castaldo*, *supra*, at 3026. Nor is a local board required to take formal action to withhold increments during such period. *DiPillo v. Township of Randolph*, 97 *N.J.A.R.* 2d (EDU) 237, 243, aff'd State Board August 6, 1997, slip op. at p. 3. However, in the instant matter, the Board increased petitioner's salary on *three separate occasions*, notwithstanding his suspension on tenure charges. Thus, the Commissioner concurs with petitioner's view that the Board is without the legal authority to recover the salary increments paid to petitioner, as such action would constitute an improper reduction of petitioner's salary. In this regard, the Commissioner recognizes that

> *** tenured teachers [have] "acquired vested rights to the salaries established for them by the Board's adoption of their salary placement" and that they [may] not "be deprived of a right they had acquired by action of the board." *Fedor v. Elmwood Park Board of Education*, 97 *N.J.A.R.* 2d (EDU) 96, 98, citing *Anson v. Bridgeton Bd. of Educ.*, 1972 *S.L.D.* 638, 640; *Docherty v. West Paterson Bd. of Educ.*, 1967 *S.L.D.* 297 ***.

Accordingly, the initial decision of the ALJ is modified as set forth herein. The Board is directed to compensate petitioner for back pay and emoluments, consistent with the above parameters, and the Board's counterclaim is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 23, 1998
DATE OF MAILING JANUARY 23, 1998

(SB) 21-98

SB #21-98

IN THE MATTER OF THE GRANT OF	:	
THE CHARTER SCHOOL APPLICATION	:	STATE BOARD OF EDUCATION
OF THE PLEASANTVILLE CHARTER	:	DECISION
SCHOOL FOR ACADEMIC EXCEL-	:	
LENCE, ATLANTIC COUNTY.	:	

Decided by the Commissioner of Education, January 21, 1998

For the Appellant, Murray, Murray & Corrigan (Yvonne D. Catley, Esq., of Counsel)

For the Respondent, J. David Alcantra, pro se

For the Participant Commissioner of Education, John K. Worthington, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

This is one of fourteen appeals from contingent approvals given by the Commissioner of Education to applications submitted to obtain charters to operate charter schools pursuant to the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 et seq. We have presumed the validity of the statute and implementing regulations for purposes of determining whether a specific applicant should be permitted to proceed in this process. Hence, for purposes of this review, we have focused on whether the appeal raises concerns of such character as to preclude the grant of a charter or has revealed circumstances which must be addressed before the proposed school can become operational.

April 1, 1998

In its brief, the Pleasantville Board contends that the proposed school's application should not have been approved because it did not meet the requirements of the statute. It also contends that the grant of a charter will impose an economic burden on the school district and will deprive those students attending the district's schools of a thorough and efficient education. In addition, the Pleasantville Board has filed a motion to supplement the record with an affidavit by one of the proposed school's founders and a letter to the Commissioner from former members of the proposed school's Board of Trustees urging the Commissioner to reconsider his approval of the application.

After reviewing the materials, we grant the motion to supplement the record. The documents submitted to us reveal that the partner of the proposed school is a private profit-making entity which controls the Board of Trustees. These circumstances are materially different from those presented to the Commissioner. We therefore refer this matter back to the Commissioner for his further consideration of the application in light of the concerns raised by the supplemental materials.

Margaret M. Bennett abstained.

April 1, 1998

Date of mailing APR 03 1998

22-98

IN THE MATTER OF THE TENURE	:	
HEARING OF ELMENA JEAN,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

JAN UARY 23, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11169-96

AGENCY DKT. NO. 379-9/96

STATE-OPERATED SCHOOL DISTRICT OF NEWARK,

Petitioner,

v.

ELMENA JEAN,

Respondent.

Derlys Maria Gutierrez, Esq., for petitioner
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Charles Auffant, Esq., for respondent

Record Closed: December 4, 1997 Decided: December 15, 1997

BEFORE **DIANA C. SUKOVICH**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 23. 1996, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

December 15, 1997
DATE

DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

Dec. 19, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 24 1997
DATE

OFFICE OF ADMINISTRATIVE LAW

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STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK

- V -

ELMENA JEAN
(TENURE CHARGES)

OAL DOCKET NO. 11169-96N
AGENCY REF. 379-9/96

STIPULATION OF SETTLEMENT

THE STATE-OPERATED SCHOOL DISTRICT OF NEWARK, HAVING FILED AND CERTIFIED TENURE CHARGES ALLEGING INEFFICIENCY AGAINST ELMENA JEAN, A TENURED TEACHER, AND THE PARTIES HAVING REACHED AN AMICABLE RESOLUTION OF THE MATTER,

ELMENA JEAN AND THE SCHOOL DISTRICT HEREBY AGREE TO THE FOLLOWING:

1. MS. ELMENA JEAN WILL BE TRANSFERRED FROM HER TEACHING POSITION TO A POSITION AS A TEACHER'S AIDE WITH A DEGREE AT THE THIRD STEP OF THE TEACHER'S AIDE'S GUIDE AT AN ANNUAL SALARY

OF $20,400.00. MS. JEAN WILL NOT BE ASSIGNED TO DR. E. ALMA FLAGG SCHOOL.

2. MS. JEAN'S TRANSFER TO A TEACHER'S AIDE POSITION AND HER CHANGE IN SALARY WILL BECOME EFFECTIVE ~~UPON~~ WHEN THE COMMISSIONER OF EDUCATION APPROVES THIS STIPULATION OF SETTLEMENT. UNTIL SUCH TIME AS THE COMMISSIONER APPROVES THE SETTLEMENT, ~~AND ADOPTS THE ABOVE~~ MS. JEAN WILL REMAIN ON SUSPENSION WITH PAY FROM HER TEACHING POSITION AT HER CURRENT TEACHER'S SALARY.

3. MS. JEAN IS AWARE THAT THE POSITION OF TEACHER'S AIDE IS A CIVIL SERVICE POSITION SUBJECT TO THE RULES OF THE DEPARTMENT OF PERSONNEL.

4. The school district agrees to complete the paperwork necessary to effectuate Mrs. Jean's transfer for payroll and pension purposes to the extent of its legal obligations.

5. The school district agrees that all future references given to prospective employers' and others' inquiries will be neutral.

6. Mrs. Jean acknowledges that no other promises or representations have been made to her concerning this settlement.

7. This agreement is subject to final approval by the State District Superintendent.

Elmena Jean 11/17/97
ELMENA JEAN

11/17/97
CHARLES AUFFANT, ESQ.

Beverly L Hall
DR. BEVERLY L. HALL
STATE DISTRICT SUPERINTENDENT

D Gutierrez 11/17/97.
DERLYS M. GUTIERREZ, ESQ.

OAL DKT. NO. EDU 11169-96
AGENCY DKT. NO. 379-9/96

IN THE MATTER OF THE TENURE	:	
HEARING OF ELMENA JEAN,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

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

Upon such review, the Commissioner cannot be satisfied by the present record that the proposed settlement in this matter meets the *Cardonick* standard for settlement of tenure matters (*In re Cardonick*, decided by the Commissioner April 7, 1982, affirmed State Board of Education April 6, 1983, 1990 *S.L.D.* 842, 846).

Specifically, there is no indication that the within teaching staff member was advised of the Commissioner's duty, pursuant to *N.J.A.C.* 6:11-3.6, to refer tenure determinations to the State Board of Examiners for possible revocation of certificate. Further, it is well established that, having once taken up the burden of tenure charges the District may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges can no longer be pursued or why it is now in the public interest not to pursue them. See *In the Matter of the Tenure Hearing of Kenneth S. Smith, School District of the City of Orange,*

Essex County, decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, affirmed with modification State Board of Education November 2, 1983, affirmed Superior Court January 30, 1986. The present record contains no such required explanation. While the Commissioner does not preclude the possibility of settlement in this matter, he must be assured that any settlement is consistent with appropriate standards for setting aside of tenure matters.

Accordingly, the instant initial decision must be rejected and the matter remanded to OAL for further action consistent with this determination.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

JANUARY 23, 1998
DATE OF MAILING JANUARY 23, 1998

(SB) 22-98

SB #22-98

IN THE MATTER OF THE GRANT OF :
THE CHARTER SCHOOL APPLICATION : STATE BOARD OF EDUCATION
OF THE ACADEMY CHARTER HIGH : DECISION
SCHOOL, MONMOUTH COUNTY. :

Decided by the Commissioner of Education, January 21, 1998

For the Appellant, Kim A. Fellenz, Esq.

For the Respondent, Mary Jo Kapalko, pro se

For the Participant Commissioner of Education, Arlene G. Lutz, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

This is one of fourteen appeals from contingent approvals given by the Commissioner of Education to applications submitted to obtain charters to operate charter schools pursuant to the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 et seq. We have presumed the validity of the statute and implementing regulations for purposes of determining whether a specific applicant should be permitted to proceed in this process. Hence, for purposes of this review, we have focused on whether the appeal raises concerns of such character as to preclude the grant of a charter or has revealed circumstances which must be addressed before the proposed school can become operational.

In support of its appeal, the Asbury Park Board (hereinafter "Board") contends that the Commissioner has an affirmative duty to deny a charter in this instance because such grant will negatively impact the racial balance at Asbury Park High

April 1, 1998

School. The Board argues that such impact will contravene New Jersey's constitutionally-derived policy with respect to racial balance in the public schools and that the approval of this application is contrary to the sending-receiving relationship between Asbury Park and its sending districts.[1] In addition, the Board asserts that the failure of the application to specify a location for the school is fatal and alleges that there are no significant curriculum differences between the proposed charter school and that already offered by Asbury Park.

We find that the Board has not shown that the substance of the application is such that we should set aside the Commissioner's determination that the proposed charter school may continue the process which would allow it to become operative if the Commissioner grants it final approval. Moreover, the Asbury Park Board's arguments with regard to racial impact are speculative at this point in the absence of actual enrollment data. However, given the racial composition of Asbury Park's student population, the Commissioner should review the racial composition of the student population of the Academy Charter High School before granting final approval.

Margaret M. Bennett abstained.

April 1, 1998

Date of mailing APR 0 3 1998

[1] We note that the "region of residence" of this proposed charter high school includes Asbury Park as well as its sending districts.

23-98

J.M.S., on behalf of minor son, M.J.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF AUDUBON, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JANUARY 23, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4460-96

AGENCY DKT. NO. 117-3/96

J.M.S., ON BEHALF OF MINOR SON, M.J.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF AUDUBON, CAMDEN COUNTY,

Respondent.

J.M.S., petitioner, on behalf of minor son, M.J.S.

Frank P. Cavallo, Jr., Esq., for respondent (Parker, McCay and Criscuolo, attorneys)

Record Closed: December 15, 1997 Decided: December 17, 1997

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from a petition of appeal filed with the Commissioner of the Department of Education by J.M.S. on behalf of his minor son, M.J.S., ("petitioner") opposing the removal of M.J.S. from the Borough of Audubon School District. The matter was transmitted to the Office of Administrative Law on May 21, 1996, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement indicating the terms of settlement.

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

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

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

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

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

December 17, 1997
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

Dec. 19, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 23 1997
DATE

Barbara A Harnak
OFFICE OF ADMINISTRATIVE LAW

mjm

Attachment

RECEIVED
DEC 15 10 28 AM '97
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

File No. 5528-0006-SJM
Law Offices
PARKER, McCAY & CRISCUOLO, P.C.
Three Greentree Centre
Suite 401
Marlton, NJ 08053
(609) 596-8900
Attorneys for Respondent

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
Docket No. EDU-S-04460-96S

JUSTIN M. SCIARRA, parent and natural guardian of Michael Justin Sciarra and Michael Justin Sciarra,

Petitioners,

vs.

AUDUBON BOARD OF EDUCATION,

Respondent.

Civil Action

STIPULATION OF SETTLEMENT

BACKGROUND

WHEREAS, the Petitioner has filed a Petition of Appeal in the above matter alleging that M.S. was entitled to a free education under N.J.S.A. 18A:38-1 et. seq. in the Borough of Audubon School District;

WHEREAS, the Respondent has denied that M.S. was entitled to a free education under N.J.S.A. 18A:38-1 et. seq. in the Borough of Audubon School District;

WHEREAS the Petitioner has acknowledged that he understands the definition of domicile as: the place where a person has his true, fixed, permanent home and principal establishment, to which whenever he is absent, he has the intention of returning, and from which he has no present intent of moving.

WHEREAS, the Petitioner and the Respondent desire to resolve this dispute in an amicable fashion.

AGREEMENT

The Petitioner and the Respondent, for the mutual promises and consideration contained herein, agree as follows:

(1) The Petitioner shall withdraw the Petition of Appeal;

(2) The Respondent shall withdraw the Counter-Petition of Appeal;

(3) The Petitioner shall not on any future date re-enroll M.S. in the Borough of Audubon School District;

(4) The Respondent shall waive its claim for tuition reimbursement subject to the Petitioner's compliance with the terms of this Stipulation of Settlement.

For Petitioner, J.M.S.

For Respondent, Audubon BOE

LAW OFFICES
PARKER, McCAY
& CRISCUOLO, P.C.

OAL DKT. NO. EDU 4460-96
AGENCY DKT. NO. 117-3/96

J.M.S., on behalf of minor son, M.J.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF AUDUBON, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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



COMMISSIONER OF EDUCATION

JANUARY 23, 1998
DATE OF MAILING JANUARY 23, 1998

(SB) 23-98

SB #23-98

IN THE MATTER OF THE GRANT OF THE :
CHARTER SCHOOL APPLICATION OF : STATE BOARD OF EDUCATION
THE CLASSICAL ACADEMY CHARTER : DECISION
SCHOOL OF CLIFTON, PASSAIC COUNTY. :

Decided by the Commissioner of Education, January 21, 1998

For the Appellant, Anthony V. D'Elia, Esq.

For the Respondent, Vincent DeRosa, pro se

For the Participant Commissioner of Education, Arlene G. Lutz, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

This is one of fourteen appeals from contingent approvals given by the Commissioner of Education to applications submitted to obtain charters to operate charter schools pursuant to the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 et seq. We have presumed the validity of the statute and implementing regulations for purposes of determining whether a specific applicant should be permitted to proceed in this process. Hence, for purposes of this review, we have focused on whether the appeal raises concerns of such character as to preclude the grant of a charter or has revealed circumstances which must be addressed before the proposed school can become operational.

The Clifton Board of Education contends that the application does not fulfill the purposes of the Charter School Act because it does not offer anything different than

April 1, 1998

what is offered by the Clifton school district. The Board further contends that the proposed school will not offer a thorough and efficient education to its students because its application does not include any meaningful curriculum. It also argues that the loss of funds to the proposed school will have a devastating effect on the district's ability to provide a thorough and efficient education to its 9,000 students.

We find that the Board has not shown that the substance of the Classical Academy Charter School's application is such that we should set aside the Commissioner's determination that the proposed charter school may continue the process which would allow it to become operative if the Commissioner grants it final approval. We therefore decline to set aside that approval.

Margaret M. Bennett abstained.

April 1, 1998

Date of mailing APR 0 3 1998

(SB) 23 -98

SB #23-98

IN THE MATTER OF THE GRANT OF THE :
CHARTER SCHOOL APPLICATION OF : STATE BOARD OF EDUCATION
THE CLASSICAL ACADEMY CHARTER : DECISION ON MOTION
SCHOOL OF CLIFTON, PASSAIC COUNTY. :

Decided by the Commissioner of Education, January 21, 1998

Decided by the State Board of Education, April 1, 1998

For the Appellant, Anthony V. D'Elia, Esq.

For the Respondent, Vincent DeRosa, pro se

For the Participant Commissioner of Education, Arlene G. Lutz, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

Inasmuch as the Clifton Board of Education's application fails to meet the standards that would entitle it to relief under Crowe v. De Gioia, 90 N.J. 126 (1982), we deny its motion for a stay.

June 3, 1998

Date of mailing JUN 05 1998

(SB) 24-98

SB #24-98

IN THE MATTER OF THE GRANT OF THE:

CHARTER SCHOOL APPLICATION OF : STATE BOARD OF EDUCATION

THE TEANECK COMMUNITY CHARTER : DECISION

SCHOOL, BERGEN COUNTY. :

Decided by the Commissioner of Education, January 21, 1998

For the Appellant, Schenck, Price, Smith & King (Sidney A. Sayovitz, Esq., of Counsel)

For the Respondent, Amy B. Kaiman, pro se

For the Participant Commissioner of Education, Michelle L. Miller, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

This is one of fourteen appeals from contingent approvals given by the Commissioner of Education to applications submitted to obtain charters to operate charter schools pursuant to the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 et seq. We have presumed the validity of the statute and implementing regulations for purposes of determining whether a specific applicant should be permitted to proceed in this process. Hence, for purposes of this review, we have focused on whether the appeal raises concerns of such character as to preclude the grant of a charter or has revealed circumstances which must be addressed before the proposed school can become operational.

April 1, 1998

In support of its appeal, the Board of Education of the Township of Teaneck (hereinafter "Board") contends that the Commissioner's decision should be reversed because the regulations implementing the Charter School Act exceed the statutory authority conferred by the Legislature. It also contends that the application of the proposed Teaneck Community Charter School fails to meet the requirements of the Charter School Act because it fails to identify a facility.

We find that the Board has not shown that the substance of the application is such that we should set aside the Commissioner's determination that the proposed charter school may continue the process which would allow it to become operative if the Commissioner grants it final approval.

Margaret M. Bennett abstained.

April 1, 1998

Date of mailing APR 0 3 1998

(SB) 24-98

SB #24-98

IN THE MATTER OF THE GRANT OF THE:

CHARTER SCHOOL APPLICATION OF : STATE BOARD OF EDUCATION

THE TEANECK COMMUNITY CHARTER : DECISION ON MOTION

SCHOOL, BERGEN COUNTY. :

Decided by the Commissioner of Education, January 21, 1998

Decided by the State Board of Education, April 1, 1998

For the Appellant, Schenck, Price, Smith & King (Sidney A. Sayovitz, Esq., of Counsel)

For the Respondent, Amy B. Kaiman, pro se

For the Participant Commissioner of Education, Michelle L. Miller, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

Inasmuch as the Teaneck Board of Education's application fails to meet the standards that would entitle it to relief under Crowe v. De Gioia, 90 N.J. 126 (1982), we deny its motion for a stay.

June 3, 1998

Date of mailing [illegible]

(SB) 25-98

SB #25-98

IN THE MATTER OF THE GRANT OF THE:

CHARTER SCHOOL APPLICATION OF : STATE BOARD OF EDUCATION

THE PATRICK DOUGLAS CHARTER : DECISION

SCHOOL, MONMOUTH COUNTY. :

Decided by the Commissioner of Education, January 21, 1998

For the Appellant, Kenney & Gross (Michael J. Gross, Esq., of Counsel)

For the Respondent, Tammy A. Ward, pro se

For the Participant Commissioner of Education, John K. Worthington, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

This is one of fourteen appeals from contingent approvals given by the Commissioner of Education to applications submitted to obtain charters to operate charter schools pursuant to the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 et seq. We have presumed the validity of the statute and implementing regulations for purposes of determining whether a specific applicant should be permitted to proceed in this process. Hence, for purposes of this review, we have focused on whether the appeal raises concerns of such character as to preclude the grant of a charter or has revealed circumstances which must be addressed before the proposed school can become operational.

In support of its appeal, the Matawan-Aberdeen Regional School District contends that the Commissioner has exceeded his authority by directing calculation of the local levy figure on the basis of proposed regulations rather than those now in

April 1, 1998

effect. The District further contends that the Charter School Act and implementing regulations are constitutionally deficient and in violation of the Administrative Procedure Act because they do not provide for a hearing prior to the Commissioner's determination. The District argues that the transfer of funds to the proposed school will cause it to breach its obligation to provide a thorough and efficient education, and that the charter school laws deprive the electorate of the right to vote on an accurate budget, create unfunded State mandates and create an inherent conflict of interest in the Commissioner. The District also maintains that the application in this case is materially defective in that numerous founders are not qualified and because the application fails to address compliance with the desegregation order in effect in the school district.

We find that the Matawan-Aberdeen Regional School District has not shown that the substance of the application is such that we should set aside the Commissioner's determination that the proposed charter school may continue the process which would allow it to become operative if the Commissioner grants it final approval. However, the Commissioner should review the racial composition of the student population of the proposed school before granting final approval in order to insure compliance with the desegregation order in effect in the district.

Margaret M. Bennett abstained.

April 1, 1998

Date of mailing APR 03 1998

(SB)25-98

SB #25-98

IN THE MATTER OF THE GRANT OF THE:

CHARTER SCHOOL APPLICATION OF : STATE BOARD OF EDUCATION

THE PATRICK DOUGLAS CHARTER : DECISION ON MOTION

SCHOOL, MONMOUTH COUNTY. :

Decided by the Commissioner of Education, January 21, 1998

Decided by the State Board of Education, April 1, 1998

For the Appellant, Kenney & Gross (Michael J. Gross, Esq., of Counsel)

For the Respondent, Tammy A. Ward, pro se

For the Participant Commissioner of Education, John K. Worthington, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

Inasmuch as the Board of Education of Matawan-Aberdeen's application fails to meet the standards that would entitle it to relief under Crowe v. De Gioia, 90 N.J. 126 (1982), we deny its motion for a stay.

June 3, 1998

Date of mailing JUN 05 1998

26-98

LORRAINE ROSZKOWSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JANUARY 27, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4016-97

AGENCY DKT. NO. 114-4/97

LORRAINE ROSZKOWSKI,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,

Respondent.

David B. Friedman, Esq., for the petitioner (Balk, Oxfeld, Mandell & Cohen, attorneys)

Francis X. Journick, Jr., Esq., for the respondent, Township of Old Bridge (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: December 22, 1997 Decided: December 23, 1997

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

This matter concerns the petition filed by the petitioner, Lorraine Roszkowski, seeking the restoration of sick days following a work related illness. The petitioner requested a hearing and the matter was transmitted to the Office of Administrative Law on April 29, 1997, pursuant to N.J.S.A. 52:14F-1 to -15 and N.J.S.A. 52:14B-1 to -13.

A prehearing telephone conference took place on September 5, 1997, and was continued on September 23, 1997. On November 14, 1997, the parties placed a settlement on the record and signed a stipulation of settlement. It was understood that the settlement was conditioned upon the approval of the Board of Education of the Township of Old Bridge(Board). The Board approved the settlement at its meeting on December 16, 1997.

The attached stipulation sets forth the terms of the settlement, and is incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1, and that the settlement should be approved. I approve the settlement, and **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded. I further note that the parties have agreed to waive the right to file exceptions and cross-exceptions.

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

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

December 23, 1997
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

12/29/97
DATE

DNP
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 30 1997
DATE

Barbara A Harnack
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

None

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
90 Woodbridge Center Drive
P.O. Box 10
Woodbridge, New Jersey 07095-0958
(908) 636-8000
Attorneys for Respondent
Old Bridge Board of Education

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET NO. EDU-04016-97S
AGENCY REF. NO. 114-4/97

LORRAINE ROSZKOWSKI, Petitioner, v. BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY, Respondent.	On Referral from the Commissioner of Education **STIPULATION OF SETTLEMENT**

WHEREAS, petitioner, Lorraine Roszkowski, filed a petition of appeal with the Commissioner of Education alleging that she suffered an injury arising out of and in the course of her employment by respondent, Board of Education of the Township of Old Bridge (the "Board"), and further alleging that the Board improperly deducted three days from petitioner's sick day bank for her absences from work allegedly due to the said injury; and

WHEREAS, the Board timely filed an answer to the petition of appeal denying petitioner's allegations and disputing her claim for the restoration of three days to her sick day bank; and

WHEREAS, petitioner and the Board have conferred with respect to this matter and have mutually agreed upon certain terms by which this matter may be settled, such terms being set forth in this Stipulation of Settlement;

IT IS hereby stipulated and agreed by and between petitioner and the Board as follows:

1. The Board shall immediately restore three (3) days to petitioner's sick day bank.

2. Petitioner hereby waives all rights to, and releases the Board from any and all claims known and unknown for, worker's compensation benefits of any kind whatsoever, including, but not limited to temporary or permanent disability benefits, as well as all other benefits, claims, liability and causes of action of any nature whatsoever, whether or not asserted in this administrative proceeding, arising out of or related to the alleged work-related injury made the subject of this matter.

3. This Stipulation of Settlement is subject to and contingent upon approval by the Board, such approval to be in the form of a resolution adopted by the Board.

4. Nothing in this Stipulation of Settlement shall constitute an admission of law or fact by either petitioner or the Board.

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
Attorneys for Respondent
Old Bridge Board of Education

By: FRANCIS X. JOURNICK, JR.

DATED: September, 1997
November

BALK ,OXF ELDMAND ELL& COH EN
Attorneys for Petitioner
Lorraine Roszkowski

By: DAVID B. FRIEDMAN

DATED: September, 1997
November 14

I have read and understand the foregoing Stipulation of Settlement and agree to be bound by the terms thereof.

LORRAINE ROSZKOWSKI

DATED: September, 1997
November 14,

WILENTZ
GOLDMAN
& SPITZER
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION

FRANCIS X. JOURNICK, JR.
(908) 855-6157

90 Woodbridge Center Drive
Suite 900 Box 10
Woodbridge, NJ 07095-0958
(908) 636-8000
Fax (908) 855-6117

December 19, 1997

Honorable Beatrice S. Tylutki, A.L.J.
New Jersey Office of Administrative Law
9 Quakerbridge Plaza
P.O. Box 049
Trenton, New Jersey 08625-0049

Re: Lorraine Roszkowski v. Old Bridge Board of Education
OAL Docket No.: EDU-04016-97S
Agency Ref. No. 114-4/97

Dear Judge Tylutki:

In connection with the above matter, enclosed please find a certified copy of the resolution adopted by the Old Bridge Board of Education approving the Stipulation of Settlement previously filed with your office.

I believe Your Honor is now in a position to enter an Initial Decision approving the Stipulation of Settlement and concluding this matter.

Thank you for Your Honor's attention to this matter.

Respectfully,

FRANCIS X. JOURNICK, JR.

FXJ/sl
Enclosure

cc: David B. Friedman, Esq.
Dr. Daniel M. Rodriguez, Superintendent of Schools
Dr. R. Gregory Quirk, Assistant Superintendent/Board Secretary
Dr. Joan M. George, Assistant Superintendent for Personnel
Harold G. Smith, Esq.

Kubicke moved, seconded by Bonk, Move the Boad approve the Stipulation of Settlement between the Old Bridge Township Public Schools and Lorraine Roszkowski (Paraprofessional Aide).

Vote: Kubicke, Racioppi, McDermott, Romeo, Bonk, Kaplan, Rafferty – Yes. Motion carried.

I HEREBY CERTIFY that the foregoing is a true copy of the motion adopted by the Old Bridge Board of Education at the regular meeting on December 16, 1997.

R. Gregory Quirk, Ed.D.
Assistant Superintendent for Business/
Board Secretary

OAL DKT. NO. EDU 4016-97
AGENCY DKT. NO. 114-4/97

LORRAINE ROSZKOWSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

JANUARY 27, 1998
DATE OF MAILING JANUARY 27, 1998

(SB) 26-98

SB #26-98

IN THE MATTER OF THE DENIAL OF :
THE CHARTER SCHOOL APPLICATION : STATE BOARD OF EDUCATION
OF THE VISTAS CHARTER SCHOOL, : DECISION
BERGEN COUNTY. :

Decided by the Commissioner of Education, January 21, 1998

For the Appellant, Charles A. Webster, pro se

For the Participant Commissioner of Education, Michelle L. Miller, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

The Vistas Charter School (hereinafter "appellant") filed an appeal to the State Board of Education from a letter decision of the Commissioner of Education dated January 21, 1998 denying its application to establish a charter school in the 1998-99 academic year. The Commissioner indicated that the application needed to be strengthened in the following areas: Educational program weak; needs additional alignment to the New Jersey Core Curriculum Content Standards; middle school alternative education concept; statewide assessment program not addressed; discriminatory admissions policy; no process for self-evaluation; and financial plan missing financial narrative.

We have considered the arguments made by appellant in light of the record provided to us on behalf of the Commissioner. On the basis of this review, we conclude that appellant has failed to demonstrate an entitlement to establish a charter school

APRIL 1/1998

pursuant to N.J.S.A. 18A:36A-1 et seq. Therefore, the State Board of Education affirms the Commissioner's decision to deny appellant the grant of a charter for 1998-99.

April 1, 1998

Date of mailing APR 03 1998

27-98

MANUEL GONZALEZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

In February 1995, Petitioner entered into an employment contract for the position of superintendent for a three-year period commencing July 1, 1996. He alleged that when the newly elected Board (of April 1996) refused to allow him to begin service and failed to pay him salary and benefits under said contract, its actions were illegal and violative of the Commissioner's directives set forth in the 1995 decision *Dunn v. Board of Education of the City of Elizabeth.*

Citing *Cummings* and relevant statutes, the ALJ found that petitioner's appointment to the position of superintendent by a prior board was null and void and not binding on the subsequent Board as the prior board acted to appoint a superintendent when there was no vacancy. Moreover, as to alleged secret meetings which resulted in OPMA violations, ALJ found that petitioner raised a factual issue which could not be resolved on the papers presented and as to civil rights claims, ALJ found that petitioner failed to state a cause of action upon which relief might be granted. ALJ granted summary decision to the Board and petition was dismissed.

Commissioner modified the initial decision. Commissioner affirmed the ALJ's dismissal of petitioner's claims with respect to the Board's violations of his rights under federal law and the U.S. Constitution, as well as his rights under the NJLAD. Commissioner also dismissed the OPMA claims, as well as petitioner's claim that his compensation was improperly reduced. The Commissioner further determined that petitioner must not prevail in his assertion that his contract was valid and binding and remained effective since the Board herein acted beyond the scope of its lawful authority when it voted in February 1995 to appoint petitioner to the superintendency effective July 1, 1996. Petition was dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING
RESPONDENT'S MOTION FOR
SUMMARY DECISION
OAL DKT. NO. EDU 7884-96
AGENCY DKT. NO. 256-7/96

MANUEL GONZALEZ,

Petitioner,

v.

BOARD OF EDUCATION OF THE
ELIZABETH SCHOOL DISTRICT,
UNION COUNTY,

Respondent.

Maria M. Lepore, Esq., for petitioner

David F. Corrigan, Esq., for respondent
(Murray, Murray & Corrigan, attorneys)

Record closed: September 4, 1997 Decided: November 25, 1997*

BEFORE **MARYLOUISE LUCCHI-McCLOUD**, ALJ:

PROCEDURAL HISTORY

This case comes by way of Verified Petition filed with the Commissioner of Education on July 3, 1996. On August 12, 1996, the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Cross motions for summary decision in the matter were filed and the record closed on September 4, 1997. The 45-day statutory period within which to file the initial decision with the Department of Education was due to expire on October 20,1997 however an extension of time to file the initial decision until December 3, 1997 was received for good cause and an order of extension was executed.

MOTIONS

Both petitioner and respondent filed for summary decision in this matter and the underlying facts in this case necessary to make a determination are not in dispute. This case turns purely upon a legal determination. As a result, the facts as recited in this initial decision are the basis for the determination.

FACTS

This case arises subsequent to another case involving Thomas G. Dunn, Jr. At the time of the filing of these cross motions and the petition in this case, Thomas G. Dunn, Jr. was the superintendent of the Elizabeth Board of Education. As the result of a dispute between Thomas G. Dunn, Jr. and the Elizabeth Board of Education, the then sitting board had relieved Thomas G. Dunn, Jr. of his duties as superintendent but had continued to pay him in accordance with his contract. In *Thomas G. Dunn, Jr. v. Elizabeth Board of Education*, 96 *N.J.A.*R.2d. (EDU) 279 (1995), the Commissioner of

Education held that the board was empowered to unilaterally relieve Mr. Dunn of his duties as superintendent for the remainder of his contract as long as it continued to pay him benefits and emoluments agreed to under his contract. The decision further went on to indicate that the board was not, however, free to assign Mr. Dunn to perform duties as an assistant superintendent for the remainder of the contract. At the time of the Dunn case, the petitioner in the instant case, Manuel Gonzalez, was the assistant superintendent. The Commissioner expressly found that the prohibition of assigning the duties of assistant superintendent to Mr. Dunn would not prevent the Board of Education from continuing with its plan to appoint the then current acting superintendent, Manual Gonzalez, to the position of superintendent, upon expiration of Dunn's contract. The expiration of Dunn's contract was to occur on June 30, 1996.

By unanimous vote on February 8, 1995, the Board of Education appointed Manuel Gonzalez as superintendent for a three year period beginning on July 1, 1996. On February 22, 1995, the Board of Education approved an employment contract for the position of school superintendent between the board and petitioner for that same term. The Board of Education in the city of Elizabeth is the governing body and is elected annually pursuant to *N.J.S.A.* 18A:14-1 *et seq.*

The February 8, 1995 board action appointing petitioner as superintendent of schools for a three year contract was to become effective sixteen months later on July 1, 1996 at a salary of $120,000 per year. The annual school board election took place on April 16, 1996, prior to the onset of the new contract which the prior board had approved and entered into with petitioner. On May 1, 1996, the first meeting of the newly constituted Board of Education took place and at that meeting the board voted to direct Dunn to resume his duties as superintendent and terminated petitioner's service as acting superintendent returning him to the position of assistant superintendent. On June 6, 1996, a majority of the Board voted to appoint Dunn to a new five year contract as superintendent of schools beginning July 1, 1996 which was the date that the prior Board of Education had determined petitioner would take that very same position.

Considering all of these facts in a light most favorable to a non-moving party, the question becomes whether or not summary decision is appropriate in this case.

LEGAL DISCUSSION

Summary decision is appropriate in cases where there exists no genuine issue with respect to any material fact and when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard. *Brill v. Guardian Life Insurance Co. of America,* 142 *N.J.* 520, 523 (1995).

Petitioner argues that because the Board of Education, as then constituted, passed a resolution and entered into an employment contract with petitioner in February 1995, that contract should be binding upon the district and the subsequent board taking office after the annual election but before the beginning of the contract term. The term of the contract was to begin July 1, 1996 and continue until July 1, 1999. The vote was unanimous and as a result petitioner states that he is entitled to the position of superintendent and that the subsequent board's actions were illegal in refusing to honor its contract with petitioner.

This case does not turn so much in reliance on Dunn, *supra*, but turns upon the validity of the contract between petitioner and respondent. "It is well established that a board of education is a non-continuous body whose authority is limited to its own official life and whose actions can bind its successors only in those ways and to the extent expressly provided by statute." *Cummings v. Bd. of Education of Pompton Lakes,* 1966 SLD 155, 166; *Evans v. Gloucester City Bd. of Education*, 13 *N.J. Misc.* 506 (Sup. Ct. 1935), aff'd 116, *N.J.L.* 448 (E. & A. 1936). Cummings applied this legal principal to examine the statute that governed the appointment of superintendents at that time. The statute at issue in Cummings, *supra*, differs in many respects from the current statute under consideration. As a result, petitioner claims that the state of the law has changed and that this principal cannot be applied because the statute was not in effect. That however is not accurate since the statute's relevancy to this legal

analysis is born out by its inclusion of a provision similar to the statute herein which authorized a board of education to appoint a superintendent for a period not to exceed five years and was binding on a successor board.

The action of the board of education in *Cummings, supra,* is strikingly similar to this matter. In 1963, the board then in office entered into an agreement which initially employed the superintendent for a term of three years less one day. The Commissioner recognized that "the agreement was within the scope of the board's authority under [the statute] even though it extended beyond the life of the initially employing board and became binding on its successors," *supra,* at 158. Under the terms of that statute, a superintendent will so acquire tenure after three years of employment. Thus, the appointment in *Cummings* will expire in June 1966 and the board in office at that time, "would be empowered to decide whether to continue the superintendent's employee. Any renewal of the employment by the board would have accorded the superintendent tenure and would have made further agreements unnecessary." *Ibid.*

The issue confronting the commissioner in Cummings was that two years later the board then in office in 1965 "intervened in June 1965 to 'extend' the agreement which would not expire until another year had elapsed for an additional three year period." *Ibid.* That, the commissioner determined, was unnecessary,

> And to do so you usurp the prerogative of the 1996 Board. There was no vacancy to be filled in June 1965, and the Board then in power had no authority to reach forward beyond its own official life and into the term of its successor to make a decision not due until them. [Cite omitted]. *Cummings, supra*@158.

The statute in the present matter, *N.J.S.A.* 18A:17-15, authorizes a board to appoint by contract a superintendent for a term of three to five years which, like the statue in *Cummings,* expressly provides for official action which will extend the life of the initially contracting board and it becomes binding on its successors. Notwithstanding this, and like the circumstances of *Cummings, supra,* when respondent

appointed petitioner superintendent on February 8, 1995, there was no vacancy in that position. At that time, the then superintendent, Dunn, had been relieved of his duties as superintendent. However, he continued to occupy the position. As a result no vacancy would exist in that position until the expiration of Dunn's contract on June 30, 1996.

Further support for the conclusion that there was no vacancy in 1995 is supported by the Commissioner's reasons in *Dunn, supra*, which rejected, as contrary to law, the respondent's directive that Dunn performed the duties of assistant superintendent. The Commission found that such an arrangement ignored Dunn's

> statutory entitlement to the position of superintendent for the duration of his contract and subverts the intent of *N.J.S.A.* 18A:17-15 *et seq.* to strike a balance of power between the board and its superintendent through the hybrid mechanism of contractual tenure. In effect the board herein has removed petitioner [Dunn] from the position of superintendent and transferred him to the distinct position of assistant superintendent, notwithstanding that he retains the salary and benefits due him under his contract as superintendent. This the board cannot do and still abide by the intent of the law, which is not now, and never was, to permit a board to replace a duly contracted superintendent easily or without meaningful, practical consequence. Rather, under the statutory scheme, a board is given the benefit of having its employment obligation to any superintendent limited to three to five years; but the superintendent is given the benefit, for reasons of both personal stability and educational integrity, of employment security and a degree of professional independence for that period of time. It is axiomatic that, when entering into an employment contract with a superintendent, a board must expect to make a commitment to live and work with him or her during the term of the contract, and if the board in that time becomes dissatisfied, it cannot merely dismiss the superintendent, impose a unilateral "buy out" or effectuate what amounts to an involuntary transfer to another position in the district. Rather, the board must conclude that the prospect of continuing the working relationship . . . is so untenable that, in the absence of a mutual separation agreement, it warrants the serious step of either filing tenure charges or relieving the superintendent of the performance of his or her duties under the statute (*N.J.S.A.* 18A:27-9) which does not contemplate performance of other work in lieu of the relieved duties, notwithstanding that the affected teaching staff member retains employee status for the remainder of the contract and the board obtains no benefit in return for salary and emoluments proffered during that time. *Dunn, supra*, 96 *N.J.A.R.* 2d (EDU.) at 283 - 84.

A finding that the superintendent position was vacant in 1995 would, likewise, be contrary to law.

As a result, the board in power in 1995 "had no authority to reach forward beyond its own official life and into the term of its successor to make a decision not due until" July 1, 1996. See, *Ibid;* see, also, *Hashman v. Friedbauer*, 4 *N.J. Super.* 123 (App. Div. 1949); *Barckett v. Garfield Bd. of Ed.*, OAL Dkt. EDU 5245-90 (July 26, 1990), adopted Commissioner of Education (August 30, 1990). As a result petitioner's appointment as superintendent in 1995 by the then sitting board pursuant to *N.J.S.A.* 18A:17-15 is, therefore, null and void and respondent's motion for summary decision on this point must be granted.

It should be noted that petitioner's reliance on the fact that the board retained certain members when the new board was voted in 1996 is misplaced due to the fact that the board of education is a non-continuous elected body. As a result the newly elected board is just that, newly elected.

As a result of the contract offered being null and void *ab initio* no illegal reduction of compensation occurred and therefore both Counts I and II of the complaint must be dismissed and summary decision on those counts granted to respondent.

In Counts I & III of the petition, Gonzalez claims that respondent committed "a violation of *N.J.S.A.* 18A:17-15 and 20, and *N.J.S.A.* 18A:6-9 through 33 . . . illegally breached its contract of employment with petitioner," and constitutes a violation of "Title VII of the United States Civil Rights Act of 1964; 42 *U.S.C.* §1983; the Fourth Amendment of the United States Constitution; (and) the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 to 42. He also asserts that since May 2, 1996, his requests for professional leave to attend certain meetings have been denied and that he has received letters from Mr. Dunn directing him to refer to Mr. Dunn as the superintendent and to refer to himself as assistance superintendent, all of which

constitute violations of his civil rights. Petitioner does not extrapolate on these claims in the briefs nor does he assert the type of discrimination he has allegedly suffered which he claims resulted in a violation of his civil rights. Based on the petition in this case and the briefs filed by petitioner, he has failed to state a cause of action upon which relief may be granted. As a result the civil rights claims alleging violations of both Federal and State law must be dismissed.

Petitioner also alleges a violation of the Open Public Meetings Act (OPMA), *N.J.S.A.* 10:4-6 to 21. The Legislature, upon enactment of the OPMA, declared that it is "the public policy of this state to insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion." *N.J.S.A.* 10:4-7. The OPMA, also referred to as the Sunshine Law, represents the principle that government should be conducted in the "sunshine." *Cole v. Woodcliff Board of Education,* 155 *N.J., super.,* 399, 403 (L. Div. 1978).

A public body is, therefore, required to provide adequate notice to the public of its meetings. *N.J.S.A.* 10:4-9.a. The details of "adequate notice" are provided at *N.J.S.A.* 10:4-8.d, which includes the provision that it be written advance notice of at least 48 hours, and to the extent known, should contain the agenda of any regular, special or rescheduled meting. While all meetings are generally open to the public, *N.J.S.A.* 10:4-12.a, the public may be excluded pursuant to the nine exemptions enumerated at subsection b. However, these exemptions to the full disclosure mandated by the OPMA should be strictly construed. *Polillo v. Deane*, 74 *N.J.* 562, 578 (1977); *Rice v. Union County Regional High School Board of Education,* 155 *N.J. Super.* 65, 70 (App. Div. 1977), cert. denied 76 *N.J.* 238 (1978).

The one exception relevant to the matter herein provides that a "public body may exclude the public only from that portion of a meeting at which the public body discusses:

> Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, . . . promotion or disciplining of any . . . current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting. *N.J.S.A.* 10:4-12.b.(8).

If such a request is received and before the public can be excluded, the public body shall adopt a resolution at a public meeting which states the general nature of the subject to be discussed and the time when that discussion can be disclosed to the public. " *N.J.S.A.* 10:4-13.

Where the public body may be considering an employee's employment pursuant to the exception at *N.J.S.A.* 10:4-12.b(8), *supra*. an employee or appointee may request in writing that the discussion be publicly conducted. The courts have specifically rejected the contention that there is an implicit requirement of a board of education to notify an individual of its intention to evaluate his or her performance and have determined that reasonable advance notice should be provided to an employee whose rights could be adversely affected by a decision of a public body which enables the employee to decide "whether they desire a public discussion and . . . prepare and present an appropriate request in writing." *Rice, supra,* at 73. Notice that conforms to the act "need not be actual;" it may be constructive." *Jameson v. Morris School District Board of Ed.,* 198 *N.J., Super.* 411, 416.

The allegation that respondent has violated the OPMA is not clearly set out in the petition in this case. In reviewing his motion, petitioner first stipulates that the respondent promptly notified the public of the May 1, 1996 meeting. Motion for Summary Decision and Reply Brief, dated April 25, 1997. He then explains the respondent's alleged violation as follows:

> What Count IV of the petition alleges on its face that members of the board met, in secret, either on May 1, 1996 or sometime prior to that date, to discuss (among other things) its scheme to violate Manuel Gonzalez's contract as superintendent of schools and place Thomas Dunn, Jr. in that position once again. A simple review of the occurrences at that meeting yield many facts which prevent summary decision from being granted in favor of respondent on this issue. *Id.* at 11.

Respondent's notice for the May 1, 1996, "reorganization" meeting provided the date, time and location of the meeting and that the "members elect" would take the oath of office prior to the meeting. It also listed certain agenda items. That agenda, found as Exhibit 5 in respondent's brief, dated April 7, 1997, lacks any indication that action would be taken on any employee/appointee issues, the agenda issued prior to a regular or non-regular meeting however does not restrict the scope of that meeting. *Grifasi v. Governing Body of Oakland,* 156 *N.J. Super.* 182, 186 (App. Div. 1978). To rule otherwise would encourage public bodies not to issue any agenda that might circumscribe its actions, thus defeating the legislative purpose of increasing the public's awareness of government processes." *Id.* at 187. Therefore, there is no violation of the OPMA relative to the public notice provided by the respondent.

Petitioner's contention that the respondent conducted secret meetings regarding his employment, however, raises a factual issue which cannot be resolved on the papers presented. If such meetings had taken place, it would clearly be a violation of *N.J.S.A.* 10:4-12b(8). While it may be important for some reasons to determine whether such meetings took place, even a finding of a violation would have no impact here on this case where all issues that were allegedly discussed during those clandestine meetings are being considered in this forum *de novo*, which means in the context of the OPMA "to consider anew, or afresh, for a second time." *Houman v. Mayor and Council of the Borough of Pompton Lakes,* 155 *N.J. Super.* 129, 164 (L. Div. 1977). Accordingly, the current proceedings effectively remedy any prior voidable acts and petitioner's motion on this issue must therefore be denied.

As discussed in this opinion, petitioner's appointment to the position of superintendent is null and void rendering any discussion of that subject matter during the alleged "secret meetings" a non-issue and therefore irrelevant. And, because petitioner's appointment was invalid, there existed no bar to the respondent's appointment of Dunn to the position of superintendent.

CONCLUSION

For all of the foregoing reasons, I hereby **CONCLUDE** that respondent's motion for summary decision as to all counts in the petition must be granted and that the petition in this case must be dismissed.

ORDER

It is hereby **ORDERED** that respondent's motion for summary decision be and hereby is **GRANTED** and the petition in this case be and hereby is **DISMISSED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

11/25/97
DATE

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

Nov. 24, 1997
DATE

D.N. Antonatis /fc
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 1 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

jrp(FV)mxl

OAL DKT. NO. EDU 7884-96
AGENCY DKT. NO. 256-7/96

MANUEL GONZALEZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.*

Petitioner initially renews his contention that the prior board had the right to enter into a contract to appoint him as the superintendent for a term which was to commence upon the expiration of Thomas Dunn's contract. In this regard, petitioner finds *Cummings, supra*, to be inapplicable, arguing that

> ***[t]he superintendent reappointment statute as it existed at the time that *Cummings* was decided was vastly different from the statute as it currently exists. The similarity between the two stops with the provision that authorized a board to have the ability to

* Although petitioner submitted a response to the Board's reply, it is noted that there is no provision for such a submission and, therefore, it was not considered in rendering this decision. *N.J.A.C.* 1:1-18.4. Additionally, although petitioner asserts that the Board's reply to his exceptions was untimely filed, the Commissioner notes that, in the absence of documentation indicating a date certain of delivery of said exception arguments to the Board and given the Board's assertion that it received petitioner's exceptions on December 16, 1997, the Board's reply submission, received December 23, 1997, is deemed timely.

> appoint a superintendent for a five year term. The prior law did not contemplate action to be taken by a board "*at least*" one year prior to the end of the term. ***
>
> ***The deliberate use of the words "at least" [in the current statute] demonstrates the intent of the legislature to override the constraint against binding future boards. The Commissioner has already embraced this interpretation by permitting mutual modification and/or recission of the respective superintendent's contracts during the unexpired term of a contract. (Citations omitted) (emphasis in text) (Petitioner's Exceptions at p. 3)

Petitioner reasons that the 1991 statutory amendments would compel a different outcome to the facts presented in *Cummings*, were it to be decided today. (*Id.* at p. 5)

Moreover, petitioner asserts that the interpretation of the superintendent's statute rendered by the Administrative Law Judge (ALJ) will have the effect of destabilizing superintendent contracts and paralyzing school boards in their efforts to seek and obtain employment of a superintendent on a timely basis. (*Id.* at p. 6) Petitioner reasons that Dunn, whose contract was to have terminated on June 30, 1996, was to be notified by June 30, 1995 that he would not be renewed for the following year. However, the initial decision would require that

> ***[t]he board that gave him notice *** would not be able to search for his successor. The board which would be in office on May 1, 1996, would have to undertake the search with only two months before the term of the Dunn contract was to expire. Even if the board commenced the search, it would [not have] had the authority to hire according to the ALJ's decision. In this regard, it must be noted that the New Jersey School Boards Association reports that a search for a new superintendent can take up to one year or more. (*Id.* at p. 7)

Petitioner avers that such an interpretation will have a "devastating effect," not only on districts electing not to renew a superintendent's contract, but on districts whose superintendents plan to

retire, and, in so doing, provide a significant margin of notice to their boards to allow the board time to conduct a search. (*Id.* at p. 8) Under such circumstances, should the board find a suitable candidate, it may be hampered from entering into a contract with that person. Indeed, petitioner asserts that "***the board will be ill-advised, under the holding of the initial decision here, to begin the search process or incur any expenses toward finding a new superintendent until the May prior to the actual vacancy." (*Id.*) Petitioner reasons that the purpose of the 1991 superintendent's statute was to balance the interests of boards of education and superintendents of schools; "[t]he amendments were to give boards greater flexibility and to insure superintendents a reasonable degree of job security. (citation omitted)" (*Id.* at p. 9) Thus, petitioner concludes that he entered into a binding contract with the board on February of 1995 to become the superintendent of schools. Should the board wish to relieve him of his duties as such, petitioner argues that it must do so in accordance with the decision in *Dunn, supra*, and pay him compensation and benefits due under the terms of the contract. (*Id.* at p. 12)

Petitioner also asserts that the ALJ disregarded his claim that the Board illegally reduced his compensation in violation of *N.J.S.A.* 18A:6-10 when, in August of 1995, it passed a resolution which set his salary at $108,760, and thereafter, on May 1, 1996, it set his salary at $94,760. Although his salary was, on March 3, 1997, changed to $102,000, petitioner argues that $6,760 has been wrongfully withheld, and the Board should be ordered "to restore that amount to his salary for all future years in which [he] maintains his tenure with the district.***" (*Id.* at p. 14) Petitioner also claims a right to pre-judgment interest.

As to his Open Public Meetings Act (OPMA) claims, petitioner excepts to the ALJ's finding that, even if his allegations that secret meetings took place were true, it is

irrelevant because the Board's actions could be ratified in the instant proceedings. Petitioner contends, "It is not the court or administrative judicial forum that can ratify such an action, but only the body which took the action originally. Therefore, the decision to grant summary judgment on this issue should be reversed." (*Id.* at p. 15) Moreover, petitioner maintains that *Rice, supra*, compels that an affected employee, in order to be able to request that his employment matters be conducted at a public hearing, must first receive notice of the Board's intention to consider personnel matters related to him. (*Id.* at p. 16) Here, petitioner insists that he did not receive the requisite *Rice* notice, notwithstanding that the Board "had seemingly known that [his] employment would be discussed ***." (*Id.*)

Lastly, petitioner contends that the ALJ improperly dismissed his allegations contained in Counts I and III of the petition concerning violations of Title VII of the United States Civil Rights Act of 1964, 42 U.S.C. Section 1983, the Fourteenth Amendment of the United States Constitution and the New Jersey Law Against Discrimination (NJLAD). If, as the ALJ states, petitioner's claims were not sufficiently developed, he argues that he "should have been granted leave to amend the Petition to detail these claims further." (*Id.* at p. 17)

In reply, the Board relies on the holdings in *Cummings, supra*, and *Barckett, supra*, to support the proposition, as argued at the OAL, that the petitioner's contract was null and void as the prior board had no right to appoint him for a term which was to commence after the expiration of that board's existence. (Board's Reply at p. 3) The Board maintains that the prohibition against making prospective appointments by governing bodies is well-established in common law. (*Id.* at p. 5) Moreover, the Board points out that the 1991 amendments to the

superintendent's statute did not change the law with respect to prospective appointments. (*Id.* at p. 8)

> There is *** no specific statutory authority which would allow a board to enter into a contract which is not to begin until after two board elections have taken place. *N.J.S.A.* 18A:17-20.1 does not offer such authority. *N.J.S.A.* 18A:17-20.1 merely states that a superintendent must be informed "at least one year prior" to the expiration of his or her contract that it will not be renewed.***
>
> (*Id.*)

The Board further counters that petitioner's contention that the ALJ's conclusion will have a "destabilizing" effect on superintendent contracts is "without merit and entirely without factual and legal support." (*Id.* at p. 10) To accept petitioner's reasoning, the Board continues, is to permit the "at least one year" language in the statute to change "the longstanding rule that boards of education cannot, without specific statutory authority, bind their successors." (*Id.* at p. 11) Rather, the Board argues that the "at least one year" provision was intended "to provide superintendents with a buffer against 'the whims' of a particular board." (*Id.* at p. 12) In requiring such notice, the Board reasons

> ***the Legislature effectively insured that the board giving [at least one year's] notice would not be the same board sitting on the date of the superintendent's termination. Thus, an excellent superintendent who runs afoul and becomes subject to the caprice of a particularly constituted board, will have the security of a board election and new board deciding whether to go forward with the former board's action. (*Id.*)

The Board maintains that the Elizabeth Board of Education which was sitting in 1995 was not authorized, and in fact was prohibited from, entering into a contract for a position which was not to become vacant until after the expiration of the life of that board. (*Id.* at p. 13)

The Board further asserts that the ALJ's decision, contrary to petitioner's arguments, was correct in granting summary judgment on the issue of petitioner's OPMA claims. Here, the Board reasons that, since petitioner was merely the acting superintendent and possessed neither tenure nor contractual rights to said position, "the board was well within its rights to return Mr. Dunn to his full duties" when it acted on May 1, 1996. (*Id.* at p. 16) The Board adds that since there was no discussion of petitioner's employment, there would have been no reason for him to be heard on the issue. (*Id.* at pp. 16, 17) Thus, the general meeting notices as provided by the Board were sufficient under the OPMA. Moreover, the Board concurs with the ALJ's view that the question of whether a "secret" meeting occurred is a fact in dispute. (*Id.* at p. 17) However, the Board warrants that the ALJ properly determined that "while the disputed fact might potentially be relevant in other contexts, *** it was not material to the determination of the issues presently before the court." (*Id.*)

Regarding petitioner's claim that the Board improperly reduced his salary, the Board affirms that, as an "acting" employee, petitioner did not have tenure in his position and cannot claim the protection of the tenure statutes for the position of acting superintendent. The Board reasons,

> ***His salary was reduced when his services in his acting position were no longer necessary and he was returned to his tenured position of assistant superintendent. To hold that a board, by appointing a person to *act* in some position, pursuant to *N.J.S.A.* 18A:16.1, and to pay [him] accordingly for the interim period, was then required to maintain that new salary structure once he *** had returned to [his] normal position would be an absurd interpretation of the statute and the school laws. (emphasis in text) (*Id.* at p. 19)

The Board underscores that the resolution passed on May 1, 1996 did not purport to change the salary set in petitioner's contract for the *assistant* superintendent position. (*Id.*)

Finally, the Board renews its contention that petitioner's federal civil rights causes of action, together with his NJLAD claim, should be dismissed. As for the federal civil rights claims, the Board argues that the Commissioner lacks jurisdiction. (*Id.* at p. 22) Likewise, although the Commissioner has jurisdiction under certain circumstances to adjudicate LAD claims, the Board contends that the within Petition of Appeal "fails to reveal any allegation or even hint of ethnic, racial, gender or any other type of discrimination." (*Id.* at p. 24)

Upon careful and independent review of the record in this matter, the Commissioner determines, for the reasons set forth herein, that summary judgment may properly be granted to the Board.

Initially, the Commissioner acknowledges the holding in *Cummings, supra*, and the cases which prohibit a board from reaching "forward beyond its own official life and into the term of its successor to make a decision not due until then." *Cummings, supra* at 158. However, the Commissioner further observes that the operative statute, *N.J.S.A.* 18A:17-15 *et seq.*, does *not* require that there be a vacancy in the position of superintendent, or even a notice of such, before a local board has the authority to enter into an agreement to employ a subsequent superintendent. To the contrary, as petitioner points out, the statute appears to contemplate, indeed, compel, that local boards will *anticipate vacancies* by notifying superintendents of their decisions not to reappoint them "at least one year prior to the expiration" of their contracts, *N.J.S.A.* 18A:17-20.1. This notification requirement, however, does not provide a board with the unfettered power to bind future boards. Instead, the Commissioner holds that the appropriate

balance between the well-established stricture against binding future boards and the clear demands of *N.J.S.A.* 18A:17-20.1 may be struck by a reading which permits, apart from a current board, only that board constituted *immediately prior to twelve months before the expiration of its superintendent's contract* to appoint a successor. Such a reading recognizes both a board's obligation to notify its superintendent of its intentions well in advance, while still not binding future boards unnecessarily or beyond the express prescription of statute. Thus, when viewed in this light, the Board herein acted beyond the scope of its lawful authority in binding *both* the April 1995 Board and the April 1996 Board by voting in February 1995 to appoint a superintendent effective July 1996.

Moreover, contrary to petitioner's view as presented before the OAL that the Commissioner's prior holding in *Dunn, supra*, affirms the Board's action to appoint petitioner to the position of superintendent in February of 1995, the Commissioner observes that said argument is erroneous. Here, petitioner asserts

> ***Since the Commissioner knew at the time this decision was issued that the Board appointed [petitioner] as Superintendent at the end of Mr. Dunn's term as Superintendent, it is clear from the plain language of the decision that the Commissioner issued approval of this action. Therefore, in accordance with the Commissioner's holding, the Board properly appointed [petitioner] as Superintendent for a term beginning July 1, 1996. What is equally clear is the Board's outrageous defiance of the Commissioner by subsequently refusing to allow [petitioner] to assume [his] duties of Superintendent. Further, in light of the Commissioner's mandate, the Board's action shows an egregious disregard for the authority of the Commissioner as well as its taxpayers ***. (Brief in Support of Petitioner's Motion for Summary Judgment at p. 8)

The language to which petitioner refers is the Commissioner's declaration in *Dunn, supra,* that

> ***there is nothing to prevent the Board from continuing with its plan to appoint the current Acting Superintendent [Gonzalez], to

> whom the Assistant Superintendent must report and from whom he or she must take assignments, to the position of Superintendent upon the expiration of [Petitioner Dunn's] contract. 96 *N.J.A.R.* 2d (EDU) 279, 284, aff'd State Board 285.

This language does not support petitioner's view that the Commissioner *directed* the Board to approve an employment contract in February of 1995 which could not go into effect until July 1, 1996. Rather, the passage cited arose in a context where the time of such an appointment was not at issue, and the language quoted, referring to the Board as an ongoing entity, certainly may not be construed as authorizing the then-sitting board, as opposed to a future board, to take the specified action.

As for petitioner's contention that the Board has violated the OPMA, the Commissioner finds it noteworthy that petitioner himself argued in his brief, dated April 4, 1997; in support of his motion for summary judgment that there *were no facts in dispute* in this matter such as to preclude a motion for summary decision in his favor. (Petitioner's Motion for Summary Judgment at p. 12) Later, however, petitioner argued on the issue of meetings allegedly conducted in secret that,

> it is clear that there are a multitude of facts in dispute, as well as incomplete facts, as to whether or not respondent violated the Open Public Meetings Act at its May 1, 1996 meeting. Because the facts as presented must be construed liberally and in favor of the non-moving party on this issue, it would be impossible to grant summary judgment on this issue. ***(Brief in Support of Petitioner's Motion for Summary Decision and Reply Brief, dated April 25, 1997, at p. 13)

In any event, the Commissioner finds that the sum and substance of petitioner's allegations of "secret meetings" in this regard amount to conjecture which, in this context, is insufficient to constitute a genuine issue of material fact enough to defeat the Board's motion for summary

judgment. Petitioner essentially argues that since the resolutions adopted at the May 1, 1996 meeting relieving him of his duties as acting superintendent, reducing his salary, and directing Dunn to resume his duties as Superintendent were not included in the agenda distributed prior to the meeting, yet said resolutions were prepared prior to the meeting and were distributed at the meeting, and inasmuch as there was no public discussion prior to the adoption of these apparently last-minute items, then, "because no discussion took place in public, it had to take place secretly." (*Id.* at pp. 11,12) However, as the Board counters,

> the issue of secret meetings remains a bare assertion in the petitioner's Petition. As stated by the Court in *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 67 (1954) "if the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful, frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment...." (Board's Reply at p. 18, citing to *Judson* at 75)

Further, the Commissioner determines, for the reasons articulated by both the Board and the ALJ, *infra,* that petitioner's claim he was denied notice that his employment was to be discussed by the Board at its May 1, 1996 meeting is properly dismissed by way of summary decision.

As to petitioner's claim that the Board's action to terminate his service as acting superintendent on May 1, 1996 and to return him to a salary level of $96,760 (from $108,760) constituted a reduction in compensation in violation of his tenure rights, the Commissioner determines that such claim must fail. Here, the Commissioner finds persuasive the Board's assertion that petitioner acquired no tenure rights in the position of acting superintendent, where his appointment was parallel to that of a substitute teacher, and where there was no vacancy in the superintendent's position for him to fill. (Board's Response to Petitioner's Motion for Summary Judgment at p. 3, citing *Mills v. Piscataway Twp. Bd. of Ed.,* 92 *N.J.A.R.* 2d (EDU)

372, 375, aff'd as modified 95 *N.J.A.R.* 2d (EDU) 133, aff'd 96 *N.J.A.R.* 2d (EDU) 588) As the State Board of Education instructed in *Mills*, although an "absence" is considered to exist where a missing teaching staff member is scheduled to return to his/her position, a "vacancy" does not exist unless the incumbent does not intend to return. *Mills* at 133, citing *Lammers v. Bd. of Educ.*, 134 *N.J.* 264, 272 (1993). Since the superintendency was at no time vacated while petitioner served as the acting superintendent, see *Dunn, supra*, he could not accrue tenure rights to "the position" of acting superintendent. Tenure is acquired in a particular position. *Howley and Bookholdt v. Board of Education of Ewing Township*, 1982 *S.L.D.* 1328, 1337. Consequently, when the Board acted to return him to his position as assistant superintendent and to reduce his salary correspondingly, there was no tenure violation.

Finally, the Commissioner finds petitioner's exception arguments with respect to the Board's violations of his rights under federal law and the U.S. Constitution, as well his rights under the NJLAD, to have been properly dismissed for the reasons stated by the ALJ and the Board.

Accordingly, the initial decision of the ALJ is modified, as set forth above. The Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 27, 1998
DATE OF MAILING JANUARY 27, 1998

27-98

EDU #7884-96
C # 27-98
SB # 29-98

MANUEL GONZALEZ, :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY, : DECISION

RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, January 27, 1998

For the Petitioner-Appellant, Maria M. Lepore, Esq.

For the Respondent-Respondent, Murray, Murray & Corrigan (David F. Corrigan, Esq., of Counsel)

In February 1995, Manuel Gonzalez (hereinafter "petitioner") entered into a three-year employment contract to be the superintendent of schools for the Board of Education of the City of Elizabeth (hereinafter "Board") for a term commencing on July 1, 1996. On July 3, 1996, petitioner filed the instant petition with the Commissioner of Education, alleging that the newly-constituted Board had acted improperly by not allowing him to begin employment as superintendent.

On November 25, 1997, the Administrative Law Judge ("ALJ") recommended granting the Board's motion for summary decision and dismissing the petition. The ALJ stressed that "a board of education is a non-continuous body whose authority is limited

June 3, 1998

to its own official life and whose actions can bind its successors only in those ways and to the extent expressly provided by statute." Initial Decision, slip op. at 4, quoting Cummings v. Bd. of Education of Pompton Lakes, 1966 S.L.D. 155, 166. Noting that the position of superintendent had not been vacant in February 1995 when the Board entered into a contract with petitioner, the ALJ concluded that the Board had no authority to reach beyond its official life and into the term of the successor Board by making a decision which was not due to be made until July 1, 1996. Consequently, the ALJ concluded that petitioner's appointment as superintendent in 1995 was null and void. The ALJ also rejected petitioner's claim that the Board had violated the provisions of the Open Public Meetings Act ("OPMA").

On January 27, 1998, the Commissioner granted summary decision to the Board, but modified the ALJ's recommendation. The Commissioner observed that N.J.S.A. 18A:17-15 et seq. does not require that there be a vacancy in the position of superintendent before a district board may enter into an agreement to employ a subsequent superintendent. The Commissioner asserted that:

> [T]he statute appears to contemplate, indeed, compel that local boards will anticipate vacancies by notifying superintendents of their decisions not to reappoint them 'at least one year prior to the expiration' of their contracts, N.J.S.A. 18A:17-20.1. This notification requirement, however, does not provide a board with the unfettered power to bind future boards. Instead, the Commissioner holds that the appropriate balance between the well-established stricture against binding future boards and the clear demands of N.J.S.A. 18A:17-20.1 may be struck by a reading which permits, apart from a current board, only that board constituted immediately prior to twelve months before the expiration of its superintendent's contract to appoint a successor.

Commissioner's Decision, slip op. at 19-20 (emphasis in original).

The Commissioner found that the Board had "acted beyond the scope of its lawful authority in binding both the April 1995 Board and the April 1996 Board by voting in February 1995 to appoint a superintendent effective July 1996." Id. at 20 (emphasis in original). The Commissioner agreed with the ALJ that petitioner had not demonstrated a violation of the OPMA. Accordingly, he dismissed the petition.

Petitioner filed the instant appeal to the State Board of Education.

After a careful review of the record, we affirm the decision of the Commissioner with the following modification.

After careful review, we can find no authority in law to support the general proposition put forward by the Commissioner that "apart from a current board, only that board constituted immediately prior to twelve months before the expiration of its superintendent's contract [may] appoint a successor." Id. Hence, we reject that proposition.

As a consequence, we find that the action taken by the Board in February 1995 to enter into an employment contract with petitioner commencing in July 1996 was void ab initio. Accordingly, the action was invalid at the time it was taken and could not, as petitioner contends in this appeal, subsequently be validated through ratification by the newly-constituted Board. As a result, we need not determine whether the Board had, in fact, ratified such action. Rather, under the facts in the record before us, and substantially for the reasons expressed by the ALJ in his initial decision, we affirm the

Commissioner's determination to grant summary decision to the Board and to dismiss the petition.[1]

June 3, 1998

Date of mailing JUN 05 1998

[1] We note that since petitioner has not challenged on appeal the Commissioner's conclusion that the Board did not violate the OPMA, we have neither addressed nor decided that issue.

28-98

DELSEY GETTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

JANUARY 29, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11309-96

AGENCY DKT. NO. 408-9/96

DELSEY GETTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,

Respondent.

David B. Friedman, Esq., for petitioner
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Denise P. Coleman, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: December 26, 1997 Decided: January 2, 1998

BEFORE **RICHARD McGILL**, ALJ:

Delsey Getty filed a petition with the Commissioner of Education seeking relief in regard to the withholding of her increment for the 1996-97 school year. The matter was

transmitted to the Office of Administrative Law on November 1, 1996, for determination as a contested case.

On the hearing day, the parties agreed to an amicable resolution of the matter. The agreement was subsequently approved by the Board of Education of the Township of Irvington. Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Jan. 2, 1998
DATE

RICHARD McGILL, ALJ

Receipt Acknowledged:

1/9/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 12 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

njf

Desley Sicky (1) OAL Docket 11309-96
Agency DKT NO. 408-9/96

Board of Education of
the Township of [redacted]

Stipulation of Settlement

This Agreement made this 18th day of November, 1997 by and between the Petitioner, Desley Sicky and the Respondent, the Irvington Board of Education, OAL Docket No EDU 11309-96, Agency DKT No. 408-9/96 the parties hereto this Stipulation of Settlement.

Whereas the parties are desirous of resolving this matter, it is hereby agreed as follows.

1. [redacted] hereby withdraws her Petition before the Commissioner of Education and Docket No EDU 11309-96 Agency DKT No 408-9/96 is hereby withdrawn with prejudice.

2. Petitioner Desley Sicky hereby voluntarily waives releases and forever discharges any and all rights that she may have to contest the withholding of the 1996-1997 employment and adjustment increment,

3. The Tenafly Board of Education hereby agrees that on or before January 15, 1998, it shall transfer Shelley Kelly to an available vacant position at the high school or any middle schools.

4. The Tenafly Board of Education further agrees that in the event that MS Kelly is not transferred to a middle school position as described in paragraph 3, then MS Kelly shall be offered a vacant [redacted] position at the commencement of the 1998-1999 school year. Should a vacant position become available prior to the commencement of the 1998-1999 school year, MS Kelly shall have the right of first refusal to that position.

5. Should a vacant middle school position become available as described

in paragraph 4, Ms Getty shall be advised of the position's availability (prior to the posting of any such position) in writing, and she shall respond as to her interest within 5 (workday) days. Should she fail to respond, said failure to respond shall be deemed as a rejection of the position, and the Irvington Board of Education shall have no further obligation under this Agreement to make a middle school position available.

5. This Agreement shall be subject to the approval of the Irvington Board of Education, and shall not become effective until their approval.

FOR THE PETITIONER

Desley Getty

David B. Friedman Esq.

FOR THE BOARD

Belinda S. Smiley

Denise P. Coleman

3c

6. In the event that this Agreement is not approved by the Board of Education, the parties shall retain any and all rights that they had prior to the execution of this stipulation of Settlement.

For the Petitioner

Desley J. Getty
Desley Getty

11/18/97
David B. Friedman

For the Board

Belinda S. Smiley
Belinda S. Smiley

Denise Coleman

OAL DKT. NO. EDU 11309-96
AGENCY DKT. NO. 408-9/96

DELSEY GETTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN-SHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. To the extent, however, that the terms of the settlement may have already been effectuated by the Board's transfer of petitioner to an available position at the high school or any of the middle schools on or before January 15, 1998, the parties are admonished that any settlement agreements of controverted matters are of no force and effect and may not be implemented absent the Commissioner's approval pursuant to *N.J.A.C.* 1:1-19.1.

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

COMMISSIONER OF EDUCATION

JANUARY 29, 1998
DATE OF MAILING JANUARY 29, 1998

(SB) 28-98

SB #28-98

IN THE MATTER OF THE GRANT OF :
THE CHARTER SCHOOL APPLICATIONS:
OF THE INTERNATIONAL CHARTER :
SCHOOL OF TRENTON AND THE :
GRANVILLE CHARTER SCHOOL, :
MERCER COUNTY. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, January 21, 1998

For the Appellant, Jessica G. de Konick, Esq.

For the Respondent, Melissa A. Benford, pro se and William Granville, pro se

For the Participant Commissioner of Education, John K. Worthington, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

By letter dated January 21, 1998, the Commissioner of Education granted contingent approval to applications submitted by the International Charter School of Trenton and the Granville Charter School to obtain charters to operate charter schools pursuant to the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 et seq. On February 24, 1998, the Board of Education of the City of Trenton (hereinafter "Board" or "Trenton Board") filed a notice of appeal from both of those decisions to the State Board of Education. Since its notice was filed more than 30 days after the filing date of the Commissioner's decision, the Board also filed a motion for leave to file a late appeal. In its motion, the Board maintained that it had not received formal notification

April 1, 1998

of the Commissioner's decisions. The Board also related that it had authorized the filing of an appeal on February 23, the deadline for filing a notice of appeal from those decisions.

Pursuant to N.J.S.A. 18A:6-28, appeals to the State Board must be taken "within 30 days after the decision appealed from is filed." The State Board may not grant extensions to enlarge the time specified for appeal. N.J.A.C. 6:2-1.5(a). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6:24-1.2; N.J.A.C. 6:24-1.15, the time limit within which an appeal must be taken to the State Board is statutory, and, given the jurisdictional nature of the statutory time limit, the State Board lacks the authority to extend it. Mount Pleasant-Blythedale Union Free School District v. New Jersey Department of Education, Docket #A-2180-89T1 (App. Div. 1990), slip op. at 5. The Appellate Division has "consistently concluded" that appeals must be timely filed and that "neither an agency nor our court on appeal may expand a mandatory statutory time limitation." In the Matter of the Special Election of the Northern Burlington County Regional School District, Docket #A-1743-95T5 (App. Div. 1996), slip op. at 3, citing Scrudato v. Mascot Sav. & Loan Ass'n, 50 N.J. Super. 264 (App. Div. 1958).

We conclude that the statutory filing requirement with which the Trenton Board failed to comply is of such significance that we deny the motion and dismiss the appeal. In Yorke v. Board of Education of the Township of Piscataway, decided by the State Board of Education, July 6, 1988, aff'd, Docket #A-5912-87T1 (App. Div. 1989), the Court upheld the dismissal of an appeal by the State Board where it found that the notice of appeal had been filed one day late by appellant's counsel, who alleged that he

had misread or misunderstood the applicable regulations. The Court added that even if the statute could be construed to permit enlargement of the time for filing an appeal, the appellant therein had failed to establish good cause.

In this case, the Commissioner's decision granting contingent approval to the two charter schools at issue was rendered on January 21, 1998 and mailed to the charter schools on that date. A copy of both letters was also sent to the president of the Trenton Board and the district superintendent. Accordingly, pursuant to N.J.A.C. 6:2-1.4, the decision appealed from was deemed filed on January 24, 1998, three days after it was mailed. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6:2-1.3(a); N.J.A.C. 6:2-1.4(a), as computed under N.J.A.C. 6:2-1.4(b), the Board was required to file its notice of appeal to the State Board on or before February 23, 1998. As previously indicated, the Board's notice of appeal was not filed until February 24.

Even if N.J.S.A. 18A:6-28 can be construed to provide us with the authority to enlarge the time limit for filing an appeal, we find no substantive basis to warrant doing so in this particular instance. We reject the Board's contention that it had not received formal notification of the Commissioner's decisions granting contingent approval to the proposed schools. The Board's Business Administrator/Board Secretary acknowledged in a certification filed with the Board's motion that "[o]n or about January 21, 1998" he had received a copy of the Commissioner's January 21 letters, which provided notice of the Commissioner's decisions. Nor is it of any moment that the Board authorized the filing of an appeal on February 23. It is undisputed that the Board did not actually file its appeal until February 24.

Accordingly, we deny the Trenton Board's motion for leave to file a late notice of appeal and dismiss the appeal in this matter for failure to file notice thereof within the statutory time limit as computed under the applicable regulations.[1]

April 1, 1998

Date of mailing APR 03 1998

[1] While we note that counsel for the Edison Project, the "successful bidder for the contract on the Granville Charter School," sought to "enter an appearance" as counsel of record for the Granville Charter School in this appeal, in view of our decision today, we need not consider whether such appearance would be appropriate.

29-98

K.W., on behalf of minor child, C.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

JANUARY 29, 1998

OAL DKT. NO. EDU 8651-97
AGENCY DKT. NO. 399-10/97

K.W., on behalf of minor child, C.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

JANUARY 29, 1998
DATE OF MAILING JANUARY 29, 1998

30-98

30-98

LORRAINE KRETZMER AND THE UNION COUNTY REGIONAL HIGH SCHOOL ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

JANUARY 29, 1998

OAL DKT. NO. EDU 5356-97
AGENCY DKT. NO. 72-2/97

LORRAINE KRETZMER AND THE UNION COUNTY REGIONAL HIGH SCHOOL ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

JANUARY 29, 1998
DATE OF MAILING JANUARY 29, 1998

31-98

31-98

THOMAS J. FICARRA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

JANUARY 29, 1998

OAL DKT. NO. EDU 11301-96
AGENCY DKT. NO. 425-9/96

THOMAS J. FICARRA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

JANUARY 29, 1998
DATE OF MAILING JANUARY 29, 1998

(SB) 31-98

SB #31-98

IN THE MATTER OF THE AMENDMENT :
TO THE CHARTER OF THE GREATER : STATE BOARD OF EDUCATION
BRUNSWICK CHARTER SCHOOL, : DECISION
MIDDLESEX COUNTY. :

Decided by the Commissioner of Education, March 4, 1998

For the Appellant, Apruzzese, McDermott, Mastro & Murphy (James L. Plosia, Jr., Esq., of Counsel)

For the Respondent, Bucca & Campisano (Benjamin S. Bucca, Jr., Esq., of Counsel)

On March 4, 1998, the Commissioner of Education approved a request made by the Greater Brunswick Charter School ("Charter School") to amend its charter so as to eliminate Milltown from its region of residence. In granting the approval, which changed the Charter School's region of residence to include only New Brunswick, Highland Park and Edison, the Commissioner expressly relied on a regulatory amendment he had proposed to N.J.A.C. 6A:11-2.6. That regulatory amendment proposed to change the terms of N.J.A.C. 6A:11-2.6 so as to permit the Commissioner to entertain a request at any time by a charter school to amend its charter. See 30 N.J.R. 588(a) (February 19, 1998). However, the State Board did not adopt that proposed rule until May 6, 1998, and it was not effective until June 1, 1998, when it was scheduled for publication in the New Jersey Register. N.J.S.A. 52:14B-5; N.J.A.C. 1:30-4.6(b) (any type rule not listed

June 3, 1998

as an exception in subsection (a) is effective when promulgated in the New Jersey Register).

The Highland Park Board of Education filed an appeal to the State Board from the Commissioner's March 4 approval of the Charter School's request to amend its charter.

The express terms of N.J.A.C. 6A:11-2.6 in effect when the Commissioner's approval was given in this case permitted a charter school to apply to the Commissioner for an amendment to its charter only after completion of the first school year of its charter period. N.J.A.C. 6A:11-2.6(a), effective August 4, 1997. See 29 N.J.R. 3489(a).[1] Hence, when the Commissioner acted to approve the Greater Brunswick Charter School's amendment request in this instance, the terms of the regulatory provisions in effect did not give him the authority to approve or deny such requests until the Charter School had completed its first year of operation. N.J.A.C. 6A:11-2.6(d). The Greater Brunswick Charter School, however, was not even scheduled to begin operation until the 1998-99 school year. Nonetheless, the Commissioner acted on the basis of the proposed regulation to grant the Charter School's request.

It is well settled that an administrative agency such as the Department of Education is bound by the terms of its own regulations until it acts pursuant to the

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[1] N.J.A.C. 6A:11-2.6 as in effect on March 4, 1998 provided in pertinent part that:

> (a) Following the completion of the first school year of the charter period, a charter school may apply to the Commissioner for an amendment to the charter....
>
> (d) The Commissioner may approve or deny amendment requests of charter schools and shall notify charter schools of decisions on or about

Administrative Procedure Act to change those regulations. E.g., United States v. Nixon, 418 U.S. 683, 695, 94 S.Ct. 3090, 3101, 41 L. Ed.2d 1039 (1974). See also Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954) (U.S. Attorney General bound by regulations even though he could amend them); Clean Ocean Action, et al. v. Colonel Thomas A. York, et al., 57 F.3d 328, 333 (3d Cir. 1995) (agency bound by express terms of regulations until it amends or revokes them).

In the case of this agency, a regulation cannot become effective until it is adopted by the State Board of Education. N.J.S.A. 18A:4-15 (state board shall make and enforce, and may alter and repeal, rules for implementing and carrying out school laws). See N.J.S.A. 18A:4-1 (state board shall be head of the department of education); N.J.S.A. 18A:4-10 (general supervision and control of the state department of education vested in state board). Consequently, the Commissioner erred in this case by applying a proposed regulation which we had not yet adopted, thereby achieving a result in this case which was contrary to the result mandated by the terms of the regulation then in effect. N.J.A.C. 18A:4-23 (commissioner shall enforce all rules prescribed by the state board).

Again, under the clear and express terms of the regulation in effect when the Commissioner granted the Charter School's request, an amendment to a charter could not be requested or granted until completion of the first school year of the charter period. See supra note 1. In this respect, we stress that the State Board did not express any intent to apply the new regulation retrospectively when we adopted it on

---

August 25. If approved, the amendment becomes effective immediately unless a different effective date is established by the Commissioner.

May 6, 1998. E.g., In the Matter of Certain Amendments, 133 N.J. 206, 223 (1993); Gibbons v. Gibbons, 86 N.J. 515, 522-23 (1981).

Thus, for the reasons expressed herein, we reverse the Commissioner's determination and set aside the amendment he granted removing Millville from the Charter School's region of residence. Board of Education of the City of Plainfield v. Cooperman, 209 N.J. Super. 174 (App. Div. 1987), aff'd with modification, 105 N.J. 587 (1987).[2]

June 3, 1998

Date of mailing JUN 05 1998

[2] We see nothing that would preclude the Greater Brunswick Charter School from applying to the Commissioner for an amendment to its charter after the effective date of the amended regulations.

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32-98

J.P. and G.P., on behalf of minor child, P.P.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JANUARY 29, 1998

OAL DKT. NO. EDU 5473-97
AGENCY DKT. NO. 116-4/97

J.P. and G.P., on behalf of minor child, P.P.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

JANUARY 29, 1998
DATE OF MAILING JANUARY 29, 1998

33-98

FRANK JAMES WHITE,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	
RESPONDENT.	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
GINA ROSAMILIA, SALVATORE GONCALVES, WILLIAM ICKLAN AND DARLENE MATTIA,	:	
INTERVENOR-RESPONDENTS.	:	

JANUARY 29, 1998

OAL DKT. NO. EDU 540-94
AGENCY DKT. NO. 415-12/93

FRANK JAMES WHITE,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	
RESPONDENT.	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
GINA ROSAMILIA, SALVATORE GONCALVES, WILLIAM ICKLAN AND DARLENE MATTIA,	:	
INTERVENOR-RESPONDENTS.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

JANUARY 29, 1998
DATE OF MAILING JANUARY 29, 1998

35-98

35-98

S.S., by guardians *ad litem,* J.A. AND T.S. *ET AL.*,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners alleged that the Board's limitation of enrollment for their 4-year-old pupils to respondent's Primary Unit Program for 4- and 5-year-old pupils was contrary to law and district desegregation plans.

ALJ found that the petition was filed untimely as petitioners waited more than 90 days from receipt of rejection letters notifying them that their children had not been selected for the program. ALJ found no reason to relax the 90-day rule.

Commissioner adopted findings and determination in initial decision as his own. Petition was dismissed as untimely.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 9127-97
AGENCY DKT. NO. 281-7/97

S.S., A MINOR, BY HER GUARDIANS AD LITEM, J.A. AND T.S., ET AL
Petitioners,
v.
THE BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,
Respondent.

Jennifer M. Smith, Esq., for petitioners
(Law Firm of Joseph A. Fortunato, attorney)

Richard H. Bauch, Esq., for respondent (DeMaria and Ellis, attorneys)

Record Closed: November 26, 1997 Decided: December 16, 1997

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

PROCEDURAL HISTORY

This matter was transmitted by the Department of Education to the Office of Administrative Law (OAL) on September 12, 1997 following the issuance of a letter decision on August 28, 1997 by Acting Commissioner Jeffrey Osowski which: (a) denied an application by petitioners for emergent relief; and (b) directed that the matter

be transmitted to the OAL for a hearing. In addition, the Acting Commissioner observed that the respondent remained free to pursue all of its affirmative defenses, including a claim of petitioners' "untimeliness" in filing their action. See, *N.J.A.C.* 6:24-1.2(c). He also instructed that any hearing be scheduled, to the extent possible, to permit resolution of the matter prior to the beginning of the 1998-99 school year. Petitioners' emergent relief application sought the September 1997 admission of their four year-old children to respondent's Primary Unit Program for four and five year-olds. No appeal was taken by petitioners to the State Board of Education, or beyond, from the Acting Commissioner's denial of that relief.

The case had its genesis with the filing of a Verified Complaint and Order to Show Cause on August 1, 1997. On August 20, 1997 respondent filed its Answer, a Motion for Summary Decision and a brief in opposition to the emergent relief request. As noted, on August 28, 1997, the Acting Commissioner denied the emergent relief application and ordered that the case be transmitted to the OAL.

When the matter was docketed at the OAL it was assigned to the undersigned administrative law judge and a November 12, 1997 plenary hearing date preliminarily was established. However, on October 2, 1997, the respondent moved before me to dismiss on the following grounds: (a) that the Complaint was untimely filed under *N.J.A.C.* 6:24-1.2(c); and (b) that in any event since no genuine issues of material fact existed the Board was entitled as a matter of law to summary decision pursuant to *N.J.A.C.* 1:1-12.5. . Thereafter, I conducted a telephone conference at which time a timetable for the filing of responsive and reply briefs was established. Oral argument on the Board's motion was scheduled for November 12, 1997, the date originally reserved for commencement of the plenary hearing itself. The parties by then recognized that in light of the Acting Commissioner's reference to the need for a decision in time to be implemented for the 1998-99 school year, and the likelihood of a multi-day hearing if the case were to be tried, that one day was not practical insofar as the commencement of a hearing was concerned.

On November 12, 1997, in lieu of oral argument, I conferenced the case with counsel who agreed that oral argument should be adjourned to November 26, 1997. Thereafter, oral argument was conducted as rescheduled and the following constitutes my decision granting the Board's motion to dismiss on the basis that: (a) the Verified Complaint was filed "untimely" under *N.J.A.C.* 6:24-1.2(c); and (b) no persuasive reasons exist for me to recommend to the Commissioner that pursuant to *N.J.A.C.* 6:24-1.15 he "relax" the 90 day limitation period.

DISCUSSION

The circumstances which led to the instant litigation arose out of the decades-old efforts by the Montclair Board to deal as comprehensively as possible with *de facto* racial segregation in its public school system. *See, Morean v. Bd. of Ed. of Montclair*, 42 *N.J.* 237 (1964). Thus, 30 years ago, in *Rice, et al v. Board of Education of the Township of Montclair*, 1967 *S.L.D.*__, decided by the Commissioner November 8, 1967, Montclair officially was ordered to take action to correct a racial imbalance in its public school system. Thereafter, various steps were taken to accomplish that result, not only to achieve a constitutionally acceptable pupil racial balance but, in addition and as part of that process, to introduce novel and creative concepts in learning. One such activity, known as the "Primary Unit Program", came into existence in 1976 and, until the 1997-98 school year, essentially consisted of the provision of a two year early education program for all four year-olds in Montclair wishing to participate in the Pre-kindergarten portion. However, during the 1996-97 school year the Board determined, effective September 1997, to modify the program by, for the first time, limiting enrollment of four year-olds to only 175 pupils. The primary reasons the Board determined to do so were fiscal and classroom space constraints.[1]

Thus, on December 19, 1996 the Board adopted a resolution specifically limiting the number of four year-olds in the program to 175 students, although the exact specifics of the selection process were not then fully identified. Thereafter, at a public

[1] See Certifications of Edna Harris, Interim Superintendent of Schools as of 7/1/97 and Board Secretary/School Business Administrator from 1993 to 1997, and Merle A. Montani, Director of Pupil Services, both dated August 19, 1997, submitted in opposition to petitioners' request for emergent relief.

meeting held on February 24, 1997, the Board adopted previously announced criteria to be used to determine which children who would be four years-old by October 1, 1997 would be allowed to enroll in the modified program. The criteria adopted by the Board provided that selection of the particular 175 students was to be determined as follows. First, 40% (70 slots) would be filled by children determined to be in the greatest "educational need" for the program as reflected in a "school-readiness" test. The remaining 60% (105 slots) were to be allocated via a lottery system. In order to attempt to insure that the program was as racially integrated as reasonably possible, the Board determined to allocate 80 of those slots by lottery to racially distributed groups - 40% Caucasian, 40% African-American and 6% "other". Those four year-old children not selected then were to be placed into a general pool and the remaining 25 slots were to be selected at random from that pool.

During February, March and into April 1997 the selection process took place. Then, in letters dated April 14, 1997 and, for purposes of this case, assumed to have been received by petitioners no later than April 18, 1997, the parents of those four year-olds not selected through the lottery system were advised of that fact. Each child, however, was placed on a waiting list in the event openings occurred.

Following dissemination of the selection/rejection letters, some of the parents of the children not selected continued to attempt to gather information concerning the situation in expectation of lodging a legal challenge to it. To that end, they attended Board and Town Council meetings, placed ads in local newspapers and contacted other parents similarly situated. In addition, they also consulted with counsel in contemplation of bringing an action challenging the Board's determination. However, at some unspecified point in June 1997 those attorneys apparently determined not to handle the case after all. As a result, petitioners then obtained other counsel - Mr. Fortunato's firm - and a Verified Complaint and Order to Show Cause with accompanying affidavits were filed on August 1, 1997 - 105 days beyond the April 18, 1997 date referenced above. The petitioners also requested emergent relief enjoining the respondent from limiting admission to the program, but the Acting Commissioner, citing *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), held that the criteria for granting such

extraordinary relief was not met. In that decision Acting Commissioner Osowski also determined that although the petitioners' four year-old children faced the clear prospect of losing a year of program participation even if they ultimately prevailed on the merits, he stressed that they have "no established entitlement to such participation". Again, in the last paragraph of his letter decision he also observed that the Board could pursue its affirmative defenses, including "untimeliness".

Based, then, upon my consideration of all the moving papers, including the certifications and affidavits filed by both sides before the Acting Commissioner in August 1997 and at the OAL thereafter, and after taking into account the presentations by counsel at the oral argument on November 26, 1997, I have determined, as noted above, to dismiss the action on the basis that: (a) the pleadings were filed 15 days beyond the 90 day time limit contained in *N.J.A.C.* 6:24-1.2(c) and; (b) no substantial reasons exist for me to recommend to the Commissioner that the time limit be relaxed pursuant to *N.J.A.C.* 6:24-1.15.

Since the "90 day rule" was adopted there have been a myriad of cases in which its impact has been considered and from which a fundamental principle has emerged: to wit, in order to give proper deference to the limitation, relaxing its admittedly strict application occurs only in the most unusual and compelling circumstances. *See, e.g. Riely v. Hunterdon Central*, 173 *N.J. Super.* 109 (App. Div. 1980); *Medieros v. Jersey City*, 97 *N.J.A.R.* 2d (EDU) 276,280 (1996) and cases cited therein. Even in those few cases where relaxation has occurred, they have been limited, as noted above, to exceptional instances where constitutional principles were involved, where there was an important policy question of more than local interest or where the equities of the situation literally "cried out" for such relief. None of those reasons can be said to exist here.

First, although for the purposes of this motion I have rejected the Board's assertion of a "trigger" date earlier than April 18, 1997, there is a respectable argument to be made that commencement of the running of the 90 day period actually occurred on February 24, 1997 when the Board adopted its resolution officially limiting

enrollment of four year-olds in the program. While none of the individual petitioners knew or could have known as of that date whether his, her or their four year-old child would be excluded from the chosen 175, each then knew their child was in jeopardy of that result and each also knew that implementation of the selection criteria for the restricted program was to begin immediately. Moreover, since petitioners' main thrust is that the Board is prohibited by the State Constitution from limiting enrollment in this way, and it was a "given" that for the first time since inception some eligible four year-olds wishing to participate were not going to be selected, arguably the issue immediately was ripe for consideration at that earlier point in time. Indeed, even though the Board likely would have claimed that the filing of a petition prior to official notification to parents in mid-April was premature, given the constitutional argument advanced by petitioners that defense probably would have been rejected. In fact, the petitioners surely would successfully have responded that if they waited beyond May 25, 1997 (90 days after February 24, 1997), thereby shortening the time between limited pupil selection and school opening in September, the Board then surely would argue it was prejudiced by the delay.

Nevertheless, for purposes of this motion, and despite the existence of a substantial argument that February 24, 1997 was a date which the 90 days could have been triggered, I have chosen April 18, 1997 instead. That date, however, was 105 days prior to the actual filing date of August 1, 1997, and although petitioners refer to certain language in the "rejection" letters indicating that an opportunity for admission still might exist (i.e., a waiting list), the fact is that the letter from the personnel administrator clearly was tantamount to, "notice of a final . . . action by the district board of education". Thus, the August 1, 1997 filing violated the requirements of *N.J.A.C.* 6:24-1.2(c).

Therefore, given the absence of any genuine dispute regarding the clear violation by petitioners of *N.J.A.C.* 6:24-1.2(c), the remaining issue is whether any sound basis exists under *N.J.A.C.* 6:24-1.15 to relax the strict application of the rule. In this respect, as noted, although the Commissioner and the courts have allowed such relaxation, these instances have occurred only in very limited instances. They include,

as both sides agree, the existence of a constitutional issue and/or a policy question of importance, either statewide or on a much broader basis than merely to the local district or the particular parties involved. I would add, of course, a third category - whether the "equities" of the situation call for such a result. For example, where a petitioner deliberately is lulled into a false sense of security regarding an intent to raise the defense of the time limit and relies reasonably upon the representation to his detriment. This situation is akin to an "equitable estoppel" and is supported by the very language of the relaxation rule itself which provides that the Commissioner may dispense with the 90 day requirement where, " . . . a strict adherence thereto may . . . result in injustice". *See, e.g., Polaha v. Buena Regional S.D.*, 212 *N.J. Super.* 628 (App. Div. 1986) (ongoing negotiations led petitioner reasonably to believe no final decision had yet been made).

Is there any State constitutional question militating against application of the 90 day limit? I do not believe so. Although petitioners argue that adoption by the Board of the Primary Unit Program in 1976 was an integral part of its voluntary desegregation plan, and therefore took on a Constitutional dimension in a school district like Montclair, there is no legal basis for reaching that result. Both under our State Constitution (Art. 8, Sec. 4, Para. 1) and the education statutes (*N.J.S.A.* 18A:38-1) entitlement to a free public education to pupils resident in New Jersey arises only when they reach the age of five years. Indeed, in the recent decision in *Herron v. Bd. of Education of Montclair*, 96 *N.J.A.R.* 2d 167 (EDU) (decided by the Commissioner April 19, 1995, *aff'd*, State Bd. of Education, December 8, 1996) the very program at issue here specifically was referred to by the Commissioner as "non-mandated". That conclusion is unassailable. A requirement that local boards constitutionally are required to provide instruction for students under the age of five years simply is not the law and although provision of a program for four year-old pupils is a salutary concept, as the State Board recognized in its decision in the *Herron* case, *supra,* creation of such programs, even in districts like Montclair, remains discretionary with the local boards.

Similarly, I also must reject petitioners' claim that the issue of entitlement of all four year-olds to attend the program is a matter of substantial statewide concern, or of

overriding public policy. While Montclair has a particularized 20 year history concerning the offering for four year-old pupils, and other districts in the State may have a similar interest and/or need, it hardly can be urged that this is an issue of "statewide" importance. Indeed, even accepting petitioners' assertion that approximately 18% of the school districts in New Jersey offer programs like this to four year-olds, (albeit, no proof was offered to support the contention), that simply means that the vast majority of districts do not. Beyond that, historically, many eligible four year-old children never participated in the Pre-K program offered by the Board. *See*, Harris Certification, *supra*, Para. 7 and Ex. 8.

The third basis for excusing strict application of the 90 day rule is one which I have characterized as the "equity" argument. As noted, the relaxation rule itself provides that such ameliorative action can be taken in the discretion of the Commissioner to avoid "injustice" and the petitioners mount a major argument in respect to this point.

First, they pointed out that there would be no prejudice to the Board if the 90 day rule is relaxed by a mere two weeks or so; whereas, preclusion of their four year-old children from attending the program during the 1997-98 school year is completely destructive with respect to their educational remedy.[2] This point essentially was rejected by the Assistant Commissioner last August when he denied emergent relief and observed that a decision in time for the 1998-99 school year was expected.

A second "equity" argument advanced by petitioners is that they are a collection of lay persons not necessarily "schooled" with respect to legal matters. Thus, they had to devote more than the usual amount of time in attempting to analyze what the impact of the selection criteria would be, to find other parents potentially similarly situated and then seek legal counsel even willing to take their case. Then, having "scrambled around" to accomplish these difficult activities they were disappointed when, sometime

[2] Some petitioners do, however, seek permission to file an Amended Verified Petition in order to claim compensatory damages arising out of their having to spend money to send their four year-old children to private school during the instant school year. Given my decision as to the untimely filing of the original pleadings, that motion is denied.

in June 1997, attorneys with whom they had conferred (it was not clear whether they formally were retained) decided not to pursue the case after all. This resulted, of course, in the necessity for them promptly to find other counsel, which petitioners did. Thus, petitioners argue that special consideration must be given to them because of those unique circumstances.[3] As part of the argument concerning the unexpected and belated need to find new counsel, Mr. Fortunato has pointed to a conversation he had with Mr. Bauch which, it is claimed, lends further support to the petitioners' "injustice" argument. Specifically, it is alleged that on July 17, 1997 (when expiration of the 90 day deadline was imminent), Mr. Fortunato spoke to Mr. Bauch to seek additional time to file the action and allegedly was told that since Mr. Bauch would be on vacation from July 23, 1997 to July 25, 1997 the petition should not be filed before Monday, July 28, 1997, after Board counsel returned from vacation. Thus, counsel for petitioner claims that in an effort to accommodate opposing counsel the filing was delayed to August 1, 1997. Mr. Bauch's own version of the conversations during this period with opposing counsel are set forth in his August 19, 1997 Certification.

In my view, the series of events surrounding counsel's conversations do not excuse the late filing. First, at oral argument Mr. Bauch represented that at no time during his telephone conversations with Mr. Fortunato or Ms. Smith was mention even made of the 90 day rule. Thus, it is not clear that petitioners' counsel even was concerned about it. Secondly, the additional time to file claimed to have been given, at least implicitly, by Mr. Bauch ended on July 28, 1997, at the latest, which still was four days prior to the actual filing date of August 1. It would in my opinion be unwise to excuse a 4 day, no less a 15 day late filing based upon whether counsel agreed to accommodate vacation schedules, etc. The "confusion", "potential mix-up" or any other description of counsel's conversation and its aftermath hardly rise to the level of the sort of "injustice" anticipated by the relaxation rule. Furthermore, it also would be unwise in the extreme to permit this case to proceed simply to take testimony and/or to consider other evidence surrounding conversations which allegedly took place between

[3] Both in the briefs and, to a lesser extent at oral argument, vague reference also was made concerning the local political circumstances extant in Montclair which led to the determination by the attorneys first consulted by petitioners to decide not to represent them after all. Other than speculation, no evidence was proffered to back up this claim and therefore it must be rejected.

counsel, the events leading up to it and the events thereafter. I perceive very real difficulties in holding a hearing which would involve not only taking of the testimony of Messrs. Fortunato and Bauch, but perhaps the previous attorneys with whom petitioners may have consulted as well. How much research did they do? To what extent did they share that information with Mr. Fortunato? Why did they choose not to take the case and when, why or how did they communicate their decision to petitioners? Was a Verified Petition and an Order to Show Cause already drafted? Was consideration first given to filing in State or Federal Court, thereby leading to additional loss of time?[4] To try those and other such issues in the present context of this case would be of little value.

Accordingly, having given consideration to all the circumstances set forth by the opposing parties in their submissions, both to the Acting Commissioner in August 1997 and to the undersigned in October-November 1997, I must reach the conclusion that the facts simply do not rise to a level requiring that I recommend to the Commissioner that the 90 day rule be relaxed. The issues in this case surely are of real importance to petitioners. However, as I previously noted in a decision recognizing the inherent harshness of applying the 90 day rule in almost every case, to make a determination based on the adverse impact it has on the parties who are barred by its application potentially could make it totally useless. *See, Weir v. No. Valley Reg. H.S. Dist.*, EDU 8609-83, dec'd by the Comm. Jul. 20, 1984, *aff'd.* State Bd. of Educ., March 6, 1985, *aff'd* App. Div., in Dkt. No. A-3520-84T6, April 9, 1986 (unreported). *N.J.A.C.* 6:24-1.2(c) is not a 91 day, a 92 day, a 93 day or a 105 day rule. It is a 90 day rule whose reasonableness and validity has been upheld by the New Jersey Supreme Court. See, *Kaprow v. Bd. of Educ. of Berkley Tp.*, 31 *N.J.* 572 (1993).

In reaching this result I also have considered the fact there is no realistic expectation that this case even could be tried, no less decided by the agency head in time to make any difference for the 1997-98 school year. Indeed, even though petitioners originally sought an expedited hearing in late August 1997, Acting Commissioner Osowski determined this was not necessary and said that the focus

[4] In this respect, see Bauch Certification, supra, Para. 4 and Ex. "A".

should be upon the 1998-99 school year. I mention this reference again since it was represented to me at oral argument by Board counsel, and by his associate in a supplemental certification, that the respondent has taken certain concrete steps in conjunction with the Township Council essentially to fund a non-profit corporation to operate the program in 1998-99 and which anticipates the participation of all four year-olds for that school year. Whether that exact plan comes to fruition, or meets the felt needs of parents, is not before me. The point to be made is that: (1) all of the four year-old children involved in the original pleadings filed in August 1997 will be five years old by September 1998; and (2) it appears likely that all children who will be four year-old by next October will be eligible for the program next school year. Thus, the only reason to try this case would be to determine whether "compensatory damages" are due to those parents who paid to send their children to private school or to day care in 1997-98. Aside from the somewhat questionable legal merit of any such claim in the circumstances of this case, I see no compelling reason to relax the 90 day rule just to try that issue, especially where the underlying issue on the "merits" likely will be moot.

Accordingly, for the reasons set forth above, respondent's motion to dismiss the Verified Petition because it was untimely filed under *N.J.A.C.* 6:24-1.2(c) is **GRANTED**, and petitioners' request that the 90 day time limit be relaxed under *N.J.A.C.* 6:24-1.15 is **DENIED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 16, 1997
DATE

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

12/17/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 18 1997
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW.

\mvh

OAL DKT. NO. EDU 9127-97
AGENCY DKT. NO. 281-7/97

S.S., by guardians *ad litem,* J.A. AND T.S. *ET AL.*,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon careful and independent review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the within Petition of Appeal is properly dismissed as untimely pursuant to *N.J.A.C.* 6:24-1.2(c), and petitioner provides no compelling reason to relax the 90-day rule pursuant to *N.J.A.C.* 6:24-1.15.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein and the Board's motion to dismiss this matter is hereby granted.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 30, 1998
DATE OF MAILING JANUARY 30, 1998

(SB) 35-98

DHPL #141-98
SB #35-98

IN THE MATTER OF THE DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF B.L.S.

STATE BOARD OF EDUCATION

DECISION

Decided by the Assistant Commissioner of Education, March 23, 1998

For the Petitioner-Appellant, B.L.S., pro se

The decision of the Assistant Commissioner of Education disqualifying petitioner from school employment following a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1 is affirmed for the reasons expressed therein.

June 3, 1998

Date of mailing JUN 05 1998

36-98

JAMES TAYLOR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HARDYSTON, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning riffed principal claimed entitlement to vice principal position following District's reorganization in which the duties of chief school administrator and principal were consolidated into a single position and the position of principal was abolished. Petitioner alleged that as principal he performed duties of vice principal during 1989-90 school year, prior to the creation of the vice principal position.

ALJ found that since principal and vice principal are separately tenurable positions and petitioner served exclusively as a principal, he did not qualify for tenure as a vice principal. ALJ found that because petitioner never served as a vice principal, he had no right to seniority in that category. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own, emphasizing that prior to the 1990-91 school year when the position of vice principal was created, the duties petitioner performed were those of his principal's position, since a vice principal position did not exist and, therefore, could not have any duties.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7070-96
AGENCY DKT. NO. 193-5/96

JAMES TAYLOR,
Petitioner,
v.
HARDYSTON TOWNSHIP BOARD OF EDUCATION,
Respondent.

Robert M. Schwartz, Esq., for petitioner

Joseph R. Morano, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorney)

Record Closed: June 13, 1997 Decided: December 11, 1997

BEFORE: **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is a dispute between a tenured principal and a tenured vice principal as to who has greater entitlement to the surviving position of vice principal. Prior to the 1996-97 school year, a small elementary-school district had an administrative structure comprised of a chief school administrator, a principal and a vice principal. To reduce administrative costs, the district adopted a reorganization plan in which the duties of chief school administrator and principal were consolidated into a single position and the position of principal was abolished. Petitioner James Taylor ("Taylor"), who had served

as principal before the district hired a vice principal to assist him, does not challenge the good faith of the district in adopting its plan to cut costs. Although petitioner never served under the title of vice principal, he claims seniority to that position because the duties of vice principal were allegedly "subsumed" under title of principal before the job of vice principal existed in this particular district.[1] Respondent Hardyston Township Board of Education ("Board") maintains that principal and vice principal are separately-tenurable positions and that petitioner's only service was as a principal. For the reasons which follow, petitioner's tenure and seniority accrue as a principal and he has no preferential right to become a vice principal.

Procedural History

On May 28, 1996, Taylor filed a verified petition with the Commissioner of Education ("Commissioner"). The Board filed its answer on June 14, 1997. Subsequently, on June 24, 1996, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held a hearing on April 29, 1997. Instead of presenting testimony, the parties entered into a stipulation of facts. Both parties submitted post-hearing briefs on June 13, 1997.

Findings of Fact

The parties have submitted a joint stipulation of all relevant facts. I adopt that stipulation as my factual findings:[2]

1. The Hardyston Township Board of Education, (hereinafter referred to as the "Board"), is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, *N.J.S.A.* 18A:11-1, and entrusted with maintaining and conducting the public schools of Hardyston Township.

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[1] In the second count of his original pleading, petitioner had also asserted a tenure claim to the position of supervisor of curriculum. At the hearing, however, he voluntarily withdrew that claim

[2] References to supporting exhibits are omitted from the recitation of facts.

2. The Hardyston Township school district is comprised of one elementary school serving the educational needs of approximately 700 students.

3. Petitioner James Taylor, (hereinafter referred to as "Petitioner"), was employed as a full-time twelve (12) month principal by the Board in the Hardyston School, a K-8 elementary school.

4. Petitioner commenced employment with the Board as a Principal for the 1989-90 school year on August 15, 1989, and continuously and exclusively served in that position until June 30, 1996. Petitioner received tenure as Principal on or about August 16, 1992.

5. Petitioner is the holder of an Administrative Certificate with a Principal-Supervisor endorsement issued by the State Board of Examiners in April 1979; a School Administrator endorsement issued August, 1989; an Assistant Superintendent for Business endorsement, issued October 1986; a School Business Instructional Certificate with a Teacher of Industrial Arts endorsement, issued February 1974.

6. During the 1989-1996 time period, Petitioner performed the duties of a Principal as set forth in the Principal job description. The job description for the position of Principal requires the holder to have a master's degree, a New Jersey Instructional Certificate, a New Jersey Certificate-Principal, three (3) years teaching experience and one year of administrative experience and such alternatives to the above qualifications as the Board may find appropriate and acceptable.

7. On or about February 1990, the Petitioner submitted a written proposal to the Superintendent to create a Vice Principal position to assist the Petitioner in his duties as Principal.

8. At the time the Petitioner submitted the Vice Principal proposal, he was assisted in his duties by Alexander Roney (hereinafter referred to as "Mr. Roney"), who had served in the part-time position of "Administrative Assistant to the Principal," since January of 1989.

9. The job description for the Administrative Assistant to the Principal position, as it existed during the 1988-89 and 1989-90 school years, required the holder to have a New Jersey Certificate for Principal or School Administrator, a minimum of five years of teaching experience, and demonstrated organizational skills.

10. As Administrative Assistant, Mr. Roney was required to "report to the Building Principal/Superintendent as directed," and was "to perform those other functions or handle those responsibilities as may be assigned by the Principal or Superintendent."

11. Petitioner has never been appointed to the title of Vice Principal by the Hardyston Township Board of Education, and has never served in that position. Nevertheless, during the 1989-90 school year, while serving in the full-time position of Principal, in which he was responsible for "the totality of the daily operation of the school," he performed all of the duties that were later included in the Vice Principal job description which was created for the 1990-91 school year, with the exception of duties involving athletic scheduling. For the 1989-90 school year, those duties were included in the job description of "Athletic Coordinator," which were also performed by Mr. Roney, who assisted Petitioner on an "as needed basis."

12. On or about May 8, 1990, the Hardyston Board of Education first established the full-time twelve (12) month position of Vice-Principal for the 1990-91 school year.

13. On or about June 26, 1990, Alexander Roney, who previously served in the part-time positions of Administrative Assistant to the Principal and Athletic Coordinator, was appointed to the full-time position of Vice-Principal for the 1990-91 school year.

14. Mr. Roney is the holder of an Administrative Certificate with a Principal/Supervisor endorsement issued May 1983, and an Instructional Certificate with a Teacher of Health and Physical Education endorsement issued October 1972.

15. The job description for the Vice-Principal position, as it existed between 1990 and 1996, required the holder to have a master's degree, a New Jersey Certificate for Principal or School Administrator, a minimum of five years of teaching experience, and alternatives for the above qualifications as the Board may find appropriate and acceptable.

16. Further, as Vice-Principal, Mr. Roney was "required to report to the Building Principal primarily," and was "to perform those other functions or handle those responsibilities as may be assigned by the Principal or Superintendent."

17. Mr. Roney was granted tenure as a Vice-Principal in the 1992-93 school year.

18. As a result of the Department of Education's decision to impose monetary penalties on districts which expend funds on administrative staff in excess of the state median, the Board commissioned consultants, Dr. William Librera and Dr. Elena J. Scambio, to conduct an analysis and prepare a report regarding the current administrative structure of the Hardyston Township School District.

19. On November 7, 1995, at a special meeting of the Hardyston Board of Education, the Board unanimously voted to accept the report entitled "Consultant Report on the Administrative Structure of the Hardyston Township Elementary School," which was prepared by Dr. Librera and Dr. Scambio.

20. At the November 7, 1995 special meeting, based on the recommendation set forth in the consultants' report, the Board voted to abolish the positions of Principal and Vice Principal, effective June 30, 1996, pending approval by the County Superintendent.

21. The Board also resolved to create two new positions, Supervisor of Student Activities and Part-time Curriculum Supervisor, effective July 1, 1996, subject to the development of job descriptions and approval by the County Superintendent.

22. On or about February 16, 1996, the Board requested approval for three job descriptions and consolidation of the Superintendent and Principal positions.

23. By letter of March 18, 1996, the Sussex County Superintendent of Schools, Michael Chirichello, responded and requested that the title of "Supervisor of Student Activities" be revised to "Vice Principal."

24. Subsequently, Petitioner was notified that the position of Building Principal had been abolished and that he would not be offered a contract as Building Principal for the 1996-96 [sic 1996-97] school year.

25. By letter dated May 6, 1996 the Sussex County Superintendent of Schools, Michael Chirichello, approved the Board's proposed administrative reorganization to consolidate the positions of Superintendent and Principal into one position for the 1996-97 school year.

26. The County Superintendent conditioned his approval for the consolidation on the Board's changing of the title "Supervisor of Student Activities" to the title of "Vice-Principal."

27. On May 14, 1996, the Board approved a job description for the position of Chief School Administrator. This position requires the holder to have a School Administrator certificate and endorsement. The Board also appointed Dr. Anne M. Wilkins, who was appropriately qualified as a School Administrator to fill the consolidated Chief School Administrator position.

28. The job description for the new Vice-Principal position, adopted by the Board on May 14, 1996, requires the holder to have a master's degree,

New Jersey Certificate for Principal or School Administrator, a minimum of five (5) years teaching experience and alternatives as the Board may find appropriate.

29. The Supervisor of Curriculum and Instruction job description, adopted by the Board on May 14, 1996, requires the holder to possess a New Jersey Certificate with a Supervisor and Elementary Education Teacher endorsements, and a minimum of three (3) years teaching experience.

30. On May 14, 1996, by Resolution adopted at a public meeting of the Hardyston Board of Education, the Board approved the administrative title and job description changes, as approved by the County Superintendent.

Conclusions of Law

Based on the stipulated facts and the applicable law, **I CONCLUDE** that the Board acted within its rightful legal authority.

N.J.S.A. 18A:28-5 provides, in pertinent part:

> The services of all teaching staff members employed in the positions of teacher, *principal*, other than administrative principal, assistant principal, *vice-principal*, assistant superintendent . . and any other employees who are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education . . . shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation, except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause . . . after employment in such district or by such board for . . . (a) [t]hree consecutive calendar years or any shorter period which may be fixed by the employing board for such purpose[.] (Emphasis added.)

Recently, the New Jersey Supreme Court had occasion to interpret this statute in the context of administrative certificates.[3] *Nelson v. Old Bridge Bd. of Educ.*, 148 *N.J.* 358 (1997) involved a former chairperson of industrial arts who claimed that his tenure in that position entitled him to appointment to a vacant principal position when his job was abolished. Nelson held an administrative certificate with separate supervisor and principal endorsements.[4] He had never served in the capacity of principal or vice principal under his principal endorsement. In its decision below, the Appellate Division determined that Nelson's tenure under the supervisor endorsement of his administrative certificate was transferable to the principal endorsement of that same certificate. Reversing that ruling, the Supreme Court relied on "the long line of court decisions and administrative decisions that have held that "the positions specifically enumerated in the Statute, including principal, are separately tenurable." *Nelson*, at 366. *E.g.*, *Kaprow v. Berkeley Twp. Bd. of Educ.*, 255 *N.J. Super.* 76, 92 (App. Div. 1992), *aff'd* 131 *N.J.* 572 (1993) (assistant superintendent is a separately tenurable position under *N.J.S.A.* 18A:28-5); *see also*, *Viemeister v. Prospect Park Bd. of Educ.*, 5 *N.J. Super.* 215, 217 (App. Div. 1949) (principal and teacher are separately tenurable, even though a principal must be "qualified to teach.").

In support of its decision, the Supreme Court also commented that a different endorsement is required for each assignment and that "the two positions are not significantly similar even though both endorsements fall under the administrative certificate." *Nelson*, at 367. If the *Nelson* rationale is applied to the present facts, Taylor does not have tenure as a vice principal. Since *N.J.S.A.* 18A:28-5 lists "principal" and "vice-principal" as separate positions, tenure achieved in one position would not automatically confer tenure in the other.

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[3] The state licensing authority issues three types of certificates: instructional, administrative and educational services. *N.J.A.C.* 6:11-2.3. *Dennery v. Passaic Cty. Reg. High Sch. Dist.* #1, 131 *N.J.* 626, 363 (1993).

[4] "Endorsements" coincide with the educational subjects or positions that share common attributes and thus are grouped under a particular certificate. *N.J.A.C.* 6:11-6.1, -6.2. *Dennery*, at 363. An administrative certificate may be endorsed for school administrator, principal, supervisor, or school business administrator. *N.J.A.C.* 6:11-9.3.

Taylor makes a strong argument as to why his situation is different. Unlike *Nelson*, the instant case involves a single endorsement. Significantly, the principal endorsement is the only one necessary to serve as an administrative officer of a school, including "principal, assistant principal, vice-principal or director." *N.J.A.C.* 6:11-9.3(b). More importantly, the duties of principal encompass nearly all of the duties performed by a vice principal, whose main function is to assist the principal in the educational leadership of the school. Comparison of the district's job descriptions for principal and vice principal show that the two administrators share responsibility for maintaining discipline and upholding school rules; supervising and evaluating staff; developing and implementing instructional programs; selecting educational materials, supplies and equipment; and maintaining favorable relationships with parents, local community groups and individuals. A principal has more responsibility than a vice principal, in that he is solely in charge of "the totality of the daily operations of the school system." Indeed, the Board stipulated that, prior to the advent of the vice-principal position, the principal alone "performed all of the duties that were later included in the Vice Principal job description, with the exception of duties involving athletic scheduling."

It might logically appear that the greater should include the lesser and that a principal ultimately responsible for management of an entire school building should be able to displace a vice principal with less experience whose job was essentially to assist him. Cases cited by the Board for the proposition that tenure cannot be transferred are readily distinguishable, in that they involve claims by a lower-level employee to a more expansive job title rather than, as here, the other way around. *Brenner v. Middlesex Twp. Bd. of Educ.*, 96 *N.J.A.R.* 2d (EDU) 81 (Comm'r Nov. 18, 1993), *appeal dismissed* 96 *N.J.A.R.* 2d (EDU) 94 (St. Bd. Oct. 5, 1995) (supervisor seeking tenure as principal); *DiSimoni v. Passaic Cty. Reg. High Sch. Dist. #1*, 1991 *S.L.D.*2540 (St. Bd. April 3, 1991) (supervisor seeking tenure as vice principal or assistant principal); *Werlock v. Woodbridge Bd. of Educ.*, 1939-49 *Comp. S.L.D.* (St. Bd. 1948), *aff'd on other grounds*, 5 *N.J. Super.* 140 (App. Div. 1949) (supervisor seeking tenure as principal). In at least one instance, the Commissioner has

recognized that service in a greater capacity may, under limited circumstances, entitle a staff member to tenure in a lesser capacity. *See Lightdale v. Union Cty. Reg. Bd. of Educ.*, 96 *N.J.A.R.* 2d (EDU) 106 (Comm'r Oct. 25, 1995) (director of guidance has temure as guidance counselor).

Despite the attractiveness of Taylor's argument, however the Legislature has provided definitive guidance on how to deal with the current controversy. After the Appellate Division's decision but before the Supreme Court's reversal in *Nelson*, the Legislature adopted curative legislation designed to clarify its intent. *L.* 1996, *c.* 58, effective June 28, 1996. While the narrow purpose of the legislation was to overrule *Nelson*, its effect is somewhat broader and clearly covers the present case. Declaring that "a clarification of the statute is necessary in order to continue the traditional practice of providing that tenure is acquired in one of the specifically enumerated positions only if the individual has served for the requisite statututorily required period of time," the Legislature amended *N.J.S.A.* 18A:28-5 to add the following language:

> For purposes of this chapter, tenure in any of the administrative or supervisory positions enumerated herein shall accrue only by employment in that administrative or supervisory position. Tenure so accrued shall not extend to any other administrative or supervisory position . . .

On appeal of the *Nelson* decision, the New Jersey Supreme Court ruled that this amendment should be retroactively applied. *Nelson*, at 368-372. Given that "principal" and "vice principal" are separately-enumerated positions in *N.J.S.A.* 18A:28-5 and that Taylor served exclusively as a principal, he does not qualify for tenure as a vice principal. *White v. Bloomfield Bd. of Educ.*, 97 *N.J.A.R.* 2d (EDU) 551 (Comm'r July 12, 1996), *aff'd in part and remanded in part*, 97 *N.J.A.R.* 2d (EDU) 552 (St. Bd. May 7, 1997).

Although the facts of this case have been analyzed largely in terms of tenure, it may also be considered in terms of seniority.[5] Seniority provides a mechanism for ranking all *tenured* teaching staff members so that reductions in force and reemployment can be effected in an equitable fashion and in accord with sound educational policies. *N.J.S.A.* 18A:28-10 to -12. *Lichtman v. Ridgewood Bd. of Educ.*, 93 *N.J.* 362, 368 (1983). When two tenured staff members have competing claims to the same position, their rights are determined by seniority standards "according to the number of academic or calendar years of employment . . . in specific categories[.]" *N.J.A.C.* 6:3-5.1(b). Under the seniority regulations, "elementary principal" is a different category from "elementary school vice-principal or assistant principal." *Compare N.J.A.C.* 6:3-5.1(l)(9) *and N.J.A.C.* 6:3-5.1(l)((15). Whenever any person's particular employment shall be abolished in a category, he or she shall be given that employment in the *same* category to which he or she is entitled by seniority. *N.J.A.C.* 6:3-5.1(j). (Emphasis added). Again, Taylor acquired seniority in the category of principal, which is separate and distinct from the category of vice principal. Having never actually served as a vice principal, he has no right to seniority in that category.

Order

It is **ORDERED** that the relief requested by Taylor is denied.

[5]Since Taylor did not acquire tenure as a vice principal, it is arguable that seniority is irrelevant.

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

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

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

Dec. 11, 1997
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

12/17/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 18 1997
DATE

Barbara A Kerner
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Exhibits

No.	Description
J-1	Copy of employee record of James F. Taylor from August 15, 1989 to the 1995-96 school year
J-2	Copy of various board resolutions renewing petitioner's employment
J-3	Copy of petitioner's certifications and endorsements
J-4.	Copy of job description for principal, undated
J-5.	Copy of proposal for vice principal position, dated February 1990
J-6	Copy of excerpt of board resolution and attachments, dated January 10, 1989
J-7	Copy of job description for administrative assistance, undated
J-8	Copy of job description for vice principal, undated
J-9	Copy of excerpt of resolution of the Hardyston Board of Education, dated June 26, 1990
J-10	Copy of certifications and endorsements held by Alexander Roney

J-11 Copy of letter to Alexander Roney from Anthony N. Norod, dated April 15, 1992

J-12 Copy of consultant report on the administrative structure of the Hardyston Township Elementary School, dated October 31, 1995

J-13 Copy of excerpt of resolution by the Hardyston Township Board of Education, dated November 7, 1995

J-14 Copy of letter to Michael Chirichello from Anthony M. Norod, dated February 16, 1996

J-15 Copy of letter to Anthony Norod from Michael Chirichello, received March 18, 1996

J-16 Copy of letter to James Taylor from George Johnson, dated April 17, 1996

J-17 Copy of letter to Anthony M. Norod from Michael Chirichello, dated May 6, 1996

J-18 Copy of job description for chief school administrator, adopted May 14, 1996

J-19 Copy of job description for vice-principal, approved May 14, 1996

J-20 Copy of job description for supervisor of curriculum and instruction approved May 14, 1996

J-21 Copy of resolution of the Hardyston Board of Education, dated May 14, 1996

J-22	Copy of employee record of Hugh Dolan, from January 1, 1993 to the 1996-97 school year
J-23	Copy of certifications and endorsements held by Hugh Dolan
J-24	Copy of employee record of Peggy Meakin, from 1980 to the 1996-97 school year
J-25	Copy of certifications and endorsements held by Peggy Meakin
J-26	Copy of employee record of Joseph Picardo, dated September 1, 1996
J-27	Copies of certifications and endorsements held by Joseph Picardo

OAL DKT. NO. EDU 7070-96
AGENCY DKT. NO. 193-5/96

JAMES TAYLOR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HARDYSTON, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4, and were duly considered in the Commissioner's determination herein.

Upon careful and independent review, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge (ALJ) for the reasons well expressed in his initial decision, that petitioner's tenure and seniority accrued as a principal and he, therefore, has no preferential right to the separately tenurable position of vice principal.

Notwithstanding that the within Petition of Appeal fails as a matter of law, the Commissioner's review of the essence of petitioner's claims, argued below and repeated in his exceptions, further reveals that the foundational premise of his petition is also logically flawed. The crux of petitioner's contention herein is that during the 1989-90 school term he performed

all of the duties of what later became the vice principal position, with the exception of athletic scheduling, and, therefore, as of July 1, 1996, he had greater seniority and a greater entitlement than did Mr. Roney to continue his employment in the District as vice principal.* The Commissioner finds that the obvious weakness of this argument is that, prior to the 1990-91 school year when the position of vice principal was created, the duties petitioner performed were those of *his principal's* position, since a vice principal position did not exist and, therefore, could not have any duties.

Accordingly, the Commissioner adopts the initial decision of the OAL and dismisses the within Petition of Appeal.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

*As observed in the Board's exceptions, it should also be noted that Mr. Roney, during his service as administrative assistant, in the 1988-89 and 1989-90 school years, also performed many of the duties subsequently encompassed within the vice principal position. (Board's Reply Exceptions at p. 5)

FEBRUARY 2, 1998
DATE OF MAILING FEBRUARY 2, 1998

36-98

JAMES TAYLOR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HARDYSTON, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning riffed principal claimed entitlement to vice principal position following District's reorganization in which the duties of chief school administrator and principal were consolidated into a single position and the position of principal was abolished. Petitioner alleged that as principal he performed duties of vice principal during 1989-90 school year, prior to the creation of the vice principal position.

ALJ found that since principal and vice principal are separately tenurable positions and petitioner served exclusively as a principal, he did not qualify for tenure as a vice principal. ALJ found that because petitioner never served as a vice principal, he had no right to seniority in that category. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own, emphasizing that prior to the 1990-91 school year when the position of vice principal was created, the duties petitioner performed were those of his principal's position, since a vice principal position did not exist and, therefore, could not have any duties.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7070-96
AGENCY DKT. NO. 193-5/96

JAMES TAYLOR,
Petitioner,
v.
HARDYSTON TOWNSHIP BOARD OF EDUCATION,
Respondent.

Robert M. Schwartz, Esq., for petitioner

Joseph R. Morano, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorney)

Record Closed: June 13, 1997 Decided: December 11, 1997

BEFORE: **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is a dispute between a tenured principal and a tenured vice principal as to who has greater entitlement to the surviving position of vice principal. Prior to the 1996-97 school year, a small elementary-school district had an administrative structure comprised of a chief school administrator, a principal and a vice principal. To reduce administrative costs, the district adopted a reorganization plan in which the duties of chief school administrator and principal were consolidated into a single position and the position of principal was abolished. Petitioner James Taylor ("Taylor"), who had served

as principal before the district hired a vice principal to assist him, does not challenge the good faith of the district in adopting its plan to cut costs. Although petitioner never served under the title of vice principal, he claims seniority to that position because the duties of vice principal were allegedly "subsumed" under title of principal before the job of vice principal existed in this particular district.[1] Respondent Hardyston Township Board of Education ("Board") maintains that principal and vice principal are separately-tenurable positions and that petitioner's only service was as a principal. For the reasons which follow, petitioner's tenure and seniority accrue as a principal and he has no preferential right to become a vice principal.

Procedural History

On May 28, 1996, Taylor filed a verified petition with the Commissioner of Education ("Commissioner"). The Board filed its answer on June 14, 1997. Subsequently, on June 24, 1996, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held a hearing on April 29, 1997. Instead of presenting testimony, the parties entered into a stipulation of facts. Both parties submitted post-hearing briefs on June 13, 1997.

Findings of Fact

The parties have submitted a joint stipulation of all relevant facts. I adopt that stipulation as my factual findings:[2]

1. The Hardyston Township Board of Education, (hereinafter referred to as the "Board"), is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, *N.J.S.A.* 18A:11-1, and entrusted with maintaining and conducting the public schools of Hardyston Township.

[1] In the second count of his original pleading, petitioner had also asserted a tenure claim to the position of supervisor of curriculum. At the hearing, however, he voluntarily withdrew that claim

[2] References to supporting exhibits are omitted from the recitation of facts.

2. The Hardyston Township school district is comprised of one elementary school serving the educational needs of approximately 700 students.

3. Petitioner James Taylor, (hereinafter referred to as "Petitioner"), was employed as a full-time twelve (12) month principal by the Board in the Hardyston School, a K-8 elementary school.

4. Petitioner commenced employment with the Board as a Principal for the 1989-90 school year on August 15, 1989, and continuously and exclusively served in that position until June 30, 1996. Petitioner received tenure as Principal on or about August 16, 1992.

5. Petitioner is the holder of an Administrative Certificate with a Principal-Supervisor endorsement issued by the State Board of Examiners in April 1979; a School Administrator endorsement issued August, 1989; an Assistant Superintendent for Business endorsement, issued October 1986; a School Business Instructional Certificate with a Teacher of Industrial Arts endorsement, issued February 1974.

6. During the 1989-1996 time period, Petitioner performed the duties of a Principal as set forth in the Principal job description. The job description for the position of Principal requires the holder to have a master's degree, a New Jersey Instructional Certificate, a New Jersey Certificate-Principal, three (3) years teaching experience and one year of administrative experience and such alternatives to the above qualifications as the Board may find appropriate and acceptable.

7. On or about February 1990, the Petitioner submitted a written proposal to the Superintendent to create a Vice Principal position to assist the Petitioner in his duties as Principal.

8. At the time the Petitioner submitted the Vice Principal proposal, he was assisted in his duties by Alexander Roney (hereinafter referred to as "Mr. Roney"), who had served in the part-time position of "Administrative Assistant to the Principal," since January of 1989.

9. The job description for the Administrative Assistant to the Principal position, as it existed during the 1988-89 and 1989-90 school years, required the holder to have a New Jersey Certificate for Principal or School Administrator, a minimum of five years of teaching experience, and demonstrated organizational skills.

10. As Administrative Assistant, Mr. Roney was required to "report to the Building Principal/Superintendent as directed," and was "to perform those other functions or handle those responsibilities as may be assigned by the Principal or Superintendent."

11. Petitioner has never been appointed to the title of Vice Principal by the Hardyston Township Board of Education, and has never served in that position. Nevertheless, during the 1989-90 school year, while serving in the full-time position of Principal, in which he was responsible for "the totality of the daily operation of the school," he performed all of the duties that were later included in the Vice Principal job description which was created for the 1990-91 school year, with the exception of duties involving athletic scheduling. For the 1989-90 school year, those duties were included in the job description of "Athletic Coordinator," which were also performed by Mr. Roney, who assisted Petitioner on an "as needed basis."

12. On or about May 8, 1990, the Hardyston Board of Education first established the full-time twelve (12) month position of Vice-Principal for the 1990-91 school year.

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19. On November 7, 1995, at a special meeting of the Hardyston Board of Education, the Board unanimously voted to accept the report entitled "Consultant Report on the Administrative Structure of the Hardyston Township Elementary School," which was prepared by Dr. Librera and Dr. Scambio.

20. At the November 7, 1995 special meeting, based on the recommendation set forth in the consultants' report, the Board voted to abolish the positions of Principal and Vice Principal, effective June 30, 1996, pending approval by the County Superintendent.

21. The Board also resolved to create two new positions, Supervisor of Student Activities and Part-time Curriculum Supervisor, effective July 1, 1996, subject to the development of job descriptions and approval by the County Superintendent.

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Conclusions of Law

Based on the stipulated facts and the applicable law, **I CONCLUDE** that the Board acted within its rightful legal authority.

N.J.S.A. 18A:28-5 provides, in pertinent part:

> The services of all teaching staff members employed in the positions of teacher, *principal*, other than administrative principal, assistant principal, *vice-principal*, assistant superintendent . . and any other employees who are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education . . . shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation, except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause . . . after employment in such district or by such board for . . . (a) [t]hree consecutive calendar years or any shorter period which may be fixed by the employing board for such purpose[.] (Emphasis added.)

Recently, the New Jersey Supreme Court had occasion to interpret this statute in the context of administrative certificates.[3] *Nelson v. Old Bridge Bd. of Educ.*, 148 *N.J.* 358 (1997) involved a former chairperson of industrial arts who claimed that his tenure in that position entitled him to appointment to a vacant principal position when his job was abolished. Nelson held an administrative certificate with separate supervisor and principal endorsements.[4] He had never served in the capacity of principal or vice principal under his principal endorsement. In its decision below, the Appellate Division determined that Nelson's tenure under the supervisor endorsement of his administrative certificate was transferable to the principal endorsement of that same certificate. Reversing that ruling, the Supreme Court relied on "the long line of court decisions and administrative decisions that have held that "the positions specifically enumerated in the Statute, including principal, are separately tenurable." *Nelson*, at 366. *E.g.*, *Kaprow v. Berkeley Twp. Bd. of Educ.*, 255 *N.J. Super.* 76, 92 (App. Div. 1992), *aff'd* 131 *N.J.* 572 (1993) (assistant superintendent is a separately tenurable position under *N.J.S.A.* 18A:28-5); *see also*, *Viemeister v. Prospect Park Bd. of Educ.*, 5 *N.J. Super.* 215, 217 (App. Div. 1949) (principal and teacher are separately tenurable, even though a principal must be "qualified to teach.").

In support of its decision, the Supreme Court also commented that a different endorsement is required for each assignment and that "the two positions are not significantly similar even though both endorsements fall under the administrative certificate." *Nelson*, at 367. If the *Nelson* rationale is applied to the present facts, Taylor does not have tenure as a vice principal. Since *N.J.S.A.* 18A:28-5 lists "principal" and "vice-principal" as separate positions, tenure achieved in one position would not automatically confer tenure in the other.

---

[3] The state licensing authority issues three types of certificates: instructional, administrative and educational services. *N.J.A.C.* 6:11-2.3. *Dennery v. Passaic Cty. Reg. High Sch. Dist.* #1, 131 *N.J.* 626, 363 (1993).

[4] "Endorsements" coincide with the educational subjects or positions that share common attributes and thus are grouped under a particular certificate. *N.J.A.C.* 6:11-6.1, -6.2. *Dennery*, at 363. An administrative certificate may be endorsed for school administrator, principal, supervisor, or school business administrator. *N.J.A.C.* 6:11-9.3.

Taylor makes a strong argument as to why his situation is different. Unlike *Nelson*, the instant case involves a single endorsement. Significantly, the principal endorsement is the only one necessary to serve as an administrative officer of a school, including "principal, assistant principal, vice-principal or director." *N.J.A.C.* 6:11-9.3(b). More importantly, the duties of principal encompass nearly all of the duties performed by a vice principal, whose main function is to assist the principal in the educational leadership of the school. Comparison of the district's job descriptions for principal and vice principal show that the two administrators share responsibility for maintaining discipline and upholding school rules; supervising and evaluating staff; developing and implementing instructional programs; selecting educational materials, supplies and equipment; and maintaining favorable relationships with parents, local community groups and individuals. A principal has more responsibility than a vice principal, in that he is solely in charge of "the totality of the daily operations of the school system." Indeed, the Board stipulated that, prior to the advent of the vice-principal position, the principal alone "performed all of the duties that were later included in the Vice Principal job description, with the exception of duties involving athletic scheduling."

It might logically appear that the greater should include the lesser and that a principal ultimately responsible for management of an entire school building should be able to displace a vice principal with less experience whose job was essentially to assist him. Cases cited by the Board for the proposition that tenure cannot be transferred are readily distinguishable, in that they involve claims by a lower-level employee to a more expansive job title rather than, as here, the other way around. *Brenner v. Middlesex Twp. Bd. of Educ.,* 96 *N.J.A.R.* 2d (EDU) 81 (Comm'r Nov. 18, 1993), *appeal dismissed* 96 *N.J.A.R.* 2d (EDU) 94 (St. Bd. Oct. 5, 1995) (supervisor seeking tenure as principal); *DiSimoni v. Passaic Cty. Reg. High Sch. Dist. #1*, 1991 *S.L.D.*2540 (St. Bd. April 3, 1991) (supervisor seeking tenure as vice principal or assistant principal); *Werlock v. Woodbridge Bd. of Educ.*, 1939-49 *Comp. S.L.D.* (St. Bd. 1948), *aff'd on other grounds*, 5 *N.J. Super.* 140 (App. Div. 1949) (supervisor seeking tenure as principal). In at least one instance, the Commissioner has

recognized that service in a greater capacity may, under limited circumstances, entitle a staff member to tenure in a lesser capacity. *See Lightdale v. Union Cty. Reg. Bd. of Educ.*, 96 *N.J.A.R.* 2d (EDU) 106 (Comm'r Oct. 25, 1995) (director of guidance has temure as guidance counselor).

Despite the attractiveness of Taylor's argument, however the Legislature has provided definitive guidance on how to deal with the current controversy. After the Appellate Division's decision but before the Supreme Court's reversal in *Nelson*, the Legislature adopted curative legislation designed to clarify its intent. *L.* 1996, *c.* 58, effective June 28, 1996. While the narrow purpose of the legislation was to overrule *Nelson*, its effect is somewhat broader and clearly covers the present case. Declaring that "a clarification of the statute is necessary in order to continue the traditional practice of providing that tenure is acquired in one of the specifically enumerated positions only if the individual has served for the requisite statututorily required period of time," the Legislature amended *N.J.S.A.* 18A:28-5 to add the following language:

> For purposes of this chapter, tenure in any of the administrative or supervisory positions enumerated herein shall accrue only by employment in that administrative or supervisory position. Tenure so accrued shall not extend to any other administrative or supervisory position . . .

On appeal of the *Nelson* decision, the New Jersey Supreme Court ruled that this amendment should be retroactively applied. *Nelson*, at 368-372. Given that "principal" and "vice principal" are separately-enumerated positions in *N.J.S.A.* 18A:28-5 and that Taylor served exclusively as a principal, he does not qualify for tenure as a vice principal. *White v. Bloomfield Bd. of Educ.*, 97 *N.J.A.R.* 2d (EDU) 551 (Comm'r July 12, 1996), *aff'd in part and remanded in part*, 97 *N.J.A.R.* 2d (EDU) 552 (St. Bd. May 7, 1997).

Although the facts of this case have been analyzed largely in terms of tenure, it may also be considered in terms of seniority.[5] Seniority provides a mechanism for ranking all *tenured* teaching staff members so that reductions in force and reemployment can be effected in an equitable fashion and in accord with sound educational policies. *N.J.S.A.* 18A:28-10 to -12. *Lichtman v. Ridgewood Bd. of Educ.*, 93 *N.J.* 362, 368 (1983). When two tenured staff members have competing claims to the same position, their rights are determined by seniority standards "according to the number of academic or calendar years of employment . . . in specific categories[.]" *N.J.A.C.* 6:3-5.1(b). Under the seniority regulations, "elementary principal" is a different category from "elementary school vice-principal or assistant principal." *Compare N.J.A.C.* 6:3-5.1(l)(9) *and N.J.A.C.* 6:3-5.1(l)((15). Whenever any person's particular employment shall be abolished in a category, he or she shall be given that employment in the *same* category to which he or she is entitled by seniority. *N.J.A.C.* 6:3-5.1(j). (Emphasis added). Again, Taylor acquired seniority in the category of principal, which is separate and distinct from the category of vice principal. Having never actually served as a vice principal, he has no right to seniority in that category.

Order

It is **ORDERED** that the relief requested by Taylor is denied.

[5]Since Taylor did not acquire tenure as a vice principal, it is arguable that seniority is irrelevant.

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

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

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

Dec. 11, 1997
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

12/17/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 18 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Exhibits

No.	Description
J-1	Copy of employee record of James F. Taylor from August 15, 1989 to the 1995-96 school year
J-2	Copy of various board resolutions renewing petitioner's employment
J-3	Copy of petitioner's certifications and endorsements
J-4.	Copy of job description for principal, undated
J-5.	Copy of proposal for vice principal position, dated February 1990
J-6	Copy of excerpt of board resolution and attachments, dated January 10, 1989
J-7	Copy of job description for administrative assistance, undated
J-8	Copy of job description for vice principal, undated
J-9	Copy of excerpt of resolution of the Hardyston Board of Education, dated June 26, 1990
J-10	Copy of certifications and endorsements held by Alexander Roney

J-11 Copy of letter to Alexander Roney from Anthony N. Norod, dated April 15, 1992

J-12 Copy of consultant report on the administrative structure of the Hardyston Township Elementary School, dated October 31, 1995

J-13 Copy of excerpt of resolution by the Hardyston Township Board of Education, dated November 7, 1995

J-14 Copy of letter to Michael Chirichello from Anthony M. Norod, dated February 16, 1996

J-15 Copy of letter to Anthony Norod from Michael Chirichello, received March 18, 1996

J-16 Copy of letter to James Taylor from George Johnson, dated April 17, 1996

J-17 Copy of letter to Anthony M. Norod from Michael Chirichello, dated May 6, 1996

J-18 Copy of job description for chief school administrator, adopted May 14, 1996

J-19 Copy of job description for vice-principal, approved May 14, 1996

J-20 Copy of job description for supervisor of curriculum and instruction approved May 14, 1996

J-21 Copy of resolution of the Hardyston Board of Education, dated May 14, 1996

J-22	Copy of employee record of Hugh Dolan, from January 1, 1993 to the 1996-97 school year
J-23	Copy of certifications and endorsements held by Hugh Dolan
J-24	Copy of employee record of Peggy Meakin, from 1980 to the 1996-97 school year
J-25	Copy of certifications and endorsements held by Peggy Meakin
J-26	Copy of employee record of Joseph Picardo, dated September 1, 1996
J-27	Copies of certifications and endorsements held by Joseph Picardo

OAL DKT. NO. EDU 7070-96
AGENCY DKT. NO. 193-5/96

JAMES TAYLOR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HARDYSTON, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4, and were duly considered in the Commissioner's determination herein.

Upon careful and independent review, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge (ALJ) for the reasons well expressed in his initial decision, that petitioner's tenure and seniority accrued as a principal and he, therefore, has no preferential right to the separately tenurable position of vice principal.

Notwithstanding that the within Petition of Appeal fails as a matter of law, the Commissioner's review of the essence of petitioner's claims, argued below and repeated in his exceptions, further reveals that the foundational premise of his petition is also logically flawed. The crux of petitioner's contention herein is that during the 1989-90 school term he performed

all of the duties of what later became the vice principal position, with the exception of athletic scheduling, and, therefore, as of July 1, 1996, he had greater seniority and a greater entitlement than did Mr. Roney to continue his employment in the District as vice principal.* The Commissioner finds that the obvious weakness of this argument is that, prior to the 1990-91 school year when the position of vice principal was created, the duties petitioner performed were those of *his principal's* position, since a vice principal position did not exist and, therefore, could not have any duties.

Accordingly, the Commissioner adopts the initial decision of the OAL and dismisses the within Petition of Appeal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

*As observed in the Board's exceptions, it should also be noted that Mr. Roney, during his service as administrative assistant, in the 1988-89 and 1989-90 school years, also performed many of the duties subsequently encompassed within the vice principal position. (Board's Reply Exceptions at p. 5)

FEBRUARY 2, 1998
DATE OF MAILING FEBRUARY 2, 1998

36-98

EDU #7070-96
C # 36-98
SB # 27-98

JAMES TAYLOR,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HARDYSTOWN, SUSSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, February 2, 1998

For the Petitioner-Appellant, Robert M. Schwartz, Esq.

For the Respondent-Respondent, Schwartz, Simon, Edelstein, Celso & Kessler (Joseph R. Morano, Esq., of Counsel)

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

June 3, 1998

Date of mailing JUN 05 1998

37-98

IN THE MATTER OF THE TENURE	:	
HEARING OF HENRY J. BAUMAN, JR.,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
CITY OF HACKENSACK, BERGEN	:	
COUNTY.	:	
	:	

FEBRUARY 2, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11306-96

AGENCY DKT. NO. 454-9/96

SCHOOL DISTRICT OF HACKENSACK,

Petitioner,

v.

HENRY J. BAUMAN, JR.,

Respondent.

Cherie L. Maxwell, Esq., appearing for petitioner
(Sills, Cummis, Zuckerman, Radin, Tischman, Esptein & Gross, attorneys)

William J. DeMarco, Esq., appearing for respondent

Record Closed: January 6, 1998 Decided: January 7, 1998

BEFORE **MARGARET M. HAYDEN**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on November 1, 1996, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A hearing was scheduled for November 14, 1997 at the OAL, 185 Washington Street, Newark, New Jersey. Prior to the hearing, settlement discussions were held and a settlement was reached.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Jan 7, 1998
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

1/9/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 12 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

jb

AGREEMENT

This Agreement, made this ____ day of November, 1997, by and between the Board of Education of the School District of the City of Hackensack (hereinafter"District") and Henry Bauman, Jr., a tenured teacher employed by the District (hereinafter "Bauman").

WHEREAS, Tenure charges against Bauman were filed with the District on or about September 24, 1996, and

WHEREAS, the parties are desirous of amicably settling the outstanding issues without the necessity of formal litigation on the charges;

NOW THEREFORE, the parties hereby agree to resolve this matter on the following basis:

1. Bauman will submit to the District upon execution of this Agreement a letter of intent to resign his position of employment with the District for the purpose of retirement effective November 30, 1997, which resignation for the purpose of retirement shall be accepted by the District.

2. The District will withdraw the tenure charges against Bauman.

3. Bauman will be placed on administrative leave, with pay, from the execution of this Agreement through November 30, 1997, at which time he shall resign for the purpose of retirement from his employment with the District. Bauman will receive his current rate of pay from the execution of this Agreement through the day of

his resignation. At the time of his resignation for the purpose of retirement, Bauman will receive payment for accrued sick leave pursuant to the applicable collective bargaining agreement and any other payment which may be due to Bauman pursuant to the terms of the applicable collective bargaining agreement. The District further agrees to provide paid dental insurance coverage to Bauman through June 30, 1998. These payments shall constitute the total financial obligation of the District to Bauman and Bauman hereby waives any claims he may have to terminal leave and/or to any payments from the District other than as provided above.

4. Bauman understands and agrees that his resignation for the purpose of retirement and the entering into of this Agreement extinguishes, terminates, waives and/or revokes any and all tenure, employment and re-employment rights he may have as a teaching staff member or administrator with the District other than those set forth in this Agreement. As required under In re Cardonick, OAL Docket No. 7093-81 (St. Bd. Aug. 4, 1982), Bauman further understands that pursuant to NJAC 6:11-3.6, the matter of his teaching certification may be reviewed by the State Board of Examiners with respect to possible revocation.

5. Bauman hereby releases, waives and forever discharges the District from any and all claims, demands, rights, actions, damages or liabilities of any description arising out of or related to Bauman's employment with the District, including but not

limited to the aforementioned tenure charges, claims for compensation other than as set forth in Paragraph 3 above, and any claims for wrongful termination of employment.

6. This Agreement is not and shall not be construed to be an admission of liability or wrongdoing by either party. Rather, the parties have entered into the Agreement for the sole purpose of resolving the aforementioned tenure charges and all other issues arising from Bauman's employment without the burden, expense, delay and uncertainties of litigation.

7. This Agreement is subject to the approval of the Hackensack Board of Education and the approval of the Commissioner of Education.

8. This Agreement is freely and voluntarily executed by each party hereto. Both parties have had the terms of this Agreement thoroughly explained by their respective legal counsel and understand such terms and the legal implications arising therefrom.

BOARD OF EDUCATION OF THE SCHOOL DISTRICT
OF THE CITY OF HACKENSACK

By: DR. JOSEPH MONTESANO
Superintendent

Dated: 12/8/97

Henry Bauman, Jr.

Dated: 10-22-97

OAL DKT. NO. EDU 11306-96
AGENCY DKT. NO. 454-9/96

IN THE MATTER OF THE TENURE	:	
HEARING OF HENRY J. BAUMAN, JR.,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
CITY OF HACKENSACK, BERGEN	:	
COUNTY.	:	
	:	

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

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (*In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846) However, to the extent the terms of this settlement have already been effectuated through respondent's resignation for the purpose of retirement on November 30, 1997, and by the Board's corresponding payment to respondent for accrued sick leave and other benefits, if any, the parties are admonished that settlement agreements are of no force and effect and may not be implemented absent the Commissioner's approval pursuant to *N.J.A.C.* 1:1-19.1.

This matter is hereby dismissed, subject to compliance with the terms of the settlement. Further, this matter shall be referred to the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.6 for action against respondent's certificate as it deems appropriate.

COMMISSIONER OF EDUCATION

FEBRUARY 2, 1998
DATE OF MAILING FEBRUARY 2, 1998

(SB) 37-98

DHPL #93-98
SB #37-98

IN THE MATTER OF THE DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF C.E. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Assistant Commissioner of Education, February 27, 1998

For the Petitioner-Appellant, C.E., pro se

The decision of the Assistant Commissioner of Education disqualifying petitioner from school employment is affirmed for the reasons expressed therein. We stress that petitioner had been convicted of manslaughter and that she had been disqualified from employment as a school bus driver, a position requiring considerable responsibility for the care and safety of children. See N.J.S.A. 18A:6-7.1(e)(1) and (2). We note, in addition, that petitioner had certified on her authorization form provided to the Office of Criminal History Review that she had not been convicted of any disqualifying offenses, including manslaughter.

Sam Podietz did not participate in deliberations in this matter.

July 1, 1998

Date of mailing JUL 06 1998

38-98

38-98 B

BOARD OF EDUCATION OF THE BOROUGH OF LITTLE FERRY,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF LITTLE FERRY, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $192,000 made by governing body following voter rejection of proposed budget on April 15, 1997.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line-item reductions was necessary in order to provide stability in the District pursuant to CEIFA, Commissioner determined to restore $136,783 for a total General Fund tax levy of $8,376,918 for 1997-98 school purposes.

FEBRUARY 2, 1998

AGENCY DKT. NO. 179-5/97

BOARD OF EDUCATION OF THE BOROUGH OF LITTLE FERRY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND COUNCIL OF THE BOROUGH OF LITTLE FERRY, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

For the Board of Education, Ferrara, Turitz, Harraka and Goldberg
(Stanley Turitz, Esq.)

For the Mayor and Council, DeCotiis, Fitzpatrick and Gluck
(John J. Langan, Jr., Esq.)

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education on May 23, 1997 through the filing of a Petition of Appeal by the Little Ferry Board of Education (Board), seeking restoration of reductions to the school budget made by the Mayor and Council of the Borough of Little Ferry (Council) pursuant to *N.J.S.A.* 18A:22-37 following defeat of the budget at the annual school election on April 15, 1997.

At that election, the voters rejected a public question proposing a General Fund tax levy of $8,432,135 for the 1997-98 school year. On May 13, 1997, following consultation with the Board as required by law, the Council adopted a resolution determining to certify a General Fund tax levy of $8,233,897 as sufficient to provide for a thorough and efficient system of education (T&E) in the District. This amount represented a reduction of $198,238 from the tax levy proposed by the Board, and was

effectuated through cuts in nine line items, for the reasons given in the schedule attached to the implementing resolution. The reductions detailed in that schedule totaled only $192,000, notwithstanding that the amount certified reflected an actual reduction of $198,238, the difference having been erroneously added to the amount of debt service certification, which was set at $485,022 rather than $478,784 as proposed by the Board. By resolution dated May 15, 1997, the Board determined to appeal the Council's reductions and duly filed the within petition.

The amounts in dispute in this appeal are thus as follows:

Tax Levy Proposed by Board		Tax Levy Certified by Council	
General Fund	$8,432,135	General Fund	$8,233,897
Debt Service	$ 478,784	Debt Service	$ 485,022
Amount of Reduction by Council		**Amount of Reduction in Dispute**	
General Fund	$198,238 (Actual) $192,000 (Intended)	General Fund	$198,238 ($192,000)

An answer to the Board's petition was filed by the Council on June 9, 1997. On June 10, 1997, the Board indicated that it would rely on the arguments and materials submitted with its petition as its position statement required pursuant to *N.J.A.C.* 6:24-7.8; the Council's position statement was submitted on July 7, 1997. On July 9, 1997, the Board filed a brief statement of reliance on prior submissions in response to the Council's position statement.

In addition, as the parties had been advised by letter from the Assistant Commissioner dated April 16, 1997, distributed through the County Superintendent to boards and municipalities experiencing budget defeats and again in conjunction with proceedings herein, as part of the record of the within appeal, the Commissioner took official notice of the Board's revised budget, its June 30 financial report to be filed by August 1 pursuant to *N.J.S.A.* 18A:17-10, applicable portions of the School Report Card and the Comparative Spending Guide, and the annual audit for purposes of verifying surplus information given in the June 30 report and any prior year data relied upon by the Commissioner in making his determinations.

Consistent with the above, upon filing of the Board's annual audit, the record of the within appeal was closed and the matter duly proceeded to determination.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to *N.J.S.A.* 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. In reviewing such appeals, the Commissioner's standard has historically been whether a district board of education has demonstrated that the amount by which a specific line-item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education (T&E). *Board of Education of East Brunswick Township v. Township Council of East Brunswick*, 48 *N.J.* 94 (1966) and *Board of Education of Deptford Township v. Mayor and Council of Deptford Township*, 116 *N.J.* 305 (1989). However, on December 20, 1996, the Legislature enacted the Comprehensive Educational Improvement and Financing Act of 1996 (CEIFA), wherein a prescribed level of expenditure range was established as sufficient for provision of T&E, and appeal of General Fund budget amounts in excess of that range, following voter defeat and municipal reduction, was expressly restricted to grounds of negative impact on the stability of the district given the need for long-term planning and budgeting. Additionally, the Act provided for standards of efficiency to be established by the Commissioner, setting forth the appropriate cost of the various programs, services, activities and materials necessary to achieve T&E. *P.L.* 1996, *c.* 138; *N.J.S.A.* 18A:7F-1 *et seq.*)

In the present instance, the Board proposed a General Fund budget including $496,465 in excess of the T&E amount established for the District pursuant to CEIFA. Accordingly, appeal of reductions may be made only on grounds of stability.

Mindful, then, of the standard to be applied, the Commissioner makes specific determinations as set forth below.

COMMISSIONER'S DETERMINATION

By way of general comment, the Board, through the certification of its superintendent, states that the current budget is 100 percent zero-based, with no extra money anywhere; that the District is currently facing a deficit of $50,789; that a $169,000 tuition adjustment is owed to Ridgefield Park, which must be paid by 1998-99 and for which there is no offsetting surplus; and that the District has been hit with a number of unanticipated special education placements, the costs of which have consistently necessitated taking money away from regular education. Under these conditions, the stability of the District cannot be maintained, nor can T&E, in the wake of Council's reductions.

The Council generally contends that its reductions were neither arbitrary nor unreasonable, being based on a report prepared by the borough auditor after examination of the Board's records. Indeed, although this report recommended $381,000 in reductions, the Council opted for reduction of only $192,000 of the Board's proposed $911,650 increase over last year's tax levy, thus leaving the Board with an increase of 7.84 percent. The Council avers that this amount should be more than adequate to provide T&E.

In addition to these general statements, the parties argue for and against specific reductions. Following each reduction listed below, the Council's rationale as stated in the schedule appended to its implementing resolution is set forth in full. The arguments of the parties on appeal follow thereafter, with each section concluded by the determination of the Commissioner.

Disputed Line-Item Number 1

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
2510	11-120-100-101	Gr. 1-5 Teacher Salaries	$1,412,882	$15,000

> The Board has budgeted for an additional third grade teacher due to increased enrollment. The position is currently budgeted at $50,448. The position should be sufficiently funded with an appropriation of $35,000.

The Board contends that the Council has offered an unsupported conclusion and failed to look at the fact that the $50,448 budgeted refers to an actual person currently employed by the school system who would take over the duties of the extra third grade teacher. Whether this teacher teaches third grade or not, her salary is $50,448 and would need to be paid. However, the District requires five sections of third grade classes for the 1997-1998 school year to keep class sizes to a maximum of 25 students as per Board policy. Assuming *arguendo* that the same number of students who attended second grade in the 1996-1997 school year move to third grade, five classes will be moving to what is currently four sections of third grade. The Board further notes that Council's position on salary is not taking into consideration the important fact that the Board renegotiated the teachers' union contract, which would have called for automatic 8 - 10 percent increases, and obtained a new contract calling for only 3.99 percent increases, a substantial savings to the Board and taxpayers.

Council contends that its understanding was that this position was to be a newly created one, the need for which arises from increased enrollment; this being so, $35,000 is an ample entry-level starting salary based on past hiring practices.

Upon review, the Commissioner notes that the Board is not compelled to hire its additional third grade teacher from outside the District, and that, having made a managerial determination to transfer a current staff member, its arguments as to the need to maintain current salary have refuted the assumption on which the Council's reduction is based. In the absence of any evidence by Council demonstrating that the position vacated by the tranferee can be filled at less than current cost, the Commissioner notes that the Board spends well within the efficiency levels established pursuant to CEIFA for

teacher salaries and determines in the interest of stability to restore the Council's reduction of $15,000.

Disputed Line-Item Number 2

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
2640	11-190-100-106	Other Salaries/Instruction	$70,931	$6,000

The reductions recommended are for the following: One of two additional part-time aides which have been budgeted for 1997-98 at $6,000 each.

The Board argues that NI classes are limited by federal and state regulation to eight students each with an age range of no more than three years from the youngest to the oldest student in each class, and that April 30, 1997 enrollment statistics for current NI class counts show that three of the Board's four classes have over eight students in them, thus mandating an additional full-time teacher aide. The Board has proposed hiring two half-time aides rather than one-full time aide to avoid paying benefits and effectuate a cost savings to the District and taxpayers. Any reduction in this area would put the Board in a position of violating statutory and regulatory requirements in that students are entitled to the least restrictive appropriate placement. The Council's position offers no statement whatsoever as to how the Board might provide for the IEPs of these students under the Council's plan. Therefore, the Council fails to meet its obligation of providing a rationale for this recommended budget reduction.

The Council maintains that its reduction is appropriate under the circumstances.

Upon review, the Commissioner finds that Council has offered no basis for its assertion that only one part-time aide is necessary. Accordingly, the Board having demonstrated its need for the position and the Commissioner noting that the Board spends well within efficiency levels for aides established pursuant to CEIFA, the Commissioner restores the $6,000 reduction.

Disputed Line-Item Number 3

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
2680	11-190-100-610	Gen. Supplies/Instruction	$110,683	$40,000

> The 1997-98 budget provided for an increase of 24 percent over the 1996-97 revised appropriation. A reduction of $15,000 will still provide for an increase of approximately 7.5 percent.
>
> An additional $25,000 has been reduced due to costs which have been reallocated [from] account #11-000-240-500 - Support Services - School Administration.

The Board contends that Council's argument regarding an increase of 24 percent over the 1996-1997 revised appropriation is clearly wrong, as the proposed 1997-1998 budget for 11-190-100-610 is $110,683, while the revised appropriations for 1996 - 1997 are $124,901. This is not a 24 percent increase, but in fact an 8.8 percent *decrease.*

Moreover, the Board contends, the Board's budget is zero-based. Rather than project from past history, the Board specifically itemizes its needs for the coming year. Increased budget needs derive directly from increased enrollment and increased prices of Board-approved curricular materials. In many cases the Board plans to carry little or no inventory in supply items even though continued upward enrollment pressure is extremely likely. Furthermore, the State Report Card shows that Little Ferry has consistently spent below the statewide average level of spending in this area. The Report Card shows that in 1994-1995, Little Ferry spent $149 per pupil, compared to a state average of $186. In 1995-1996, Little Ferry spent $157 compared to a state average of $187. In 1996-1997, Little Ferry spent $168 compared to a state average of $192. Clearly, the state average continues to rise; however, Little Ferry has proposed a *decrease* in spending in this area for 1997 - 1998 which would *further* lower its spending in comparison to state averages.

With respect to the proposed additional $25,000 cut in the area of Support Services School Administration, the Board contends, the Council's argument that this money was reallocated from another line that existed last year is unsubstantiated. While

the Little Ferry School District has indeed rebuilt its Chart of Accounts to be GAAP compliant and charged expenditures to lines that did not exist in the 1996-1997 budget, the account lines where these moneys used to exist are no longer in existence. The following codes were collapsed into 11-000-240-500: 11-000-240-440, 11-000-240-500, and 11-000-240-580. These codes did not exist in the 1996-1997 budget. 1) 11-000-240-440 (Other Purchased Services Rentals) contains all of the schools' photocopier maintenance and copy charges for the 1997-1998 budget. In the 1996-1997 budget, this item was charged to 11-000-260-420-03-999, which no longer exists. The Board has simply eliminated accounts that are not GAAP compliant and charged the expenditures to the proper GAAP account. If money is cut from this line, it would mean the school would have to drastically reduce the number of copiers it has, when it already does not have enough copiers to service the needs of the students and staff. 2) 11-000-240-500 (Other Purchased Services School Administration) items used to be charged to 11-000-222-610-00-999; the Board simply charged these services to a different line item and eliminated the old line. The services charged include a contract for software licensing from New Century Education which does not expire for two more years, so that any cut would translate into a violation of a signed three-year contract for services that the students use on a daily basis. 3) 11-000-240-580 did not exist in the Little Ferry Board of Education's 1996-1997 Chart of Accounts. Thus, any expenditures in this area had to be charged to a different line item, which was not correct according to GAAP. The Board was advised by its auditor that it must have this line to be able to properly charge travel expenditures. Furthermore, two principals are entitled to reimbursement for travel expenses to meetings and conventions as per their union contract, so that no cut is possible here.

The Council argues that the line item 11-190-100-610 had been budgeted in the 1996-97 school year for $88,865. The proposed 1997-98 budget contains a line item (number 610) budgeted at $110,683 with an additional line item for supplies of $45,474 (11000-240-500), thereby totaling $156,157 for supplies in the 1997-98 budget when the previous year's allocation was $88,865. Even after the cut of $15,000 in line

number 610 and $25,000 in line number 500, the allocation for General Supplies totals $116,157, versus $88,865 for the 1996-97 year, representing an increase of 31 percent.

Upon review, the Commissioner finds the record to support the Board's assertion that the extraordinary increase perceived by Council is, in fact, due in substantial part to recoding of expenditures from the prior year's budget, and that the Board has demonstrated the need for the funds reduced in order to maintain stability. Additionally, the Commissioner notes that the Board spends well within established levels of efficiency for the items allocated to this account. Accordingly, the Commissioner determines to restore the Council's reduction of $40,000.

Disputed Line-Item Number 4

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
6610	11-000-219-320	Purch. Prof. Services	$28,800	$18,000

This reduction is based upon withdrawal from the Region VI Council for Special Education and contracting with another special education provider.

The Board argues that, while the Council is correct that the Region VI Council for Special Education will dissolve on June 30, 1997, the students currently being serviced by this program must be placed elsewhere, as Little Ferry is still responsible for providing them with services required by their IEPs. The way Region VI was structured, costs for services such as transportation, physical therapy and occupational therapy were averaged; under any new arrangement, costs are likely not to be averaged, but actual. Over the last three years, Special Education costs have outstripped the other areas of the budget. It is not only prudent and wise to expect these costs to increase with an overall increase in population, such as Little Ferry has had, it is also necessary to project these costs so that services mandated by the students' IEPs are provided as required by law.

The Council contends that as a result of the disbanding of Region VI, there are no contractual obligations to pay; thus, its cut should have been the full $28,000, not just $18,000, as the services referenced should be provided "in-house".

Upon review, the Commissioner finds that the Council's assertion is reasonable and that the Board has not provided a compelling factual basis for refuting it. No showing having been made that the disputed amount is necessary to maintain stability, the Commissioner determines to sustain the $18,000 reduction.

Disputed Line-Item Number 5

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
6810	11-000-221-500	Purch. Serv./Improvement	$10,000	$5,000

This reduction still provides a $5,000 appropriation for a program which was not budgeted in 1996-97.

The Board argues that Council did not look at the entire picture when reaching its conclusion, as this money was indeed budgeted in the 1996 - 1997 school year, albeit under a different account code. It argues that, in this line in the 1997 - 1998 budget, there is $4000 budgeted for In-Service for staff and $6000 for staff attendance at workshops. In the 1996 - 1997 budget, $4000 was budgeted for In-Service for staff in line 11-190-100-320-00-061. This line was eliminated for 1997 - 1998 and folded into 11-190-221-500 to be GAAP compliant. An amount of $6000 was budgeted in the 1996 - 1997 budget for workshops for staff under line 11-190-100-320-00-062, which line was also eliminated and folded into 11-190-221-500 to be GAAP compliant. The Board avers that professional development standards are both recognized in the Board's union contract and encouraged by the Commissioner as a matter of State policy. According to the Board, any cuts in this line will impair the Board's ability to in-service teachers with respect to integration of the Core Curriculum Standards into the current program.

The Council states that its resolution speaks for itself.

Upon review, the Commissioner finds that the increase perceived by Council is, in fact, due to recoding. The basis for the reduction having been refuted, the Commissioner determines that loss of the budgeted funds would be detrimental to the stability of the District and restores the $5,000.

Disputed Line-Item Number 6

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
6980	11-000-230-820	Judgments Against District	$30,000	$15,000

This reduction is based upon the vagueness of the budget detail worksheets.

The Board argues that the cut proposed by Council would greatly affect the stability of the District. The Board notes that it has two lawsuits pending against it as of May 19, 1997, a personnel issue involving the Director of the Region VI Council for Special Education, who has indicated that he will be taking legal action for which the Board would be partially responsible, and a claim by Energy Consortium for the Washington School Heating Work Contract, for which the Board needs to pay International Fidelity Insurance Company $12,722.15 for work completed (minimum amount pending acceptance of settlement). Additionally, the Board argues, it is liable for bills incurred to defend suits against it, as per its contract signed with its Board Attorney, and has budgeted based on a three-year spending pattern. Any expenditures above the amount left after reduction would require funds to be transferred from another line, and there are no such monies available, nor does the District have any surplus.

The Council contends that it could not, based upon the Board's submission, justify this allocation and it, therefore, made a cut of $15,000 from $30,000. It did not cut the entire amount, notwithstanding the vagueness of the submission by the Board, since there have been no judgments entered at this time. Council believes that an increase of $700,000 over the prior year's budget should have taken into consideration all contingencies, including potential judgments. There also should be a surplus, which can be used if any judgments are ever entered against the Board over and above the amount left following reduction.

Upon review, the Commissioner finds this account to include several items which should have been budgeted under 11-000-230-331, Legal Fees. When these two accounts are viewed in tandem, the Commissioner finds the Board to be spending within efficiency levels established pursuant to CEIFA for recurrent and ordinary legal fees, and to have projected appropriately for potential judgments against it. Accordingly, the

disputed funds are necessary to maintain stability and the $15,000 reduction is restored by the Commissioner.

Disputed Line-Item Number 7

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
7070	11-000-240-600	Supplies and Materials	$10,200	$3,000

> The 1997-98 budget provides for an increase of $3,677 or 56 percent over the 1996-97 revised appropriations. The reduced appropriation still provides for a 10 percent increase over the 1996-97 appropriations.

The Board contends that Council's figures are completely incorrect, as evidenced by the budget detail which shows the 1996-1997 revised appropriation as $9,000 and the 1997-1998 appropriation as $10,200. This is definitely not a 56 percent increase over the previous year, but only a $1,200 increase. Moreover, this increase is necessary to cover the cost of graduation expenses, which were not budgeted in 1996-1997, and resulted in monies being taken from other lines. This is counterproductive to stability, as departments cannot realistically manage their budgets when they are susceptible to line-item transfers. Putting graduation expenses into the 1997-1998 budget represents sound, proactive planning.

The Council states that its resolution speaks for itself.

Upon review, the Commissioner finds that notwithstanding the Council's misunderstanding of the actual level of increase, which the record shows to support the Board's position, its assumption of sufficient funds available in the account after reduction is borne out by a comparison of the District's budgeted expenditures and the levels of efficiency for supplies and materials established pursuant to CEIFA. Accordingly, the Commissioner sustains the Council's reduction of $3,000.

Disputed Line-Item Number 8

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
12620	11-000-291-220	Social Security Contrib.	$80,000	$15,000

> This reduction is based upon the projected 1997-98 requirements as compared to the 1996-97 projected actual expenditures.

The Board states that in 1995-1996, the District spent $73,437.40 for FICA. In 1996-1997, the District has spent $49,242.40 in this line at the time of its appeal submissions, which did not include posting of the May 15 payroll.

The Council states that there was insufficient information to justify this request at the time of budget preparation, therefore the $15,000 line item cut was clearly justified. Based upon the recent reports received by the Board, however, the Council now acknowledges that the monies are necessary and that its request for reduction should be withdrawn.

Upon review, the Commissioner is satisfied that this reduction of $15,000, now withdrawn by the Council, must be restored in order to maintain District stability.

Disputed Line-Item Number 9

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
12680	11-000-291-270	Health Benefits	$571,699	$75,000

This is based upon the two (2) month premium holiday which has been announced by the State Health Benefits Plan to occur in the 1997-98 budget year.

The Board argues that Council ignored the fact that the two-month premium holiday was taken into consideration when preparing the budget. The one-year history of benefits payments to the State Health Benefits Plan is as follows:

May 1996	$38,125.42
June 1996	$38,296.93
July 1996	$42,771.68
August 1996	$43,915.53
September 1996	$41,289.75
October 1996	$38,315.61
November 1996	$39,463.96
December 1996	$39,440.66
January 1997	$37,743.23
February 1997	$36,320.38
March 1997	$35,588.32

Furthermore, the Board contends, there are ten new positions which will require benefits. These positions could cost up to $10,000 each, equating to $70,000. The average month is $39,180.75. Thus, $39,180.75 x 10 months of service equates to $391,807.50. However, there is $436,024.00 budgeted for health benefits, the difference being due to costs associated with an employee on the family health benefits plan who was not formerly the Board's responsibility but will become so for this fiscal year as a result of dissolution of the Region VI Council for Special Education. Additionally, an amount of $34,216.50 is necessary to have in the budget because the Board is two months behind in its health benefits payments. According to advice given by the auditing firm of Lerch, Vinci and Higgins, the Board requested permission from the State to delay the payment of two months of benefits due to financial constraints, and although permission was granted, these two months of payments are still due and need to be paid back. The Board is planning to buy back one month in its 1997 - 1998 budget and one month in its 1998 - 1999 budget.

The Council references the analysis performed by the auditors for the Borough of Little Ferry, together with the letter from the Department of the Treasury regarding the State Health Benefits local group rate action with the announcement of the two-month premium holiday to occur in the 1997-98 budget year. Furthermore, the Board provided for ten new positions in their proposed budget, which Council believes to be excessive and unsubstantiated. Council has recognized that three new positions may be required, when they set forth an appropriation of $448,200 versus the Board's requested $676,024 for this line item, a difference of $127,824. Assuming there may be other contingencies, the Council has only reduced this line item by $75,000, as opposed to the recommended $127,824 by the Borough's auditors. The Council has provided an additional $52,824 over the auditors' recommendation even if the Board were to create more than three new positions in the next budget year.

Upon review, the Commissioner finds the record to support the Board's assertions that it already considered the premium holiday in budgeting for this account. However, review of the year-end audit for the 1996-97 school year shows that the two

months' payment obligation deferred by State consent was, in fact, charged to this account in the 1996-97 budget year, as is appropriate under GAAP. Therefore, there is no basis for including these amounts yet again in the 1997-98 and 1998-99 budgets; when the cash payment is made, it will be charged against the accounts payable established at June 30, 1997 for this liability, so that this issue is one of cash flow, as opposed to budgetary need. Finally, with regard to Council's assertions that the Board may need only seven of its ten projected new positions, the Commissioner holds that, that contention not having been argued or supported through reductions elsewhere, the Council may not reasonably seek to cut benefits for those positions when reviewing the instant line item. Accordingly, the Commissioner sustains that portion of the Council's reduction attributable to the 1996-97 payment deferred to the present budget year, i.e., $34, 217, and restores the remaining $40,783 as necessary to maintain the stability of the District.

APPLICATION OF SURPLUS

In its advertised annual school District budget statement, the Board projected a deficit in surplus, and allocated no surplus funds as revenue. The Board's annual audit substantially confirms this projection, showing a negligible level of undesignated unreserved surplus. Accordingly, there are no funds here available to offset restorations made by the Commissioner.

RESTORATION DUE TO CERTIFICATION ERROR

The Commissioner notes, as set forth above, that while the Council intended only $192,000 in line-item reductions, it actually certified a General Fund tax levy reflecting reductions of $198,238, having erroneously certified the additional $6,238 as Debt Service levy. Accordingly, there being no basis for the reduction to General Fund levy, the Commissioner directs restoration of the $6,238. However, he

concomitantly directs that the 1997-98 Debt Service levy be amended to reflect the correct amount of $478,784 rather than the $485,022 erroneously certified by Council.

SUMMARY

In summary, the Commissioner directs restoration or sustaining of the Council's line-item reductions to appropriations as set forth below.

Line Item	Description	Sustained	Restored
11-120-100-101	Gr. 1-5 Teacher Salaries	$ -0-	$ 15,000
11-190-100-106	Other Salaries-Instruction	-0-	6,000
11-190-100-610	Gen. Supplies/Instruction	-0-	40,000
11-000-219-320	Purch. Prof. Services	18,000	-0-
11-000-221-500	Purch. Serv./Improvement	-0-	5,000
11-000-230-820	Judgments Against District	-0-	15,000
11-000-240-600	Supplies and Materials	3,000	-0-
11-000-291-220*	Social Security Contributions*	-0-*	15,000*
11-000-291-270	Health Benefits	34,217	40,783
	*Request for reduction withdrawn by Council		
Total Line-Item Determinations:		$ 55,217	$136,783

General Fund Tax Levy Certified by Governing Body:	$8,233,897
Restoration of Reductions:	136,783
Restoration Due to Certification Error	6,238
Amount of Restoration Funded by Surplus:	(0)
Total General Fund Tax Levy for 1997-98:	$8,376,918
Debt Service Certified by Governing Body	$ 485,022
Debt Service Levy Certified in Error	(6,238)
Total Debt Service Tax Levy for 1997-98	$ 478,784

Accordingly, the Bergen County Board of Taxation is directed to make the necessary adjustments, as set forth above, to reflect a total of $8,376,918 to be raised in

tax levy for General Fund purposes, and a total of $478,784 for Debt Service purposes, of the Little Ferry Board of Education for the 1997-98 school year.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

FEBRUARY 2, 1998
DATE OF MAILING FEBRUARY 2, 1998

39-98

WILLIAM R. KENDRICK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner alleged that the Board violated his tenure rights when it failed to appoint him to the position of mathematics chairperson while appointing a nontenured supervisor to the position. Petitioner acknowledged that he had no certification in mathematics, having taught that subject only as a substitute in the vocational school.

Citing the *Lisa* and *Galbraith* decisions, the ALJ found that petitioner was not qualified to teach math, had not done so, and that if appointed to the math chair he could not fulfill the expected and historically based requirements of the job. Thus, ALJ found that the Board's action denying petitioner the appointment was proper; petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own. Commissioner directed the District to forthwith conform its written job descriptions and endorsement qualifications to reflect its actual practice with regard to area chairs.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10331-96
AGENCY DKT. NO. 476-10/96

WILLIAM R. KENDRICK,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,
Respondent.

Randi Doner April, Esq., for petitioner (Balk, Oxfeld, Mandell & Cohen, attorneys)

Robert A. Blanda, Esq., for respondent

Record Closed: November 6, 1997 Decided: December 18, 1997

BEFORE **JEFF S. MASIN**, ALJ:

William Kendrick filed a petition with the Commissioner of Education complaining that the respondent Board of Education of the Borough of South River violated his tenure rights when it failed to appoint him to the position of chairperson for the mathematics department in the district's high school. The Commissioner transferred the matter as a contested case to the Office of Administrative Law ("OAL") pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A prehearing conference was held on January 16, 1997, and a prehearing order was issued on February 4. A hearing was held on September 12, 1997, and the attorneys submitted briefs and closing arguments thereafter, with the record closing upon the receipt of reply briefs on November 6, 1997.

William Kendrick has served in the district since 1964. He taught industrial arts and served as department chair for industrial arts beginning in 1973. He holds a certification as an industrial arts teacher. In 1985 he was appointed as the chair of the Home Economics department when the chairperson of that department retired. He was not certified in nor did he teach home economics. Eventually the industrial arts and home economics departments were merged into the Department of Vocational Education. Mr. Kendrick has no certification in mathematics, having taught that subject only as a substitute in the vocational school.

Mr. Kendrick acknowledged that department chairpersons all have taught a full load of classes. He believes that if he were appointed as the math department chair he could be mentored, but as for such activities as developing curriculum, selecting books and other functions of the chair, he would work through committees.

Dr. John Hinton Ambrogi, the Superintendent of Schools for the district since 1993, identified the generic "Area Chairperson" job description adopted on August 17, 1989. A new description became effective February 24, 1995. No specific job description exists for any particular area chairperson. These documents do not specifically list teaching classes as a duty for the area chairperson. They each do require that the applicants possess a Masters Degree from an accredited institution including not less than fifteen graduate credits in the subject field of the particular area.

Dr. Ambrogi noted that the number of area chairpersons has decreased in the past few years. While there had been more in the school before his arrival in the district, by the time he arrived the number had been reduced to four. These persons have traditionally all taught five periods a day in the area of their certification, in addition to having one prep period and two periods assigned for department duties. Schedules showing the assignments of teachers, including the department chairs, for the school years 1994-95, 1995-96, 1996-97 were admitted in evidence. The current math department chair, Geraldine Misiewicz, teaches pre-calculus, Math I, and Calculus.

The Superintendent asserted that mathematics was a highly specialized subject and it was essential that the chairperson of that department be conversant with and have some expertise in

the math curriculum, instructional philosophy, etc. He would be "incredulous" if the chair had no educational background in math. In his opinion, one who did not have such background could not properly review lesson plans and suggest means of improvement.

There are 6 and 1/2 teachers in the math department and Ambrogi questioned what there would be for the math department chair to do all day if he or she did not teach classes. If Kendrick continued to teach industrial arts while chairing the math department he would have less time to teach industrial arts.

In summary, the witness noted that his quite small district has always struggled to pass the HSPT test and only recently has done so. As he attempts to raise the district's standards, the appointment of someone as the math chairperson who was not certified to teach math courses would have a negative effect upon the district.

Dr. Ambrogi admitted that an area chairperson required a supervisor's certificate, even though he argued that the area chairs were not actually considered to be supervisors. Persons holding supervisors' certificates can evaluate. He denied that Mr. Kendrick was ever the chair of a separate home economics department, as he believed from his research that the home economics and industrial arts departments had been combined into the vocational education department throughout the time that Kendrick was assigned to chair the home economics as well as industrial arts component. There are presently no area chairs for a number of academic areas, such as art, business, foreign language, health and physical education, special education, and others. These are supervised by the high school principal and vice principal.

DISCUSSION

In support of his contention that the Board has wrongfully denied him the area chairperson's position in the math department, Mr. Kendrick argues that there is no requirement that one seeking such a position be certified to teach the specific subject matter taught within the department. So long as one holds the necessary supervisor's certification, as Kendrick does, one is authorized to serve as a supervisor and cannot be denied such a position in derogation of one's tenure and seniority rights, unless the duties of the position sought are such as to make a specific

endorsement necessary. Citing the fact that the Board has not insisted that the prinicpal or vice-principal, who act as supervisors of a number of varied subject matter areas, be certified in each of these areas, Kendrick, who also claims to have been allowed to act as the chair of the home economics department without any certification to teach in that field, contends that there is no compelling need for him to have any math certification or any graduate credits in the mathematics field. He relies upon decisions rendered in *South River Education Association v. Board of Education of the Borough of South River,* decided by the State Board of Education, November 4, 1987, aff'd, Docket No. A-1695-87T8 (App. Div. 1990), and *Herbert v. Board of Education of the Township of Middletown,* decided by the State Board of Education, August 1, 1990, aff'd. Docket No. A-318-90T1 (App. Div. 1991). In each of these cases, the State Board determined that there was no warrant for the local boards of education to add qualifications beyond those established by the regulations controlling certification so as to render inapplicable categories established by the seniority regulations.

The Board relies upon *Lisa v. Board of Education of the Township of Washington, Gloucester County,* 97 *N.J.A.R.* 2d (EDU) 478. In *Lisa,* Judge Duncan quoted *Galbraith v. Lenape Regional High School District,* 96 *N.J.A.R.* 2d (EDU) 396, where the Commissioner stated that

> The law is well-settled that a supervisor endorsement is generic and authorizes the holder to supervise any subject matter and any grade level. Moreover, while there is nothing to prevent a local board from establishing additional instructional certification requirements, absent a showing that instructional certification is necessary to perform the duties of the position at issue, such requirements cannot sidestep the educator's tenure rights on a preferred eligibility list of supervisors.
> [*Id.* at 406.]

In *Galbraith,* the record did not demonstrate that there was any requirement for the Supervisor-Social Studies/Art/Music to teach any classes in these instructional areas. Historically, supervisors in the Lenape District had not been required to teach. As such, no grounds existed to deny Galbraith the position, as there was no demonstrated necessity for Galbraith to hold an endorsement in any of these three areas. However, in *Lisa,* the judge determined that each of the Supervisor/Teacher positions sought by the petitioners in the case involved a requirement for

direct instructional services and the historical practice in Washington Township was for the supervisors to teach at least one class or have direct counselor responsibilities in addition to supervisory responsibilities. Since the petitioners were not in possession of endorsements in any of the subject matter areas or of a guidance endorsement, Judge Duncan determined that none of them were in a position to teach as required by the job descriptions. As there was nothing arbitrary or capricious about the Board requiring such teaching and/or counseling services from the supervisors, the petitioners had no basis for overturning the Board's rejection of them from the positions.

In the present matter, the record demonstrates that the job descriptions themselves did not spell out any specific requirement that the area chairpersons in any of the areas teach classes in that particular area. However, the unchallenged evidence is that the historical practice in the South River district has been to require such teaching from the area chairs, indeed, full loads were required, as admitted by Mr. Kendrick and supported by the documentary evidence. Additionally, the job descriptions contain a catch-all requirement for the chair to "perform other such duties as may be assigned by Superintendent," and while these are not spelled out, the historical assignment of the area chairs has been to teach as well as act as a chairperson. Thus, the record indicates that this case is much like *Lisa.*

That the specific duties required in any particular case must be examined in order to determine whether additional qualifications may be required by a board is demonstrated by the decision of the State Board in *Timko v. Bridgewater-Raritan Regional School District*, 94 *N.J.A.R* 2d (EDU) 481, where the State Board rejected the Commissioner's decision "rejecting instructional certification for the positions at issue." The Board criticized the Commissioner for deciding the issue "without reviewing the particular duties thereof," thereby "incorrectly interpret(ing) and apply(ing) our holdings in *Herbert, Schienholz and South River*, *Timko, supra.*, at 482. As this determination demonstrates, the general principle of *Herbert* and *South River* relied upon by Kendrick is subject to a case-specific assessment of duties and responsibilities which may demonstrate, as in *Lisa*, that the historical practice and the job requirements of a given situation do support a board's requirement of additional qualifications.

Counsel for Mr. Kendrick tries to distinguish *Lisa* based upon the lack of a teaching requirement in the job description and the absence of the teaching requirement for the persons acting as chairpersons in the areas supervised by the principal and vice-principal. While these distinctions are factually accurate, as noted, the historical record regarding the teaching requirement for the chairs of the four "major" areas is highly relevant and cannot be dismissed, and the lack of a teaching requirement applicable to all persons acting in chair positions in the district does not vitiate the history as it has applied to such major areas as math, english, science and social studies.

Based upon the present record, I **FIND** that the Board of Education of South River has historically required its area chair of mathematics as well as of other core curricula subjects to teach more than one class per day, even up to five per day, and that while this specific teaching requirement was not stated in the job description for the area chairs it was well understood and known by Kendrick. I **FIND** that he is not qualified to teach math, has not done so, and that if appointed to the math chair he could not fulfill the expected and historically based requirements of the job. As such, and as I **CONCLUDE** that the Board was justified in requiring that the applicants for the chair possess graduate credits in the subject field which Mr. Kendrick does not have, the Board's action denying him appointment to the area chair for math was proper. The petition must therefore be **DISMISSED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 18, 1997
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

Dec. 19, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 23 1997
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

JOINT EXHIBITS:

J-1 Memorandum from Dr. John H. Ambrogi to All Staff Members

FOR THE PETITIONER:

P-1 Policy No. 309, Board of Education, South River, Area Chairperson job description

P-2 Job Description Manual, South River Public Schools, Area Chairperson, No. B-6

FOR THE RESPONDENT:

R-1 Job Description Manual, South River Public Schools, Area Chairperson, No. B-6, marked as Revised: 1/24/95, 1st Reading: 1/26/97, 2nd Reading: 2/24/95

R-2 Teachers Schedules 1994-1995

R-3 Teachers Schedules 1995-1996

R-4 Teachers Schedules 1996-1997

OAL DKT. NO. EDU 10331-96
AGENCY DKT. NO. 476-10/96

WILLIAM R. KENDRICK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions, which essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ), were timely filed in accordance with *N.J.A.C.* 1:1-18.4 and were considered by the Commissioner in rendering the within decision.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that petitioner is not entitled to the position in question. In so ruling, the Commissioner is satisfied that the duties attending the controverted position are of such character as to require possession of an instructional certification in a pertinent subject field, in addition to certification as a supervisor, in order to be authorized by statute and regulation to perform such functions. See *Lisa, supra,* and *Galbraith v. BOE Lenape Regional High School District*, aff'd State Board June 5, 1996, slip opinion at pp. 1-2, aff'd, N.J. Superior Court, Appellate Division, 97 *N.J.A.R.* 2d (EDU) 558.

Accordingly, for the reasons expressed therein, the Commissioner affirms the initial decision of the OAL and dismisses the within Petition of Appeal. However, in view of the information brought to the record in this matter, the Commissioner directs the District to forthwith conform its written job descriptions and endorsement qualifications to reflect its actual practice with regard to area chairs.*

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

* The Commissioner notes that while the Board's requirement that a supervisor possess subject area graduate credits, which was deemed justified by the ALJ on page 6 of the initial decision, may be appropriate for new hirings, it would have no bearing on claims rooted in tenure and seniority rights as are at issue herein.

(SB) 39-98

DHPBL #111-98
SB # 39-98

IN THE MATTER OF THE DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF M.D.S. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Assistant Commissioner of Education, March 13, 1998

For the Petitioner-Appellant, Curry, Connelly & Kukfa (Kenneth M. Kukfa, Esq., of Counsel)

The decision of the Assistant Commissioner of Education disqualifying petitioner from school employment is affirmed for the reasons expressed therein. We add only that petitioner had certified on his authorization form provided to the Office of Criminal History Review that he had not been convicted of any disqualifying offenses, including any violations of the Controlled Dangerous Substance Act.

S. David Brandt opposed.

Sam Podietz did not participate in deliberations in this matter.

July 1, 1998

Date of mailing JUL 06 1998

(SB) 40-98

SBE #449-05/97-127
SB # 40-98

IN THE MATTER OF THE REVOCATION :

OF THE TEACHING CERTIFICATES OF : STATE BOARD OF EDUCATION

FRANK ROBERTS BY THE STATE : DECISION

BOARD OF EXAMINERS. :

Decided by the State Board of Examiners, December 11, 1997

For the Petitioner-Respondent, Peter Wint, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

For the Respondent-Appellant, Zazzali, Zazzali, Fagella & Nowak (Richard A. Friedman, Esq., of Counsel)

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

August 5, 1998

Date of mailing AUG 07 1998

43-98

43-98

DREW BRADFORD,	:	
V.	:	COMMISSIONER OF EDUCATION
ALAINE CAMPBELL *ET AL.* AND THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.	:	DECISION
	:	

FEBRUARY 5, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
185 Washington Street
Newark, New Jersey 07102
(973) 648-6051
Fax No. (973) 648-6124

Mumtaz Bari-Brown
Administrative Law Judge

January 7, 1997

Dr. Leo F. Klagholz
Commissioner
Department of Education
Riverview Executive Plaza
Building 100, Route 29
P.O. Box 500
Trenton, NJ 08625-0500

Re: *Drew Bradford v. Alaine Campbell, et al, and the State Operated School District of the City of Paterson, Passaic County*
OAL DKT. NO. EDU 1373-96
Agency Dkt. No. 488-12/95

Dear Commissioner:

Enclosed please find petitioner's withdrawal of his request for a hearing.

On January 2, 1998, petitioner Drew Bradford, by certification, voluntarily withdrew his request for a hearing and claim of unlawful discrimination. Respondents objected to petitioner's withdrawal. On January 6, 1998, a telephone hearing was held and the parties placed their positions on the record. The procedural history, petitioner's voluntary withdrawal, and respondents' opposition are summarized herein.

Petitioner, appearing *pro se*, filed a verified complaint before the Superior Court of New Jersey, Passaic County, charging respondents Alain Campbell, *et al.*, and the State Operated School District of the City of Paterson, Passaic County (the District), with violation of the New Jersey Law Against Discrimination (LAD), the New Jersey Conscientious Employees Protection Act (CEPA), and the federal civil rights statutes and intentional infliction of mental distress.

On September 8, 1995, the court ordered that petitioner's claims pertaining to LAD and CEPA be transferred to the Commissioner of Education (Commissioner). Further, the court ordered that "in the event that the Commissioner finds in favor of the plaintiff, this court shall retain jurisdiction for the purpose of conducting a jury trial and determining plaintiff's entitlement to damages. . . ." Additionally, the court ordered that the "matter shall be placed on the inactive list and either dismissed with prejudice in the event the Commissioner finds against the plaintiff, or proceed, . . . in the event that the Commissioner finds in plaintiff's favor."

On January 29, 1996, the matter was transmitted to OAL as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. Hearings were scheduled for October 21, 22 and 28, 1996. Based on several motions filed by petitioner, the hearings were rescheduled for January 6, 7, 8, 12, 13, 14, and 15, 1998.

On August 22, 1996, petitioner moved for a determination on which counts[1] would be adjudicated before the OAL. Also, petitioner requested that the OAL transfer the remaining counts to the Passaic County Superior Court. By Order dated September 17, 1996, I concluded that the Commissioner had jurisdiction under *N.J.S.A.* 18A:6-9 to adjudicate employment discrimination claims under LAD, *N.J.S.A.* 10:5-1 *et seq.* Further, I concluded that the Commissioner lacked jurisdiction to hear the CEPA claim, allegations of intentional infliction of mental distress, and claims under the Federal Civil Rights Act. Petitioner's request that the OAL transfer the remaining counts to the Superior Court was denied.

Thereafter, petitioner twice filed Motions to Recuse the undersigned on September 28, 1996 and on October 4, 1996. The undersigned denied petitioner's Motions, and Judge Barbara A. Harned, Director and Chief Judge, Office of Administrative Law, twice affirmed the orders denying recusal. On September 29, 1997, petitioner moved for leave to appeal the Final Order of Affirmance. On November 20, 1997, the Appellate Division denied petitioner's motion for leave to appeal.

On December 10, 1997, respondents moved for sanctions pursuant to *N.J.A.C.* 1:1-14.14. On December 23, 1997, petitioner requested an adjournment of the hearings scheduled to begin on January 6, 1998. On December 29, 1997, I denied respondents' motion for sanctions and petitioner's request for an adjournment.

On January 2, 1998, petitioner submitted a certification withdrawing his petition before the OAL. On January 5, 1998, respondents filed an objection. On January 6, 1998, the undersigned conducted a telephone hearing. Petitioner placed on the record his withdrawal of the petition charging employment discrimination based on race, creed, and retaliation in violation of *N.J.S.A.* 10:5-12(a) and (d). Respondents opposed petitioner's withdrawal. Respondents argued that the withdrawal is a direct attempt to circumvent the order of the Superior Court that petitioner exhaust his administrative remedies before proceeding before the court. The parties acknowledged, however, that the court has scheduled hearings in June 1998 on petitioner's CEPA claim. Accordingly, petitioner's reprisal claim before OAL is waived. *Young v. Schering Corp.*, 141 *N.J.* 16 (1995); *Lally v. Clark Board of Education*, 96 *N.J.A.R.* 2d (EDU) 784

[1] Count I: Alleging a violation of the New Jersey Law Against Discrimination (NJLAD)
Count II: Alleging a violation of New Jersey Conscientious Employee Protection Act (CEPA)
Count III: Alleging tort of Intentional Infliction of Mental Distress
Count IV: Alleging a violation of Federal Civil Rights Statute 42 USC 1981
Count V: Alleging a violation of Federal Civil Rights Statute 42 USC 1983
Count VI: Alleging a violation of Federal Civil Rights Statute 42 USC 1985

(1996); *Forster v. Jersey Central Power & Light Company*, 96 *N.J.A.R.* 2d (CRT) 101 (1996).

Further, the parties acknowledged that on January 2, 1998, the court denied petitioner's motion to transfer the discrimination claim to the Superior Court. Petitioner replied on the record that his withdrawal of the OAL petition was not conditioned upon the transfer of the discrimination claim to the court.

Petitioner, Drew Bradford, in his certification and on the record, has voluntarily withdrawn his request for a hearing and claim of unlawful discrimination. Accordingly, this matter is **WITHDRAWN** with **PREJUDICE**.

Very truly yours,

Mumtaz Bari Brown
Administrative Law Judge

MMB/cb
cc: Drew Bradford, *pro se*
Gregory G. Johnson, Esq.
Thomas E. Clancy, ALAJ
William Speziale, Clerk's Office

OAL DKT. NO. EDU 1373-96
AGENCY DKT. NO. 488-12/95

DREW BRADFORD,	:	
V.	:	COMMISSIONER OF EDUCATION
ALAINE CAMPBELL *ET AL.* AND THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.	:	DECISION
	:	
	:	

The record of this matter and an accompanying letter from the Administrative Law Judge (ALJ) dated January 7, 1998, addressed to the Commissioner, detailing reasons why she had determined to accept petitioner's withdrawal of his request for a hearing in this matter, have been reviewed. Due to the fact that the record reflects that petitioner's request for withdrawal of this matter was vigorously contested by the District, the letter of the ALJ was deemed an initial decision, and exceptions of the District, along with a reply thereto from petitioner, were entertained and considered by the Commissioner in his determination pursuant to *N.J.A.C.* 1:1-18.4.

Upon his review and consideration of this entire matter, the Commissioner cannot be satisfied from the record before him that the parties fully understand and accept that petitioner's withdrawal of his Count 1 discrimination claim under the New Jersey Law Against Discrimination (LAD), and the Commissioner's subsequent approval of such request, with prejudice, would effectively terminate his claim of retaliation also contained in that Count,

precluding him from raising either claim in any other forum. As such, the Commissioner cannot accept petitioner's withdrawal request absent supplementation of the record which confirms the parties' full understanding of this consequence.

Accordingly, the ALJ's recommended withdrawal of this matter is rejected and this matter shall be remanded to the Office of Administrative Law for supplementation of the record consistent with this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 5, 1998
DATE OF MAILING FEBRUARY 5, 1998

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(43-98)

DREW BRADFORD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ALAINE CAMPBELL *ET AL.* AND THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION ON REMAND
RESPONDENTS.	:	

JUNE 3, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ON REMAND
WITHDRAWAL
OAL DKT. NO. EDU 1864-98

DREW BRADFORD,

Petitioner,

v.

ALAIN CAMPBELL, BARBARA RUGYS, CORNELIA DONNELLON, DR. JUDITH SAMPSON, DR. RUTH BASKERVILLE, JOHN RIZZO, YOLANDA BARGOS and THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.

Respondents.

Drew Bradford, *pro se*

Gregory Johnson, Esq., for respondent

Record Closed: April 17, 1998 Decided: April 20, 1998

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

STATEMENT OF CASE AND PROCEDURAL HISTORY

Petitioner, Drew Bradford, alleged that respondent, the State Operated School District of Paterson, Alaine Campbell, *et al*, terminated his employment in violation of the Law Against Discrimination (LAD), *N.J.S.A* 10:5-12(a) and (d). Specifically, petitioner alleged that the respondent illegally terminated his employment based on his

race (white, European) and creed (Christian), and in retaliation for his reporting alleged racist conduct by District employees.

On January 2, 1998, petitioner voluntarily withdrew his request for a hearing and claim of unlawful discrimination. On February 5, 1998, the Commissioner of Education remanded the matter to the Office of Administrative Law (OAL) for supplemental information.

By order dated March 19, 1998, I scheduled hearings for May 5, 6, 7, and 8, 1998. By prior order, I dismissed petitioner's charges of violation of the New Jersey Conscientious Employee Protection Act ("CEPA"), *N.J.S.A.* 34:19-1 *et seq.*, intentional infliction of mental distress, and violations of the federal civil rights statutes. Those claims are scheduled for trial on June 1, 1998, before the Superior Court, Docket No. PAS-L-002809-95. I, therefore, concluded that petitioner's LAD reprisal claimed was waived pursuant to *N.J.S.A.* 34:19-8 by the institution of the CEPA action in Superior Court. *Young v. Schering Corp.*, 141 *N.J.* 16 (1995); *Lally v. Clark Board of Education*, 96 *N.J.A.R.* 2d (EDU) 784 (1996); *Forster v. Jersey Central Power & Light Company*, 96 *N.J.A.R.* 2d (CRT) 101 (1996).

Therefore, the issue is whether petitioner's termination on June 30, 1995, was based on his race and creed, thus violating LAD.

On April 6, 1998, petitioner withdrew charges of discrimination against respondents filed before the OAL. Petitioner's withdrawal, by certification and on the record, are attached and fully incorporated herein. Respondents objected to petitioner's request to withdraw charges of discrimination against them.

I have reviewed the record, the positions of the parties and **FIND**:

1. Petitioner has read the Decision issued by the Commissioner of Education dated February 5, 1998. Further, petitioner has fully discussed the Commissioner's Decision with attorneys who have advised petitioner

in these proceedings and on various claims against respondents in other tribunals.

2. Petitioner has reviewed, considered and understands the Commissioner's findings and conclusions incorporated in the Decision.

3. Petitioner's claims under CEPA, *N.J.S.A.* 34:19-1 *et seq*, intentional infliction of mental distress, and federal civil rights statutes are scheduled for trial on June 1, 1998, before the Superior Court, Docket No. PAS-L-002809-95.

4. Petitioner voluntarily, knowingly, and without duress or coercion withdraws all claims against respondent filed before the OAL.

Based on a carefully review of the record including petitioner's testimony, I **CONCLUDE** that petitioner has voluntarily withdrawn this matter before the OAL. I further **CONCLUDE** that petitioner's withdrawal is consistent with the Decision issued by the Commissioner of Education on February 5, 1998. Further, I **CONCLUDE** that respondents cannot force petitioner to pursue charges of illegal discrimination against the School District of Paterson and its employees.

Therefore, it is **ORDERED** that petitioner's request to withdraw this matter before the Office of Administrative Law be **GRANTED**. It is further **ORDERED** that this matter be **DISMISSED** with prejudice.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 20, 1998
DATE

Mumtaz Bari-Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

April 22, 1998
DATE

N Catanoutis/gc
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 27 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 1864-98
(EDU 1373-96 ON REMAND)
AGENCY DKT. NO. 488-12/95

DREW BRADFORD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ALAINE CAMPBELL *ET AL.* AND THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION ON REMAND
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's submitted comments and those of the District along with petitioner's reply comments were duly considered by the Commissioner.

Upon review of this remanded matter, the Commissioner is satisfied that his prior concern in accepting withdrawal of this matter, *i.e.*, that the parties fully understand and accept that petitioner's withdrawal of his Count 1 discrimination claim under the New Jersey Law Against Discrimination (LAD), and the Commissioner's subsequent approval of such request, with prejudice, would effectively terminate his claim of retaliation also contained in that Count, precluding him from raising either claim in any other forum, has been satisfactorily resolved in the Administrative Law Judge's (ALJ) decision herein. As such, the Commissioner concurs with the ALJ recommendation that petitioner's request to withdraw this matter be granted.

Accordingly, this matter is no longer deemed to be a contested matter before the Commissioner and is dismissed, with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

JUNE 3, 1998
DATE OF MAILING JUNE 3, 1998

44-98

LORINE SIMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning teacher challenged the District's denial of her increment for the 1996-97 school year for unsatisfactory performance.

ALJ concluded that petitioner failed to prove by a preponderance of credible evidence that the District did not have a reasonable basis for the withholding or that the District's action was arbitrary or capricious. Petition was dismissed.

Commissioner concurred with the ALJ's determination, noting that the clerical error on petitioner's evaluation, which indicated she would receive her increment, was without legal significance.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11303-96

AGENCY DKT. NO. 439-9/96

LORINE SIMS,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

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

Charlotte Kitler, Esq., appearing for respondent

Record Closed: November 6, 1997 Decided: December 22, 1997

BEFORE **MARGARET M. HAYDEN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Lorine Sims (Petitioner) is a tenured teacher employed by respondent State Operated School District of Jersey City (School District). On July 18, 1997, the

School District acted to withhold petitioner's salary increase for the 1996-97 school year. Petitioner here appeals the School District's action.

Petitioner filed her verified petition of appeal with the Commissioner of Education on September 23, 1996. The School District filed an answer on October 23, 1996. On November 1, 1996, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to *N.J.S.A.* 5:14F-1 to -13. The OAL held a hearing on November 6, 1997 at which time the record was closed. The issue to be resolved here is whether the School District acted reasonably in withholding petitioner's salary increment.

DISCUSSION OF EVIDENCE AND TESTIMONY

Undisputed Testimony

Certain basic facts are undisputed and I **FIND** them as follows.

Petitioner Lorine Sims, who has worked in the School District for 30 years, is currently a kindergarten teacher. For approximately five years including during the review period at issue, petitioner was a Title I teacher who worked on basic skills for children who were having difficulties. Petitioner has a BS in Social Science, 18.5 credits towards her Masters degree and has been certified to teach K-8.

In 1995-96, petitioner was assigned to School 39 as a basic skills teacher. Petitioner did not have her own classroom but did her work in other teachers' classrooms with the children who needed extra help. In the beginning of the year, an orientation session was held for all the Title I teachers in which the general requirements and teaching methods for that year were discussed.

Disputed Testimony

Arlene Onnembo is Supervisor of the Title I Program in the School District, a job which required her to supervise and evaluate Title I teachers. Ms. Onnembo has 23 years experience as a teacher, a Masters in reading, and certifications in elementary education, secondary education, reading, and supervision.

During the year, the witness had held training session with all of the Title I teachers including Sims. She discussed what the expectations were for teachers in terms of class content and performance. The pedagogical approach of the School District was to work with a literature-based instructional model, which was required to be used in all reading classes. The teachers were to work around literature and not use drills or work sheets.

During the 1995-96 school year, Ms. Onnembo had had occasion to informally evaluate Ms. Sims several times. She always talked to the teachers after the informal evaluations. On February 29, 1996, she did the first formal evaluation of the year of petitioner. Before the class she had a conference with petitioner where petitioner explained her plan for the lesson, spoke about the problems of the class, and discussed expectation for the lesson.

During the 30 minutes observation, petitioner was working with three third grade children. Ms. Onnembo observed that petitioner worked with one child for approximately 10 minutes while the other two children had nothing to do. Next petitioner went over words in a workbook with all the children. The Title I teachers had been trained in the utilizing of effective educational techniques and going over a list of words was not considered effective. The teachers had been taught that the children needed ways to remember words whether they are pictures or poems or some sort of alternative learning style. However, that day the witness found that Sims was doing strictly a pen and pencil activity. When she started working with the children she had

them going over a list of words from a work sheet. The work sheet usually contain drill work, which does not really require a teacher to go over them. When the witness had a meeting with petitioner before the class, petitioner seemed aware of the children's needs but did not know how to address them.

While the teacher was dealing with one child the other children had nothing to do. The teacher's job is to have assignments for all three children so that they are "on tasks" for the entire time. Petitioner then spent about 10 minutes going over a work sheet and then spent 10 minutes lecturing all three children. Petitioner did not work out ways for them to all be working at their own levels at once.

At the end of the observation or shortly thereafter, the witness verbally discussed the evaluation with Ms. Sims. She also prepare a written evaluation in which the petitioner was rated for five performance factors. In three of the performance factors, petitioner received a satisfactory rating and in two of them, effective organization and planning, and utilization of effective instructional techniques, petitioner received an unsatisfactory rating. Ms. Onnembo also discussed the evaluation with the principal of the school and told the principal she was not satisfied with Ms. Sims' lesson. She offered to give the petitioner more support and to reevaluate her in the future. The principal said she would also evaluate petitioner. The witness attempted to observe the petitioner the next month but petitioner was absent during most of April and May and the witness never observed her formally again.

Dorian Skeete

Dorian Skeete, the principal of PS 39 since 1991, has been an educator since 1970. Ms. Skeete has a BA and a MA and is working on a Ph.D.

As a result of her conversation with Ms. Onnembo, Ms. Skeete conducted an observation on petitioner on March 11, 1996. She observed petitioner for 40 minutes and saw her conducting a lesson with a small group of children in the back of the

classroom. Of the five performance factors, Ms. Skeete rated petitioner satisfactory in two, unsatisfactory in the same two as in Ms. Onnembo's performance evaluation, and "needs improvement" on the performance factor of demonstration of proficiency in subject matter.

Concerning petitioner's need for improvement in proficiency in the subject matter, Ms. Skeete explained that all instructions were supposed to be literature-based and petitioner's instructions were not. All that happen during the entire period was the children filled out and discussed a work sheet concerning organizing things. As far as effective organizing and planning, which Ms. Skeete found to be unsatisfactory, there was no evidence that the lesson was organized around any literature or had a literature-based context. Moreover, there was no individualized approach to the instruction; everybody worked on the same activity at the same rate. Ms. Skeete found similar problems around the performance factor of utilization of effective instructional techniques. Essentially she found that the petitioner was working on isolated skills not part of an integrated literature-based reading and writing instruction. Based on the two evaluations, Ms. Skeete told petitioner by letter dated March 14, 1996, that she was going to recommend that Ms. Sims' increment be withheld.

On June 17, 1996, Ms. Skeete issued a two page Instructional Annual Written Performance Report for petitioner prepared pursuant to *N.J.A.C.* 6:1.2-1. There were seven performance factors rated; of those four were listed as satisfactory, two as unsatisfactory and one as needs improvement. The report stated that petitioner was being recommended for reemployment and recommended for her increment. Ms. Skeete and petitioner both signed the report on June 18, 1996. This document, which was not typed by Ms. Skeete, contained an error about the increment as she had

already informed petitioner in March 1996, that she had recommended withholding of petitioner's increment.

Lorine Sims

Petitioner Lorine Sims testified that she worked with children who were identified as in need of help with basic skills. Every Friday she discussed with the children's teachers what to work on the next week. Prior to the formal observation on February 29, she was never observed by Ms. Onnembo. Petitioner submitted a planning book every three weeks to the principal and the principal approved it. No one ever criticized her lessons as not being literature-based.

On February 29, 1996, when she was observed by Ms. Onnembo, she was doing a review of what had already been taught. The previous day she had read the children stories and she had used charts to talk about homophones. There was no time during the observation when the children were sitting with nothing to do. After the lesson Ms. Onnembo did not discuss the evaluation with her although she did recommend a book for petitioner to use which was not available in the school. In her class sometimes she used the workbooks and sometimes she went to the library. She always reviewed with the classroom teachers what she was doing.

In March 1996 when the principal observed her class, petitioner was doing a lesson on organization that a teacher had asked her to do. The worksheets had words that went together and the whole group worked on identifying the organizational principles. After the evaluations neither the principal nor Ms. Onnembo offered to give her help; nor did either one reevaluate her.

Petitioner never received the March 14, 1996 memo from Ms. Skeete recommending that petitioner not get her increment. However, on June 18, the principal told petitioner that she was getting the increment. Petitioner only discovered

the increment was denied after school was out when she got a letter from the District. Petitioner never before had had an increment denied.

On the day of Ms. Skeete's evaluation the students had read stories that day but had finished when the principal arrived. She had an opportunity on the evaluation sheet to say this or in any other way correct the evaluation but she did not. However, she was absent a lot during March and April. She never discussed the evaluations with the principal although she was concerned.

Where the facts are contested, the trier of fact must weigh the credibility of the witnesses in order to make factual findings concerning the disputed facts. Credibility is the value that a fact finder gives to a witness's testimony, requiring an overall assessment of the witness's story in light of its rationality, internal consistency, and manner in which it hangs together with other evidence. *Carbo v. United States*, 314 *F.*2d 718 (9th Cir. 1963). Credible testimony must proceed from the mouth of a credible witness and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. *State v. Taylor*, 38 *N.J. Super.* 6, 24 (App. Div. 1955). A fact finder is expected to base credibility decisions on common sense, which is also referred to as intuition or experience. *Barnes v. United States*, 412 *U.S.* 837, 93 *S. Ct.* 2357, 37 *L. Ed.* 2d 380 (1973).

Having heard the testimony, considered the witnesses' demeanor, and reviewed the exhibits, I **FIND** the testimony of Ms. Skeete and Ms. Onnembo to be more credible. Thus I **FIND** the evidence in their testimony to be **FACTS.**

LEGAL DISCUSSION AND CONCLUSION

N.J.S.A. 18:24-9 provides in pertinent part as follows:

> Any Board of Education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both,

> of any member in any year . . . . It shall be the duty of the Board of Education, within 10 days, to give written notice of such action, together with the reasons therefore, to the member concerned . . . .

In *Bernards Twp. Board of Education v. Bernards Twp. Education Association*, 79 *N.J.* 311, 321 (1979) the New Jersey Supreme Court address the purposes of *N.J.S.A.* 18A:29-14:

> [t]he decision to withhold an increment . . . is dependent upon an evaluation of the quality of the service which the teacher has rendered . . . The purpose of the statute is thus to reward only those who have contributed to the educational process thereby encouraging high standards of performance. In determining whether to withhold the salary increment, a local board is therefore making a judgment concerning the quality of the educational system. It is reasonable to assume that an adversely effective teacher will strive to eliminate the causes or basis of "inefficiency." The decision to withhold an increment is therefore of essential managerial prerogative which has been delegated by the legislature to the board . . . (citation omitted).

The standard of review of a local board's action here is said forth in *Kopera v. West Orange Bd. of Ed.* 60 *N.J. Super.* 288, 296 (App. Div. 1960) where the court held that the scope of the Commissioner's review is "not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions . . . The burden of proving unreasonableness is on the appellant." Thus the petitioner has the burden of demonstrating that the complained of withholding was arbitrary or unreasonable because the board did not have a reasonable basis for its factual conclusions.

The facts demonstrates that the petitioner had been trained by seminars and orientation to teach using the literature-based teaching method. The petitioner, when evaluated twice, failed to follow that method. She also failed to explain in a timely matter as was her option on the written evaluation why she did not do so. I **FIND** that there is nothing unreasonable about the School District's requiring their teachers to use certain teaching techniques and for withholdings their increments if the teacher fails to implement the required technique.

I do not find it meaningful that there was a clerical error on petitioner's yearly performance evaluation which said she was getting her increment. Petitioner had already been notified that she had received two unsatisfactory reviews and that she would not be getting the increment. Additionally petitioner was informed shortly after the yearly performance review that she was not getting the increment so there was no detrimental reliance.

I therefore **CONCLUDE** that the petitioner failed to prove by a preponderance of the credible evidence that the School District did not in fact have a reasonable basis for its increment withholding action or that the School District's action was arbitrary or capricious.

ORDER

It is therefore **ORDERED** that the District's action in withholding the petitioner's 1995-96 salary increment is **AFFIRMED** and the petition is **DISMISSED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box**

500, Trenton, New Jersey 08625-0500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Dec 22, 1997
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

Dec. 24, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

12-30-97
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Exhibits

Respondent

R-1 Instructional Observation Report dated February 9, 1996

R-2 Instructional Observation Report dated March 11, 1996

R-3 Memo from Skeete to Sims dated March 14, 1996

R-4 School District to Sims dated June 18, 1996

Petitioner

P-1 Jersey City Annual Written Performance Report dated June 17, 1997

OAL DKT. NO. EDU 11303-96
AGENCY DKT. NO. 439-9/96

LORINE SIMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon careful and independent review, and accepting the factual findings and credibility determinations of the ALJ, the Commissioner determines to affirm the initial decision. As noted, it is petitioner's burden to prove, by a preponderance of credible evidence, that the District's decision to withhold her increment was unreasonable, based on the facts. *Kopera, supra.* The Commissioner finds that petitioner has failed to meet her burden.

Further, the Commissioner concurs with the ALJ that the clerical error on petitioner's June 17, 1996 evaluation which indicated that she would receive her increment is without legal significance. The District acted in accordance with the statute when it notified her by memorandum dated June 18, 1996 that her increments were to be withheld for the 1996-97 school year. *N.J.S.A.* 18A:29-14. (Exhibit R-4) There is no requirement in the statute for

advance written notice of the intent to withhold an increment. See *Sturn v. South Plainfield Borough Board of Education*, 92 *N.J.A.R.* 2d (EDU) 661, 668, 669, citing to *Loewengart v. Randolph BOE*, OAL Dkt. No. EDU 5721-87 (June 20, 1988), adopted by the Commissioner July 29, 1988.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein. The Petition of Appeal in this matter is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 5, 1998
DATE OF MAILING FEBRUARY 5, 1998

(SB) 44-98

SB #44-98

DENISE JONES ET AL.,

PETITIONERS-APPELLANTS,

V.

LEO F. KLAGHOLZ, COMMISSIONER OF EDUCATION, AND NEW JERSEY STATE BOARD OF EDUCATION,

RESPONDENTS-RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION ON MOTION

For the Petitioners-Appellants, Education Law Center (David G. Sciarra, Esq., of Counsel) and Gibbons, DelDeo, Dolan, Griffinger & Vecchione (David B. Thronson, Esq., of Counsel)

For the Respondents-Respondents, Peter Verniero, Attorney General of New Jersey, and Nancy Kaplen, Deputy Attorney General

This matter was initiated on August 1, 1997, when a group of students and parents of children attending school in the Plainfield school district (hereinafter "petitioners") filed a petition with the Commissioner, seeking to include Plainfield as a special needs district so as to entitle Plainfield's students to the remedies ordered in Abbott v. Burke, 149 N.J. 145 (1997) (Abbott IV). At the same time, Petitioners also filed an application for emergent relief, seeking such classification on an interim basis pending the Commissioner's final determination of the underlying matter.

On August 21, 1997, a Deputy Attorney General representing the State respondents filed a motion to dismiss the matter.

July 1, 1998

By letter decision dated September 5, 1997, the Commissioner denied petitioners' application for emergent relief and directed that the matter proceed to "further determination".

Although petitioners wrote to the Commissioner on October 10, 1997 and January 27, 1998, requesting that he decide the motion to dismiss, as of April 16, 1998, the Commissioner had taken no further action in the case. Consequently, on April 21, 1998, petitioners filed a motion with the State Board, seeking to compel the Commissioner to decide the motion to dismiss.

On April 28, 1998, the Commissioner issued his final decision in the case, dismissing the petition in its entirety.

On May 26, 1998, petitioners filed a notice of appeal from the Commissioner's decision, and on June 15, 1998, they filed their appeal brief, accompanied by a motion to supplement the record.

Given these circumstances, we find that petitioners' motion to compel the Commissioner to issue his decision is moot. Accordingly, the State Board of Education dismisses the motion.

Orlando Edreira abstained.

Sam Podietz did not participate in deliberations in this matter.

July 1, 1998

Date of mailing JUL 06 1998

(SB) 45-98

DHPBL #52-98
SB #45-98

IN THE MATTER OF THE DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF J.S.B.

STATE BOARD OF EDUCATION

DECISION

Decided by the Assistant Commissioner of Education, February 6, 1998

For the Petitioner-Appellant, J.S.B., pro se

On February 6, 1998, the Assistant Commissioner of Education, Executive Services, affirmed the determination of the Office of Criminal History Review disqualifying J.S.B. (hereinafter "appellant") from school employment as a bus driver following a criminal history record review conducted pursuant to N.J.S.A. 18A:39-19.1.[1] The Assistant Commissioner determined that appellant had failed to affirmatively demonstrate his rehabilitation by clear and convincing evidence.

On April 14, 1998, appellant, acting pro se, filed a notice of appeal to the State Board of Education. By letter dated April 27, the Director of the State Board Appeals Office advised appellant that his appeal had been due within 30 days of the filing date of the Commissioner's decision, and that this matter was being referred to our Legal Committee for consideration of the effect of his failure to file timely notice. Appellant

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

JUNE 3, 1998

was given until May 8 to file an explanation setting forth the circumstances of his late filing. Appellant did not provide any explanation for his late filing or otherwise respond to that letter.

Pursuant to N.J.S.A. 18A:6-28, appeals to the State Board must be taken "within 30 days after the decision appealed from is filed." The State Board may not grant extensions to enlarge the time specified for appeal. N.J.A.C. 6:2-1.5(a). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6:24-1.2; N.J.A.C. 6:24-1.15, the time limit within which an appeal must be taken to the State Board is statutory, and, given the jurisdictional nature of the statutory time limit, the State Board lacks the authority to extend it. Mount Pleasant-Blythedale Union Free School District v. New Jersey Department of Education, Docket #A-2180-89T1 (App. Div. 1990), slip op. at 5. The Appellate Division has "consistently concluded" that appeals must be timely filed and that "neither an agency nor our court on appeal may expand a mandatory statutory time limitation." In the Matter of the Special Election of the Northern Burlington County Regional School District, Docket #A-1743-95T5 (App. Div. 1996), slip op. at 3, citing Scrudato v. Mascot Sav. & Loan Ass'n, 50 N.J. Super. 264 (App. Div. 1958).

We conclude that the statutory filing requirement with which the appellant failed to comply is of such significance that we dismiss the appeal. In Yorke v. Board of Education of the Township of Piscataway, decided by the State Board of Education, July 6, 1988, aff'd, Docket #A-5912-87T1 (App. Div. 1989), the Court upheld the dismissal of an appeal by the State Board where it found that the notice of appeal had been filed one day late by appellant's counsel, who alleged that he had misread or

misunderstood the applicable regulations. The Court added that even if the statute could be construed to permit enlargement of the time for filing an appeal, the appellant therein had failed to establish good cause.

In this case, the Assistant Commissioner's decision was rendered on February 6, 1998 and mailed to the appellant on that date. Accordingly, pursuant to N.J.A.C. 6:2-1.4, the decision appealed from was deemed filed on February 9, 1998, three days after it was mailed. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6:2-1.3(a); N.J.A.C. 6:2-1.4(a), as computed under N.J.A.C. 6:2-1.4(b), the appellant was required to file his notice of appeal to the State Board on or before March 11, 1998. As previously indicated, the appellant's notice of appeal was not filed until April 14, more than a month after the deadline.

Even if N.J.S.A. 18A:6-28 can be construed to provide us with the authority to enlarge the time limit for filing an appeal, we find no substantive basis to warrant doing so in this particular instance. While we are mindful of appellant's pro se status, he has failed to provide any explanation for his late filing despite being provided with the opportunity to do so.

Accordingly, we dismiss the appeal in this matter for failure to file notice thereof within the statutory time limit as computed under the applicable regulations.

June 3, 1998

Date of mailing JUN 0 5 1998

(SB) 46-98

DHPBL #113-98
SB # 46-98

IN THE MATTER OF THE DISQUALIFI- :
CATION FROM SCHOOL EMPLOYMENT :
OF T.J.H. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Assistant Commissioner of Education, March 13, 1998

For the Petitioner-Appellant, T.J.H., pro se

On March 13, 1998, the Assistant Commissioner of Education, Executive Services,[1] affirmed the determination of the Office of Criminal History Review disqualifying T.J.H. (hereinafter "appellant") from school employment as a bus driver after a criminal history record review conducted pursuant to N.J.S.A. 18A:39-19.1 revealed a conviction for Criminal Sexual Contact. The Assistant Commissioner determined that appellant had failed to affirmatively demonstrate his rehabilitation by clear and convincing evidence.

On April 22, 1998, appellant, acting pro se, filed a notice of appeal to the State Board of Education, along with an explanation for his late filing. By letter dated April 27, the Director of the State Board Appeals Office advised appellant that his appeal had been due within 30 days of the filing date of the Commissioner's decision, and that this

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

JUNE 3, 1998

matter was being referred to our Legal Committee for consideration of the effect of his failure to file timely notice.

Pursuant to N.J.S.A. 18A:6-28, appeals to the State Board must be taken "within 30 days after the decision appealed from is filed." The State Board may not grant extensions to enlarge the time specified for appeal. N.J.A.C. 6:2-1.5(a). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6:24-1.2; N.J.A.C. 6:24-1.15, the time limit within which an appeal must be taken to the State Board is statutory, and, given the jurisdictional nature of the statutory time limit, the State Board lacks the authority to extend it. Mount Pleasant-Blythedale Union Free School District v. New Jersey Department of Education, Docket #A-2180-89T1 (App. Div. 1990), slip op. at 5. The Appellate Division has "consistently concluded" that appeals must be timely filed and that "neither an agency nor our court on appeal may expand a mandatory statutory time limitation." In the Matter of the Special Election of the Northern Burlington County Regional School District, Docket #A-1743-95T5 (App. Div. 1996), slip op. at 3, citing Scrudato v. Mascot Sav. & Loan Ass'n, 50 N.J. Super. 264 (App. Div. 1958).

We conclude that the statutory filing requirement with which the appellant failed to comply is of such significance that we dismiss the appeal. In Yorke v. Board of Education of the Township of Piscataway, decided by the State Board of Education, July 6, 1988, aff'd, Docket #A-5912-87T1 (App. Div. 1989), the Court upheld the dismissal of an appeal by the State Board where it found that the notice of appeal had been filed one day late by appellant's counsel, who alleged that he had misread or misunderstood the applicable regulations. The Court added that even if the statute

could be construed to permit enlargement of the time for filing an appeal, the appellant therein had failed to establish good cause.

In this case, the Assistant Commissioner's decision was rendered on March 13, 1998 and mailed to the appellant on that date. Accordingly, pursuant to N.J.A.C. 6:2-1.4, the decision appealed from was deemed filed on March 16, 1998, three days after it was mailed. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6:2-1.3(a); N.J.A.C. 6:2-1.4(a), as computed under N.J.A.C. 6:2-1.4(b), the appellant was required to file his notice of appeal to the State Board on or before April 15, 1998. As previously indicated, the appellant's notice of appeal was not filed until April 22, a week after the deadline.

Even if N.J.S.A. 18A:6-28 can be construed to provide us with the authority to enlarge the time limit for filing an appeal, we find no substantive basis to warrant doing so in this particular instance. Appellant explains his late filing by indicating that he had gone into a "deep depression" after receiving the Assistant Commissioner's decision. He states: "It was very hard to deal with and I could not stay focused at the time. I had no appetite and I would sleep all day with no desire to get up or do anything. I felt like everything I had worked for and hoped for was no longer in reach or possible." While we are mindful of appellant's pro se status, we find that his explanation does not excuse his failure to comply with the statutory filing requirement.

Accordingly, we dismiss the appeal in this matter for failure to file notice thereof within the statutory time limit as computed under the applicable regulations.

June 3, 1998

Date of mailing _____

(SB) 47-98

DHPL #140-98
SB # 47-98

IN THE MATTER OF THE DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF D.B. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Assistant Commissioner of Education, March 23, 1998

For the Petitioner-Appellant, D.B., pro se

On March 23, 1998, the Assistant Commissioner of Education issued a letter decision in which he disqualified D.B. (hereinafter "appellant") from school employment after a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1 revealed that appellant had been convicted of aggravated assault, a disqualifying offense.

On April 20, 1998, appellant, acting pro se, filed a notice of appeal with the State Board of Education.

Pursuant to N.J.A.C. 6:2-1.11(a), appellant's brief in support of his appeal was due on May 11, 1998, 20 days after he filed his notice of appeal. Appellant, however, failed to file a brief by that date. By letter dated May 15, 1998, the Director of the State Board Appeals Office notified appellant of his failure to file a brief and informed him that this matter was being referred to the Legal Committee for consideration of his failure to perfect the appeal.

June 1, 1998

Appellant has still failed to file a brief in support of his appeal, more than seven weeks after the deadline for such filing. Nor has appellant offered any explanation for his failure to file a brief or requested an extension of time for such filing. As a result, we dismiss the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a). See Paszamant v. Board of Education of the Borough of Highland Park, decided by the State Board, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993).

Sam Podietz did not participate in deliberations in this matter.

July 1, 1998

Date of mailing JUL 06 1998

(SB) 48-98

DHPL #132-98
SB #48-98

IN THE MATTER OF THE DISQUALIFI- :
CATION FROM SCHOOL EMPLOYMENT :
OF D.L. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Assistant Commissioner of Education, March 20, 1998

For the Petitioner-Appellant, D.L., pro se

On March 20, 1998, the Assistant Commissioner of Education, Executive Services,[1] affirmed the determination of the Office of Criminal History Review disqualifying D.L. (hereinafter "appellant") from school employment as a custodian after a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1 revealed that he had been convicted of distributing a controlled dangerous substance, marijuana, within 1,000 feet of school property. The Assistant Commissioner determined that appellant had failed to affirmatively demonstrate his rehabilitation by clear and convincing evidence.

On April 30, 1998, appellant, acting pro se, filed a notice of appeal to the State Board of Education, along with an explanation for his late filing.

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

JUNE 3, 1998

Pursuant to N.J.S.A. 18A:6-28, appeals to the State Board must be taken "within 30 days after the decision appealed from is filed." The State Board may not grant extensions to enlarge the time specified for appeal. N.J.A.C. 6:2-1.5(a). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6:24-1.2; N.J.A.C. 6:24-1.15, the time limit within which an appeal must be taken to the State Board is statutory, and, given the jurisdictional nature of the statutory time limit, the State Board lacks the authority to extend it. Mount Pleasant-Blythedale Union Free School District v. New Jersey Department of Education, Docket #A-2180-89T1 (App. Div. 1990), slip op. at 5. The Appellate Division has "consistently concluded" that appeals must be timely filed and that "neither an agency nor our court on appeal may expand a mandatory statutory time limitation." In the Matter of the Special Election of the Northern Burlington County Regional School District, Docket #A-1743-95T5 (App. Div. 1996), slip op. at 3, citing Scrudato v. Mascot Sav. & Loan Ass'n, 50 N.J. Super. 264 (App. Div. 1958).

We conclude that the statutory filing requirement with which the appellant failed to comply is of such significance that we dismiss the appeal. In Yorke v. Board of Education of the Township of Piscataway, decided by the State Board of Education, July 6, 1988, aff'd, Docket #A-5912-87T1 (App. Div. 1989), the Court upheld the dismissal of an appeal by the State Board where it found that the notice of appeal had been filed one day late by appellant's counsel, who alleged that he had misread or misunderstood the applicable regulations. The Court added that even if the statute could be construed to permit enlargement of the time for filing an appeal, the appellant therein had failed to establish good cause.

In this case, the Assistant Commissioner's decision was rendered on March 20, 1998 and mailed to the appellant on that date. Accordingly, pursuant to N.J.A.C. 6:2-1.4, the decision appealed from was deemed filed on March 23, 1998, three days after it was mailed. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6:2-1.3(a); N.J.A.C. 6:2-1.4(a), as computed under N.J.A.C. 6:2-1.4(b), the appellant was required to file his notice of appeal to the State Board on or before April 22, 1998. As previously indicated, the appellant's notice of appeal was not filed until April 30.

Even if N.J.S.A. 18A:6-28 can be construed to provide us with the authority to enlarge the time limit for filing an appeal, we find no substantive basis to warrant doing so in this particular instance. Appellant asserts that he is dyslexic and has other learning disabilities and that he had not been informed of the 30-day deadline for filing an appeal from the Assistant Commissioner's decision. While we are mindful of appellant's pro se status, we find that his explanation does not excuse his failure to comply with the statutory filing requirement.

Accordingly, we dismiss the appeal in this matter for failure to file notice thereof within the statutory time limit as computed under the applicable regulations.

June 3, 1998

Date of mailing JUN 03 1998

SB/53-98

EDU #3857-97N
DHP # 230-98
SB # 53-98

IN THE MATTER OF THE DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF J.G. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 27, 1998

For the Petitioner-Appellant, Ronald M. Gutwirth, Esq.

J.G. (hereinafter "appellant"), who was employed as a custodian by the State-operated School District of Newark, was disqualified from continued employment in the State's schools by the Office of Criminal History Review of the Department of Education after a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1 revealed that he had been convicted of second-degree murder in 1966. The appellant appealed his disqualification to the Commissioner of Education, contending that he was rehabilitated.[1]

On February 27, 1998, the Commissioner of Education upheld the disqualification, concluding that the appellant had failed to demonstrate clear and convincing evidence of his rehabilitation under the standard set forth in N.J.S.A. 18A:6-7.1 as then in effect.

[1] We note that petitioner's criminal history record review was conducted prior to the 1998 amendment to N.J.S.A. 18A:6-7.1, which eliminated rehabiliation as a basis for challenging a disqualification determination. The statute as amended now provides that an individual convicted of any of the offenses specified therein "shall be permanently disqualified" from school employment as the result of such

June 2, 1999

The appellant filed the instant appeal to the State Board of Education.

By letter dated October 6, 1998, the Director of the State Board Appeals Office notified counsel for the appellant that the Legal Committee of the State Board had determined that it was necessary to supplement the record on appeal pursuant to N.J.A.C. 6:2-1.9 with additional documents in order to determine whether the appellant had affirmatively demonstrated his rehabilitation. The appellant was therefore directed to supplement the record with: "1) any additional court documents, records and transcripts, including, but not limited to, a copy of the court's sentencing memo following appellant's conviction for second-degree murder in 1966, 2) documentation and further information regarding the appellant's contention that Franklin Gilchrist pleaded guilty during the trial, 3) an explanation of and any additional documentation relating to the robbery charges (subsequently dismissed) which were filed against the appellant in November 1965 when he was charged with murder, and 4) any other documents regarding the circumstances surrounding the murder charge, trial and conviction."

Counsel for the appellant was further advised that "[a]lthough the appellant may not relitigate his conviction in these proceedings, the requested information is relevant to '[t]he nature and seriousness of the offense,' N.J.S.A. 18A:6-7.1(e)(2), a factor which must be considered by the State Board in determining whether the appellant has demonstrated his rehabilitation under the statute."

Counsel for the appellant submitted supplemental materials to the State Board in April 1999.

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conviction. Consequently, rehabilitation is no longer available as a mechanism to abrogate the effect of a disqualifying offense.

After a thorough review of the record as supplemented, we affirm the decision of the Commissioner. Although the appellant continues to deny his involvement in the crime that led to his conviction for second-degree murder, his guilt is not at issue in these proceedings, and we find nothing in the supplemented record that would mitigate the gravity of that offense.

We therefore affirm the decision of the Commissioner disqualifying the appellant from school employment.

June 2, 1999

Date of mailing JUN 04 1999

54-98

54-98 E

JOSHUA BRALTS, AXEL BRALTS, and CARIN BRALTS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning parents and son Joshua sought stay of the NJSIAA's determination that Joshua was ineligible to participate in interscholastic contests (basketball) by application of Article V, Section 4J (eight semester rule). NJSIAA contended Joshua was in his fifth year of high school in that he repeated tenth grade when he was living in Florida. Joshua was eligible to participate in interscholastic basketball during his past four years of high school, but elected not to play during his first tenth grade year.

Commissioner concluded that Joshua was afforded the due process to which he was entitled and that the Eligibility Appeals Committee's determination was not arbitrary, capricious or unreasonable so as to warrant the Commissioner's intervention as Joshua's repetition of tenth grade was not due to circumstances beyond his control, but rather was a result of petitioners' voluntary actions, thus, rendering Joshua ineligible for a waiver of the eight semester rule. Thus, the Commissioner affirmed the NJSIAA's decision. Petition was dismissed.

AGENCY DKT. NO. 7-1/98

JOSHUA BRALTS, AXEL BRALTS, and CARIN BRALTS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	
RESPONDENT.	:	
	:	

For Petitioners Joshua, Axel and Carin Bralts, *pro se*

For Respondent NJSIAA, Herbert, Van Ness, Cayci and Goodell
(Steven P. Goodell, Esq., of Counsel)

This matter has come before the Commissioner of Education by way of a Petition of Appeal and Motion for Emergent Relief filed by petitioners on January 12, 1998, seeking a stay of the determination of the New Jersey State Interscholastic Athletic Association (NJSIAA) that Petitioner Joshua Bralts (Joshua) is ineligible to participate in interscholastic athletic contests by application of Article V, Section 4J of the NJSIAA bylaws, the eight semester rule, which precludes eligibility of a student for high school athletics after the expiration of eight consecutive semesters following his entrance into ninth grade. (*NJSIAA Handbook, 1997-98,* at p. 44)

Respondent NJSIAA submitted its Answer and Reply Brief on January 23, 1998, together with the record of proceedings before NJSIAA.

Petitioners also faxed two subsequent submissions on January 23, 1998 and January 28, 1998, with no indication of proof of service upon adversary. In that no provision for

additional submissions was made in the briefing schedule sent to the parties on January 13, 1998, these were not considered in the rendering of the within decision.

The undisputed facts reveal that Joshua is in his fifth year of high school at Mt. Olive High School (Mount Olive) in that he repeated tenth grade when he was living in Florida. Joshua stands at six feet seven inches tall and has been characterized as an excellent player who would be starting this season on the Mount Olive's Boys' Varsity Basketball Team if he were allowed to compete. Joshua was eligible to participate in interscholastic basketball during his past four years of high school, playing in ninth grade, his second tenth grade year, and in eleventh grade, having elected not to play during his first tenth grade year. He now seeks to play in his senior year. Joshua was advised by school officials in Mount Olive that unless NJSIAA granted him a waiver from its eight semester rule, he would be ineligible to participate in interscholastic competition this year.

Mount Olive and petitioners requested a waiver of the eight semester rule before the NJSIAA's Eligibility Committee (EC) which was denied on November 10, 1997. A hearing was held on December 10, 1997, before the NJSIAA Eligibility Appeals Committee (EAC), under the provisions set forth in the *NJSIAA Handbook.* In its determination letter dated December 18, 1997, NJSIAA denied the waiver, rendering Joshua ineligible to compete in high school sports, finding that "the extension of this student's high school career was a voluntary act."

Upon review, the Commissioner finds that the record herein is sufficient to establish, independent of the issue of emergent relief, that the NJSIAA's determination was not arbitrary, capricious or unreasonable. Therefore, the Commissioner has determined to decide this matter on its merits and uphold the decision of the NJSIAA.

In moving papers, petitioners seek emergent relief to allow Joshua to participate in interscholastic athletic competition, a reversal of the NJSIAA's decision and granting of a waiver of the eight semester rule so as to allow Joshua to participate in competitive basketball in his senior year.

Petitioners assert that their decision for Joshua to repeat tenth grade was based on legitimate educational and social considerations and that there was no intention whatsoever to advance his athletic career by keeping him back in tenth grade. They further contend that

Joshua's circumstances, causing him to relocate eight times in nine years due to his mother's job situation, were "Truly Extraordinary circumstances" beyond Joshua's control. (Petition of Appeal) Therefore, petitioners state that they acted in Joshua's best interests to slow his secondary schooling down by a year. (Cover Page, Petition of Appeal) Further, they aver that NJSIAA has acted contrary to its own Interpretive Guidelines which provide that waivers may be granted for circumstances beyond the student's control. They observe that in the past the NJSIAA has granted 30 or more exceptions from the eight semester rule, including waivers for reasons other than clearly demonstrable physical or mental disability and that no showing has been made that some of those students were more deserving of waiver than the instant petitioner. Further, based on the granting of these other exceptions, they contend that the NJSIAA's denial of a waiver to Joshua is arbitrary, capricious and unreasonable.

Lastly, they point out that the decision for Joshua to repeat the tenth grade was not "Solely Discretionary" in that Joshua did not have enough credits to move to the next grade level. They attach an exhibit to demonstrate that Joshua had 27.5 credits but that he needed 29 credits to progress. (Petition of Appeal, para. 4)

In its response papers, NJSIAA sets forth arguments to demonstrate that petitioners cannot meet the standards which would allow for the granting of emergent relief. *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). NJSIAA asserts that participation in extracurricular activities is not a fundamental right and Joshua's ineligibility therefrom would not amount to irreparable harm. (NJSIAA'S Brief at pp. 7-8)

In arguing that petitioners are unlikely to succeed on the merits of their claim, NJSIAA explains the eight semester rule is aimed at prohibiting "redshirting," a practice of holding a student back to allow him an extra year to mature or to save a talented athlete for another season, and preventing students who are not meeting academic standards from replacing students who are maintaining their academic standards. Waivers of the eight semester rule are only granted when a student has had to continue schooling beyond the eight semesters because of circumstances beyond his or her control. Waivers are not granted where the decision to attend high school for more than four years was voluntary. (*Id.* at pp. 8-9)

NJSIAA observes that the Commissioner has reviewed and upheld the Association in its interpretation and application of the eight semester rule eight times in the past

fifteen years, citing two cases, similar to the present, which involved a student repeating a grade because of an ill-timed move. See *Deborah E. Peveler v. NJSIAA*, decided December 5, 1994 *and Eugene Bradford v. NJSIAA*, 93 *N.J.A.R. 2d* (EDU) 165 (1993). It alleges that Joshua received full and fair due process before the NJSIAA comprised of two separate committees of educators, the EC and the EAC, when each convened to consider petitioners' request for a waiver from the Association's eight semester rule. In actuality, the EAC held a hearing at which petitioners were permitted to present evidence and witnesses and be represented by counsel if desired. Both the EC and the EAC determined that this student was not a victim of circumstances that were beyond his control. (NJSIAA's Brief at p. 13) There is no evidence that Joshua was required to miss school due to hospitalization, medical illness, to attend to a sick family member, or for any other reason beyond his control. *(Id.)*

As to petitioners' argument that Joshua lacked the requisite credits to progress to eleventh grade so that their decision was not "Solely Discretionary," NJSIAA responds that the test for determining whether a waiver of the NJSIAA eligibility rules should be granted is whether the student was unable to comply with the rules due to circumstances beyond his control. Here, it found the decision to repeat tenth grade was a voluntary one made by Joshua and his parents. (NJSIAA's Answer, para. 4)

FINDINGS AND CONCLUSIONS

The NJSIAA is a voluntary association. The Commissioner's scope of review in NJSIAA determinations is an appellate one. *N.J.S.A.* 18A:11-3; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188. The Commissioner may not overturn an action by the NJSIAA in applying eligibility rules absent a finding that the Association applied the rules in a patently arbitrary, capricious or unreasonable manner. *BC v. Cumberland Regional School District,* 220 *N.J. Super.* 214, 231-232 (App. Div. 1987). Further, the burden of proof that an action was so deficient rests with the person challenging the decision. *Kopera v. West Orange Board of Education,* 60 *N.J. Super.* 288, 297 (App. Div. 1960). It must be stressed that the Commissioner's scope of review is limited in that he may not substitute his judgment for that of the Association, even when he might judge otherwise in a *de novo* review. *Dam Jin Koh and Hong Jun Kim v. NJSIAA*, 1987 *S.L.D.* 259. Such point is underscored in the present matter

where petitioners present a compelling argument as to why their relocations amounted to truly extraordinary circumstances warranting waiver of the rule in describing their eight moves in nine years, how these may have effected Joshua's academic progress, and that these academic concerns colored their decision to have Joshua retained in tenth grade.

Nonetheless, the Commissioner is satisfied that NJSIAA did not act arbitrarily or unreasonably when it concluded, on the basis of the record before it, that Joshua's repetition of tenth grade was not due to circumstances beyond his control, but rather was the result of petitioners' voluntary actions, thus, rendering Joshua ineligible for a waiver of the eight semester rule. Moreover, in determining to uphold the determination of the NJSIAA, the Commissioner recognizes the importance of the eight semester rule as it is designed to prevent athletic advantage for older, larger students and the displacement of otherwise eligible students by those who have already had a full opportunity to participate in interscholastic athletics. The Commissioner also appreciates NJSIAA's concern for fairness to the opposing teams whose athletes meet all eligibility standards.

Accordingly, petitioners not having met their burden of establishing that in denying their request for waiver the NJSIAA acted arbitrarily, unreasonably, in bad faith or contrary to law, the Commissioner upholds the NJSIAA's decision and dismisses the Petition of Appeal.

COMMISSIONER OF EDUCATION

FEBRUARY 6, 1998
DATE OF MAILING FEBRUARY 6, 1998

55-98

55-98 B

BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWNSHIP COUNCIL OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $1,097,000 made by governing body following voter rejection of proposed budget on April 15,1997. (Board elected not to dispute an additional $610,000 in reductions to its proposed budget.)

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line-item reductions was necessary in order to maintain stability in the district pursuant to CEIFA, Commissioner determined to restore $797,000, to be offset by reallocation of $146,911, for a total General Fund tax levy of $51,805,087 for 1997-98 school purposes.

FEBRUARY 6, 1998

AGENCY DKT. NO. 219-6/97

BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWNSHIP COUNCIL OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

For the Board of Education, Wilentz, Goldman & Spitzer
(Francis X. Journick, Jr., Esq.)

For the Council, Thomas Hall., Esq.
(Assistant Township Attorney)

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education on June 18, 1997 through the filing of a Petition of Appeal by the Old Bridge Board of Education (Board), seeking restoration of reductions to the school budget made by the Council of the Township of Old Bridge (Council) pursuant to *N.J.S.A.* 18A:22-37 following defeat of the budget at the annual school election on April 15, 1997.

At that election, the voters rejected a public question proposing a General Fund tax levy of $52,861,998 for the 1997-98 school year. On May 19, 1997, following consultation with the Board as required by law, the Council adopted a resolution determining to certify a General Fund tax levy of $51,154,998 as sufficient to provide for a thorough and efficient system of education (T&E) in the District. This amount

represented a reduction of $1,707,000 from the tax levy proposed by the Board, and was effectuated through cuts in nine line items, for the reasons given in the schedule attached to the implementing resolution. By resolution dated June 2, 1997, the Board determined to appeal the Council's reductions and duly filed the within petition.

In its position statement, the Board notes that it is not seeking restoration of all items cut, and that it is only seeking a partial restoration of two items. Thus, the Board is agreeable to accept and implement $610,000 of the reductions imposed by the Council, so that of the $1,707,000 in reductions imposed, the Board seeks restoration of only $1,097,000.

The amounts in dispute in this appeal are thus as follows:

Tax Levy Proposed by Board		Tax Levy Certified by Council	
General Fund	$52,861,998	General Fund	$51,154,998

Amount of Reduction by Council		Amount of Reduction in Dispute	
General Fund	$ $1,707,000	General Fund	$1,097,000

An answer to the Board's petition was filed by the Borough on July 1, 1997. On July 21, 1997, both the Board and the Council filed position statements as required pursuant to *N.J.A.C.* 6:24-7.8. On August 8, 1997, the Board and the Council each filed a response to the other's position statement. On August 22, 1997, the parties filed their final summations.

In addition, as the parties had been advised by letter from the Assistant Commissioner dated April 16, 1997, distributed through the County Superintendent to boards and municipalities experiencing budget defeats and again in conjunction with proceedings herein, as part of the record of the within appeal, the Commissioner is taking official notice of the Board's revised budget, its June 30 financial report to be filed by August 1 pursuant to *N.J.S.A.* 18A:17-10, applicable portions of the School Report Card and the Comparative Spending Guide, and the annual audit for purposes of verifying surplus information given in the June 30 report and any prior year data relied upon by the Commissioner in making his determinations.

Consistent with the above, upon filing of the annual audit, the record of the within appeal was closed and the matter duly proceeded to determination.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to *N.J.S.A.* 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. In reviewing such appeals, the Commissioner's standard has historically been whether a district board of education has demonstrated that the amount by which a specific line-item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education (T&E). *Board of Education of East Brunswick Township v. Township Council of East Brunswick*, 48 *N.J.* 94 (1966) and *Board of Education of Deptford Township v. Mayor and Council of Deptford Township*, 116 *N.J.* 305 (1989). However, on December 20, 1996, the Legislature enacted the Comprehensive Educational Improvement and Financing Act of 1996 (CEIFA), wherein a prescribed level of expenditure range was established as sufficient for provision of T&E, and appeal of General Fund budget amounts in excess of that range, following voter defeat and municipal reduction, was expressly restricted to grounds of negative impact on the stability of the district given the need for long-term planning and budgeting. Additionally, the Act provided for standards of efficiency to be established by the Commissioner, setting forth the appropriate cost of the various programs, services, activities and materials necessary to achieve T&E. *P.L.* 1996, *c.* 138; *N.J.S.A.* 18A:7F-1 *et seq.*

In the present instance, the Board proposed a General Fund budget including $4,578,665 in excess of the T&E amount established for the District pursuant to CEIFA. Accordingly, appeal of reductions may be made only on grounds of stability.

Mindful, then, of the standard to be applied, the Commissioner makes specific determinations as set forth below.

COMMISSIONER'S DETERMINATION

Following each reduction listed below, the Council's rationale as stated in the schedule appended to its implementing resolution is set forth in full. The arguments of the parties on appeal follow thereafter.

Disputed Line-Item Number 1

Line No.	Account No.	Description	Amount Budgeted	Amount Increased
121	10-303	Budgeted Fund Balance	$600,000	$300,000

> The Council adjusted the budget by upwardly adjusting the anticipated surplus by $300,000. The Council avers that the Board could easily absorb this amount without placing it in a dire financial position and that utilization of this surplus will not jeopardize the provision of a thorough and efficient education.

The Board avers that the Council incorrectly anticipated a surplus in its proposed 1997-98 budget of $2,207,541, which is only 2.7 percent of that budget. With the $300,000 increase imposed by the Council, undesignated surplus is reduced to $1,907,541 or 2.4 percent of the 1997-98 budget. Unfortunately, the Board was required to spend $400,000 more in its 1996-97 budget year than it had originally anticipated reducing from $1,200,000 to $800,000 the surplus balance to be carried over into the 1997-98 school budget. This unanticipated spending included increases in health insurance costs for the Board's employees attributable to an unanticipated increase in claims. The Board's health insurance costs are calculated on the basis of its claims experience, so that the Board's costs increase as the claims of its employees increase. In addition, repair was required to several water lines, a sink hole, and replacement of a fire hydrant. As a result of this additional $400,000 in expenditures in the 1996-97 budget year, the surplus available for inclusion in the 1997-98 school budget is estimated to be reduced by $400,000. Thus, with the Council's reduction to this item, the 1997-98

budget is estimated to contain only $1,507,541 in surplus. This is only 1.9 percent of the Board's 1997-98 budget. The Board contends that it is simply imprudent by accepted school accounting practice to maintain a surplus of 1.9 percent on an $80 million budget noting that the State Board of Education has established a recommended minimum surplus of 3 percent of the budget and the Commissioner has applied this minimum when considering budget appeals involving a governing body's appropriation of surplus to reduce the municipal tax levy. The Board contends that the Council has justified its reduction on anticipated revenue; however, it fails to identify those sources of revenue which the Board has not accounted for in its budgeted surplus.

Council asserts that the Board has historically underestimated its available surplus and has failed to account for several categories of expense reductions and income in the present budget. It contends that over the last three years, the Board has underestimated its surplus by an average of $2.4 million per year. Further, it states that as a result of the Pension Bond Act, the Board has been relieved of its obligation to make $146,911 in pension contributions in this budget. Council then contends that the Board has demonstrated an ongoing capacity to locate and utilize excess funds from various sources within its budget to avert program cuts. Additionally, it avers that the Board made a series of questionable last-minute transfers from its surplus and now claims that it is left with an insufficient surplus balance. Council asserts that an overall lack of budgetary discipline in the management of other budget accounts causes the Board to squander its surplus.

The Board objects to Council's assertion that the Board has a history of underestimation of surplus. The Board provides an analysis of the average difference between the estimated surplus set forth in the Board's final adopted budgets for each of the school years from 1993-94 through 1995-96, and the year-end audited surplus for each of those same years as well as pages from the audits of the Board's accounts as of June 30, 1994, 1995 and 1996 showing the actual surplus as of those dates. These are provided to show that the Board's average underestimation of surplus over the last three audited school years is only $1.4 million, not $2.4 million as Council calculated. The Board also notes that the accounting principles for school districts were modified with

respect to the treatment of the amounts maintained in the minimum premium insurance plan. The Board then avers that the Council has not supported its assertions regarding underestimation of salary costs with facts nor has it explained how the budget transfers implemented by the Board from specific line items were unwarranted or improper. Finally, the Board states that the Pension Bond Act will not help the Board, contrary to Council's claims.

Upon review, the Commissioner finds that the District has a minimum premium health benefits plan for which an Incurred But Not Reported (IBNR) liability of $2,185,625 was reported as of June 30, 1997. Since the District is required to budget for its maximum annual claims exposure, which by statute must be established under a minimum premium health benefits plan, the IBNR amount is merely a GAAP accounting treatment to reflect the potential liability for run-out claims if the District decides to terminate its policy. Since there is no indication that the Board intends to do this in 1997-98, IBNR amounts must be considered surplus funds, as, unlike accounts payable, encumbrances and designated general fund balances which represent planned subsequent year's expenditures, they are being held for a contingency which may or may not arise. When the IBNR amount is added to the undesignated fund balance, the total ($3,385,460) is substantially higher than the acceptable level of three percent. Accordingly, the Commissioner determines that the Council's proposed increase to designated general fund balance of $300,000 should be sustained.

Disputed Line-Item Numbers 2 & 3

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
8270	12-000-400-450	Capital Outlay-Constr.	$407,000	$407,000
8290	12-000-400-710	Capital Improvements	$315, 000	$315,000

The Council proposed capital outlay reductions for payments to outside contractors for construction, renovation and remodeling in the amount of $407,000 and reductions in capital outlay for site improvements in the amount of $315,000. The Council proposed that the Board utilize lease purchase agreements to finance their capital projects which would result in the deferral of costs over a five-year period and thus reduce the impact of these costs on the tax rate.

The Board argues that the projects at issue are not eligible for a lease purchase agreement for a variety of reasons. It contends that sound school accounting practice requires that these projects be budgeted annually. These projects are uniformly of the type required on a recurring basis, annually as a general rule, to maintain and support the 20 school and administrative buildings operated by the Board. The Board notes that it applied to the Middlesex County Superintendent of Schools and received, as part of the County Superintendent's approval of the Board's proposed budget, a spending growth limitation waiver for these very projects. It avers this waiver approval constitutes an acknowledgment by the Commissioner that these capital projects must be completed during the 1997-98 school year to enable the Board to satisfy its educational responsibilities. It argues that to require the Board to finance these capital outlay projects through a lease purchase agreement would distort the finances of the Board by deferring the payment for these projects to later years when payment for these projects will compete under the growth spending limitation not only with payment for similar projects which will be necessary in those years, but also with the need to spend more for educational programs and services due to an increasing enrollment trend. The approach of paying for these capital projects in the year in which they are completed is cheaper than the lease purchase option since it avoids debt service, administrative fees and issuance costs.

The Board next asserts that these types of annually recurring capital projects generally are not eligible for lease purchase financing under the rules, regulations and policies of the Commissioner. Additionally, it cannot make the assurance that any lease purchase payments could be made within the growth spending limitation without an adverse effect on the Board's educational product. It argues that such an assurance is a precondition to the Commissioner's approval of a lease purchase agreement.

The Council claims that while it has reduced the Board's entire budget request for capital improvements in 1997-98, its proposed solution still enables the Board to attain its capital project goals. It points out that in the 1996-97 budget year, the Board exceeded its budget for construction and renovation account by more than $1 million. The Council says the Board ignored the fact that Township tax revenues have been

increasing each year, as well as the strong potential for increased tax revenues in the future due to expansion of the commercial tax base. It notes that the Board's argument further relies on certain demographic predictions which foresee increased enrollment. However, the Board fails to set forth sufficient facts in support of these predictions. The Board fails to set forth who prepared these projections, the background and qualifications of the preparer, and whether the methodology used to prepare the report has been recognized as reliable by the Commissioner. The Council avers that the Board points to no accounting practice or stipulation promulgated by the Commissioner in support of its contention that these projects are budgeted annually.

Upon review, the Commissioner finds that the Board has demonstrated that all expenditures proposed to be funded by the disputed amounts were part of a long-term planning process and could not be delayed beyond the fiscal year without seriously jeopardizing the Board's continuing ability to provide T&E. Accordingly, the Commissioner finds the disputed amounts necessary for the stability and long-term planning needs of the District and determines to restore the $407,000 and $315,000 reduced by Council.

Disputed Line-Item Number 4

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
7230	11-000-270-109	Student Transp. Services	$208,000	$70,000

> This item involves overtime for drivers that transport students to and from after-school extracurricular activities. The Board seeks only a partial restoration, $50,000, of the amount cut.

The Board argues that it uses its own buses and bus drivers to transport these students and that the late runs are necessary due to the heavily trafficked highways and dangerous roadways in the District, making it unacceptable to permit students to walk home. In addition, because the District encompasses 38 square miles, many students would not be capable of attending or participating in after-school and extracurricular events and programs simply because they could not get home from their schools when

these events or programs ended. The Board had budgeted $70,000 for such runs and cannot continue to provide these late runs with only $38,750. After studying this item, however, the Board believes that it could be reduced by $20,000 without reducing services. The Board believes it can achieve some economies by making a number of runs more efficient by combining the lesser used runs and eliminating some unnecessary buses. However, any greater reduction would not be prudent because the schedules of events and programs at the middle schools and high school can be coordinated only so much due to scheduling conflicts.

Council contends that the Board originally budgeted an $8,000 increase over last year. During pre-appeal negotiations, the Board indicated that of its budgeted amount about $60,000 was intended for transporting student athletes to and from away games. The remainder of about $146,000 was for overtime to be paid to 15 drivers who transport participants in extracurricular activities from the Middle and High School Buildings. Consequently, Council decided to reduce the overtime budget for the after-school drivers by less than 50 percent. Now the Board asserts that the buses for extra-curricular activities cost $108,750 rather than about $146,000. The Council, however, says it relied on the figures during negotiation and that the Board now fails to present facts in support of its revised figure. Additionally, Council does not find persuasive the argument that the late bus runs would create a significant decline in the participation of the District's after-school, extracurricular and athletic events and programs. Through consolidation of bus trips, it avers that, at worst, some students may be forced to wait for a longer period of time for their bus ride home.

Upon review, the Commissioner finds that Board's manner of providing transportation for extracurricular activities is not unreasonable, and that its expenditures for extracurricular activities overall are low in comparison to the efficiency standards established pursuant to CEIFA. Accordingly, the Commissioner determines that a reduction of $70,000, as opposed to the $20,000 reduction to which the Board has agreed, would negatively impact the stability of the District's current level of extracurricular programs, and the Commissioner, therefore, restores $50,000 to this account.

Disputed Line-Item Number 5

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
7260	11-000-270-511-00	Student Trans. Services	$2,268,050	$73,000

This item involves transportation to and from the regular, curricular school program. Such transportation is provided by independent contractors as a supplement to the Board's own buses and staff of drivers. The Board seeks only a partial restoration of the amount cut, $25,000.

The Board argues that the projected increase in the Board's schools for the 1997-98 school year is 305 students. Without a restoration of $25,000 to this item, the Board will not be able to transport all of the students who require, and are entitled to, transportation to and from school. By consolidating routes, the Board believes it can achieve economies to enable it to actually drop two routes and save $28,000. In addition, the Board recently entered into service agreements with neighboring districts whereby the Board's buses will be providing transportation in those neighboring districts, thereby generating an additional $20,000 in revenue. This is how the Board believes it can address a $48,000 reduction in this item. But the Board cannot see, and the Council has not provided any workable solutions for, handling an additional reduction of $25,000 in this item.

The Council explains that it imposed a reduction of $73,000 for this item which halved the Board's proposed budget increase for outside contractors to transport regular program students to and from school. Most of the District's transportation expenses come from this service, which is provided by an outside contract worth more than $2 million. The Board's proposed budget seeks an increase of $146,000 or 6.9 percent. The Council avers that its consultant analyzed the 54 bus routes being utilized and concluded that it was feasible to impose their efficiency, particularly at the middle school level. Consequently, it was recommended the Board's proposed budget increase be reduced by 50 percent from $146,000 to $73,000 and that any potential impact be mitigated by the recommended service modifications.

Upon review, the Commissioner finds that the Board, having made significant strides in improving the efficiency of its transportation program, has shown its

Upon review, the Commissioner finds that the Board, having made significant strides in improving the efficiency of its transportation program, has shown its need for the requested $25,000 restoration in order to maintain the stability of this program for the 1997-98 budget year. While the Commissioner would urge the Board to continue its efforts toward reaching a maximum level of efficiency, he concurs that the Board cannot absorb the entire $73,000 reduction in this year and determines to restore $25,000 of this amount as argued by the Board.

APPLICATION OF SURPLUS

In addition to sustaining the Council's increase to surplus as set forth at line item No. 1 above, the Commissioner finds that the restorations directed herein may be partially offset by reallocation of $146,911 from elsewhere within District's budget. This is attributable to the fact that the District will not be required to make a PERS payment in 1997-98 as a consequence of the Pension Bond Financing Act of 1997.

SUMMARY

In summary, on those items in dispute in this matter, the Commissioner directs restoration or sustaining of the Council's reductions to appropriations and increases to revenue as set forth below.

Line Item	Description	Sustained	Restored
8270	Capital Outlay-Construction Svcs.	$ -0-	$ 407,000
8290	Capital Improvements - Site Improvements	-0-	315,000
7230	Student Transp. Svcs. - Overtime Svcs.	20,000*	50,000
7260	Student Transp. Svcs. - Contracted Svcs.	48,000*	25,000
121	Budgeted Fund Balance	300,000	-0-
		$368,000	$ 797,000

*Undisputed by the Board

General Fund Tax Levy Certified by Governing Body:	$51,154,998
Restoration of Reductions:	797,000
Amount of Restoration Funded by Reallocation:	(146,911)
Total General Fund Tax Levy for 1997-98:	$51,805,087

Accordingly, the Middlesex County Board of Taxation is directed to make the necessary adjustments, as set forth above, to reflect a total of $51,805,087 to be raised in tax levy for General Fund purposes of the Old Bridge Board of Education for the 1997-98 school year.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 6, 1998
DATE OF MAILING FEBRUARY 6, 1998

(SB) 55-98

DHBL #230-98
SB # 55-98

IN THE MATTER OF THE DISQUALIFI- :
CATION FROM SCHOOL EMPLOYMENT :
OF S.A.S. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Assistant Commissioner of Education, May 29, 1998

For the Petitioner-Appellant, S.A.S., pro se

On May 29, 1998, the Assistant Commissioner of Education, Executive Services, issued a letter decision in which he disqualified S.A.S. (hereinafter "appellant") from school employment in the State after a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1 revealed that appellant had four convictions for armed robbery.

On June 15, 1998, appellant, acting pro se, filed a notice of appeal with the State Board of Education.

Pursuant to N.J.A.C. 6:2-1.11(a), appellant's brief in support of his appeal was due on July 6, 1998, 20 days after he filed his notice of appeal. Appellant, however, failed to file a brief by that date. By letter dated July 9, 1998, the Director of the State Board Appeals Office notified appellant of his failure to file a brief and informed him that this matter was being referred to the Legal Committee for consideration of his failure to perfect the appeal.

SEPT. 2, 1998

Appellant has still failed to file a brief in support of his appeal, nearly two months after the deadline for such filing. Nor has he offered any explanation for his failure to file a brief or requested an extension of time for such filing. As a result, we dismiss the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a). See Paszamant v. Board of Education of the Borough of Highland Park, decided by the State Board, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993).

September 2, 1998

Date of mailing SEP 04 1998

(SB) 55-98

DHBL #230-98
SB # 55-98

IN THE MATTER OF THE DISQUALIFI- :
CATION FROM SCHOOL EMPLOYMENT :
OF S.A.S. :

STATE BOARD OF EDUCATION

DECISION ON MOTION

Decided by the Assistant Commissioner of Education, May 29, 1998

Decided by the State Board of Education, September 2, 1998

For the Petitioner-Appellant, S.A.S., pro se

The State Board of Education denies petitioner's request to reconsider its decision dated September 2, 1998 in this matter.

November 4, 1998

Date of mailing NOV 06 1998

56-98

CARLA ROCKLIFF,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

FEBRUARY 10, 1998



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 3962-97

AGENCY DKT. NO. 44-2/97

CARLA ROCKLIFF,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY

Respondent.

David B. Friedman, Esq., for petitioner (Balk, Oxfeld, Mandell & Cohen, attorneys)

Alan J. Schnirman, Esq., for respondent

Record Closed: January 7, 1998 Decided: January 7, 1998

BEFORE **EDITH KLINGER**, ALJ:

On April 21, 1997, the Department of Education transmitted this matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. Petitioner claimed that respondent led her to believe that her position as instructor in the school district's nursing assistant training program was being abolished for reasons of economy and efficiency. As a result, she tendered her resignation from her job. She later came to believe that the district had recreated her

old position and brought this action to claim her tenure and seniority rights to be rehired.

A telephone prehearing conference was held with the parties on June 17, 1997 and continued to June 26, 1997. At this time, it was determined that the district no longer offered the nursing assistant program because it had too few students enrolled and petitioner had already found another position. It was proposed that, if petitioner received a letter from the Superintendent of the district officially advising her that the nursing program no longer existed, she would consider withdrawing her appeal. No contact with the Superintendent was possible until July 7, 1997 at the earliest. As a result, another telephone conference was held with the parties on July 16, 1997.

On September 12, 1997, the undersigned received a copy of a letter from respondent's attorney to petitioner's attorney stating that a letter, dated September 8, 1997, from James B. Clarke, Jr., Superintendent of the Linden Public Schools, was enclosed. The enclosed letter was not provided to the undersigned. According to the Board's attorney, Superintendent Clarke advised counsel in his letter as follows:

> As you can see from Mr. Clarke's letter, the Nursing I Program was eliminated due to low student enrollment on June 30, 1996, with the Nursing II Program continued through the 1996-1997 school year. Superintendent Clarke further states that as of June 30, 1997, the Nursing Assistance Program was abolished and the District has no intention of reinstating the program for the 1997-1998 school year.

When the undersigned received no further communication from the parties, the matter was scheduled for hearing on January 7, 1998. Notices of the scheduled hearing date were mailed to the parties on October 31, 1997.

On January 7, 1998, neither side appeared for the hearing and no one communicated with the Office of Administrative Law to explain the reason for the failure to appear.

Therefore, based upon the above, I **FIND** that the parties no longer wish to pursue this matter. Accordingly, I **CONCLUDE** that this appeal should be **DISMISSED**.

It is **ORDERED** that the appeal of Carla Rockliff is hereby **DISMISSED WITH PREJUDICE**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 7, 1998
DATE

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

1/9/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 12 1998
DATE

Barbara A Kamel
OFFICE OF ADMINISTRATIVE LAW

md

OAL DKT. NO. EDU 3962-97
AGENCY DKT. NO. 44-2/97

CARLA ROCKLIFF,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law advising of the parties' failure to appear have been reviewed. No exceptions were filed nor was an explanation for such nonappearance provided. There being no further communication from the parties, this matter is no longer deemed to be a contested matter before the Commissioner. Accordingly, the initial decision dismissing this appeal is adopted for the reasons expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBruary 10, 1998
DATE OF MAILING FEBRUARY 10, 1998

57-98

57-98

IN THE MATTER OF THE TENURE	:	
HEARING OF JEANNE OPPEL, STATE-	:	
OPERATED SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
CITY OF JERSEY CITY, HUDSON	:	DECISION
COUNTY.	:	

FEBRUARY 10, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5255-96

AGENCY DKT. NO. 143-4/96

IN THE MATTER OF THE TENURE HEARING OF JEANNE OPPEL, STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY

Cheri L. Maxwell, Esq., for petitioner
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Wayne J. Oppito, Esq., for respondent

Record Closed: December 26, 1997 Decided: January 8, 1998

BEFORE **MARIE P. SIMONELLI,** ALJ:

On May 10, 1996, the Department of Education transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

After numerous adjournments, this matter was subsequently scheduled for hearing on February 5, 17, March 9, 10 and 11, 1998 at the OAL in Newark.

Prior to the scheduled hearing dates, the parties advised the undersigned that this matter had been resolved.

On December 26, 1997, the parties submitted the attached Stipulation of Settlement indicating the terms of agreement which are incorporated herein by reference.

Having reviewed the record, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE**

DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Jan. 8, 1998
DATE

MARIE P. SIMONELLI, ALJ

Receipt Acknowledged:

1/14/98
DATE

D.N. Contenacutis/jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 15 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

md

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
DEC 26 2 37 PM '97

WAYNE J. OPPITO, ESQUIRE
12 Centre Drive
Jamesburg, New Jersey 08831
609-860-1200
Attorney for Respondent

STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY,	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
Petitioner,	:	OAL Docket No. EDUTH 05255-96N Agency Reference No. 143-4/96
v.	:	
JEANNE OPPEL,	:	**STIPULATION OF SETTLEMENT**
Respondent.	:	

In consideration of the mutual promises and undertakings contained in this Agreement, Petitioner, State-Operated School District of Jersey City and Respondent, Jeanne Oppel hereby agree that the above-captioned matter and any and all other claims, rights and obligations between the undersigned parties shall be resolved as follows:

1. The parties agree that this settlement represents the compromise of disputed claims and is not an admission of liability, negligence or wrongdoing by either party. This settlement was reached by the parties as a business judgment bearing in mind the cost, disruption and uncertainty of litigation.

2. The State-Operated School District of Jersey City withdraws with prejudice the tenure charges against Jeanne Oppel, entitled State-Operated School District of Jersey City v. Jeanne Oppel, bearing OAL Docket No. EDUTH 05255-96N and Agency Reference No 143-4/96.

3. Ms. Oppel shall withdraw, with prejudice, all outstanding grievances. Ms. Oppel shall also withdraw, with prejudice, her claims against the State-Operated School District of Jersey City, Frank M. Sinatra, Charles R. Smith and Constance Frazier, which are pending in a civil suit in the Superior Court of New Jersey, Law Division, Morris County, Docket No. L-967-97. Jeanne Oppel hereby releases and forever discharges the State-Operated School District of Jersey City, its successors and assigns, and its past, present or future officers, directors, agents or employees, from all claims, causes of actions, suits, etc., which she now has or ever had against the State-Operated School District of Jersey City, including but not limited to all claims arising out of her employment with the State-Operated School District of Jersey City. The State-Operated School District of Jersey City, its successors and assigns, and its past, present or future officers, directors, agents or employees, hereby release and forever discharge Jeanne Oppel from all claims, causes of actions, suits, etc., which it now has or ever had against Jeanne Oppel.

4. Ms. Oppel shall receive in a lump sum payment, less required deductions, all back pay with all increments and other benefits withheld from the time of her suspension to the date of the approval of this Settlement by the Commissioner. Said payment shall be made by the State-Operated School District of Jersey City within 30 days of the approval of this Settlement by the Commissioner.

5. Ms. Oppel shall be reimbursed for medical expenses incurred and not covered by insurance, not to exceed ONE THOUSAND DOLLARS ($1,000.00).

6. The State-Operated School District of Jersey City shall place Ms. Oppel on administrative leave from the date of the approval of this Settlement by

the Commissioner through and including March 31, 1998 at full pay and benefits, at which time Ms. Oppel resigns from her employment with the State-Operated School District of Jersey City.

7. If the State-Operated School District of Jersey City receives inquiry from future employers concerning Ms. Oppel, the State-Operated School District shall only report her length of tenure in the school district, the positions held and that Ms. Oppel resigned in good standing. The State-Operated School District of Jersey City will take no affirmative action to block any future employment of Ms. Oppel.

8. Other than for implementation of the Agreement, the parties agree to safeguard the confidentiality of this Agreement to the extent permitted by law.

9. The parties agree that this Agreement will be construed and governed by the laws of the State of New Jersey, without regard to principles of conflicts of law, and the parties hereby submit to the jurisdiction of the Commissioner of Education and Office of Administrative Law with regard to enforcement of this Agreement.

10. The parties to this Agreement acknowledge that they have been represented by independent legal counsel of their own choice throughout all of the negotiations that preceded the execution of this Agreement and General Release. The parties acknowledge and represent that they have carefully read and fully understand all of the provisions herein and that they have voluntarily executed same without coercion or duress.

11. This Agreement, General Release and transcript of the OAL Hearing in this matter on October 6, 1997 before the Honorable Marie P. Simonelli, ALJ, constitutes the entire agreement with respect to the subject matter hereof and shall not be amended, modified or amplified except in writing signed by both parties. No oral statement of any person, other than as set forth in the

October 6, 1997 hearing before Judge Simonelli, shall in any manner or degree modify the terms and provisions of this Agreement and General Release.

12. This Agreement may be executed in multiple originals, each of which shall be considered an original instrument, but all of which shall constitute one agreement, and shall bind the parties hereto and their successors, heirs, assigns and legal representatives.

13. This agreement will only become effective when it is approved by the Commissioner of Education. Any disapproval by the Commissioner shall not interfere with the rights of either party to pursue this matter and the other matters referenced herein further.

for the State-Operated
School District of Jersey City

Jeanne Oppel

Sills Cummis Zuckerman Radin
Tischman Epstein & Gross
Attorneys for Petitioner

Wayne J. Oppito, Esq.
Attorney for Respondent

Dated:

OAL DKT. NO EDU 5255-96
AGENCY DKT. NO. 143-4/96

IN THE MATTER OF THE TENURE	:	
HEARING OF JEANNE OPPEL, STATE-	:	
OPERATED SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
CITY OF JERSEY CITY, HUDSON	:	DECISION
COUNTY.	:	

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

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

COMMISSIONER OF EDUCATION

FEBRUARY 10, 1998
DATE OF MAILING FEBRUARY 10, 1998

SB/57-98

SB #57-98

IN THE MATTER OF THE ISSUANCE OF :
A COUNTY SUBSTITUTE CERTIFICATE :
TO KAREN GABA. :

STATE BOARD OF EDUCATION

DECISION

Decided by the State Board of Examiners, June 8, 1998

For the Petitioner-Appellant, Karen L. Gaba, pro se

For the Respondent-Respondent, Michelle L. Miller, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

On June 12, 1998, Karen Gaba (hereinafter "petitioner") filed an appeal to the State Board of Education from a letter decision issued on June 8, 1998 by the Secretary of the State Board of Examiners indicating that the Board of Examiners had voted "to block issuance of a new county substitute license" to petitioner. Petitioner was informed that the Board of Examiners had:

> also found troubling what it perceived as inconsistencies between your signed resignation of February 14, 1994 and the recitation of the facts that led to the revocation of your county substitute license, as you now report them in your letter of March 10, 1998. While you admit the presence of students whom you did not invite to your home on February 12, 1994, nowhere in your March 10, 1998 letter do you acknowledge knowingly serving students alcohol or providing "aprox 1 hit of pot" to any student at your home on that night. Such inconsistency creates question regarding your rehabilitation and sincerity in reapplying for licensure. These factors, combined with the relatively short period of time since the earlier revocation of your county substitute license, militated against granting licensure following the revocation of your county substitute license.

Nov. 3, 1999

After a careful review of the record, we agree that petitioner should not be issued another county substitute certificate at this time. Like the Board of Examiners, we are troubled by the fact that petitioner has failed to address or acknowledge a signed statement dated February 14, 1994 in which she admitted that she had provided alcoholic beverages and marijuana to students. Given the gravity of such admission, we conclude that the petitioner has not shown an entitlement to receive a county substitute certificate. However, we find that the procedure utilized in this case was not in accordance with our regulations.

A county substitute certificate, in contrast to a standard certificate, is issued by a county superintendent, rather than by the State Board of Examiners, and is not a teaching certificate. In the Matter of the Revocation of the Teaching Certificate of Shawn Hines, decided by the State Board of Education, November 6, 1996, slip op. at 3; N.J.A.C. 6:11-4.5.[1] Nonetheless, the Board of Examiners took jurisdiction over petitioner's application on the basis of N.J.A.C. 6:11-3.6(g), which provides that:

> Where an applicant for certification indicates that he or she previously held a certificate issued by the State Board of

[1] N.J.A.C. 6:11-4.5 provides, in pertinent part, that:

> (a) Persons who do not hold a standard instructional certificate issued by the State Board of Examiners but who can present a minimum of 60 semester-hour credits completed in an accredited college, may be granted a county substitute certificate for day-to-day substitute teaching in the county which grants the certificate.
>
> (b) Each district board of education shall submit to the county superintendent for review and approval, each applicant's official transcripts, oath of allegiance, and credentials.
>
> (c) The certificate will be issued for a three-year period, but the holder may serve for no more than 20 consecutive days in the same position in one school district during the school year. Such certificates, which are issued by the county superintendent of schools, are to be granted only when the supply of properly certificated teachers is inadequate to staff the school....

> Examiners, which certificate was revoked, the Board of Examiners may require the applicant to set forth the pertinent circumstances relating to the revocation, and require the applicant to demonstrate to the Board rehabilitation which warrants reinstatement of the revoked certificate.... (Emphasis added.)

We conclude that N.J.A.C. 6:11-3.6(g) did not provide the Board of Examiners with the authority to consider petitioner's application. Petitioner's previously-held county substitute certificate had not been issued by the Board of Examiners. Nor was she applying for reinstatement of a revoked certificate. Unlike a standard teaching certificate, a county substitute certificate may only be issued for a period of three years. N.J.A.C. 6:11-4.5(c). Petitioner's previously-held certificate, which had been issued in August 1993 and revoked by the State Board of Examiners in August 1996, had an expiration date of January 2, 1997.[2] Consequently, the certificate would have expired prior to petitioner's instant application for a new three-year county substitute certificate. Thus, notwithstanding the fact that petitioner's previously-held county substitute certificate had been deemed revoked,[3] our regulations did not provide the Board of Examiners with the authority to determine petitioner's instant application. In accordance with the terms of N.J.A.C. 6:11-4.5, petitioner's application should have been submitted to the County Superintendent for review and approval.

---

[2] The county substitute certificate issued to petitioner in August 1993, while indicating in accordance with the regulations that it "will be issued for a three-year period," also stated that "[t]his certificate will expire three years from the first day of July or the second day of January next following the date of issuance," and included an expiration date of January 2, 1997, three years and four months after its issuance. Although the issue is not currently before us, we can find no authority in the regulations for the issuance of a county substitute certificate for a period of more than three years.

[3] We note that petitioner had entered into a stipulation of settlement with the Board of Examiners in August 1996 in which she agreed to surrender her county substitute certificate and that such surrender would be deemed to be a revocation. We note further that, for purposes of this decision, we do not address whether the Board of Examiners has the authority under the regulations to revoke a county substitute certificate.

We find it unnecessary, however, to remand this matter to the County Superintendent. As the ultimate administrative decision-maker in matters arising under the school laws, Matter of Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), certif. denied, 121 N.J. 615 (1990); Dore v. Board of Educ., 185 N.J. Super. 447, 452 (App. Div. 1982), we have reviewed the record, which includes petitioner's application for a new county substitute certificate and her submissions to the Board of Examiners in support of her application. For the reasons stated above, we deny petitioner's application.

November 3, 1999

Date of mailing NOV 05 1999

58-98

58-98

IN THE MATTER OF THE TENURE	:	
HEARING OF DOREATHA HILLS,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	

FEBRUARY 11, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3639-97

AGENCY DKT. NO. 17-1/97

IN THE MATTER OF THE TENURE HEARING OF DOREATHA HILLS, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK

Gregory G. Johnson, Esq., for petitioner

William J. Ewing, Esq., for respondent

Record Closed: January 16, 1998 Decided: January 16, 1998

BEFORE **KEN R. SPRINGER,** ALJ:

This matter involves tenure charges of corporal punishment, unbecoming conduct and insubordination certified by the State-Operated School District of the City of Newark ("District") against Doreatha Hills under the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 to -18.1.

Doreatha Hills is a tenured teaching staff member employed by the District. By resolution adopted on December 6, 1996, the state district superintendent found

existence of probable cause to certify tenure charges which, if true, are sufficient to warrant dismissal or reduction in salary. Basically, the charges allege that Ms. Hill committed six separate acts constituting corporal punishment or unbecoming conduct during the period commencing March 27, 1992 and ending May 30, 1996. As a result of her determination, the state district superintendent suspended Ms. Hills, without pay, effective December 6, 1996.

On January 17, 1997, the District filed its written tenure charges with the Commissioner of Education ("Commissioner"). Respondent filed an answer on March 17, 1997. Subsequently, on March 27, 1997, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for determination as a contested case.

Both parties have agreed to a proposed settlement, subject to approval by the Commissioner. In accordance with the decision of the State Board of Education in *Cardonic v. Brooklawn Bd. of Educ.*, 193 *S.L.D.* _____ (*St. Bd.* April 6, 1983), the record of any proposed settlement must include:

> . . . the nature of the charges, circumstances justifying the settlement, consent or authorization by the Board of Education and the teacher to the proposed agreement, the Administrative Law Judge's finding that the teacher entered into the agreement with a full understanding of his rights, and [a finding] that the agreement is consistent with the public interest.

On January 6, 1998, the OAL held a public hearing on the issue of whether or not the proposed settlement should be accepted. Counsel for both parties set forth on the record the reasons why settlement would be in the public interest. Ms. Hills testified that she fully understood and voluntarily agreed to the terms of settlement. In addition, the parties have prepared a stipulation of settlement, which is attached and fully incorporated in this decision. The State District Superintendent approved the settlement terms on January 12, 1998.

Based on my review of the records, I **FIND** that the proposed settlement is consistent with the public interest for the following reasons:

(1) Doreatha Hills been employed as a teacher by the District or its predecessor for twenty-six years. At the hearing, she appeared to be sincerely proud of her long service as a teacher.

(2) It is anticipated that the hearing in this matter would be protracted and costly. The OAL has scheduled the matter to be heard on seven separate dates in January 1998.

(3) Board counsel estimates that he would call sixteen witnesses to prove the charges. Eleven of the District's intended witnesses are young children, ranging in age from eleven to thirteen years-old. In addition, petitioner intended to call two state investigators from Division of Youth & Family Services and three school administrators.

(4) Respondent would testify on her own behalf and call eight other witnesses. Thus, at least twenty-five witnesses would testify in this matter.

(5) Under the proposed terms of settlement, Ms. Hills will resign from her position effective May 30, 1998. In exchange, she would receive her salary from January 6, 1997 through May 30, 1997.

(6) Under the best of circumstances, it is unlikely that the tenure hearing would be concluded until the end of January 1998. Then the administrative law judge will have forty-five days to prepare an initial decision and the Commissioner will have an additional forty-five days for review and issuance of a final decision. Regardless of whether it won or lost, the District would incur the expense of paying Ms. Hill's annual salary for the better part of the 1997-98 school year.

(7) If the tenure matter proceeds to hearing, the parties would incur the cost of paying their attorneys for a hearing lasting seven days.

(8) An essential provision of the agreement obligates Ms. Hill to surrender all licenses and certificates authorizing her to teach in the State of New Jersey. Further, Ms. Hill is aware that, pursuant to *N.J.A.C.* 6:11-3.6, the Commissioner of Education may refer this matter to the State Board of Examiners for any action which it may deem appropriate.

(9) Before entering into this agreement, Ms. Hill fully understood her rights and had an adequate opportunity to consult with legal counsel.

(10) The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that the terms of the settlement are in the public interest.

It is **ORDERED** that the parties comply with the settlement terms and that the proceedings are hereby concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Jan. 16, 1998
DATE

Ken R Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

1/21/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 22 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

Jan 16 1 32 PM '98

Gregory G. Johnson, Esq.
17 Academy Street, Suite 208
Newark, New Jersey 07102
973-642-0001
Attorney for the Newark Public Schools

IN THE MATTER OF THE TENURE HEARING OF DORETHA HILLS

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK

BEFORE THE COMMISSIONER OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW

OAL Docket No. EDUTH 3639-97
Agency Ref. No. 519-11/96

STIPULATION OF SETTLEMENT

This Agreement made this on January 5, 1998, by and between the parties, petitioner State-Operated School District of the City of Newark ("District"), and respondent Doretha Hills, a tenured teacher, residing at 154 Orange Road, Montclair, New Jersey 07042.

WHEREAS, Ms. Hills is a tenured teacher employed by the District;

WHEREAS, on or about November 8, 1996, tenure charges were filed against Ms. Hills based upon corporal punishment, unjustified physical contact with pupils; and Insubordination;

WHEREAS, on December 8, 1996, the State District Superintendent acted to certify the charges against Ms. Hills, and suspended her for a 120 day suspension without pay pending a hearing pursuant to *N.J.S.A.* 18A:6-14.

WHEREAS, on or about March 6, 1997, Ms. Hills's attorney filed an Answer denying the Charges with the Commissioner of Education; and

WHEREAS, in light of the nature of charges, and potential for protracted litigation, it is in the best interest of the parties to resolve the charges before the Commissioner of Education;

NOW THEREFORE BE IT RESOLVED, the parties hereby stipulate and agree as follows

1. The District agrees to withdraw the tenure charges in this case. Ms. Hills hereby resigns her teaching position, effective May 30, 1998. (See attached letter as Exhibit "A")

2. Ms. Hills is entitled to her full salary and benefits until May 29, 1998. Ms. Hills agrees never to seek employment with the District in the future.

3. Ms. Hills specifically acknowledges that she has been advised of the duty of the Commissioner of Education pursuant to *N.J.A.C.* 6:11-3.6(a)(1) and *In re Cardonick* concerning referral to the State Board of Examiners for possible action regarding Ms. Hills's teaching certification. Ms. Hills agrees to voluntarily relinquish her teaching certificates within 30 days from the date of final approval of the Settlement Agreement by the Commissioner.

4. The parties respectively acknowledge that each has had ample opportunity to seek independent legal counsel, financial or other advice regarding this Agreement, and that each signing this Agreement freely and voluntarily, without coercion, duress or pressure from the other party.

5. This Agreement constitutes the full Agreement between the parties.

6. By entering this Agreement, each party releases and discharges the other with respect to all claims or rights that either party may have against the other. This includes all claims, including those of which either party is not aware and those not mentioned herein. It specifically includes all claims which Ms. Hills may have respecting tenure, discrimination on any basis, rights under any collective bargaining agreement, disability payments, sick leave, salary or any other matter pertaining to her employment, except the salary and benefits granted in Paragraph 2.

7. The terms and condition of this settlement shall not prejudice any rights or benefits Ms. Hills may be entitled to relating to her retirement or pension.

8. Ms. Hills intends to apply for a retirement pension. The District will use its best efforts to assist Ms. Hills in processing her pension application.

9. This Agreement is subject to approval by the State District Superintendent, Office o Administrative Law, and Commissioner of Education.

FOR THE EMPLOYEE

Doretha C. Hills

Doretha Hills

Dated: 1/6/98

~~Mitchell P. Lenczewski, Esq.~~
Attorney for Ms. Hills
William J. Ewing Esq

Dated: Jan. 6. 1998

FOR THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK

Beverly L. Hall

Dr. Beverly L. Hall

Dated: 1/12/98

Gregory G. Johnson

Gregory G. Johnson, Esq.

Dated: JAN. 6, 1998

January 5, 1998

Dr. Beverly L. Hall
State District Superintendent
Newark Public Schools

Dear Dr. Hall:

In accordance with the Settlement Agreement, I hereby resign my tenured teaching position effective May 30, 1998.

Very truly yours,

Doretha C. Hills

Doretha Hills

OAL DKT. NO. EDU 3639-97
AGENCY DKT. NO. 17-1/97

IN THE MATTER OF THE TENURE	:	
HEARING OF DOREATHA HILLS,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	

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

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

In accordance with the terms of the settlement agreement, this matter shall be transmitted to the State Board of Examiners for revocation of respondent's certification. In this regard, it is directed that the original of each instructional certificate issued by the State Board of Examiners possessed by respondent be submitted by respondent's attorney to the State Board of Examiners by certified mail within 30 days of the date of this decision together with a sworn statement of respondent that she does not oppose the revocation of such certificate(s).



COMMISSIONER OF EDUCATION

FEBRUARY 11, 1998
DATE OF MAILING FEBRUARY 11, 1998

59-98

IN THE MATTER OF THE TENURE	:	
HEARING OF JACQUELINE ALLEN,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	

FEBRUARY 11, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11546-96
AGENCY DKT. NO. 520-11/96

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,
Petitioner,
v.
IN THE MATTER OF THE TENURE HEARING OF JACQUELINE ALLEN,
Respondent.

Gregory G. Johnson, Esq., for petitioner

Nancy Iris Oxfeld, Esq., for respondent
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: December 30, 1997 Decided: January 20, 1998

BEFORE **ARNOLD SAMUELS**, ALJ:

In August 1996 the petitioner, School District of the City of Newark, Essex County, filed a certificate of determination and written charges against the respondent, pursuant to *N.J.S.A.* 18A:6-10 and *N.J.A.C.* 6:24-5.1 *et seq.*, seeking her dismissal

from her tenured position, because of unbecoming conduct or other just cause. The respondent subsequently filed an answer with the Commissioner of Education.

On November 29, 1996 the Commissioner transmitted the matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to 13.

A prehearing conference was held at the OAL on February 6, 1997, and a prehearing order was entered, defining and limiting the issues to be decided, fixing hearing dates, providing for discovery and regulating other procedural aspects of the forthcoming hearing, which was scheduled for four days beginning on December 18, 1997.

Prior to the scheduled hearing dates, counsel advised that the parties had reached a settlement. A written agreement, containing the terms of settlement in full, was signed by the parties and their attorneys in July and August 1997. A copy of the agreement was subsequently filed in the OAL.

The settlement agreement specifically refers to an acknowledgment by the respondent that she has been advised of the duty of the Commissioner of Education, pursuant to *N.J.A.C.* 6:11-3.6(a)(1), to refer the matter to the State Board of Examiners for possible action regarding her teaching certificates. This acknowledgment by Ms. Allen indicates that the settlement terms comport with the *Cardonick* standards for the review of settlements in tenure matters. *In Re Cardonick*, decided by the *Comm. of Educ.*, (April 7, 1982), Aff'd, *St. Bd. of Educ.*, (April 6, 1983), 1990 *S.L.D.* 842, 846.

The respondent further states, in the agreement, that she intends to voluntarily relinquish any teaching certificates she now possesses, in connection with her retirement from the petitioner's school district and the automatic resignation of her position. A copy of the settlement agreement is attached hereto and made a part hereof.

The parties have agreed to settle this matter, in accordance with the attached agreement. I have reviewed the record and the settlement terms and I **FIND**:

1. The parties have voluntarily agreed to the settlement, as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

3. The agreement conforms with the standards of *In Re Cardonick, supra.*

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

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

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

January 20, 1998
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

1/23/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 26 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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OFFICE OF ADMIN. LAW

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Gregory G. Johnson, Esq.
17 Academy Street, Suite 208
Newark, New Jersey 07102
201-642-0001
Attorney for the Newark Public Schools

IN THE MATTER OF THE TENURE HEARING OF JACQUELINE ALLEN,

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.

BEFORE THE COMMISSIONER OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW

11546-96

OAL Docket No. EDU ~~11677-96~~
Agency Ref. No. 520-11/96

STIPULATION OF SETTLEMENT

This Agreement made this on April ___, 1997, by and between the parties, petitioner State-Operated School District of the City of Newark ("District"), and respondent Jacqueline Allen, a tenured teacher, residing at 1640 Columbus Place, Rahway, New Jersey 07065.

WHEREAS, Ms. Allen is a tenured teacher employed by the District;

WHEREAS, on or about August 29, 1996, tenure charges were filed against Ms. Allen based upon corporal punishment, unjustified physical contact with pupils; and Insubordination;

WHEREAS, on October 30, 1996, the State District Superintendent acted to certify the charges against Ms. Allen, and suspended her for a 120 day suspension without pay pending a hearing pursuant to *N.J.S.A.* 18A:6-14.

WHEREAS, on or about November 20, 1996, Ms. Allen's attorney filed an Answer denying the Charges with the Commissioner of Education; and

WHEREAS, by letter dated August 8, 1996, the Bureau of Retirement, Division of Pensions, advised that the Board of Trustees approved Ms. Allen's retirement, effective February 1, 1997; and

WHEREAS, in light of Ms. Allen's retirement, the nature of charges, and potential f. protracted litigation, it is in the best interest of the parties to resolve the charges before the Commissioner of Education;

NOW THEREFORE BE IT RESOLVED, the parties hereby stipulate and agree as follows:

1. The District agrees to withdraw the tenure charges in light of Ms. Allen's retirement approval which constitutes an automatic resignation from the District.

2. Ms. Allen specifically acknowledges that she has been advised of the duty of the Commissioner of Education pursuant to *N.J.A.C.* 6:11-3.6(a)(1) and *In re Cardonick* concerning referral to the State Board of Examiners for possible action regarding Ms. Allen's teaching certification. Ms. Allen represents that she intends to voluntarily relinquish any teaching certificates she now possesses.

3. Ms. Allen expressly waives and releases the District from any and all claims to salary or benefits in return for the District's compliance with this agreement. Ms. Allen agrees never to seek employment with the District in the future.

4. The parties respectively acknowledge that each has had ample opportunity to seek independent legal counsel, financial or other advice regarding this Agreement, and that each is signing this Agreement freely and voluntarily, without coercion, duress or pressure from the other party.

5. This Agreement constitutes the full Agreement between the parties.

6. By entering this Agreement, each party releases and discharges the other with respect to all claims or rights that either party may have against the other. This includes all claims, including those of which either party is not aware and those not mentioned herein. The releases by each party apply to all claims resulting from anything which has happened up to now. It specifically includes, without limitation, all claims which Ms. Allen may have respecting tenure, discrimination on any basis, rights under any collective bargaining agreement, disability payments, sick leave, salary or any other matter pertaining to her employment.

7. This Agreement is subject to approval by the State District Superintendent, Office o. Administrative Law, and Commissioner of Education.

FOR THE EMPLOYEE

Jacqueline E. Allen

Jacqueline Allen

Dated: 7/22/97

Nancy I. Oxfeld, Esq.
Attorney for Ms. Allen

Dated: 7/22/97

FOR THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK

Beverly L. Hall

Dr. Beverly L. Hall

Dated: 8/12/97

Gregory G. Johnson

Gregory G. Johnson, Esq.

Dated: 7/31/97

OAL DKT. NO. EDU 11546-96
AGENCY DKT. NO. 520-11/96

IN THE MATTER OF THE TENURE	:	
HEARING OF JACQUELINE ALLEN,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	

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

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

This matter will be transmitted to the State Board of Examiners for action as it deems appropriate.

COMMISSIONER OF EDUCATION

FE BRUARY 11, 1998
DATE OF MAILING FEBRUARY 11, 1998

60-98

60-98

J.E., on behalf of minor child, B.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

FEBRUARY 11, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4831-97

AGENCY DKT. NO. 205-6/97

J.E., ON BEHALF OF MINOR CHILD, B.L.,

Petitioner,

v.

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

Respondent.

Sidney I. Sawyer, Esq., for petitioner (Sawyer, Gale & Laughlin, attorneys)

Martin M. Barger, Esq., for respondent (Reussile, Mausner, Carotenuto, Barger & Steel, attorneys)

Record Closed: January 20, 1998 Decided: January 21, 1998

BEFORE **KATHRYN A. CLARK**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on June 20, 1997, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

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

Jan 21, 1998
DATE

Kathryn A Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

1/23/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 26 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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1998 JAN 20 A 9:50

REUSSILLE, MAUSNER, CAROTENUTO, BARGER & STEEL
365 BROAD STREET
P.O.BOX 580
RED BANK, NEW JERSEY 07701-0580
(732)741-1800
Attorneys for Respondent

BEFORE THE COMMISSIONER OF
EDUCATION OF NEW JERSEY
OAL DOCKET NO. EDUOS 04831-97S
AGENCY REF. NO. 205-6/97

J.E. ON BEHALF OF MINOR CHILD, B.L.	)	
Petitioners,	)	
vs.	)	STIPULATION OF SETTLEMENT
HOLMDEL TOWNSHIP BOARD OF EDUCATION, Monmouth County,	)	
Respondent.	)	

This matter being opened to the Court by Sawyer, Gale & Laughlin, Esqs., Attorneys for Petitioners and Reussille, Mausner, Carotenuto, Barger & Steel, Esqs., Attorneys for Respondent, and the parties having settled the matter, and the parties wishing to memorialize their settlement in this Stipulation which shall become a part of the record in this proceeding, it is hereby Agreed and Stipulated as follows:

1. Petitioners shall pay the sum of $3,500.00 to Holmdel Township Board of Education in full and final settlement of all claims between the parties.

2. Payments shall be as follows:

February 15th	-	$500.00
March 15th	-	$300.00
April 15th	-	$300 00
May 15th	-	$300.00
June 15th	-	$300.00
July 15th	-	$300.00
August 15th	-	$300.00
September 15th	-	$300.00
October 15th	-	$300.00
November 15th	-	$300.00
December 15th	-	$300.00

3. All payments shall be made by Petitioners to MARTIN M. BARGER, ESQUIRE, Attorney for Respondent, at 365 Broad Street, P.O.Box 580, Red Bank, New Jersey 07701-0580.

4. In the event that any payment is more than ten (10) days late the entire amount shall become due and payable immediately, with interest at the Superior Court of New Jersey prevailing rate and Respondent shall be permitted to commence all collection remedies available to it.

5. Neither party admits guilt or wrong doing in any manner whatsoever.

SAWYER, GALE & LAUGHLIN
Attorneys for Petitioners

BY: _____
SIDNEY I. SAWYER
Member of the Firm

Dated: January 12th, 1998.

REUSSILLE, MAUSNER, CAROTENUTO
BARGER & STEEL
Attorneys for Respondent

BY: _____
MARTIN M. BARGER
Member of the Firm

Dated: January 16, 1998.

OAL DKT. NO. EDU 4831-97
AGENCY DKT. NO. 205-6/97

J.E., on behalf of minor child, B.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN-SHIP OF HOLMDEL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

FEBRUARY 11, 1998
DATE OF MAILING FEB RUARY 11, 1998

63-98

EDU #5959-96
C # 264-98
C # 403-98L
SB # 63-98

T.B.W., on behalf of minor child, A.W.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, June 18, 1998

Decision on motion by the Commissioner of Education, September 17, 1998

For the Petitioner-Appellant, Marshall, Wooden, Corbett & Davenport (Renata Wooden, Esq., of Counsel)

For the Respondent-Respondent, Gaccione, Pomaco & Beck (Frank Pomaco, Esq., of Counsel)

In a petition filed with the Commissioner of Education, T.B.W. (hereinafter "petitioner") challenged the determination by the Board of Education of the Township of Belleville (hereinafter "Board") in April 1996 that her daughter, A.W., who had attended school in that district since September 1993, was not entitled to a free public education in the district. The petitioner contended that she had separated from her husband in 1993 and had moved out of their marital home in East Orange with A.W. to live with her cousin, F.B., in Belleville. The Board filed a counterclaim seeking tuition for the period of A.W.'s attendance in the district.

In his Initial Decision, the Administrative Law Judge ("ALJ") recommended that the petitioner be directed to reimburse the Board for tuition since September 1993, concluding that she had failed to demonstrate that A.W. was domiciled in Belleville during the period relevant to this matter. The ALJ found the Board's witnesses to be "fully credible" and did not "consider the testimony to the effect that T.B.W. and A.W. actually resided...in Belleville during the period in question to be credible." Initial Decision, slip op. at 16. The ALJ observed that "[t]he fact that A.W. was observed 'on numerous occasions' boarding a bus which goes to East Orange casts doubt on T.B.W.'s claim." Id. The ALJ found that the petitioner:

> has not established that she actually moved from East Orange to Belleville. Additionally, T.B.W. did not change her address for almost all purposes from East Orange to Belleville, and she conceded that she changed the address on her driver's license in 1996 for the specific purpose of creating proof of residency in Belleville. These circumstances indicate that T.B.W. did not intend to change her domicile to Belleville or to abandon her old domicile.

Id.

The Commissioner adopted the findings and conclusions of the ALJ and directed the petitioner "to reimburse the Board a total of $31,023.93, representing tuition through the first half of the 1997-98 school year, plus a sum of $44.46 per school day from the first day of the second semester until the date of this decision, or, if later, her removal from the District." Commissioner's Decision, slip op. at 22. Noting that the record before him did not include transcripts of the hearing held in the Office of Administrative Law, the Commissioner found he had no basis on which to challenge or otherwise disturb the factual findings and credibility determinations made by the ALJ, and he stressed that the ALJ had determined that the petitioner's testimony with regard to her

living in Belleville was not credible. The Commissioner subsequently denied a motion filed by the petitioner for a stay of his decision.

The petitioner filed the instant appeal to the State Board.

Although the petitioner also filed a motion for a stay with the State Board, she failed to correct deficiencies in the motion and apparently has abandoned it.[1] Hence, we deny that motion.

After a thorough review of the record, including the transcripts of the hearing held in the Office of Administrative Law, which were not available to the Commissioner, we affirm the decision of the Commissioner as clarified herein.

The law is clear that public schools shall be free to "[a]ny person who is domiciled within the school district." N.J.S.A. 18A:38-1(a). As the ALJ correctly observed, the petitioner had the burden of demonstrating by a preponderance of the credible evidence that she was domiciled in Belleville during the relevant period. N.J.S.A. 18A:38-1(b)(2). Due consideration should be afforded to the fact that the ALJ had the opportunity to observe the witnesses, see Quinlan v. Bd. of Ed. of North Bergen Tp., 73 N.J. Super. 40, 50 (App. Div. 1962), and we are required to give due regard to the ALJ's ability to judge the witnesses' credibility, Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587 (1988), and to "recognize and give due weight to the ALJ's unique position and ability to make demeanor based judgments," Whasun Lee v. Board of

[1] The petitioner failed to file a supporting brief with her motion or 17 copies of the Commissioner's decision denying a stay, as required by the regulations governing appeals to the State Board, N.J.A.C. 6:2-1.1 et seq. (now codified at N.J.A.C. 6A:4-1.1 et seq.). The petitioner was advised of such deficiencies and, when she failed to correct them, was notified that her motion was being referred to the Legal Committee for dismissal as a result of such failure.

Education of the Township of Holmdel, Docket #A-5978-98T2 (App. Div. 2000) [subsequent history omitted], slip op. at 14.

Our review of the transcripts reinforces the Commissioner's determination. Mario Pettineo, Jr., a crossing guard in Belleville, alerted Frank Montagna, a member of the Belleville Board, that he had seen a student boarding a bus to East Orange after school on numerous occasions. Tr. 2/3/98, at 6-9, 14, 30. Pettineo testified that the student was "always going away from the Township [after school], towards Bloomfield or East Orange on that 92 bus," id. at 7, and that "she kept getting on the bus every time I saw her." Id. at 10. He indicated that he saw her waiting for the bus to East Orange "[t]wo, three times a week" and that it was "[s]ometimes on a Monday, sometimes on a Tuesday, Thursday, Friday." Id. at 14. Montagna subsequently observed the student, who was pointed out to him by Pettineo, boarding that bus on three consecutive days, Wednesday, March 20 through Friday, March 22, 1996, and he followed the bus in his car until it left Belleville. Id. at 45-47, 62-63, 66. On the third day, he was accompanied by Dr. Joseph Ciccone, the Assistant Superintendent in the district. Id. at 47, 66. Dr. Ciccone followed the bus in a van and saw the student get off in East Orange and enter a house which was identified as being owned by the petitioner and her husband. Tr. 2/2/98, at 101-102. At the hearing, Dr. Ciccone identified the student as A.W. Id. at 102.

The petitioner conceded that she did not change her address from East Orange to Belleville on any documents until after the Board took action to disenroll A.W. in April 1996. Id. at 62-64. The record reveals that the petitioner did not report a change of address to her employer or to the post office and that she continued to use her house in

East Orange as her address for all purposes, including her driver's license, car insurance and tax returns, until April 1996.[2]

After reviewing the transcripts of the hearing, and giving due weight to the ALJ's unique position to make demeanor-based judgments, we find no basis for disturbing the ALJ's credibility findings. Our review of the record leads us to agree with the conclusion reached by the ALJ and adopted by the Commissioner that the petitioner has not demonstrated that she was domiciled in Belleville during the period at issue. We stress in so doing, however, that our decision is in no way predicated on the ALJ's statement that it is "difficult to believe that T.B.W. would remain in the living arrangement as described for a period of years when she owned her own home [jointly with her husband] nearby." We are unwilling to base a determination of domicile upon such speculation. Moreover, although the petitioner contends that A.W. spent weekends in East Orange with her father, the record demonstrates that she was taking the bus back to East Orange after school even during the week. See p. 4 infra.

Accordingly, as clarified herein, we affirm the decision of the Commissioner.

November 6, 2002

Date of mailing NOV 08 2002

[2] Although the petitioner provided the Board with a lease agreement in August 1993 between herself and her cousin, exhibit J-1, in evidence, she subsequently admitted that she did not have a lease arrangement with her cousin and that the document had been created solely for purposes of providing a proof of residency to the district. The petitioner pleaded guilty in Belleville Municipal Court to violation of a local ordinance as a result of providing false information to a public official.

(SB) 64-98

DHPL #255-98
SB # 64-98

IN THE MATTER OF THE DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF W.M.R. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Assistant Commissioner of Education, June 12, 1998

For the Petitioner-Appellant, W.M.R., pro se

On June 12, 1998, the Assistant Commissioner of Education, Executive Services, issued a letter decision in which he disqualified W.M.R. (hereinafter "appellant") from school employment in the State after a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1 revealed that appellant had several convictions for disqualifying offenses.

On July 7, 1998, appellant, acting pro se, filed a notice of appeal with the State Board of Education.

Pursuant to N.J.A.C. 6:2-1.11(a), appellant's brief in support of his appeal was due on July 27, 1998, 20 days after he filed his notice of appeal. Appellant, however, failed to file a brief by that date. By letter dated August 13, 1998, the Director of the State Board Appeals Office notified appellant of his failure to file a brief and informed him that this matter was being referred to the Legal Committee for consideration of his failure to perfect the appeal.

OCTOBER 7, 1998

Appellant has still failed to file a brief in support of his appeal, more than two months after the deadline for such filing. Nor has he offered any explanation for his failure to file a brief or requested an extension of time for such filing. As a result, we dismiss the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a). See Paszamant v. Board of Education of the Borough of Highland Park, decided by the State Board, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993).

October 7, 1998

Date of mailing OCT 09 1998

66-98

J.D. AND E.D., on behalf of minor daughter, B.D.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parents contested suspension of minor daughter, B.D., alleging that the Board violated its own policy and acted arbitrarily when it imposed a one day out-of-school suspension instead of an in-school suspension against B.D. for her use of profanity during a verbal altercation with another student.

ALJ granted summary decision to the Board as there were no contested facts between the parties. B.D. admitted violating the well-documented Board policy. ALJ concluded that the Board demonstrated that there were no genuine issues of fact and that it was entitled to prevail as a matter of law. Petition was dismissed.

Commissioner adopted determination of ALJ as his own, noting that petitioners failed to show that there was a genuine issue which could only be determined in an evidentiary proceeding.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING
MOTION FOR SUMMARY JUDGMENT
OAL DKT. NO. EDU 6009-97
AGENCY DKT. NO. 204-6/97

J.D. AND E.D., ON BEHALF OF
MINOR DAUGHTER, B.D.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOMS
RIVER REGIONAL SCHOOL DISTRICT,
OCEAN COUNTY,
Respondent.

J.D., and **E.D.**, parents of **B.D.**, petitioners, *pro se*

Christine M. Faustini, Esq., for respondent (Gilmore & Monahan, attorneys)

Record Closed: November 19, 1997 Decided: December 29, 1997

BEFORE **STEVEN C. REBACK**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On June 10, 1997, the petitioners J.D. and E.D., on behalf of their minor child, B.D., filed a petition before the Commissioner of Education challenging respondent's (Toms River) policy on

suspensions and expulsion. Specifically, petitioners challenge the decision arrived at by Toms River imposing a one day out of school suspension against their child for her use of profanity.

On June 30, 1997, Toms River submitted its answer to the petition of appeal arguing that the principal had determined that B.D. utilized profane language and, pursuant to a reasonable application of *N.J.S.A.* 18A:37-2, imposed a one day suspension. Toms River further argues that the Board's policy is reasonable, that all students and parents are on notice of those policies and that, therefore, the petition of appeal should be dismissed.

Thereafter, the matter the transmitted to the Office of Administrative Law (OAL) by the Commissioner of Education on July 7, 1997, as a contested case, pursuant to *N.J.S.A.* 52:14B-1 and *N.J.S.A.* 52:14F-1 to -13. On August 13, 1997, Toms River submitted its moving papers seeking summary decision in the matter. Thereafter, petitioner submitted its own motion for summary decision and various follow-up briefs were submitted. The final brief was submitted by the petitioner in reply to respondent's motion for summary decision and received by my office on November 19, 1997, the date on which the record in these proceedings closed.

THE FACTS

Unless otherwise noted the following is a substantially uncontradicted narrative of the operative facts in these proceedings derived from the moving papers. Accordingly, **I FIND**:

B.D., the petitioner, is a student at Tom's River East High School. On April 9, 1997, she had received threatening telephone calls at home from another student, T.B. Based upon these threats, B.D.'s mother wrote a note to Mr. Kohl, the school's principal, regarding the behavior of the other student and the threats that her daughter received. It stated that the other students involved (T.B. and others implicated in the telephone threats) were bullies seeking to provoke an incident. It directed Mr. Kohl to "get these people under control." This note was presented first thing in the morning on April 10, 1997, by B.D. to Mr. Azzolini, the administrator present.

B.D. was involved in an altercation with the other student, T.B., later in the day on April 10, 1997. This altercation involved the use of profanity by both students (each apparently used the epithet, "F--king whore." The students were sent to the office to address the matter. B.D. and her parents attended a conference with Mr. Kohl the following day, April 11, 1997, where B.D. admitted to the use of profanity on her part. Mr. Kohl found that the prior history between the two students did not warrant B.D.'s language, which was a direct violation of school policy. He then imposed a one day out-of-school suspension against B.D. She appealed this suspension to the Department of Education, which transferred the matter as a contested case to the OAL. The suspension has been stayed pending the appeal.

ANALYSIS

Summary decision may be granted at the Office of Administrative Law "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." *N.J.A.C.* 1:1-15.5. This evidence should be considered in the light most favorable to the non-moving party. *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 523 (1995). The essential question is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one sided that one party must prevail as a matter of law." *Id.* at 533. The rationale behind the procedure is clear. Summary decision is:

> designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion, clearly shows not to present any genuine issue of material fact requiring disposition at a trial. *Judson v. Peoples Bank and Trust Co. of Westfield*, 17 *N.J.* 67, 74 (1954).

In the present matter, summary decision may properly be granted to Toms River. The petitioner has presented no issues of fact requiring disposition at a hearing. There are no contested facts between the parties, and there exists only one possible outcome in the matter. Based upon the papers as submitted, the respondent-school should prevail as a matter of law.

The petitioner admits violating the well-documented and publicized school policy against the use of profanity. Her only defense is that she gave prior warning to the school that such an incident may likely occur, in that T.B. was provoking her. This defense lacks legal merit.

The fact that an individual gives an authority notice that a violation of policy may occur does not excuse that individual from liability for the violation when it actually occurs. The fact remains that the student violated an explicit policy of the school with full knowledge and control of her actions. Only in an extreme instance of self-defense would a student be excused from the voluntary violation of policy. Such is not the case here, where the altercation involved words of profanity. The petitioner could have chosen several alternative courses of action, including ignoring the other student and remaining silent, leaving the scene, or seeking intervention from a teacher or administrator. This is not an instance where there existed no path of retreat and the individual had no choice but to physically confront the other student. To the contrary, this was a verbal exchange where free will was exercised by the petitioner in her choice of words.

In *L.B. v. Board of Educ. of the City of Elizabeth*, 95 *N.J.A.R.* 2d (EDU) 110, the petitioner-student was expelled for brandishing a weapon and threatening other students. He attempted to assert a self-defense argument, but the ALJ noted that the student "could have avoided confrontation entirely by the simple expedient of retreat, that is, by leaving the scene and going elsewhere. Confrontation was of his own making." *Id.* at 114. Likewise, D.B. could have avoided the use of profanity by remaining silent, leaving the presence of the other student, or seeking out a teacher or administrator for intervention. The choice not to do any of these and resort to the use of profanity was her own. Thus, she will be held responsible for her use of profanity in violation of school policy. The fact that she may have been provoked is of no consequence unless, as stated above, she was left with no alternative courses of action and was forced to violate school policy for her own safety.

The prohibition of profanity is entirely within the power of the local school board. In *J.G. v. Lakewood Board of Education*, 93 *N.J.A.R.*2d (EDU) 433, the Commissioner adopted the initial decision of the ALJ who held that a three-day suspension of a student who used profane language was appropriate. While noting that the student has a right to a free public school

education, the ALJ stated that this right is not absolute. "The exercise of the right is subject to [the student's] adherence with the rules and regulations of the school. *N.J.S.A.* 18A:37-1." *Id.* at 434.

Standard Of Review

The applicable standard of review at this OAL hearing is whether the local school board's decision was arbitrary, capricious or unreasonable. However, in making this decision the ALJ is not limited to the review of the record below. A hearing may be held where testimony is adduced and evidence considered.

In *L.B. v. Board of Educ., supra*, ALJ Ospenson stated that the applicable standard of review "is whether petitioner shall have established by preponderance of credible evidence that action of the Board in expelling [the student] was improper, that is, patently arbitrary, without rational basis or induced by improper motive." *Id.* at 111. The decision cites *Kopera v. Board of Educ. of West Orange*, 60 *N.J. Super.* 288 (App. Div. 1960), for the proposition that it is a well-established rule that action of a local school board "which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives." *Id.* at 294 (citations omitted).

In *K.O.H. v. Edison Township Bd. of Educ.*, 95 *N.J.A.R.*2d (EDU) 275, ALJ Miller coherently discussed the applicable standard of review with regard to a student expulsion.

In assessing the propriety of the instant expulsion, the scope of review of the Commissioner of Education is circumscribed. As noted by Administrative Law Judge Metzger in *M.G. v. Monmouth Regional High School Bd. of Educ.*, 91 *N.J.A.R.*2d (Vol. 4) 38, 40 (Education), adopted in part, rejected in part, State Bd. of Educ., 92 *N.J.A.R.*2d (Vol. 4) 364 (Education): "[Board] decisions in this matter carry a presumption of validity and [it is the] petitioners who must show that the actions taken were arbitrary and unreasonable, if they are to be disturbed." In adopting the administrative law judge's decision, the Commissioner of Education likewise noted the limited scope of review: " * * * it is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards." 91 *N.J.A.R.*2d (Vol. 4) at 42, quoting *Boult v. Board of Education of the City of Passaic*, 1939-49 *S.L.D.* 7 (1946), *aff'd*, State Board of Education 15, 135 *N.J.L.* 329 (Sup. Ct. 1947), *aff'd*, 136 *N.J.L.* 521 (E. & A. 1948).

Among the many judicial decisions expressing the same concepts are: *Quinlan v. Board of Education of North Bergen Township*, 73 *N.J. Super.* 40, 46-7 (App. Div. 1962); *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 294 (App. Div. 1960); *Thomas v. Morris Township Board of Education*, 89 *N.J. Super.* 327, 332 (App. Div. 1965); *aff'd*, 46 *N.J.* 581 (1966); and *Boyle v. Riti*, 175 *N.J. Super.* 158, 166 (App. Div. 1980). In *Boyle*, the court declared:

It is well established that a presumption of reasonableness attaches to the action of an administrative agency and the party who challenges the validity of that action has the burden of showing that it was arbitrary, unreasonable or capricious. . . . Also, where the administrative record discloses a reasonable basis for findings and accordant administrative action, our duty is ordinarily to uphold such action. [175 *N.J. Super.* at 166 (citations omitted).]

There are, of course, numerous administrative law cases to the same effect. These include *Boult, supra; M.G. v. Board of Education of West Deptford*, 83 *S.L.D.* 339, 354 (Commissioner of Education cannot substitute his judgment for that of the local board of education and can only determine whether it had a reasonable basis for its conclusion); and *K.L. v. Board of Education of Matawan/Aberdeen High School District*, 91 *N.J.A.R.*2d (Vol. 4) 74, 76 (Education)(discretionary action of local school board may

> not be upset, unless patently arbitrary, without rational basis, or induced by improper motives).
>
> The judicial rationale for this deference to local boards of education appears to be twofold: (1) the ability of the local board of education as the fact-finder in the first instance to see and hear the witnesses and determine credibility, and (2) the expertise of the local board with respect to its knowledge of local conditions and circumstances.
>
> [*K.O.H. v. Edison Township Board of Education*, 95 *N.J.A.R.*2d (EDU) 275, 276-77.]

The Commissioner of Education adopted Judge Miller's decision in full, and noted in this adoption that he "concurs with the findings and conclusions of the Administrative Law Judge that petitioner has not met the burden of establishing that the Board's action in expelling [the student] was arbitrary, capricious, or unreasonable." *Id.* at 278. Additionally, the State Board of Education has affirmed the Commissioner's decision, at 96 *N.J.A.R.*2d (EDU) 445.

In addition to the expulsion cases cited above, there are numerous administrative decisions involving school suspensions that employ the arbitrary, capricious or unreasonable standard of review. In *R.L. v. Board of Educ. of Kingsway Reg. High School Dist.*, 95 *N.J.A.R.*2d (EDU) 296, a student's disciplinary penalty was modified from an expulsion to a long-term suspension, and was reviewed under the arbitrary, capricious or unreasonable standard. In that case, ALJ Thomas wrote:

> Statutory provision for suspension and expulsion is found in *N.J.S.A.* 18A:37-1 and 37-2. The authority of a board of education to act is set forth in language appropriate for this matter in *Thomas v. Morris Township Bd. of Educ.*, 89 *N.J. Super.* 327, 332 (App. Div. 1965), [*aff'd* 46 *N.J.* 581 (1966)], where it stated: "When such a body acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable. The agency's factual determinations must be accepted if supported by substantial credible evidence." [*R.L. v. Board of Educ. of Kingsway, supra,* at 300.]

The Commissioner, in his final decision, noted that the petitioner had filed an exception to ALJ Thomas' initial decision. The exception stated that ALJ Judge Thomas, in deciding that the Board's action wasn't arbitrary, capricious or unreasonable, didn't comprehensively and objectively weigh and evaluate the testimony of numerous witnesses. The Commissioner, after a careful and independent review of the record, concurred with the findings of fact and conclusions of law of ALJ Thomas, and adopted the decision in its entirety.

In *F. McB. v. Board of Educ. of the Township of Washington*, 96 *N.J.A.R.*2d (EDU) 298, ALJ Campbell upheld the local board's suspension of a student from school activities as a reasonable exercise of the board's authority. He stated, "The actions of the board and its agents were reasonable in that the application of discipline in this matter was directly related to the good order and best interest of the school and school activities." *Id.* at 306. This decision was adopted by the Commissioner, who stated that "the Board's application of discipline was rationally related to the good order and best interest of the school and to the particular conduct exhibited by [the suspended student]. *Id.*

In *Janine Barna v. Irvington Bd. of Educ.*, 97 *N.J.A.R.*2d (EDU) 345, the Commissioner of Education adopted ALJ Klinger's initial decision affirming the suspension of a student for assaultive conduct. The Commissioner stated, "It is axiomatic that when a local board of education acts within its authority, its decision is entitled to a presumption of correctness and may not be disturbed absent a finding that it was arbitrary, capricious or unreasonable." *Id.* at 347.

In reaching a decision on whether the board's actions were arbitrary, capricious, or unreasonable, an ALJ may hear testimony and receive evidence. The standard of review is not limited to the record created below. *N.J.A.C.* 6:24-1.10 states that when the Commissioner transfers an education matter to the OAL for a hearing, the conduct of the proceedings shall be governed by the Uniform Administrative Procedure Rules of Practice. Thus, an ALJ may hear witnesses, receive evidence and utilize all other procedures as described in *N.J.A.C.* 1:1. Therefore, in reaching a decision as to whether the board's actions were arbitrary, capricious or unreasonable, the ALJ is not limited to reviewing the record below.

Based upon the foregoing, I **CONCLUDE** that respondent has demonstrated that there are no genuine issues of fact and that it is entitled to prevail as a matter of law. The substantial credible evidence in the record does not support a finding that Toms River's decision to suspend the petitioner for one day was arbitrary, capricious or unreasonable. Petitioners argument that she was provoked is an inadequate defense in that it ignores the fact that she could have avoided the use of profanity in several ways but chose not to do so. The fact that she warned the school's administration of the possibility of an altercation in no way relieves her of her liability for the voluntary violation of school policy.

For the foregoing reasons it is therefore **ORDERED** that the appeal of the petitioner from the decision by the respondent to impose a one day out of school suspension on petitioner be and is hereby **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

12/29/99
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

Dec. 31, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 8 1998
DATE

OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 6009-97
AGENCY DKT. NO. 204-6/97

J.D. AND E.D., on behalf of minor daughter, B.D.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioners' exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4.

Petitioners' exceptions recast their arguments as raised before the Administrative Law Judge (ALJ), essentially contending that the Board violated its own policy by requiring that B.D. serve an out-of-school suspension, rather than an in-school suspension, when respondent's policy provides, *inter alia,* that, "[t]he Board directs the administration to arrange facilities for in-school suspension whenever possible.***" (Board's Reply to Petitioners' Opposition to Respondent's Motion for Summary Judgment, Exhibit A at p. 3) Petitioners assert that the Board's "violation" of its policy without justification, and the ALJ's tolerance of such, constitutes a "double standard." (Petitioners' Exceptions at p. 3) Petitioners further argue that

> The inaction of the school to protect B.D. should not be glazed over. A safe environment must be provided by the schools when it is within their power; in this case they were given verbal and written warning of the situation, yet failed to act upon it. (*Id.* at p. 1)

Thus, petitioners conclude that a hearing in this matter is due, "[i]n view of the lack of evidence to support the modification of [the Board's] own policy, and the inaction of the schools to provide a safe environment for the Petitioners[']' daughter ***." (*Id.* at p. 5)

Upon careful and independent review, the Commissioner concurs with the ALJ that the Board's motion for summary decision may properly be granted. Even accepting as true the facts alleged by petitioners, the Commissioner finds that they have failed to meet their burden of proving that the Board's decision to suspend B.D. for one day, out of school, is arbitrary, capricious or unreasonable. In this regard, the Commissioner underscores the ALJ's observation that B.D.'s use of profanity was the result of her own exercise of free will in her choice of words, and may not be viewed as an act of "self-defense," deserving of a lesser penalty. (Initial Decision at p. 4)

As for petitioners' contention that the Board violated its own policy by issuing an out-of-school suspension, rather than an in-school suspension, the Commissioner notes that the Board policy provides for such in-school suspension, *whenever possible.* (Board's Reply to Petitioners' Opposition to Respondent's Motion for Summary Judgment, Exhibit A at p. 3) As the Board states

> ***Due to the complications involved in arranging an in-school suspension, which include the necessity of obtaining lesson plans and school assignment[s] from the student's teachers, the minimum in-school suspension which will be imposed is three (3) days. This three (3) day minimum in-school suspension is a uniform practice used throughout the Toms River Regional School system. ***Mr. Kohl, therefore, did not violate school policy by not imposing an in-school suspension, as a one-day in-school suspension is not possible to arrange.*** *(Id.* at p. 3*)*

Notwithstanding petitioners' plea that a hearing is due, the Commissioner recognizes "[i]t is well-established that where no disputed issues of material fact exist, an administrative agency need not hold an evidential hearing in a contested case." *Frank v. Ivy Club*, 120 *N.J.* 73, 98, citing *Cunningham v. Dept. of Civil Service*, 69 *N.J.* 13, 24-25 (1975). "Moreover, disputes as to the

conclusions to be drawn from the facts, as opposed to the facts themselves, will not defeat a motion for summary judgment." (emphasis added) Contini v. Board of Education of Newark, 96 *N.J.A.R.* 2d (EDU) 196, 215, citing *Lima & Sons, Inc.* v. *Borough of Ramsey*, 269 *N.J. Super.* 469, 478 (App. Div. 1994). Summary disposition in favor of the Board is, therefore, appropriate, inasmuch as petitioners have failed to show "that there is a *genuine issue* which can *only* be determined in an evidentiary proceeding."* (emphasis added) (*N.J.A.C.* 1:1-12.5(b)) Although petitioners no doubt disagree with the Board's action in this matter, the Board has the authority to establish a policy which prohibits the use of profanity, as well as a procedure for limiting in-school suspensions to periods of three days or more, and there has been no showing that the suspension issued in this matter was inappropriate, particularly where petitioners admit to their daughter's involvement in a "verbal altercation." (Petitioners' Brief in Reply to Respondent's Motion for Summary Judgment at p. 1, paragraph 3)

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein, and amplified above. The Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* It is herein noted that petitioners' affidavit and brief filed in response to the Board's motion for summary judgment do not allege any specific facts which would indicate that there is a genuine issue sufficient to preclude a motion for summary judgment. *N.J.A.C.* 1:1-12.5(b)

FEBRUARY 17, 1998
DATE OF MAILING FEBRUARY 17, 1998

66-98

EDU #6009-97
C # 66-98
SB # 34-98

J.D. AND E.D., on behalf of minor daughter, B.D.,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT OCEAN COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 17, 1998

For the Petitioners-Appellants, Jill Dienemann and Eckart Dienemann, pro se

For the Respondent-Respondent, Gilmore & Monahan (Christine M. Faustini, Esq., of Counsel)

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

Wendel E. Daniels abstained.

Sam Podietz did not participate in deliberations in this matter.

July 1, 1998

Date of decision JUL 08 1998

(SB) 66-98

SBE #448-05/97-143
SB # 66-98

IN THE MATTER OF THE REVOCATION :
OF THE TEACHING CERTIFICATES OF :
NORMA POLLARD BY THE STATE :
BOARD OF EXAMINERS. :

STATE BOARD OF EDUCATION

DECISION

Decided by the State Board of Examiners, April 2, 1998

For the Petitioner-Respondent, Arlene G. Lutz, Deputy Attorney General (Peter Vemiero, Attorney General of New Jersey)

For the Respondent-Appellant, Norma Pollard, pro se

On April 2, 1998, the State Board of Examiners rendered a decision, mailed on June 9, 1998, in which it revoked the teaching certificates of Norma Pollard (hereinafter "appellant") for unbecoming conduct.

On July 8, 1998, appellant, acting pro se, filed a notice of appeal with the State Board of Education.

Pursuant to N.J.A.C. 6:2-1.11(a), appellant's brief in support of her appeal was due on July 28, 1998, 20 days after she filed her notice of appeal. Appellant, however, failed to file a brief by that date. By letter dated August 13, 1998, the Director of the State Board Appeals Office notified appellant of her failure to file a brief and informed her that this matter was being referred to our Legal Committee for consideration of her failure to perfect the appeal.

On August 27, 1998, appellant requested a 100-day extension in which to file a brief in support of her appeal "[a]s the result of filing PRO SE and extenuating

OCTOBER 7, 1998

circumstances." In response, the Director of the State Board Appeals Office notified appellant by letter dated August 27 that in order for the Legal Committee to consider her request, she was required to submit an affidavit explaining both why her appeal brief was not filed in a timely manner and why she had failed to request an extension for such filing until 30 days after the brief had been due. Appellant was further advised that her affidavit was required to provide an explanation of the extenuating circumstances supporting her request for an extension.[1]

On September 8, 1998, appellant filed an affidavit in which she indicated that:

> The request for a 100 day extension to file an appeal brief is due to the fact that I am unable to obtain an attorney. Therefore, the RESPONDENT is filing PRO SE. The format, and presentation of the brief requires skillful preparation.
>
> For over two years the respondent has been involved with the critical illness of a family member which has tremenously [sic] impacted upon her.

Appellant provided no details regarding her inability to obtain an attorney or the efforts she had made, if any, to obtain counsel. Nor did she offer any explanation for her failure to request an extension for filing her brief until a month after the filing deadline.

While we are mindful of appellant's pro se status, we conclude that she has not provided sufficient justification for granting her request. Appellant's inability to obtain legal counsel does not excuse her prolonged failure to request an extension for filing her brief. Consequently, we deny appellant's request for a 100-day extension and dismiss the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a). See

---

[1] Extensions for filing briefs "may be obtained for a period not to exceed an accumulated total of 30 days for all extensions in one case." N.J.A.C. 6:2-1.5(b). "Further extensions of time may be granted only by leave of the Legal Committee upon a showing of good cause." N.J.A.C. 6:2-1.5(d).

Paszamant v. Board of Education of the Borough of Highland Park, decided by the State Board of Education, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993).

October 7, 1998

Date of mailing OCT 09 1998

67-98

67-98 DHP

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF D.E.B.	:	DECISION
_____	:	

FEBRUARY 17, 1998

OAL DKT. NO. EDU 1340-97
AGENCY DKT. NO. DHP 99-96

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF D.E.B.	:	DECISION
	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on December 23, 1997, providing appellant ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the parties, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice, and appellant's disqualification from school employment is hereby affirmed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 17, 1998
DATE OF MAILING FEBRUARY 17, 1998

68-98

68-98

L.S., on behalf of minor, G.S.A.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

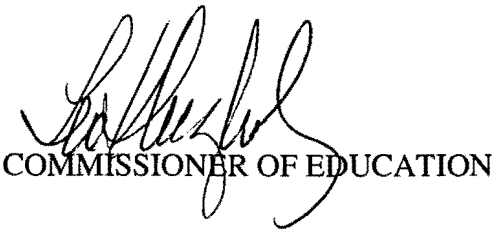
FEBRUARY 17, 1998

OAL DKT. NO. EDU 1749-97
AGENCY DKT. NO. 468-10/96

L.S., on behalf of minor, G.S.A.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on December 10, 1997, providing them ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the parties, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.*

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

FEBRUARY 17, 1998
DATE OF MAILING FEBRUARY 17, 1998

* The Commissioner notes that his decision herein does not preclude the Board from seeking tuition, as may be due and owing. For the period of time when G.S.A.N. was ineligible to attend school in the District.

69-78

69-98

HAMILTON TOWNSHIP LEARNING CONSULTANTS ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

OAL DKT. NO. EDU 2456-97
AGENCY DKT. NO. 561-11/96

HAMILTON TOWNSHIP LEARNING CONSULTANTS ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

FEBRUARY 19, 1998
DATE OF MAILING FEB RUARY 19, 1998

70-98

70-98

DONALD GARLANGER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF HUMAN SERVICES, ANCORA PSYCHIATRIC HOSPITAL,	:	DECISION
RESPONDENT.	:	
	:	

FEBRUARY 19, 1998

OAL DKT. NO. EDU 4719-97
AGENCY DKT. NO. 153-5/97

DONALD GARLANGER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF HUMAN SERVICES, ANCORA PSYCHIATRIC HOSPITAL,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

FEBRUARY 19, 1998

71-98

DOROTHY DE FAZIO,

PETITIONER,

V.

BOROUGH OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

FEBRUARY 19, 1998

OAL DKT. NO. EDU 10855-96
AGENCY DKT. NO. 526-11/96

DOROTHY DE FAZIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOROUGH OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

FEBRUARY 19, 1998
DATE OF MAILING FEBRUARY 19, 1998

72-98

72-98

JANE K. WENGER AND DEBORAH BUTTIGLIERI AND LINDA METAXAS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

FEBRUARY 19, 1998

OAL DKT. NOS. EDU 7334-96 and 7885-96 (Consolidated)
AGENCY DKT. NOS. 176-5/96 and 274-7/96 (Consolidated)

JANE K. WENGER AND DEBORAH BUTTIGLIERI AND LINDA METAXAS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal of this consolidated matter transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.



ASSISTANT COMMISSIONER OF EDUCATION

FEBRUARY 19, 1998
DATE OF MAILING FEBRUARY 19, 1998

(SB) 72-98

SBE #427-12/97-147
SBE #426-12/96-149
SBE #430-12/96-148
SBE #423-12/96-146
SB #72-98, #73-98, #74-98 and #75-98 (consolidated)

IN THE MATTER OF THE LICENSES OF TERESE CAPRIGLIONE,

AND

IN THE MATTER OF THE LICENSES OF FRED ENGLE,

AND

IN THE MATTER OF THE LICENSES OF PHILIP MARAVIGLIA, JR.,

AND

IN THE MATTER OF THE LICENSES OF PASQUALE RAIMONDO.

STATE BOARD OF EDUCATION

DECISION

Decided by the State Board of Examiners, June 18, 1998

For the Petitioner-Respondent, Arlene G. Lutz, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

For the Respondents-Appellants, Balk, Oxfeld, Mandell & Cohen (Sanford R. Oxfeld, Esq., of Counsel)

The decision of the State Board of Examiners to suspend respondents' teaching certificates for one year as a result of their convictions for Disturbing the Results of an Election is affirmed for the reasons expressed therein. In so doing, we reject respondents' contention that they were treated differently by the Board of Examiners than another staff member who had been convicted of the same offense. See In the Matter of the Licenses of Gregory Palumbo, decided by the State Board of Examiners,

October 9, 1997. A review of the Palumbo decision reveals that the Board of Examiners suspended Palumbo's teaching certificates for one year, the same suspension it imposed on the respondents herein.

Any difference between these matters lies in the fact that Palumbo waived indictment and pleaded guilty to the criminal charges, while the respondents were suspended without pay from their tenured positions in the State-operated District by operation of N.J.S.A. 18A:6-8.3 following their indictments[1] and subsequently suspended without pay for an additional seven months after the Commissioner of Education determined that the District had proven tenure charges of unbecoming conduct against them. The Commissioner also suspended Palumbo from his tenured position for seven months without pay. See In the Matter of the Tenure Hearing of Gregory Palumbo, decided by the Commissioner of Education, April 22, 1998.

We note in that regard that the only issue before us is the decision by the Board of Examiners to suspend respondents' teaching certificates for one year. Respondents did not file an appeal from the decision of the Commissioner. On the basis of the record before us, we can find no basis for disturbing the Board of Examiners' determination.

November 4, 1998

NOV 06 1998

Date of mailing _____

[1] N.J.S.A. 18A:6-8.3 provides that "[a]ny employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension...." Emphasis added.

73-98

73-98

ROY BEARDSLEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

FEBRUARY 19, 1998

OAL DKT. NO. EDU 7612-95
AGENCY DKT. NO. 224-6/95

ROY BEARDSLEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

FEBRUARY 19, 1998
DATE OF MAILING FEBRUARY 19, 1998

75-98

75-98

IN THE MATTER OF THE TENURE	:	
HEARING OF THOMAS KATSANOS,	:	
SCHOOL DISTRICT OF LENAPE	:	COMMISSIONER OF EDUCATION
REGIONAL HIGH, BURLINGTON	:	DECISION
COUNTY.	:	
	:	

FEBRUARY 20, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4015-97
AGENCY DKT. NO. 111-3/97

BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,
Petitioner,
v.
THOMAS KATSANOS,
Respondent.

Louis L. Chodoff, Esq., on behalf of petitioner (Archer & Greiner, attorneys)

Saul J. Steinberg, Esq., on behalf of respondent (Sufrin, Zucker, Steinberg, Waller & Wixted, attorneys)

Record Closed: January 9, 1998 Decided: January 14, 1998

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter arises out of tenure charges filed by petitioner pursuant to the School Law, *N.J.S.A.* 18A:6-10 *et seq.*, and regulations promulgated thereunder. The matter was transmitted to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The parties have now entered into a settlement agreement which is annexed. It appearing that the settlement was entered into voluntarily and fully disposes of all issues in controversy, I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

1/14/98
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

Jan. 15, 1998
DATE

D. M. Antanaitis Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 13 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/cat

ARCHER & GREINER,
A Professional Corporation
One Centennial Square
Haddonfield, New Jersey 08033
(609) 795-2121
Attorneys for Petitioner, Board of Education of the Lenape Regional High School District, Burlington County

BY: LOUIS L. CHODOFF, ESQUIRE

DEPARTMENT OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW

BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY	:	**BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY**
Petitioner	:	**OAL DOCKET NO: EDU-4015-97**
v.	:	
THOMAS KATSANOS	:	**STIPULATION OF SETTLEMENT**
Respondent	:	

Petitioner, the Board of Education of the Lenape Regional High School District (hereinafter referred to as "Petitioner"), and Respondent, Thomas Katsanos, hereby agree to resolve and settle the dispute which has given rise to this proceeding as follows:

1. The parties have entered into a written Agreement agreeing to resolve and settle the within dispute, a copy of which Agreement is attached as Exhibit "A," and incorporated herein.

2. The attached Agreement is a full, complete and final settlement of all claims of the Petitioner against Respondent as set forth in the Petition filed herein.

3. This Agreement is further contingent upon approval by the Burlington County Superintendent of Schools and/or the New Jersey Commissioner of Education, should such approval be necessary and/or required by law.

4. The terms of the Agreement shall remain confidential as between the parties.

DATED:

HONORABLE SOLOMON A. METZGER

BOARD OF EDUCATION OF THE
LENAPE REGIONAL HIGH
SCHOOL DISTRICT, Petitioner

By: Paula Lee 12/15/97
PAULA LEE, DATE:
President

ARCHER & GREINER
A Professional Corporation
Attorneys for Petitioner

By: Louis L. Chodoff
LOUIS L. CHODOFF DATE: 12/18/97

SUFRIN, ZUCKER, STEINBERG,
WALLER & WIXTED, P.C.
Attorneys for Respondent

By:
SAUL J. STEINBERG DATE: 12/12/97

Thomas Katsanos
THOMAS KATSANOS, Respondent

278313

ARCHER & GREINER
A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW
HADDONFIELD, NJ 08033

ARCHER & GREINER,
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(609) 795-2121
Attorneys for Petitioner, Board of Education of the Lenape Regional High School District, Burlington County

BY: LOUIS L. CHODOFF, ESQUIRE

DEPARTMENT OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW

BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY	:	**BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY**
Petitioner	:	**OAL DOCKET NO: EDU-4015-97**
v.	:	
THOMAS KATSANOS	:	
Respondent	:	

SETTLEMENT AGREEMENT

This Agreement made this day of , 1997, by and between Petitioner, Board of Education of the Lenape Regional High School District, Burlington County ("Lenape Board"), and Respondent, Thomas Katsanos:

ARCHER & GREINER
A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW
HADDONFIELD, NJ 08033

Background

WHEREAS, on June 14, 1996, Daniel F. Hicks, Ph.D., Superintendent of the Lenape Regional High School District ("Lenape District") filed tenure charges with the Lenape Board against Katsanos, alleging that Katsanos had engaged in various acts of conduct unbecoming of a teacher within the meaning of N.J.S.A. 18A:6-10 et seq.; and

WHEREAS, in lieu of making any formal findings with respect to the tenure charges, the Lenape Board agreed to withdraw the tenure charges subject to reinstatement if Katsanos failed to abide by certain conditions agreed to between the Lenape Board and Katsanos on August 8, 1996, and/or if Katsanos engaged in any subsequent acts of conduct unbecoming a teacher; and

WHEREAS, on February 19, 1997, Dr. Hicks filed tenure charges with the Lenape Board against Katsanos, alleging an act of conduct unbecoming a teacher which occurred after the August 8, 1996, agreement between the Lenape Board and Katsanos, and also reinstated the incidents from the June 14, 1996, tenure charges alleging that Katsanos had engaged in other various acts of conduct unbecoming of a teacher within the meaning of N.J.S.A. 18A:6-10, et seq.; and

WHEREAS, on March 7, 1997, Katsanos submitted his opposition to these tenure charges with the Lenape Board; and

WHEREAS, at a closed session at a special meeting held on March 24, 1997, the Lenape Board duly certified these tenure charges; and

WHEREAS, on March 31, 1997, the Lenape Board filed these tenure charges with the Commissioner of Education ("Commissioner"); and

WHEREAS, after two days of hearing and testimony in this matter on November 17 and 18, 1997, the Lenape Board and Katsanos have agreed to settle this matter as between themselves, the terms of which are set forth below:

1. Katsanos shall resign from the Lenape District immediately, effective December 15, 1997. Katsanos further agrees not to seek reinstatement and/or reemployment in any capacity with the Lenape District.

ARCHER & GREINER
A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW
HADDONFIELD, NJ 08033

2. In response to reference requests and/or requests for information concerning Katsanos' separation from employment with the Lenape District, the Lenape Board agrees that Katsanos' date of hire, the effective date of his resignation from the Lenape District, and that he resigned during the pendency of tenure charges that were filed against him for conduct unbecoming a teacher will be disclosed. Any further information will be supplied by Katsanos.

3. The Lenape Board agrees that it will make no reporting to the New Jersey State pension trustees regarding the parties' settlement of this matter, unless required to do so by legal process.

4. The Lenape Board agrees that it will make no reporting to the New Jersey State Board of Examiners regarding the parties' settlement of this matter, unless required to do so by legal process.

5. With the exception of a copy of this Settlement Agreement, the Lenape Board agrees that nothing will be added to Katsanos' personnel file.

6. The parties acknowledge that this Settlement Agreement is being entered into as a means of terminating the above-captioned matter, and is not an admission, and shall not be construed to be an admission on the part of Katsanos of any liability.

7. The parties agree that the terms of this Settlement Agreement shall remain confidential, and shall not be disclosed by either party unless required to do so by legal process. The parties further recognize that knowledge of these proceedings, and Katsanos' resignation from the Lenape District, extends beyond the parties, including, without limitation, Lenape District employees and parents of students involved in these proceedings, and that the Lenape Board and/or the Lenape District has no control over these individuals in terms of this confidentiality provision.

8. On or before December 12, 1997, Respondent agrees to submit to the Lenape Board, a letter of resignation, the form and content of which is acceptable to the Lenape Board and its counsel.

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COUNSELLORS AT LAW
HADDONFIELD, NJ 08033

9. The parties agree and acknowledge that any sick days that Katsanos accrued but did not use during his employment with the Lenape District will be paid to Katsanos, if applicable, in accordance with the current collective bargaining agreement between the Lenape District Education Association and the Lenape Board and/or applicable law.

10. This Settlement Agreement is further contingent upon approval by the Lenape Board, the Burlington County Superintendent of Schools and the Commissioner, should such approval be necessary and/or required by law.

11. If this Settlement Agreement is not so approved by the Lenape Board, the Burlington County Superintendent of Schools and the Commissioner, should such approval be necessary and/or required by law, Katsanos agrees and acknowledges that the hearing in this matter shall resume.

ATTEST:

By: _____

BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT

By: Paula Lee 12/15/97
PAULA LEE, DATE
President

ATTEST:

By: _____

Thomas Katsanos
THOMAS KATSANOS DATE
12/12/97

277022

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HADDONFIELD, NJ 08033

John T. Katsanos
177 Chickahominy Trl
Medford Lakes, NJ 08055

William J. Krzan
Mgr. Personnel Services
Lenape Regional High School District
93 Willow Grove Rd
Shamong, NJ 08088

December 12, 1996

Dear Sir:

Please accept this letter as my notification of resignation effective December 15, 1997 as a teacher in the Lenape Regional School District.

Sincerely,

John T. Katsanos

ARCHER & GREINER

A PROFESSIONAL CORPORATION

COUNSELLORS AT LAW

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*Also Member of Pennsylvania Bar
**Member of Pennsylvania Bar Only
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WILLIAM J. O'KANE, JR.*
RONALD J. PATTERSON*
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Direct Dial:
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lchodoff@archerlaw.com

January 9, 1998
VIA HAND DELIVERY

Honorable Solomon Metzger
State of New Jersey
Office of Administrative Law
Quakerbridge Plaza, Building 9
P.O. Box 049
Mercerville, NJ 08625-0049

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
1998 JAN -9 P 4:54

Re: Bd of Education of the Lenape Reg High School Dist, Burlington Co v. Katsanos
OAL Docket No. EDU-4015-97

Dear Judge Metzger:

With reference to the settlement of the above-named matter, enclosed please find the fully executed Addendum to Paragraph 7 of the Settlement Agreement which further describes the parties' obligations with regard to the confidentiality provision.

Thank you for Your Honor's consideration of this matter.

Very truly yours,

ARCHER & GREINER,
A Professional Corporation

By: Louis L. Chodoff
LOUIS L. CHODOFF

LLC/ss
Enclosures
cc: Saul Steinberg, Esquire (w/enc)
Mr. William J. Krzan (w/enc)
288701

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

1998 JAN -9 P 4:55

ADDENDUM

THIS ADDENDUM, made this day of , 199 , by and between BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY and THOMAS KATSANOS:

W I T N E S S E T H:

WHEREAS, the parties, Board of Education of the Lenape Regional High School District, Burlington County and Thomas Katsanos have entered into a Settlement Agreement resolving the dispute between the parties; and

WHEREAS, the parties have agreed to the substance of a modification to Paragraph seven (7) of that agreement.

NOW, THEREFORE, it is on this day of 199 agreed by and between the parties that Paragraph seven (7) of the Settlement Agreement be and hereby is modified to provide that the Lenape District will use its best efforts to ensure that its employees, including without limitation, teachers and administrators, abide by the confidentially provision and not disclose the terms of the Settlement Agreement and the proceeding leading to the Agreement.

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

ATTEST

BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT

Paula Lee

By: Paula Lee, President

ATTEST

Thomas Katsanos

Thomas Katsanos

OAL DKT. NO. EDU 4015-97
AGENCY DKT. NO. 111-3/97

IN THE MATTER OF THE TENURE	:	
HEARING OF THOMAS KATSANOS,	:	
SCHOOL DISTRICT OF LENAPE	:	COMMISSIONER OF EDUCATION
REGIONAL HIGH, BURLINGTON	:	DECISION
COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) in the form of a joint stipulation of settlement have been reviewed.

Upon careful and independent review of the full record of this matter and the terms of the proposed settlement agreement, the Commissioner is compelled to reject such agreement as it is currently structured since he cannot be satisfied by the present record that the proposed settlement meets the *Cardonick* standards for settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, affirmed State Board of Education April 6, 1983, 1990 S.L.D. 842, 846.

It is well-established that, having once taken up the burden of tenure charges, the Board may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges can no longer be pursued or why it is now in the public interest not to pursue them. *In the Matter of the Tenure Hearing of Kenneth S. Smith, School District of the City of Orange*, Essex County, decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, affirmed with modification by the State Board of Education November 2, 1983, affirmed N.J. Superior Court, Appellate Division, January 30, 1986. The

present record contains no such explanation. The Commissioner notes that his determination in this regard was highly influenced by the nature of the charges, *i.e.,* allegations of improper remarks and inappropriate physical contact with students.

Further, there is no indication that the within teaching staff member was advised of the Commissioner's duty, pursuant to *N.J.A.C.* 6:11-3.6, to refer tenure determinations for possible revocation of certificate.

Moreover, it appears that the terms of the settlement have already been effectuated through respondent's resignation effective December 15, 1997. The parties are, therefore, admonished that settlement agreements of controverted matters are of no force and effect and may not be implemented absent the Commissioner's approval pursuant to *N.J.A.C.* 1:1-19.1.

While the Commissioner does not preclude the possibility of settlement in this matter, he stresses that in order for him to meet his own obligation to the schools and children of this State, he must be assured that any settlement is consistent with appropriate standards for setting aside tenure matters as expressed in *Cardonick, supra*.

Accordingly, the proposed settlement is rejected for the reasons expressed herein. The Commissioner hereby remands this matter to the OAL for further revision of the settlement documents and expansion of the record, consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to a plenary hearing on the merits.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* It is herein noted that the Burlington County Superintendent plays no role in the adjudication of tenure charges or approval of settlement agreements related thereto. *N.J.S.A.* 18A:6-10 *et seq.*, *N.J.A.C.* 1:1-19.1.

75-98

424-98 R
(75-98)

IN THE MATTER OF THE TENURE	:	
HEARING OF THOMAS KATSANOS,	:	
SCHOOL DISTRICT OF LENAPE	:	COMMISSIONER OF EDUCATION
REGIONAL HIGH, BURLINGTON	:	DECISION ON REMAND
COUNTY.	:	
	:	

SEPTEMBER 30, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2057-98

(ON REMAND EDU 4015-97)

AGENCY DKT. NO. 111-3/97

BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,

Petitioner,

v.

THOMAS KATSANOS,

Respondent.

Louis L. Chodoff, Esq., for petitioner (Archer & Greiner, attorneys)

Saul J. Steinberg, Esq., for respondent (Sufrin, Zucker, Steinberg, Waller & Wixted, attorneys)

Record Closed: August 20, 1997 Decided: August 24, 1997

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter was remanded to the Office of Administrative Law on February 25, 1998, for further revision of the settlement documents and expansion of the record.

The parties have agreed to a revised settlement and have prepared a settlement agreement indicating the terms thereof, which is incorporated herein by reference and attachment.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

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

8/4/98
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

8/26/98
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 27 1998
DATE

OFFICE OF ADMINISTRATIVE LAW

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ARCHER & GREINER,
A Professional Corporation
One Centennial Square
Haddonfield, New Jersey 08033
(609) 795-2121
Attorneys for Petitioner, Board of Education of the Lenape Regional High School District, Burlington County

BY: LOUIS L. CHODOFF, ESQUIRE

DEPARTMENT OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW

BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY	:	**BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY**
Petitioner	:	**OAL DOCKET NO: EDU-4015-97**
v.	:	
THOMAS KATSANOS	:	
Respondent	:	

SETTLEMENT AGREEMENT

This Agreement made this day of , 1998, by and between Petitioner, Board of Education of the Lenape Regional High School District, Burlington County ("Lenape Board"), and Respondent, Thomas Katsanos:

Background

WHEREAS, on June 14, 1996, Daniel F. Hicks, Ph.D., Superintendent of the Lenape Regional High School District (" Lenape District") filed tenure charges with the Lenape Board against Katsanos, alleging that Katsanos had engaged in various acts of conduct unbecoming of a teacher within the meaning of N.J.S.A. 18A:6-10 et seq.; and

WHEREAS, in lieu of making any formal findings with respect to the tenure charges, the Lenape Board agreed to withdraw the tenure charges subject to reinstatement if Katsanos failed to abide by certain conditions agreed to between the Lenape Board and Katsanos on August 8, 1996, and/or if Katsanos engaged in any subsequent acts of conduct unbecoming a teacher; and

WHEREAS, on February 19, 1997, Dr. Hicks filed tenure charges with the Lenape Board against Katsanos, alleging an act of conduct unbecoming a teacher which occurred after the August 8, 1996, agreement between the Lenape Board and Katsanos, and also reinstated the incidents from the June 14, 1996, tenure charges alleging that Katsanos had engaged in other various acts of conduct unbecoming of a teacher within the meaning of N.J.S.A. 18A:6-10, et seq.; and

WHEREAS, on March 7, 1997, Katsanos submitted his opposition to these tenure charges with the Lenape Board; and

WHEREAS, at a closed session at a special meeting held on March 24, 1997, the Lenape Board duly certified these tenure charges; and

WHEREAS, on March 31, 1997, the Lenape Board filed these tenure charges with the Commissioner of Education ("Commissioner"); and

WHEREAS, after two days of hearing and testimony in this matter on November 17 and 18, 1997, the Lenape Board and Katsanos have agreed to settle this matter as between themselves;

WHEREAS, Katsanos acknowledges that he has entered into this settlement willingly and voluntarily, and with a full and complete understanding of his rights;

WHEREAS, Katsanos acknowledges that he was expressly advised of the Commissioner's duty, pursuant to N.J.A.C. 6:11-3.6, to refer tenure determinations to the New Jersey State Board of Examiners for possible revocation of his teaching certificate, and having been so advised, Katsanos still wishes to settle this matter on the terms set forth below;

WHEREAS, the Lenape Board acknowledges that it has agreed to settle this matter because, as a result of such settlement, Katsanos is removed from his position as teacher/coach within the Lenape Regional High School District, and The Lenape Board has conserved a significant amount of public funds in so doing;

WHEREAS, the Lenape Board acknowledges and understood that, as a result of the settlement, Katsanos will be removed from his position as teacher/coach within the Lenape Regional High School District, i.e., the maximum penalty which could have been imposed by Judge Metzger under N.J.S.A. 18A:6-16, even after a full hearing;

WHEREAS, the Lenape Board acknowledges and understands that the Commissioner still has the authority to refer the matter to the New Jersey State Board of Examiners if he felt the matter warranted such referral; and

WHEREAS, the parties have agreed to settle this matter on the terms forth below:

1. Katsanos shall resign from the Lenape District immediately, effective December 15, 1997. Katsanos further agrees not to seek reinstatement and/or reemployment in any capacity with the Lenape District.

2. In response to reference requests and/or requests for information concerning Katsanos' separation from employment with the Lenape District, the Lenape Board agrees that Katsanos' date of hire, the effective date of his resignation from the Lenape District, and that he resigned during the pendency of tenure charges that were filed against him for conduct unbecoming a teacher will be disclosed. Any further information will be supplied by Katsanos.

3. The Lenape Board agrees that it will make no reporting to the New Jersey State pension trustees regarding the parties' settlement of this matter, unless required to do so by legal process.

4. The Lenape Board agrees that it will make no reporting to the New Jersey State Board of Examiners regarding the parties' settlement of this matter, unless required to do so by legal process.

5. With the exception of a copy of this Settlement Agreement, the Lenape Board agrees that nothing will be added to Katsanos' personnel file.

6. The parties acknowledge that this Settlement Agreement is being entered into as a means of terminating the above-captioned matter, and is not an admission, and shall not be construed to be an admission on the part of Katsanos of any liability.

7. The parties agree that the terms of this Settlement Agreement shall remain confidential, and shall not be disclosed by either party unless required to do so by legal process. The parties further recognize that knowledge of these proceedings, and Katsanos' resignation from the Lenape District, extends beyond the parties, including, without limitation, Lenape District employees and parents of students involved in these proceedings, and that the Lenape Board and/or the Lenape District has no control over these individuals in terms of this confidentiality provision. The Lenape Board will use its best efforts to ensure, to the extent possible, that its employees will abide by the terms of this provision.

8. On or before December 12, 1997, Respondent agrees to submit to the Lenape Board, a letter of resignation, the form and content of which is acceptable to the Lenape Board and its counsel.

9. The parties agree and acknowledge that any sick days that Katsanos accrued but did not use during his employment with the Lenape District will be paid to Katsanos, if applicable, in accordance with the current collective bargaining agreement between the Lenape District Education Association and the Lenape Board and/or applicable law.

10. This Settlement Agreement is further contingent upon approval by the Lenape Board, the Burlington County Superintendent of Schools and the Commissioner, should such approval be necessary and/or required by law.

11. If this Settlement Agreement is not so approved by the Lenape Board, the Burlington County Superintendent of Schools and the Commissioner, should such approval be necessary and/or required by law, Katsanos agrees and acknowledges that the hearing in this matter shall resume.

ATTEST:

By:_____

BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT

By: Paula D. Lee 8/18/98
PAULA LEE, President — DATE

ATTEST:

By:_____

Thomas Katsanos 7/15/98
THOMAS KATSANOS — DATE

339289

OAL DKT. NO. EDU 2057-98 (EDU 4015-97 ON REMAND)
AGENCY DKT. NO. 111-3/97

IN THE MATTER OF THE TENURE	:	
HEARING OF THOMAS KATSANOS,	:	
SCHOOL DISTRICT OF LENAPE	:	COMMISSIONER OF EDUCATION
REGIONAL HIGH, BURLINGTON	:	DECISION ON REMAND
COUNTY.	:	
	:	

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

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter.[1] *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement. However, in light of the seriousness of the underlying allegations involved in this case, the Commissioner determines to forward the record of this matter to the State Board of Examiners for action as it deems appropriate.[2]

COMMISSIONER OF EDUCATION

[1] It is herein noted that the Burlington County Superintendent plays no role in the adjudication of tenure charges or the approval of settlement agreements thereto. *N.J.S.A.* 18A:6-10 *et seq.*, *N.J.A.C.* 1:1-19.1.
[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* .and *N.J.A.C.* 6:2-1.1 *et seq*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SEPTEMBER 30, 1998
DATE OF MAILING SEPTEMBER 30, 1998

77-98

77-98

JOSHUA ALAM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

FEBRUARY 23, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8064-97
AGENCY DKT. NO. 267-7/97

JOSHUA ALAM,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,
Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Karen A. Murray, Esq., for respondent (Murray, Murray & Corrigan, attorneys)

Record Closed: January 26, 1998 Decided: January 30, 1998

BEFORE **ANTHONY T. BRUNO**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 15, 1997, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

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

January 30, 1998
DATE

Anthony T. Bruno
ANTHONY T. BRUNO, ALJ

Receipt Acknowledged:

Feb. 3, 1998
DATE

D. M. Centanni Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 5 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF ADMIN.
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SETTLEMENT AGREEMENT
Camden Board of Education and Joshua Alam
Docket No.: EDU-8064-97S

This Agreement, made and entered into this _____ day of _____, 1998, by and between **JOSHUA ALAM** (hereinafter referred to as "employee") and the **CAMDEN BOARD OF EDUCATION** (hereinafter the "Board") to resolve amicably the dispute between the parties relating to Joshua Alam v. Camden Board of Education, EDU-8064-97S.

For the mutual covenants and considerations set forth below, the employee and the Board do hereby agree as follows:

1. The Board agrees to appoint the employee to the position of Supervisor of Personnel Services, at an annual salary of Fifty-five Thousand and Six-Hundred and Eighty-Four Dollars ($55,684.00), for the 1997-98 school year. This appointment shall be effective January 1, 1998. The title shall be confidential and shall not be included in any bargaining unit.

2. The employee shall also receive Two-Hundred Dollars ($200.00) for district longevity and Five-Hundred Dollars ($500.00) for his years of service as an administrator.

3. The Board agrees that the employee is entitled to all the benefits accorded to confidential employees.

4. The parties agree that the employee's salary set forth in paragraph 1 above is inclusive of any increment for 1997-98 and a 4.25% increase and that the employee shall be entitled to no additional monies for the 1997-98 school year.

5. The parties agree that the employee reserves all the rights available to him under the tenure, senority and education

laws in the event his position is abolished, reduced in hours o if he is transferred.

6. The Board retains it right to any and all legal defenses and rights with regard to paragraph 4.

7. This Settlement Agreement resolves all actual and/or potential claims between the parties arising from the allegation of a violation of tenure and/or seniority rights at issue in this case, subject to the provisions in paragraphs 4 and 5.

8. This Agreement contains all of the terms of the parties' agreement and cannot be modified or changed unless all parties agree to do so in writing.

9. The employee agrees that he has voluntarily and without coercion entered into this settlement agreement.

IN WITNESS WHEREOF, the parties have signed, sealed, delivered and acknowledged this Agreement.

CAMDEN BOARD OF EDUCATION

By: _____
Karen A. Murray, Esq.

Date: 1/22/98

For Joshua Alam,

_____
Joshua Alam

Date: 1-20-98

_____
Richard Friedman, Esq.

Date: 1/20/98

OAL DKT. NO. EDU 8064-97
AGENCY DKT. NO. 267-7/97

JOSHUA ALAM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

FEBRUARY 23, 1998
DATE OF MAILING FEBRUARY 23, 1998

78-98

78-98

THOMAS F. GRIGGS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

FEBRUARY 23, 1998

OAL DKT. NO. EDU 8031-95
AGENCY DKT. NO. 279-7/95

THOMAS F. GRIGGS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

FEBRUARY 23, 1998
DATE OF MAILING FEBRUARY 23, 1998

79-98

79-98

MARY KAY SCOLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

FEBRUARY 23, 1998

OAL DKT. NO. EDU 6747-97
AGENCY DKT. NO. 235-7/97

MARY KAY SCOLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

FEBRUARY 23, 1998
DATE OF MAILING FEBRUARY 23, 1998

(SB) 79-98

SB #79-98

WENDE BAER, PATTY BIETH, COLLEEN DOOLEY, DIANNE VASQUEZ, NEW JERSEY PROTECTION AND ADVOCACY, INC., STATEWIDE PARENT ADVOCACY NETWORK, JERSEY CITY SPECIAL EDUCATION PARENTS COUNCIL, AND ALLIANCE FOR THE BETTERMENT OF CITIZENS WITH DISABILITIES,	:	
APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
LEO KLAGHOLZ, COMMISSIONER, DEPARTMENT OF EDUCATION AND STATE BOARD OF EDUCATION,	:	DECISION
RESPONDENTS.	:	

For the Appellants, Education Law Center (Elizabeth Athos, Esq., and Ellen M. Boylan, Esq., of Counsel), Rutgers Special Education Clinic (Mary F. Hartnett, Esq., of Counsel), New Jersey Protection & Advocacy, Inc. (Linda D. Headley, Esq., of Counsel) and Cole, Schotz, Meisel, Forman & Leonard (Rebecca Spar, Esq., of Counsel)

For the Respondents, Arlene G. Lutz, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

On August 20, 1998, the appellants in this matter filed a notice of appeal to the Appellate Division pursuant to R. 2:2-3 challenging the final agency rules governing the provision of an appropriate public education to students with disabilities which had been adopted by the State Board of Education on July 3, 1998. On the same date, appellants filed a motion with the State Board seeking either: 1.) a free transcript of the proceedings before the State Board pursuant to 20 U.S.C. 1415(h)(3), or 2.) an order

pursuant to R. 2:5-3(c)(2) limiting the record before the Appellate Division to the written testimony submitted to the State Board during the adoption process and any other written records of those proceedings. The motion is opposed by the Deputy Attorney General who is representing the State Board in the appeal now before the Appellate Division.

After considering the arguments of the parties and reviewing the provisions of 20 U.S.C. 1415(h)(3), we conclude that the Individuals with Disabilities Education Act, 20 U.S.C.A. 1400 et seq. ("IDEA") does not provide the appellants with an entitlement to the production of a free transcript of the public comment sessions conducted on behalf of the State Board as part of the administrative rulemaking process. The express terms of 20 U.S.C.A. 1415(h), including the right to a transcript, apply only to due process hearings conducted pursuant to 20 U.S.C.A. 1415(f), appeals therefrom as delineated by 20 U.S.C.A. 1415(g), and hearings for the change in placement of a child with disabilities under 20 U.S.C.A. 1415(k). In short, the IDEA confers the right to a transcript on parents involved in proceedings to determine or change the appropriate placement of individual students with disabilities, and such right does not extend to the administrative rulemaking process of state agencies.

Further, review of the pertinent court rule which specifies what must be included in the record in matters on appeal to the Appellate Division indicates that appellants are not required to produce a transcript of the public comment sessions in order to proceed with their appeal. Rather, R. 2:5-4 specifies that:

> The record on appeal shall consist of all papers on file in the court or courts or agencies below, with all entries as to matters made on the records of such courts and agencies, the stenographic transcript or statement of the proceedings

> therein, and all papers filed with or entries made on the records of the appellate court.

There are no transcripts of the public comment sessions that are part of an administrative rulemaking process. While tape recordings are available, only the written comments submitted to the State Board as required by the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. ("APA"), are considered by our agency during the adoption process.[1] In short, the record in an appeal from the adoption of administrative rules does not automatically include a transcription of the public comment sessions. Hence, there is no need for the State Board to direct that the transcript be abbreviated pursuant to R. 2:5-3(c) in order to relieve the appellants of an obligation to produce transcripts of the public comment sessions.

Similarly, R. 2:5-4 does not necessarily require the appellants to produce a transcript of the State Board meetings at which we considered the rules under challenge. However, the appellants must bear the cost of producing a transcript of any portions of those meetings upon which it seeks to rely in its appeal to the court.

November 4, 1998

Date of mailing NOV 06 1998

[1] The rules of the Office of Administrative Law only require an agency to retain a record of any oral or written comments received in response to a proposal for a period of one year to demonstrate compliance with the procedural requirements of the APA. N.J.A.C. 1:30-3.4(a).

80-98

80-98

R.N. AND P.N., on behalf of minor child, J.N.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BURLINGTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

FEBRUARY 23, 1998

OAL DKT. NO. EDU 2498-97
AGENCY DKT. NO. 58-2/97

R.N. AND P.N., on behalf of minor child, J.N.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BURLINGTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

FEBRUARY 23, 1998
DATE OF MAILING FEBRUARY 23, 1998

82-98

82-98 A

NANCY RHINESMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

FEBRUARY 23, 1998

OAL DKT. NO. EDU 9185-97
AGENCY DKT. NO. 260-7/97

NANCY RHINESMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

FEBRUARY 23, 1998
DATE OF MAILING FEBRUARY 23, 1998

82-98 B

Z.A. and J.R., on behalf of minor children, P.R. and N.R.,

PETITIONERS,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

FEBRUARY 24, 1998

OAL DKT. NO. EDU 7080-97
AGENCY DKT. NO. 176-5/97

Z.A. and J.R., on behalf of minor children, P.R. and N.R.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LEONIA, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

FEBRUARY 24, 1998
date of mailing february 24, 1998

83-98

KAREN WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

FEBRUARY 24, 1998

OAL DKT. NO. EDU 953-97
AGENCY DKT. NO. 21-1/97

KAREN WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

FEBRUARY 24, 1998
DATE OF MAILING FEBRUARY 24, 1998

84-98

84-98

B.F. and S.F., on behalf of minor child, J.G., :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY, : DECISION

RESPONDENT. :

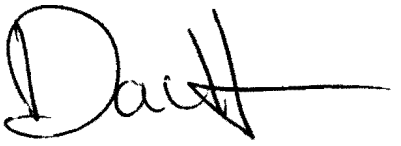
FEBRUARY 24, 1998

OAL DKT. NO. EDU 5904-97
AGENCY DKT. NO. 198-6/97

B.F. and S.F., on behalf of minor child, J.G.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.



ASSISTANT COMMISSIONER OF EDUCATION

FEBRUARY 24, 1998
DATE OF MAILING FEBRUARY 24, 1998

85-98

85-98

THERESA J. KUCHON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

FEBRUARY 24, 1998

OAL DKT. NO. EDU 6584-97
AGENCY DKT. NO. 274-7/97

THERESA J. KUCHON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

FEBRUARY 24, 1998
DATE OF MAILING FEBRUARY 24, 1998

(SB) 85-98

SB #85-98

BOARD OF EDUCATION OF THE CITY OF BAYONNE,

PETITIONER-APPELLANT,

V.

BOARD OF SCHOOL ESTIMATE OF THE CITY OF BAYONNE AND THE MAYOR AND COUNCIL OF THE CITY OF BAYONNE, HUDSON COUNTY,

RESPONDENTS-RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 14, 1998

For the Petitioner-Appellant, Kenneth R. Hampton, Esq.

For the Respondents-Respondents, John R. Coffey, Esq.

This is an appeal from a decision of the Commissioner of Education made pursuant to N.J.S.A. 18A:7F-5(e)(2) of the Comprehensive Educational Improvement and Financing Act of 1996, N.J.S.A. 18A:7F-1 et seq. ("CEIFA").[1] That statutory provision specifies the grounds for appeal to the Commissioner in those cases in which, as here, a district board has proposed a budget amount at or below the district's maximum "T&E budget" as calculated under N.J.S.A. 18A:7F-13 and the board of school estimate has certified an amount pursuant to N.J.S.A. 18A:22-14 which is less

[1] N.J.S.A. 18A:7F-5(e)(2) applies both to school districts in which the proposed education budget is submitted to the voters and those, like Bayonne, which have boards of school estimate responsible under N.J.S.A. 18A:22-14 for determining "the amount of money necessary to be appropriated for the use of the public schools in the district for the ensuing school year."

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than that proposed by the district board. The grounds for appeal under N.J.S.A. 18A:7F-5(e)(2) are limited to: 1) that the amount at issue is necessary for a thorough and efficient education, or 2) that reductions made by the board of school estimate will negatively impact on the stability of the district given the need for long-term planning and budgeting.

In this case, the Board of Education of the City of Bayonne ("Board" or "Bayonne Board"), which is a Type I school district, proposed a basic education budget ("base budget") for 1998-99 to its Board of School Estimate ("BSE") totaling $60,890,346.[2] As mandated by N.J.S.A. 18A:22-14, the Board of School Estimate then determined "the amount of money necessary to be appropriated for the use of the public schools in the district for the ensuing school year...." In making this determination, the Board of School Estimate reduced the basic education budget proposed by the Bayonne Board by $5,785,583, representing a 9.5% reduction in each line item of the proposed base budget.

The Bayonne Board availed itself of the expedited budget review process authorized by N.J.S.A. 18A:7F-5(e)(3). As provided by the implementing regulations, the Board filed an application on April 3, 1998 seeking restoration of the full amount by which the Board of School Estimate had reduced its proposed base budget.

After reviewing the documentation and reallocating amounts within the Bayonne Board's base budget, the Commissioner increased the amount certified by the Board of School Estimate by $1,532,690 in general fund taxes. This represented a reduction of

[2] We note that Bayonne also submitted a separate proposal to the BSE for $6, 610,400 in additional funds pursuant to N.J.S.A. 18A:7F-5(d)(9). The BSE reduced that amount by 23%. This reduction, however, was not appealable to the Commissioner under N.J.S.A. 18A:7F-5(e).

$4,102,893 in the amount of the base budget originally proposed by the Bayonne Board.

The Bayonne Board then appealed to the State Board. By its appeal, the Board is seeking restoration of the full amount included in the base budget it had originally proposed to the BSE. The thrust of the Board's appeal is twofold. First, the Board contends that it is entitled on procedural grounds to the full amount it proposed to the BSE. The Board argues that it is entitled to such relief under the New Jersey Supreme Court decisions in Board of Education, East Brunswick Township v. Township Council, East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989) because the Board of School Estimate reduced the amount of its proposed budget in order to maintain a lower tax rate and did not provide a statement of reasons for the resulting line item reductions or an assessment of the educational impact of those reductions. Second, the Board contends that since the Commissioner relied solely on the "efficiency standards" to sustain some reductions, his decision is arbitrary and these amounts must therefore be restored.

We do not agree.

Deptford and East Brunswick involved reductions made pursuant to N.J.S.A. 18A:22-37 to education budgets that had been proposed by the district board of education and rejected by the voters in the annual school election.[3] That statute requires that following such defeat by the voters, the municipal governing body must

[3] N.J.S.A. 18A:22-37 provides in pertinent part that when voters reject any of the items submitted at the annual school election, the governing body of the municipality must, after consultation with the board of education, "determine the amount which...is necessary to be appropriated for each item appearing in the budget...."

determine the amount necessary for each item in the budget proposal. In contrast, N.J.S.A. 18A:22-14, which governed the Board of School Estimate's action in this case, requires that the BSE determine the "amount of money necessary for the use of the public schools...."

The difference in these statutory provisions is significant, reflecting that the proposed budgets in cases involving Type I districts such as Bayonne are not submitted to the voters, but to a board of school estimate. In contrast to N.J.S.A. 18A:22-37, a determination under N.J.S.A. 18A:22-14 is not made by the municipal governing body, but by the board of school estimate, which is comprised of two members of the district board of education, two members of the municipal governing body and the mayor. N.J.S.A. 18A:22-1.

Quite simply, it is well settled that under the terms of N.J.S.A. 18A:22-14, Bayonne's Board of School Estimate was not required to determine the amount necessary for each item. Townsend v. State Board of Education, 88 N.J.L. 97 (1915), 1915 N.J. Super. LEXIS 236. Rather, its duty was to review the itemized statement submitted by the school district and, based on that proposal, determine the total amount necessary for the use of the schools. Id. Hence, we reject the Bayonne Board's contention that because the BSE did not comply with the procedural requirements applicable to governing bodies under N.J.S.A. 18A:22-37, it is entitled to restoration of the full amount by which the BSE reduced its base budget.

We also reject the Board's assertion that it is entitled to additional amounts because the Commissioner relied on the efficiency standards established under

N.J.S.A. 18A:7F-4(b) and (c) to make reallocations and to sustain reductions to the Board's budget proposal.

CEIFA provides the statutory framework under which we must judge the propriety of the Commissioner's determinations in this case. CEIFA is distinguished from prior school funding laws in that it: 1) establishes a definition of a thorough and efficient system of public education which is "uniformly applicable to all districts in the State," 2) establishes the types of programs and services that will accomplish these goals in a manner that is thorough and efficient, 3) provides a level of financial support sufficient to provide those programs and services, 4) provides a funding mechanism to ensure that support, and 5) establishes "a system which assures that the expenditure of public funds will be undertaken both with prudence and sound management." N.J.S.A. 18A:7F-2.

The foundation of that system is the "T&E amount." That amount is "the cost per elementary pupil of delivering the core curriculum content standards and extracurricular and cocurricular activities necessary for a thorough regular education under the assumptions of reasonableness and efficiency contained in the Report on the Cost of Providing a Thorough and Efficient Education." N.J.S.A. 18A:7F-3. A dollar amount, the "T&E flexible amount," is applied to determine a "T&E range," which is the range of regular education spending that will be considered thorough and efficient. Id.

On this basis, State aid is determined, local shares are calculated and school districts are notified of their minimum and maximum T&E budgets for the ensuing school year. N.J.S.A. 18A:7F-5. Hence, the T&E amount and its underlying assumptions are integrated into the budget development process.

The T&E amount, in turn, is established by the Legislature through the process set forth in N.J.S.A. 18A:7F-4. See N.J.S.A. 18A:7F-12 (establishment of basic per pupil T&E amount). The amount is embodied in the recommendations in the Report on the Cost of Providing a Thorough and Efficient Education issued pursuant to N.J.S.A. 18A:7F-4(c). Once that report has been deemed approved by the Legislature, this agency must apply the standards set forth therein.

This system was designed to assure that all budget proposals include sufficient funds to provide a thorough and efficient education. Accordingly, when a district board's proposed base budget is, as in this case, at or below the district's maximum "T&E budget," N.J.S.A. 18A:7F-5(e)(2) permits the district to appeal to the Commissioner for restoration of funds included in that budget on the grounds that such amounts are necessary for a thorough and efficient education. In contrast, N.J.S.A. 18A:7F-5(e)(1) precludes a district from raising a thorough and efficient claim when its proposed budget is in excess of its maximum "T&E budget."

In this case, the Bayonne Board's proposed base budget was at or below its maximum "T&E budget" established under N.J.S.A. 18A:7F-1 et seq. See N.J.S.A. 18A:7F-13 (calculation of minimum and maximum T&E budget). Consequently, N.J.S.A. 18A:7F-5(e)(2) provided the basis upon which the Board could seek restoration of the amounts reduced by the BSE. As set forth by the Commissioner in his decision, the Bayonne Board did not demonstrate that any of the amount reduced by the BSE was necessary for a thorough and efficient education or that the stability of the district required restoration of the full amount of the base budget it had originally submitted to the Board of School Estimate.

Nor has the Board demonstrated in this appeal that it is otherwise entitled to any increase in the budget amount established by the Commissioner in his decision. In this respect, we again stress that the efficiency standards which the Commissioner applied in reviewing this matter were established through the legislative process mandated by N.J.S.A. 18A:7F-4. Hence, neither the Commissioner nor the State Board has the authority to alter those standards without legislative action.

Therefore, for the reasons set forth herein, we affirm the Commissioner's decision and reject the Bayonne Board's claim to increase the district's base budget beyond the amount which the Commissioner determined to be adequate.

February 3, 1999

Date of mailing FEB 03 1999

86-98

86-98

JOSEPH RUSSO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

FEBRUARY 24, 1998

OAL DKT. NO. EDU 6587-97
AGENCY DKT. NO. 273-7/97

JOSEPH RUSSO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

FEBRUARY 24, 1998
DATE OF MAILING FEBRUARY 24, 1998

(SB) 86-98

SB #86-98

IN THE MATTER OF THE FINAL GRANT :
OF A CHARTER FOR THE UNITY : STATE BOARD OF EDUCATION
CHARTER SCHOOL, MORRIS COUNTY. : DECISION

Decided by the Commissioner of Education, September 3, 1998

For the Appellant, Wiley, Malehorn & Sirota (John G. Geppert, Jr., Esq., of Counsel)

For the Respondent, Harvey Gilbert, Esq.

For the Participant Commissioner of Education, Terri A. Cutrera, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

This is an appeal by the Morris School District (hereinafter "District") from a grant of final approval given on September 3, 1998 by the Commissioner of Education to the Unity Charter School (hereinafter "Charter School") to operate a charter school pursuant to the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 et seq. (hereinafter "Act") for the period from July 1, 1998 through June 30, 2002. The District's brief was filed on October 1, 1998, and was accompanied by the certifications of Dr. Dwight Pfenning and John G. Geppert Jr., Esq.

The District alleges that the Commissioner's final approval should be set aside because the Charter School's facility is not suitable for educational purposes. The District further argues that approval must be withdrawn because the Charter School has not shown how it will comply with the State's core curriculum standards and statewide assessment program. It also seeks an order from the State Board that the Charter

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School must work with the District to establish a calendar and schedule to enable the District to efficiently transport all students to their respective schools.

In addition, the District raises questions relating to the constitutionality of the Act and the implementing regulations under the New Jersey constitution and claims that approval of the Charter School is in violation of other requirements of New Jersey law. More specifically, the District contends that final approval permits the operation of a segregated public school in violation of New Jersey's constitution and judicial decisions relating to racial balance, including Jenkins v. Tp. of Morris School District and Bd. of Educ., 58 N.J. 483 (1971), which was the foundation for the formation of the Morris School District. The District also contends that New Jersey's guidelines governing the desegregation of the public schools require that all public schools, including charter schools, be balanced.

The District also argues that payment of funds to the Charter School is unconstitutional because the regulations require it to pay more for its resident students attending the Charter School than other district boards must pay for their students. Finally, the District asserts that the regulations are unconstitutional because they require district boards to allocate public funds for the use of private individuals.

The Commissioner is participating in this appeal as provided by N.J.A.C. 6A:11-2.5(d). In the brief filed on his behalf, the Deputy Attorney General representing the Commissioner contends that all issues raised in this appeal relating to the Commissioner's initial approval given on February 5, 1997 should be dismissed as time-barred, arguing that under N.J.A.C. 6A:11-2.5(a), an appeal from the final grant of a charter "can only relate to the documentation which the Commissioner needed

beyond that submitted in connection with the initial application." Brief on Behalf of Commissioner, at 5. The Deputy Attorney General representing the Commissioner maintains that the only issue properly before the State Board is whether the Commissioner abused his discretion in finding that the Charter School's facility was fit for educational purposes.

On the same date, the Charter School filed its answer. Like the Deputy Attorney General representing the Commissioner, the Charter School contends that the appeal is time-barred and that final approval of its charter was proper. In addition, on October 13, the Charter School filed a motion to strike and/or suppress the District's appeal on the grounds that by relying on the certifications accompanying its appeal brief, the District had included legal argument that was based on facts that were not in the record. It further moved to supplement the record with affidavits relating to the operations of the Morristown Columbian Club, the facility in which the Charter School is housed.

After reviewing the circumstances, we conclude that the District's appeal is not time-barred. In so concluding, we stress that the Commissioner's contingent approval of the Charter School was given on February 5, 1997, well before we adopted the regulations upon which the Deputy Attorney General and the Charter School rely. Furthermore, we would hesitate to interpret our regulations to bar any appeal where the appellant had not had notice of the factual circumstances in question and where, as here, those circumstances are material to the determination being challenged.

We are sensitive to the fact that some of the claims raised by the District involve constitutional issues, and we are cognizant of our jurisdictional limitations. E.g., Abbott v Burke, 100 N.J. 269 (1985) (subsequent history omitted). Given the constraints and

the statutory time limit within which we must act, N.J.S.A. 18A:36A-4(d), we have noted the presence of these issues but have presumed the validity of the statute and implementing regulations for purposes of determining whether the Charter School should be permitted to continue to operate. Hence, for purposes of this review, we have focused on whether the appeal has raised concerns of such character that the school should not be permitted to operate at this point. In this respect, the District has not made any showing that the actual composition of the Charter School's student body has had any impact on the racial composition of the Morris School District or that the Charter School is in fact segregated.

Given the focus of our review and the fact that the supplemental materials implicate the suitability of the facility in which the Charter School is housed, we grant the motions to supplement the record filed by the District and the Charter School.

N.J.S.A. 18A:36A-4(c) provides that "[a]n application to establish a charter school shall be submitted to the commissioner and the local board of education...in the school year preceding the school year in which the charter school will be established. The board of education...shall review the application and forward a recommendation to the commissioner within 60 days of receipt of the application." The application is required to include, inter alia, "[a] description of, and address for, the physical facility in which the charter school will be located." N.J.S.A. 18A:36A-5. The Act further provides that "[a] charter school may be located in part of an existing public school building, in space provided on a public work site, in a public building, or any other suitable location." N.J.S.A. 18A:36A-10 (emphasis added).

Careful review reveals that there was nothing in the record before the Commissioner at the time he granted final approval to the Charter School to indicate that the facility it was planning to utilize was a social club in which alcoholic beverages were stored and served.[1] This circumstance raises both policy and legal concerns relating to the presence of alcoholic beverages in or in close proximity to facilities housing schools. See, e.g., N.J.S.A. 33:1-76 (prohibiting the issuance of a license for the sale of alcoholic beverages within two hundred feet of a school) and N.J.S.A. 2C:33-16 (any person who brings alcoholic beverages onto school property without express written permission of the school board is guilty of a disorderly persons offense). In light of the information contained in the supplemental materials, further review and determination by the Commissioner of the suitability of this site for educational purposes is required.[2] N.J.S.A. 18A:36A-10. We therefore remand this matter to the Commissioner and direct that he make such determination within thirty days of this decision. While the Charter School may continue to operate in the interim, we retain jurisdiction.

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[1] We note that Lisa Brick, president of the Charter School's Board of Trustees, indicates in a certification which we have permitted to be supplemented into the record, that she had communicated verbally with an employee of the Department's Office of Innovative Programs "of the possibility of alcohol in the Club's facility." Certification, at 4. However, there is nothing in the record before us that indicates that such information was communicated to the Commissioner or considered by him in determining to grant final approval to the Charter School.

[2] In R.F. v. Board of Education of Park Ridge, 93 N.J.A.R.2d (EDU) 79, 82 the Commissioner recognized "the Legislature's clear intent as stated in N.J.S.A. 18A:37-1...'that the public schools of the State of New Jersey will act to help control the problem of youth/alcohol abuse, especially in the school.'" In that regard, N.J.S.A. 18A:40A-1 requires that "[I]nstructional programs on the nature of drugs, alcohol, anabolic steroids, tobacco and controlled dangerous substances...and their physiological, psychological, sociological and legal effects on the individual, the family and society shall be taught in each public school and in each grade from kindergarten through 12 in a manner adapted to the age and understanding of the pupils. The programs shall be based upon the curriculum guidelines established by the Commissioner of Education...."

Finally, we cannot ignore the fact that there is no permanent certificate of occupancy for the Charter School in the record transmitted to us. That record, which is dated October 8, 1998, shows only that a temporary certificate of occupancy was issued by the municipality's construction official on September 2, 1998, specifying that certain building deficiencies were required to be corrected by October 2. Hence, the Commissioner's September 3 grant of final approval to the Charter School was based on the temporary certificate of occupancy, which was only valid for one month, as proof that the school had satisfied all contingencies, including, as required by N.J.A.C. 6A:11-2.1(g), submission of a certificate of occupancy. The Commissioner did not condition his approval of the school's facility upon submission of a permanent certificate of occupancy reflecting full compliance with the New Jersey Uniform Construction Code. Hence, we also direct the Commissioner to verify that such building deficiencies have been corrected and that all documentation required by N.J.A.C. 6A:11-2.1 has been submitted and approved.

November 4, 1998

Date of mailing NOV 06 1998

(SB) 86-98

SB #86-98

IN THE MATTER OF THE FINAL GRANT :
OF A CHARTER FOR THE UNITY : STATE BOARD OF EDUCATION
CHARTER SCHOOL, MORRIS COUNTY. : DECISION

Decided by the Commissioner of Education, September 3, 1998

Remanded by the State Board of Education, November 4, 1998

Decision on remand by the Commissioner of Education, December 4, 1998

For the Appellant, Wiley, Malehorn & Sirota (John G. Geppert, Jr., Esq., of Counsel)

For the Respondent, Harvey Gilbert, Esq.

For the Participant Commissioner of Education, Terri A. Cutrera, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

This matter was initiated by an appeal by the Morris School District (hereinafter "District") from a grant of final approval given on September 3, 1998 by the Commissioner of Education to the Unity Charter School (hereinafter "Charter School") to operate a charter school pursuant to the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 et seq. (hereinafter "Act") for the period from July 1, 1998 through June 30, 2002. One of the focal issues of the District's appeal was the suitability of the Charter School's facility for educational purposes.[1]

[1] In addition, the District raised questions relating to the constitutionality of the Act and implementing regulations under the New Jersey constitution and claimed that approval of the Charter School was in violation of other requirements of New Jersey law. More specifically, the District contended that final approval permitted the operation of a segregated public school in violation of New Jersey's constitution and judicial decisions relating to racial balance, including Jenkins v. Tp. of Morris School District and Bd.

FEBRUARY 3, 1999

On November 4, 1998, we issued our decision. We found that there was nothing in the record before the Commissioner at the time he granted final approval to the Charter School to indicate that the facility it was planning to utilize was a social club in which alcoholic beverages were served and stored. This circumstance raised both policy and legal concerns relating to the presence of alcoholic beverages in a facility housing a school. In light of the information contained in supplemental materials, we concluded that further review and determination by the Commissioner of the suitability of this site for educational purposes was required. N.J.S.A. 18A:36A-10. We therefore retained jurisdiction while remanding this matter to the Commissioner for determination within thirty days of the suitability of the site for educational purposes.

On December 4, 1998, the Commissioner issued his decision on remand. Based on the Charter School's submission and a report to him following a site visit by Department of Education staff describing the facility, the Commissioner concluded that students did not have access to the social club or to the alcoholic beverages stored in the building and that the facility was suitable for a charter school.

Our Legal Committee's initial review of the Commissioner's December 4 decision indicated that some items which had been referenced by the Commissioner in his decision had not been included in the record transmitted to us by the Attorney General's Office on December 15. Consequently, on December 29, we sent a letter to the

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of Educ., 58 N.J. 483 (1971), which was the foundation for the formation of the Morris School District. The District also contended that New Jersey's guidelines governing the desegregation of the public schools require that all public schools, including charter schools, be racially balanced. The District also claimed that payment of funds to the Charter School was unconstitutional and that the regulations were unconstitutional because they required district boards to allocate public funds for the use of private individuals. Given the constraints on our jurisdiction and the statutory time limit within which we were required to act, N.J.S.A. 18A:36A-4(d), we noted the presence of these issues in our decision of November 4, 1998, but presumed the validity of the statute and implementing regulations for purposes of determining whether the Charter School should be permitted to continue to operate.

Commissioner requesting those items, which included documentation as to the exact location of the alcoholic beverages that the Commissioner had concluded were not accessible to the Charter School's students. We also requested clarification of the bathroom facilities that were assigned for use by students and those which were used by staff and other adults who had access to the building. See N.J.A.C. 6:22-5.4(h).

On January 5, 1999, Deputy Attorney General Terri A. Cutrera responded to our request on behalf of the Commissioner. While providing most of the documents we had requested, the Deputy Attorney General did not furnish documentation relating to the site visit conducted by Department staff which had been relied upon by the Commissioner, indicating that such report had been "communicated orally to the Commissioner." Letter dated 1/5/99 from Deputy Attorney General Cutrera, at 2. Nor did the Deputy Attorney General provide clarification regarding the bathroom facilities or specify the location of the alcoholic beverages stored at the site, stating that "all other information and documentation requested in the [December 29, 1998] letter was not before the Commissioner when he rendered his December 4, 1998 decision." Id.

We have reviewed the materials provided to us on behalf of the Commissioner. Given the issues that have been raised by the District's appeal, we are unable to resolve this matter without identification of the bathroom facilities and specification of the exact location of the alcoholic beverages. We therefore remand this matter once again to the Commissioner. In so doing, we direct the Commissioner to direct the County Superintendent to revisit the Charter School's facility and to submit a written report to him which 1) specifically identifies the exact location within the building where the alcoholic beverages are stored, including identification of such location on a site

plan and 2) provides clarification of the bathroom facilities which are assigned for use by students and those which are used by staff and other adults who have access to the building, including the specific type and location of bathroom facilities provided for the school's kindergarten students, so as to assure that the facilities are in compliance with the requirements of N.J.A.C. 6:22-5.4(h). In that regard, we also specifically direct that the County Superintendent assure that the Charter School has complied with the requirements of N.J.A.C. 6:22-5.4(h)4i or submitted an alternative bathroom plan for its kindergarten students in accordance with the requirements of N.J.A.C. 6:22-5.4(h)4ii and iii.

We direct the Commissioner to transmit the County Superintendent's report to us by February 16, 1999.

We again retain jurisdiction.

February 3, 1999

Date of mailing FEB 05 1999

(SB) 86 - 98

SB #86-98

IN THE MATTER OF THE FINAL GRANT :
OF A CHARTER FOR THE UNITY : STATE BOARD OF EDUCATION
CHARTER SCHOOL, MORRIS COUNTY. : DECISION

Decided by the Commissioner of Education, September 3, 1998

Remanded by the State Board of Education, November 4, 1998

Decision on remand by the Commissioner of Education, December 4, 1998

Remanded by the State Board of Education, February 3, 1999

Response by the Commissioner of Education, February 16, 1999

For the Appellant, Wiley, Malehorn & Sirota (John G. Geppert, Jr., Esq., of Counsel)

For the Respondent, Harvey Gilbert, Esq.

For the Participant Commissioner of Education, Terri A. Cutrera, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

This matter was initiated by an appeal filed by the Morris School District (hereinafter "District") from a grant of final approval given on September 3, 1998 by the Commissioner of Education to the Unity Charter School (hereinafter "Charter School") to operate a charter school pursuant to the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 et seq. (hereinafter "Act") for the period from July 1, 1998 through June 30, 2002.[1] As set forth in its application, Unity Charter School planned to open with 60

[1] The Morris School District did not file an appeal from the Commissioner's contingent approval of Unity Charter School given on February 5, 1997. As set forth in our decision of November 4, 1998, the Deputy Attorney General representing the Commissioner argued that all issues relating to the Commissioner's initial approval should be dismissed as time-barred. The State Board concluded that the appeal was not time-barred, stressing both that the initial approval had been given before the State Board had adopted

students in grades K-8, and to expand by the fourth year to include 195 students in grades K-12.[2]

One of the central issues of the District's appeal was the suitability of the Charter School's facility for educational purposes.[3] In this regard, the District focused on the fact that the building was owned by a social club which would continue to operate and which served and stored alcoholic beverages at the site for its members. The District was also concerned about whether the bathroom facilities for the students were appropriate in view of the rules pertaining to such facilities in schools and given the possibility that members of the social club might be present during school hours.

On November 4, 1998, we issued our first decision in this matter. We found that there was nothing in the record before the Commissioner at the time he granted final approval to the Charter School to indicate that the facility it was planning to utilize was a social club in which alcoholic beverages were served and stored.[4] This circumstance

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the regulations upon which the Deputy relied and that it would "hesitate to interpret our regulations to bar any appeal where the appellant had not had notice of the factual circumstances...." State Board's Decision, slip op. at 3.

[2] Under the terms of the Charter School's three-year lease for its current facility, the school would expand to a maximum of 140 students by the last year of the term of that lease.

[3] In addition, the District raised questions relating to the constitutionality of the Act and implementing regulations under the New Jersey constitution and claimed that approval of the Charter School was in violation of other requirements of New Jersey law. More specifically, the District contended that final approval permitted the operation of a segregated public school in violation of New Jersey's constitution and judicial decisions relating to racial balance, including Jenkins v. Tp. of Morris School District and Bd. of Educ., 58 N.J. 483 (1971), which was the foundation for the formation of the Morris School District. The District also contended that New Jersey's guidelines governing the desegregation of the public schools require that all public schools, including charter schools, be racially balanced. The District further claimed that payment of funds to the Charter School was unconstitutional and that the regulations were unconstitutional because they required district boards to allocate public funds for the use of private individuals. Given the constraints on our jurisdiction and the statutory time limit within which we were required to act, N.J.S.A. 18A:36A-4(d), we noted the presence of these issues in our decision of November 4, 1998, but presumed the validity of the statute and implementing regulations for purposes of determining whether the Charter School should be permitted to continue to operate.

[4] The Commissioner subsequently indicated in his decision on remand issued on December 4, 1998 that he "was advised [by Department staff] of the fact that the United Charter School is located in a building that also houses a social club" prior to his grant of a final charter to the school. Commissioner's Decision

raised both policy and legal concerns relating to the presence of alcoholic beverages in a facility housing a school. In light of the information contained in materials submitted by the parties in supplementation of the record, we concluded that further review and determination by the Commissioner of the suitability of this site for educational purposes was required pursuant to N.J.S.A. 18A:36A-10.[5] We therefore retained jurisdiction while remanding this matter to the Commissioner for determination within thirty days of the suitability of the site for educational purposes.

On December 4, 1998, the Commissioner issued his first decision on remand. Based on the Charter School's submission and a report to him describing the facility following a site visit by Department of Education staff, the Commissioner concluded that students did not have access to the social club or to the alcoholic beverages stored in the building and that the facility was suitable for a charter school.

Our Legal Committee's initial review of the Commissioner's December 4, 1998 decision indicated that some items which had been referenced by the Commissioner in his decision had not been included in the record transmitted to us by the Attorney General's office on December 15, 1998. Consequently, on December 29, we sent a letter to the Commissioner requesting those items, which included documentation as to the exact location of the alcoholic beverages that the Commissioner had concluded

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on Remand of December 4, 1998, slip op. at 1. The Deputy Attorney General representing the Commissioner, a participant in this appeal, also alleged in her brief to us dated October 19, 1998 that "[w]hen the Commissioner rendered his decision on September 3, 1998 to grant a charter to the Unity Charter School, he was fully informed about the nature and location of the proposed facility....The Commissioner was informed that even though the first floor of the Columbian Club houses a bar, no drinks are served on the premises during school hours." Commissioner's Brief, at 23-24. However, there is no documentation in any of the materials transmitted to us on appeal by the Commissioner that indicates that such information was communicated to him or considered by him in determining to grant final approval to the Charter School.

[5] N.J.S.A. 18A:36A-10 provides that: "A charter school may be located in part of an existing public school building, in space provided on a public work site, in a public building, or any other suitable location. The

were not accessible to the Charter School's students. We also requested clarification of the bathroom facilities that were assigned for use by students and those which were used by staff and other adults who had access to the building. See N.J.A.C. 6:22-5.4(h).[6]

On January 5, 1999, the Deputy Attorney General representing the Commissioner responded to our request on his behalf. While providing most of the documents we had requested, the Deputy Attorney General did not furnish documentation relating to the site visit conducted by Department staff which had been relied upon by the Commissioner, indicating that such report had been "communicated orally to the Commissioner." Letter dated 1/5/99 from Deputy Attorney General Cutrera, at 2. Nor did the Deputy Attorney General's submission provide clarification regarding the bathroom facilities or specify the location of the alcoholic beverages stored at the site, stating that "all other information and documentation requested in the [December 29, 1998] letter was not before the Commissioner when he rendered his December 4, 1998 decision." Id.

On February 3, 1999, we remanded this matter to the Commissioner for a second time. Given the issues that had been raised by the District's appeal, we found

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facility shall be exempt from public school facility regulations except those pertaining to the health or safety of the pupils...."

[6] N.J.A.C. 6:22-5.4(h) provides, in part:

> 2. General pupil toilet rooms are those which are designed and labeled for pupil use, contain at least two of each required fixture and are directly accessible from a corridor or an open plan instructional space. Pupils housed within an instructional space which is in excess of 300 square feet shall not be required to travel through any other space except a corridor to reach a general pupil toilet room.
>
> 3. There shall be at least one general toilet room for each sex on each floor occupied by pupils or all instructional rooms shall have individual toilet rooms. Where classrooms, shops or physical education rooms are provided with self-contained individual facilities (water closet, lavatory and drinking fountains), the pupil capacity of these rooms shall not be counted in computing the number of fixtures required in the general pupil toilet rooms.

See also N.J.A.C. 6:22-5.4(h)4, infra, n.7.

that we were unable to resolve this matter without specification of the exact location of the alcoholic beverages in the facility and assurance that the bathroom facilities complied with the requirements of N.J.A.C. 6:22-5.4(h). We directed the Commissioner to direct the County Superintendent to revisit the Charter School's facility and to submit a written report to him which

> 1) specifically identifies the exact location within the building where the alcoholic beverages are stored, including identification of such location on a site plan and 2) provides clarification of the bathroom facilities which are assigned for use by students and those which are used by staff and other adults who have access to the building, including the specific type and location of bathroom facilities provided for the school's kindergarten students, so as to assure that the facilities are in compliance with the requirements of N.J.A.C. 6:22-5.4(h).

State Board's Decision, slip op. at 4.

We also directed that the County Superintendent assure that the Charter School had complied with the requirements of N.J.A.C. 6:22-5.4(h)4i or submitted an alternative bathroom plan for its kindergarten students in accordance with the requirements of N.J.A.C. 6:22-5.4(h)4ii and iii.[7] We directed the Commissioner to transmit the County

[7] N.J.A.C. 6:22-5.4(h)4 provides:

> 4. Toilet facilities for early intervention, pre-kindergarten and kindergarten classrooms shall be provided as follows:
>
> i. An individual toilet room shall be provided in each classroom and shall meet the following criteria:
>
> (1) Be located and equipped in such a way as to ensure privacy for the pupils;
>
> (2) Be accessible to physically handicapped students and barrier free in design as per N.J.A.C. 5:23-7;
>
> (3) Meet all other provisions of N.J.A.C. 6:22-2.4(b) which pertain to toilet room design;
>
> (4) Pre-kindergarten and kindergarten classrooms shall contain a junior-juvenile size water closet suitable for children's use, equipped with an open front seat with a flood rim height no greater than 14 inches from the floor, and a lavatory (sink) with a flood rim height no greater than 26 inches from the floor; and
>
> (5) Facilities for early intervention programs shall provide a diaper/clothes changing area.
>
> ii. In lieu of providing an individual toilet room in each classroom as required in (h)4i above, toilet rooms may be provided adjacent to or outside the classroom if the following criteria are satisfactorily addressed:

Superintendent's report to us by February 16, 1999. Once again, we retained jurisdiction.

On February 16, 1999, the Commissioner transmitted a report to us prepared by the County Superintendent regarding her visit to the school on February 8, 1999. In her report, the County Superintendent provided a floor plan marked to show where alcoholic beverages were stored in the building, noting that the three cabinets used for such storage had been secured with a padlock requiring a key. She also indicated that a small amount of alcohol was locked in a small storage closet next to the bar.

With regard to the bathroom facilities, the County Superintendent reported that: "Bathroom facilities are located on both the upper and lower levels. There is one handicapped accessible toilet and sink for girls and one for boys located on the upper (school) level. On the lower level are larger restroom facilities. The girls' room consists of three stalls and three sinks. The boys' room consists of three stalls, three urinals and three sinks." Report of County Superintendent, at 2. The County Superintendent attached a copy of a memo from the Charter School's director to staff which directed "all

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(1) No child or group of children shall be left unsupervised at any time when traveling to or from the facilities. Provisions shall be made for adult supervision in a manner that will not infringe upon instructional time.

(2) Toilet facilities shall be readily accessible and the toilet room and signage shall be visible to a child from the classroom door.

(3) Toilet facilities for early intervention, pre-kindergarten pupils shall be designated for their exclusive use and shall be so identified.

(4) Toilet facilities shall be provided for both boys and girls and shall meet the requirements of (h)4i(4) above.

iii. If a school district chooses to provide toilet rooms adjacent to or outside the classroom in conformance with (h)4ii above, the chief school administrator shall certify to the county superintendent how the alternate method of compliance shall be addressed, on forms prescribed by the Commissioner. The completed form and a copy of a resolution by the local district board of education approving the alternate method of compliance shall be submitted to the county superintendent for approval. Annually, thereafter, the chief school administrator shall resubmit the form certifying how the alternate method of compliance shall be addressed. Any changes to the approved alternate method of compliance shall be submitted to the county superintendent for approval.

students to use the upstairs bathroom at all times. If the upstairs bathroom is not available, students are required to be accompanied by a staff member to the lower level rest room." Id. The County Superintendent indicated that the social club's maintenance man was the only other adult present in the building on a regular basis.

The County Superintendent also reported that a request was received from the Charter School on December 23, 1998 for approval of an alternative method of compliance with the requirements for in-class toilet facilities for kindergarten students. N.J.A.C. 6:22-5.4(h)4. That request stated that kindergarten students would be "escorted to and from the bathrooms by a designated staff person at or around 9:00 a.m. and again at or around 11:00 a.m. daily. Unless otherwise in use, the children will use the bathrooms on the main floor of the school. After lunch and before nap time, at or around 12:30 p.m., the children will use the lower level bathrooms adjacent to the nap area. At any additional time that there is a need for one of our youngest children to use a bathroom, he/she will be escorted to and from the bathroom by a staff member." The County Superintendent related that she had approved the school's alternative plan on January 5, 1999.

The County Superintendent did not, however, respond to our request to clarify which of the bathroom facilities at the site were designated for use by staff members and other adults who have access to the building.[8] Nor did the County Superintendent describe the specific type of toilet facilities provided for the school's kindergarten

[8] The State Board requested this specific information in its letter to the Commissioner dated December 29, 1998 and again in its decision of February 3, 1999.

students, so as to ensure compliance with the requirements of N.J.A.C. 6:22-5.4(h)4i(4). See N.J.A.C. 6:22-5.4(h)ii(4). See also N.J.A.C. 6:22-6.1(g)2vi(1).[9]

Hence, we are still unable to determine whether the facility in which the Charter School is housed is suitable for educational purposes as required by N.J.S.A. 18A:36A-10.[10] As a result, we find it necessary at this juncture to solicit additional briefs from the parties. We therefore direct the parties to submit briefs on the question of whether the bathroom facilities offered at the school's facility meet health and safety concerns, including but not necessarily limited to the regulatory provisions listed above. See, e.g., N.J.A.C. 6:22-5.4(h)4, N.J.A.C. 6:22-5.4(h)ii(4) and N.J.A.C. 6:22-6.1(g)2vi(1). In view of the fact that the school anticipates significant expansion, see, supra, at 1-2; n.2, we also direct the parties to address whether the Charter School can provide bathroom facilities at this site that meet health and safety concerns as the school expands. In this respect, the parties should pay particular attention to the health and safety needs of its kindergarten and elementary age children in relation to the middle school age children currently enrolled at the school and the high school students who will be attending school at this facility during the three-year term of the lease, in addition to the fact that the school has been approved by the Commissioner to expand to 140 students at this site by the 2000-2001 school year. Id.

Moreover, we cannot ignore the fact that on March 29, 1999, the Appellate Division issued a lengthy decision disposing of three appeals from contingent approvals of charter applications given by the Commissioner, including the Englewood on the

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[9] N.J.A.C. 6:22-6.1(g)2vi(1), regarding emergency provisions for accommodation of pupils in substandard school facilities, provides that toilet facilities for pupils in off-site, rented or leased buildings "shall be provided for students in early intervention, pre-kindergarten and kindergarten programs as per N.J.A.C. 6:22-5.4(h)4."

[10] See, supra, n.5.

Palisades Charter School. In the Matter of the Grant of the Charter School Application of Englewood on the Palisades Charter School, et al., __ N.J. Super. __ (App. Div. 1999) ("Englewood on the Palisades"). The Morris School District appeared as amicus curiae in that case. However, the Court "decline[d] to address specifically the issues raised" by the District because it "has an appeal pending before the State Board at present." Id., slip op. at 82.[11]

Given this circumstance, we direct the parties to brief the issues raised by the District that should most appropriately be considered in the first instance by this agency, see Abbott v. Burke, 100 N.J. 269, 301-303 (1985), as well as to address the impact of the Appellate Division's recent decision in Englewood on the Palisades on the instant appeal.

Finally, we recognize that under the circumstances as they had been presented to him at that point, the Commissioner stated in his decision of December 4, 1998 that he could find no legal prohibition to the Charter School's location in a building that also houses a social club. He further indicated in a footnote that "it does not appear" that either N.J.S.A. 33:1-76 or N.J.S.A. 2C:33-16 are implicated by the fact that the Charter School is housed in such a facility. Commissioner's Letter Determination of December 4, 1998, at notes 1 and 2 and accompanying text. However, the Commissioner did not expressly decide the legal issues raised and did not address the practical and policy implications of allowing a public school to operate in a facility where alcoholic beverages are present. In that the jurisdiction to decide these issues now lies with the State Board, we direct that the parties address these questions in more depth

[11] We note that, in contrast to the approvals challenged by the parties in that case, the Morris School District's appeal to the State Board in the instant matter is from the Commissioner's grant of final approval rather than from a grant of contingent approval. See, supra, n.1 and accompanying text.

on the basis of the information now in the record.

April 7, 1999

Date of mailing APR 09 1999

SB/86-98

SB #86-98

IN THE MATTER OF THE FINAL GRANT :

OF A CHARTER FOR THE UNITY : STATE BOARD OF EDUCATION

CHARTER SCHOOL, MORRIS COUNTY. : DECISION

Decided by the Commissioner of Education, September 3, 1998

Remanded by the State Board of Education, November 4, 1998

Decision on remand by the Commissioner of Education, December 4, 1998

Remanded by the State Board of Education, February 3, 1999

Response by the Commissioner of Education, February 16, 1999

Decision by the State Board of Education, April 7, 1999

For the Appellant, Wiley, Malehorn & Sirota (John G. Geppert, Jr., Esq., of Counsel)

For the Respondent, Collier, Jacob & Mills (David H. Ganz, Esq., of Counsel)

For the Participant Commissioner of Education, Terri A. Cutrera, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

This is our fourth determination in this matter. As described in the first section of this opinion, the matter involves a challenge by the Morris School District (hereinafter "District") to the grant of a charter to Unity Charter School (hereinafter "Unity" or "Charter School") under the Charter School Act of 1995. The District's challenge was based on several grounds, some of which related specifically to the circumstances of Unity's operation. These included claims that the Commissioner's approval of Unity's charter application was improper because: 1) the approval improperly permitted the operation of a segregated school in circumvention of the New Jersey Supreme Court's decision in Jenkins v. Tp. of Morris School District and Bd. of Educ., 58 N.J. 483 (1971)

July 7, 1999

and the Commissioner's subsequent order establishing the Morris School District, 2) Unity's facility was not suitable for educational purposes, and 3) Unity's application had not shown how the school would comply with the core curriculum standards and statewide assessment program. In addition, the District challenged the statutory and regulatory framework that currently governs the funding of charter schools.

As detailed below, our review thus far has focused on whether the Charter School's facility was suitable for educational purposes. Hence, our efforts have largely been directed toward establishing a record that would be sufficient to permit us to properly decide the facility issues. As described below, such a record has been developed, and we now decide those issues. At the same time, we have turned our attention to the District's remaining claims and, as embodied in this opinion, we also decide the issues related to those claims.

I

This appeal, which was initiated by the Morris School District, challenges a grant of final approval given on September 3, 1998 by the Commissioner of Education to the Unity Charter School to operate a charter school pursuant to the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 et seq. (hereinafter "Act") for the period from July 1, 1998 through June 30, 2002.[1] As set forth in its application, the Charter School

[1] The Morris School District did not file an appeal from the Commissioner's contingent approval of Unity Charter School given on February 5, 1997. As set forth in our decision of November 4, 1998, the deputy attorney general representing the Commissioner argued that all issues relating to the Commissioner's initial approval should be dismissed as time-barred. The State Board concluded that the appeal was not time-barred, stressing both that the initial approval had been given before the State Board had adopted the regulations upon which the Deputy relied and that it would "hesitate to interpret our regulations to bar any appeal where the appellant had not had notice of the factual circumstances...." State Board's Decision, slip op. at 3.

planned to open with 60 students in grades K-8, and to expand by the fourth year to include 195 students in grades K-12.[2]

One of the central issues of the District's appeal was the suitability of the Charter School's facility for educational purposes.[3] In this regard, the District focused on the fact that the building was owned by a social club which would continue to operate and which served and stored alcoholic beverages at the site for its members. The District was also concerned about whether the bathroom facilities for the students were appropriate in view of the rules pertaining to such facilities in schools and given the possibility that members of the social club might be present during school hours.

On November 4, 1998, we issued our first decision in this matter. We found that there was nothing in the record before the Commissioner at the time he granted final approval to the Charter School to indicate that the facility it was planning to utilize was a social club in which alcoholic beverages were served and stored.[4] This circumstance

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[2] Under the terms of the Charter School's three-year lease for its current facility, the school would expand to a maximum of 140 students by the last year of the term of that lease.

[3] In addition, the District raised questions relating to the constitutionality of the Act and implementing regulations under the New Jersey constitution and claimed that approval of the Charter School was in violation of other requirements of New Jersey law. More specifically, the District contended that final approval permitted the operation of a segregated public school in violation of New Jersey's constitution and judicial decisions relating to racial balance, including Jenkins, supra, which was the foundation for the formation of the Morris School District. The District also contended that New Jersey's guidelines governing the desegregation of the public schools require that all public schools, including charter schools, be racially balanced. The District further claimed that payment of funds to the Charter School was unconstitutional and that the regulations were unconstitutional because they required district boards to allocate public funds for the use of private individuals. Given the constraints on our jurisdiction and the statutory time limit within which we were required to act, N.J.S.A. 18A:36A-4(d), we noted the presence of these issues in our decision of November 4, 1998, but presumed at that time the validity of the statute and implementing regulations for purposes of determining whether the Charter School should be permitted to continue to operate.

[4] The Commissioner subsequently indicated in his decision on remand issued on December 4, 1998 that he "was advised [by Department staff] of the fact that the United Charter School is located in a building that also houses a social club" prior to his grant of a final charter to the school. Commissioner's Decision on Remand of December 4, 1998, slip op. at 1. The deputy attorney general representing the Commissioner, a participant in this appeal, also alleged in her brief to us dated October 19, 1998 that "[w]hen the Commissioner rendered his decision on September 3, 1998 to grant a charter to the Unity

raised both policy and legal concerns relating to the presence of alcoholic beverages in a facility housing a school. In light of the information contained in materials submitted by the parties in supplementation of the record, we concluded that further review and determination by the Commissioner of the suitability of this site for educational purposes was required pursuant to N.J.S.A. 18A:36A-10.[5] We therefore retained jurisdiction while remanding this matter to the Commissioner for determination within thirty days of the suitability of the site for educational purposes.

On December 4, 1998, the Commissioner issued his first decision on remand. Based on the Charter School's submission and a report to him describing the facility following a site visit by Department of Education staff, the Commissioner concluded that students did not have access to the social club or to the alcoholic beverages stored in the building and that the facility was suitable for a charter school.

Our Legal Committee's initial review of the Commissioner's December 4, 1998 decision indicated that some items which had been referenced by the Commissioner in his decision had not been included in the record transmitted to us by the Attorney General's office on December 15, 1998. Consequently, on December 29, 1998, we sent a letter to the Commissioner requesting those items, which included documentation as to the exact location of the alcoholic beverages that the Commissioner had

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Charter School, he was fully informed about the nature and location of the proposed facility....The Commissioner was informed that even though the first floor of the Columbian Club houses a bar, no drinks are served on the premises during school hours." Commissioner's Brief, at 23-24. However, there is no documentation in any of the materials transmitted to us on appeal by the Commissioner that indicates that such information was communicated to him or considered by him in determining to grant final approval to the Charter School.

[5] N.J.S.A. 18A:36A-10 provides that: "A charter school may be located in part of an existing public school building, in space provided on a public work site, in a public building, or any other suitable location. The facility shall be exempt from public school facility regulations except those pertaining to the health or safety of the pupils...."

concluded were not accessible to the Charter School's students. We also requested clarification of the bathroom facilities that were assigned for use by students and those which were used by staff and other adults who had access to the building. See N.J.A.C. 6:22-5.4(h).[6]

On January 5, 1999, a deputy attorney general representing the Commissioner responded to our request on his behalf. While providing most of the documents we had requested, the deputy did not furnish documentation relating to the site visit conducted by Department staff which had been relied upon by the Commissioner, indicating that such report had been "communicated orally to the Commissioner." Letter dated 1/5/99 from Deputy Attorney General Cutrera, at 2. Nor did the deputy's submission provide clarification regarding the bathroom facilities or specify the location of the alcoholic beverages stored at the site, stating that "all other information and documentation requested in the [December 29, 1998] letter was not before the Commissioner when he rendered his December 4, 1998 decision." Id.

On February 3, 1999, we remanded this matter to the Commissioner for a second time. Given the issues that had been raised by the District's appeal, we found that we were unable to resolve this matter without specification of the exact location of

[6] N.J.A.C. 6:22-5.4(h) provides, in part:

> 2. General pupil toilet rooms are those which are designed and labeled for pupil use, contain at least two of each required fixture and are directly accessible from a corridor or an open plan instructional space. Pupils housed within an instructional space which is in excess of 300 square feet shall not be required to travel through any other space except a corridor to reach a general pupil toilet room.
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> 3. There shall be at least one general toilet room for each sex on each floor occupied by pupils or all instructional rooms shall have individual toilet rooms. Where classrooms, shops or physical education rooms are provided with self-contained individual facilities (water closet, lavatory and drinking fountains), the pupil capacity of these rooms shall not be counted in computing the number of fixtures required in the general pupil toilet rooms.

See also N.J.A.C. 6:22-5.4(h)4, infra, n.7.

the alcoholic beverages in the facility and assurance that the bathroom facilities complied with the requirements of N.J.A.C. 6:22-5.4(h). We directed the Commissioner to direct the County Superintendent to revisit the Charter School's facility and to submit a written report to him which:

> 1) specifically identifies the exact location within the building where the alcoholic beverages are stored, including identification of such location on a site plan and 2) provides clarification of the bathroom facilities which are assigned for use by students and those which are used by staff and other adults who have access to the building, including the specific type and location of bathroom facilities provided for the school's kindergarten students, so as to assure that the facilities are in compliance with the requirements of N.J.A.C. 6:22-5.4(h).

State Board's Decision, slip op. at 4.

We also directed that the County Superintendent assure that the Charter School had complied with the requirements of N.J.A.C. 6:22-5.4(h)4i or submitted an alternative bathroom plan for its kindergarten students in accordance with the requirements of N.J.A.C. 6:22-5.4(h)4ii and iii.[7] We directed the Commissioner to transmit the County

[7] N.J.A.C. 6:22-5.4(h)4 provides:

> Toilet facilities for early intervention, pre-kindergarten and kindergarten classrooms shall be provided as follows:
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> i. An individual toilet room shall be provided in each classroom and shall meet the following criteria:
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> (1) Be located and equipped in such a way as to ensure privacy for the pupils;
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> (2) Be accessible to physically handicapped students and barrier free in design as per N.J.A.C. 5:23-7;
>
> (3) Meet all other provisions of N.J.A.C. 6:22-2.4(b) which pertain to toilet room design;
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> (4) Pre-kindergarten and kindergarten classrooms shall contain a junior-juvenile size water closet suitable for children's use, equipped with an open front seat with a flood rim height no greater than 14 inches from the floor, and a lavatory (sink) with a flood rim height no greater than 26 inches from the floor; and
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> (5) Facilities for early intervention programs shall provide a diaper/clothes changing area.
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> ii. In lieu of providing an individual toilet room in each classroom as required in (h)4i above, toilet rooms may be provided adjacent to or outside the classroom if the following criteria are satisfactorily addressed:

Superintendent's report to us by February 16, 1999. Once again, we retained jurisdiction.

On February 16, 1999, the Commissioner transmitted a report to us prepared by the County Superintendent regarding her visit to the school on February 8, 1999. In her report, the County Superintendent provided a floor plan marked to show where alcoholic beverages were stored in the building, noting that the three cabinets used for such storage had been secured with a padlock requiring a key. She also indicated that a small amount of alcohol was locked in a small storage closet next to the bar.

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(1) No child or group of children shall be left unsupervised at any time when traveling to or from the facilities. Provisions shall be made for adult supervision in a manner that will not infringe upon instructional time.

(2) Toilet facilities shall be readily accessible and the toilet room and signage shall be visible to a child from the classroom door.

(3) Toilet facilities for early intervention, pre-kindergarten pupils shall be designated for their exclusive use and shall be so identified.

(4) Toilet facilities shall be provided for both boys and girls and shall meet the requirements of (h)4i(4) above.

iii. If a school district chooses to provide toilet rooms adjacent to or outside the classroom in conformance with (h)4ii above, the chief school administrator shall certify to the county superintendent how the alternate method of compliance shall be addressed, on forms prescribed by the Commissioner. The completed form and a copy of a resolution by the local district board of education approving the alternate method of compliance shall be submitted to the county superintendent for approval. Annually, thereafter, the chief school administrator shall resubmit the form certifying how the alternate method of compliance shall be addressed. Any changes to the approved alternate method of compliance shall be submitted to the county superintendent for approval.

students to use the upstairs bathroom at all times. If the upstairs bathroom is not available, students are required to be accompanied by a staff member to the lower level rest room." Id. The County Superintendent indicated that the social club's maintenance man was the only other adult present in the building on a regular basis.

The County Superintendent also reported that a request was received from the Charter School on December 23, 1998 for approval of an alternative method of compliance with the requirements for in-class toilet facilities for kindergarten students. N.J.A.C. 6:22-5.4(h)4. That request stated that kindergarten students would be "escorted to and from the bathrooms by a designated staff person at or around 9:00 a.m. and again at or around 11:00 a.m. daily. Unless otherwise in use, the children will use the bathrooms on the main floor of the school. After lunch and before nap time, at or around 12:30 p.m., the children will use the lower level bathrooms adjacent to the nap area. At any additional time that there is a need for one of our youngest children to use a bathroom, he/she will be escorted to and from the bathroom by a staff member." The County Superintendent related that she had approved the school's alternative plan on January 5, 1999.

The County Superintendent did not, however, respond to our request to clarify which of the bathroom facilities at the site were designated for use by staff members and other adults who have access to the building.[8] Nor did the County Superintendent describe the specific type of toilet facilities provided for the school's kindergarten

[8] The State Board requested this specific information in its letter to the Commissioner dated December 29, 1998 and again in its decision of February 3, 1999.

students, so as to ensure compliance with the requirements of N.J.A.C. 6:22-5.4(h)4i(4). See N.J.A.C. 6:22-5.4(h)ii(4). See also N.J.A.C. 6:22-6.1(g)2vi(1).[9]

On April 7, 1999, finding that we were still unable to determine whether the facility in which the Charter School is housed is suitable for educational purposes as required by N.J.S.A. 18A:36A-10,[10] we directed the parties to submit additional briefs on the question of whether the bathroom facilities offered at the school met health and safety concerns, including but not necessarily limited to the regulatory provisions listed above. In view of the fact that the school anticipated significant expansion, we also directed the parties to address whether the Charter School could provide bathroom facilities at this site that met health and safety concerns as the school expanded. In this respect, we stressed that the parties should pay particular attention to the health and safety needs of the school's kindergarten and elementary age children in relation to the middle school age children currently enrolled at the school and the high school students who will be attending school at this facility during the three-year term of the lease, in addition to the fact that the school has been approved by the Commissioner to expand to 140 students at this site by the 2000-2001 school year.[11]

In addition, we could not ignore the fact that the Appellate Division had issued a decision on March 29, 1999 disposing of three appeals from contingent approvals of charter applications given by the Commissioner. In the Matter of the Grant of the

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[9] N.J.A.C. 6:22-6.1(g)2vi(1), regarding emergency provisions for accommodation of pupils in substandard school facilities, provides that toilet facilities for pupils in off-site, rented or leased buildings "shall be provided for students in early intervention, pre-kindergarten and kindergarten programs as per N.J.A.C. 6:22-5.4(h)4."

[10] See, supra, n.5.

[11] The Charter School has indicated in briefs and certifications that the number of students it is permitted to enroll at this site was limited to 105 by the Morristown Zoning Board when the school was granted a zoning variance in June 1998. However, there is no documentation in the record to verify that assertion.

Charter School Application of Englewood on the Palisades Charter School, et al., 320 N.J. Super. 174 (App. Div. 1999) ("Englewood on the Palisades"). The Morris School District appeared as amicus curiae in that case. However, the Court "decline[d] to address specifically the issues raised" by the District because it "has an appeal pending before the State Board at present." Id. at 243.[12] Given this circumstance, we directed the parties to brief the issues raised by the District that should most appropriately be considered in the first instance by this agency, see Abbott v. Burke, 100 N.J. 269, 301-303 (1985), as well as to address the impact of the Appellate Division's recent decision in Englewood on the Palisades on the instant appeal.

Finally, we recognized that under the circumstances as they had been presented to him at that point, the Commissioner had stated in his decision of December 4, 1998 that he could find no legal prohibition to the Charter School's location in a building that also housed a social club. He further indicated in a footnote that "it does not appear" that either N.J.S.A. 33:1-76 or N.J.S.A. 2C:33-16 are implicated by the fact that the Charter School is located in such a facility. However, the Commissioner did not expressly decide the legal issues raised and did not address the practical and policy implications of allowing a public school to operate in a facility where alcoholic beverages were present. In that the jurisdiction to decide these issues now lay with the State Board, we directed the parties to address these questions in more depth.

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[12] We note that, in contrast to the approvals challenged by the parties in that case, the Morris School District's appeal to the State Board in the instant matter is from the Commissioner's grant of final approval rather than from a grant of contingent approval. See, supra, n.1 and accompanying text.

II

The Morris School District responded to the directives in our April 7, 1999 decision by filing a supplemental brief. That brief, dated April 30, both addressed the issues we had identified in our decision and reasserted the claims that were the original focus of its appeal to the State Board. Accordingly, the District not only pursued its challenge to the suitability of the facility, but also renewed its claim that because charter schools are public schools, this agency is obligated to ensure that the student population attending Unity Charter School is racially balanced as measured under the Department of Education's desegregation guidelines. The District also reasserted its claim that financial obligations imposed on it by the Charter School's operation would result in violation of the rights of the District's students. The District argued in this respect that N.J.A.C. 6A:11-7.1(c) improperly required it to divert more of its funds to support the Charter School on a per pupil basis than the regulation required from the other school districts from which Unity would draw its students.

In a brief dated April 28, a deputy attorney general representing the Commissioner of Education argued that Unity's bathroom facilities were in compliance with applicable health and safety regulations and that the presence of alcohol did not under the circumstances violate state statutes or regulations. The deputy also argued that, within the limits established by various judicial decisions, the State Board had the jurisdiction to consider all of the issues raised in this appeal by the District, including the constitutional dimensions of those issues relating to funding and racial segregation. However, the deputy contended that the District lacks the standing to pursue an equal protection argument.

In its brief dated May 14, Unity addressed the facilities questions and responded to the District's other claims. The Charter School adopted the factual and legal arguments advanced on behalf of the Commissioner with the exception of the statement in the Commissioner's brief that the State Board had the jurisdiction to consider the District's equal protection argument. The Charter School denied the assertion that it was a segregated school and argued that the District's prior claim that the makeup of the school had a potentially negative effect on the District's racial balance should be rejected as insignificant and speculative. The Charter School contended that the Appellate Division's decision in Englewood on the Palisades, supra, had settled that the funding provisions of the Charter School Act were not unconstitutional. Along with its brief, the Charter School filed a motion to supplement the record with certifications relating to the racial balance of its student population and the efforts through which it had achieved such balance, as well as certifications relating to the facilities issues.

On May 18, the District filed a letter brief to bring to our attention the Appellate Division's decision in In the Matter of Charter School Appeal of the Greater Brunswick Charter School, Docket #A-4557-97T1F (App. Div. 1999), which had been rendered on May 17. On May 21, the deputy attorney general representing the Commissioner filed a letter brief in response and brought to our attention the Appellate Division's May 17 decision in In the Matter of the Grant of the Charter School Application of the Patrick Douglas Charter School, Docket #A-4713-97T1 (App. Div. 1999).

On May 26, the Charter School filed a response to the District's May 19 filing and also commented on the five charter school decisions rendered by the Appellate Division on May 17. In response to the Charter School's filing, the District filed a motion to supplement the record with data relating to its minority enrollment.

III

Initially, we grant the motions of both the Charter School and the District to supplement the record. After carefully reviewing the District's claims of racial imbalance on the basis of the record as supplemented, we find that it has failed to establish the validity of these claims.

There are two distinct aspects to the District's claims of racial imbalance. Its central claim is that the Commissioner could not properly approve the charter because such approval permitted the operation of a segregated school. The focus of this claim is the racial composition of the pupil population of Unity Charter School. However, the District is also contending that the Commissioner's approval was improper because the availability of the option of enrolling in the Charter School may result in a negative impact on the racial composition of the student population that continues to attend the District's schools.

We recognize that the parties are not in agreement as to the proportion of Unity's students that are minority. Nor is there agreement as to the racial composition of the Morris School District and the proper unit within the District by which to measure its racial balance in relation to Unity's. Nonetheless, even accepting the District's view on these questions,[13] it has not provided minimal substantiation for its claims. Given the

[13] The District contends that only 14% of Unity's student population is minority as compared to the District's overall enrollment of 40% minority. In its last submission, the District urges the State Board to use its K-2 minority enrollment of 46% as the basis for measuring the adequacy of the diversity achieved by Unity. However, we cannot discern any basis for evaluating the racial composition of the District's student population and any impact thereon solely by reference to its K-2 enrollment.

Moreover, a 46% minority enrollment, in and of itself, does not represent a concentration of minority students in the District such that remedial measures would be required and, as set forth above, the District has not shown that the small number of students from the District who are attending Unity have had any impact on the racial composition of the District's student population.

opportunity that we have afforded the District in these proceedings to pursue its claims and to provide adequate support for them, as well as the sweeping implications of granting the relief sought by the District,[14] we deny its claims of improper racial imbalance.

In doing so, we reject the District's argument that the question of whether Unity Charter School is segregated should be resolved by application of the Department's desegregation guidelines. Those guidelines were designed to ensure that the student populations attending school within a district were not segregated as a result of their assignment by the district to specific schools. This is not the situation confronting a charter school, which may recruit students from more than one district and which does not distribute its students by assigning them to different schools.

In point of fact, in the case of a charter school, the student makes the "assignment" by choosing to enroll in the charter school. Moreover, the conceptual foundation of the charter school program rests on the policy determination to provide students and their parents with the opportunity to make this choice.

This does not mean that, from an educational policy perspective, having a diverse student population is not important in the context of a charter school. In addition to prohibiting discrimination, N.J.S.A. 18A:36A-7; N.J.S.A. 18A:36A-11, the Legislature recognized the significance of achieving such diversity by requiring charter schools to have an admission policy that "...to the maximum extent practicable, seek[s] the enrollment of a cross section of the community's school age population, including race and academic factors." N.J.S.A. 18A:36A-8(e). In this respect, we stress that the

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[14] The District is seeking race-based remedies applicable to all charter schools.

District has not questioned the efforts that Unity has made to attract such a student population. Nor has the District alleged that Unity has in fact discriminated in either its recruitment efforts or its admissions.

Similarly, there is no indication that the option of attending Unity has had any impact on the racial composition of the District's student population. Given the number of students from the Morris School District who are enrolled in the Charter School, and based on the District's statistics, we cannot discern even a minimal impact on the racial composition of the District.

In this respect, we emphasize that, as the Appellate Division stated in Patrick Douglas Charter School, supra, slip op. at 12:

> [I]f and when the charter school in any particular district results in a skewed or undesirable racial mix in the existing district, the Commissioner has the power – independently of the powers granted by the Charter School Program Act – to take remedial action.

However, as described above, there is no indication from the District's submissions that Unity has had such an impact on the racial composition of the District's student population. Compare with Board of Educ. of Englewood Cliffs v. Board of Educ. of Englewood, decided by the State Board of Education, April 4, 1990, aff'd, 257 N.J. Super. 413 (App. Div. 1992), aff'd, 132 N.J. 327 (1993), cert. denied, 510 U.S. 991, 114 S.Ct. 547, 126 L.Ed.2d 449 (1993) (loss of 6% of the white student population from Dwight Morrow High School in Englewood to Tenafly High School pursuant to tuition policy constituted significant negative impact on the racial composition of Englewood's student population).

IV

We reject the District's contention that approval of Unity's charter should be reversed because Unity's application did not show how it would comply with the Core Curriculum Content Standards and the Statewide Assessment Program. In this respect, we stress that the Core Curriculum Content Standards define the results expected from the education provided, but they do not specify the strategies that a school district or a charter school must follow to achieve such results. Introduction to Core Curriculum Content Standards. Our review of Unity's application indicates that the curriculum planned by this Charter School was comprehensive and well thought out. In fact, the over-all application clearly demonstrates the school's commitment to achieving the standards and to going beyond them. Nor has the District specified any deficiency in Unity's curriculum, either as set forth in the application or as implemented. Hence, the District has not established any basis that would justify setting aside the approval granted by the Commissioner in this case to Unity's educational program.

V

We now turn to the issues relating to the Charter School's current facility. As set forth above, the District claimed that Unity's facility was not suitable for educational purposes as required by N.J.S.A. 18A:36A-10 because the school was housed in a facility that: 1) also served as a social club for adults and in which alcohol was present, and 2} did not have adequate bathroom facilities.

The District's concerns are twofold. First, it was concerned that the presence of alcoholic beverages at the site meant that there was a potential for children attending the Charter School to gain access to those beverages even if they were not served

during school hours. The District argued that this endangered the welfare of the students and also created a legal liability for the school and its founders.

Second, the District contended that permitting alcohol on the premises of a public school is contrary to the public policy of this State. In this regard, the District points to N.J.S.A. 33:1-76 (no liquor license shall be issued for the sale of alcoholic beverages within 200 feet of a church or public schoolhouse) and N.J.S.A. 2C:33-16 (any person bringing or disposing of alcoholic beverages on school property without express written permission is guilty of a disorderly persons offense). The District argues that these statutes both reflect this policy and the fact that the Legislature did not intend to allow the presence of alcohol on school premises under normal circumstances. The District also asserts that the concerns about the pervasiveness of alcohol problems in our nation's schools, which were highlighted by the "Safe and Drug Free School and Communities Act of 1994," 20 U.S.C.A. §7101 et seq., should be determinative in evaluating the suitability of Unity's facility.

After careful review of the legal and policy concerns that have been expressed, we reject the District's contention that the presence of alcoholic beverages on this site under the particular circumstances that have been presented here renders the site unsuitable for educational purposes. In this respect, we stress that, as found by the Commissioner, the statutes cited by the District do not create any legal prohibition that would have excluded the facility in question from use as a school. At the same time, we emphasize that the fact that there is no legal prohibition applicable to this situation does not mean that this facility is necessarily suitable for use for educational purposes.

Given the strength of our State's policies with respect to alcohol in our schools and this agency's objectives with respect to drug and alcohol education, we would not

permit Unity to continue to operate at this site unless we were satisfied that the circumstances were such that any possibility had been eliminated that the alcohol might be made available to the students. The record at this point satisfies us that this is in fact the case. Unity has provided detailed descriptions of how the alcohol is stored and how issues related thereto are handled. This has convinced us that the presence of the alcohol in this case is being treated by both Unity and its landlord with appropriate sensitivity to the welfare of the students in both the physical and social sense.

However, we continue to be concerned that access to alcoholic beverages might occur as a result of the presence of club members or other adults when the school is in operation, and we find that it is critical to avoid the potential that any such incident might occur in this setting. Accordingly, although Unity has indicated that such adults are not present during school hours, we find it necessary to formalize this practice by directing that adults who are not associated with the school shall not be permitted to be in the building when children are present during school hours or for school-sponsored events except with specific authorization from the appropriate school personnel and under proper supervision therefrom.

We have also examined with extreme care the issues related to Unity's bathroom facilities. After reviewing all of the submissions, we find that Unity has developed an alternate bathroom plan that appears to provide for adequate supervision of the children when they use the bathrooms. However, in addition to meeting those concerns, alternate bathroom plans authorized under N.J.A.C. 6:22-5.4(ii) must also "meet the requirements of [N.J.A.C. 6:22-5.4(h)4i(4)]." That regulation mandates without exception that kindergarten bathroom facilities which are outside or adjacent to the classroom must still contain a junior-juvenile size toilet and sink suitable for children's

use which meet the specifications set forth in the regulation. See, supra, n.7. There is no indication in the Charter School's alternate plan that either bathroom used by its kindergarten students complies with this requirement. Nothing in the information that has been provided to us gives us any indication that Unity's bathroom facilities conform with the requirements of N.J.A.C. 6:22-5.4(h)4i(4). Accordingly, notwithstanding the County Superintendent's approval, we cannot permit Unity to operate without a plan that reflects compliance with the requirements of N.J.A.C. 6:22-5.4(h)(4)ii. We therefore direct Unity to submit a revised plan that is in full compliance with the requirements of N.J.A.C. 6:22-5.4(h)(4)ii and 6:22-5.4(h)4i(4) to the County Superintendent for review and approval. We further direct that such plan be implemented by the start of the 1999-2000 school year, and we instruct the County Superintendent to verify such implementation on the basis of an inspection of the facility.

VI

We have carefully considered the District's argument that N.J.A.C. 6A:11-7.1(c) discriminates between resident and non-resident school districts by allowing non-resident districts to pay a charter school on a per pupil basis the lower of either the amount of its local levy or the local levy of the district of residence. We reject the District's contention that any resulting disparity between the amount it must pay as a resident district and that which a non-resident district will pay when one of its students attends Unity is impermissible. We are aware that such result will occur in cases where the non-resident district spends less on a per pupil basis to educate its students than does the resident district in which the charter school is located. However, we find that it is inequitable to require a school district to spend more on a per pupil basis to support

those students attending a charter school than it spends to educate the students attending school in the district. Nor would it be appropriate to permit a district to spend less for the education of students who attend a charter school located within the district than it does to educate those students who attend the district's schools. Hence, given the fact that the current statutory scheme for funding public education, the Comprehensive Education Improvement and Financing Act of 1996, permits variations in the amount of per pupil expenditures, we find that, in basing the obligations of resident and non-resident districts to support the educational costs of students attending charter schools on each district's expenditures for students in the district's schools, N.J.A.C. 6A:711-7.2(c) provides a proper and fair method for establishing the amount to be charged to each district to support those students attending a charter school.

VII

In summary, we find that the District has failed to establish the validity of its claims of racial imbalance on the basis of the record as supplemented. Even accepting the District's view on this issue, we find that it has not provided minimal substantiation for its claims. Nor is there any indication in the record that the option of attending Unity has had any impact on the racial composition of the District's student population. We therefore deny the District's claims of improper racial imbalance.

We also reject the District's contention that approval of Unity's charter should be reversed because Unity's application did not show how it would comply with the Core Curriculum Content Standards and the Statewide Assessment Program. The over-all application clearly demonstrates the school's commitment to achieving the standards and to going beyond them. The District has not specified any deficiency in Unity's

curriculum, either as set forth in the application or as implemented. Hence, the District has not established any basis that would justify setting aside the approval granted by the Commissioner in this case to Unity's educational program.

We also reject the District's contention that the presence of alcoholic beverages on this site under the particular circumstances that have been presented here renders the site unsuitable for educational purposes. However, given the presence of a social club on the premises in which alcoholic beverages are stored and served, we direct that adults who are not associated with the school be permitted to be in the building in which the Charter School is housed only with specific authorization from the appropriate school personnel and under proper supervision therefrom.

We find, in addition, that there is no indication in the record that Unity's bathroom facilities conform with the requirements of N.J.A.C. 6:22-5.4(h)4i(4). Accordingly, we direct Unity to submit a revised alternate bathroom plan that is in full compliance with the requirements of N.J.A.C. 6:22-5.4(h)(4)ii and 6:22-5.4(h)4i(4) to the County Superintendent for review and approval. We further direct that such plan be implemented by the start of the 1999-2000 school year, and we instruct the County Superintendent to verify such implementation on the basis of an inspection of the facility.

In addition, we reject the District's argument that N.J.A.C. 6A:11-7.1(c) discriminates between resident and non-resident school districts by allowing non-resident districts to pay a charter school on a per pupil basis the lower of either the amount of its local levy or the local levy of the district of residence. We reject the District's contention that any resulting disparity between the amount it must pay as a resident district and that which a non-resident district will pay when one of its students

attends Unity is impermissible. We find that, in basing the obligations of resident and non-resident districts to support the educational costs of students attending charter schools on each district's expenditures for students in the district's schools, N.J.A.C. 6A:711-7.2(c) provides a proper and fair method for establishing the amount to be charged to each district to support those students attending a charter school.

By our decision today, after a careful review of the record as supplemented, we have resolved all of the issues raised by this appeal. On this basis, as set forth in this decision, we have determined that the approval granted by the Commissioner to Unity Charter School should not be set aside. However, in so doing, we stress that the Charter School must comply with our directives as set forth above.

We do not retain jurisdiction.

Donald C. Addison, Jr. opposed.

Jean D. Alexander opposed.

July 7, 1999

Date of mailing _____

87-98

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JENNIFER ADORNO AND THE NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

FEBRUARY 24, 1998

OAL DKT. NO. EDU 8510-97
AGENCY DKT. NO. 292-8/97

JENNIFER ADORNO AND THE NEPTUNE TOWNSHIP EDUCATION ASSOCIATION, PETITIONERS, V. BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

FEBRUARY 24, 1998
DATE OF MAILING FEBRUARY 24, 1998

88-98

88-98

MARILYN D'AMATO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WEST PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

Febr uary 24, 1998

OAL DKT. NO. EDU 3959-97
AGENCY DKT. NO. 59-2/97

MARILYN D'AMATO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WEST PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

FEBRUARY 24, 1998
DATE OF MAILING FEBRUARY 24, 1998

(SB) 88-98

SB #88-98

IN THE MATTER OF THE FINAL GRANT :
OF A CHARTER FOR THE TEANECK : STATE BOARD OF EDUCATION
COMMUNITY CHARTER SCHOOL, : DECISION
BERGEN COUNTY. :

Decided by the Commissioner of Education, September 11, 1998

For the Appellant, Schenck, Price, Smith & King (Sidney A. Sayovitz, Esq., of Counsel)

For the Respondent, Paula Dillon, Esq.

For the Participant Commissioner of Education, Terri A. Cutrera, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

This is an appeal by the Board of Education of the Township of Teaneck (hereinafter "Board") from a grant of final approval given on September 11, 1998 by the Commissioner of Education to the Teaneck Community Charter School (hereinafter "Charter School") to operate a charter school pursuant to the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 et seq. (hereinafter "Act") for the period from July 1, 1998 through June 30, 2002.

The Board alleges that the Charter School had failed to meet its obligation to provide a copy of a signed lease for its facility by July 31, 1998, as required by the Commissioner in his contingent approval dated January 21, 1998, and that, in any event, there is no valid approval of the facility in which the Charter School is actually located because the facility that was the subject of the contingent approval was

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unavailable for occupancy in early September, causing the Charter School to move from one facility to another.[1]

The Commissioner is participating in this appeal as provided by N.J.A.C. 6A:11-2.5(d).

In addition, the Board has filed a motion to settle the record, contending that the record of this matter, which was prepared for the State Board by the Deputy Attorney General representing the Commissioner in this appeal, omits a number of material documents. The Commissioner opposes this motion, arguing that "[t]he letters which appellant seeks to add were not materials the regulations required the charter school to provide and were not considered by the Commissioner in reaching his final decision to grant a charter."

The Charter School has moved to supplement the record on appeal with the certifications of its Coordinator/Master-facilitator and its landlord. The Board opposes this motion.

We have reviewed the record provided to us on behalf of the Commissioner. Additionally, in view of the extremely stringent time limit under which the Legislature has required us to decide appeals of this type, N.J.S.A. 18A:36A-4(d), we have also accepted and reviewed all of the documents that have been filed with us by the parties to this matter. However, we recognize that an appeal of the Commissioner's contingent approval of the Charter School's application is currently pending before the Appellate

[1] We note that the Board filed an appeal from the contingent approval given by the Commissioner on January 21, 1998 to the Charter School's application. In a decision dated April 1, 1998, we presumed the validity of the statute and implementing regulations for purposes of determining whether the applicant should be permitted to proceed in this process and focused on whether the appeal raised concerns of such character as to preclude the grant of a charter. We concluded that the Board had not shown that the substance of the application was such that we should set aside the Commissioner's determination

Division and, consequently, that jurisdiction over the issues raised by that appeal now lies with the court. In arriving at our determination today, we have not considered any of those issues or documentation relating to those issues.

N.J.S.A. 18A:36A-4(c) provides that "[a]n application to establish a charter school shall be submitted to the commissioner and the local board of education...in the school year preceding the school year in which the charter school will be established. The board of education...shall review the application and forward a recommendation to the commissioner within 60 days of receipt of the application." The application is required to include, inter alia, "[a] description of, and address for, the physical facility in which the charter school will be located." N.J.S.A. 18A:36A-5. The Act further provides that "[a] charter school may be located in part of an existing public school building, in space provided on a public work site, in a public building, or any other suitable location." N.J.S.A. 18A:36A-10 (emphasis added).

The record provided on behalf of the Commissioner reflects that the Bergen County Superintendent of Schools submitted a facility verification form to the Commissioner on September 11, 1998, recommending approval of the Charter School's temporary facility contingent upon correction of a number of building deficiencies identified by the township's construction official. In a report issued earlier that day, the township's construction official had made the certificate of use for the school's temporary facility, St. Mark's Syrian Orthodox Cathedral, dependent upon correction of certain specified defects by September 16, 1998. However, the Commissioner's grant of final approval to the Charter School on September 11 contained no such

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that the proposed charter school could continue the process which would allow it to become operative if the Commissioner granted it final approval. That decision is currently on appeal in the Appellate Division.

contingencies. To the contrary, the Commissioner indicated that all contingencies, including submission and approval of a certificate of occupancy for the Charter School's temporary facility, had been satisfied. As indicated, however, such finding was based on the temporary certificate of use that would expire in five days on the temporary facility that the Charter School intended to use for approximately one month until its permanent facility was ready.[2] Moreover, there is no indication in the record that the deficiencies identified by the construction official were ultimately corrected or that the certificate of use on the temporary facility extended beyond September 16.[3]

In addition, while the record before the Commissioner included a signed lease for the Charter School's permanent facility, Yeshiva High School for Girls, several of the required documents relating to that facility had not yet been submitted when the Commissioner approved the final grant of a charter to the school for four years. These included a certificate of occupancy, fire inspection certificate and sanitary inspection report. See N.J.A.C. 6A:11-2.1(g). Nor did the Commissioner make his final grant of a charter contingent upon submission of such documents.[4]

We are sensitive to the fact that, as in its appeal to the Appellate Division, some of the Board's claims involve constitutional issues. Again, we are cognizant of our jurisdictional limitations. E.g., Abbott v Burke, 100 N.J. 269 (1985) (subsequent history

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[2] We note that a certificate of occupancy submitted by the Charter School was dated December 16, 1994 and had been issued to the church. It does not give approval for the occupancy of the facility as a charter school.

[3] The Charter School indicates that it did not move into its permanent facility until October 12.

[4] We note that after the Commissioner granted final approval to the Charter School on September 11, 1998, temporary certificates of occupancy were issued for the school's permanent facility, Yeshiva High School for Girls, on October 9 and October 14, requiring correction of certain specified building deficiencies by November 13. Although the Charter School indicates that it relocated to its Yeshiva facility on October 12, the record prepared for us, which is dated October 16, does not contain a fire inspection certificate or sanitary certificate for that facility.

omitted). Given the constraints, we have noted the presence of these issues but have presumed the validity of the statute and implementing regulations for purposes of determining whether the Charter School should be permitted to continue to operate.

As detailed above, the record before us reflects significant departures from the procedural requirements of the State Board's regulations which govern the charter school approval process. As a result, we find it necessary to remand this matter to the Commissioner for further review and determination of the suitability of Yeshiva High School for Girls, the Charter School's permanent facility, for educational purposes as required by N.J.S.A. 18A:36A-10. As part of his review, we direct the Commissioner to verify that all building deficiencies identified by the township's building official have been corrected and that all documentation required by N.J.A.C. 6A:11-2.1 has been submitted and approved. We also direct the Commissioner to verify that the Charter School had a valid certificate of use during the entire period of its operation at its temporary facility, the St. Mark's Syrian Orthodox Cathedral.

Since the Board has not shown that the procedural defects in this case reflect substantive deficiencies in the Charter School's facility of such character as to preclude the Charter School from continuing to operate at this time, we permit the Charter School to operate in the interim. In so doing, however, we do not minimize the importance of following the requirements of the regulations and of ensuring that a charter school has fulfilled all substantive requirements before granting final approval.

We retain jurisdiction.

November 4, 1998

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Date of mailing _____

(SB) 88-98

SB #88-98

IN THE MATTER OF THE FINAL GRANT	:	
OF A CHARTER FOR THE TEANECK	:	STATE BOARD OF EDUCATION
COMMUNITY CHARTER SCHOOL,	:	DECISION
BERGEN COUNTY.	:	

Decided by the Commissioner of Education, September 11, 1998

Remanded by the State Board of Education, November 4, 1998

Decision on remand by the Commissioner of Education, December 23, 1998

For the Appellant, Schenck, Price, Smith & King (Sidney A. Sayovitz, Esq., of Counsel)

For the Respondent, Carpenter, Bennett & Morrissey (Lois Goodman, Esq., of Counsel)

For the Participant Commissioner of Education, Michelle Lynn Miller, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

On October 9, 1998, the Board of Education of the Township of Teaneck (hereinafter "Board") filed an appeal to the State Board of Education from a grant of final approval given on September 11, 1998 by the Commissioner of Education to the Teaneck Community Charter School (hereinafter "Charter School") to operate a charter school pursuant to the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 et seq. (hereinafter "Act") for the period from July 1, 1998 through June 30, 2002.

On November 4, 1998, we remanded this matter to the Commissioner, finding that the record "reflect[ed] significant departures from the procedural requirements of

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the State Board's regulations which govern the charter school approval process." State Board's decision, slip op. at 5. In particular, we noted that the Commissioner had granted final approval to the school to operate for four years on the basis of a temporary certificate of use that was valid for five days on a temporary facility that the Charter School intended to use for approximately one month until its permanent facility was ready in October 1998. We therefore directed the Commissioner to verify that the Charter School had had a valid certificate of use during the entire period of its operation at its temporary facility, the St. Mark's Syrian Orthodox Cathedral, as well as to review and determine the suitability of Yeshiva High School for Girls, the Charter School's permanent facility, for educational purposes as required by N.J.S.A. 18A:36A-10. As part of this review, we directed the Commissioner to verify that all building deficiencies had been corrected and that all documentation required by N.J.A.C. 6A:11-2.1 had been submitted and approved.

On December 23, 1998, the Commissioner, upon review of additional documents submitted by the Charter School, concluded that the school "is a suitable facility for a charter school, has provided all necessary documentation, and was properly awarded a final charter." Commissioner's Decision on Remand, slip op. at 3.

After a careful review of the record, including the supplemental materials provided by the Charter School since our last decision, we find that the school has now satisfied the procedural requirements of N.J.A.C. 6A:11-2.1. Given that the school has now submitted all documentation required by N.J.A.C. 6A:11-2.1, see N.J.A.C. 6A:11-2.1(g) and (h), which documents have been approved by the Department, we approve the grant of a charter. We note, however, that the required documents were

neither requested by the Commissioner nor submitted by the Charter School until after our November 4, 1998 decision.[1]

March 3, 1999

Date of mailing MAR 05 1999

[1] Indeed, the record indicates that the Charter School did not even receive a fire inspection certificate for its permanent facility, as required by N.J.A.C. 6A:11-2.1(g)6, until November 5, 1998, the day after our prior decision in this matter and more than three weeks after the school had relocated its students to that site.

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SB #89-98

IN THE MATTER OF THE FINAL GRANT :

OF A CHARTER FOR THE ENGLEWOOD : STATE BOARD OF EDUCATION

ON THE PALISADES CHARTER SCHOOL: DECISION

BERGEN COUNTY. :

Decided by the Commissioner of Education, September 16, 1998

For the Appellant, Mauro, Savo, Camerino & Grant (Eric Martin Bernstein, Esq., of Counsel)

For the Respondent, Harry A. Carroll, Esq.

For the Participant Commissioner of Education, Arlene G. Lutz, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

This is an appeal by the Board of Education of the City of Englewood (hereinafter "Board") from a grant of final approval given on September 16, 1998 by the Commissioner of Education to the Englewood on the Palisades Charter School (hereinafter "Charter School" or "School") to operate a charter school pursuant to the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 et seq. (hereinafter "Act") for the period from July 1, 1998 through June 30, 2002.[1]

The Board alleges that the Charter School's facility and lease information did not meet the requirements of the Act, that the documentation provided to the Commissioner by the Charter School did not address admissions issues and racial balance, that the

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[1] The Board had filed an earlier appeal from a decision by the Commissioner on January 21, 1998 to grant contingent approval to the Charter School's application. In a decision issued on April 1, 1998, we permitted the Charter School to continue the process which would allow it to become operative if the Commissioner granted it final approval. In the Matter of the Grant of the Charter School Application of the Englewood on the Palisades Charter School, decided by the State Board of Education, April 1, 1998, appeal pending (App. Div.).

DECEMBER 2, 1998

documentation did not satisfy governance and staff requirements, that the Charter School had the burden to ensure that it did not have a negative impact on the Englewood public schools, that the approval of the Charter School would have an adverse impact on the Englewood public schools and that the Commissioner's exercise of discretion without applying every requirement raised constitutional issues.

The Commissioner, who is participating in this appeal as provided by N.J.A.C. 6A:11-2.5(d), filed an answer to the Board's brief along with a motion to supplement the record on appeal with "44 pages of documents related to racial issues regarding the Englewood on the Palisades Charter School" and a certification of the Deputy Attorney General representing the Commissioner.

After a thorough review of the record, we find it necessary to remand this matter to the Commissioner for further review and determination in accordance with our decision herein.

We stress that we did not make any determinations concerning the racial composition of the Charter School's pupil population in our prior decision in this matter. See supra note 1. Nor did we make any determinations with respect to the Board's allegations that granting this charter would have a negative racial impact on the Englewood school district because we agreed with the Commissioner that these questions were not ripe for determination at that point in the absence of actual enrollment data. However, we concluded that "given the racial composition of Englewood's student population," the Commissioner "should review the racial composition of the student population of the proposed Englewood on the Palisades Charter School before granting final approval." In the Matter of the Grant of the Charter

School Application of the Englewood on the Palisades Charter School, supra, slip op. at 2.

Unfortunately, neither the record provided to us on behalf of the Commissioner in this matter nor the Commissioner's letter of September 16, 1998 reflect that he reviewed the racial composition of the school before granting it final approval to begin operations. Hence, we direct the Commissioner to provide us by January 15, 1999 with a written assessment of both the racial balance of the student population currently attending the Charter School and the potential impact of that school on the Englewood school district during the term for which the charter is approved, as well as an assessment of the school's potential long-term impact on the district's racial balance. We also direct that the Commissioner articulate the standard which he relied upon in making his determination, as well as the factual basis for his conclusions. Such standard must be delineated with careful reference to the applicable judicial decisions. E.g., Board of Educ. of Englewood Cliffs v. Board of Educ. of Englewood, 257 N.J. Super. 413 (App. Div. 1992), aff'd, 132 N.J. 327 (1993), cert. denied, 510 U.S. 991, 114 S.Ct. 547, 126 L.Ed.2d 449 (1993).

In addition to our concerns relating to racial balance, we find that the record provided to us on behalf of the Commissioner fails to demonstrate that the only teacher employed by the Charter School is properly certified as required by N.J.S.A. 18A:36A-14(c). That statute, which applies specifically to charter school employees, requires that:

> All classroom teachers and professional support staff shall hold appropriate New Jersey certification....

In his letter of January 21, 1998 to the Charter School, the Commissioner recognized that the Charter School had not yet complied with this statutory requirement because his approval of the school's application was made contingent upon receipt and approval of documentation not included with the Charter School's application, including: "Copies of Certifications of Teachers, Principals/Directors and Professional Support Staff."

The documentation which the Charter School submitted to the Commissioner in order to satisfy this contingency shows only that the school has employed a single individual who was to serve as a teacher. Those documents, however, do not reflect that this individual is appropriately certified for such employment. See N.J.S.A. 18A:1-1; N.J.S.A. 18A: 26-1; N.J.S.A. 18A:26-2; N.J.S.A. 18A: 27-2. Rather, the documents show only that this individual had been issued a "certificate of eligibility" by the State Board of Examiners in October 1996. The certificate of eligibility states that the teacher, Dana D. Clark, is "eligible to seek employment in positions requiring the Provisional Certificate," and specifies that "[t]he Provisional Certificate will be issued contingent upon evidence of employment in a district that agrees to provide an approved induction program, including required job support, performance evaluation and professional coursework."[2]

[2] Our regulations provide that a certificate of eligibility is "a permanent certificate that may be issued to persons who meet academic degree and examination requirements for provisional employment." N.J.A.C. 6:11-4.4(a). The provisional certificate is a substandard teaching certificate which "is a temporary one-year certificate issued to candidates who have met requirements for initial employment as part of a State-approved district training program or residency leading to standard certification." N.J.A.C. 6:11-4.2. Accordingly, the regulations specify that "[h]olders of certificates of eligibility shall not assume responsibility for a job assignment until they have been issued provisional certificates." N.J.A.C. 6:11-4.4(a).

Those regulations further require that "[e]ach district school or consortium seeking to hire a provisional teacher must submit a plan to the Department of Education and receive approval in accordance with the same procedures used for initial approval of collegiate preparation programs." N.J.A.C. 6:11-5.3(a). "No

We recognize that, as found by the Legislature, charter schools may provide a mechanism for the implementation of a variety of educational approaches which may not be available in the traditional public school classroom. N.J.S.A. 18A:36A-2. However, nothing in N.J.S.A. 18A:36-1 et seq. or in any other provision of the education law excuses a charter school from complying with statutory certification requirements.

Again, there is nothing in the record provided to us by the Commissioner to show that Ms. Clark, the Charter School's only teacher, holds appropriate New Jersey certification as required by the applicable statutes. Furthermore, even where a provisionally certified alternate route teaching candidate may appropriately be employed, a certificate of eligibility, as set forth hereinabove, does not constitute provisional certification. See supra note 2.

Although we make no definitive judgment at this time concerning the specific certification required in this case, we cannot ignore the fact that there is no indication in the record that the Charter School has retained any staff member other than Ms. Clark to serve as part of its teaching staff or as director/headmaster of the school.

Accordingly, we also remand this matter to the Commissioner for determination, in accordance with our decision herein, of whether all classroom teachers employed by the Charter School possess certification that is appropriate to authorize them to fulfill the responsibilities attending their positions, as required by N.J.S.A. 18A:36A-14(c),

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public school district shall be authorized to employ a provisional teacher unless it has submitted a plan and received the approval of the commissioner at the recommendation of the State Board of Examiners." N.J.A.C. 6:11-5.3(d). State-approved training programs for provisional teachers must provide a "full-time seminar/practicum of no less than 20 days duration which takes place prior to the time at which the provisional teacher takes full responsibility for a classroom" and a "period of intensive on-the-job supervision beginning the first day on which the provisional teacher assumes full responsibility for a classroom." N.J.A.C. 6:11-5.3(f). The program must also include approximately 200 hours of formal instruction. N.J.A.C. 6:11-5.3(g).

whether the school has employed at this point a headmaster as indicated in its application and, if so, the qualifications of such individual. Given our concerns, we direct the Commissioner to make such determination and transmit it to us by December 14, 1998.

In view of our determination, we have not considered at this time the motions to supplement the record filed by the Commissioner and the Englewood Board. While the Charter School may continue to operate in the interim, we retain jurisdiction.

Donald C. Addison, Jr. and S. David Brandt opposed.

December 2, 1998

Date of mailing DEC 04 1998

(SB) 89-98

SB #89-98

IN THE MATTER OF THE FINAL GRANT :
OF A CHARTER FOR THE ENGLEWOOD : STATE BOARD OF EDUCATION
ON THE PALISADES CHARTER SCHOOL,: DECISION
BERGEN COUNTY. :

Decided by the Commissioner of Education, September 16, 1998

Remanded by the State Board of Education, December 2, 1998

Decision on remand by the Commissioner of Education, December 14, 1998

For the Appellant, Mauro, Savo, Camerino & Grant (Eric Martin Bernstein, Esq., of Counsel)

For the Respondent, Harry A. Carroll, Esq.

For the Participant Commissioner of Education, Arlene G. Lutz, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

This appeal was initiated by the Board of Education of the City of Englewood (hereinafter "Board") following the grant of final approval by the Commissioner of Education to the Englewood on the Palisades Charter School (hereinafter "Charter School") to operate a charter school pursuant to the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 et seq. (hereinafter "Act"). The approval authorized the Charter School to operate from July 1, 1998 through June 30, 2002,[1] at which time the

[1] We note that the Charter School's application indicates that the school would include kindergarten through eighth grade by the 2005-2006 school year, and that it anticipated employing 18 to 27 classroom teachers at that point.

MARCH 17, 1999

Charter School anticipated that it would encompass grades K-5 and employ fourteen teachers. At the time of its approval, the school anticipated opening for the 1998-99 school year with ninety students in grades K-2 and 6 full-time teachers.

On December 2, 1998, we issued our first decision relating to the final approval which had been granted to the Charter School by the Commissioner on September 18, 1998. After reviewing the record, we found that we could not properly decide the appeal without first remanding it to the Commissioner. As set forth in our decision, one of our major concerns was whether the teaching staff members employed by the Charter School were appropriately certified for such employment as required by statute. We were cognizant of the fact that the Commissioner's contingent approval on January 21, 1998 had approved the Charter School's application contingent, inter alia, on receipt of copies of certifications for the staff.[2] However, the documentation submitted by the Charter School showed only that it had employed a single individual, Dana D. Clark, who was to serve as a teacher and that she had been issued a "certificate of eligibility" by the State Board of Examiners in October 1996.

When we reviewed the matter, we were aware that under the terms of our regulations, a certificate of eligibility merely authorizes an individual to seek employment in positions requiring a provisional certificate and that a certificate of eligibility cannot be considered as appropriate certification within the meaning of the education statutes. We were also sensitive to the fact that there was very little information in the record

[2] We note that he Board had filed an earlier appeal from a decision by the Commissioner on January 21, 1998 to grant contingent approval to the Charter School's application. In a decision issued on April 1, 1998, we permitted the Charter School to continue the process which would allow it to become operative if the Commissioner granted it final approval. In the Matter of the Grant of the Charter School Application

provided to us concerning the program that was actually being implemented by the Charter School during the first year of the term of its charter. We therefore found that it was necessary to remand the matter to the Commissioner for a determination by December 14, 1998 of whether all classroom teachers employed by the Charter School possessed certification that was appropriate to authorize them to fulfill the responsibilities attending their positions and whether the school had employed a headmaster as it had indicated in its application.[3]

On December 14, 1998, the Commissioner issued his decision on remand regarding the certification issue. That decision confirmed that Ms. Clark was in fact the only teacher who had been employed by the Charter School. Without reference to the program structure of the Charter School, the Commissioner reported that Ms. Clark "possesses certification that authorizes her to serve as an elementary school teacher." Commissioner's Decision on Remand, slip op. at 3. The Commissioner also reported that:

> On December 7, 1998, the department received the Statement of Assurance [of Position to Teach] and related fee from Englewood on the Palisades Charter School. On December 8, 1998, the department received and reviewed for approval a copy of the "Provisional Teacher Program Training Support and Evaluation Contract for Holders of Certificates of Eligibility Contract." Subsequently, the department issued the teacher a Provisional Teaching Certificate dated December 1998. This certificate authorizes the holder to teach at the charter school. The employed

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of the Englewood on the Palisades Charter School, decided by the State Board of Education, April 1, 1998, appeal pending (App. Div.).

[3] We also directed the Commissioner to provide us by January 15, 1999 with a written assessment of both the racial balance of the student population attending the Charter School and the potential impact of that school on the Englewood school district during the term for which the charter was approved, as well as an assessment of the school's potential long-term impact on the district's racial balance. Our decision today, however, addresses only the certification issue.

> teacher has been working with a mentor teacher and participating in the Phase I training class at the Montclair Regional Training Center....

Id. at 2.

The Training Support and Evaluation Contract provided to the Commissioner by the Charter School on December 8, 1998 indicated that a retired teacher was serving as Ms. Clark's mentor teacher. It further indicated that the support team assembled for Ms. Clark, as required by N.J.A.C. 6:11-5.3, consisted of the mentor teacher, the school's headmaster, who did not possess supervisory certification, and a retired principal, who held certification as a principal.

The Commissioner also verified that the school's headmaster, Joyce Garrison Wiggins, had been employed by the Charter School when he had granted final approval of the charter. In response to our directive that he provide us with Ms. Wiggins' qualifications, the Commissioner indicated that, under the regulations applicable to charter schools, certification as a principal was not required in order to serve as a headmaster.

After a careful review of the record, including the additional materials provided to us on behalf of the Commissioner, we are still unable to resolve the question of whether the Charter School is fulfilling its statutory obligations with respect to certification requirements. In fact, the information which the Commissioner has supplied in response to our remand has increased our level of concern by confirming that, despite the representations in its application, the Charter School began operating with only one class of kindergarten students, one individual to serve as a teacher, and a headmaster.

The information which the Commissioner has supplied confirms that the single individual employed by the school as a teacher is an alternate route candidate who did not receive her provisional certification until three months after the school year had begun.[4] It also appears that there are no staff members employed by the school who hold standard certification.

These circumstances are unusual, even for a charter school. While the Commissioner properly reported that provisional certification authorizes an alternate route candidate to teach, and although there is no general requirement that the director of a charter school possess certification either as a teacher or an administrator, this combination of circumstances requires careful evaluation when the only individual who is providing instructional services to the students is the alternate route candidate. In this context, the apparent change in the scope of the school's operations from that anticipated in the application that was the basis for the grant of the charter is critical, especially with respect to whether the Charter School can provide the level of support required in an approved plan for an alternate route candidate given its current configuration.[5] In this respect, we stress that compliance with the regulatory

[4] As we stated in our previous decision in this matter, a certificate of eligibility is "a permanent certificate that may be issued to persons who meet academic degree and examination requirements for provisional employment." N.J.A.C. 6:11-4.4(a). The provisional certificate is a substandard teaching certificate which "is a temporary one-year certificate issued to candidates who have met requirements for initial employment as part of a State-approved district training program or residency leading to standard certification." N.J.A.C. 6:11-4.2. Accordingly, the regulations specify that "[h]olders of certificates of eligibility shall not assume responsibility for a job assignment until they have been issued provisional certificates." N.J.A.C. 6:11-4.4(a).

[5] We note that the Charter School's founder sent a letter to the Department of Education in August 1998 advising that the school planned to open with 30 students for kindergarten only in 1998-99, the first year of its charter, rather than K-2 with 90 students and six full-time teachers as proposed in the school's application approved by the Commissioner. The letter further indicated that the school would be submitting a formal resolution requesting an amendment of its charter to permit such a change. However, there is nothing further in the record before us regarding such an amendment.

requirements for the provisional teacher training program is necessary in order to protect the children of the state and the integrity of the certification system. See, e.g., LaRosa v. Ellis, decided by the Commissioner of Education, September 2, 1992.

Given the particular circumstances, we are unable to determine whether the provisional teacher training program implemented by the Charter School in this instance complies with the requirements of N.J.A.C. 6:11-5.3. Therefore, pursuant to N.J.A.C. 6:2-1.9, we direct that the Charter School supplement the record in this case with the following information: documents showing acceptance of the school's provisional teacher program by the State Board of Examiners; documents demonstrating that the composition of Ms. Clark's professional support team complies with the requirements of N.J.A.C. 6:11-5.3(h); documents showing when Ms. Clark commenced phase I of the provisional teacher program, the substance of that program and the current status of her training, N.J.A.C. 6:11-5.3(f)1; any evaluations of Ms. Clark prepared by the professional support team as required by N.J.A.C. 6:11-5.3 and 5.4; any reports by the regional training center showing successful completion by Ms. Clark of any phases of the provisional teacher program, N.J.A.C. 6:11-5.3(f); whether any certified teaching staff members were on site and shared responsibility for Ms. Clark's classroom pending her receipt of a provisional certificate and completion of phase I of the training program, including the names and certification of any such individuals, their responsibilities during this period and the amount of time they spent in the classroom, N.J.A.C. 6:11-4.4(a), N.J.A.C. 6:11-5.3(f)1; and any other documents providing details regarding the substance of the provisional teacher program implemented by the Charter School pursuant to the requirements of N.J.A.C. 6:11-5.3.

We direct the Charter School to submit all information required by our decision today to our Legal Committee within ten days from the date of this decision.

March 17, 1999

Date of mailing MAR 22 1999

SB/89-98

SB #89-98

IN THE MATTER OF THE FINAL GRANT :
OF A CHARTER FOR THE ENGLEWOOD : STATE BOARD OF EDUCATION
ON THE PALISADES CHARTER SCHOOL,: DECISION
BERGEN COUNTY. :

Decided by the Commissioner of Education, September 16, 1998

Remanded by the State Board of Education, December 2, 1998

Decision on remand by the Commissioner of Education, December 14, 1998

Decision by the State Board of Education, March 17, 1999

For the Appellant, Mauro, Savo, Camerino & Grant (Eric Martin Bernstein, Esq., of Counsel)

For the Respondent, Harry A. Carroll, Esq.

For the Participant Commissioner of Education, Arlene G. Lutz, Deputy Attorney General (Paul H. Zoubek, Acting Attorney General of New Jersey)

This appeal was initiated by the Board of Education of the City of Englewood (hereinafter "Board") following the grant of final approval by the Commissioner of Education to the Englewood on the Palisades Charter School (hereinafter "Charter School") to operate a charter school pursuant to the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 et seq. The Commissioner's approval authorized the Charter

JUNE 2, 1999

School to operate from July 1, 1998 through June 30, 2002,[1] at which time the Charter School anticipated that it would encompass grades K-5 and employ fourteen teachers. In its application, the school anticipated opening for the 1998-99 school year with ninety students in grades K-2 and 6 full-time teachers.[2]

On December 2, 1998, we issued our first decision relating to the final approval granted to the Charter School by the Commissioner on September 16, 1998. After reviewing the record, we found that we could not properly determine the appeal without first remanding it to the Commissioner. As set forth in that decision, one of our major concerns was whether the teaching staff members employed by the Charter School were appropriately certified for such employment as required by statute. We were cognizant of the fact that the Commissioner's contingent approval on January 21, 1998 had approved the Charter School's application contingent, inter alia, on receipt of copies of certifications for the school's staff.[3] However, the documentation submitted by the Charter School showed that it had employed only a single individual, Dana D. Clark,

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[1] We note that the Charter School's application indicates that the school would include kindergarten through eighth grade by the 2005-2006 school year, and that it anticipated employing 18 to 27 classroom teachers at that point.

[2] We note that the Charter School's founder sent a letter to the Department of Education in August 1998 advising that the school planned to open with 30 students for kindergarten only in 1998-99, the first year of its charter, rather than K-2 with 90 students and six full-time teachers as proposed in the school's application approved by the Commissioner. The letter further indicated that the school would be submitting a formal resolution requesting an amendment of its charter to permit such a change. However, there is nothing further in the record before us regarding such an amendment, and the Commissioner permitted the school to open with one kindergarten class consisting of 15 students. Contrast with In the Matter of the Denial of the Charter School Application of the Galloway Educational Meridian Charter School, decided by the State Board of Education, April 7, 1999.

[3] We note that the Board had filed an earlier appeal from a decision by the Commissioner on January 21, 1998 to grant contingent approval to the Charter School's application. In a decision issued on April 1, 1998, we permitted the Charter School to continue the process which would allow it to become operative if the Commissioner granted it final approval. In the Matter of the Grant of the Charter School Application of the Englewood on the Palisades Charter School, decided by the State Board of Education, April 1, 1998. On March 29, 1999, the Appellate Division affirmed that decision. In the Matter of the Grant of the Charter School Application of Englewood on the Palisades Charter School, et al., __ N.J. Super. __ (App. Div. 1999).

who was to serve as a teacher and that Ms. Clark had been issued a "certificate of eligibility" by the State Board of Examiners in October 1996.[4]

When we reviewed the matter, we were aware that under the terms of our regulations, a certificate of eligibility authorized an individual only to seek employment in positions requiring a provisional certificate and that a certificate of eligibility could not be considered as appropriate certification within the meaning of the education statutes.[5] We were also sensitive to the fact that there was very little information in the record provided to us concerning the program that was being implemented by the Charter School during the first year of the term of its charter. We therefore found it necessary to remand the matter to the Commissioner for a determination by December 14, 1998 of whether the classroom teachers employed by the Charter School possessed certification that was appropriate to authorize them to fulfill the responsibilities attending their positions and whether the school had employed a headmaster as it had indicated in its application.[6]

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[4] We note in that regard that the checklist of required documentation prepared by the Department and utilized by the Commissioner in reviewing the documents submitted by the Charter School after its contingent approval does not have a checkmark next to "Copies of Certifications of Teachers, Principals/Directors and Professional Support Staff."

[5] Our regulations provide that a certificate of eligibility is "a permanent certificate that may be issued to persons who meet academic degree and examination requirements for provisional employment." N.J.A.C. 6:11-4.4(a). The provisional certificate is a substandard teaching certificate which "is a temporary one-year certificate issued to candidates who have met requirements for initial employment as part of a State-approved district training program or residency leading to standard certification." N.J.A.C. 6:11-4.2. Accordingly, the regulations specify that "[h]olders of certificates of eligibility shall not assume responsibility for a job assignment until they have been issued provisional certificates." N.J.A.C. 6:11-4.4(a).

[6] We also directed the Commissioner to provide us by January 15, 1999 with a written assessment of both the racial balance of the student population attending the Charter School and the potential impact of that school on the Englewood school district during the term for which the charter was approved, as well as an assessment of the school's potential long-term impact on the district's racial balance. Our decision today, however, addresses only the certification issue.

On December 14, 1998, the Commissioner issued his decision on remand regarding the certification issue. That decision confirmed that Ms. Clark was in fact the only teacher who had been employed by the Charter School.

The Commissioner rendered his decision on remand without reference to the structure of the Charter School and its program. Hence, while the Commissioner reported in his decision that Ms. Clark "possesses certification that authorizes her to serve as an elementary school teacher," Commissioner's Decision on Remand, slip op. at 3, he did not consider whether provisional certification was appropriate in the context of the structure of the particular instructional program being delivered.

The Commissioner also reported that:

> On December 7, 1998, the department received the Statement of Assurance [of Position to Teach] and related fee from Englewood on the Palisades Charter School. On December 8, 1998, the department received and reviewed for approval a copy of the "Provisional Teacher Program Training Support and Evaluation Contract for Holders of Certificates of Eligibility Contract." Subsequently, the department issued the teacher a Provisional Teaching Certificate dated December 1998. This certificate authorizes the holder to teach at the charter school. The employed teacher has been working with a mentor teacher and participating in the Phase I training class at the Montclair Regional Training Center....

Id. at 2.

The Training Support and Evaluation Contract provided to the Commissioner by the Charter School on December 8, 1998 indicated that a retired teacher was serving as Ms. Clark's mentor teacher. It further indicated that the support team assembled for Ms. Clark, as required by N.J.A.C. 6:11-5.3, consisted of the mentor teacher, the school's headmaster, who did not possess supervisory certification, and a retired principal, who

held certification as a principal. The Commissioner also verified that the school's headmaster, Joyce Garrison Wiggins, had been employed by the Charter School when he had granted final approval of the charter. In response to our directive that he provide us with Ms. Wiggins' qualifications, the Commissioner indicated that, under the regulations applicable to charter schools, certification as a principal was not required in order to serve as a headmaster.

Again, the Commissioner made no judgment as to whether, given the particular circumstances, the qualifications possessed by Ms. Wiggins were sufficient to authorize her to fulfill the specific responsibilities of her position. Nor did the Commissioner assess whether the individuals comprising the support team responsible for overseeing Ms. Clark's alternate route program were appropriately certified for the roles they were fulfilling or that the team conformed with the requirements of the certification regulations.

On March 17, 1999, we issued our second decision relating to the final approval which had been granted to the Charter School by the Commissioner. We stated in that decision:

> After a careful review of the record, including the additional materials provided to us on behalf of the Commissioner, we are still unable to resolve the question of whether the Charter School is fulfilling its statutory obligations with respect to certification requirements. In fact, the information which the Commissioner has supplied in response to our remand has increased our level of concern by confirming that, despite the representations in its application, the Charter School began operating with only one class of kindergarten students, one individual to serve as a teacher, and a headmaster.
>
> The information which the Commissioner has supplied confirms that the single individual employed by the

school as a teacher is an alternate route candidate who did not receive her provisional certification until three months after the school year had begun. It also appears that there are no staff members employed by the school who hold standard certification.

These circumstances are unusual, even for a charter school. While the Commissioner properly reported that provisional certification authorizes an alternate route candidate to teach, and although there is no general requirement that the director of a charter school possess certification either as a teacher or an administrator, this combination of circumstances requires careful evaluation when the only individual who is providing instructional services to the students is the alternate route candidate. In this context, the apparent change in the scope of the school's operations from that anticipated in the application that was the basis for the grant of the charter is critical, especially with respect to whether the Charter School can provide the level of support required in an approved plan for an alternate route candidate given its current configuration. In this respect, we stress that compliance with the regulatory requirements for the provisional teacher training program is necessary in order to protect the children of the state and the integrity of the certification system. See, e.g., LaRosa v. Ellis, decided by the Commissioner of Education, September 2, 1992.

Given the particular circumstances, we are unable to determine whether the provisional teacher training program implemented by the Charter School in this instance complies with the requirements of N.J.A.C. 6:11-5.3. Therefore, pursuant to N.J.A.C. 6:2-1.9, we direct that the Charter School supplement the record in this case with the following information: documents showing acceptance of the school's provisional teacher program by the State Board of Examiners; documents demonstrating that the composition of Ms. Clark's professional support team complies with the requirements of N.J.A.C. 6:11-5.3(h); documents showing when Ms. Clark commenced phase I of the provisional teacher program, the substance of that program and the current status of her training, N.J.A.C. 6:11-5.3(f)1; any evaluations of Ms. Clark prepared by the professional support team as required by N.J.A.C. 6:11-5.3 and 5.4; any reports by the regional training center showing successful completion by Ms. Clark of any phases of the provisional

> teacher program, N.J.A.C. 6:11-5.3(f); whether any certified teaching staff members were on site and shared responsibility for Ms. Clark's classroom pending her receipt of a provisional certificate and completion of phase I of the training program, including the names and certification of any such individuals, their responsibilities during this period and the amount of time they spent in the classroom, N.J.A.C. 6:11-4.4(a), N.J.A.C. 6:11-5.3(f)1; and any other documents providing details regarding the substance of the provisional teacher program implemented by the Charter School pursuant to the requirements of N.J.A.C. 6:11-5.3.
>
> We direct the Charter School to submit all information required by our decision today to our Legal Committee within ten days from the date of this decision.

State Board's Decision, slip op. at 4-7 (footnotes omitted).

The Charter School submitted additional materials pursuant to our directive. It also filed a letter brief with those materials. The Board was provided with the opportunity to file a brief, but did not take advantage of this opportunity.

On the basis of the information now contained in the record, we find that the Commissioner's final approval of the Charter School was not proper in that he had not received the documentation required to ensure that the Charter School would be operating in compliance with statutory certification requirements. We find, in addition, that the Charter School is not at this point operating in compliance with the applicable statutes and regulations.

Initially, we reiterate that, as set forth in our regulations, "[s]tate certification requirements are those structured training and competency evaluation requirements that are prescribed by the State Board of Education in order to protect the public." N.J.A.C. 6:3-1.4. As emphasized by the Department of Education, the purpose of N.J.S.A. 18A:26-2, which requires all teaching staff members to hold valid certificates,

"is to protect the public from potential harm through regulation of the minimum qualifications that must be possessed by those who seek to work in the schools." New Jersey Register, 22 N.J.R. 1873 (1990). Accordingly, all teaching staff members employed by a school district must be properly certified. N.J.S.A. 18A:1-1 (defining "teaching staff member" as a member of a district's staff whose position is of such character as to require possession of a valid certificate appropriate to the position); 18A:26-2 (no teaching staff member may be employed unless he is the holder of a valid certificate); 18A:27-2 (terminating the employment of staff members who do not hold appropriate certification); 18A:28-14 (employment of teaching staff member who does not hold appropriate certificate may be terminated without charge or hearing); 18A:29-1 (teaching staff members not entitled to salary unless they hold appropriate certificate). See also N.J.S.A. 18A:28-5 (providing tenure for "all teaching staff members" and "such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners").

Moreover, as reflected by the education statutes and implementing regulations, employment of properly certified teaching staff members is indispensable to the ability of a school to operate properly. See, e.g., N.J.A.C. 6:3-6.2 through 6:3-6.5 (providing "certified school personnel" with access to pupil records); N.J.A.C. 6:3-1.6(b) (district boards "shall provide certified personnel needed to implement a thorough and efficient system of free public schools"); N.J.S.A. 18A:46-5.1 (pupils to be referred to a child study team by "certified school personnel"); N.J.A.C. 6:8-2.8(a) (an indicator in monitoring code required for an acceptable rating is that the district employs teaching staff members who hold appropriate certificates); N.J.A.C. 6:11-3.1 (appropriate

certification required); N.J.A.C. 6:29-10.4(a) ("teaching staff member" shall report possession or distribution of drugs by students).

Thus, the requirement that a district employ properly certified teaching staff members cannot be overstated. In view of the policy implications reflected in the law, we conclude that it is imperative for a charter school to have at least one fully-certified teaching staff member on site at all times. From the record, it appears that this Charter School has not employed even one staff member who possesses standard New Jersey certification. We, therefore, direct the Charter School to correct this deficiency by employing appropriately certified staff.

In addition, while not determinative of the school's ability to operate, we cannot ignore the fact that Ms. Clark's alternate route program does not comport with the regulatory requirements that are the prerequisite to the ultimate issuance of standard certification by the State Board of Examiners. See In the Matter of the Denial of Standard Certification to Linda J. Avellino, decided by the State Board of Education, May 5, 1999. For example, N.J.A.C. 6:11-5.3(f)1, setting forth the requirements for Phase I of the provisional teacher training program,[7] provides that a provisional teacher must attend "[a] full-time seminar/practicum of no less than 20 days duration which takes place prior to the time at which the provisional teacher takes full responsibility for a classroom." (Emphasis added.) The record as supplemented shows that Ms. Clark

[7] N.J.A.C. 6:11-5.3(f) provides for three phases of the provisional training program: Phase 1, which requires a "full-time seminar/practicum of no less than 20 days duration which takes place prior to the time at which the provisional teacher takes full responsibility for a classroom"; Phase 2, "[a] period of intensive on-the-job supervision beginning the first day on which the provisional teacher assumes full responsibility for a classroom and continuing for a period of at least 10 weeks"; and Phase 3, "[a]n additional period of continued supervision and evaluation of no less than 20 weeks duration." In addition, "[a]pproximately 200 hours of formal instruction...shall be provided in all three phases of the program combined." N.J.A.C. 6:11-5.3(g).

did not commence Phase I of her provisional training program until December 1, 1998 and that she did not complete that phase of her program until February 18, 1999. Nonetheless, Ms. Clark was given full responsibility for the school's only classroom in September 1998.[8] The record further indicates that Ms. Clark did not even receive her provisional certificate from the State Board of Examiners until December 1998, and that her service prior to that time was under a certificate of eligibility.[9]

Following completion of Phase I training, Phase 2 of the training program requires a "period of intensive on-the-job supervision beginning the first day on which the provisional teacher assumes full responsibility for a classroom and continuing for a period of at least 10 weeks. During this time, the provisional teacher shall be visited and critiqued no less than one time every two weeks by members of a Professional Support Team...." N.J.A.C. 6:11-5.3(f)2. There is no indication in the record that the Charter School complied with this requirement. Indeed, the materials submitted indicate that Ms. Clark's mentor teacher visited her classroom just four times from the beginning of the school year through January 1999: October 8 and 9, 1998, December 21, 1998, and January 26, 1999.

The record further reveals that Ms. Clark's first formal evaluation, as required by N.J.A.C. 6:11-5.3(f)2, was conducted by Ms. Wiggins, the school's headmaster, who

[8] In her affidavit, Ms. Clark indicates for the first time that there is a non-certified teaching assistant in the classroom with her. The presence of a non-certified assistant, however, does not overcome the school's failure to employ a properly certified teaching staff member. Nor does the presence in the classroom of an individual who is not an appropriately certified teaching staff member alter the fact that Ms. Clark was given full responsibility for the classroom prior to her receipt of a provisional certificate and prior to her completion of Phase I of her provisional training program. We note, in addition, that our decision is not altered by Ms. Clark's contention that two founding members of the school who possess New Jersey certification, but who are not members of her professional support team, "spent substantial time with me both inside and outside the classroom." Certification of Dana D. Clark, at 4.

[9] See, supra, n.5.

does not possess certification that would authorize her to evaluate staff. See N.J.A.C. 6:11-9.3. That requirement is reaffirmed by the regulations governing provisional teachers, which require that provisional teachers must be observed and evaluated by "appropriately certified Support Team Members." N.J.A.C. 6:11-5.4(a); N.J.A.C. 6:11-5.3(f)2. Moreover, such evaluations "shall be shared by at least two, but no more than three members of the Support Team." N.J.A.C. 6:11-5.4(b). In this case, only Ms. Wiggins, who was not an appropriately certified member of Ms. Clark's professional support team, participated in the evaluation.

Given the import of the specific problems that have been revealed in the course of these proceedings, we place the Charter School on probationary status pursuant to N.J.A.C. 6A:11-2.4(a) for a period of 90 days to allow for the implementation of a remedial plan. We direct the Charter School to submit a remedial plan to the Commissioner within 30 days from our decision today in which it provides the specific steps that it will undertake to remedy the violations identified in our decision. N.J.A.C. 6A:11-2.4(a). We further direct that the State Board of Examiners review Ms. Clark's provisional teacher training program in the context of the particular circumstances presented herein.

We retain jurisdiction.

June 2, 1999

Date of mailing JUN 04 1999

SB/89-98

SB #89-98

IN THE MATTER OF THE FINAL GRANT :

OF A CHARTER FOR THE ENGLEWOOD : STATE BOARD OF EDUCATION

ON THE PALISADES CHARTER SCHOOL,: DECISION

BERGEN COUNTY. :

Decided by the Commissioner of Education, September 16, 1998

Remanded by the State Board of Education, December 2, 1998

Decision on remand by the Commissioner of Education, December 14, 1998

Decision by the State Board of Education, March 17, 1999

Remanded by the State Board of Education, June 2, 1999

Decision on remand by the State Board of Examiners, dated September 24, 1999

Decision on remand by the Commissioner of Education, November 17, 1999

For the Appellant, Mauro, Savo, Camerino & Grant (Eric Martin Bernstein, Esq., of Counsel)

For the Respondent, Carpenter, Bennett & Morrissey (Lois Goodman, Esq, of Counsel)

For the Participant Commissioner of Education, Arlene G. Lutz, Deputy Attorney General (Paul H. Zoubek, Acting Attorney General of New Jersey)

In our last decision in this matter, the State Board of Education concluded that the final approval given by the Commissioner of Education to the Englewood

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on the Palisades Charter School ("Charter School") in September 1998 had not been properly granted because the Commissioner had not received the documentation required to ensure that the school would be operating in compliance with statutory certification requirements when he had granted a charter to the school.

When we rendered our decision on June 2, 1999, we further found that the Charter School was not operating in compliance with the applicable statutes and regulations. Stressing that employment of properly certified teaching staff members is indispensable to the ability of a school to operate properly, the State Board concluded that it was imperative for a charter school to have at least one fully certified teaching staff member on site at all times. Since it appeared that the Englewood on the Palisades Charter School had not employed even one staff member who possessed standard New Jersey certification, we directed the school to correct this deficiency immediately by employing an appropriately certified staff.

Given the import of the specific problems that had been revealed in the course of the proceedings, we placed the Charter School on probationary status pursuant to N.J.A.C. 6A:11-2.4(a) for a period of 90 days to allow for the implementation of a remedial plan. We directed the Charter School to submit its remedial plan to the Commissioner within 30 days, providing therein the specific steps that it would undertake to remedy the violations identified in our decision of June 2. In doing so, we retained jurisdiction over the matter.

By letter dated September 23, 1999, the Commissioner extended the school's probationary period until December 1, 1999 in order to insure that the State Board of Education had adequate time to review his report as to the school's probationary status and to act on his recommendation. On November 17, the Commissioner transmitted his recommendation to us along with the documentation upon which that recommendation was based.

That documentation includes: 1) the remedial plan which the Charter School submitted to the Commissioner on June 30, 1999; 2) a submission relating to the plan's implementation dated August 16 and filed by counsel for the Charter School; 3) a request by the Director of the Office of School Choice for further action with respect to two items dated September 1; 4) a response dated September 3 from Anthony Barckett, the Charter School's director; and 5) a copy of a transmittal memorandum from the State Board of Examiners to the members of the State Board of Education dated September 24 indicating that the Board of Examiners had voted not to take action with respect to standard certification issued in June 1999 to Dana Clark, the school's only teacher during the 1998-99 school year.

Based on this documentation, the Commissioner has recommended that the Charter School's probationary status be ended and that it be granted a final charter as of December 2, 1999.

We have reviewed the Commissioner's recommendation and the supporting documentation in light of our June 2 decisions, and we accept that

recommendation. Accordingly, we grant final approval for a charter to the Englewood on the Palisades Charter School.

However, in our June 2 decision, we also found that the provisional teacher training program for Dana Clark, the only teacher employed by the Charter School for the 1998-99 school year, did not comport with the regulatory requirements that were the prerequisite to the ultimate issuance of standard certification by the State Board of Examiners. While retaining jurisdiction over the matter, we remanded the issues relating to Dana Clark's alternate route program to the Board of Examiners for review. In doing so, we directed that the Board of Examiners examine those issues as they related to the sufficiency of the alternate route program under which Ms. Clark was earning standard certification.

On September 24, 1999, the State Board of Examiners transmitted its conclusions to us, together with the documents upon which those conclusions were based. The conclusions were set forth in a memorandum from the Secretary of the Board of Examiners to the members of the State Board of Education. That memorandum stated that the Board of Examiners had voted unanimously at its September 23 meeting to take no action to revoke Ms. Clark's Teacher of Elementary School certificate, which had been issued to her in June 1999. The Board of Examiners provided the following reason in support of its determination:

> ...The Board [of Examiners] found that the circumstances of the charter school were outside of Ms. Clark's control. She was not aware that her supervisor was not appropriately certified. The Board

> further found that when looking at the totality of Ms. Clark's induction year, she has substantially complied with the requirements of the Provisional Teacher Program-Alternate Route.

The memorandum indicated that the Board of Examiners had reviewed "Dana Clark's completion of the Provisional Teacher Program" and that it had "also reviewed records on file in the Office of Licensing and Credentials concerning Ms Clark." The memorandum was accompanied by the following documentation: 1) A memorandum dated August 9, 1999 from the Secretary of the Board of Examiners conveying to its members the State Board of Education's June 2 decision and indicating that the "issue is whether the events that occurred in the charter school as set forth in the State Board of Education's decision impacted Ms. Clark's successful completion of the Provisional Teacher Program;" 2) the State Board of Education's June 2 decision along with the Commissioner's cover letter; 3) a data base printout from the Department of Education; 4) pages 1, 3 and 4 of Dana Clark's Training Support and Evaluation Contract of September 1998; 5) Dana Clark's summative evaluation; and 4) a letter dated June 30, 1999 from the President of the Board of Trustees of the Charter School to the Commissioner dated June 30, 1999 setting forth the school's proposed remedial plan.

We have carefully reviewed the transmittal memorandum and the supporting documents provided to us by the State Board of Examiners. Because neither the transmittal memorandum nor the supporting documentation reflects that the Board of Examiners fulfilled the terms of our June 2 remand, and because only partial documentation has been provided to us, we again remand

this aspect of the matter to the Board of Examiners. In doing so, we stress that the review directed by our June 2 decision was not merely of "Dana Clark's completion of the Provisional Teacher Program." Rather, as set forth in our decision, we contemplated that the Board of Examiners would review each aspect of Ms. Clark's program against the applicable regulatory requirement, identify any deficiencies that had resulted in her program and, on that basis, ascertain whether anything further was required in order for her to satisfy the regulatory requirements.

Specifically, in our decision of June 2, we found on the basis of the record before us that Ms. Clark had been given full responsibility for the school's only classroom in September 1998, despite the fact that she did not complete Phase I of her provisional training program–which requires that a provisional teacher attend "[a] full-time seminar/practicum of no less than 20 days duration which takes place prior to the time at which the provisional teacher takes full responsibility for a classroom"–until February 1999. N.J.A.C. 6:11-5.3(f)1. The record further indicated that Ms. Clark did not even receive her provisional certificate from the Board of Examiners until December 1998 and that her service prior to that time was under a certificate of eligibility, which did not entitle her to assume responsibility for a job assignment. N.J.A.C. 6:11-4.4(a).

In addition, we found that Ms. Clark's program had failed to comply with N.J.A.C. 6:11-5.3(f)2, which requires a "period of intensive on-the-job supervision beginning the first day on which the provisional teacher assumes full responsibility for a classroom and continuing for a period of at least 10 weeks.

During this time, the provisional teacher shall be visited and critiqued no less than one time every two weeks by members of a Professional Support Team...." The record indicated that Ms. Clark's mentor teacher had visited her classroom just four times from the beginning of the school year through January 1999. The record further revealed that Ms. Clark's first formal evaluation, as required by N.J.A.C. 6:11-5.3(f)2, was conducted by the school's headmaster, who did not possess certification that would authorize her to evaluate staff. See N.J.A.C. 6:11-9.3; N.J.A.C. 6:11-5.4(a); N.J.A.C. 6:11-5.3(f)2. Moreover, the headmaster was the only support team member who participated in that evaluation, despite the requirement that such evaluations "shall be shared by at least two, but no more than three members of the Support Team." N.J.A.C. 6:11-5.4(b).

In light of the seriousness of our concerns, we directed the State Board of Examiners to review Ms. Clark's provisional teacher training program in the context of the particular circumstances presented. Again, the purpose of such directive was to enable the Board of Examiners to ascertain what was necessary in order for the training ultimately received by this provisional teacher to meet regulatory standards. In this respect, we stress that the alternate route program was intended to be "stringent." 16 N.J.R. 1647. Whether Ms. Clark was aware of the circumstances outlined in our previous decision, including the adequacy of her supervisor's certification, may be relevant in determining the appropriateness of permitting her to remediate the situation. However, such circumstances cannot be determinative of the sufficiency of her preparation to teach. As the Commissioner of Education has stressed under similar circumstances, "the

State's interest in licensing only teachers who have fully met...requirements cannot be thwarted by circumstances such as those herein." LaRosa v. John Ellis, et al., 93 N.J.A.R.2d (EDU), 459, 461. This is because "[u]nqualified teachers, just like unqualified surgeons, should not be licensed to practice under any condition." Id., Initial Decision, at 460. Hence, the focus of the Board of Examiners' review must be on the adequacy of Ms. Clark's preparation as judged under the applicable regulations.

Accordingly, we again remand the issues relating to Dana Clark's certification to the State Board of Examiners. In doing so, we remind the Board of Examiners that its conclusions must be based exclusively on the record, N.J.S.A. 52:14B-9(f), and that its determination must articulate adequate findings to apprise those interested, as well as the State Board of Education, of the basis on which its decision was reached. E.g., McCool v. Western Electric/AT&T Techs., 229 N.J. Super. 84 (App. Div. 1988). In short, the grounds on which it is acting, its reasoning, and the manner in which the facts in the record have been "transmuted into ultimate conclusions" should be clearly disclosed and carefully explained in the Board of Examiners' decision. In re 1976 Hosp. Reimbursement Rate for William B. Kessler Memorial Hosp., 78 N.J. 564, 577 (1979) (Handler, J., concurring). We retain jurisdiction.

December 1, 1999

Date of mailing DEC 03 1999

89-98

SB #89-98
App. Div. #A-2692-99T1
SBE #574-09/99-260

IN THE MATTER OF THE FINAL GRANT	:	
OF A CHARTER FOR THE ENGLEWOOD	:	STATE BOARD OF EDUCATION
ON THE PALISADES CHARTER SCHOOL,	:	DECISION
BERGEN COUNTY.	:	

Decided by the Commissioner of Education, September 16, 1998

Remanded by the State Board of Education, December 2, 1998

Decision on remand by the Commissioner of Education, December 14, 1998

Decision by the State Board of Education, March 17, 1999

Remanded by the State Board of Education, June 2, 1999

Decision on remand by the State Board of Examiners, September 24, 1999

Decision on remand by the Commissioner of Education, November 17, 1999

Remanded by the State Board of Education, December 1, 1999

Decided by the Appellate Division, May 23, 2001

Decision on remand by the State Board of Examiners, October 1, 2001

For the Appellant, Mauro, Savo, Camerino & Grant (Eric Martin Bernstein, Esq., of Counsel)

For the Respondent Englewood on the Palisades Charter School, Carpenter, Bennett & Morrissey (Lois Goodman, Esq., of Counsel)

For the Respondent Dana D. Clark, Dana D. Clark, pro se

For the Participant Commissioner of Education, Michelle Miller, Deputy Attorney General (Peter C. Harvey, Acting Attorney General of New Jersey)

The protracted proceedings in this matter had their genesis in an appeal filed with the State Board of Education pursuant to N.J.S.A. 18A:36A-4(d) by the Board of Education of the City of Englewood. That appeal challenged the final approval granted to the Englewood on the Palisades Charter School by the Commissioner of Education pursuant to N.J.S.A. 18A:36A-1 et seq. on September 16, 1998.

In a decision issued on December 2, 1998, the State Board found that it could not decide the appeal because the record failed to reflect that the Commissioner had reviewed the racial composition of the school before granting final approval and failed to demonstrate that the teaching staff employed by the Charter School was properly certified as required by the Charter School Program Act, N.J.S.A. 18A:36A-1 et seq. The State Board had become concerned about this issue because the documentation submitted by the Charter School showed that it employed only one individual as a classroom teacher and that this individual, Dana D. Clark, was a participant in the alternate route teacher preparation program who did not possess standard certification. Our concerns were heightened by the fact that the record indicated that Ms. Clark possessed only a "certificate of eligibility," which only authorized her to seek employment, and that she did not possess the provisional certification required in order for her to be authorized to serve as a teacher.

To address its concerns regarding the Commissioner's review of the racial composition of the Charter School, the State Board directed the Commissioner to provide it with a written assessment of the Charter School's racial composition and its potential long-term impact on the school district. To resolve whether the Charter School

had employed a properly certified teaching staff, the State Board remanded the matter to the Commissioner with the direction that he determine whether Dana Clark was in fact the only individual employed as a teacher by the Charter School and whether she and any other individuals serving as classroom teachers possessed certification that was appropriate to authorize them to fulfill the responsibilities attending their positions.

On December 14, 1998, the Commissioner rendered his decision on remand. That decision confirmed that Ms. Clark was, in fact, the only teacher who had been employed by the Charter School. The Commissioner found that Ms. Clark possessed a provisional certificate authorizing her to serve as a teacher, but he made this determination without reference to the structure of the Charter School and the specific educational program it was offering. Consequently, he did not consider in this context whether provisional certification was appropriate to authorize Ms. Clark to serve as a teacher given that she was the only one employed in that capacity. In addition, the Commissioner's decision on remand revealed that Ms. Clark had not been issued a provisional certificate until December 1998. Consequently, prior to that time, she was serving as a teacher while possessing only a "certificate of eligibility."

In a decision issued on March 17, 1999, the State Board found that it was still unable to determine whether the approval granted to the Charter School by the Commissioner should be affirmed because it still could not ascertain whether the Charter School was fulfilling its statutory obligations with respect to certification requirements. In particular, the State Board was not able to determine whether the provisional teacher training program implemented by the Charter School complied with the applicable regulations, N.J.A.C. 6:11-5.3. The State Board found that such

compliance was critical given that Ms. Clark was the only individual employed by the Charter School as a teacher. Therefore, the State Board directed that the Charter School supplement the record with information regarding its training program.

After reviewing the supplemental material submitted by the Charter School, the State Board issued another decision on June 2, 1999, finding that the Charter School was not operating in compliance with statutory certification requirements. In that it appeared that the Charter School had not employed even one staff member who possessed standard certification, and given the import of failing to employ properly certified staff, the State Board placed the Charter School on probation and directed it to submit a remedial plan to the Commissioner within 30 days. In addition, the State Board found that the provisional teacher training program which the Charter School was providing for Ms. Clark did not comport with the regulatory requirements that were prerequisite to the ultimate issuance of a standard instructional certificate by the State Board of Examiners. Given the Board of Examiners' statutory responsibility for issuing certificates in the first instance, the State Board of Education remanded the issues relating to adequacy of Ms. Clark's alternate route program to the Board of Examiners for review. However, the State Board of Education retained jurisdiction over the matter.

On September 24, 1999, the Board of Examiners transmitted its conclusions to the State Board of Education, together with the documents upon which those conclusions were based. In an accompanying memorandum, the Secretary of the Board of Examiners indicated that Ms. Clark had been issued a standard instructional certificate with an elementary endorsement in June 1999 and that the Board of Examiners had voted to take no action to revoke her certification despite the regulatory

deficiencies in the provisional training program provided to her by the Charter School. The Board of Examiners' determination to take no action was based on the fact that the circumstances of the Charter School were outside of Ms. Clark's control and its conclusion that she had substantially complied with the requirements of the regulations governing provisional teachers.

On December 1, 1999, the State Board of Education rendered its fourth decision in the matter. In that decision, the State Board reviewed the Commissioner's report as to the Charter School's remedial plan and accepted his recommendation to grant it final approval. However, the State Board further concluded that it was compelled to remand the issues relating to Ms. Clark's certification to the State Board of Examiners once again. The State Board of Education explained that:

> We have carefully reviewed the transmittal memorandum and the supporting documents provided to us by the State Board of Examiners. Because neither the transmittal memorandum nor the supporting documentation reflects that the Board of Examiners fulfilled the terms of our June 2 remand, and because only partial documentation has been provided to us, we again remand this aspect of the matter to the Board of Examiners. In doing so, we stress that the review directed by our June 2 decision was not merely of "Dana Clark's completion of the Provisional Teacher Program." Rather, as set forth in our decision, we contemplated that the Board of Examiners would review each aspect of Ms. Clark's program against the applicable regulatory requirement, identify any deficiencies that had resulted in her program and, on that basis, ascertain whether anything further was required in order for her to satisfy the regulatory requirements.
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> Specifically, in our decision of June 2, we found on the basis of the record before us that Ms. Clark had been given full responsibility for the school's only classroom in September 1998, despite the fact that she did not complete Phase I of her provisional training program – which requires that a provisional teacher attend "[a] full-time

seminar/practicum of no less than 20 days duration which takes place prior to the time at which the provisional teacher takes full responsibility for a classroom" – until February 1999. N.J.A.C. 6:11-5.3(f)1. The record further indicated that Ms. Clark did not even receive her provisional certificate from the Board of Examiners until December 1998 and that her service prior to that time was under a certificate of eligibility, which did not entitle her to assume responsibility for a job assignment. N.J.A.C. 6:11-4.4(a).

In addition, we found that Ms. Clark's program had failed to comply with N.J.A.C. 6:11-5.3(f)2, which requires a "period of intensive on-the-job supervision beginning the first day on which the provisional teacher assumes full responsibility for a classroom and continuing for a period of at least 10 weeks. During this time, the provisional teacher shall be visited and critiqued no less than one time every two weeks by members of a Professional Support Team...." The record indicated that Ms. Clark's mentor teacher had visited her classroom just four times from the beginning of the school year through January 1999. The record further revealed that Ms. Clark's first formal evaluation, as required by N.J.A.C. 6:11-5.3(f)2, was conducted by the school's headmaster, who did not possess certification that would authorize her to evaluate staff. See N.J.A.C. 6:11-9.3; N.J.A.C. 6:11-5.4(a); N.J.A.C. 6:11-5.3(f)2. Moreover, the headmaster was the only support team member who participated in that evaluation, despite the requirement that such evaluations "shall be shared by at least two, but no more than three members of the Support Team." N.J.A.C. 6:11-5.4(b).

In light of the seriousness of our concerns, we directed the State Board of Examiners to review Ms. Clark's provisional teacher training program in the context of the particular circumstances presented. Again, the purpose of such directive was to enable the Board of Examiners to ascertain what was necessary in order for the training ultimately received by this provisional teacher to meet regulatory standards.

State Board of Education's Decision of December 1, 1999, slip op. at 5-7.

The State Board retained jurisdiction over the issue of Clark's certification.[1]

In a decision rendered on October 1, 2001 and mailed on March 21, 2002, the State Board of Examiners determined that Ms. Clark's instructional certification had been issued appropriately. In the Matter of the Certificate of Dana Clark, decided by the State Board of Examiners, October 1, 2001. In so doing, the Board of Examiners reviewed documents, including performance evaluations, prepared during the 1999-2000 and 2000-01 school years, subsequent to its issuance of a standard certificate to Ms. Clark, and concluded that:

> ....over the last two years Clark has had been properly supervised and had excellent evaluations consistent with the requirements of the Provisional Teacher Program/Alternate Route. N.J.A.C. 6:11-5.3. All of Clark's numerous evaluations have been conducted by an appropriately certified individual, N.J.A.C. 6:11-5.3(f), and she has fulfilled all three phases of her training as provided in N.J.A.C. 6:11-5.3(f)1-3. She has also attended the 200 hours of formal instruction mandated of all provisional teacher candidates who possess a Certificate of Eligibility. N.J.A.C. 6:11-5.3(g).
>
> Furthermore, the Board of Examiners wants to reiterate that as the only administrative body authorized to issue and revoke teacher certificates, it originally made the determination that Clark was properly certified because the errors in oversight she experienced in her first provisional year were not of her doing or to her knowledge. Notwithstanding the State Board's contention that Clarks' initial provisional year was so fundamentally flawed as to negate the validity of her credential, she has subsequently fulfilled all requirements of the Provisional Teacher Program. Thus, even assuming arguendo that the Board of Examiners'

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[1] This decision marks the point at which the issues pertaining to the Charter School diverged from the issue of Clark's certification. On May 23, 2001, the Appellate Division affirmed our determination to grant final approval to the Charter School and remanded on the issue of Clark's certification, observing that the State Board had retained jurisdiction over that issue and that the Board of Examiners had not yet issued a decision on remand. In the Matter of the Final Grant of a Charter to Englewood on the Palisades Charter School, Docket #A-2692-99T1 (App. Div. 2001).

> initial determination was in error, it now finds that the appropriateness of Clark's certificate issuance is beyond question.

Id., slip op. at 2-3.

Consistent with our statutory responsibilities and our obligations as head of the Department of Education, we have reviewed the decision issued by the State Board of Examiners with utmost care. In this respect, we remind the Board of Examiners that, although it is charged with the responsibility for issuing and revoking certificates in the first instance, it does so under rules adopted by the State Board of Education. N.J.S.A. 18A:6-38. Furthermore, it is well established that the State Board of Education, as the statutory head of the Department of Education, N.J.S.A. 18A:4-1, is the ultimate administrative decision-maker in matters arising under the school laws. Matter of Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), certif. denied, 121 N.J. 615 (1990); Dore v. Board of Educ., 185 N.J. Super. 447, 452 (App. Div. 1982). Accordingly, not only is the Board of Examiners required to act in accordance with the rules and regulations we have adopted to govern the issuance, revocation and suspension of certificates, N.J.A.C. 6:11-2.2, but all final decisions made by the State Board of Examiners with respect thereto are appealable to the State Board of Education, and the Board of Examiners is bound by our decisions.

We turn now to the substantive questions presented by this matter. Pursuant to our retention of jurisdiction, we have reviewed the record certified to us by the Board of Examiners with great care.[2] Based on that review, we reverse the Board of Examiners'

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[2] We note that the record certified to us by a Deputy Attorney General on behalf of the State Board of Examiners does not include the record on which we had based our previous determinations in this matter.

determination that Ms. Clark's instructional certificate was issued appropriately. Quite simply, as the record clearly demonstrates, Ms. Clark was not eligible for a standard certificate at the time the Board of Examiners issued her an instructional certificate in June 1999.

Initially, the Board of Examiners' characterization of Ms. Clark's service in 1998-99 as a "first" or "initial" provisional year is incorrect. As defined in our regulations, a provisional certificate is a "temporary one-year certificate issued to candidates who have met the requirements for initial employment as part of a State-approved district training program or residency leading to standard certification." N.J.A.C. 6:11-4.2. Although the regulations do not preclude the Board of Examiners from issuing another provisional certificate to an individual in a subsequent year, they do not authorize service under a provisional certificate beyond the one-year period for which a given provisional certificate was issued. Hence, the 1998-99 school year was the only school year for which Ms. Clark's provisional certificate was valid. Given that fact, the standard certificate issued to her by the Board of Examiners in June 1999 was the only certification that she possessed in the 1999-2000 school year and thereafter. Consequently, contrary to the Board of Examiners' view, Ms. Clark's service was under a standard certificate after the 1998-99 school year.

Rather, it includes only those documents which were reviewed by the Board of Examiners during this latest remand.

We note in addition that, given the procedural posture of this matter, which involved a challenge to the Commissioner's approval of the Charter School's application, Ms. Clark has never participated as a party in these proceedings. However, since the validity of her teaching certificate is at issue, Clark must be considered to be a party, and we provided her, the Charter School and the Commissioner of Education, who was granted participant status, with the opportunity to submit briefs in response to the Board of Examiners' decision. No briefs were submitted.

Since teaching staff members who serve under a standard certificate are not subject to the regulatory requirements that apply to alternate route teachers during their provisional year, it is critical that a candidate meet all of the regulatory requirements of the alternate route program before the Board of Examiners issues a standard certificate to that individual. That being the case, we do not agree with the Board of Examiners that "the appropriateness of Clark's certificate issuance is beyond question." Our regulations are clear and unambiguous in predicating a provisional teacher's eligibility for a standard teaching certificate on fulfillment of the precise requirements of the regulations governing provisional teachers. N.J.A.C. 6:11-5.2 See In the Matter of the Issuance of a Teaching Certificate to Linda J. Avellino, decided by the State Board of Education, March 7, 2001 (State Board of Education affirmed Board of Examiners' determination to deny issuance of standard certificate to provisional teacher, agreeing that after-school enrichment program run by the district board "did not constitute substantial compliance with the intensive provisional teacher training program contemplated by the regulations for alternate route candidates"). One of those requirements is that, in addition to possessing a provisional certificate, the candidate must have completed a State-approved training program in order to be eligible for a standard certificate. In this instance, Ms. Clark had not completed such a program in June 1999 when the Board of Examiners issued her a standard certificate. Hence, its issuance was not appropriate.

Ordinarily, such a failure to comply with regulatory requirements would call for revocation of an individual's certification. See Avellino, supra. However, this situation presents us with very unique circumstances. The litigation was initiated as an appeal to

the grant of approval to a charter school and not as a challenge to Ms. Clark's certification. Hence, Ms. Clark did not have notice that there was any question concerning the propriety of the issuance of her standard certificate. The situation was compounded by the Board of Examiners' failure to fulfill the terms of our remands of June 2, 1999 and December 1, 1999. If the Board of Examiners had done so, the deficiencies in Ms. Clark's alternate route program could have been corrected. The fact that the Board of Examiners did not examine the alternate route program that had been provided to Ms. Clark in light of the regulatory requirements, in effect, deprived her of any meaningful opportunity to correct the deficiencies in her program. Given the length of time that has passed since Ms. Clark completed her provisional year and given that she has been teaching during this period, another remand would be counterproductive. Rather, at this point it is more appropriate for us to examine the record and resolve the matter.

Ms. Clark now has been teaching for nearly five years. The record certified to us during the course of these proceedings shows that she successfully completed the 200 hours of formal instruction required of provisional teachers. Although she was never provided with the mentoring and on-the-job supervision required for alternate route teachers, N.J.A.C. 6:11-5.3, and was not evaluated in compliance with N.J.A.C. 6:11-5.4, because of the singular circumstances of this matter, Ms. Clark was given the opportunity to demonstrate her capabilities as a teacher in such manner as to permit us to assess them. The record shows that Ms. Clark received exemplary performance evaluations from a certified administrator during the 1999-2000 and 2000-01 school years. She was rated as satisfactory in all performance categories, and the evaluator

observed that she "has developed into an excellent role model and teacher." He further indicated that Ms. Clark was "a dedicated teacher" who "keeps student interest high....She makes students feel they can learn." She was described as "[a]n asset to our school." Under the circumstances, we find that it would serve no purpose to require Ms. Clark to undergo a training program designed for alternate route teachers during their provisional year. Nor is revocation of her certificate warranted.

However, we cannot ignore the fact that the scenario presented by this case should never have occurred. Given the litany of deficiencies that we have identified in Ms. Clark's training program, it is evident that the State Board of Examiners acted contrary to the language and intent of the certification regulations when it issued her a standard certificate in June 1999. The fact that the "errors in oversight" that occurred during the provisional year were "not of [Clark's] doing or to her knowledge" did not provide justification for the Board of Examiners to issue a standard certificate to a provisional teacher whose training program did not even minimally satisfy the regulatory requirements. Furthermore, as the ALJ pointed out in Avellino, ultimately it is the responsibility of the provisional teacher to ensure that his or her experience satisfies the regulatory requirements. We reiterate in that regard that:

> ....the alternate route program was intended to be "stringent." 16 N.J.R. 1647. Whether Ms. Clark was aware of the circumstances outlined in our previous decision, including the adequacy of her supervisor's certification, may be relevant in determining the appropriateness of permitting her to remediate the situation. However, such circumstances cannot be determinative of the sufficiency of her preparation to teach. As the Commissioner of Education has stressed under similar circumstances, "the State's interest in licensing only teachers who have fully met...requirements cannot be thwarted by circumstances such as those herein." LaRosa v. John Ellis, et al., 93

> N.J.A.R.2d (EDU), 459, 461. This is because "[u]nqualified teachers, just like unqualified surgeons, should not be licensed to practice under any condition." Id., Initial Decision, at 460.

State Board of Education's Decision of December 1, 1999, slip op. at 7-8.

Accordingly, we remind the State Board of Examiners that a standard certificate must not be issued to a provisional teacher unless he or she has demonstrated compliance with the regulatory requirements, and, in light of the concerns raised by this case, we are compelled to admonish the Board of Examiners to exercise greater care with respect to its obligations in this regard.

April 2, 2003

Date of mailing APR 04 2003

91-98

BOARD OF EDUCATION OF THE BOROUGH OF WALLINGTON	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
MAYOR AND COUNCIL OF THE BOROUGH OF WALLINGTON, BERGEN COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Board appealed General Fund tax levy reductions totaling $493,342 made by governing body following voter rejection of proposed budget on April 15, 1997.

Upon review to determine whether governing body had demonstrated that such reductions, which resulted in a budget below the minimum T&E amount established pursuant to the Comprehensive Educational Improvement and Financing Act of 1996 (CEIFA), would not negatively impact upon the ability of the District to provide T&E or on the stability of the District, Commissioner determined to restore $406,201 for a total General Fund Tax Levy of $8,130,518 for 1997-98 school purposes.

February 26, 1998

AGENCY DKT. NO. 217-6/97

BOARD OF EDUCATION OF THE BOROUGH OF WALLINGTON	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
MAYOR AND COUNCIL OF THE BOROUGH OF WALLINGTON, BERGEN COUNTY,	:	
RESPONDENT.	:	

For the Board of Education, Walter M. Slomienski, Jr., Esq.

For the Mayor and Council, Joseph Rosa, Jr., Esq.

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education on June 12, 1997 through the filing of a Petition of Appeal by the Wallington Board of Education (Board), seeking restoration of reductions to the school budget made by the Mayor and Council of the Borough of Wallington (Council) pursuant to N.J.S.A. 18A:22-37 following defeat of the budget at the annual school election on April 15, 1997.

At that election, the voters rejected a public question proposing a General Fund tax levy of $8,232,189 for the 1997-98 school year. On May 15, 1997, following consultation with the Board as required by law, the Council adopted a resolution determining to certify a General Fund tax levy of $7,724,317 as sufficient to provide for a thorough and efficient system of education (T&E) in the District. This amount represented a reduction of $507,872 from the tax levy proposed by the Board, and was effectuated through cuts in 34 line items, for the reasons given in the schedule attached to the implementing resolution. By resolution dated June 9, 1997, the Board determined to appeal the Council's reductions and duly filed the within petition.

The amounts in dispute in this appeal are as follows:

Tax Levy Proposed by Board		Tax Levy Certified by Council	
General Fund	$8,232,189	General Fund	$7,724,317
Amount of Reduction by Council		**Amount of Reduction in Dispute**	
General Fund	$507,872	General Fund	$493,342[1]

An answer to the Board's petition was filed by the Council on June 26, 1997. On July 10, 1997, the Board filed its position statement and on July 22, 1997, the Council filed a response to the Board's position statement. On July 25, 1997, the Board filed a document labeled as both a response to the Council's position statement and a final summation, and on July 30, 1997, the Council submitted its final summation.[2]

In addition, as the parties had been advised by letter from the Assistant Commissioner dated April 16, 1997, distributed through the County Superintendent to boards and municipalities experiencing budget defeats and again in conjunction with proceedings herein, as part of the record of the within appeal, the Commissioner took official notice of the Board's revised budget, its June 30 financial report filed by August 1 pursuant to N.J.S.A. 18A:17-10, applicable portions of the School Report Card and the Comparative Spending Guide, and the annual audit for purposes of verifying surplus information given in the June 30 report and any prior year data relied upon by the Commissioner in making his determinations.

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[1] During the course of this appeal, Council determined to withdraw its request for reduction to 3 accounts: Line No. 06440, Act. No. 11-000-213-300, Health Purchased Services, $3,000; Line No. 07150, Act. No. 11-000-260-520, Operation and Maintenance of Plant Services - Insurance, $5,000; and Line No. 07160, Act. No. 11-000-200-590, Operation and Maintenance of Plant Services - Miscellaneous Purchased Services, $1,000. Accordingly, because they are not reflected in the tax levy certified, these amounts are restored in full in the final tally below, but are not discussed as contested line items. Additionally, it is here noted that the Board agreed to accept the Council's full $14,530 reduction to the Unemployment Insurance account. Accordingly, this amount is not deemed in dispute and does not appear in discussions or tallies below.

[2] On August 8, 1997, the Board submitted a letter from the Superintendent of its schools to the Commissioner, which purported to be the Board's "response to the Borough's final summation," notwithstanding that it was categorized in the accompanying memo of the Board's attorney as a "Final Summation." On August 14, 1997, counsel for the Borough filed an objection to this submission, terming it an improper filing in that it was not only untimely, pursuant to N.J.A.C. 6:24-7.8(a)5, but the Board had already filed a final summation on July 25, 1997. Upon review, the Commissioner concurs with the position of the Borough and, as such, the Board's August 8, 1997 filing is not considered herein.

Finally, the Board was advised by letter dated July 11, 1997, from Assistant Commissioner Mike Azzara, that as a result of the recently approved Appropriations Act for the fiscal year ending June 30, 1998, the District would receive additional school aid in the amount of $50,000. Such letter further advised the Board that this additional school aid would be considered by the Commissioner in making his determinations in the instant budget appeal. As noted below, the Board submitted a letter regarding this matter, but no comment was made by Council.

Consistent with the above, upon filing of the Board's annual audit, the record of the within appeal was closed and the matter proceeded to determination.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. In reviewing such appeals, the Commissioner's standard has historically been whether a district board of education has demonstrated that the amount by which a specific line-item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education (T&E). Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989). However, on December 20, 1996, the Legislature enacted the Comprehensive Educational Improvement and Financing Act of 1996 (CEIFA), wherein a prescribed level of expenditure range was established as sufficient for provision of T&E. Therein, appeal of General Fund budget amounts in excess of that range, following voter defeat and municipal reduction, was expressly restricted to grounds of negative impact on the stability of the district given the need for long term planning and budgeting, while appeal of General Fund budget amounts within that range could also be based on necessity for

T&E. For budgets proposed or reduced below the established minimum T&E amount, however, the law provides for automatic review by the Commissioner, construed within the context of then-current budget appeal regulations as a mandatory appeal, with the burden of proof on the governing body to demonstrate to the Commissioner that the proposed reductions shall not adversely affect the ability of the school district to provide T&E or the stability of the district given the need for long term planning and budgeting. Additionally, the Act provided for standards of efficiency to be established by the Commissioner, setting forth the appropriate cost of the various programs, activities, materials and services necessary to achieve T&E. P.L. 1996, c. 138; N.J.S.A. 18A:7F-1 et seq.

In the present instance, the Board proposed a General Fund budget which was below the minimum T&E amount established for the District pursuant to CEIFA, which budget was then further reduced by the governing body. Accordingly, the burden in this matter lies with the Council to demonstrate that its reductions will not negatively impact upon the District's ability to provide T&E or the stability of the District. Id., Section 5e(2)

Mindful, then, of the standard to be applied, the Commissioner makes specific determinations as set forth below.

COMMISSIONER'S DETERMINATION

Disputed Line-Item Number 1

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
2710	Various	Teaching Salaries	$3,443,704	$65,000

The Council notes that the Board's financial statements, when projected to the end of the school year, indicate that roughly $3.2 million will be expended for teacher salaries. Some May and June spending will be higher than the normal monthly averages due to substitutes and other items, but in any event, the amount to be expended should not exceed the Board's current estimate of $3,203,331. The 1997-98 budget, therefore, is 7.5 percent higher than the amount expected to be spent this year. Though the Council supports the hiring of the additional full-time and two part-time teachers, the funding can likely come from breakage (the reduction in expenditures when one employee at the top of the pay scale leaves and is replaced by an employee at the lower end of the scale). Even after factoring the salaries of the new positions,

the salary increases are far over the projected 4.3 percent increase necessitated by negotiated raises which, would not normally be the resulting increase in actual spending due to breakage. The Council believes that the teaching salary account is overbudgeted substantially and recommends the reduction of $65,000 from this line item, which still leaves room for the new teachers and only marginally takes advantage of breakage.

The Board counters that "breakage" is very difficult to predict. It avers that several existing full-time positions will be filled for 1997, and, in fact, at this time the salaries for these replacements will be higher than those being replaced. The Board avers that its position statement included a complete description of all accounts, with all salaries specifically being accounted for. It contends that any reduction in funding would result in a reduction in staff and negatively impact the Board's ability to provide T&E in the District.

Upon review, the Commissioner finds that the Board's papers account for all proposed staff expenditures, so that any loss of budgeted funds would necessitate reductions to a level of proposed staffing that is well within efficiency standards established pursuant to CEIFA. The Council has not contended that reductions in staff are supportable. Accordingly, the Council has not met its burden, and the Commissioner determines to restore the $65,000 reduction.

Disputed Line-Item Number 2

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
02640	11-190-100-106	Other Salaries/Instruction	$79,250	$30,000

The Council observes that the Board had projected $79,250 in new positions for teacher aides in this account, but had no budget or spending here in the past. The budget document, however, shows one teacher full-time and one part-time aide currently, and another new one budgeted in 1998. As such, it maintains that the current aides are not charged to this account this year and are likely charged to the regular teaching account. The Council posits that since the regular teaching account was analyzed without this information, there is already enough funding provided therein to cover those positions. Council further avers that, although the teaching aide position is important, a budget of $79,250 for two full-time and one part-time teacher aides is excessive.

In response, the Board asserts that the aide referenced in the report is currently employed in its elementary school, but was previously in place, and budgeted, for a special services student. The Board further takes exception to the Council's assertion that the amount budgeted in this account is excessive. It explains that this item was included in the regular teacher account in the last two budgets but, at the suggestion of its new board secretary, was broken out to allow for a closer analysis. The Board contends that this appropriation includes substitute teachers at all levels for the full school year which, for the 1996-97 school year, represented a cost of $54,105, and cannot be reduced without affecting the Board's ability to offer a thorough, efficient and stable educational program.

The Council contends that if this account was, indeed, fully budgeted under Teaching Salaries for the last two years, then the amount of overbudgeting in this account for 1998 is even more excessive. Further, it argues that this account should not include substitute salaries for all teachers since these are properly budgeted with the regular teacher salaries. The Council proffers that if substitutes are included, then the $30,000 budget reduction in this line item can simply be added to the Teaching Salaries account reduction and the Board will feel no ill effects from this cut.

Upon review, the Commissioner finds that notwithstanding its manner of accounting for such expenditures, the Board's costs in the areas of aides and substitutes are well within the standards of efficiency established by the Commissioner pursuant to CEIFA. The Commissioner further finds that the Council has made no showing that the Board could sustain reductions in staff while still providing T&E. Accordingly, the Council has not met its burden and the Commissioner determines to restore the $30,000 reduction.

Disputed Line-Item Number 3

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
02680	11-190-100-610	General Supplies	$128,252	$10,000

The Council maintains that if all encumbrances outstanding in this area are ultimately spent, the Board will be expected to finish 1997 with the same $110,000 average annual supply spending as in the prior three years. Further, it observes that, notwithstanding that the District is below the State averages on supply spending, this fact cannot be used as

justification for increasing this line item. It posits that increases in supply accounts should roughly parallel increased enrollments and increased prices, though not all supplies are directly parallel to enrollment. Therefore, a 17 percent increase in this account would not appear justifiable when compared to the District's student population estimates and today's inflationary environment. The Council advances that a $10,000 reduction could be sustained in this account while still providing for a generous increase over normal annual spending.

The Board asserts that the Council's observation that the District is below the State averages on supply spending is a gross understatement. It argues that the Department's Comparative Spending Guide lists Wallington as ranking last of the 57 K-12 districts with less than 1800 students in New Jersey in the General Supplies and Textbook indicator. It maintains, however, that this fact alone is not responsible for the budget increase in this line item. The Board advances that the District is scheduled for state monitoring in 1997-98, is well behind in technology, and is beginning to respond to curriculum revision as per the new Core Curriculum Content Standards. As such, it argues that responding only to the 17 percent increase in this account is insensitive to the needs of the children in the District and reflects ignorance of the many new mandates imposed on the District's schools.

In reply, the Council contends that the Board has had a very predictable pattern in supply spending over the last several years, notwithstanding that there have been new mandates imposed every year. Further, it posits that revisions in curriculum do not necessarily mean an increase in supply needs, just a change in the component of supplies. As such, the Council maintains that the Board has offered no proof that a 17 percent increase in supplies is warranted.

Upon review, the Commissioner finds that the Council's sole basis for this reduction is the amount of increase over prior year expenditures, without regard to the needs being addressed in light of newly established standards for T&E. Accordingly, the Commissioner finds that the Council has not met its burden, and determines to restore the $10,000 reduction.

Disputed Line-Item Number 4

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
02690	11-190-100-640	Textbooks	$78,112	$20,000

The Council argues that the District anticipates spending $78,112 in textbook replacements in 1998, despite spending $113,599 for the entire four-year period prior to 1998. It avers that, although textbooks in the District should be consistently updated and modernized, a carefully planned replacement program should be maintained rather than charging one budget for such a large appropriation. The Council contends that a budget of $58,112, which is more than double the average annual spending of the past four years, will be sufficient and appropriate.

The Board, although agreeing that the increase in this area is significant, strongly contends that it is necessary. It argues that a review of past budgets and purchases will reveal that the Board has been undertaking as carefully planned textbook replacement program as could be expected under a series of 27 consecutive budget defeats. It explains that the District has a K-6 reading series that is 12 years old and replacements which have been planned over the past two years had to be eliminated due to budget constraints. Now, it argues, a new reading series is a must, with these replacements planned over the next two years, 1997-98 and 1998-99, and $48,000 of the total amount budgeted for this account is earmarked for this series in grades K-4.

The Council advances the Board's admission that the textbook replacement program is not a priority by virtue of the fact that more important budgetary needs have routinely displaced spending in this area. It contends that the $20,000 reduction to this account, which still leaves double the amount of average annual spending here over the past four years, gives the Board ample room to begin a replacement program.

Upon review, the Commissioner finds that the Board's budgeted textbook replacement expenditures, apart from some of the costs arising from the unique circumstance of being required to replace an entire K-6 reading series over a two-year period, are well within standards of efficiency established pursuant to CEIFA. Moreover, Council has not demonstrated how the District can adequately meet Core Curriculum Content Standards if it is unable to effectuate the reading series replacement as planned. Accordingly, the Commissioner restores the Council's reduction of $20,000 as necessary for the District to provide T&E.

Disputed Line-Item Number 5

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
03920	11-213-100-640	Resource Room Textbooks	$1,500	$500

The Council contends that this account increases for no apparent reason. It proffers that spending for four years combined has been $2,903, with the Board's budgeted amount escalating to $1,500 for this one year for no apparent reason. The Council observes that there is an existing balance of $397 in this account yet no textbooks were purchased with this funding. As such, it points out that the Board spent less than 60 percent of this account's allocation in 1997, yet proposes to increase the original budget by 50 percent in 1998, which would actually be 2-1/2 times the amount spent in 1997, with no substantiated justification.

The Board argues that the District employs 4-1/2 teachers to implement its resource center program from grades 1-12. This budget reflects an increase from $1,000 in 1996-97 to $1,500 for 1997-98, which is largely due to changes in instruction due to Core Curriculum Standards. It argues that the $397 balance in this account as of April 1997 is insignificant, as is the projected increase here.

Upon review, the Commissioner finds that the Council has not shown that the District can meet new Core Curriculum Standards with its present Resource Room supplies, instead relying solely on the degree of increase in this account over last year's expenditures. Moreover, the Commissioner notes that the District spends well within efficiency standards for nonsalary special education costs established pursuant to CEIFA. Accordingly, the Commissioner determines to restore the $500 reduction as necessary for provision of T&E.

Disputed Line-Item Number 6

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
04860	11-230-100-610	General Supplies/Basic Skills	$2,400	$1,600

The Council asserts that, again, the budget appears to climb for no obvious reason and with no historical spending pattern to support the increase. It observes that in a total of four years, less than $4,000 was spent for these supplies, yet this budget climbs to $2,400 for one year alone in 1998. The Council maintains that while it wishes to provide for generous annual increases in this area, a jump from $536 in 1997 spending to $2,400 in 1998 is inappropriate.

The Board advances that a total of $2,400 is budgeted for the Basic Skills Instruction Program districtwide. It observes that this program addresses remediation of deficiencies as per the California Achievement Test, EWT and HSPT, and will be expanded due

to the new grade 4 ESPA. It further observes that there is also the concern regarding student Review Assessments. The Board argues that as of May 1997, it has 279 students in its math and language arts remediation program, at a cost of $8.60 per student. As such, a reduction of $1,600 as recommended would leave the Board with $800 in this account. Moreover, it avers that the amount of supplies provided by the Title 1 grant in this particular area is minimal, and that it is reduced each year by 15 percent, increasing the local share required for remediation.

Upon review, the Commissioner notes that, once again, the Board spends well within efficiency standards established pursuant to CEIFA for this area and the Council has argued based on past expenditure patterns without regard to the District's current actual need. Thus, it has made no showing as to how the District can provide T&E in the wake of the proposed reduction. Accordingly, the Commissioner restores the Council's reduction of $1,600.

Disputed Line-Item Number 7

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
05040	11-300-100-610	General Supplies/Vocational	$500	$500

Again, the Council asserts, a line item appears where there was no spending at all in the past, most likely due to all charges previously having been made to the general supply account. It contends that if the Board was able to do this in past years, and there was ample room for increases in that account, it should be done again this year so that there is no need for a separate account.

The Board claims that, although this is an area which was not funded last year, this minimal account of funding is necessary as "seed money" due to the workplace readiness component being infused into all areas of the curriculum consistent with Core Curriculum Standards.

Council contends that all vocational teaching supplies were likely charged to the general supplies account in the past, and it has left ample funds in that account for all of the District's supply needs. Therefore, it argues, this new account is unnecessary.

Upon review, the Commissioner again notes the District's general efficiency in the area of supplies, viewed in light of standards established pursuant to CEIFA. Additionally, the Commissioner notes that the Council's argument does not establish how, in the absence of

the budgeted amount, the Board can meet the workplace readiness component of the Core Curriculum Standards while still providing appropriately for other supply needs. Accordingly, the Commissioner restores the Council's $500 reduction as necessary for provision of T&E.

Disputed Line-Item Numbers 8, 9,10

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
06090	11-402-100-100	Athletics Salaries	$148,653	$12,000
06110	11-402-100-600	Athletic Supplies/Materials	$ 36,660	$ 2,000
06120	11-402-100-800	Athletics - Other Objects	$ 10,580	$ 2,000

While the Council agrees that additional spending in the area of athletics is warranted, it queries whether the budget goes too far compared to the actual programs being offered. It observes that a projection of 1997 spending here is difficult since spring sports are usually the most utilized and many expenses will be incurred in May and June. Therefore, it states that a comparison to the full year is appropriate and the Council sees a total of a 39 percent increase in this account over two years. Although recognizing there have been salary increases, and that an athletic trainer, new coaches and programs, improved security and even goal posts are important, it questions whether a more than $60,000 increase in appropriation level over 1996 is necessary. Accordingly, it recommends the reduction of $12,000 from the salary account, $2,000 from the Athletics Supplies account, and $2,000 from the Athletics Other Objects account.

The Board initially points out that the District's extracurricular cost per pupil as per the Comparative Spending Guide ranks the Wallington School District 47th out of the 57 Districts in its category. Further, the Council's first misconception regarding this account is that it only represents salaries for coaches. In reality, it proffers, this account includes coaches, ticket sellers, crowd control, chain crews, staff, special and regular police security, scouting and an athletic trainer service. The Board asserts that the program is also being expanded in several areas, a freshman volleyball team to address high levels of participation and Title IX issues and two junior high school programs. It further notes that the original budget for 1997-98 included soccer for the District's exceptionally large Polish student population (60 percent of the student body) and a third junior high school program, both of which were eliminated earlier in the budget process. The Board urges that it has endeavored to focus on programs not offered by the

Borough's recreation department, i.e., volleyball and baseball. It further proffers that the portion of the $19,000 community allotment to recreation that goes to children is insufficient. It is, therefore, the Board's intent to offer its students a more comprehensive program of cocurricular activities.

The Council maintains that the Board can in no way justify a 36 percent increase in spending for athletic salaries over two years regardless of how many minor programs are added. It proffers that the Board anticipates spending for positions such as ticket sellers, chain crews, etc., which in many cases are provided on a voluntary basis. Council notes that its own recreation programs have virtually all of these types of positions covered by volunteers. It further observes, that many of the areas noted by the Board here are already provided by the Council through its recreation department. The Council also maintains that the Board's discussion with respect to soccer and certain junior high school sports which were cut by the Board prior to the budget introduction is irrelevant in its defense of this budget.

In response, the Board asserts that the athletic salaries are clearly and specifically listed in this account description for the Council's review. It avers that the Council is out of touch if it believes that this work can be performed by volunteers, as these positions carry paid stipends. It avers that it also approves volunteers in any one of its athletic programs if requested by the respective head coach.

With regard to supplies and materials, the Board argues that a close inspection of actual allotments per activity will reveal a very austere projection. The increase of $6,280 here is largely due to the need for new cheering and boys' basketball uniforms, football goal posts and two junior high school programs. The Board maintains the budgetary provisions here are required to provide a thorough and efficient education and stability in its staffing.

The Council contends that the Board in its arguments points to certain items that need to be purchased in 1998, but these are items purchased every year, including uniforms and field expenses. It asserts that in 1998 it will be boys basketball and cheerleader items and in prior years it might have been wrestling mats, proffering that nothing is offered as to a reason why a 39 percent increase in athletic supply spending is necessary for a thorough and efficient system of education over a two-year period. The Council maintains that its reduction in this area leaves a sufficient provision for inflationary or usage increase.

In response, the Board proffers that the Council is incorrect in its assessment that uniforms are ordered every year rather, they are only ordered upon need. Goal posts, it maintains, are exceptions. The Board notes that as a Cap Waiver district in 1996-97, its athletic costs were frozen at the 1995-96 level and, therefore, comparisons of 1997-98 to 1996-97 are skewed.

The Board advances that its increase in the Other Objects account is due to the reinstatement of funding for clinics/workshops for coaches, which was eliminated for the 1996-97 school year, additional funds for athletic dinners and award ceremonies (All Bergen County Dinner, Herald News Awards Dinner, Bergen County NFL Football Hall of Fame Awards Dinner, etc.), banners, athletic letters which are ordered every two years and registration fees for junior high school programs. It asserts that the success of individuals and/or teams is difficult to predict, as evidenced by the account being well underfunded this year due to outstanding individual and team accomplishments. The Board contends that this account was underfunded and completely expended in 1996-97.

The Council observes that, although these areas are of concern to the Board, they are certainly not a required appropriation for a thorough and efficient system of education within the District. If the Board managed in the past to get by without coaching workshops, it asserts they should be able to do so in 1998 or, alternatively, have the coaches pay for their own workshops. It argues that, when only $2,500 is spent in 1997, the Board cannot justify spending $10,580 for the same items in the following year.

The Board advances that it is not up to the Council to define what is and is not required for a thorough and efficient educational program. It contends that cocurricular activities are an essential component of the educational program and, as such, its coaches need to be exposed to new techniques and professional development just as a teachers would. Clinics, it asserts, are only a small part of this appropriation.

Upon review, the Commissioner initially notes that the Board proposes to spend in excess of efficiency levels established for extracurricular activities pursuant to CEIFA. He further finds that the Council has met its burden of demonstrating that its reductions can be sustained without impairing District stability or the Board's ability to provide T&E.

Accordingly, the Commissioner determines to sustain the Council's reductions of $12,000, $2,000 and $2,000, respectively, to the three accounts listed above.

Disputed Line-Item Numbers 11, 12, 13

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
06150	11-4XX-100-100	Improvement of Instruction - Salaries	$5,960	$2,500
06160	11-4XX-100-500	Improvement of Instruction - Purchased Services	$ 500	$ 300
06170	11-4XX-100-600	Improvement of Instruction - Supplies	$1,350	$ 600

The Council attests to its recognition that there are new standards for the District to analyze to be certain that students are prepared for basic tests at the fourth, eighth and twelfth grade levels, and to its realization that certain efforts will be needed in order to assure that the District's students are prepared to meet those standards. However, the Council finds excessive increases in these accounts. The Council notes that there are ample professional staff in the District to assist in all analysis of new State standards and does not believe that the District needs to spend significant additional sums for these new programs. While conceding that some amount of staff training will need to be done, the Council believes that the Board is excessive in its projections and recommends the reduction of $2,500 from salaries, $300 from other purchased services and $600 from supplies.

The Board asserts that the increase in this area is for home instruction for special services students and SAT salaries; it has nothing to do with Core Curriculum Content Standards or the grade 4, 8 and 11 state tests as stated by the Council. The Board argues that the increase from 1995-96 to 1997-98 levels is due to the realization that past budgets have been seriously underfunded in this area. It avers that home instruction for special services students is projected to increase, and transportation for CST members and parents to placement meetings and site visitations must be provided for. Additionally, a $1,000 budget for the gifted and talented program is minimal considering it will span grades 3-12. The Board observes that in each of the two prior years, appropriations for special services students included only those registered at that

time, which number was always greater with the opening of school in September. It avers that the cost of these additional students was funded by surplus. The Board urges, however, that this does not account for the unknown number of preschool handicapped students that the District has each year or the enormous increase in Bergen County Special Services tuition. It claims that these items can no longer be funded by surplus, particularly in that last year the District was given a cap waiver which required that surplus be kept at a maximum of 3 percent. The Board argues that it finds the $500, which represents transportation, to be necessary because of costs of transporting child study team members to meetings regarding home instruction, transportation for parents to the same meetings due to extenuating circumstances and transportation of the student(s) involved to an alternate site for preregistration conferences, if necessary.

The Council urges that the Board has always spent money for these items but fails to advise where these costs were budgeted and paid for the past two years. If $500 is suddenly necessary for an account with no charges for the past two years, Council wishes to understand where such spending was previously charged so that it may look for reductions in that area.

The Board argues that the appropriation of $1,350 to this account may seem significant when compared to prior amounts, however, it is, in fact, minimal and most likely insufficient to meet the needs of its SAT preparation and Gifted and Talented Program. The Board urges that the SAT preparation has become more involved in technology and it has therefore, provided $350 for software and review material. It posits that the G & T program is in need of much more financial support. The Board points out that a G & T teacher/coordinator was originally budgeted for in 1997-98 but removed prior to going to the voters in order to provide some tax relief. It maintains that the $1,000 provision for G & T supplies is needed for minimal program provision.

The Council advances that the Board, again, refers to components, including SAT preparation, which are normal recurring items of spending for the District, without explaining why a budget of $1,350 is necessary when only $100 annually was required for the past two years. It queries whether there were expenditures for SAT preparation in the past, where were these charged, and whether those accounts have been reduced.

Upon review, the Commissioner notes that the Board's proposed expenditures are well within standards of efficiency established pursuant to CEIFA, and that the Council, once

again relying on comparison to prior expenditures, has not demonstrated that the District can meet its obligation to provide T&E with a level of expenditure less than proposed. Accordingly, the Commissioner determines to restore the Council's reductions of $2,500, $300 and $600 to the respective accounts listed above.

Disputed Line-Item Number 14

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
06360	Multiple	Tuition	$850,692	$89,742

The Council notes that the budget for tuition is up substantially from $672,397 to $850,692, and it assumes that even 1996-1997 spending will not be up to the level of that year's budget. It advances that the budget is up for 1998 to a level 65.7 percent higher than the spending of the last full year of audited data in 1996, which the Council attributes to the Board's extreme conservatism in estimating the number of pupils that may require sending to another district. While recognizing the need for the Board to be somewhat conservative in this account, since a placement into the District after the budget is prepared can cause an unexpected appropriation, the Council contends that it must be recognized that it is also just as likely that a student currently in the District will move out, thus creating a budgetary savings. The Council observes that the Board's budget submission documentation shows $89,742 in assumed placements with no corresponding school, leading it to believe that this is for anticipated, but as yet unknown, placements. Council avers that it provided for a 3 percent balance in its analysis, which represents an even larger amount considering the conservative manner in which the analysis was performed. As a result, Council contends, any unanticipated placements can be covered by surplus without the need for line-item appropriations for these possibilities.

The Board asserts that there are two major considerations concerning tuition that the Council either ignores or categorizes as "conservatism," these being the dramatic increase in Bergen County Special Services tuition and the unpredictability of special services placements. It proffers that the Bergen County Special Services School District has increased its tuition for 1997-98 significantly due to the loss of State aid. It asserts that this increase has more than compensated for any increase in State aid to the District. Further, it asserts, the number of special services placements is impossible to predict. Budget figures are based upon enrollments

at the time of advertising (March 1, 1997), while the actual outside placements in September 1997, could be significantly higher based upon new registrants, new classifications and requests from parents of preschool handicapped children upon their third birthday. The Board proffers that in past years additions to outside placements have been handled through its surplus account, with no additional funds ever being provided for in the budget. It asserts that the increased cost of tuition and the small surplus no longer make this possible.

Council maintains that the budget should be prepared with all students known at the time of preparation and should not include provisions for potential placements. These, it argues, should be funded by surplus only if there are no savings from budgeted placements that become unneeded after budget adoption.

Upon review, the Commissioner finds the record to support the Board's contentions regarding increased Special Services District tuition and the Board's inability to continue its past practice of funding unanticipated placements from excess surplus. Given the Board's current surplus situation (see below), it is unreasonable for Council to contend that no provision should be made within applicable line-item appropriations for the possibility of unanticipated placements. Council having, thus, not demonstrated how the Board can provide T&E in the wake of its proposed reduction, the Commissioner determines to restore the reduction of $89,742 to the Board's tuition accounts.

Disputed Line-Item Number 15

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
06560	11-000-218-800	Support Svcs. - Reg. Students Other Objects	$3,600	$3,600

The Council avers that the Board again creates a new account with no past spending and no other accounts with obvious decreases to justify it. The budget for supplies and materials is appropriate based on past spending, and the provision for $3,600 would appear to be unnecessary.

The Board argues that this account represents its payment for advanced placement tests taken by its students. It asserts that the Board paid this expense prior to the 1995-96 school year, and then terminated the process for budgetary reasons. The Board claims that a decision

was made this year to pay these charges for 1996-97 and to continue payment in 1997-98 for what it believes is a very sound reason. It contends that many of its students cannot afford the cost of taking the AP exam, as the District is a low socioeconomic community as evidenced by its DFG rating of B. The Board argues that a lack of finances shouldn't prevent its students from the possibility of acquiring college credit in high school. The Board states that it firmly believes that the pinnacle of its educational program is its advanced placement curriculum and, as such, its students must be given the opportunity to take the AP exams and acquire college credit as in any other high school. It notes that when the Board dropped this item in the past, the number of students taking the exam decreased significantly.

The Council asserts that the Board here notes that they dropped spending in this area for budgetary reasons in the past, and the Council encourages it to do the same in the future. It avers if the Board could provide a thorough and efficient system of education without this appropriation in the past, it can do so again.

Upon review, the Commissioner notes that the Board offers advanced placement courses as an integral part of its curricular program and spends well within levels of efficiency for supplies as established pursuant to CEIFA. Therefore, the Council's argument that the proposed expenditure has been omitted in the past and can be omitted again is not sufficient to meet its burden of demonstrating that this reduction will not impair District stability or provision of T&E. Accordingly, the Commissioner restores the $3,600 reduction.

Disputed Line-Item Number 16

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
06750	11-000-221-102	Salaries/Supervisors of Instruction	$124,047	$40,000

The Council maintains that the Board should be striving to eliminate non-classroom overhead accounts such as department heads, curriculum coordinators, etc. It posits that the Board is expected to spend approximately $81,000 this year in this account and wishes to spend $124,047 next year, a 53 percent increase. The Council believes that all new positions should be in the classroom and not in administration and it, therefore, recommends a complete freeze on all such positions.

In defense of this line item the Board argues that the District hired a new school business administrator in October 1996, and increases in some areas of the budget are due to the change in the manner in which money is appropriated to certain accounts. It maintains that expenditures in this account are clearly explained with respect to each supervisor. The Board advances that its supervisors teach four classes and supervise those remaining, with each of them receiving $9,250 for the portion of his day dedicated to supervision plus a $2,150 stipend per department. Further, it asserts that the teaching load is heavier and the stipend is less than that of supervisors in other districts.

In reply, the Council alleges that the Board points to a need for additional spending in this account due to reclassifications but does not offer any corresponding areas with verified reductions because of the transfers. It asserts that, although the Board indicates the components of this account, including supervisors and the amount of teaching they do, this does absolutely nothing to justify the need for an increase of almost 65 percent over two years.

The Board asserts that the Council should be able to cull out the change in the manner of prorating and appropriating the salaries of the department supervisors, as their salaries are specifically listed in the account description packet. It proffers that any reduction here would result in the elimination of supervisory positions, which are crucial in a District already without a vice-principal or curriculum coordinator.

Upon review, the Commissioner is satisfied that the Board's account description papers support its contention regarding reclassification, and the Commissioner, moreover, notes that the Board spends well within administrative efficiency standards established pursuant to CEIFA. Accordingly, the Council having failed to demonstrate that its reduction would not cause an unsupportable loss of staff, the Commissioner determines to restore the reduction of $40,000.

Disputed Line-Item Number 17

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
06940	11-000-230-340	Purchased Tech. Svcs./Gen. Admin.	$23,000	$7,000

The Council observes that the Board wishes to spend 1-1/2 times as much in this account ($23,000) as in the 1997 budget ($14,774). It asserts that administrative costs should be decreasing rather than increasing and, with this in mind, it wishes to provide for normal overhead without allowing for new initiatives or costs. The Council advances that the average for the three prior full years in spending has been $11,500 and it believes that a budget will provide for any cost increases in these expenditures over normal patterns.

The Board contends that two of its buildings were erected prior to 1920 and, as such, the District is planning to address several facility issues which include: 1) conversion of an empty industrial arts facility into a classroom, office/conference area; 2) replacement of the classroom floors in all nine of the rooms in the Jefferson Elementary School; 3) replacement of the high school boilers and heating system; 4) replacement of a roof at the high school; 5) replacement of the windows in the Gavlak Elementary School; 6) ADA work; 7) an all-purpose room at the Jefferson Elementary School (the 210 students currently attending this school take gym in a basement hallway); and 8) modular structures to provide four classrooms at the Jefferson Elementary School. The Board argues that although funds are not provided for these projects in the 1997-98 budget, planning for all of them has begun, and $20,000 of the $23,000 is dedicated to the necessary architects' fees. The Board observes that even the amount budgeted will most likely be insufficient.

In response, the Council contends that the Board's justification for this line item is a mere "wish list" of projects, of which many are desirable but only those necessary should be funded. It further notes that funding has not been provided for the actual work for any of these projects. The Council contends that it left more funding in this account than has ever been spent by the Board, which should be enough to cover those projects that are deemed most important and most sensitive to the safety of the students.

Upon review, the Commissioner finds that the Council has not shown how the Board can provide for T&E and maintain stability in the wake of clear facility maintenance needs without the planning and exploration needed to implement these projects in future budgets. As the Board spends well within efficiency standards for administrative services established pursuant to CEIFA, the Commissioner restores the Council's reduction of $7,000.

Disputed Line-Item Number 18

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
06950	11-000-230-530	Communications/Telephone	$30,500	$2,000

The Council observes that the Board has been remarkably consistent in its phone expenditures, going from $19,964 in 1994 to $20,487 in 1995 to $22,060 in 1996 to probably near $25,000 in 1997 and, therefore, a jump to $30,500 would appear to be unnecessary. It asserts that although there are increasing demands for telephones due to on-line educational services, there are State programs that fund many of the hookup charges for these areas. Council believes that a normal increase should be provided here but finds $5,000 to be excessive.

The Board posits that the Council's reduction fails to consider the fact that the District is increasing its Internet access in each of two buildings and implementing it in the third for 1997-98. Further, it argues that its District Technology Plan also calls for the creation of a WAN via phone lines, and the projection here includes the cost for all necessary modems. Additionally, FAX machines are being provided to the high school and one of the elementary school offices for the first time. Finally, it asserts, telephones will most likely be placed in the projected modular structures.

In response, the Council points out that its analysis here provided for a healthy increase over normal spending to cover the technological areas noted by the Board. Further, it argues, there is $12,000 provided by the Distance Network Learning Grant for technology and networking and another $11,333 for media supplies and equipment. As such, the Council maintains that its modest reduction in this area can be sustained considering all of the grant funding available, a point not mentioned by the Board.

The Board asserts that the funding in this area will be allocated to developing its media centers, Internet access and reinstating a library/media center in Jefferson School, which has been without such a facility since 1994 when it was needed for a classroom.

Upon review, the Commissioner notes that the Board spends well within efficiency standards established pursuant to CEIFA in this area, and that the Council has not demonstrated how the Board can meet its ongoing needs while still providing the increased

services necessary to support the Board's proposed use of dedicated grant funds. Accordingly, the Commissioner determines to restore the reduction of $2,000.

Disputed Line-Item Number 19

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
06970	11-000-230-600	Support Services/General Admin.	$7,000	$1,000

The Council asserts that, again, a budget for overhead rises with no substantiation in past spending. The budget for this account at $7,000 is excessive by $1,000 and the Council recommends this reduction based on past spending which has never exceeded $6,000.

The Board maintains that this account provides for supplies and materials for the superintendent and board secretary's offices. It avers that the increase is due to the expanded computer program in the board secretary's office. It states that it is also planning on several additional mailings and other public relations activities as the District pursues funding for the projects discussed above.

The Council purports that perhaps nowhere is the Board's insistence on no budget reductions more obvious than the area of general administration. It posits that from spending of approximately $5,000 per year for the last two years, the Council provided the Board a budget of $6,000 for 1998 and this is not enough. Council questions how the Board's desire to have more mailings and other public relations activities affects the education of the students in the District. It maintains that the Board is unreasonable to be increasing overhead accounts in light of continued budget defeats in the District.

In response, the Board avers that an enlightened public is a necessary ingredient of today's educational programs and it has increased mailings accordingly. Further, it does not believe that a $4,000 appropriation for the superintendent's office is excessive given that this increase is largely due to technological items which will help expedite the workload, which is handled by only the superintendent and one secretary.

Upon review, the Commissioner notes that the Board spends well within applicable efficiency levels as established pursuant to CEIFA, and that the Council's sole basis

for reduction is comparison to prior-year spending patterns rather than determination of current need. Accordingly, the Council has not met its burden and the Commissioner restores the reduction of $1,000.

Disputed Line-Item Number 20

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
06990	11-000-230-890	Gen. Admin./Misc. Expenditures	$15,600	$2,000

The Council asserts that a $15,600 budget cannot be substantiated by past spending of far less than $10,000 annually. New expenditures in this account have occurred but not at a level warranting such an increase.

The Board observes that the balance in this account as of the advertised budget is misleading, as it does not reflect the costs of the election for 1997 which were approximately $5,000. It avers that when such cost for 1997-98 is projected at the same level, a minimal amount of monies would remain available for bidding, teaching assignments, flowers for appropriate activities (retirements, teacher recognition grant, funerals, etc.) The Board argues that this particular line item already shows a 25.7 percent decrease from 1995-96 despite including the costs of the annual election.

The Council observes that the Board justifies this line item with flowers for teachers and it asserts that such spending is certainly not necessary for a thorough and efficient system of education within the District.

Upon review, the Commissioner notes that while the Board spends well within established efficiency standards in the area of supplies, the items it proposes to fund over and above election costs should be sufficiently provided for with the appropriation recommended by Council. Accordingly, the Council has met its burden and the Commissioner determines to sustain the reduction of $2,000.

Disputed Line-Item Numbers 21, 22

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
07060	11-000-240-500	Support Services/Sch Admn. - Other Purchased Services	$8,865	$3,000
07070	11-000-240-600	Support Services/Sch. Admn. - Supplies and Materials	$30,325	$4,000

The Council notes Wallington's favorable ranking in spending in certain accounts but still believes that its appropriations for 1998 are excessive based on spending that has proven adequate in the past. A total overhead budget across all accounts shows $39,190 compared to $29,304 in spending just two years ago and $31,600 in spending this year, assuming the unlikely event that the entire budget is expended. Such increases cannot be justified and the Council insists on level overhead spending and increased classroom spending. Accordingly, the Council recommends a reduction of $3,000 in Purchased Services and $4,000 in Supplies and Materials.

The Board asserts that the $8,865 appropriated in the first account represents costs for dues, travel, workshops, contractual issues such as medical physicals and tuition reimbursement, Middle States Association dues, NJSIAA and athletic dues, student awareness and convention expenses which, it contends, are required to provide a thorough and efficient education and stability in its staffing.

The Council asserts that the Board, while providing a listing of the components of this account, fails to explain the need for a $8,865 budget when only $5,300 was budgeted for 1996-97 year and only $3,892 actually spent in 1996.

With regard to Supplies, the Board, while recognizing that there is a $4,025 increase in this line item, rejects Council's assertion that it cannot be justified. The Board proffers that a review of the account description reflects the cost of office supplies, copier supplies, postage, printing, scoring of standardized tests (*i.e.*, CAT, Metropolitan Readiness Test), intensive care for the high school report card/attendance/permanent record data base, and discipline forms. It avers that such monies are required to provide a thorough and efficient education as well as stability.

The Council asserts that the Board has provided nothing more than a listing of the components of this account, completely failing to put forth any justification for the increase here.

Upon review, the Commissioner finds that the Council has again relied solely on prior-year spending patterns without any analysis of actual need. As the Board is spending well within established efficiency levels for items for which the Council does not contest the necessity, the Commissioner determines to restore the reductions of $3,000 and $4,000.

Disputed Line-Item Number 23

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
07100	11-000-260-100	Operation & Maintenance of Plant Svcs. - Salaries	$343,943	$30,000

The Council states that for the last several years the spending in this account has increased by roughly the amount of the annual negotiated increases. Yet, for 1998 the budget is up 14 percent over the 1997 budget which will likely prove excessive by several thousand dollars. Much of the increase is due to overtime. The Council notes its own efforts to control overhead expenses relative to buildings and grounds and would like the Board to operate under the same constraints. A 15 percent increase in salaries when there are no new positions is simply unacceptable and not necessary in a district in order to maintain the provision of a thorough and efficient system of education. Accordingly, the Council recommends a reduction of $30,000 from this account which will leave ample amounts for salary increases.

The Board avers that the 1996-97 appropriation for this account is misleading since it does not include the full salary of the supervisor of buildings and grounds. It contends that this position remained open from July 1, 1996 through March 1, 1997 while applicants were reviewed. The 1997-98 budget contains the full appropriation of the $33,637 salary. Additionally, the Board argues that overtime has been increasing each year due to extended custodial absences due to illness and the increased use of its facilities by community recreation programs. It observes that the Board assumes all the overtime costs for Borough recreation activities held on its field and in its gyms on the weekends.

In reply, the Council asserts that the Board assumed that the Council's analysis failed to account for the temporary vacancy in this account, but that is not the case. It contends that a projection was made through the end of 1997 based on the recent spending which included this position. Further, the Board also notes extra overtime spending due to illness but if this were excessive then the employees out on sick leave would likely receive disability and not have their total salaries charged to the budget, short term illnesses would not have a material effect on any budget. The Council observes that this account had a balance of $1,000 against a budget of $301,389 as of May 31, 1997, and queries why then is a budget increase to $343,943 necessary if there are no new positions in this account. It states that overtime spending can simply not be that

excessive and, if it is, it should be eliminated immediately. Council avers that there is absolutely no justification for a 14 percent increase in this account even considering the temporary absence. Therefore, the Council wishes to restore $15,000 to this line item and still recommends the reduction of the remaining $15,000.

Upon review, the Commissioner finds that the Council has borne its burden of demonstrating that the Board evinces no documented need for the full amount of this line item, so as not to be able to absorb a lesser reduction of $15,000. Accordingly, the Commissioner determines to sustain $15,000 of the Council's original $30,000 reduction and restore the remaining $15,000.

Disputed Line-Item Number 24

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
07350	11-000-270-XXX	Contracted Transp. Services	$291,230	$20,000

The Council contends that, although there are supportable reasons for the increases in this account, the percentages anticipated by the Board appear excessive. From actual spending for the last three full years that has remained remarkably consistent ($211,327 in 1994, $232,709 in 1995 and $224,173 in 1996), the Board wishes to hike the budget to $291,230. Certainly new athletic programs will cause more busing and certainly new special education placements will do the same. Overall school enrollment increases will not necessarily cause the budget to rise, but certainly additional routes can be anticipated. However, the Board is being entirely too conservative in its estimates and the Council believes that all new programs, placements and routes can be achieved with a budget that is 20 percent higher than the last full year of spending. The Council maintains that the Board did not justify its budget need here other than to state the components of this account, which has been overbudgeted in the past.

The Board posits that this account represents all transportation between schools, staff transportation, athletics, vocational schools and special services. It states that although the internal traveling needs are relatively easy to project, special services routes are not. Further, it avers that the appropriation here does not provide transportation costs for new registrants. The

Board asserts that it did justify the need for this appropriation, as contracted routes are specifically listed in the account description.

Upon review, the Commissioner finds that the Council has based its reduction solely on what it believes to be a reasonable percentage increase over prior year expenditures rather than on an analysis of the District's actual needs, which are, in fact, detailed in the Board's supporting papers. Therefore, the Commissioner restores the reduction of $20,000 to this account.

Disputed Line-Item Number 25

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
See Below		Social Security Contributions	See Below	$2,000

The Council avers that it performed an analysis of spending in this account and believes the Board's budget to be excessive by $2,000 based on current spending, a stable FICA rate, and a small increase in the maximum base with an accounting for Districtwide raises.

The Board purports that social security contributions are distributed through several accounts, *i.e.*, instruction/regular programs, instruction/special programs, instruction/vocational programs, instruction/other programs, attendance and social work services, health services, support services/regular, support services/special, improvement of instruction services, instructional staff training services, school administration and operation of plant services, and it is not clear which area is recommended for the $2,000 reduction. The Board urges that it would not be prudent to base its projection on current spending, considering that the District will have several new employees in 1997-98, some of which are additions to the budgeted 1996-97 staff. Also, it contends that this account was fully expended in 1996-97.

In reply, the Council states that the reason it is not clear which area within Social Security is recommended for reduction is because there was never any schedule provided by the Board to indicate exactly which positions were covered by Social Security and how much each would be allocated. It observes that the Board notes "several new employees" in 1998 but the full-time positions are those not covered by Social Security. Further, it states that the fact that

this account was fully expended in 1997 is of no consequence if the budget is up more than a reasonable amount over the prior-year figure.

Upon review, the Commissioner finds that Council offers no basis for its reduction, other than an unsupported assertion that the Board's appropriation is excessive by $2,000. The Council having failed to meet its burden and the Commissioner noting that Board expenditures for staffing are well within levels of efficiency established pursuant to CEIFA, the Commissioner determines to restore the reduction of $2,000.

Disputed Line-Item Number 26

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
Multiple	Multiple	Business/Other Support Svcs.	17,300 Total	$9,000 Total
07430	11-000-290-330	Purchased Professional Svcs.	$4,000	$3,000
07440	11-000-290-340	Purchased Technical Svcs.	4,000	4,000
07450	11-000-290-500	Other Purchased Services	3,330	-0-
07460	11-000-290-600	Supplies & Materials	6,000	2,000

The Council observes that the Board spent $4,650 in 1994, $6,624 in 1995, and $7,725 in 1996 for these accounts and has expended only $1,874 through nine months of 1997, yet the budget for 1998 escalates to $17,300. There should be no new overhead programs or spending unless it is absolutely essential to the maintenance of a thorough and efficient system of education in the school District and these expenditures are all classified as instructional and not support. The Council recommends that the following reductions be made in these accounts: $3,000 from Purchased Professional Services, $4,000 from Purchased Technical Services and $2,000 from Supplies and Materials.

The Board asserts that it is in a state of transition due to a change in Board secretaries. It contends that the monies appropriated for these three areas is already insufficient given that the Board is involved in upgrading hardware and software, providing training for the staff involved and networking all three schools with respect to administrative services.

In response, the Council states that the District's Distance Network Learning Grant provides for $17,319 for elementary workstations and $15,260 for high school workstations, as well as the aforementioned funding for networking. It contends that its reduction is reasonable considering all of the outside funding already provided.

The Board urges that although the Distance Network Learning Grant provides for some of the elementary and secondary school and central office technology needs, upgrading, training and other technological needs remain.

Upon review, the Commissioner notes that the Board spends well within efficiency standards established pursuant to CEIFA in this area, and that the Council has not demonstrated how the Board can meet its ongoing needs while still providing the increased services necessary to support the Board's proposed use of dedicated grant funds. Accordingly, the Commissioner determines to restore the Council's reduction of $9,000.

Disputed Line-Item Number 27

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
07550	11-000-310-930	Transfer/Food Service Deficit	$34,000	$34,000

The Council, through its survey of other districts, has found many able to obtain no-cost guarantees from food services providers. The Board has not had to fund a deficit in any of the prior three full years and has not had to pay over any funds so far in 1997 despite a budget of $28,155; yet, the budget for the deficit climbs to $34,000 in 1998. The Council notes that the Board is moving in the wrong direction for these deficits and contrary to almost every other district surveyed. The Council believes that the Board can and should operate its food program at no cost to the taxpayers of the District and recommends the reduction of the full appropriation of $34,000 from this account.

The Board posits that it is not possible to operate the National School Lunch Program at no cost to the taxpayer. It asserts that this is not a profit-making venture, there are no cafeterias or hot-lunch provisions, rather a cold lunch is provided through a contract with a neighboring school district. It urges that the actual cost of each lunch is greater than what the Board is permitted to charge. The Board observes that the $34,000 appropriated in this account is broken down to: 1) Salaries for lunch program coordinator and aides, $27,965; 2) Supplies & Materials, $300; and 3) Transfers to Cover Deficit, $5,735. It avers that as of May 7, 1997 this account shows no remaining balance. It also finds significant that in 1996-97, the State reduced the subsidy for lunches in May and June.

Upon review, the Commissioner finds that he cannot condone the running of a food service program that is anticipated to be in continual deficit. Accordingly, the Council's reduction of $34,000 is sustained and the Board is directed to take such steps as are necessary to operate its food service program on a break-even basis.

Disputed Line-Item Number 28

Line No.	Account No.	Description	Amount Budgeted	Amount Increased
121	10-303	Budgeted Fund Balance	$-0-	$30,000

The Council reviewed carefully the Board's Recapitulation of Fund Balance that was part of the budget document provided. Any increases to the amount of revenue realized from surplus would automatically mean a reduction in the tax rate without any effect whatsoever on the appropriations of the District. Therefore, the Council prepared its own recapitulation of the fund balance anticipated as of June 30, 1997 to determine if such additional funding was available.

First and foremost in this analysis is a determination of an acceptable level of surplus balance for the Board to maintain. In general, a factor of 3 percent of the succeeding year's budget has been determined to be a fair level of surplus to maintain. The Board estimates its surplus balance as of June 30, 1997 at $167,017, which is slightly under 2 percent of the 1997-98 appropriation level. The Board made no estimate of surplus being generated during 1996-97 and utilized no surplus to balance the 1997-98 budget and provide an offset to the school tax levy. The Board estimate is merely the audited balance of $235,517 from June 30, 1996, adjusted for $68,500 utilized as a revenue in the 1996-97 budget.

The Council believes that the assumption that nothing will be credited to surplus in the 1997 budget year is unreasonable based on an analysis of the current year budget and a review of past Board financial results. The Board is already over its budget for interest income by $11,710 with two months yet to go and is just near the budget for miscellaneous revenues of $10,000 with $9,622 after 10 months with some predictable sources certain to bring the total over the budget, though not by much. Tuition is also just $430 short of the $4,000 budget and likely

to go over by the year's end. As a result, at a minimum, the Council expects the Board to be $14,500 over the budget for miscellaneous revenues, thereby rendering the zero estimate for surplus regeneration as inadequate without even beginning an analysis of appropriations.

The Council's analysis of appropriations would indicate that significant balances will lapse to surplus absent any unforeseen emergencies. All salaries have been provided for in the budget except for certain hourly workers and substitutes. Supplies and texts across all budget categories have likely all been paid for since very little needs to be bought in May and June which would be any benefit at all to the 1997 school year. Certain expenses such as graduation and spring sports are yet to be paid but are not material to the overall budget. Tuition, energy and employee benefits, though not always encumbered in the financial statements, still were estimated by the Council to determine the proper amount that may lapse to surplus from unspent budgetary appropriations.

As a result of the Council analysis, it is estimated that $120,000 will lapse to surplus at the conclusion of the 1997 school year. Primarily these lapses should come from tuition, improvement of instruction, operation of plant and student transportation. All estimates were prepared conservatively and through careful analysis of monthly bills paid versus months left in the year. The Council's estimate of lapsing appropriations is not without historical consistency. In 1996, the last full year audited of the Board's budget, the lapsed appropriations were $141,537 and in 1995 they were $330,599 and in 1994 they were $145,268. If a budget annually increases over a prior budget that has proven to be excessive, it is only natural that the next budget would also prove excessive absent major staff increases or major new initiatives or programs, neither of which has appeared in the Board's budget.

It should be noted that although the Council does project a large balance lapsing to surplus, the Board itself controls the actual amount that will lapse. This is because the Board controls all spending through the end of the year and also controls any major projects that may be funded with an appropriation from surplus before June 30. The Council's estimates assume that the Board will not enter into any advance purchases of items that will, in effect, benefit the 1998 budget year and not the 1997 year, including supplies, textbooks and other items. The Council also assumes that no appropriation will be made for any capital projects which should be

reasonable considering that no major capital construction or acquisition projects were included in the 1998 school budget.

The Council also notes that any encumbrances that exist on the books as of June 30, 1997 are mostly for items which have not been delivered and, therefore, have absolutely no benefit to the 1997 budget year, though they are essentially charged there. For the most part, encumbrances really are items for next year charged to this year and, therefore, in almost all cases, the budgets for the future year can be automatically decreased by the amount of open encumbrances if they, in fact, represent purchases that were actually consummated by the District. When utilized for items such as supplies, routine textbooks and similar expenses, encumbrances really become hidden surplus that is designated for use for normal operating expenditures that perhaps should be charged to the succeeding year's budget when the items are utilized. This discussion of encumbrances is significant due to the large balances that existed as of June 30, 1996 ($106,761) and may possibly exist as of June 30, 1997. These encumbrances were evident in a variety of accounts in the budget. This meant that the first $106,761 spent by the Board in fiscal 1997 in these accounts actually was charged to the 1996 budget.

The Board argues that its fund balance as of May 31, 1997 was $167,462, which has been reduced by $30,000 with the Council's recommended reduction, bringing the Board well under 2 percent. It realizes that there will be some unexpended funds as of June 30, 1997 which will be credited to surplus and it is counting on this to bring surplus to an acceptable level of between 2.5 percent and 3 percent. The Board contends that the Council's assessment is inaccurate, as relying on projected interest is unreliable, tuition costs were underestimated, and miscellaneous revenues will not likely be significant. The Board asserts that the assumption that supplies and texts across all budget categories have likely been paid for is incorrect. The Board has held off on the purchase of many instructional supplies and materials until it had sufficient time to assess its curriculum needs concerning the new Core Curriculum Standards issued by the Department. Also, it asserts that like many other districts, it has delayed ordering materials related to preparation for the new Grade 4 ESPA, administered May 19 - 23. The Board plans to purchase these items now with the funds that have been provided, not as a part of next year's budget. Additionally, although the Council states it estimated tuition, energy and employee benefits, the Board questions its conclusions. It proffers that Council's estimate that $120,000

will "lapse to surplus" is inaccurate; the Board's estimate is $60,000. The Board also disputes the statement that there haven't been any major staff increases, initiatives or programs. It states that the staff has increased by one full-time teacher in 1996-97, by two in 1995-96, and by two in 1994-95. Moreover, it contends that as its enrollment increased from 1,026 in October 1996, to a projected 1,291 in September 1997 (25.8 percent), it will have added five full-time teachers, five part-time teachers, a student assistance counselor and at least three instructional aides over this period of time. The Board contends that this is the primary cause for the increase in its salary account. Further, the Board states that it has undertaken new initiatives which include computerizing its school business administrator's office and adding technology in its schools. Although the amount spent in technology for 1996-97 ($29,000) may not seem significant, it was when compared to the previous year's budget of zero dollars. The Board contends that the manner in which it encumbers its fund for purchases and/or services for the last two months of the school year should be of no concern to the Council. It proffers that several projects and expenditures were held until this time due to the previously mentioned assessment process, the time of the year and availability. Also, the Board contends that the Council's statement that encumbrances on the books as of June 30, 1997 do not benefit the 1996-97 budget year is misleading and irrelevant. It asserts that it is not aware of any established relevancy timeline, and does not interpret such encumbrances as "hidden surplus."

Upon review, the Commissioner notes that the Board's audited actual surplus for 1996-97 was $279,486, or $10,141 above the generally acceptable level of 3 percent. Accordingly, the Commissioner determines to restore $19,859 of the Council's increase to budgeted fund balance, but to sustain the remaining $10,141.

Disputed Line-Item Number 29

Line No.	Account No.	Description	Amount Budgeted	Amount Increased
00253	10-1XXX	Miscellaneous Revenues	$29,500	$10,000

The Council contends that the Board has achieved significantly more in interest income than was budgeted, but the budget for 1997-98 drops substantially. The largest portion of the Board revenues comes from the tax levy as billed and collected by the Borough and then paid to the Board on a regular monthly basis. Therefore, the interest earnings by the Board are not

subject to major cash flow fluctuations, as they are in the municipal government, so the earnings should be fairly stable and predictable. The only variable in this calculation is the actual interest rate. Council states that from an actual 1997 figure that should be in excess of $30,000, the Board should be budgeting more than $16,000 in 1998 for interest income. As such, Council believes that the Miscellaneous Revenue category can be increased by $10,000 to $39,500. This increase will provide a direct benefit to taxpayers with no effect whatsoever on the educational system in the District. Even though the Council recognizes the significant increase in surplus utilization in the budget, the Board will not begin to notice this until the fall because most employees are paid over 10 months, so that the cash outflows in July and August will be minimal while the Borough will still be forwarding the monthly tax checks so that interest income may drop somewhat but not by enough that the $26,000 budget will prove to be excessive.

In response, the Board disputes the claim of the Council that the tax levy revenue is paid to the Board on a "regular monthly basis." It avers that payment to the Board has been highly irregular, many times on a weekly basis, which makes the calculation of interest very difficult. The Board rejects the recommendation that this area of the budget be increased by $10,000 and suggests that if the Council were to pay the Board via the tax levy on a quarterly schedule, such an action would deserve consideration.

Upon review, the Commissioner finds that the Council has met its burden of demonstrating that additional interest income could be anticipated under the circumstances it describes. Accordingly, the Commissioner determines to sustain the Council's $10,000 increase to revenue, but concomitantly notes that such decision is predicated on the forwarding of tax levy by the Borough to the Board on a monthly basis as stated.

Disputed Line-Item Number 30

Description	Amount Appropriated as Revenue Increase
Unemployment Trust Fund Revenue	$50,000

Council states that the Board has a self-funded unemployment trust fund which generates revenue in three ways: from employer contributions, from employee withholdings and from interest income. It states that the District has a fund that has a balance at June 30, 1996 of

$353,503 with annual earnings which more than paid for claims in 1996 that amounted to $9,304. The Board is permitted by State regulations to recapture past contributions if they are still in the fund and are not necessary for future claims. It asserts that in a district this size, layoffs are not material and no layoffs are planned in the 1997-98 budget, therefore, this account is a potential source of revenue which may be utilized in the budget.

The Board asserts that it has been advised that, according to the New Jersey Department of Labor, this action is not appropriate due to required timelines.

In response, the Council contends that it investigated this matter and was advised that such an action to access these reserve balances for a revenue source is entirely possible and only has to be completed prior to June 30, 1998 in order to have a favorable impact on the 1998 budget. Council warrants that there is over $350,000 sitting in this fund which is not ever likely to be utilized by the Board, noting that payments from this account have been minimal and can actually be made through the income of the fund on an annual basis.

Upon review, the Commissioner finds that the Council has not met its burden of demonstrating that the Board can effectuate this increase in revenue without impairing the District's stability or its ability to provide T&E, in that the Council provides no substantiation in the record as to factual basis for its claims. Accordingly, the Commissioner restores the $50,000 increase in revenue.

APPLICATION OF ADDITIONAL APPROPRIATION

The Board states, in a letter responding to notice from the Assistant Commissioner that an additional State appropriation of $50,000 would be considered within the context of this appeal, that the additional aid was requested, and is to be used, for a program having no direct relationship to the District's instructional program. Specifically, in an effort to further assist the District's non-English speaking students, the Board has arranged for an after-school/summer/Saturday language immersion program operated by Berlitz, International. The Board opines that this appropriation should have no bearing on the within appeal, and the Council submits no comment on the matter.

Upon review, the Commissioner finds that, in view of the circumstances and purpose of the appropriation at issue, it should not be reallocated to offset restorations directed

herein. However, any portion of the appropriation *not* used for the designated purpose shall specifically be reserved as excess surplus to be appropriated in the 1998-99 budget for purposes of tax relief.

APPLICATION OF SURPLUS

As set forth at line item No. 28 above, the Commissioner finds no surplus over and above the $10,141 already allocated to offset restorations to appropriations directed herein.

SUMMARY

In summary, the Commissioner directs restoration or sustaining of the Council's line-item reductions to appropriations and increases to revenue as set forth below.

Line Item	Description	Sustained	Restored
2710	Teaching Salaries	$ -0-	$ 65,000
2640	Other Salaries/Instruction	-0-	30,000
2680	General Supplies	-0-	10,000
2690	Textbooks	-0-	20,000
3920	Resource Room Textbooks	-0-	500
4860	General Supplies/Basic Skills	-0-	1,600
5040	General Supplies/Vocational	-0-	500
6090	Athletic Salaries	12,000	-0-
6110	Athletic Supplies/Materials	2,000	-0-
6120	Athletics - Other Objects	2,000	-0-
6150	Improvement of Instruction - Salaries	-0-	2,500
6160	Improvement of Instruction - Purch. Serv.	-0-	300
6170	Improvement of Instruction - Supplies	-0-	600
6360	Tuition	-0-	89,742
6560	Support Services - Reg. Students	-0-	3,600
6750	Salaries/Supervisors of Instruction	-0-	40,000
6940	Purchased Technical Services	-0-	7,000
6950	Communications/Telephone	-0-	2,000
6970	Support Services/General Administration	-0-	1,000
6990	Gen. Administration/Misc. Expenditures	2,000	-0-
7060	Support Services/Sch. Admn. - Purchased Serv.	-0-	3,000
7070	Support Services/Sch. Admn. - Supplies/Mat.	-0-	4,000
7100	Operation & Maintenance - Salaries	15,000	15,000*
7350	Contracted Transportation Services	-0-	20,000
--	Social Security Contributions	-0-	2,000
7430	Purchased Professional Services	-0-	3,000
7440	Purchased Technical Services	-0-	4,000

7460	Supplies and Materials	$ -0-	$ 2,000
7550	Transfer/Food Service Deficit	34,000	-0-
121	Budgeted Fund Balance	10,141	19,859
253	Miscellaneous Revenues	10,000	-0-
--	Unemployment Trust Fund Revenue	-0-	50,000
6440	Health Purchased Services	-0-	3,000**
7150	Operation & Maintenance - Insurance	-0-	5,000**
7160	Operation & Maintenance - Misc. Purch. Serv.	-0-	1,000**
Total Line-Item Determinations:		$ 87,141	$ 406,201

*Undisputed by Council, See Line Item 23 above
**Undisputed by Council, See Note 1 above

General Fund Tax Levy Certified by Governing Body:	$7,724,317
Restoration of Reductions:	406,201
Amount of Restoration Funded by Surplus:	(0)
Amount of Restoration Funded by Additional Appropriation:	(0)
Total General Fund Tax Levy for 1997-98:	$8,130,518

Accordingly, the Bergen County Board of Taxation is directed to make the necessary adjustments, as set forth above, to reflect a total of $8,130,518 to be raised in tax levy for General Fund purposes of the Wallington Board of Education for the 1997-98 school year. Additionally, the Board is reminded that it has been permitted to exclude its additional State appropriation from consideration herein under the express condition that any portion of such appropriation not used for the designated purpose, as set forth above, shall be reserved as excess surplus to be appropriated in the 1998-99 budget as tax relief.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 26, 1998
Date of Mailing, February 26, 1998

91-98

C #91-98
SB #33-98

BOARD OF EDUCATION OF THE BOROUGH OF WALLINGTON,	:	
PETITIONER-APPELLANT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
MAYOR AND COUNCIL OF THE BOROUGH OF WALLINGTON, BERGEN COUNTY,	:	
RESPONDENT-CROSS/APPELLANT.	:	

Decided by the Commissioner of Education, February 26, 1998

For the Petitioner-Appellant, Walter M. Slomienski, Jr., Esq.

For the Respondent-Cross/Appellant, Joseph Rosa, Jr., Esq.

This matter arises from reductions made by the Mayor and Council of the Borough of Wallington (hereinafter "Borough") pursuant to N.J.S.A. 18A:22-37 to the budget proposed by the Board of Education of the Borough of Wallington (hereinafter "Board") for the 1997-98 school year following defeat of the proposed budget at the annual school election held on April 15, 1997. Those reductions totaled $507,872 from a proposed general fund tax levy of $8,232,189, and were effectuated by reduction of 34 line items included in the Board's proposed budget.

Because the general fund budget proposed by the Board was below the minimum amount which, as established under the Comprehensive Educational Improvement and Financing Act of 1996, was necessary in order for the district to

June 1, 1998

provide a thorough and efficient education to its students, the Commissioner of Education required the Borough to demonstrate that its reductions would not negatively impact the district's stability or its ability to provide a thorough and efficient education. Under that standard, and permitting the district to exclude an additional State aid appropriation from consideration,[1] the Commissioner determined that $406,201 of the reductions disputed by the Board should be restored.

The Commissioner sustained reductions totaling $87,141. These reductions included $34,000 designated as "Transfer/Food Service Deficit," leaving that account with no balance. In sustaining this reduction, the Commissioner reasoned that he could not "condone the running of a food service program that is anticipated to be in a continual deficit," and he directed the Board to "take such steps as are necessary to operate its food service program on a break-even basis." Commissioner's Decision, slip op. at 30.

The Borough appealed to the State Board from the Commissioner's determination to restore $406,201 of its reductions. The Board appealed that part of the determination sustaining the $34,000 reduction to its lunch program, arguing that this item included supplies, salaries for a lunch program coordinator and aides, as well as the funds necessary to cover a $5,735 deficit. The Board argues that if this reduction were to be sustained, it would not be able to provide a lunch program.

After reviewing the record and the arguments of counsel, the State Board affirms the Commissioner's determination with the following modification. Given the Commissioner's rationale for sustaining the $34,000 reduction to the food service

[1] Such exclusion was given on the condition that any portion of those funds not used for the purpose designated be reserved to be appropriated as tax relief in 1998-99.

program and his directive to the Board, we affirm only $5,735 of that reduction, representing the amount which the Board had appropriated to fund the deficit in its program. We therefore direct restoration of an additional $28,265, representing the amount appropriated for salaries and supplies in order for the Board to provide a food service program for its students.

Sam Podietz did not participate in deliberations in this matter.

July 1, 1998

Date of mailing JUL 06 1998

92 - 98

92-98 DHP

IN THAT MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF J.G.	:	DECISION
	:	

SYNOPSIS

Following appeal of the Department's disqualification of J.G., custodian convicted of second degree murder in 1966, matter of disqualification was transmitted to OAL for hearing.

In light of the documents in evidence and the testimony of witnesses, the ALJ concluded that J.G. affirmatively demonstrated rehabilitation.

Commissioner reversed ALJ's decision, holding that balancing of all factors required for consideration did not permit Commissioner to conclude, on existing record, that J.G. had clearly and convincingly demonstrated rehabilitation within the intendment of the criminal history record check law set forth at *N.J.S.A.* 18A:6-7.1 *et seq.*

February 27, 1998

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3857-97N

AGENCY DKT. NO. DHP 27-97

IN THE MATTER OF THE DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF J.G.

Stephen Bunda, Esq., for petitioner, J.G.

New Jersey Department of Education, appearing pursuant to *N.J.A.C.* 1:1-5.6(a)

Record Closed: September 30, 1997 Decided: November 26, 1997

BEFORE **BARBARA A. HARNED** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, J.G., was employed as a school custodian by the state-operated School District of Newark, Essex County (School District). On February 19, 1997 the New Jersey Department of Education (Department) notified J.G. and the School District that a fingerprint search conducted through the New Jersey State Police and the Federal Bureau of Investigation revealed that J.G. had been convicted of murder in the second degree in 1966 and sentenced on January 3, 1967 to a term of twenty-five to thirty years confinement in the New Jersey State Prison. The Department's Notice further advised J.G. and the School District that as a result of this conviction, J.G. was disqualified from continued employment at any school or other institution under the supervision of the Department.

J.G. appealed the decision of the Department to disqualify him from continued employment based on the grounds of rehabilitation. The matter was transmitted to the Office of Administrative Law (OAL) on April 11, 1997 for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-12 to -15 and *N.J.S.A.* 52:14F-1 to -13. A prehearing conference was held on July 9, 1997 and the hearing was held on September 30, 1997, on which date the record closed.

FACTUAL DISCUSSION AND FINDINGS

Unless otherwise noted, the following facts are undisputed and I adopt them as **FINDINGS OF FACT.** In 1965, at the age of 22, J.G. was arrested for homicide. A jury convicted him of second degree murder and on January 3, 1967, he was sentenced to a term of not less than twenty-five and not more than thirty years imprisonment at the State Prison of New Jersey in Rahway. The records submitted by the Department do not contain any description of the acts leading to J.G.'s conviction. J.G. submitted a written statement to the Department concerning the homicide, P-21, and during his testimony at this hearing he swore as to the truthfulness and accuracy of P-21. I found J.G. to be a credible and convincing witness. Accordingly, **I FIND** that on the night of the homicide, an acquaintance of J.G. came to his house and J.G. got in the acquaintance's car. J.G. had known this individual, F.G., for about one year. The two used to go out together on weekends. In the car with F.G. was an individual whom J.G. was told was F.G.'s stepfather. F.G. and his stepfather were in the front seat of the car and began a conversation about an argument in their family. F.G. then shot his stepfather three times in the face. J.G. was shocked and asked F.G. if he was crazy and to let J.G. out of the car. J.G. did not report the murder because he was afraid of F.G. After being arrested, F.G. told the police that J.G. had shot and killed his stepfather. F.G.'s mother corroborated his statement. During the trial, F.G. pleaded guilty and testified for the State against J.G.

While J.G. was sentenced to a twenty-five to thirty year term, he was released on parole on June 24, 1975 (P-10, P-11). His parole officer for several years was Marjorie Brown, who testified at the hearing. Ms. Brown could not recollect the exact years she supervised J.G. because she retired four years ago and the records are no longer available to her. However, she was sure she had been J.G.'s parole officer for at least several years. During that period, J.G. adhered to all his parole

requirements. He maintained gainful employment, attended all scheduled office visits and participated in home visits. Having satisfied all parole requirements, J.G. received early release from his parole on March 27, 1980 (P-12). Prior to discharge from parole, a parolee's officer must certify that the parolee is rehabilitated. Ms. Brown believed then that J.G. was rehabilitated. Although she has not seen J.G. since his release from parole, she believes he is still rehabilitated and is and will be a productive member of the community. She would recommend his employment as a school custodian and believes he would be an asset to the school system.

While in prison, J.G. earned Certificates of Achievements for courses in barbering and auto mechanics (P-13, P-14, P-15). He has been steadily employed since his release from prison in 1975. He obtained his first job, with an industrial brake manufacturer, within one week of release from prison. He remained in this position for three years when he left to accept a job with Conrail. He first worked as a conductor for Conrail in the freight yard and then as a passenger conductor. He worked at Conrail for about ten years and eventually left because of the unsteady nature of the work. Between 1987 and 1992, J.G. worked as a truck driver for two firms. In 1990, while working for J.J. Keller & Associates, Inc., he satisfactorily completed training in the safe transportation of hazardous waste as required by the states of Maryland and New Jersey (P-16). In 1992, while making a delivery, J.G. suffered a back injury and went on disability. He subsequently worked as a volunteer in patient information at University Hospital, University of Medicine and Dentistry of New Jersey. Eventually he obtained employment at UMDNJ in its Housekeeping Department. His work included keeping the hospital clean and preparing operating rooms for surgery by cleaning up waste and sterilizing the rooms. Matthew Strand was J.G.'s supervisor when he worked in the Housekeeping Department. Mr. Strand described J.G. as "dependable," someone who "always came to work," who gave "110 percent" and "went the extra mile." Everyone respected J.G., he got along well with his co-workers and supervisors and Mr. Strand never received any complaints about J.G.'s work. J.G. left UMDNJ in 1996 to accept employment with the Board of Education. "Without a doubt," Mr. Strand would recommend J.G. for reemployment if he ever reapplied to UMDNJ. When J.G. was looking for other employment in October, 1996, Mr. Strand wrote a letter of recommendation for him in which he described J.G. as "a hardworking and highly motivated individual," "courteous and professional" and one who "can be counted on to give his best effort in any situation" (P-1). Mr.

Strand lives in Newark and has children of grade school age. He would have no problem with J.G. working as a custodian in the school his children attend.

While at UMDNJ, J.G. successfully completed training courses in Introduction & Orientation to Housekeeping Policies, Procedures & Practices and in Fire Safety Training (P-17, P-19). In addition, while employed at UMDNJ, J.G. took a course at Essex County College for a Boiler Operator License. In addition to the course, J.G. had to apprentice for hands on training under a licensed supervisor for six months to obtain his license. J.G. obtained his hands on training at Angelica Health Care Services. During this six month period, J.G. trained at Angelica in an unpaid position from 8 a.m. to 1 p.m., five days a week. He then worked at UMDNJ from 3:30 p.m. to midnight. On Saturday, he attended courses at Essex County College. J.G. completed the course at Essex County College (P-18), passed the licensing examination and received his Black Seal Boiler Operator License on July 10, 1996 (P-20). The license is issued for a period of four years and expires in July, 2000.[1] J.G.'s goal is to eventually obtain a Gold Seal license.

J.G. wanted a position in which he could use his license as a boiler operator. There were no such positions available at UMDNJ. Accordingly, J.G. applied to the Newark School District for employment. In connection with his application to the school district, J.G. asked the Newark Police Department to do a record check. On October 21, 1996, the Newark Police Department reported that a record check revealed that the Department had no records on J.G. (P-22). J.G. was hired by the school district on November 27, 1996 as a per diem custodian to be employed in schools as needed during the school year (P-23). His duties included maintaining the boilers in schools and doing repairs as needed. One of the schools he worked at was the Newton Street School. Prior to being employed by the school district, J.G. had volunteered at the Newton Street School, performing minor maintenance and chaperoning children when the school was short-handed. The Newton Street School staff, including the principal and teachers, told J.G. they would support his reinstatement.

Mr. Willie Thomas has been the principal of Newton Street School for 25 years. The school contains kindergarten through eighth grades and is about 1/2 mile from J.G.'s home. Mr. Thomas

[1] The copy of the identification card attached to J.G.'s license is partly illegible (P-20). During the hearing, J.G. showed me the origina identification card which contains his name, address and the expiration date of July, 2000.

knew J.G. for about one year before he was hired by the school district because J.G. would come around to help out at the school. Mr. Thomas was happy to have a black male volunteering at the school and providing a role model for the students. He described one incident when J.G. came in as a volunteer to help prepare the school for newspaper coverage of the principal for a day program. J.G. did a better job than the six employed custodial workers in preparing the school. Mr. Thomas was "elated" when J.G. was hired by the district. He described J.G.'s work as an employee as "outstanding." He "has never seen an employee like J.G." in his 37 years in the school system. J.G. was very professional with children and staff, very cooperative and easy to get along with. He went beyond the "call of duty" and was "very special." J.G. often stayed late and would do extra work. Mr. Thomas and other principals wanted J.G. permanently assigned to their schools because of his superior performance.

Mr. Thomas was very upset when he heard that J.G. was being terminated due to the conviction in 1965. He feels that the conviction was too long ago to require J.G.'s disqualification from school employment in 1997 and was very pleased to testify at the hearing in support of J.G. Even after he was terminated, J.G. continues to volunteer at the school. He comes there every morning and evening to help out by, for example, bringing in crates for bookshelves for the teachers and bringing in materials for the school library. Mr. Thomas opined that J.G. is a good historian and brings in good materials for the library. The day before the hearing, J.G. was fixing up a bulletin board for the school. Mr. Thomas described Newton Street School as a "family school" and that J.G. is part of the family. On June 23, 1997, J.G. was honored, along with other volunteers, for his outstanding service to the school (P-24). J.G.'s name was the first one mentioned by the team that made the recommendations for the awards.

Mr. Thomas was glad to write a recommendation for J.G. to the Department in which he described J.G. as "an outstanding dedicated worker" and a "model worker" who "consistently displayed qualities of initiative and conscientiousness" (P-3). He described J.G.'s "personal characteristics such as patience, consideration, emotional stability, and good judgment" as "his great assets." (P-3). Mr. Thomas described an example of J.G.'s good judgment which occurred during a meeting when a lay pastor remarked about "bad teachers." J.G. spoke up and stated that a lot comes from the home and everything cannot be blamed on teachers. Following J.G.'s statement, everyone

applauded. Mr. Thomas would not hesitate to rehire J.G. and has absolutely no concerns with J.G. being in the presence of children.

J.G. has lived at his present home for over 15 years. It is a cooperative building and J.G. volunteers for activities for children, including counseling and a scholarship program. He has been married to his second wife for ten years and has two grown stepdaughters. He has committed no other violations since he was released from prison. J.G. belongs to the Church of God, Saints of Christ. He wants to be employed in the school system because children need more positive role models. He recognizes that every employee has an impact on the children because they emulate the adults they see and he wants to do a little "extra" to improve the schools.

In addition to the letters of support submitted by Principal Thomas and Mr. Strand, letters of support attesting to J.G.'s rehabilitation were submitted by Congressman Donald M. Payne, Councilman George Branch, Freeholder Blonnie R. Watson, Deborah A. Jones, County Committee Member, Evangelist Harold Thomas, and friends Loretta Lindsey and Edward E. Shackleford (P-2, P-4 through P-9).

LEGAL DISCUSSION

N.J.S.A. 18A:6-7.1 prohibits the employment by Boards of Education of persons who have been convicted of certain types of crimes and offenses. Murder, for which J.G. was convicted, is one of the disqualifying crimes. *N.J.S.A.* 18A:6-7.1c(1). However, the statute further provides that an individual convicted of one of the listed crimes shall not be disqualified from school employment "if the individual has affirmatively demonstrated to the Commissioner of Education clear and convincing evidence of his or her rehabilitation." *N.J.S.A.* 18A:6-7.1e. In evaluating whether rehabilitation has been affirmatively demonstrated, the following factors must be considered:

(1) The nature and responsibility of the position which the convicted individual would hold;

(2) The nature and seriousness of the offense;

(3) The circumstances under which the offense occurred;

(4) The date of the offense;

(5) The age of the individual when the offense was committed;

(6) Whether the offense was an isolated or repeated incident;

(7) Any social conditions which may have contributed to the offense;

(8) Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have had the individual under their supervision [*N.J.S.A.* 18A:6-7.1e].

The burden of proving rehabilitation by clear and convincing evidence is on petitioner, J.G.

With respect to the first factor, the nature and responsibility of the position sought by J.G., the Commissioner has consistently reasoned that "a custodial position affords an individual significant and otherwise unsupervised access to children, a consideration which must not be minimized when examining rehabilitation pursuant to *N.J.S.A.* 18A:6-7.1." *In the Matter of Eloise Wiggs*, 97 *N.J.A.R.* 2d (EDU) 129. With respect to the second factor, the nature and seriousness of the offense, a conviction for second degree murder is clearly a very serious offense. However, without in any way minimizing the nature and responsibility of the position sought by J.G. or the seriousness of his offense, consideration of the six other statutory factors supports a conclusion that J.G. has affirmatively demonstrated his rehabilitation by clear and convincing evidence.

The third factor looks to the circumstances under which the offense occurred. Based on the findings made above, it appears that J.G. was not a willing participant in the murder of F.G.'s stepfather but rather was "in the wrong place at the wrong time." The fourth and fifth factors consider the date of the offense and the age of the appellant when the offense occurred. This offense occurred over thirty years ago in 1965 when J.G. was 22. The sixth factor considers whether the offense was an isolated or repeated incident. This conviction is the only one received by J.G. The long period of time (over thirty years) during which J.G. has committed no further offenses and his young age (22) at the time of his only offense all support a conclusion that J.G. has been rehabilitated.

The seventh factor considers any social condition which may have contributed to the offense. J.G. did not submit any evidence in regard to this factor. Very strong evidence was submitted regarding the eighth and final factor, evidence of rehabilitation. In this regard, J.G. was released after only ten years served on the twenty-five to thirty year term and received early release from his parole. While in prison, he earned Certificates of Achievement in several courses. He has been steadily employed since his release from prison and has continued his vocational training and obtained a Boiler Operator License. He received strong recommendations from two individuals who directly supervised his work, Mr. Strand and Principal Thomas, as well as from his former parole officer. J.G. has strong ties in the community as shown by his volunteer work at the Newton Street School and at his cooperative and the letters of support he submitted into evidence.

Based on the whole of the record, **I CONCLUDE** that J.G. has affirmatively demonstrated his rehabilitation by clear and convincing evidence within the meaning of *N.J.S.A.* 18A:6-7.1(e).

ORDER

It is hereby **ORDERED** that the Department's action to disqualify J.G. from employment with the state-operated School District of Newark is **REVERSED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

11/26/97
DATE

Barbara A. Harned
BARBARA A. HARNED, CHIEF ALJ

Receipt Acknowledged:

Dec. 2, 1997
DATE

D. M. Antonaitis/jc
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 3 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

DOCUMENTS IN EVIDENCE

For petitioner:

P-1 Letter dated October 21, 1996 from Matthew Strand to "To Whom It May Concern"

P-2 Letter dated February 26, 1997 from Donald M. Payne to Carl H. Carabelli

P-3 Letter dated February 26, 1997 from Willie Thomas to Carl H. Carabelli

P-4 Letter dated February 27, 1997 from George Branch to Carl H. Carabelli

P-5 Letter dated February 27, 1997 from Blonnie R. Watson to Carl H. Carabelli

P-6 Letter dated February 27, 1997 from Deborah A. Jones to Carl H. Carabelli

P-7 Letter dated February 27, 1997 from Evangelist Harold Thomas to Carl H. Carabelli

P-8 Letter dated February 27, 1997 from Loretta Lindsey to Carl H. Carabelli

P-9 Letter dated February 27, 1997 from Edward E. Shackleford to Carl H. Carabelli

P-10 Certificate of Parole dated January 20, 1975

P-11 Bureau of Parole Form I-5, dated June 24, 1975

P-12 Discharge from Parole dated March 27, 1989

P-13 Certificate of Achievement dated October 23, 1969

P-14 Certification of training in Auto Mechanics dated May 10, 1974

P-15 Certificate of Achievement dated September 27, 1974

P-16 Certificate of training in transportation of hazardous waste dated August 16, 1990

P-17 Certificate of training in Housekeeping Services dated August, 1995

P-18 Certificate from Essex County College re: Fireman Black Seal dated February 15, 1996

P-19 Certificate for Fire Safety Training dated February 22, 1996

P-20 Boiler Operator License and Identification Card dated July 10, 1996

P-21 Letter dated February 26, 1997 from J.G. to Carl H. Carabelli

P-22 Report from Newark Department of Police dated October 21, 1996

P-23 Newark Public Schools Employee Status Form for J.G.

P-24 Letter to various individuals from Willie Thomas re: award ceremony

WITNESSES

For petitioner:

J.G., petitioner

Willie Thomas

Marjorie Brown

Matthew Strand

IN THAT MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF J.G.	:	DECISION
	:	

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

Upon careful and independent review of the record in this matter, the Commissioner is compelled to reach a different conclusion from that of the ALJ. In weighing the factors to be considered in the analysis of rehabilitation, the Commissioner initially concurs with the ALJ that the nature of the position of custodian, which allows for significant potential unsupervised contact with children, and the nature and seriousness of the offense of second degree murder, militate against a finding that petitioner should be qualified for employment in the schools of the State.

The Commissioner does not agree, however, that the remaining six factors weigh sufficiently in petitioners' favor to overcome this consideration. While the Commissioner recognizes that petitioner was found credible in his account of the circumstances of his offense, wherein he denies any role in the killing which occurred, such account does not, on its face, appear consonant with a conviction for second degree murder under the then-existing statute, *N.J.S.A.* 2A:113-1 *et seq.*, and no explanation for the apparent anomaly has been brought to the

record. Additionally, while petitioner's offense was an isolated one occurring over thirty years ago, it occurred at an age (22) when he was sufficiently mature to recognize the nature and consequences of actions such as he was found to have committed, and the record is devoid of any evidence whatsoever that social conditions contributed to these actions. Thus, while petitioner has indeed submitted, as found by the ALJ, strong evidence of rehabilitation in his showing on the eighth and final factor, a balancing of *all* factors required will simply not permit the Commissioner to be clearly and convincingly persuaded, as he must be by law, that petitioner is qualified for school employment notwithstanding his disqualifying conviction. In this regard, the Commissioner underscores the daunting responsibility he holds in judging whether persons who have been convicted of extremely violent offenses should be able to work in the school environment, notwithstanding their history.

Accordingly, the initial decision of the ALJ is reversed for the reasons herein expressed. Petitioner is found not to have demonstrated rehabilitation in accordance with the requirements of *N.J.S.A.* 18A:6-7.1, and, therefore, remains disqualified from employment as a school custodian.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 27, 1998
Date of Mailing, February 27, 1998

(SB) 91-98

SBE #471-04/98-161
SB # 91- 98

IN THE MATTER OF THE REVOCATION :

OF THE TEACHING CERTIFICATE OF : STATE BOARD OF EDUCATION

SANDI I. TANNEN. : DECISION

Decided by the State Board of Examiners, September 24, 1998

For the Petitioner-Respondent, Arlene G. Lutz, Deputy Attorney General
(Peter Verniero, Attorney General of New Jersey)

For the Respondent-Appellant, Jeffrey N. Kale, Esq.

The decision of the State Board of Examiners is affirmed for the reasons expressed therein.

February 3, 1999

Date of mailing FEB 05 1999

94-98

94-98

GLEN DAVIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning teacher alleged that the Board violated *N.J.S.A.* 18A:25-6 by its action to suspend him without pay by reason of his indictment as it failed to obtain a majority vote of its full membership on the motion to suspend him.

ALJ concluded that the Board did not act properly when it voted to suspend petitioner without a majority vote of the full membership. Nature of the vote (for indictments, etc.) was not relevant. ALJ ordered the Board to compensate petitioner for the period from March 10, 1997 until April 14, 1997, the date on which the Board took appropriate action to suspend petitioner.

Commissioner adopted findings and determination in initial decision as his own.

February 27, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4941-97
AGENCY DKT. NO. 177-6/97

GLENN DAVIS,
Petitioner,
v.
BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, CAMDEN COUNTY,
Respondent.

Steven R. Cohen, Esq., for petitioner (Selikoff and Cohen, attorneys)

Robert E. Birsner, Esq., for respondent (Maressa, Goldstein, Birsner, Patterson, Drinkwater and Oddo, attorneys)

Record Closed: October 20, 1997 Decided: January 15, 1998

BEFORE **JEFF S. MASIN**, ALJ:

The respondent school board voted on March 10, 1997, at a regularly scheduled meeting to suspend Mr. Glenn Davis without pay by reason of his having been indicted. At that meeting the Board took its action by a recorded role call vote of less than a majority of its full membership. Thereafter on April 14, 1997, at another regularly scheduled meeting, the Board again suspended Mr. Davis without pay by reason of the indictment. This time the Board voted

by a recorded role call vote of a majority of its full membership. These facts are agreed upon by counsel for both parties. Subsequent to the second attempt at suspending Mr. Davis, he filed a petition with the Commissioner of Education alleging that the Board had violated *N.J.S.A.* 18A:25-6 when it purported to suspend him on March 10, as it violated the terms of *N.J.S.A.* 18A:25-6 in failing to obtain a majority vote of its full membership on the motion to suspend him. Mr. Davis seeks reinstatement of his payroll status for the time period from March 10, 1997, until April 14, 1997.

In support of a motion for summary decision, Mr. Davis relies upon the plain language of *N.J.S.A.* 18A:25-6. That statute provides

> The superintendent of schools may, with the approval of the president or presidents of the board or boards employing him, suspend any assistant superintendent, principal or teaching staff member, and shall report such a suspension to the board or boards forthwith. The board or boards, each by a recorded role call majority vote of its membership, shall take such action for the restoration or removal of such person as it shall deem proper, subject to the provisions of Chapter 6 and Chapter 28 of this Title.

In response to Mr. Davis' position, the Board argues that its determination to suspend Mr. Davis without pay was made pursuant to *N.J.S.A.* 18A:6-8.3, which reads

> Any employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such periods of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in Chapter 6 of which this section is a supplement

Counsel for the Board notes that there is no statement in this statute regarding the necessity of a majority vote of full membership, as there is in *N.J.S.A.* 18A:25-6 or in *N.J.S.A.* 18A:6-11. This latter statute provides for charges made against any employee under tenure during good behavior and efficiency and provides the procedure for bringing such charges before the Board of

Education, obtaining a vote on the charges to determine whether they should be certified to the Commissioner of Education and provides the procedures for the Board notifying the employee of the charges. This provision provides in part

> After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and other such charge, if credited, is sufficient to warrant the dismissal or reduction of salary.

Counsel for the Board argues that since *N.J.S.A.* 18A:6-8.3 does not contain the language requiring a majority vote of the full membership, and *N.J.S.A.* 18A:25-6 provides that its terms are subject to the provisions of Chapter 6, therefore there is no requirement for a majority vote of he full membership.

DISCUSSION

A review of the several statutes appears to indicate that Mr. Davis' position is the correct interpretation of the law. *N.J.S.A.* 18A:25-6 provides that various persons, including teaching staff members, may be suspended by a Board of Education. It says nothing more regarding who these employees are, that is, whether they are tenured or not, nor does it mention the reasons for which such suspensions may occur. It simply provides that the superintendent, with approval from the Board President, and subsequently the Board of Education, may suspend teaching staff members. When doing so, the Board must act by a "recorded roll call majority vote of its membership." The reference in this section to Chapters 6 refers to provisions such as *N.J.S.A.* 18A:6-11, which provides a set of procedures for the bringing of charges against tenured employees, culminating in a reference by the board of education to the Commissioner of Education. *N.J.S.A.* 18A:6-11 provides that such tenure charges must be determined by a majority vote of the Board's full membership, which must determine whether or not there is probable cause to credit the evidence in support of the charge and whether "such charge, if credited, is sufficient to warrant the dismissal or reduction of salary." These tenured persons may or may not have already been suspended. Other provisions of *N.J.S.A.* 18A:6-1 *et seq.* provide for suspension upon certification of charges, hearing procedures, for the payment of salary if the charge is not

determined within certain periods of time, and other matters relating to the rights and responsibilities of employees. *N.J.S.A.* 18A:28, also referenced in the section, provides for tenure and seniority rights for certain employees, and other provisions limit those employees who may obtain tenure.

N.J.S.A. 18A:25-6 allows boards to suspend teaching staff members. Once this has occurred, if the employee is a tenured employee then he may be further charged via the procedure set forth at 18A:6-11, which may eventually impact upon his tenure and seniority rights under Chapter 28. As for *N.J.S.A.* 18A:6-8.3, this provision simply refers to compensation for employees who are suspended other than by reason of indictment. Nothing in this provision deals with the method of suspension and therefore there is no reason for this provision to discuss the voting requirements for a board when it seeks to suspend an employee, by reason of indictment or any other reason. That voting process must be in accord with the provisions allowing suspension in *N.J.S.A.* 18A:25-6, which mandates a majority vote of the Board's membership and in the case of tenure charges, the vote to certify such charges must be in accord with *N.J.S.A.* 18A:6-11, again requiring a majority vote of the full membership of the Board.

CONCLUSION AND ORDER

For the reasons expressed, I **CONCLUDE** that the Board did not act properly in March 1997 when it voted at its regularly scheduled meeting, to suspend Mr. Davis without pay by reason of the indictment. Pursuant to *N.J.S.A.* 18A:25-6, a determination by the Board to suspend the employee must be by a majority vote of its membership. This provision does not distinguish between suspensions arising as a result of indictments or any other reason. *N.J.S.A.* 18A:6-8.3 authorizes by implication the refusal of a Board of Education to pay an indicted employee during the period of suspension. It says nothing about what the nature of the vote permitting such suspension should be.

It is hereby **ORDERED** that Mr. Davis shall receive his normal rate of compensation for the period from March 10, 1997, until the Board properly voted in accordance with the provisions

of law on April 14, 1997. For purposes of allowing his compensation, he shall be restored to the payroll for that period from March 10 until April 17, 1997. It is so **ORDERED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 15, 1998
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 20 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

mjm

EVIDENCE LIST

FOR THE PETITIONER:

None.

FOR THE RESPONDENT:

None.

OAL DKT. NO. EDU 4941
AGENCY DKT. NO. 177-6/97

GLEN DAVIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon his independent review the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that the Board's action of March 10, 1997, suspending petitioner without pay by reason of his indictment, was not in conformance with the requirements of *N.J.S.A.* 18A:25-6 and is, therefore, void *ab initio*. As such, petitioner is entitled to be restored to the Board's payroll for the period March 10, 1997 to April 14, 1997, the date on which the Board took appropriate action to suspend petitioner.

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter for the reasons clearly stated therein.* The Board is hereby directed to compensate petitioner in accordance with this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

February 27, 1998
Date of Mailing, February 27, 1998

(SB) 94-98

DHPBL #96-98
SB #94-98

IN THE MATTER OF THE DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF J.A.L. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Assistant Commissioner of Education, October 23, 1998

For the Petitioner-Appellant, J.A.L., pro se

On October 23, 1998, the Assistant Commissioner of Education, Executive Services, issued a letter decision in which he disqualified J.A.L. (hereinafter "appellant") from school employment in the State after a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1 revealed that appellant had been convicted of several disqualifying offenses involving controlled dangerous substances.

On November 13, 1998, appellant, acting pro se, filed a notice of appeal with the State Board of Education.

Pursuant to N.J.A.C. 6:2-1.11(a), appellant's brief in support of his appeal was due on December 3, 1998, 20 days after he filed his notice of appeal. Appellant, however, failed to file a brief by that date. By letter dated December 4, 1998, the Director of the State Board Appeals Office notified appellant of his failure to file a brief and informed him that this matter was being referred to the Legal Committee of the State Board for consideration of his failure to perfect the appeal.

Appellant has still failed to file a brief in support of his appeal, more than a month after the deadline for such filing. Nor has he offered any explanation for his failure to file a brief or requested an extension of time for such filing. As a result, we dismiss the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a). See Paszamant v. Board of Education of the Borough of Highland Park, decided by the State Board, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993).

January 6, 1999

Date of mailing JAN 08 1999

95-98

IN THE MATTER OF THE TENURE HEARING OF JOAN MC NUTT, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	
AND	:	COMMISSIONER OF EDUCATION
JOAN MC NUTT,	:	DECISION
PETITIONER,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

In the Matter of the Tenure Hearing of Joan McNutt, State-operated School District of the City of Jersey City, Hudson County AND Joan McNutt v. State-operated School District of the City of Jersey City, Hudson County

District certified tenure charges of unbecoming conduct against math supervisor and withheld her increment for the school year 1996-97 for allegedly distributing a portion of the 1995 Early Warning Test (EWT), a test she knew to be a secured test.

ALJ found that the District proved beyond a preponderance of the evidence the tenure charges against Ms. McNutt -- she distributed the EWT and she then lied to her supervisors about the incident thereby exhibiting a consciousness of guilt leading to the conclusion that she knew the breach of security she committed. ALJ ordered Ms. McNutt dismissed from her tenured position, finding that the seriousness of her conduct was such that it had potential damage for students and significant financial damage to the District.

Citing *In re Martone*, the Commissioner adopted the findings and determination in the initial decision. Commissioner ordered Ms. McNutt dismissed from her position as tenured teaching supervisor and further dismissed without prejudice her claim with respect to the denial of her increment for the 1996-97 school year. Commissioner directed the matter be transmitted to the State Board of Examiners for further appropriate action.

MARCH 2, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11168-96
and
OAL DKT. NO. EDU 5138-97
AGENCY. NO.: 419-9/96

STATE OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,

Petitioner,

v.

JOAN MC NUTT,

Respondent.

Charlotte Kitler, Esq., for petitioner
(General Counsel - Hudson County)

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

Record Closed: December 8, 1997 Decided: January 9, 1998

BEFORE: **JEFFREY A. GERSON**, ALJ

STATEMENT OF CASE

Pending against Joan McNutt, a tenured math supervisor in the Jersey City School District, are tenure charges and an increment withholding for the year 1995-1996.

It is contended by the State Operated School District of Jersey City that as a tenured supervisor, Ms. McNutt is guilty of unbecoming and unprofessional conduct. The basis of this contention is that Ms. McNutt, distributed a portion of the 1995 Early Warning Test (EWT) that she knew was a secured test.

TESTIMONY

According to Veronica Orsi, an employee of the Office of Assessment in the New Jersey Department of Education, the EWT has been administered to eighth grade students in New Jersey since 1989. The purpose of the EWT is to identify those children in need of remediation, and to determine appropriate high school placement. It is also used to evaluate District performance.

According to Ms. Orsi, the EWT test, up until 1993, was a secured test, meaning that no copies of the test could be in the possession of anyone in the District until the central office was notified by the State Department of Education that the test could be used for instructional purposes. After 1993, commencing in 1994, the test became permanently secured in that the test booklets were no longer retained in the school district and there were no plans to release the tests in the future.

The security measures surrounding the administration of the EWT were quite detailed, to the point of actually bar coding each of the test booklets to ensure that they were all returned. Ms. Orsi testified that unauthorized release of even one of the EWTs would result in significant costs in reproducing an entirely new exam, in addition to the potential that if the test was actually in the possession of the students who were taking it or a teacher who used it for instructional purposes, the results would obviously be unrepresentative and potentially do damage to those who are actually in need of assistance.

The EWT was administered in March each year. Ms. McNutt did not become a math supervisor until September 1995. At the time of the EWT in March 1995, she was involved in curriculum and dealt with, almost exclusively, other supervisors. In September 1995, she became a supervisor of mathematics. Prior to her elevation to supervisor of mathematics, Ms.

McNutt was involved in staff development. In April 1995, one month after the administration of the 1995 EWT and several months prior to Ms. McNutt being elevated to a mathematics supervisor, she had a conversation with Mr. Martone, another math supervisor, a conversation in which Ms. McNutt alleges that Mr. Martone told her he had a copy of the math portion of the 1995 EWT. After Mr. Martone showed her the 1995 EWT, Ms. McNutt made a copy of it and returned one copy to Mr. Martone and kept one for herself. She did not, at this time, know that she was going to be appointed a mathematics supervisor.

In September 1995, Ms. McNutt found out for the first time that she was being appointed a mathematics supervisor. In that capacity, she would be responsible for the performance of the eighth grade students on the coming EWTs. Her conversations with math teachers elicited complaints that there was "to much to cover." This reminded Ms. McNutt that she had a copy of the 1995 EWT in her possession.

Prior to assuming the position of math supervisor, Ms. McNutt attended at least two meetings, one on August 1, 1995 and one in September 1995, at which the security of the EWTs was allegedly discussed. According to the agenda for the August 31, 1995 meeting, test security was to be discussed and a memorandum from the Department of Education was attached indicating that breaches of security would be dealt with severely. This same memo (P-2, in evidence) was once again given to Ms. McNutt by Ms. McGhee, her supervisor, at a meeting in September.

Sometime in the middle of September and carrying on until approximately the second week in October, Ms. McNutt mailed a copy of the math portion of the 1995 EWT test to approximately 12 teachers. According to her testimony, she discussed the fact that she was

going to mail the 1995 EWT to these teachers and none of them alerted her to the fact that it was a secure test.

Around the same time, between the first week in October and October 13, 1995, Ms. McNutt was personally distributing a copy of the 1993 EWT which she had gotten from another teacher. The distribution of the 1993 EWT was done personally by Ms. McNutt utilizing hand delivery to each teacher under her supervision.

On or about October 5, 1995, Ms Coyle, the principal of School 27, had been notified by one of her teachers that she had received the 1995 math portion of the EWT in the mail from Ms. McNutt. Ms. Coyle indicated that she didn't want her teachers using prior exams and mailed the exam back to Ms. McNutt's office.

Elaine McGhee, Director of Programs and Services and Ms. McNutt's immediate supervisor, had a meeting with Ms. McNutt on October 18, 1995 at the suggestion of Dr. Pablo Clausell, the former assistant superintendent of the State Operated School District of Jersey City. He had suggested the meeting so that Ms. McGhee could investigate how Ms. McNutt had come into possession of the 1995 math portion of the EWT.

At this meeting, Ms McNutt told Ms. McGhee that she did have in her possession a copy of the math portion of the 1995 EWT and had, in fact, disseminated it to one teacher in the District. Ms. McNutt said that the test did not come from the Jersey City School District and that she was using it only to assist the staff members in improving the students' skill.

On October 23, 1995, a second interview, this time with Dr. Pablo Clausell, the Associate Superintendent, and Ms. McGhee was conducted. Ms. McNutt was asked specifically how she obtained a copy of the 1995 EWT math section and, she said she got it at

a social occasion in Bergen County on Labor Day weekend. She was also asked whether or not she had shared it with anyone in the school district and she said just her husband and the teacher who had returned her copy to Ms. Coyle. She went on to say that those were the only three copies that she knew about.

On October 24, 1995, Ms. McNutt was suspended from her tenured position as a math supervisor. She contended at the time that she did not even know the reason why she was being suspended nor did she know the meaning of "secure" until October 24. She was told on October 24 by Amy Mistrial after she was suspended, the meaning of "secure."

On October 30, 1995, Ms. McNutt was interviewed by representatives of the State of New Jersey, one of whom was Ms. Orsi. At this interview, for the first time, Ms. McNutt disclosed the true history of the manner in which she came into possession of the math portion of the 1995 EWT. The only issue to be resolved in this matter is whether or not at the time Ms McNutt distributed the math portion of the 1995 EWT, she was aware that it was a "secure" test not to be in the possession of anyone in the district.

DISCUSSION

Most of the facts in this matter are not in dispute. Ms. McNutt concedes that she did, in fact, distribute the 1995 math portion of the EWT and did so by mailing it to 12 teachers under her supervision. It was mailed to the teachers' home addresses. She further concedes that at both her interviews with Ms. McGhee and Dr. Clausell she lied in response to several of their questions.

Ms. McNutt contends that since she was "out of the loop" for several years prior to her appointment as math supervisor, she was unaware of the sanctity of the security surrounding the EWT. She indicated that the fact that the 1991, 1992 and the 1993 EWTs had been

provided to her by her subordinates there was no reason to believe that since the 1995 EWT had been completed in March 1995, it would not also be subject to distribution. Ms. McNutt's actions completely belie her verbal protestations.

The clandestine manner in which she handled the math portion of the 1995 EWT bespeaks of a conscious effort to cover up her wrongdoing.

There is a complete absence of any logical explanation for some of Ms. McNutt's actions. For example, why would she mail the 1995 math portion of the EWT, without a cover letter, directly to the home addresses to the math teachers she supervised? Why would she not deliver the 1995 EWT math portion in the same manner that she delivered the 1993 EWT? It was, in fact, Ms. McNutt's testimony that the reason she was providing the 1993 EWT to her charges was that the other supervisors in the other division had done so and she believed it only fair that her subordinates should have the same material. This of course also belies any logic in that at the time she started to distribute the 1993 EWT after being advised that the other division had already done so, she failed to disclose to the other division that she had already been in the process of distributing the 1995 EWT. If she did actually believe that the distribution of the 1995 EWT was completely legitimate why would she fail to disclose it? If, as she contends, she did not know that distribution of the secured 1995 EWT was prohibited, why did she not, at her first interview with Ms. McGhee, simply say so? What was the purpose in lying to Ms. McGhee about the manner in which she came into possession of the 1995 EWT? What, in fact, was the purpose of perpetuating her false contentions at the meeting with Dr. Clausell? She could not possibly have thought at this point, a second meeting on the same subject matter, this time not only with her supervisor but with the associate superintendent, that this was just harmless conduct on her part. How could she possibly contend, given the questions that she was being asked by Ms. McGhee and Dr. Clausell, that when she was

suspended on October 24, 1995, she did not know the reason? A quick perusal of the questions asked and the answers given as marked in evidence would lead any reasonable person to conclude that distribution of the 1995 EWT was prohibited. The surreptitious and clandestine manner in which Ms. McNutt distributed the 1995 EWT unquestionably displays a consciousness of guilt that dispels any possibility that Ms. McNutt was unaware of the serious breach of security she was committing.

Ms. McNutt contends that she lied to both McGhee and Clausell to protect either the others involved or to limit the blame to herself, obviously underestimating the seriousness of her conduct. Nonetheless, this is an absolute contradiction of her contention that she did not know, nor did she believe, that she had not done anything wrong in distributing the 1995 EWT. If, in fact, that contention were true, it should have been a simple matter for her to disclose to Ms. McGhee that she did distribute the 1995 EWT but did not know why this would be the subject matter of any questioning or investigation. This is not what she did at all. Her responses to the questioning of both McGhee and Clausell exhibited an undeniable consciousness of guilt. Ms. McNutt's actions refute her own argument that the district failed to properly apprise her of the security surrounding the EWT. Though that very well may be true, a finding which I do not in fact make, the nature of her conduct proves that regardless of the manner in which she found out that the 1995 EWT was totally secure, she did, in fact, undoubtedly know that it was.

Ms. McNutt further contends that she would have absolutely no reason to jeopardize her whole career by distributing an exam which she knew was secure. Though superficially this argument is logically compelling, the district is not required to establish motivation. Surely it could be speculated that Ms. McNutt, in her zeal to assist her subordinates, simply overstepped the ground of propriety in the hope that she would not get caught or would not be

dealt with harshly. If the students' performance on the EWT improved as dramatically as might be expected if they had the test prior to it being administered, Ms. McNutt might very well have been honored as a savior. Though I attribute no malicious motive to Ms. McNutt's conduct, the ramification of her distributing the test could very well have ended up being very harmful to the students.

PENALTY

Both tenure charges against Ms. McNutt have been proven way beyond a preponderance of the evidence. She lied to her supervisor and then lied to the assistant superintendent. What she lied about was the fact that when she distributed the 1995 math portion of the EWT she was not aware that she was committing a breach of security. Though there are no prior instances of disciplinary action taken against Ms. McNutt, and she did have character witnesses who confirmed that she was an energetic and effective member of the educational community, the seriousness of her conduct cannot be tempered. The potential damage to students was great and the financial damage to the district was significant. Lying to her superiors on two separate occasions, especially with respect to a matter as crucial as the security of a standardized test, warrants dismissal.

ORDER

It is **ORDERED** that Joan McNutt be dismissed from her tenured position of math supervisor.

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

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

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

1/8/98
DATE

JEFFREY A. GERSON,
Administrative Law Judge

1/14/98
DATE

Receipt Acknowledged:
D. N. Antaramian
DEPARTMENT OF EDUCATION

JAN 15 1998
DATE

Mailed to Parties:
Barbara A Harnes
OFFICE OF ADMINISTRATIVE LAW

/g

IN THE MATTER OF THE TENURE HEARING OF JOAN MC NUTT, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	
AND	:	COMMISSIONER OF EDUCATION
JOAN MC NUTT,	:	DECISION
PETITIONER,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Ms. McNutt's exceptions and the District's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.

Ms. McNutt contends in her exceptions that the testimony adduced at the hearing does not support the ALJ's conclusions. Specifically, she maintains that, contrary to the ALJ's findings, the testimony established that, prior to September 1995, she "***had absolutely no connection with instruction, with the faculty or with the Early Warning Test (EWT)." (Ms. McNutt's Exceptions at p. 2) Ms. McNutt further asserts that the testimony does not support the ALJ's finding that she attended "'at least two meetings"' during which security measures of the EWT were discussed. (*Id.*) Rather, Ms. McNutt affirms that she "***had no

exposure to the EWT whatsoever," (*id.*) and argues that there was no testimony presented by the District which would confirm what was *actually* discussed at the meeting of August 31, 1995, as opposed to what was placed on the agenda. (*Id.*) Ms. McNutt maintains that she did not hear any discussion of the EWT at that meeting *(id.),* that she sent the EWT to the homes of the teachers "in the interests of time," and her actions were not clandestine. (*Id.* at p. 3)

Finally, Ms. McNutt objects to the ALJ's conclusion that she was aware that she had violated EWT test security "***because she lied to her two immediate supervisors during the preliminary investigation of this matter." (*Id.*) Here, Ms. McNutt asserts that what she lied about was where she obtained the test, so as not to "get anyone else in trouble, and this was after she was told for the first time that she should not have distributed the tests." (*Id.*) Prior to these meetings, Ms. McNutt claims she was unaware that she did anything wrong. Thus, she concludes that "***the initial decision of the ALJ [should] be rejected in its entirety[,] or in the alternative, [that her] increment for the 1996-97 school year be denied her." (*Id.* at p. 7)

In reply, the District underscores Ms. McNutt's admission, both in her exceptions and in the proceedings before the ALJ, that she sent copies of the math portion of the EWT to the homes of teachers in the District, and that she lied to her superiors when questioned about the same. (District's Reply at pp. 1, 2) Further, contrary to Ms. McNutt's claim regarding the meeting of August 31, 1995, *supra*,

> ***the District provided testimony of Associate Superintendent Dr. Clausell and Division Director Elaine McGhee who both stated that they definitely remembered that the item on test security was mentioned and reviewed at that meeting. Furthermore, there was a second meeting with supervisors in early September 1995 where the ALJ found, as related by Ms. McGhee in her testimony, that the memo from the Department of Education (Exhibit P-2) was again given to Ms. McNutt.*** (*Id. at* pp. 2, 3)

Moreover, the District disputes Ms. McNutt's contention that, prior to September 1995, she had no connection with instruction. Here, the District asserts that Ms. McNutt's own testimony affirmed that she was a math teacher at Lincoln High School before becoming a supervisor, that she administrated the HSPT-9 to her students, and was aware of the security of the test and the precautions taken for the HSPT. (*Id.* at p. 3)

As to her credibility, the District maintains that it is not reasonable to believe that Ms. McNutt mailed the secure 1995 EWT to the homes of the teachers merely, as she claims, "in the interests of time," when she could have hand-delivered them along with her delivery of the 1993 EWT to the teachers. (*Id.* at p. 4, citing to Initial Decision at p. 6) That she further failed to disclose the mailings to her supervisor suggests, the District contends, that Ms. McNutt was aware that the 1995 EWT was a secure instrument. (*Id.* at pp. 4, 5)

Thus, the District cites *In the Matter of the Tenure Hearing of DePasquale,* 92 *N.J.A.R.* 2d (EDU) 537, for the proposition that "***[a] board of education has the right to presume the basic honesty of its employees. A dishonest act by a public employee violates the public trust." (*Id.*, citing *In re Depasquale* at 540) The District further argues that case law establishes that "any employee who intentionally or knowingly provides untruthful information to a school district breaches a fundamental obligation of honesty and commits an act of misconduct warranting dismissal.***" (District's Exceptions at p. 7)

Finally, with respect to the issue of Ms. McNutt's increment withholding, the District notes Ms. McNutt's argument in her exceptions that she should not be dismissed, but should, instead, have her increment withheld. The District provides:

> ***Thus, even Ms. McNutt recognizes that the withholding of her increment was warranted. It is settled that the same conduct can support and lead to both dismissal as well as the withholding of increment. [In the Matter of the] *Tenure Hearing of Gilbert*, 1982 S.L.D. 274, 311, aff'd, 1982 S.L.D. 328 (St. Bd.). Accordingly, it is submitted that the Commissioner should affirm the increment

withholding as well as the ALJ's order to terminate Ms. McNutt's employment. (*Id.* at p. 9)

Upon careful and independent review of the record in this matter, which included transcripts from the hearing conducted at the OAL on November 13, 1997 and November 14, 1997,[1] the Commissioner finds no cause to disturb the credibility determinations and factual findings rendered by the ALJ. The Commissioner, therefore, concurs with the ALJ that the District has demonstrated by a preponderance of credible evidence that Ms. McNutt is guilty of unbecoming conduct by a teaching staff member. In so finding, the Commissioner notes that, contrary to Ms. McNutt's assertions, there is ample evidence in the record to conclude that, at the meeting conducted by the District on August 31, 1995, a meeting which Ms. McNutt attended, the memorandum from the Department of Education to all chief school administrators regarding test security was, indeed, reviewed, and Ms. McNutt was provided a copy of the memorandum. (T1:11, 12, 42, 76, 77, 100, 101; T2:69) Moreover, there is sufficient, credible evidence to conclude that Ms. McNutt was provided a second copy of the memorandum at a meeting in September of that year with Ms. McGhee, her supervisor, (T1:45), as well as a copy of the District's standard operating procedures with regard to test security (T1:79).

As to the recommended penalty of dismissal, the Commissioner references *In the Matter of the Tenure Hearing of Vincent Martone, State-operated School District of the City of Jersey City, Hudson County*, decided December 18, 1997, a recent and related decision concerning a math supervisor in the State-operated School District of the City of Jersey City who was found guilty of unbecoming conduct when he distributed a portion of the 1995 Early Warning Test, knowing that it was secure, to several teachers, including Ms. McNutt, herein. (*In*

[1] The transcript from November 13, 1997 shall hereinafter be referred to as "T1." The transcript from November 14, 1997 shall be referred to as "T2."

re Martone, decided December 18, 1997, Slip. Op. at p. 6; Initial Decision at p. 3) In that case, the Commissioner held that

> breaches in statewide test security [are] a matter of utmost concern and will be dealt with severely. As stated by Assistant Commissioner, Division of Academic Programs and Standards, in a two-page letter dated April 19, 1995:
>
> > ***the reproduction of secure test items *** is strictly prohibited**. *Individuals who violate this prohibition risk personal sanction which could include suspension or revocation of their professional license.* (Boldface *sic)* (emphasis supplied) (Exhibit P-7 in Evidence)
>
> The position of this agency is both clear and unequivocally communicated to school districts and staff throughout the state. Breaches of test security will not be tolerated. Therefore, the Commissioner finds that a single incident of this nature is "sufficiently flagrant" to warrant an employee's dismissal, notwithstanding where, as here, respondent has had a long career with an apparently unblemished record. *Redcay v. State Board of Education*, 130 *N.J.L.* 369, 371 (Sup. Ct. 1943); aff'd 131 *N.J.L.* 326 (*E.&A.* 1944). Further, while the Commissioner finds that respondent's behavior, as related by the ALJ in the initial decision, is particularly unbecoming for a supervisor, it cannot be countenanced for *any* teaching professional. The Commissioner has stated that "[b]eing a teacher requires *** a consistently intense dedication to civility and respect***." *In the Matter of the Tenure Hearing of Robert H. Beam*, 1973 *S.L.D.* 157, 163. Further, teachers "***must exhibit a high degree of exemplary behavior." *In re Tyler*, 13 *N.J.A.R.* 297, 308 (1991). This is so in that
>
> > [t]eachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils.*** *In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County, 1974 S.L.D. 97, 98.*
>
> Therefore, the Commissioner finds that, in view of all the facts, respondent's proposed penalty wherein he would abandon his supervisor's position in favor of a teaching position, would not be appropriate. Rather, in order to adequately impress upon respondent, and others, the extreme seriousness of his infraction and the Commissioner's concern about the poor judgment displayed during the incidents leading to the instant tenure charges,

> the Commissioner finds that loss of tenure is fully warranted in this instance. Therefore, the Commissioner adopts the recommended penalty of the ALJ and further finds this matter should be forwarded to the State Board of Examiners for such action it may deem appropriate with regard to respondent's certificates. (Slip Op. at pp. 11-12)

Finding that Ms. McNutt has raised no compelling reason to distinguish the instant matter from the matter *In re Martone, supra,* the Commissioner adopts the recommended penalty of dismissal, notwithstanding Ms. McNutt's apparently unblemished record within the District. Here, the Commissioner adds that the lapse in security caused the Department of Education to modify its plans for the development of the mathematics section of the March 1996 EWT, thereby resulting in an assessment of $7,603 to the District for the special construction of a new mathematics section. (Exhibit P-7)

Finally, the Commissioner notes that, although this is a consolidated matter, joining the issue of the District's tenure charges against Ms. Nutt with the issue of her challenge of the District's decision to withhold her salary increment for the 1996-97 school year, the latter issue is not addressed in the initial decision. However, the Commissioner notes his concurrence with the following argument provided by Ms. McNutt to the ALJ:

> McNutt avers that the denial of her increment was indeed disciplinary. As the Court well knows, the legislature in 1990 amended the New Jersey Employer-Employee Relations Act. Now included is a provision providing for the disposition of disciplinary actions taken by a school district *** and the bargaining agent of the staff. ***
>
> It would appear *** that the proper avenue to be followed by *** McNutt would be before an arbitrator and not the Commissioner.
>
> It is respectfully submitted to the Court that the tenure charges *** be dismissed and that the Court not act upon the increment cause, but instead refer the matter to the grievance procedure in place between the District and the appropriate bargaining unit for McNutt for disposition. (Ms. McNutt's Letter Brief, December 4, 1997 at pp. 4, 5)

Accordingly, for the reasons expressed therein, the Commissioner affirms the initial decision of the OAL and hereby orders that Ms. McNutt be dismissed from her position as tenured teaching supervisor with the State-operated School District of Jersey City as of the date of this decision. The Commissioner further dismisses, without prejudice, Ms. McNutt's claim with respect to the denial of her increment for the 1996-97 school year. Finally, this matter shall be transmitted to the State Board of Examiners, pursuant to the requirements of *N.J.A.C.* 6:11-3.6, for action against Ms. McNutt's certificate as it deems appropriate.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

95-98

EDU #11168-96 and #5138-97 (consolidated)
C # 95-98
SB # 32-98

IN THE MATTER OF THE TENURE HEARING OF JOAN MC NUTT, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	
AND	:	
JOAN MC NUTT,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, March 2, 1998

For the Petitioner/Respondent-Respondent, Charlotte Kitler, Esq.

For the Respondent/Petitioner-Appellant, Feintuch, Porwich & Feintuch (Philip Feintuch, Esq., of Counsel)

After a thorough review of the record, including the transcripts from the hearing held in the Office of Administrative Law, we affirm the determination of the Commissioner of Education to dismiss respondent from her tenured employment substantially for the reasons expressed therein. In considering the evidence, including the August 1, 1995 memo from Assistant Commissioner Ellen Schechter, exhibit P-2, in evidence, which expresses concern about teachers "copying tests and test items," along

OCTOBER 7, 1998

with respondent's actions in mailing copies of the 1995 EWT to the teachers' homes, rather than distributing them at school as she did with the 1993 test, and lying to her supervisor about her conduct, we find that the State-operated District has satisfied its burden of demonstrating the truthfulness of the charges by a preponderance of the credible evidence. We further conclude that dismissal of respondent from her tenured employment is the appropriate penalty.

October 7, 1998

Date of mailing OCT 09 1998

(SB) 95-98

DHPBL #495-98
SB # 95-98

IN THE MATTER OF THE DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF J.A.R. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Assistant Commissioner of Education, October 23, 1998

For the Petitioner-Appellant, J.A.R., pro se

J.A.R. (hereinafter "petitioner"), who was employed as a school bus driver, was disqualified by the Office of Criminal History Review of the Department of Education from continued employment in the State's schools after a criminal history record review conducted pursuant to N.J.S.A. 18A:6-39-19.1 revealed that she had been convicted of several disqualifying offenses involving controlled dangerous substances. Petitioner sought to overturn her disqualification on the basis of rehabilitation.[1]

In a letter decision dated October 23, 1998, the Assistant Commissioner of Education, Executive Services, upheld the disqualification, concluding that petitioner had failed to demonstrate clear and convincing evidence of her rehabilitation as required by N.J.S.A. 18A:6-7.1.[2]

[1] We note that petitioner's criminal history record review was conducted prior to the 1998 amendments to N.J.S.A. 18A:6-7.1 and N.J.S.A. 18A:39-19.1 which eliminated rehabilitation as a basis for challenging a disqualification determination.

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

FEBRUARY 3, 1999

Petitioner filed the instant appeal to the State Board.

After a thorough review of the record, we affirm the decision of the Assistant Commissioner. Although it appears that petitioner is making good progress towards rehabilitation, we are unable to conclude on the basis of the record before us that she has affirmatively demonstrated her rehabilitation by clear and convincing evidence, particularly in light of the nature and seriousness of her offenses, which included employing a juvenile in a drug distribution scheme, and the nature and responsibility of her position as a school bus driver. See N.J.S.A. 18A:6-7.1(e).

February 3, 1999

Date of mailing FEB 05 1999

97-98

IN THE MATTER OF THE TENURE	:	
HEARING OF ELIZABETH MC CLEAR	:	
POFFENBERGER, SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE TOWN OF WESTFIELD,	:	DECISION
UNION COUNTY.	:	
	:	

MARCH 6, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 7612-97

AGENCY DKT. NO. 237-7/97

WESTFIELD BOARD OF EDUCATION,

Petitioner,

v.

ELIZABETH McLEAR POFFENBERGER,

Respondent.

Cherie L. Maxwell, Esq., appearing for petitioner (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Gail Oxfeld Kanef, Esq., appearing for respondent (Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: December 9, 1997 Decided: January 20, 1998

BEFORE **MARGARET M. HAYDEN**, ALJ:

STATEMENT OF THE CASE

Petitioner Westfield Board of Education (Board) filed tenure charges on June 16, 1997, against respondent Elizabeth McLear Poffenberger who was employed by the Board as a tenure secretary. On July 1, 1997, the Board certified the charges of

abandonment of employment, conduct unbecoming an employee and excessive absenteeism, to the Commissioner of Education. The District submitted that the respondent's conduct warrants her dismissal for employment. Respondent denied all charges of wrong doing and requested reinstatement. On August 7, 1997, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for a hearing as a contested case.

On November 11, 1997, the Board filed a motion for summary decision and supporting papers. On December 8, 1997, the undersigned and the counsel for the parties had a prehearing conference to discuss the matter. Counsel for respondent informed the undersigned that her client did not intend to oppose in any manner the motion of the Board. By letter of December 9, 1997, respondent's counsel confirmed the respondent's intent not to oppose the Summary Judgment Motion.

FACTS

On or about September 26, 1997, the District served initial requests for admission of fact pursuant to *N.J.A.C.* 1:1-10.2 on counsel for respondent. Respondent failed to answer, thereby admitting the statements in the request pursuant to *N.J.A.C.* 1:1-10.4(c). Thus the following facts must be deemed admitted and I so **FIND** them the **FACTS** in this case.

The respondent was absent from her position as a secretary in the Westfield School District 98.5 days during the 1996-97 academic year. A medical certificate completed by Joseph T. Barmakian, M.D. on May 19, 1997, indicated that respondent was able to return to work on May 26, 1997. The respondent did not return to work on May 26, 1997, or at any time there after. During the respondent's absence after May 26, 1997, the respondent did not notify the Board when she expected to return to work. The respondent was absent without leave from May 27, 1997 until the end of the academic year.

Since the respondent's absences began, respondent has repeatedly failed to contact the District in a timely matter regarding her medical status and/or her expected return to work date. Prior to the 1996-97 academic school year, the respondent had been absent without leave. During the respondent's absences during 1996-97, the respondent failed to respond to all the District's requests for status clarification regarding her employment. The respondent received notice from the Board requesting weekly medical progress updates during her absence.

SUMMARY OF THE CHARGES

Respondent is charged with abandonment of position, conduct unbecoming an employee, and chronic and excessive absenteeism. In the first charge, respondent is accused of abandoning her position and conduct unbecoming an employee by failing to return from leave on the date released when she was determined by her physician to be ready to return to work. Respondent's failure to contact the District concerning her status, her failure to respond to the District's efforts to contact her, and her failure to report for work meant that she abandoned her position as secretary. Such conduct adversely effects the operation of the Westfield School District.

The second charge is that the respondent is guilty of chronic and excessive absenteeism to the extent that her unauthorized absences has had a significance impact on the operation of the Westfield School District. The respondent has been absent from her position for 98.5 days during the 1996-97 school year, partially without approved leaves. Moreover, respondent continued her course of excessive absenteeism despite requests from the District to clarify her status with warnings for failure to do so. At the time of the charges, the respondent was still absent without leave.

DISCUSSION AND CONCLUSION

Summary Decision must be granted if the pleadings and affidavits show that there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5; *Contini v. Bd. of Educ. of Newark,* 286 *N.J. Super.* 106, 121 (1995). While viewing the evidentiary material presented in the light most favorable to the non-moving party, the court must determine whether there is sufficient evidence to permit a rational fact-finder to resolve the alleged disputed issues in favor of the moving party. *Brill v. Guardian Life Ins. Co.,* 142. *N.J.* 520, 523, (1995). When a motion for Summary Decision is made and supported, an adverse party in order to prevail "must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determine in an evidentiary hearing." *N.J.A.C.* 1:1-12.5. If the adverse party does not so respond, a Summary Decision, if appropriate, shall be entered. *Id.*

Based on the undisputed facts I **CONCLUDE** that respondent is guilty of the charges. More particularly, respondent is guilty of charge number one that she failed to return to work on May 26, 1997, and failed to contact the District concerning her status as well failed to respond to the District's efforts to contact her, thus abandoning her position as a secretary. Additionally, respondent is guilty of chronic and excessive absenteeism in that her 98 absences have had a significance adverse impact upon the operation of the Westfield School District. The respondent's unrelenting and unauthorized absenteeism constitutes excessive absenteeism and presents just cause for her dismissal under the laws of the State of New Jersey.

The statutory requirements to hear and decide tenure cases require a concomitant determination as to the appropriate penalty. *In re the matter of the tenure hearing of Andrea Phillips*, 97 *N.J.A.R.* 2d (EDU) 46, 49: *In re Fulcomer* 93 *N.J. Super.* 404, 410 (App. Div. 1967). However, in this instance as respondent has affirmatively indicated that she is not opposing the motion for summary decision which includes the penalty of termination, the matter is ripe for summary decision.

I **CONCLUDE** that the District has met its burden of proving that the respondent is guilty of abandonment of position, conduct unbecoming an employee, and chronic and excessive absenteeism and that said conduct constitutes just cause for her termination from the employ of the Board. Therefore I **CONCLUDE** that the District's Summary Decision Motion should be **GRANTED**.

ORDER

Based on the foregoing it is **ORDERED** that the District's motion for Summary Decision is hereby **GRANTED**. The respondent's appeal is hereby **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

1/23/98

DATE

DNA

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 26 1998

DATE

Barbara A Kamen

OFFICE OF ADMINISTRATIVE LAW

jb

OAL DKT. NO. EDU 7612-97
AGENCY DKT. NO. 237-7/97

IN THE MATTER OF THE TENURE	:	
HEARING OF ELIZABETH MC CLEAR	:	
POFFENBERGER, SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE TOWN OF WESTFIELD,	:	DECISION
UNION COUNTY.	:	
	:	

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

Upon careful and independent review, the Commissioner concurs with the ALJ that summary judgment should be granted the Board in this matter, inasmuch as respondent does not oppose the Board's motion, which clearly included the penalty of dismissal.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein. Respondent is deemed dismissed from her position as a tenured secretary with the Board, as of the date of this decision.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MARCH 6, 1998
DATE OF MAILING MARCH 6, 1998

SB/97-98

SEC # 33-96
SB # 97-98

IN THE MATTER OF EDWARD :
MERCER, BRICK TOWNSHIP BOARD :
OF EDUCATION, OCEAN COUNTY :

STATE BOARD OF EDUCATION

DECISION

Decided by the School Ethics Commission, October 28, 1997

For the Petitioner-Appellant, Wilbert & Montenegro (Ben Montenegro, Esq., of Counsel)

For the Respondent-Respondent, Thomas G. Gannon, Esq.

For the Respondent, Peter Wint, Deputy Attorney General (John J. Farmer, Attorney General of New Jersey)

On November 19, 1998, the Board of Education of the Township of Brick (hereinafter "Board") filed a notice of appeal to the State Board of Education from a determination by the School Ethics Commission that Edward Mercer, a member of the Board, had not violated N.J.S.A. 18A:12-24(b) of the School Ethics Act.

Pursuant to N.J.A.C. 6:2-1.11(a), the Board's brief in support of its appeal was due on December 9, 1998, 20 days after it filed its notice of appeal. The Board, however, failed to file a brief by that date. By letter dated December 17, 1998, the Director of the State Board Appeals Office ("Director") notified the counsel for the Board of his failure to file a brief. On or about January 5, 1999, counsel for the Board made a formal request that this matter be placed in abeyance while he attempted to obtain an audible copy of the tapes from the hearing held before the Ethics Commission. By letter

FEB. 2, 2000

dated January 11, 1999, counsel for the Board confirmed that both opposing counsel had agreed to his request, and the briefing schedule was placed in abeyance.

On November 18, 1999, more than ten months after this matter was placed in abeyance, the Director of the Appeals Office, having heard nothing further from the counsel for the Board, requested that he advise her of the status of his efforts to obtain the hearing tapes so that the briefing schedule could be reestablished. Counsel for the Board did not respond to that letter. By letter dated January 13, 2000, the Director advised the counsel for the Board that, given these circumstances, this matter was being referred to our Legal Committee.

After consideration of the circumstances, we dismiss the appeal in this matter. The counsel for the Board failed to advise us of the status of his efforts to obtain an audible copy of the hearing tapes for more than a year after this matter was placed in abeyance, failing even to respond to the November 18, 1999 letter from the Director of our Appeals Office requesting such information. Nor has he filed a brief in support of the Board's appeal, more than 14 months after he filed a notice of appeal. We find such failures sufficiently egregious to warrant dismissal of the appeal.

February 2, 2000

Date of mailing FEB 04 2000

98-98

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

SYNOPSIS

Petitioner, tenured music teacher, alleged the Board wrongfully withheld his increment for the 1996-97 school year for unsatisfactory performance. Board noted the principal recommended termination but the Board imposed the less severe penalty of withholding.

Having considered contradictory testimony and having found petitioner's testimony to lack credibility, the ALJ concluded that petitioner did not sustain his burden of proof by a preponderance of competent evidence that the Board's action was improper. Petition was dismissed.

Citing *Kopera*, the Commissioner adopted the findings and determination in initial decision as his own.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11550-96

AGENCY DKT. NO. 326-8/96

JAMES SAKOFSKY,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,

Respondent.

Randi Doner April, Esq., appearing for petitioner
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Melvin C. Randall, Esq., appearing for respondent
(Love and Randall, attorneys)

Record Closed: December 1, 1997 Decided: January 15, 1998

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

Petitioner challenges the determination by the East Orange Board of Education, Respondent, to withhold his annual increment. On November 20, 1996, the

Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to *N.J.S.A.* 5:14F-1 to -13.

FINDINGS OF FACT

Based on the evidence presented at the hearing, as well as on the opportunity to observe the witnesses and assess their credibility, I make the following findings of fact, which are essentially undisputed, in this matter.

1. Petitioner is a tenured teacher of music in the district.

2. Petitioner's annual increment was withheld for the 1996-97 school year.

3. There were numerous conferences from September 1995 until February 1996 between Petitioner and the Principal of Cicely Tyson School in East Orange, Ms. Trimmings.

4. In addition to the conferences between the two, Ms. Trimmings observed Mr. Sakofsky informally. Ms. Trimmings concluded that Petitioner's overall performance was unsatisfactory and recommended termination at the close of the 1995-96 school year.

5. Petitioner was absent a total of 93 days during the 1995-96 school year and was tardy on 32 occasions.

6. After February 29, 1996, Petitioner was absent until June 11, 1996.

7. Upon Petitioner's return to school on June 11, 1996, he found three evaluations dated November 30, 1995, March 1, 1996, and May 15, 1996. Petitioner had not seen any of these evaluations prior to June 11, 1996.

8. The Board voted unanimously to withhold Petitioner's increment for the 1996-97 school year.

DISCUSSION AND CONCLUSION

A Board of Education may withhold the employment or adjustment increment, or both, of any teacher for reason of efficiency or other good cause in any year. *N.J.S.A.* 18A:29-14. The decision of a local Board of Education to withhold the increment of a teaching staff member is a discretionary action which may not be upset unless found to be arbitrary, without rational basis or induced by improper motives. *Kopera v. West Orange Board of Education,* 60 *N.J. Super.* 288, 294 (App. Div. 1960). The burden of proof is on Petitioner *N.J.S.A.* 18A:29-14. In this case, two witnesses were called to testify, Petitioner and his supervisor, Laura Trimmings, Principal of the Cicely Tyson School in East Orange. Because the testimony of these two witnesses is contradictory on several essential points, it is necessary to address the credibility of each.

Petitioner testified that he had no knowledge of any deficiencies in his performance until he returned to school in June 1996, after an absence which began in early March. Ms. Trimmings testified that in the many conferences which the two had at the beginning of 1995-96 school year she addressed many of her concerns about Petitioner's performance. Only when pressed on cross examination, did Petitioner admit that these discussions did in fact take place and that the content of the discussions included the deficiencies as Ms. Trimmings perceived them.

Ms. Trimmings detailed some of her concerns about his performance during the early part of the school year in a memo dated October 27, 1995. Petitioner's draft reply is dated November 8, 1995. The deficiencies included the failure to follow up and report students who did not appear in class. In addition, Ms. Trimmings expressed concern about the fact that students who entered the class without instruments were not permitted to go to the storage area to pick them up, as well as what appeared to be

an "indifferent" attitude on the part of Petitioner. Ms. Trimming's memo goes on to state that this kind of attitude and behavior is less than professional and will not be tolerated. Petitioner prepared a draft response to that memo in which he provides an explanation for the deficiencies which Ms. Trimmings perceived. Regardless of whether Petitioner agreed with those deficiencies, he was on notice that the Principal, his supervisor, regarded these problems as short comings in his performance. Petitioner asserts, however, that he had no knowledge of these deficiencies until he returned to school after his extended absence.

Based on the inconsistencies, I **CONCLUDE** that Petitioner's testimony lacks credibility. Moreover, the withholding of the increment is discretionary. In this case, the testimony is clear that Petitioner's immediate supervisor perceived deficiencies in his performance. It is equally clear, that these deficiencies were discussed with Petitioner in the frequent conferences in which the two engaged. Accordingly, even discounting the formal evaluations prepared by Ms. Trimmings, there is a rational basis for the withholding of the increment.

Furthermore, Petitioner's attendance record indicates that he was absent a total of 93 days for the entire school year. Even legitimate absences are not immune from disciplinary action by a Board which is seeking to deter the harmful effect excessive absence can have on the continuity of instruction. *Neptune Twp. Education Association v. Board of Education of Neptune*, OAL Dkt. No. EDU 4432-88 (May 25, 1989). The Commissioner has found that excessive absenteeism can be unavoidably harmful to pupils in the overall education program. *Angelucchi v. West Orange Bd. of Educ.* 80 S.L.D. 1066.[1]

In this case, Petitioner acknowledged that he realized the impact his poor attendance could have on the continuity of instruction in instrumental music. He also pointed out the importance of music instruction with a program specifically designed for

[1]Because of the determination that a rational basis for the Board's action does exist based on the Petitioner's absences and the discussions about his deficiencies with his supervisor, it is not necessary to address the issue of the manner in which the evaluations were made or distributed to Petitioner.

students interested in the performing arts. Ms. Trimmings testified that she was unable to secure the services of a substitute sufficiently versed in music to step into the void created by Petitioner's absence.

The only question open for review in this case is whether the Board has a reasonable basis for its action in withholding the increment. Based on the foregoing discussion as well as the conclusion that Petitioner's testimony with respect to the deficiencies perceived by Ms Trimmings lacks credibility, I **CONCLUDE** that Petitioner has not sustained his burden of proof by a preponderance of competent evidence that the Board's action was arbitrary and capricious. Of significance, furthermore, is the fact that the Principal's recommendation was for termination; that recommendation was supported by the Superintendent of Schools. In a clear exercise of its discretion, the Board imposed the less severe disciplinary action of withholding a salary increment.

ORDERED

Accordingly, it is hereby **ORDERED** that this petition be and hereby is **DISMISSED WITH PREJUDICE**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 15, 1998
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

1/21/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 22 1998
DATE

Barbara A. Kennel
OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Witnesses

James Sakofsky

Laura W. Trimmings

Exhibits

J-1 Packet of evaluations and observations from March 14, 1986 to March 31, 1994

J-2 Evaluation dated November 30, 1995 - 4 pages

J-3 Evaluation dated March 1, 1996 - 3 pages

J-4 Evaluation dated May 15, 1996 - 3 pages

P-1 Items needing attention dated January 24, 1995

P-2 Notes on Sakofsky's plan book dated January 6, 1995

P-3 Memo to Sakofsky from Trimmings - Lesson Plans dated October 31, 1994

P-4 Memo to Sakofsky from Trimmings - Lesson Plans dated December 19, 1994

P-5 Memo to Sakofsky from Trimmings - Lesson Plans dated October 27, 1995 - 2 pages

P-6 Memo to Sakofsky from Dr. King - Lesson Plans dated November 3, 1995

P-7 Memo to Sakofsky from Trimmings dated February 27, 1996

P-8 Letter from Orange County Community Hospital to East Orange Board of Education dated May 8, 1996

P-9 Letter from Orange County Community Hospital to East Orange Board of Education dated May 21, 1996

P-10 Note from Dr. Alfred Santangelo dated June 10, 1996

P-11 Note from Dr. Alfred Santangelo dated June 11, 1996

P-12 Memo to Trimmings from Sakofsky dated November 8, 1995

R-1 Lesson plans submitted September 14, 1995

R-2 Attendance record

OAL DKT. NO. EDU 11550-96
AGENCY DKT. NO. 326-8/96

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

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions, and the Board's replies thereto, which essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ), were timely filed in accordance with *N.J.A.C.* 1:1-18.4 and were considered by the Commissioner in rendering the within decision.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that the Board's withholding of petitioner's increment was not improper for the reasons expressed therein.

It is well-settled that board decisions to withhold increments may not be upset unless they can be demonstrated to be patently arbitrary, capricious, unlawful or induced by improper motive. *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). The burden of proof that an action was so deficient rests with the person challenging the decision. *Kopera* at 297. The Commissioner concurs that, based on the record before him, the Board's decision to withhold petitioner's increment did not exceed the reasonable use of its discretionary authority, and moreover, that the petitioner has not met his burden of establishing otherwise.

Accordingly, for the reasons articulated therein and further explicated above, the Commissioner adopts the initial decision of the OAL and dismisses the instant Petition of Appeal.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MARCH 6, 1998
DATE OF MAILING MARCH 6, 1998

99-98

IN THE MATTER OF THE TENURE	:	
HEARING OF CONSTANCE JONES,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK,	:	
ESSEX COUNTY,	:	
	:	

SYNOPSIS

District certified tenure charges of excessive absenteeism, incapacity and insubordination against respondent teacher.

ALJ concluded that the District sustained its burden of proving the tenure charges by a preponderance of competent evidence. ALJ found that respondent was not protected by the Law Against Discrimination (LAD) by virtue of her inability to perform adequately essential duties of a teacher. Moreover, the ALJ found that she was not protected by the Americans with Disabilities Act (ADA) based on the hardship of the employer in finding appropriate substitutes and the hardship to students whose instruction was interrupted. ALJ ordered respondent terminated from her employment as an elementary teacher of special education.

Commissioner adopted findings and determination in initial decision. Commissioner ordered respondent dismissed from her employment as of the date of this decision and directed the matter be forwarded to the State Board of Examiners for further appropriate action.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10912-96

AGENCY DKT. NO. 506-10/96

IN THE MATTER OF THE TENURE HEARING OF CONSTANCE JONES, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY

Gregory G. Johnson, Esq. for Petitioner

Robert T. Pickett, Esq. for Respondent

Record Closed: October 27, 1997 Decided: December 9, 1997

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

Petitioner seeks Respondent's termination from employment as a special education teacher based on charges of excessive and chronic absenteeism, incapacity to perform, consistently, her teaching duties and responsibilities, and excessive tardiness and insubordination during the period commencing in September 1993 and concluding in June 1996, inclusive.

PROCEDURAL HISTORY

This matter comes before the Office of Administrative Law (OAL) as the result of the filing of tenure charges by the Petitioner, the State-Operated School District of the City of Newark (Petitioner or District), against the Respondent, Constance Jones. On or about August 28, 1996, Petitioner forwarded Tenure Charges to Respondent. Petitioner scheduled a review of the evidence and a determination of probable cause to credit the evidence supporting the charges on October 21, 1996. Respondent filed a Statement of Position with the Commissioner of Education, in accordance with her right to do so pursuant to *N.J.S.A.* 18A:6-11, on or about September 12, 1996, explaining and denying the charges. On October 21, 1996, Petitioner determined and certified the tenure charges. Petitioner suspended Respondent Jones on October 21, 1996, without pay in accordance with *N.J.S.A.* 18A:6-14.

The certified charges were forwarded to the Commissioner of Education on or about October 22, 1996, for his review and consideration in accordance with *N.J.S.A.* 18A:6-9. On November 15, 1996, a formal answer was filed with the Commissioner of Education denying the charges and setting forth various affirmative defenses. In accordance with *N.J.S.A.* 18A:6-14, since on or about March 1, 1997, Respondent Jones has been receiving her full salary.

The matter was forwarded to the OAL for determination as a contested case on December 10, 1996, in accordance with *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The hearing in this matter commenced on April 2, continued on April 9, 25, May 12, 14, and concluded on August 5, 1997. Counsel for both parties requested an opportunity to obtain a transcript of the proceeding and to prepare written summations. Accordingly, the record closed on October 27, 1997.

Respondent concedes the charges of excessive and chronic absenteeism and tardiness; she challenges the characterization of incapacity and asserts that Petitioner

had an affirmative obligation, which it did not meet, to accommodate, reasonably, her handicap and/or allow her to take a disability leave to address it.

FINDINGS OF FACT

The following facts were the subject of a Request for Admissions propounded by Petitioner to which Respondent did not reply. Pursuant to *N.J.A.C.* 1:1-10.4, they are, therefore, deemed to have been admitted and are incorporated herein as findings of fact in this matter.

1. The Respondent, Constance Jones, was hired as a teacher by the District on September 6, 1993.

2. During the 1993-94 school year, Respondent was assigned to the Thirteenth Avenue School as an elementary special education teacher.

3. As of December 10, 1993, Respondent was absent fourteen (14) school days for the 1993-94 school year.

4. On October 8, 1993, the Respondent's immediate supervisor, Vice Principal Jack DeFares, held a conference with the Respondent to discuss her absences.

5. As of April 25, 1994, Respondent was absent a total of 54 times during the 1994-95 school year.

6. On May 10, and 12, 1994, Respondent was absent and failed to call in to report her absences.

7. On May 19, 1994, Respondent was absent and failed to call in to report her absence before deadline.

8. On June 6, 1994, Respondent was absent and failed to call in to report her absence before deadline.

9. Respondent was absent on June 22, 1994.

10. On June 27, 1994, Vice Principal DeFares advised Respondent she had accumulated 45.5 days absent, for the 1993-94 school year, which was excessive.

11. On October 19, 1994, Vice Principal DeFares held a conference with Respondent to discuss her absences.

12. As of October 28, 1994, Respondent was absent at least 18 school days for the 1994-95 school year.

13. As of December 23, 1994, Respondent was absent 30 days.

14. Respondent was absent eight (8) times during the month of December 1994.

15. As of March 15, 1995, Respondent had 44 accumulated absences and had been tardy 27 times for the 1994-95 school year.

16. On May 2, 1995, the Board of Education withheld Respondent's salary increment based upon excessive absenteeism and tardiness.

17. Respondent's June 1995 evaluation rated her performance as unsatisfactory and noted the need to improve attendance.

18. On November 20, 1995, Vice Principal Roberts wrote Respondent a memo indicating that her absences were 18 or more for the 1995-96 school year and reminded her that a conference had been held on October 10, 1995, to discuss her absences.

19. On November 20, 1995, Respondent was absent, had exhausted her sick leave, and was docked pay.

20. Respondent was absent a total of 48.5 days during the 1995-96 school year. She was docked approximately 28 times for absences beyond her leave time.

21. On April 2, 1996, Vice Principal Geneva Roberts wrote to Respondent about her absences (8.5 times) in March.

22. On June 25, 1996, Principal Glenda Johnson Green notified Respondent that she was absent on May 29, 1996, and June 6, 12, 13, 24, and 25, 1996, and failed to call in and report her absences.

23. As of June 27, 1994, Respondent was tardy reporting to work 84 times.

24. As of December 23, 1994, Respondent was tardy to work 8 times in December.

25. Vice Principal Roberts wrote to Respondent warning her about tardiness on September 27, 1995. Respondent was tardy six times in September 1995.

26. Respondent was advised that she was tardy four times in October 1995.

27. Vice Principal Roberts advised Respondent that she was tardy nine times in March 1996.

In addition to the foregoing findings of fact, based on the evidence presented at the hearing, as well as on the opportunity to observe the witnesses and assess their credibility, I make the following further findings of fact, which are essentially undisputed, in this matter.

28. Respondent participated in a residential substance abuse rehabilitation program at Valley View Hospital in New York State from which she was released on September 30, 1994.

29. Respondent participated in an inpatient rehabilitation program at Union Hospital sometime in November 1995.

30. After release from Union Hospital, Respondent followed that facility's recommendation for aftercare to the extent of attending a few 12-step meetings.

31. Respondent sought help from a private therapist sometime between November 1995 and June 1996.

32. On June 19, 1996, Respondent enrolled in a residential treatment program at Sunrise House located in Summit, New Jersey. She was involuntarily discharged from the program on July 4, 1996, when she admitted to using drugs during the treatment program.

33. Petitioner's representatives advised Respondent of the availability of the Employee Assistance Program (EAP) on at least three (3) separate occasions, January 1993, May 1993 and late 1995.

34. Respondent contacted the EAP on at least two distinctly separate occasions; in both instances she disclosed her substance abuse problem to staff personnel. A family member also contacted the EAP sometime in June 1996, on Respondent's behalf.

35. The second contact with EAP occurred soon after Respondent's discharge from Union Hospital. At that time, she was referred to the EAP aftercare group. She attended only one meeting.

36. The Principal, Glenda Johnson Green and the Vice Principal, Geneva Roberts, who directly supervised Respondent, admonished Ms. Jones verbally and by memo and letter on numerous occasions that her attendance and punctuality were unsatisfactory.

37. By letter dated November 20, 1995, Respondent was advised that failure to improve her attendance could result in the filing of tenure charges, the loss of increment or separation from employment with the Newark School District. (P-13)

38. During the 1995-96 school year, Petitioner received verbal and written requests for a change of class from the parents of several of the young special education students in Respondent's class which consisted of approximately eight (8) students; at least four requested a change to a class because the teacher in the present class, Respondent, was absent a great deal. (P-9, P-10; T-1, 26, 22-25)[1]

39. Respondent's tardiness resulted in disruption of the students' daily routine and had a negative impact on instruction.

40. Respondent did not disclose her substance abuse problem to anyone in the administration at the Thirteenth Street School or to anyone in central administration for the District.

41. Respondent specifically attributed her tardiness, at least in part, to having to rely on public transportation; she explained her absences as dealing with grief depression and personal problems.

[1] There are six volumes of transcript in this matter. In this decision, T1 refers to the transcript of April 2, 1997; T2 refers to the transcript of April 9, 1997; T3 refers to the transcript of April 25, 1997; T4 refers to the transcript of May 12, 1997; T5 refers to the transcript of May 14, 1997; T6 refers to the transcript of August 5, 1997. The volume number is followed by the page and line numbers of the cited text.

42. Regular attendance by a teacher of special education is important for continuity of instruction. In addition, substitute teachers, for the most part, are not certified special education teachers.

43. Respondent has a history of substance abuse.

DISCUSSION AND CONCLUSIONS

The tenure charges in this case are threefold: excessive absenteeism, incapacity (based on excessive absenteeism), and excessive tardiness. Respondent concedes that, for the academic years in question, 1993-94, 1994-95, 1995-96, "she was, under all attendant circumstances, excessively absent and tardy." (RPB, pg. 2)[2] She asserts, however, that the absences and tardiness were caused by her substance abuse problem, which is a handicap within the protection of the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*, (LAD).[3] That statute provides that, unless it can be clearly demonstrated that a person's handicap would prevent the person from performing a particular job, it is an unlawful employment practice to deny an opportunity for employment to a person otherwise qualified, thus, effectively barring any discriminating conduct against handicapped individuals in the workplace, unless the nature of the handicap reasonably precludes performance of the particular employment. *Id.*

The central issue to be resolved is whether the Respondent should be afforded the protection of the statutes and regulations addressing discrimination in employment for individuals with disabilities. If Respondent does not fall within the protected class of individuals contemplated by the legislation and regulations, the issue becomes whether

[2] RPB refers to Respondent's Post Hearing Brief, followed by the relevant page number.

[3] In her post hearing submissions, Respondent states that she will make generic references to provisions in the Americans with Disabilities Act, The Rehabilitation Act of 1973, the LAD, and the Reasonable Accommodation regulation (citations omitted) as the "Act" (RPB, 16, n.5); in this decision, the same statutes and regulation are referred to collectively as "legislation" or "the legislative and regulative scheme."

the charges as set forth above are of such serious consequences that they should result in termination.

In this case, Respondent does not dispute the absenteeism or the tardiness; she does not even dispute that she was excessively absent or tardy. Instead, she asserts a defense to the charges based on the legislative scheme enacted to protect handicapped individuals.

The record discloses that the behavior on which these charges are predicated occurred over a three year period. In fact, during the first school year in question, Respondent had already been warned that her absences for that year were considered to be excessive. Petitioner could have filed tenure charges based on absenteeism earlier than August, 1996, but did not to do so. Instead, the record documents the efforts made by Petitioner to counsel Respondent with respect to improving her attendance and the encouragement given to her, specifically by Vice Principal Roberts who noted that, although Jones failed to perform the other essential duties of her position, her academic performance was satisfactory, at least during a portion of the time period in question. The District also provided Jones with information regarding the availability of the EAP. Finally, the District imposed the less severe sanction of withholding an increment in 1995, before finally initiating tenure charges.

The documentary evidence as well as the testimony of Respondent support the conclusion that Ms. Jones is a substance abuser. Since substance abuse is a defined disability under the law, the District had an obligation, within reason, to accommodate Respondent's disability or to demonstrate that she was incapable of performing the essential duties of her position.

It is clear from the testimony of Mr. Stalks and Mr. Lewis that participation in the EAP is open to any employee who needs assistance in resolving personal issues. There is no requirement that the employee seeking assistance be disabled. Since the policy of the District is to attempt to counsel, rehabilitate, or impose a less severe form of discipline before considering termination, Respondent was eligible for such

assistance whether or not she suffers from a defined disability. For that reason, it is appropriate to analyze the efforts the District made to assist Respondent in resolving the personal issues to which she attributed her absences.

Specifically, Respondent asserts that Petitioner failed to offer her a reasonable accommodation to the limitations of her handicap. Logic and common sense dictate, however, that in order to offer an accommodation, an employer must be aware of the employee's handicap. In this case, the record is replete with references to Respondent's desire to maintain confidentiality. For example, a conference was held on October 8, 1993, shortly after Respondent was released from the Valley View residential program; the subject of the conference was Respondent's absences. If accommodation were sought, this conference certainly provided Respondent with the opportunity, at minimum, to request a referral to the EAP. Indeed, in answer to questions put to her by Petitioner's attorney and by the ALJ, she indicated that she did not want her problems to become the subject of gossip in the school or the District. In short, and in her own words, Respondent did not trust her supervisors enough to have confidence that they would respect her privacy.

Notwithstanding Respondent's understandable reticence to waive the confidentiality to which she is entitled, she argues that, somehow, Petitioner should have been aware and should have made a greater affirmative effort to help her. It is worth noting at this point that the EAP representative, Mr. Stalks, with whom Respondent spoke on at least one occasion, testified that supervisors are advised, during training, not to invade personal or private matters nor to attempt to diagnose a person in assessing the need for a referral, but to relate the referral to job performance. In addition he detailed the efforts made by the District to educate the professional and non-professional staff of the availability of the EAP. (T-3, 43, 6-14).

I **CONCLUDE**, based on Stalks' testimony as well as the factual finding that supervisory personnel offered Respondent the assistance of EAP, that Petitioner did make an affirmative effort to provide assistance in resolving the personal problems to

which Respondent attributed her absences by counseling her about her absences and tardiness, and by providing her not only with the information regarding the availability of the EAP but also with the opportunity to speak with an EAP counselor. I further **CONCLUDE** that Petitioner also employed lesser forms of discipline, including verbal and written warnings of the consequences of continued absenteeism and tardiness and the withholding of an increment on account of the continued behavior.

Respondent also asserts that, because no specific referral on her behalf was made to the EAP, the Petitioner failed to meet its obligation to her. This reliance is misplaced because it completely ignores the voluntary nature of participation, as testified to by Mr. Stalks and Mr. Lewis. Furthermore, in consideration of the discretionary nature of participation in the EAP and the attendant confidentiality, Respondent's assertion that Petitioner set Respondent's misconduct in motion by failing to require Respondent to undergo treatment is absurd. Even if a supervisor makes a referral, Respondent has no obligation to follow the advice offered nor to accept referrals, nor is there an obligation on the part of the EAP to follow up according to the testimony of Mr. Lewis, the EAP counselor who met with Respondent.

In this case, Petitioner provided the necessary information and opportunity for Respondent to avail herself of assistance from the EAP; Respondent was aware of the availability of the EAP; she had contacted the program and had not chosen to follow the recommendation for aftercare in November 1995; she chose to go to Charter Clinic, which referred her to Sunrise House on her own, notwithstanding the availability of a referral from the EAP to that facility, at the time of her admission there.[4]

Accordingly, I **CONCLUDE** that the failure of the Petitioner to make a specific referral rather than or in addition to advising Respondent of the availability of the plan

[4] Respondent's witness, Dr. Cowan, was qualified as an expert in the field of psychiatry and testified as to the mental condition of Respondent. His testimony also included, however, criticisms of the manner in which the EAP handled Respondent's case. Based, however, on the fact that he had no independent knowledge of this EAP or the manner in which Respondent's case was handled, and that his knowledge of the program was derived solely from his consultation with the Respondent, in light of the lack of credibility attributed to Respondent, I give no weight to the testimony of Dr. Cowan with respect to the effectiveness of the EAP.

is a distinction without a difference; it is not a material consideration in resolving this matter. Moreover, I **CONCLUDE** that, based on the information Respondent had provided to Petitioner, the District acted in accordance with its stated policy of providing counseling, attempting rehabilitation, and imposing less severe discipline before seeking termination.

Turning now to whether Respondent should have been afforded reasonable accommodation, the threshold issue, whether Respondent was disabled as defined by the statute, must first be resolved.

Apparently, Respondent is arguing that she was rehabilitated during the summer of 1996; accordingly, Petitioner had an obligation to reasonably accommodate her disability beginning in September 1996, when, clearly, the District had received actual notice of the nature of Respondent's problem. (RPB, 26) In the first place, although Respondent makes reference to the District attempting to justify Respondent's dismissal on the basis of current use of illegal substances, *i.e.,* in September and October 1996, I find nothing in the record to indicate that Petitioner sought dismissal on that basis. The time frame on which Petitioner predicated its charges is clearly delineated as commencing in September, 1993, and concluding in June, 1996, in the pleadings and throughout the record.

Second, if Respondent is asserting that she had been rehabilitated during the summer of 1996, and, therefore, should have been given the opportunity to retain her position, it is her burden to demonstrate the rehabilitation with something more than her own opinion and the less than reliable doctor's certification described below. She testified to efforts of detoxification which she made after the involuntary dismissal from Sunrise House; however, she failed to produce any corroborating evidence of these efforts and continuing aftercare.

Because I **FIND** Respondent's testimony to be less than credible, based on her insistence that Principal Johnson-Green failed to advise her of the EAP and was

unsympathetic, contrary to the documentary evidence, as well as her omission or mischaracterization of the circumstance surrounding her departure from Sunrise House, her assertion of rehabilitation, without corroboration, is of no value.

In addition, she asserts that she felt she had been rehabilitated as of August 1996, just prior to the new school year; the record, however, does not contain any corroboration of her "feeling" except for the certification by Petitioner's physician that Respondent was capable of performing her duties as a teacher (P-27). The doctor examined Respondent on August 30, 1996, to determine fitness to return to work; the certification, however, was based on incomplete information, *i.e.,* Respondent testified that she did not disclose her disability to the District's doctor.

Accordingly, I **CONCLUDE** that physician's the certification is unreliable as evidence of rehabilitation

Respondent buttresses her assertion that, as a disabled individual entitled to protection in the workplace on account of her rehabilitation, she was not afforded reasonable accommodation by arguing that since she had not missed a day of work (unauthorized) and had not suffered a relapse from the time she returned to work in September 1996, until the tenure charges were certified on October 12, 1996, a rational trier of fact could reasonably find that Respondent had been rehabilitated and, therefore, was entitled to the protection of the pertinent state and federal statutes. Respondent fails to cite any documentary evidence or testimony in the record to support the assertion that she did not have any unauthorized absences during that period.

I further **CONCLUDE** that Respondent, who asserted rehabilitation as an affirmative defense, failed to sustain her burden of proving that she had been rehabilitated by a preponderance of competent evidence.

The common thread in the legislative and regulative schemes enacted to protect

disabled employees is that such protection is afforded to the disabled individual unless the employer reasonably believes that the employee is unable to perform adequately the essential duties of employment. If accommodating a handicapped employee imposes an undue hardship on the employer, that employer is not obligated to accommodate the disabled individual.

Moreover, the legislation and regulation relevant to reasonable accommodation of disability in the workplace recognize that the obligation to accommodate is not unrestricted; when an employer reasonably believes that an individual who may otherwise qualify for the protection afforded by the law cannot perform the essential duties of the position even with reasonable accommodation or if accommodating the disabled individual presents a hardship, the constraints of the legislation do not adhere. Accordingly, the remaining issue to be resolved is whether the continued behavior constituted an inability to perform essential duties of a teacher.

The act of coming to work is fundamental to all other responsibilities of the job. *Combs v. New Jersey Dept. of Transp.*, 97 *N.J.A.R.* 2d (CSV) 451, 454 (citing *Walders v. Garrett*, 765 *F. Supp.* 303, 309 (E.D. Va. 1991), aff'd, 956 F.2d 1163 (4th Cir. 1992). "Common sense dictates that teacher's continued absences must, at some point have a negative impact upon her pupils even if a board of education is unable to prove the relationship between a teacher's attendance and pupil progress." *I/M/O Tenure Hearing of Green*, 1991 *S.L.D.* 1103, 1119 (1991). The Commissioner pointed out that while "a school district has a responsibility to teachers who are plagued with illness and have medical problems . . . *the overarching responsibility of the commissioner and the local Board of Education is to the children.*" Id. (emphasis supplied) This is the vantage point from which the issues in this matter were resolved.

Principal Johnson-Green testified that she received parental complaints about Respondent's poor attendance. The vice principal also testified about parental complaints, verbal and written, by parents requesting that their children be transferred from Respondent's class. It is clear that Respondent's excessive absenteeism and tardiness prevented her from performing the essential requirements of her job, i.e.

being in class, on time and on a regular basis, so that her special education students would have some stability and continuity in their instruction. See *I/M/O Tenure Hearing of Kacprowicz,* 93 *N.J.A.R.* 2d (EDU) 147, 152, (stating that "frequent absences . . . necessarily disrupted the required continuity of instruction necessary to provide the opportunity for a pupil's maximum educational progress.")

The supervisory personnel also testified to the need to assign teachers and supervisors to cover Respondent's assignments and classes when she was tardy; in addition, they testified to the difficulties encountered in finding available substitute teachers when Respondent was absent without notifying the appropriate personnel. Of utmost concern is the testimony that substitutes invariably are not certified in special education.

The dismissal of tenured teachers is governed by *N.J.S.A.* 18A:6-10, which provides in relevant part:

> "No person shall be dismissed or reduced in compensation, (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state . . .except for inefficiency, incapacity, unbecoming conduct, or other just cause . . ."

"[T]here is no question that repeated and excessive absenteeism of regular teachers poses a threat to the integrity of the educational process." *Trenton Board of Educ. v. Williamson*, OAL Dkt. No. EDU 7335-85 (April 14, 1986) citation omitted. This rationale was explained in greater detail by the Commissioner in *I/M/O Tenure Hearing of Reilly*, 1977 *S.L.D.* 403:

> Frequent absences of teachers from regular classroom activity disrupt the continuity of the instructional process. The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra effort, when the regular teacher returns to the classroom. Consequently, many pupils who don't have the benefit of their regular classroom teacher frequently experience great difficulty in achieving the maximum benefit of schooling. The regular contact of pupils with their assigned teachers is vital to this process.

Chronic or excessive absenteeism has been found to warrant removal even where the absences in question were for legitimate medical or health reasons. *Board of Ed. of Pequannock Township v. Malley*, 1986 *S.L.D.* 866, *aff'd Comm'r* (Dec. 29, 1986), *aff'd State Bd. of Ed.* (April 3, 1987); see also *Reilly, supra* (teacher's dismissal was affirmed notwithstanding a claim that the teacher had been suffering from chronic respiratory ailments during most of her leaves of absence); In *I/M/O Tenure Hearing of Sheets*, 1980 *S.L.D.* 1536, *rev'g,* 1979 *S.L.D.* 790, (teacher's dismissal was affirmed despite the teacher's claim of having suffered from bronchitis, anxiety and depression, and/or hypertension during the period in question).

Moreover, chronic or excessive absenteeism has been found to constitute both "incapacity"[5] and "unbecoming conduct," within the meaning of *N.J.S.A.* 18A:6-10, such as to warrant dismissal from employment. In *Reilly, supra*, the Commissioner of Education affirmed the dismissal of a teacher whose absences ranged from 5 to 149 days a year over a ten year period, on grounds of incapacity and conduct unbecoming a teacher, notwithstanding the claim that most of the absences were in connection with a physical ailment plaguing the teacher

If a school board proves that a teacher is excessively absent, the burden then shifts to the teacher to show that his/her performance is unaffected by continued absences, notwithstanding the legitimacy of the excuse. *Vonita Smith v. Bd. of Ed. of the City of Trenton*, OAL Dkt. EDU 5255-88, *aff'd Comm'r* (April 18, 1984). There has been no such showing in this case; in fact, Respondent has conceded the truth of the charges of excessive absenteeism.

I **CONCLUDE** that Respondent is not protected by the LAD by virtue of her inability to perform adequately essential duties of a teacher; I further **CONCLUDE** that

[5] In her post hearing submission, Respondent argues that the charge of incapacity should have been delineated as inefficiency, which would have triggered certain protections for her. NJAC 18A: 6 -11. This argument is rejected out of hand because it was only raised in the post hearing brief. In addition, caselaw reflects that incapacity is a proper charge under the circumstances.

she is foreclosed from the protections in the workplace afforded by law to individuals with disabilities, based on the hardship devolving on the employer in finding appropriate substitute teachers and the hardship devolving on the students whose instruction is impermissibly interrupted, disjointed and uneven as a result of the absences and tardiness.

I further **CONCLUDE** that the Petitioner has sustained its burden of proving the tenure charges by preponderance of competent evidence. Accordingly, it is hereby ordered that Respondent's employment as an elementary teacher of special education be and hereby is terminated.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 9, 1997
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

12/12/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 17 1997
DATE

Barbara A. Hamed
OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

WITNESSES

Glenda Johnson-Green

Geneva Roberts

Julia Williams

Curtis Stalks

Douglas Lewis

Dr. James Cowan

Era Dunnell

Cheryl LuSane

Alison Nistad

EXHIBITS

	P-1	Request for Admission dated March 13, 1997
*	P-2	Chronology - 1993-94
*	P-3	Chronology - 1994-95
	P-4	Teacher's Annual Evaluation Report June 1995
*	P-5	Chronology - 1995-96
	P-6	Teacher Annual Evaluation Report dated June 24, 1996
*	P-7	Memo and Chronology 1994-95
	P-8	Letter dated may 8, 1997
	P-9	Handwritten letter dated November 20, 1995
	P-10	Handwritten letter dated November 29, 1995

* Marked for identification only; not received in evidence

**	P-11	Memo (tardiness) dated October 19, 1995
**	P-12	Memo (absences) dated October 24, 1995
**	P-13	Memo (absences) dated November 20, 1995
	P-14	Letter dated October 27, 1994
*	P-15	Memo (absences) dated December 23,1994
	P-15a	Memo (tardiness) dated December 24, 1994
	P-16	Memo (absences) 2 pages dated January 12, 1995
	P-17	Memo (absences) dated March 8, 1995
***	P-18	Instructional time book dated March 21, 1994
	P-19	Time reports dated September 3, 1994 to June 25, 1995
	P-20	Time reports dated September 4, 1993 to June 29, 1994
	P-21	Time reports dated September 1, 1995 to June 256, 1996
***	P-22	Time book dated February 3, 1993 to March 18, 1994
***	P-23	Time book November 1995 to March 1997
	P-24	Memo to Johnson Green from Constance Jones dated May 24, 1995
	P-25	Statement in opposition charge September 1996
	P-26	Form dated May 20, 1996
	P-27	Health History and Physical Exam dated August 2=30, 1996
	P-28	Discharge Summary from Sunrise House - 7 pages
	P-29	Compilation of information in P-19, 20, 21
	R-1	Letter from Johnson to Pickett dated March 27, 1997
	R-2	Memo to Jones from Roberts dated January 2, 1995
	R-3	Memo to Vivian Lampkin dated January 22, 1993

* Marked for identification only; not received in evidence

** These exhibits were stipulated by Respondent

***These exhibits were marked for identification; they consisted of the official time books for the period in question and were returned to Petitioner.

R-4 Memo to Jones - 2 pages dated January 22, 1993

R-5 Memo from Nurse Hobbs to Principal dated June 15, 1993

R-6 Policy and Regulations of EAP - 1989

R-7 Affirmative Action on Policy - 6 pages

R-8 EAP brochure - 2 pages

R-9 Confidential Assistance Program brochure - 2 pages

R-10 Newark Board of Education Employee's Medical Certificate - 5 pages

R-11 EAP client data - 4 page document dated November 30, 1995

R-12a Sunrise House

R-12b Union Hospital

R-13 Dr. Cowan's report dated April 9, 1997

J-1 Agreement between Newark Public Schools and Newark Teachers Union - pages 22 & 23 dated July 1, 1994 to June 30, 1997

J-2 Agreement between Newark Public Schools and Newark Teachers Union - pages 80, 81, 82, 83

IN THE MATTER OF THE TENURE	:	
HEARING OF CONSTANCE JONES,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK,	:	
ESSEX COUNTY,	:	

The record of this matter, including transcripts of the hearing conducted by the Administrative Law Judge (ALJ), and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4.

Respondent raises numerous objections, but essentially renews her contention that she is a handicapped individual by virtue of her addiction and the District, by seeking to terminate her, has not "reasonably accommodated" her handicap as required under New Jersey's Law Against Discrimination (LAD), *N.J.S.A.* 10:5-1 *et seq.*, and its federal counterpart, the Americans with Disabilities Act (ADA), 42 USC s.12101 *et seq.* Respondent also cites to the "reasonable accommodation regulation," set forth at *N.J.A.C.* 13:13-2.5(b), which provides that "***an individual who has a handicap is entitled to be reasonably accommodated by his/her employer for that particular handicap [and to be given] another chance*** should he/she be an alcoholic and/or drug addict." (Respondent's Exceptions at p. 13)

Respondent also identifies several findings of fact that were reached by the ALJ which she avers are erroneous in that they are not supported by testimony. (*Id.* at p. 2) She further lists findings that are lacking in the initial decision, asserting they are supported in the record, undisputed, and critical to a proper resolution of the within matter. (*Id.* at p. 5) Respondent's comments in this regard, as well the additional arguments presented by her in 28 pages of exceptions, are duly noted and were considered by the Commissioner in rendering the within decision.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ) that the Board has proven its charges against respondent by a preponderance of competent evidence and that her termination from employment is warranted, pursuant to *N.J.S.A.* 18A:6-10 and 11. The Commissioner finds that the initial decision squarely addressed the exception arguments raised by respondent with regard to her charge that the Board failed to offer her a reasonable accommodation to the limitations of her handicap. The Commissioner is further satisfied that the findings of fact set forth in the initial decision support the ALJ's conclusions and need not be supplemented, in that they constitute the material facts necessary for decision in this matter and were reached by the trier of fact who was in the optimum position to consider all testimony and weigh its content according to the credibility of the witnesses. In this latter regard, respondent has presented no cause to challenge the ALJ's credibility determinations. See *In the Matter of Raymond Morrison*, 216 *N.J. Super.* 143 (App. Div. 1987). Finally, the ALJ's recommendation herein is consistent with prior Commissioner's decisions and other case law addressing the LAD. See, for example, *IMO Cahill*, 245 *N.J. Super.* 397 (App. Div. 1991); *IMO Tenure Hearing of Edward Kozik, School District of the Township of West Deptford*, 96 *N.J.A.R.* 2d *(EDU) 335; IMO Tenure Hearing of Sondra Yanniello, Bd. of Ed. of the City of Millville*, 95 *N.J.A.R.* 2d (EDU) 262; and *IMO Tenure Hearing of Dorothy Howard, State-operated School District of Jersey City,* 93 *N.J.A.R.* 2d (EDU) 788.

Accordingly, for the reasons expressed therein, the Commissioner affirms the initial decision of the OAL and orders that respondent be dismissed from her tenured employment as of the date of this decision. Additionally, this matter is hereby forwarded to the State Board of Examiners for action as it deems appropriate pursuant to *N.J.A.C.* 6:11-3.6.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.,* within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MARCH 6, 1998
DATE OF MAILING MARCH 6, 1998

100-98

CORRECTED COPY

IN THE MATTER OF THE TENURE HEARING OF SHARON BATES, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.	:	
AND	:	COMMISSIONER OF EDUCATION
SHARON BATES,	:	DECISION
PETITIONER,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	
RESPONDENT.	:	
	:	

MARCH 6, 1998
MARCH 12, 1998 CORRECTED COPY

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1188-97 and
EDU 5561-97
AGENCY DKT. NO. 566-11/96 and
151-5/97

SHARON BATES,
Petitioner,
v.
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY
Respondent.

Mary J. Hammer, Esq., for petitioner (Bucceri & Pincus, Esqs.)

Gregory G. Johnson, Esq., for respondent

Record Closed: January 12, 1998 Decided: January 23, 1998

BEFORE **MARGARET M. HAYDEN**, ALJ:

These matters were transmitted to the Office of Administrative Law (OAL) from the Department of Education, on January 10, 1997 and June 2, 1997, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A hearing was scheduled for December 16, 1997 at the OAL, 185 Washington Street, Newark, New Jersey. At the hearing, settlement discussions were held and a settlement was reached.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Jan 23, 1998
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

1/27/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 29 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

jb

J-1

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
JAN 12 12 45 PM '98

Gregory G. Johnson, Esq.
17 Academy Street, Suite 208
Newark, New Jersey 07102
973-642-0001
Attorney for the Paterson Public Schools

IN THE MATTER OF THE TENURE HEARING OF SHARON BATES STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON	**BEFORE THE COMMISSIONER OF EDUCATION** **OFFICE OF ADMINISTRATIVE LAW** **OAL Docket No. EDUTH 05561-97N** **Agency Reference No. 151-5/97** **STIPULATION OF SETTLEMENT**

This Agreement made on December 16, 1997, by and between the parties, petitioner State-Operated School District of the City of Paterson ("District"), and respondent Sharon Bates, a tenured teacher, residing at 660 East 26th Street, Apt. 9, Paterson, N.J. 07504.

WHEREAS, Ms. Bates is a tenured teacher employed by the District;

WHEREAS, on August 23, 1996, the District withheld the Ms. Bates' salary increment for excessive absenteeism and excessive tardiness;

WHEREAS, on November 25, 1996, Ms. Bates' filed a petition of appeal with the Commissioner of Education contesting her increment denial, OAL Dkt. No. EDU 01188-97. The District filed an answer to the petition;

WHEREAS, on or about March 21, 1997, tenure charges were filed against Ms. Bates based upon based upon excessive absenteeism, excessive tardiness and insubordination;

WHEREAS, on May 7, 1997, the State District Superintendent acted to certify the charges against Ms. Bates, and suspended her for a 120 day suspension without pay pending a hearing pursuant to *N.J.S.A.* 18A:6-14. This matter was transmitted to the Office of Administrative Law, OAL Dkt. No. EDU 05561-97;

WHEREAS, on or about May 27, 1997, Ms. Bates's attorney filed an Answer denying the charges with the Commissioner of Education;

WHEREAS, the Office of Administrative Law consolidated the increment denial appeal

and the tenure matter on September 2, 1997; and

WHEREAS, in light of the nature of charges, and potential for protracted litigation, it is in the best interest of the parties to resolve the charges before the Commissioner of Education;

NOW THEREFORE BE IT RESOLVED, the parties hereby stipulate and agree as follows:

1. Ms. Bates agrees to resign her teaching position from the District, effective June 30, 1998;

2. The District agrees to withdraw the tenure charges in light of Ms. Bates's resignation from the District. Ms. Bates agrees not to seek employment with the District in the future.

3. The District agrees to restore Ms. Bates' salary increment for 1996-97, retroactive to July 1, 1996. The parties agree that Ms. Bates ~~should have been receiving~~ actually received an annual salary of $56,512 for the 1996-97 and 1997-98 school years. Under the terms of this Agreement, Ms. Bates' will receive the difference between $56,512 and $64,864 for the 1996-97 school year. All appropriate contributions will be made to the Division of Pensions on Ms. Bates' behalf. Upon receipt of the Commissioner's approval of this Settlement Agreement, the District will process a retroactive payment for increment denial monies due Ms. Bates within sixty (60) days.

4. The teacher's contract for 1997-98 is still in negotiations. When finalized, Ms. Bates will receive the appropriate salary under the new contract.

5. Ms. Bates agrees to withdraw her Superior Court complaint in *Sharon Bates v. Richard B. Garibell, et al.*, Superior Court Dkt No. L-7944-97, with prejudice. Ms. Bates will file a Stipulation of Dismissal by January 1, 1998.

6. Ms. Bates contends that her absences were attributable to breast cancer and other medical complications. Ms. Bates intends to apply for a disability retirement. The District will not oppose Ms. Bates' application for disability retirement.

7. Ms. Bates specifically acknowledges that she has been advised of the duty of the

Commissioner of Education pursuant to *N.J.A.C.* 6:11-3.6(a)(1) and *In re Cardonick* concerning referral to the State Board of Examiners for possible action regarding Ms. Bates's teaching certification.

8. The parties respectively acknowledge that each has had ample opportunity to seek independent legal counsel, financial or other advice regarding this Agreement, and that each is signing this Agreement freely and voluntarily, without coercion, duress or pressure from the other party.

9. This Agreement constitutes the full Agreement between the parties.

10. By entering this Agreement, each party releases and discharges the other with respect to all claims or rights that either party may have against the other. This includes all claims, including those of which either party is not aware and those not mentioned herein. The releases by each party apply to all claims resulting from anything which has happened up to now. It specifically includes, without limitation, all claims which Ms. Bates may have respecting tenure, discrimination on any basis, rights under any collective bargaining agreement, disability payments, sick leave, salary or any other matter pertaining to her employment.

11. This Agreement is subject to approval by the State District Superintendent, Office of Administrative Law, and Commissioner of Education.

FOR THE EMPLOYEE

Sharon J. Bates
Sharon Bates

Dated: December 16, 1997

Mary J. Hammer
Mary J. Hammer, Esq.
Attorney for Ms. Bates

Dated: December 16, 1997

FOR THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON

Dr. Edwin Duroy, Jr.
State District Superintendent

Dated: _____

Gregory G. Johnson
Gregory G. Johnson, Esq.

Dated: December 16, 1997

OAL DKT. NOS. EDU 1188-97 and EDU 5561-97 (CONSOLIDATED)
AGENCY DKT. NOS. 556-11/96 and 151-5/97

IN THE MATTER OF THE TENURE HEARING OF SHARON BATES, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.	:	
AND	:	COMMISSIONER OF EDUCATION
SHARON BATES,	:	DECISION
PETITIONER,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	
RESPONDENT.	:	
	:	

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

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick,* decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement and shall be referred to the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.6 for action against Bates' certificate, as it deems appropriate*

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MARCH 6, 1998
REMAILING MARCH 12, 1998

101-98

101-98

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF W.L.	:	DECISION
	:	

MARCH 9, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU10911-96

Agency Reference # DHP59-96

IN THE MATTER OF THE DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF WILLIAM LAWRENCE.

William Lawrence, appellant, *pro se*

Department of Education, respondent, appearing without representation, on the papers pursuant to *N.J.A.C.*1:1-5.6

Record Closed: December 31, 1997 Decided: January 22, 1998

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

This matter is brought by appellant to challenge his disqualification from school employment pursuant to N.J.S.A.18A:6-7.1 based upon the existence of a conviction of a crime involving the possession, or habitual use of a controlled dangerous substance.

PROCEDURAL HISTORY

By way of letter dated May 13, 1996 the Department of Education informed appellant that based upon the results of a fingerprint search conducted through the New Jersey State Police and the Federal Bureau of investigation he "may" be disqualified from school employment. The disqualifying crimes were both drug related and resulted in a conviction for "dangerous drugs" on December 12, 1971 as well as a conviction for possession of heroin on June 9, 1975. This letter informed appellant that he would have thirty days to submit documentation of either mistake in the records or of rehabilitation.

After several letters to appellant regarding his appeal on the basis of rehabilitation the Department found discrepancies in the facts and on December 10, 1996 transmitted the matter to the Office of Administrative Law (OAL) as a contested matter pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The only issue transmitted for determination is the issue of rehabilitation pursuant to the statute.

On October 28, 1997 a hearing was held at which the Department proceeded on the papers without representation. Appellant presented documentation as well as testimony. The record was left open to allow appellant time to obtain clarification of a letter which he had presented to the Department which he alleged was not accurate in stating that he had been enrolled in drug treatment since January 4, 1994 and drug free since that time. As of the October 28, 1997 date the undersigned had not received either the submission or any other communication from that appellant. Because of the appellant's statements regarding the time it might take to obtain a letter of clarification the undersigned left the record open for an additional period of time until December 31, 1997. At that time, after absolutely no communication from the appellant, the record closed in this matter.

UNDISPUTED FACTS

The majority of **FACTS** in this case are uncontested and are set out herein as **FACT**:

Appellant in this case had been working as a cafeteria worker for the West Orange school system. Most recently he was working for the East Orange schools. In 1996 the result of a criminal history background check revealed that he had two prior convictions for "controlled dangerous substances". The first offense was dated February 2, 1971 and is listed as "dangerous drugs". A conviction is recorded as having occurred on December 21, 1971 and a sentence of five years was imposed. The second conviction on June 9, 1975 was for possession of heroin on September 24, 1974 and the sentence was five years suspended confinement and three years probation.

Upon being notified of the disqualification issue by the Department appellant wrote a letter indicating that he had more than twenty years unblemished by any other criminal involvement and describing his situation. Among the letters of support that appellant proffered was a September 11, 1996 letter from David C. Roach, C.S.W. of the Health Department/Substance Abuse Program of the City of East Orange. That letter (R-1) states in pertinent part:

> Mr. Lawrence has been enrolled in treatment since January 4, 1994. He has discontinued all drug use since entering the program. Mr. Lawrence attends weekly group sessions, and monthly individual sessions. He has shown himself to be a hard worker and a very dependable and responsible person.
>
> In summary, Mr. Lawrence demonstrates substantial personal growth and rehabilitation due to his involvement with treatment.

Appellant is 48 years old, married and has four sons. In addition to working for the Board of Education until the question regarding his background arose, he coaches football. He also helps at Lincoln School on the playground with the children. He states that this is how he got his job originally. As of the time of the hearing he was doing odd jobs. Appellant states that he still goes to group meetings and speaks to recovering addicts.

Janice Lawrence testified that she and appellant have been married for sixteen years and he has had no problems with the law. She feels that when he was hired by

the Board of Education everything was all right. Her husband has a Black Seal Boiler license and she feels he has been rehabilitated.

Stanley O. Edwards testified that he has known appellant for twenty-one years. He states that the appellant has been instrumental in helping him. The witness has now started his own youth organization and appellant has been a member. He describes appellant as a dedicated coach, father and friend. He stated that appellant has also let the youth organization know he was not available on certain days when there were counseling sessions in East Orange.

As the above recitation is uncontroverted **I FIND** it to constitute operational **FACTS** for the purpose of this proceeding.

DISPUTED FACTS

Appellant testified that he has not had any problem with drugs for over twenty years. This is in direct conflict with the letter which he submitted from the Health Department/ Substance Abuse Program of the City of East Orange. (R-1) That letter stated clearly that:

> Mr. Lawrence has been enrolled in treatment since January 4, 1994. He has discontinued all drug use since entering the program Mr. Lawrence attends weekly group sessions, and monthly individual sessions. He has shown himself to be a hard worker and a very dependable and responsible person.
>
> In summary, Mr. Lawrence demonstrates substantial personal growth and rehabilitation due to his involvement with treatment.

At the hearing Appellant said that this letter he had submitted was not accurate and that he was not enrolled in drug treatment but helping counsel others. The reason that this matter was transmitted was for appellant to show rehabilitation and because the letter was at odds with his letter to the Department as well as his testimony in this matter. As a result an extended period of time was given to allow appellant to provide

documentation that the contents of the letter were in error. By the time the record had closed no such documentation had been provided.

FINDINGS OF FACT

As to the contested facts, after having heard the testimony of the witnesses and having reviewed the documentary evidence, and not having received documentation as to an alleged error in R-1 originally submitted by Appellant for consideration I **FIND** the following to be **FACT** in addition to those **FACTS FOUND** above as uncontested:

1) Appellant has presented evidence to the Department by way of an original letter that he has been enrolled in drug treatment and has discontinued all use since January 4, 1994.

2) Although given the opportunity to supplement the record with documentation that this information is in error and that he has not been enrolled in drug treatment but was a counselor, no further proof was supplied by appellant.

3) Due to the lack of any documentary support for appellants contention that he is a counselor rather than enrolled in drug treatment since January 1994 no credible proof as to the veracity of this claim has been offered.

4) Having failed to put forward proof that any error exists with respect to the letter by way of correction or otherwise petitioner is assumed for the purposes of this application to have been enrolled in drug treatment as of January 4, 1994 and drug free from that time.

LEGAL DISCUSSION

This matter comes for determination as to whether appellant should be disqualified from school employment pursuant to *N.J.S.A.*18A:6-7.1. There is no dispute as to the fact that appellant has two convictions which may disqualify him.

These convictions are for dangerous drugs in 1971 and 1974. The question arises as to whether appellant has demonstrated clear and convincing evidence of rehabilitation pursuant to *N.J.S.A.*18A:6-7.1(e). This provisions lists many considerations such as the nature and seriousness of the offenses as well as the date of the offenses.

Appellant argues that he was convicted in 1971 and 1974 and that these convictions for dangerous drugs and heroin are remote in time. He has offered much information on his present status and involvement in youth oriented activities. In addition however, he offered the letter from the East Orange Health Department/Substance Abuse Program. That letter stated unequivocally that he enrolled in drug treatment and had been drug free since January 1994. Although appellant disputes the accuracy of the letter and says he has been a counselor there and not enrolled in a substance abuse program he has offered nothing from the East Orange Board of Health/Substance Abuse Program indicating that their original letter was in error.

As far back as October 1996 the Department of Education pointed out the discrepancy to appellant and gave him the opportunity to submit information to resolve the discrepancy. None was supplied, even after a period of time after the hearing date to do so. The statement that he was enrolled in drug counseling in direct opposition to appellant's claim that he has been drug free for in excess of twenty years.

The standard of proof in this matter pursuant to the above cited statute is clear and convincing. Appellant has not offered proof of rehabilitation necessary to reach that level. In fact appellant has never offered any documentation the he was not enrolled in drug treatment as of January 1994 and drug free from that time. Appellant also did not bring any witness from the Program with relevant knowledge which he was free to do. Not only was no documentation received during the hearing but no documentation was received after the hearing which was permitted expressly to give appellant that opportunity. In fact no letter or any other contact was received after the date of the hearing.

CONCLUSION

Based on the foregoing **I CONCLUDE** that appellant has not offered clear and

convincing evidence affirmatively demonstrating rehabilitation.

ORDER

It is hereby **ORDERED** that appellants challenge to disqualification as a school employee pursuant to *N.J.S.A.* 18A:6-7.1 be and is hereby dismissed.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER**

OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

1/22/98
DATE

MARYLOUISE LUCCHI-MCCLOUD, ALJ

Receipt Acknowledged:

1/27/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 29 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

APPENDIX

EXHIBITS:

For Petitioner:

P-1 Letter dated Nov. 26, 1996 from Stanley O. Edwards

P-2 Copy of Letter dated March 15, 1996 from Jay Griggs

P-3 Letter dated March 15, 1996 from Janice Lawrence

P-4 Copy of letter dated March 13, 1996 from Karlene Mullings

P-5 Copy of letter dated March 14, 1996 from Barbara Glover

P-6 Copy of memo dated March 15, 1996 from Gwendolyn Harris

For Respondent:

R-1 September 11, 1996 letter from David C. Roach

R-2 Memo from Carl Carabelli to Debbie Antanaitis dated August 9, 1996

OAL DKT. NO. EDU 10911-96
AGENCY DKT. NO. DHP 59-96

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF W.L.	:	DECISION
	:	

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

Upon a careful and independent review of the record, the Commissioner adopts the findings and conclusion of the Administrative Law Judge and in the absence of any further submissions by the within appellant, that appellant has not demonstrated rehabilitation in accordance with *N.J.S.A.* 18A:6-7.1 and is, therefore, not qualified for school employment within the intent of the criminal history record check laws.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision as the final decision in this matter and affirms appellant's disqualification from school employment.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MARCH 9, 1998
DATE OF MAILING MARCH 9, 1998

102-98

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF R.D.H.	:	DECISION
	:	

MARCH 9, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5214-97

AGENCY DKT. NO. DHP#41-97

IN THE MATTER OF THE DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF ROBERT D. HOLLOWAY

Robert L. Brown, Esq., appearing for Appellant

Carl Carabelli, Manager, appearing for respondent

Record Closed: January 12,1998 Decided: January 26, 1998

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

Appellant is challenging the disqualification from school employment on the basis of a criminal record. This matter was transmitted on May 7, 1997, to the Office of Administrative Law (OAL) to afford Appellant an opportunity to demonstrate rehabilitation in accordance with *N.J.S.A.* 18A:6-7.1.

FINDINGS OF FACT

Based on the record before me, including the testimony of Appellant as well as the documents submitted by the Department of Education, I make the following findings of fact in this matter.

1. Appellant has been employed by the Irvington Board of Education since May 1992, in a general maintenance position.

2. As a result of a background check required by statute Appellant was disqualified from employment by the District by letter dated March 19, 1997.

3. Appellant's background search indicated convictions on two separate occasion for constructive possession of controlled dangerous substance (CDS). The first offense, which occurred on May 3, 1989, was a disorderly person offense, possession of marijuana, which was disposed of in the Municipal Court of West Orange. The penalty included one year probation as well as a fine of $850 plus costs and other fees and surcharges. The second incident occurred on May 15, 1989. The offense was a crime of the third degree, possession of CDS, cocaine, with intent to distribute. The penalty imposed was a term of three years probation, a condition of which was that the Appellant submit to random urine monitoring.

4. Appellant successfully completed his probation without incident.

5. There has been no further criminal activity since these two incidents.

6. Appellant completed 10th grade high school; he also attended Newark Technical School where he developed some vocational skills including carpentry and some knowledge of electricity.

7. Since the two incident in his record, Appellant was employed by AT&T as a carpenter. He left that employment to take the position with the Irvington Board of Education.

8. Appellant is a church member and cares for his young, school aged daughter.

LEGAL DISCUSSION AND CONCLUSION

Appellant was suspended from his position with the Irvington School District pursuant to the statutory requirement that no school system under the supervision of the Department of Education and Board of Education shall employ a school maintenance worker, unless the employer has first determined that no criminal record information exists on file either in the Federal Bureau of Investigation or the State Bureau of Identification. The statute specifies that an individual

> shall be disqualified from employment if the individuals criminal history record check reveals a record of conviction of any of the following crimes and offenses:. . . b. A crime or offense involving the manufacturer, transportation, sell, possession, or habitual use of a control dangerous substance. . . . *N.J.S.A.* 18A:6-7

Clearly the Appellant is disqualified from employment on the basis of this section of the statute; however, the statute also provides that an individual shall not be disqualified from employment if he has affirmatively demonstrated clear and convincing evidence of his rehabilitation. *N.J.S.A.* 18A:6-7.1(e). In this case, Appellant has submitted, as required by the Department of Education, notarized statements from the former Mayor of Orange, Robert L. Brown, who is also a former state legislator, Robert Brewer, Associate Minister of Emanuel Missionary Baptist Church, Newark, New

Jersey, Ralph C. Steele, President of Irvington PAL Board of Directors and head coach of the Irvington Golden Knights football and wrestling teams, Ms. Vergie Jenkins, Member of the Emanuel Baptist Church, Alice Richards, Assistant Principal of the Chancellor Avenue School in Irvington, Willie McKay, co-worker, Eddie Vazquez, Appellant's immediate supervisor, Frank P. Aiello, Supervisor of buildings and grounds for the Irvington Board of Education and Russella Holloway, Appellant's sister, attesting to Appellant's good character and rehabilitation.

The statute requires consideration of several factors in reaching a determination of affirmative rehabilitation. Among those factors is the nature and seriousness of the offenses as well as the circumstances under which the offenses occurred. The offenses of which Appellant was convicted, the possession of CDS, are serious. However, in both instances Appellant was arrested in the company of other actors in a situation where the ownership of the illegal substances could not be determined. Accordingly, Appellant's convictions were for the constructive possession of CDS. I **FIND** credible his testimony that he did not use nor was he the owner of control dangerous substance.

Moreover, both offenses occurred within a short period of time of each other. Since that time, Appellant has had no further negative interaction with law enforcement authorities. At the time of the offenses in May 1989, Appellant was 22 years old. He is now approximately 30 years of age and has demonstrated through his employment record as well as the documents which was submitted by the above referenced individuals that he has become a more responsible and productive person. In addition, it must be noted that he completed his probation on the two charges without any further incident as is demonstrated by the inclusion of a certificate from the Essex Vicinage Probation dated April 8, 1997. The final factor to be considered in a determination such as this is the nature and responsibility of the position to which the convicted individual would hold. While a member of the custodial staff has, by the nature of his employment, regular contact with pupils in school district, the contact is not to the same

degree and intensity as, for example, members of the administrative and instructional staff.

Based on the documentary evidence, Appellant's good demeanor and appearance at the hearing as well as his forth right explanation and admission with respect to certain errors of fact which were perceived in his counsel's presentation, I **CONCLUDE** that this Appellant has sustain his burden of demonstrating by clear and convincing evidence that he has been rehabilitated since the incidents reflected on his criminal record.

ORDER

Accordingly, it is hereby **ORDERED** that the disqualification from school employment of Robert D. Holloway be and hereby is **REVERSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 26, 1998
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

1/30/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 2 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

jb

OAL DKT. NO. EDU 5214-97
AGENCY DKT. NO. DHP 41-97

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF R.D.H.	:	DECISION
	:	

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

Upon careful and independent review, and based upon the credibility determinations of the Administrative Law Judge (ALJ) and the absence of any evidence to rebut appellant's account of the arrests underlying his 1989 convictions, the Commissioner concurs with the ALJ's conclusion that appellant has demonstrated rehabilitation within the intendment of the criminal history record check statutes set forth at *N.J.S.A.* 18A:6-7.1 *et seq.*

Accordingly, the initial decision of the OAL is adopted for the reasons expressed therein, and appellant is deemed eligible for school employment as a maintenance worker.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MARCH 9, 1998
DATE OF MAILING MARCH 9, 1998

103-98

E.P., on behalf of minor, L.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MILFORD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

MARCH 9, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ON MOTION
OAL DKT. NO. EDU 5545-96
AGENCY DKT. NO. 148-4/96

E.P. on Behalf of Minor L.M.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF MILFORD, BERGEN COUNTY,
Respondent.

E.P., *pro se*

Mario R. LaBarbara, Esq., for respondent

Record Closed: January 7, 1998 Decided: January 26, 1998

BEFORE **ELINOR R. REINER**, ALJ:

On or about April 25, 1996, petitioner, E.P., parent and legal guardian of L.M., filed a petition of appeal before the Commissioner of Education contesting respondent, New Milford Board of Education's action to disenroll L.M. from New Milford High School. Petitioner also requested that respondent be barred from compelling tuition payments from petitioner on behalf of L.M. or in the alternative limiting tuition payments to the period from November 1996 through April 25, 1996. On May 6, 1996, respondent filed an answer to the petition requesting that the Commissioner confirm its action disenrolling L.M. for nonresidency and directing petitioner to pay the cost of education for L.M., a non-resident student.

The matter was transmitted to the Office of Administrative Law on May 24, 1996, for a hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was assigned to the undersigned judge on July 10, 1996 and a telephone prehearing conference held on August 28, 1996. At the time of the prehearing conference, petitioner was represented by Melanie Brown, Esq. The issues were isolated as follows:

1. Does petitioner owe respondent tuition payments for the school years 1994-95 and 1995-96?

    a. Was there a period of time L.M. resided in New Milford?

2. Is respondent estopped from compelling tuition payments from petitioner because of its failure to promptly request same?

During the prehearing conference the parties agreed that they would be pursuing settlement; a settlement conference was scheduled for September 10, 1996. On or about that date, the undersigned was informed that a settlement had been reached. By letter dated October 21, 1996, counsel for respondent advised Ms. Brown that he had sent her a form of proposed settlement but had not heard from her. Since the settlement agreement was not forthcoming, the matter was rescheduled for hearing on October 30, 1997 at 9:00 a.m. at the Office of Administrative Law.

Prior to that date, by facsimile dated October 21, 1997, Melanie Brown indicated that it had been approximately one year since her firm last heard from E.P. The letter further indicated that although E.P. had authorized the settlement offer made to the Board of Education on her behalf, she had not responded to telephone calls or correspondence nor had she honored the settlement. Brown further stated that on December 19, 1996 via telefax E.P., without explanation, formerly terminated her

representation. Of import, Brown further stated that both by certified and regular mail, she had advised E.P. of the trial date of October 30, 1997 and the necessity of her appearance. The letter was sent to E.P. at the address of 8-24 Rock Creek Terrace, Englewood, New Jersey 07631. In that same correspondence, she enclosed a substitution of attorney form which was not returned.

Since Melanie Brown's services were terminated by E.P., Melanie Brown did not appear at the hearing scheduled for October 30, 1997 at the Office of Administrative Law. E.P. did not appear nor did she inform the court as to any reason for her non-appearance. Respondent's attorney appeared and indicated that in light of E.P.'s non-appearance he would move for dismissal of this matter and reimbursement of tuition cost.

On November 5, 1997, respondent filed a notice of motion requesting dismissal of the complaint and judgment for respondent for tuition due from petitioner in the amount of $17,944. The proof of mailing attached to the notice of motion indicated that respondent had mailed the motion on November 3, 1997 in the U.S. Post Office in New Milford, New Jersey by certified mail return receipt requested and by regular mail to E.P. at 8-24 Rock Creek Terrace, Englewood, New Jersey 07631, the addressee's last known address. On December 1, 1997, respondent filed a supplemental affidavit stating that he had a receipt for the certified mail but had not received the "green card" which shows that E.P. received the certified mail.

On December 9, 1997, at the request of the undersigned, respondent sent a notice of motion to a second address which appeared on the OAL transmittal sheet of 271A Franklin Road, Englewood, New Jersey 07631. The proof of mailing indicated that respondent had mailed the motion on December 8, 1997 in the U.S. Post Office in New Milford, New Jersey, by certified mail, return receipt requested, and by regular mail to E.P., at 271A Franklin Road, Englewood, New Jersey 07631-3813. Respondent filed a supplemental affidavit on January 7, 1998 indicating that he had a receipt for the certified mail and that the letter had been returned as not deliverable as addressed, unable to forward.

Based on the above, I **FIND** as follows:

1. E.P. was sent a notice of the hearing of October 30, 1997 at 9:00 a.m. at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey by her attorney Melanie Brown, Esq.

2. Notwithstanding such notice, petitioner failed to appear.

3. Petitioner was sent a notice of motion to the address which was her last known address, 8-24 Rock Creek Terrace, Englewood, New Jersey 07631 by certified mail return receipt requested and by regular mail. There was no indication that petitioner received the mail at that address.

4. Petitioner was sent a notice of motion by certified mail and regular mail to another address specified as hers, 271 Franklin Road, Englewood, New Jersey. The return receipt requested was not received but the letter sent by regular mail was returned as nondelivered.

5. Respondent attempted to serve petitioner at both addresses the court had on record for petitioner.

6. Petitioner has not communicated in any manner with attorney for respondent or this court regarding her non-appearance, or in response to the properly served motions.

In light of the above, it is hereby **CONCLUDED** that this matter must be dismissed for petitioner's failure to appear on October 30, 1997 at the Office of Administrative Law, as well as petitioner's failure to respond in any manner to the motion that was attempted to be served upon her.

Respondent also seeks as part of its motion the sum of $17,944 for tuition due from petitioner. Respondent relies for support on the affidavit of its attorney, Mario R. LaBarbera, as well as the affidavit of Frank Ceurvels, business administrator and board secretary of New Milford Board of Education. Those affidavits indicate that E.P. is the mother of L.M., who attended the New Milford public schools. The affidavits indicate that neither petitioner nor L.M. were residents of the Borough of New Milford after July 27, 1994. Although not entitled to attend the New Milford School, L.M. remained in the borough high school for the academic years of 1994-95 and 1995-96. The tuition due to the New Milford Board of Education is $17,944.

Based on the above undisputed facts, as supported by the affidavits, it is hereby **ORDERED** that petitioner, E.P. owes respondent the sum of $17,944 in tuition reimbursement.

It is hereby **ORDERED** that respondent's motion is granted and petitioner's appeal is dismissed.

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

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

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

January 26, 1998
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

1/30/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 2 1998
DATE

Barbara A. Harnes
OFFICE OF ADMINISTRATIVE LAW

al

OAL DKT. NO. EDU 5545-96
AGENCY DKT. NO. 148-4/96

E.P., on behalf of minor, L.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MILFORD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ's finding that the within Petition of Appeal should be dismissed for petitioner's failure to appear, and for her failure to respond to the Board's motion for reimbursement of tuition.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein. Pursuant to *N.J.S.A.* 18A:38-1 *et seq.*, the Commissioner directs that petitioner remit to the Board tuition for $17,944, as determined due and owing for L.M.'s ineligible attendance in the District.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MARCH 9, 1998

DATE OF MAILING MARCH 9, 1998

KENILWORTH EDUCATION ASSOCIATION,	:	
CHARGING PARTY,	:	
V.	:	
KENILWORTH BOARD OF EDUCATION, UNION COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT.	:	DECISION
LINDA AMITRANO,	:	
PETITIONER,	:	
V.	:	
KENILWORTH BOARD OF EDUCATION, UNION COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

In consolidated matter, petitioning Association and Linda Amitrano, office secretary whose position was eliminated, alleged bad faith bargaining and violation of Amitrano's tenure and seniority rights in Board's failure to appoint her to the new position of Clerk/Receptionist/Attendance Officer immediately upon its creation on July 1, 1995.

ALJ found that the Board did not engage in bad faith bargaining or violate the New Jersey Employer-Employee Relations Act, nor did it violate Amitrano's tenure and seniority rights, by not appointing Amitrano to the new position until August 1, 1995. PERC affirmed those aspects of the ALJ's decision within its jurisdiction.

With respect to those aspects under the Commissioner's jurisdiction, Commissioner adopted initial decision as his own and dismissed the petition. Commissioner found that the Board's conduct was in no manner an arbitrary, capricious or unreasonable exercise of the Board's lawful discretion as the Board promptly offered petitioner the new full-time position and appointed her immediately upon her first indication that she was willing to work for the salary set by the Board pending further negotiations.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ARNOLD H. ZUDICK
Administrative Law Judge T/A
c/o Public Employment Relations Commission
CN 429
495 West State St.
Trenton, NJ 08625-0429
(609) 292-6780

INITIAL DECISION
PERC DKT NO. CO-H-96-76
OAL DKT. NO. EDU-11374-95
CONSOLIDATED

KENILWORTH BOARD OF EDUCATION,
Respondent,
v.

KENILWORTH EDCATION ASSOCIATION,
Charging Party.

LINDA AMITRANO,
Appellant,
v.

KENILWORTH BOARD OF EDUCATION,
Respondent.

Gail Oxfeld Kanef, Esq., for Charging Party and Appellant (Balk, Oxfeld, Mandell & Cohen, attorneys)

James P. Granello, Esq., for Respondent

Record Closed: October 1, 1997 Decided: October 27, 1997

BEFORE **ARNOLD H. ZUDICK, ALJ** t/a

STATEMENT OF THE CASE

This matter involves consolidated cases arising in two State agencies concerning employee Linda Amitrano, and the employment position she held, Clerk/Receptionist/Attendance Officer. The Charging Party alleged before the New Jersey Public Employment Relations Commission that the Employer refused to

Officer ("Position"). Although the Association listed subsection 5.4(a)(3) as an alleged violation on the charge form, it did not allege any facts in the body of the charge to support a 5.4(a)(3) violation. The Association seeks an order requiring the Board to negotiate over all the terms and conditions of employment for the Position.

On September 29, 1995, Linda Amitrano filed a Petition of Appeal with the Commissioner of Education (A-2), alleging the Board violated her seniority and tenure rights by failing and refusing to appoint her to the Position effective July 1, 1995. The Board appointed her to the Position effective August 1, 1995. Amitrano requested the Department of Education award her full back pay and other emoluments as if she were in the position effective July 1, 1995.

On October 2, 1995, the Board filed an Answer to the Petition (A-7) admitting that the Position remained vacant from July 1, 1995 until August 1, 1995, but denying that Amitrano's seniority and tenure rights were violated by not appointing her to the Position until August 1, 1995. The Board asserted that it did not fill the Position until August because it was not until July 27, 1995 that the parties agreed upon what salary to pay Amitrano pending further salary negotiations.

On October 5, 1995, the Commissioner of Education transferred the Petition to the Office of Administrative Law (OAL) as a contested case.

On March 15, 1996, the Commission issued a Complaint and Notice of Hearing (A-1) in the unfair practice charge assigning that case to me as Hearing Examiner. On March 22, 1996, the Board filed an Answer to the Charge (A-3) denying it violated the Act. The Board asserted that it negotiated with the Association over the salary for the Position.

Based upon the entire record, I make the following:

FINDINGS

The parties introduced the following joint stipulations of fact (A-10), and joint exhibits (A-9).[3/]

1. Petitioner has been employed in the district for 15 years since September, 1982 (A-10 #2).

2. During the 1994-95 school year, petitioner was employed as a full-time media center secretary (10 months) at a salary of $17,389 on step six (6) of the 1994-95 10-month secretarial salary guide (A-10 #1).

Step six (6) was the top of the guide in 1994-95. A seventh (7th) step was added for 1995-96 listed as $18,406, which is the salary Amitrano would have received for that position had she remained in that full time ten month position through the 1995-96 academic year (J-1, 1994-97 collective agreement (J-13).

3. By letter of April 24, 1995 (J-2), Amitrano was notified that her library clerk position (media center secretary) was being reduced to half-time, but that her tenure/seniority rights would be retained.

4. On April 27, 1995, principal made inquiry to petitioner whether she would be interested in the new clerk/receptionist/ attendance officer position (A-10 #5).

3/ The stipulations and exhibits are being presented chronologically in the FINDINGS and, therefore, they do not match the numbering sequence in Exhibit A-10.

7. On May 8, 1995, respondent Board of Education moved to create a full-time 12-month position of clerk/receptionist/ attendance officer (A-10 #4).

8. On May 9, 1995, School Business Administrator/Board Secretary communicated to KEA President the appointment of petitioner to new 12-month position and proposed the terms and conditions under which she would serve. Including calculating her 12-month salary by prorating her 1995-96 10-month full-time salary of $18,406 by two (2) additional months' work and then placing her on the closest corresponding step of the 12-month secretarial guide (A-10 #7).

The letter Business Administrator/Board Secretary Vincent Gonnella sent KEA President Howard Toplansky on May 9, 1995 (J-7) provided in pertinent part:

> Because this employee will be making a lateral move from a 10 month secretary/clerk to a 12 month secretary/clerk, terms and conditions for Mrs. Amitrano's employment in this position must be established. The Board has proposed the following terms for this position:
>
> -Contract year will run from, July 1, 1995 to June 30, 1996.
>
> -Mrs. Amitrano will be placed on Step 3 of the 12 Month Secretary/Clerk salary guide. (Calculated by prorating 95-96 salary upwards for 2 added months work, then placing on closest corresponding step.)
>
> -Upon completion of one year of employment in the 12 month position, four weeks (20) days vacation will have accrued.

11 of the 12-month guide plus the $2,000 stipend for call-in service. The Association based its prposal on the argument that petitioner was paid on the top step of the 10-month guide and should be paid on the top step of the 12-month guide (A-10 #9).

By letter of May 15, 1995 (J-9), Toplansky notified Gonnella that Amitrano was accepting the Position, but added the following language concerning her salary:

> It should be noted that Linda Amitrano will have completed 12 years of service in the Kenilworth School District and therefore her correct salary for 1995-1996 should be $32,644. This figure represents the amount recognized by the operant [sic] bargained agreement. Any other figure would represent the following:
>
> 1. A violation of the existing contract.
>
> 2. An individually negotiated contract between the Board of Education and a member of the bargaining unit and, therefore, unlawful.
>
> 3. A discriminatory act based upon board of education practice.
>
> The Board of Education cannot point to any provision in the existing contract to justify withholding any part of Linda Amitrano's salary. Any attempt toward this end will be viewed by the Kenilworth Education Association as improper and unlawful.

14. On June 16, 1995, the KEA modified its position to make the $2,000 stipend part of the base salary of $32,644 (A-10 #11).

By letter of June 16, 1995 (J-11), Association President Toplansky responded to J-10, and as a "settlement position" offered that the $32,644 salary include the $2,000 stipend. Toplansky concluded J-11 by accepting the other offers Gonnella made in J-7. He said:

> All other matters covered in the original correspondence of May 9, 1995 from the Board of Education Secretary are satisfactory.

15. On June 28, 1995, the KEA, through the NJEA representative, offered to accept a salary of $30,212 and place petitioner at step 9 of the 12-month guide (A-10 #12).

By letter of June 28, 1995 (J-12), the Board's attorney notified Board Secretary Gonnella that the Association proposed that Amitrano be placed on step 9 of the 12 month secretarial guide for 1995-96 at $30,212 including the $2,000 stipend.

16. On July 11, 1995, the Board of Education notified the KEA representative that it rejected their latest proposal. The Board offered to go to impasse or to resolve the issue through contract grievance/arbitration (A-10 #13).

The Board's attorney notified the Association by letter of July 11, 1995 (J-13) that it was rejecting the Association's salary proposal for Amitrano and maintaining its own proposal of $22,408 plus the $2,000 stipend. The Board attorney concluded J-13 by asking the Association if it preferred to proceed to mediation, but the Board also offered to arbitrate any alleged contract breach. The pertinent part of J-13 provides as follows:

The Board's attorney responded by letter of July 14, 1995 (J-15), agreeing to meet face-to-face and offering Amitrano the position. He said:

> This will serve to acknowledge receipt of your letter dated July 13, 1995. In light of the fact that the Association has never requested face-to-face bargaining over this issue, I was under the impression that my discussions with you and Howard Toplanski, President of the KEA, constituted good faith negotiations over this matter. If the Association believes that face-to-face bargaining is required, we are certainly willing to meet you face-to-face in negotiations. I will arrange to offer dates from the Board's finance committee for that purpose.
>
> The Board of Education stands ready to offer Ms. Amitrano the 12-month position in question. However, we are unwilling to have her salary dictated to us by her or the Association. As I have indicated in previous correspondence, if the Association believes there is a contractual requirement to pay Ms. Amitrano at the maximum step of the 12-month guide, then we urge the Association to make such representation to us and we would attempt to expedite an arbitration over this issue. In light of the fact that you have not come forward and made such a demand, we can only assume that you agree with us that this matter is subject to negotiations and that our offer to Ms. Amitrano is within the Board's right to do so. However, if at a point of impasse between the parties we cannot come to an agreement on salary, then the Board has the right

> In assessing the merits of the claim by the Association that Ms. Amitrano would be entitled to back pay since the position became vacant, I am of the opinion that such claim lacks legal merit. Up until last evening neither Ms. Amitrano nor the Association gave any indication of a willingness to begin work at the rate of salary that was set by the Board of Education. In fact, by letter dated May 15, 1995 written by Mr. Howard Toplansky, it was emphatically stated that Ms. Amitrano should receive the salary of $32,644 and any other figure would be considered "a violation of the existing contract." Accordingly, there was ample justificaion for not placing Ms. Amitrano in this position at an undetermined salary. By accepting the employment at the salary set by the district subject to negotiations, we minimally have the ability of paying her on a recognized salary and the Board need not change its position as to what salary should be paid for the 1995-96 school year.

20. On August 7, 1995, the Board of Education acted to appoint petitioner to the new position effective August 1, 1995 at third step of 12-month guide at $22,408 plus $2,000 stipend and rejected Association's latest proposal to place petitioner at step 7 and offered no counterproposal (A-10 #16).

By resolution on August 7, 1995 (J-20), the Board made the above appointment at the above rate, effective from August 1, 1995 through September 30, 1995, and included the following sentence:

> **These** conditions are pending completion of negotiations **with the KEA.**

These conditions are pending completion of negotiations with the Kenilworth Education Association.

23. On September 28, 1995, the parties met face-to-face for the second time to discuss petitioner's salary. No new proposals were submitted by either side. The KEA indicated that it intended to appeal to the Commissioner of Education regarding failure to appoint petitioner from July 1, 1995 forward to the new position. The Board committee believed a genuine impasse existed and on September 29, 1995 filed a notice of impasse with PERC (A-10 #18).

24. The parties have not met since that time, and the KEA/petitioner pursued litigation before PERC and the Commissioner of Education (A-10 #19).

25. By letter of September 29, 1995 (J-25), the Board attorney notified Gonnella of the results of the September 28th negotiations session and that the KEA did not acknowledge that an impasse existed. On October 3, 1995, the Board filed a Notice of Impasse with the Commission (J-26) regarding the new Position (Docket No. I-96-97).

26. No evidence was presented on whether the parties engaged in mediation or subsequently reached a final agreement on Amitrano's salary.

ANALYSIS

THE CHARGE

In its post-hearing brief, the Association argued that while the Board attended negotiation sessions it was merely going through the motions because it made only one proposal and showed no

> is not necessarily inconsistent with a sincere desire to reach an agreement. An adamant position that limits wage proposals to existing levels is not necessarily a failure to negotiate in good faith.
> [Id. at 40].

Finally, the Commission in that case also explained the difference between refusing to negotiate salary and proposing a salary based on economic realities as viewed by the employer. It again concluded that the focus is on the willingness to negotiate and a desire to reach an agreement.

> There is a significant difference between a refusal to discuss or negotiate salary, regardless of the reason, and the formulation of a proposal based upon the economic realities as viewed by the public employer. In the first, there may be a refusal to negotiate in fact; the employer has refused to meet with the employee organization on the issue. In the second, the situation presented herein, the public employer is willing to meet with the employee organization and negotiate on salary and all other issues. The fact that the negotiating position reflects the severe economic crisis which the public employer feels exists, does not negate the intention to reach an agreement. It is rather a reflection of the duty imposed on the employer. Good faith collective negotiations do not require one party to adopt the position of the other; they only require a willingness to negotiate the issue with an open mind and a desire to reach an agreement. The fact that the two parties

The Association also relied on the decision in Township of Gloucester, H.E. No. 87-18, 12 NJPER 671 (¶17254 1986), adopted P.E.R.C. No. 87-42, 12 NJPER 805 (¶17308 1986) to support its case. In Gloucester, a Civil Service desk audit resulted in upgrading an employee's job to a new position. Since the parties contract had not provided a salary for that position the parties engaged in negotiations. The Employer proposed a $1,000 increase for the employee which the union rejected. After a second negotiations session ended without agreement, the Employer's Business Administrator processed the $1,000 increase through Civil Service before going on vacation, and offered some assurance he would discuss the matter further upon his return. The Hearing Examiner found the Employer violated the Act by implementing the increase in the middle of the negotiations process and without the union's acceptance of the Employer's assurances for subsequent negotiations.

The Association's reliance here on certain phrases in J-7, J-15 and J-19, and the holding in Gloucester to support its case is misplaced. The facts here show that despite the Board's hard negotiations position on salary, it had a consistent desire to reach agreement and worked toward that goal in good faith.

Immediately after formally creating the new Position on May 8, 1995, and after having already determined Amitrano's interest in the Position, the Board notified the Association of the Position on May 9, 1995 and proposed a salary and other terms for the Position (J-7). The Board's language in J-7 that it would like to post the position if the Association found the terms unacceptable was not "take it or leave it" language. The Board did not threaten to take action, nor decline to negotiate, and it reinforced its willingness to negotiate on June 13, 1995. Rather, the Board's J-7 language reflected the realities of fulfilling its duty to manage the operations of the school district and get the work done.

Position, the Association, at the July 27th negotiations session, accepted the Board's proposed salary subject to further negotiations in order to place Amitrano in the Position without further delay.6/

The Board's use of the word "dictated" in J-15 and the language: "salary that was set by the Board" in J-19, was not evidence of bad faith. The "dictated" remark was nothing more than the normal language used in testy or heated negotiations. The "salary set" language was taken out of context. Later in the same paragraph it was used again but with a qualifier. It read: "salary set by the district subject to negotiations..." In the context of the paragraph it did not demonstrate an attempt to circumvent the negotiations process.

The Commission decision in Ocean County College, P.E.R.C. No. 84-99, 10 NJPER 172 (¶15084 1984) is more relevant here than Gloucester. In Ocean, the College rejected the Association's economic proposals, did not make economic counter-proposals, and argued that salaries for unit employees were already on par with the highest salaries at other county colleges. Thus, the College offered no increase. The College, however, met frequently with the Association, repeatedly discussed salaries, agreed to some non-salary proposals, asked for but did not receive a comparability study from the Association, and fully participated in the Commission's impasse procedures. The Commission, citing State of New Jersey, and noting the totality of the Board's conduct, held that the College did not negotiate in bad faith.

6/ Finding of Fact No. 19 (A-10 #15) shows that the Association indicated that Amitrano was willing to accept the Board's proposed salary pending further negotiations. Although that finding does not say the Association accepted the same proposal, I infer it did. The Association has not denied as much.

not infer that its decision to first negotiate the salary before filing the Position was in bad faith. Since the Board's decision was lawfully based the result could not have violated Amitrano's seniority or tenure rights. A public employer is entitled to negotiate terms and conditions of employment before filling a position.

On June 13, 1995 (J-10), two weeks before the Position became available, the Board notified the Association that it would not fill the Position without negotiating salary and benefits. While that action may have increased pressure on the Association (and Amitrano) to resolve the salary issue, it was no greater or more unusual pressure than normally exists in the negotiations process.

Consequently, the Board's actions here to reach an agreement with the Association before Amitrano was placed in the Position was consistent with the intent of the Act and good faith behavior. Therefore, it could not have violated Amitrano's seniority and tenure rights. To hold otherwise would place the Board in a "catch 22" whereby acting consistent with one law it violates another. Such a result is inconsistent with public policy. The Petition should, therefore, be dismissed.

Accordingly, based upon the above Findings and Analysis, I make the following:

CONCLUSIONS

1. The Board did not engage in bad faith negotiations or otherwise violate the Act by bargaining hard over the salary for the Clerk/Receptionist/Attendance Officer position.

2. The Board did not discriminate against the Association by bargaining hard over the salary for the Position.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties any party may file written exceptions with the **PUBLIC EMPLOYMENT RELATIONS COMMISSION, P.O. Box 429, Trenton, New Jersey 08625-0429;** or with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State St., P.O. Box 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10/27/97
Date

ARNOLD H. ZUDICK, ALJ t/a

Receipt Acknowledged:

10/29/97
Date

Millicent A. Hasell
PUBLIC EMPLOYMENT RELATIONS COMMISSION

Date

COMMISSIONER, DEPARTMENT OF EDUCATION

Mailed to Parties:

Date

OFFICE OF ADMINISTRATIVE LAW

We also reject the contention that the Board violated the Act by not appointing Amitrano to the new position until August 1, 1995. According to documents in the record, the Board was not informed until July 27, 1995 that Amitrano was willing to work under the salary proposed by the Board, subject to ongoing negotiations with the Association. Until that time, the Board believed that Amitrano would not accept the new position unless the salary was acceptable to her and the Association. Once informed otherwise, the Board took immediate action to appoint Amitrano to the position, effective August 1, under the Board's terms pending the completion of negotiations. Under these circumstances, we cannot conclude that the Board was not acting in good faith by not appointing Amitrano on July 1.

Accordingly, we dismiss the Complaint. Pursuant to the Joint Order, we transfer the remaining issues to the Commissioner of Education.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Ricci and Wenzler voted in favor of this decision. Commissioner Buchanan voted against this decision. Commissioner Boose abstained from consideration. Commissioners Finn and Klagholz were not present.

DATED: January 29, 1998
Trenton, New Jersey
ISSUED: January 30, 1998

employment for a new position, clerk/receptionist/attendance officer.

On September 29, 1995, Linda Amitrano filed a Petition of Appeal with the Commissioner of Education alleging that the Board violated her seniority and tenure rights by refusing to appoint her to the new position effective July 1, 1995.

On March 15, 1996, a Complaint and Notice of Hearing issued on the unfair practice charge. The hearing was postponed pending resolution of a motion to consolidate the charge with the Petition. The Board filed an Answer denying that it had violated the Act or education law.

Pursuant to a Joint Order of the Commissioner of Education and the Acting Chair of the Commission, the cases were consolidated. P.E.R.C. No. 97-1, 22 NJPER 265 (¶27139 1996). Commission Hearing Examiner Arnold H. Zudick was designated as a temporary Administrative Law Judge. On June 23, 1997, the parties stipulated facts and exhibits. They filed post-hearing briefs by October 1, 1997.

On October 27, 1997, the Administrative Law Judge issued an Initial Decision recommending dismissal of the consolidated matter. He concluded that the Board had not engaged in bad faith negotiations or otherwise violated the Act by bargaining hard over the salary for the clerk/receptionist/attendance officer position; had not discriminated against the Association by bargaining hard over the salary for the new position; and had not violated

PERC DKT. NO. CO-H-96-76, OAL DKT. NO. EDU 11374-95 (CONSOLIDATED)
AGENCY DKT. NO. 398-10/95

KENILWORTH EDUCATION ASSOCIATION,	:	
CHARGING PARTY,	:	
V.	:	
KENILWORTH BOARD OF EDUCATION, UNION COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT.	:	DECISION
LINDA AMITRANO,	:	
PETITIONER,	:	
V.	:	
KENILWORTH BOARD OF EDUCATION, UNION COUNTY,	:	
RESPONDENT.	:	

The initial decision and record of this consolidated matter, now before the Commissioner for final decision on those issues within his jurisdiction as set forth above, have been reviewed. Timely exceptions were filed by petitioners pursuant to *N.J.A.C.* 1:1-1.18.4, as were replies by the Respondent Board of Education (Board).

In the instant proceeding, petitioners claim violation of Amitrano's tenure and seniority rights as a consequence of the Board's failure to appoint her to the position of Clerk/Receptionist/Attendance Officer effective July 1, 1995, rather than on August 1, 1995, due to the inability of the parties to agree on an acceptable salary. Petitioners further claim that the Board's actions in this matter were an arbitrary, capricious and unreasonable exercise of the Board's managerial prerogative, in that they

had a "chilling" effect on negotiations and constituted nothing more than an attempt to force Amitrano's agreement to the Board's proposed salary.

Upon review, the Commissioner determines to reject petitioners' claims. No showing has been made herein that the Board violated Amitrano's tenure rights following reduction of her prior position to half-time; to the contrary, the Board promptly offered Amitrano a newly created full-time position within her area of entitlement, and appointed her to that position immediately upon her first indication that she was, in fact, willing to work for the salary set by the Board pending further negotiations. Further, even as the ALJ and the Public Employment Relations Commission found the Board's conduct not to constitute a failure to negotiate in good faith, the Commissioner finds that such conduct was in no manner an arbitrary, capricious or unreasonable exercise of the Board's lawful discretion.

Accordingly, the initial decision of the ALJ is adopted as the final decision in this matter as to those issues within the purview of the Commissioner of Education, and the Petition of Appeal is hereby dismissed.[1]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.,* within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MARCH 9, 1998
DATE OF MAILING MARCH 9, 1998

104-98

EDU #11374-95
C # 104-98
SB # 38-98

KENILWORTH EDUCATION ASSOCIATION,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF KENILWORTH, UNION COUNTY,

RESPONDENT-RESPONDENT.

AND

LINDA AMITRANO,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF KENILWORTH, UNION COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 9, 1998

For the Petitioners-Appellants, Balk, Oxfeld, Mandell & Cohen (Gail Oxfeld Kanef, Esq., of Counsel)

For the Respondent-Respondent, James P. Granello, Esq.

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

August 5, 1998

Date of mailing AUG 07 1998

105-98

IN THE MATTER OF THE TENURE	:	
HEARING OF ELAINE FROST,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF BOGOTA, BERGEN	:	DECISION
COUNTY.	:	
	:	

MARCH 10, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

APPROVING WITHDRAWAL

OAL DKT. NO. EDU 11545-96

AGENCY DKT. NO. 512-10/96

BOARD OF EDUCATION OF
THE BOROUGH OF BOGOTA,

Petitioner,

v.

ELAINE FROST,

Respondent.

Lane Biviano, Esq., for petitioner

Nancy I. Oxfeld, Esq., for respondent (Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: January 21, 1998 Decided: January 28, 1998

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

This is a tenure hearing brought pursuant to *N.J.S.A.* 18A:6-14. The charges were considered by the Petitioner Board of Education and certified to the Commissioner on October 21, 1996. The matter was transmitted to the Office of

Administrative Law (OAL) for determination as a contested case on November 20, 1996, in accordance with *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was scheduled for hearing on January 21 & 22, 1998. Prior do that date, Petitioner indicated that the Board wish to withdraw the tenure charges. Respondent's attorney has vigorously indicated her opposition to the withdrawal of such charges based on, since coupled with the withdrawal, the Board indicated that they would be filing a minor disciplinary action. As a result of Respondent's opposition to the withdrawal of the charges, the matter cannot be considered to have been settled.

Petitioner has set forth the rationale for its determination to reduce the disciplinary action it seeks to impose from tenure charges to a minor disciplinary penalty in a letter dated January 14, 1998, attached hereto, incorporated herein, and made a part hereof. (Exhibit A)

Respondent, through her attorney and her answer to the charges, has vigorously denied the allegations underlying the charges; moreover, to the extent that the rationale presented by the Petitioner in its letter of January 14, 1998, constitutes findings of fact in the matter, Respondent denies all of those findings.

I have reviewed Petitioner's letter of January 14, 1998, and without making factual determinations, I **CONCLUDE** that the charges in this matter were of such a nature that, based on the Board's representation that it considered the totality of the circumstances and took into consideration mitigating circumstances, withdrawal of the charges is appropriate, I hereby approve the withdrawal of the tenure charges.

ORDER

Accordingly, it is hereby **ORDERED** that the withdrawal of the tenure charges against Respondent is appropriate, it is further **ORDERED** that the 15-day suspension shall be expunged from her record; it is further **ORDERED** that Respondent shall be

reimbursed in full for the salary withheld on account of the 15-day suspension imposed as a result of the Board's action.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 28, 1998
DATE

Maria M. LaFiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

1/30/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 2 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

jb

OAL DKT. NO. EDU 11545-96
AGENCY DKT. NO. 512-10/96

IN THE MATTER OF THE TENURE	:	
HEARING OF ELAINE FROST,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF BOGOTA, BERGEN	:	DECISION
COUNTY.	:	
	:	

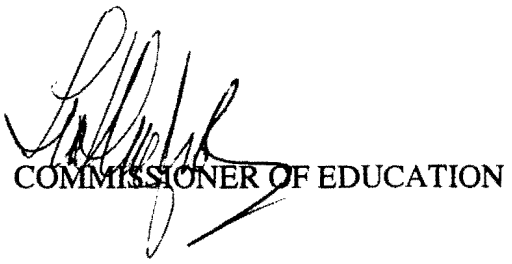
The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Respondent's exceptions and the Board's replies thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4. Both parties' exception arguments are duly noted and were considered by the Commissioner in rendering the within decision.

Upon a careful and independent review, the Commissioner determines to affirm the initial decision of the ALJ approving the Board's withdrawal of the instant tenure matter. The Commissioner concurs that withdrawal of tenure charges is appropriate herein, in that the Board determined that it did not possess sufficient evidence to substantiate respondent's removal from her position or a reduction in her salary, and the Commissioner will not force a Board to prosecute charges under such circumstances. In this regard, and in light of respondent's objection to the withdrawal, the Commissioner stresses that he makes *no findings of any kind* with regard to the facts surrounding this matter, *and* that affirmance of the instant withdrawal serves neither as an endorsement, nor a preclusion, to any subsequent disciplinary action that the

Board may choose to initiate against respondent.[1] Neither is this result defeated by the presence of a counterclaim from respondent, as the Commissioner deems this claim moot in that the relief sought thereunder, expungement of respondent's 15-day suspension and reinstatement of her pay for that period, has been granted herein.

Accordingly, the initial decision of the OAL approving withdrawal of the tenure charges, and granting respondent's claim for expungement of the 15-day suspension imposed by the Board and reinstatement of pay for such period, is affirmed for the reasons expressed therein and above.[2]

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

[1] Should the Board elect to impose discipline, respondent may appeal from any such action, as a separate matter, in the appropriate forum.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MARCH 10, 1998
DATE OF MAILING MARCH 10, 1998

105-98

EDU #11545-96
C # 105-98
SB # 36-98

IN THE MATTER OF THE TENURE	:	
HEARING OF ELAINE FROST, SCHOOL	:	STATE BOARD OF EDUCATION
DISTRICT OF THE BOROUGH OF	:	DECISION
BOGOTA, BERGEN COUNTY.	:	

Decided by the Commissioner of Education, March 10, 1998

For the Petitioner-Respondent, Lane J. Biviano, Esq.

For the Respondent-Appellant, Balk, Oxfeld, Mandell & Cohen (Nancy I. Oxfeld, Esq., of Counsel)

This matter was initiated when the Board of Education of the Borough of Bogota (hereinafter "Board") certified tenure charges to the Commissioner of Education against Elaine Frost (hereinafter "respondent"), a tenured school social worker and the chairperson of the district's Child Study Team, alleging unbecoming conduct, neglect of duty, insubordination and incompetency. The matter was transmitted to the Office of Administrative Law for determination and scheduled for hearing. However, after reviewing the circumstances and taking into consideration a number of mitigating circumstances, the Board sought to withdraw the charges prior to hearing, determining instead to impose minor discipline on respondent in the form of a written reprimand and to withhold a salary increment.

July 1, 1998

Respondent opposed withdrawal of the charges because the Board indicated that it would pursue minor discipline. Accordingly, the Administrative Law Judge ("ALJ") could not consider the matter to have been settled. Nonetheless, based on the Board's representations, the ALJ recommended that the Commissioner approve withdrawal of the charges.

The Commissioner adopted the ALJ's recommendation, concluding that withdrawal of the charges was appropriate under the circumstances. Hence, he approved the withdrawal and granted respondent's claim for expungement of the suspension which the Board had imposed on her. In doing so, the Commissioner stressed that he was not making any findings concerning the facts surrounding the matter and that no import could be attached to his approval of the withdrawal with respect to any subsequent disciplinary action taken by the Board.

Respondent appealed to the State Board, maintaining that approval of the withdrawal of the tenure charges constitutes an acceptance of the Board's findings of fact and determination of penalty. She therefore is seeking reversal of the Commissioner's determination and a remand to the Commissioner for a hearing.

After reviewing the record in this matter, we conclude that the withdrawal of tenure charges in this case is consistent with the principles articulated in Cardonick v. Board of Education of the Borough of Brooklawn, decided by the State Board of Education, April 6, 1983. Accordingly, we affirm the Commissioner's determination substantially for the reasons expressed therein. In doing so, we stress that the authority to impose minor discipline is distinct from the statutory framework governing tenure proceedings, and that in the event that the Board imposes such discipline, N.J.S.A.

34:13A-42 ensures that respondent has appropriate recourse through the grievance procedure and binding arbitration.

Sam Podietz did not participate in deliberations in this matter.

July 1, 1998

Date of mailing JUL 06 1998

106-98

IN THE MATTER OF THE TENURE HEARING:

OF REGINALD BYRD, STATE-OPERATED :

SCHOOL DISTRICT OF THE CITY OF : COMMISSIONER OF EDUCATION

PATERSON, PASSAIC COUNTY. : DECISION

:

MARCH 10, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11311-96

I/M/O THE TENURE HEARING OF REGINALD BYRD, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY

Gregory G. Johnson, Esq., for State Operated School District of the City of Paterson, petitioner

James M. Weinberg, Esq., for Reginald Byrd, respondent (Weinberg and Weinberg, attorneys)

Record Closed: January 2, 1998 Decided: January 29, 1998

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

STATEMENT OF CASE

This case was transmitted to the Office of Administrative Law (OAL) on November 4, 1996 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

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

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

1. The parties have voluntarily agreed to the settlement.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 29, 1998
DATE

Mumtaz Bari Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

2/2/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 2 1998
DATE

Barbara A Harnes
OFFICE OF ADMINISTRATIVE LAW

Gregory G. Johnson, Esq.
17 Academy Street, Suite 208
Newark, New Jersey 07102
973-642-0001
Attorney for the Paterson Public Schools

IN THE MATTER OF THE TENURE HEARING OF REGINALD BYRD	NEW JERSEY DEPARTMENT OF CIVIL SERVICE OFFICE OF ADMINISTRATIVE LAW
	OAL DOCKET NO. EDUTH 11311-96N
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON	**STIPULATION OF SETTLEMENT**

This Agreement made this on September 22, 1997, by and between the parties, petitioner State-Operated School District of the City of Paterson ("District"), and respondent Reginald Byrd, former custodian.

WHEREAS, Reginald Byrd ("Respondent") was a tenured custodian employed by the District;

WHEREAS, on or about January 29, 1996, tenure charges were filed against the Respondent based upon conduct unbecoming and misbehavior;

WHEREAS, on April 18, 1996, the State District Superintendent certified the charges against the Respondent to the Commissioner of Education;

WHEREAS, on October 7, 1996, the Respondent's attorney filed an Answer essentially denying the charges;

WHEREAS, in April 1996, the State District Superintendent determined to subcontract the District's custodial services and abolish all custodial positions in the district, including the Respondent, effective June 30, 1996; and

WHEREAS, in light of the nature of charges, and potential for protracted litigation, it is in the best interest of the parties to resolve the charges before the Commissioner of Education in the following matter;

JAN 2

NOW THEREFORE BE IT RESOLVED, the parties hereby stipulate and agree as follows:

1. The District hereby withdraws and dismisses the certified tenure charges against the respondent;

2. The District will include the respondent and his position in the reduction in force, effective June 30, 1996, thereby terminating the respondent's employment. The respondent agrees not to apply for work with the the District or any contractor providing custodial services to the District;

3. The District agrees to compensate the respondent for three months (3) salary during the 1995-96 school year at the respondent's existing salary. The three month period will cover April 1, 1996 to June, 30, 1996. The respondent waives any right to payment for benefits. The respondent will receive a lump sum payment within 60 days from the date of final approval of this Agreement by the Commissioner of Education.

4. The parties respectively acknowledge that each has had ample opportunity to seek independent legal counsel, financial or other advice regarding this Agreement, and that each is signing this Agreement freely and voluntarily, without coercion, duress or pressure from the other party.

5. By entering this Agreement, each party releases and discharges the other with respect to all claims or rights that either party may have against the other. This includes all claims to salary and benefits except specifically listed herein, including those of which either party is not aware and those not mentioned herein. The releases by each party apply to all claims resulting from anything which has happened up to now.

6. This Agreement is subject to approval by the State District Superintendent, Office of Administrative Law, and Commissioner of Education.

FOR THE EMPLOYEE

Reginald Byrd

Reginald Byrd

Dated: Nov. 21, 1997

James M. Weinberg, Esq.

Dated: 12/1/97

FOR THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON

Dr. Edwin Duroy,
State District Superintendent

Dated: 12/3/97

Gregory G. Johnson, Esq.

Dated: 12/5/97

OAL DKT. NO. EDU 11311-96
AGENCY DKT. NO. 153-4/96

IN THE MATTER OF THE TENURE HEARING:		
OF REGINALD BYRD, STATE-OPERATED	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
PATERSON, PASSAIC COUNTY.	:	DECISION
	:	

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

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

COMMISSIONER OF EDUCATION

MARCH 10, 1998
DATE OF MAILING MARCH 10, 1998

107-98

JAMES B. LEDERER,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE BERGEN COUNTY SPECIAL SERVICES SCHOOL DISTRICT, BERGEN COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner, tenured superintendent, alleged that the Board acted contrary to its own policy and practice in failing to pay him for accrued vacation, sick leave and personal days following his resignation.

ALJ approved settlement of the matter.

Commissioner reversed the initial decision and remanded the matter to OAL for revision of the settlement agreement, as that agreement concurrently resolves both the present petition and tenure charges which are the subject of a separate proceeding and is not an acceptable resolution to the tenure charges. Where all terms of a settlement are deemed material, Commissioner cannot accept settlement in one context while rejecting it in the other.

MARCH 11,1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5712-95

JAMES B. LEDERER,

Petitioner,

v.

BOARD OF EDUCATION OF THE BERGEN COUNTY SPECIAL SERVICES SCHOOL DISTRICT,

Respondent.

Raymond F. Flood, Esq. for petitioner (Flood and Basile, attorneys)

Fredric J. Sirota, Esq., for respondent (Wiley, Malehorn and Sirota, attorneys)

Record Closed: January 13, 1998 Decided: January 29, 1998

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

This matter was transmitted to the Office of Administrative Law by the Department of Education as a contested case on June 13, 1995. In his petition, Dr. Lederer claimed that the Board had violated its own policy and practice by failing and refusing to pay him for accrued vacation, sick leave and personal days. At the time that this petition was filed the parties also were pursuing an earlier filed case (EDU 2992-95) which involved the certification of tenure charges by the respondent Board against Dr. Lederer. That latter case has been the subject of a separate Stipulation of Dismissal, as

has a separate civil action brought by Lederer against the Board (New Jersey Superior Court, Law Division, Bergen County, Dkt. No. BER-L-2094-95).

In addition to the above referenced Administrative Law and Superior Court actions, a criminal prosecution also was brought against Lederer which the attached Stipulation of Settlement notes has resulted in his guilty plea to a charge of misapplication of government funds. Accordingly, all of the pending litigation, criminal, civil and administrative, between the parties and/or involving Dr. Lederer have been resolved.

Attached hereto is a Stipulation setting forth the terms and conditions of the agreement reached between the parties with respect to the two administrative actions and the Superior Court Law, Division action. I have reviewed the terms of the settlement as set forth in the Stipulation. Insofar as the terms relate to the case assigned to me (EDU 5712-95), I find they are consistent with law.

Accordingly, having reviewed the terms of the Stipulation of Settlement, which is attached hereto and made a part hereof, I **FIND** as follows:

1. The parties voluntarily have agreed to the settlement as evidenced by the signatures of Dr. Lederer, Mr. Albrecht, the Board President and Mr. Aloia, the Board Secretary, contained thereon.

2. The settlement, as set forth above, fully disposes of all issues in controversy before me and is consistent with law.

Therefore, I **ORDER** that the parties comply with the terms of the settlement and that these proceedings be and are hereby **CONCLUDED**.

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

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

January 29, 1998
DATE

STEPHEN G. WEISS , ALJ

Receipt Acknowledged:

Feb. 3, 1998
DATE

D. M. Antanaitis /sc
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 5 1998
DATE

Barbara A Hermel
OFFICE OF ADMINISTRATIVE LAW

\mvh

WILEY, MALEHORN AND SIROTA
250 Madison Avenue
Morristown, New Jersey 07960
(201) 539-1313
Attorneys for Petitioner,
Board of Education of the Bergen County
Special Services School District

RECEIVED
NOV 13 11 10 AM '97

IN THE MATTER OF THE TENURE HEARING OF JAMES LEDERER,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
BOARD OF EDUCATION OF THE BERGEN COUNTY SPECIAL SERVICES SCHOOL DISTRICT	:	AGENCY REF. NO. 36-2/95 O.A.L. DOCKET NO. 02992-95N

BOARD OF EDUCATION OF THE BERGEN COUNTY SPECIAL SERVICES SCHOOL DISTRICT, Plaintiff,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO. BER-L-2094-95
v.	:	Civil Action
JAMES B. LEDERER, Defendant.	:	

JAMES LEDERER	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF
v.	:	ADMINISTRATIVE LAW
BOARD OF EDUCATION OF THE BERGEN COUNTY SPECIAL SERVICES SCHOOL DISTRICT	:	AGENCY REF. NO. 152-4/95 O.A.L. DOCKET NO. EDU 5712-95

STIPULATION OF SETTLEMENT

This Stipulation of Settlement is made by and between Dr. James B. Lederer (hereinafter "Dr. Lederer"), residing at 202 Spring Valley Road, Oradell, New Jersey, and the Board of

Education of the Bergen County Special Services School District (hereinafter "Board"). In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the undersigned state:

WHEREAS, Dr. Lederer was appointed by the Board as the District's Assistant Superintendent in 1980 and Superintendent in 1985; and

WHEREAS, the Board certified Tenure Charges against Dr. Lederer to the Commissioner of Education on February 15, 1995, Agency Reference Number 36-2/95; and

WHEREAS, the Tenure Charges were transmitted for a hearing to the Office of Administrative Law, OAL Docket Number 02992-95N; and

WHEREAS, the Board brought an Ethics Complaint against Dr. Lederer to the School Ethics Commission on February 15, 1995; and

WHEREAS, the Board brought a civil action against Dr. Lederer before the Superior Court of New Jersey Law Division, Bergen County, on March 1, 1995, Docket Number BER-L-2094-95; and

WHEREAS, Dr. Lederer brought a petition against the Board to the Commissioner of Education of New Jersey demanding payment for his unused vacation, sick leave, and personal days, Agency Reference Number 152-4/95; and

WHEREAS, Dr. Lederer's action was transmitted for a hearing to the Office of Administrative Law, O.A.L. Docket Number EDU 5712-95; and

WHEREAS, a criminal prosecution of Dr. Lederer has resulted in a guilty plea by Dr. Lederer to the misapplication of government funds; and

WHEREAS, the Board has determined that further proceedings in this matter given the total circumstances are moot in light of Dr. Lederer's guilty plea;

IT IS on this _____ day of _____, 1997, agreed that:

THE PARTIES AGREE TO DISMISS ALL MATTERS CURRENTLY OUTSTANDING BETWEEN THEM.

1. The Board agrees to dismiss, with prejudice, the Tenure Charges, currently outstanding before the Commissioner of Education, Agency Ref. No. 36-2/95, and the Office of Administrative Law, Docket Number 02992-95N, against Dr. Lederer as moot, subject to the approval of the Office of Administrative Law and the Commissioner of Education.

2. The Board agrees to dismiss, with prejudice, the civil action, brought against Dr. Lederer before the Superior Court of New Jersey Law Division, Bergen County, Docket No. BER-L-2094-95.

3. Dr. Lederer agrees to dismiss, with prejudice, his petition for payment for his unused vacation, sick leave, and personal days, currently outstanding before the Commissioner of Education, Agency Ref. No. 152-4/95, and the Office of Administrative Law, Docket No. EDU 5712-95, subject to the approval of the Office of Administrative Law and the Commissioner of Education.

4. The parties shall exchange mutual general releases in the forms attached hereto. Such releases indicate that each party will retain the right to enforce this Agreement, that the Board retains the right to bring a third party complaint or cross-claim against Dr. Lederer in the event that the Board or any of its employees, members, agents or representatives are joined in a suit by any party based upon any alleged action or inaction of Dr. Lederer, and that Dr. Lederer retains the right to bring a cross-claim or third party complaint against the Board in the event that he is joined in a suit by any party based upon any alleged action or inaction of the Board. Said release of the Board by Dr. Lederer shall further exclude Workers Compensation cases numbers 95010937 and 95020147, with respect to both of which Dr. Lederer is the petitioner and the Board is a respondent.

5. The originals of said releases shall be signed but held in escrow by each party's respective counsel until approval of the dismissal of the Board's Tenure Charges and Dr. Lederer's Petition is received from the Commissioner of Education and finalization of this Stipulation of Settlement before the Superior Court of New Jersey.

OUTSTANDING PAYMENTS

6. Payroll checks directed to Dr. Lederer by the District between the date of his resignation and the commencement of the tenure proceeding and his suspension (which checks have been held and not deposited by Dr. Lederer) are hereby stopped and canceled and Dr. Lederer waives any claim with respect to the foregoing as

well as all other monies and claims that are or may be alleged to be due to Dr. Lederer by the Board, its employees, representatives, members or agents. Dr. Lederer shall immediately return all uncancelled checks.

NO FURTHER ACTION WITH RESPECT TO THE ETHICS COMPLAINT, DR. LEDERER'S TEACHING CERTIFICATE, AND DR. LEDERER'S PENSION.

7. The Board agrees that the Ethics Complaint known as Board of Education of the Bergen County Special Services School District with respect to Dr. James B. Lederer, is moot.

8. The Board shall not initiate or prosecute any action with respect to a review by the State Board of Examiners as to whether or not an Order to Show Cause should be instituted seeking the revocation or suspension of Dr. Lederer's educational certificates and endorsements or with respect to any consideration by the New Jersey Division on Pensions as to Dr. Lederer' pension benefits. The Board shall complete the relevant Certification of Service and Final Salary form with respect to Dr. Lederer.

MISCELLANEOUS

9. As both parties acknowledge that the dismissal of the Board's Tenure Charges against Dr. Lederer and Dr. Lederer's petition against the Board are subject to the approval of the Office of Administrative Law and the Commissioner of Education. If any such approval, or that of the Superior Court of New Jersey, is not received, this entire agreement, including the releases

attached hereto and the dismissal of the aforementioned Superior Court matter, shall be null and void.

10. Dr. Lederer acknowledges that he has hereby been advised in writing that he has the right to consult with an attorney or a representative of his own choosing prior to signing this Agreement, and has done so, and that he signs this Agreement as his own voluntary act and deed, and that he fully understands the duties and obligations enumerated herein.

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

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

13. Nothing in this Agreement shall be deemed to constitute precedent, past practice or policy as to the rights of any Board employee, nor any future Board employee, other than Dr. Lederer.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals.

Raymond F. Flood, Esq.

James B. Lederer

Board of Education of the
Bergen County Special Services
School District

Fredric J. Sirota, Esq.

By: Wolfgang Albrecht
Board President

Robert Aloia
Board Secretary

DATED: 11/10/97

OAL DKT. NO. EDU 5712-95
AGENCY DKT. NO. 152-4/95

JAMES B. LEDERER,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE BERGEN COUNTY SPECIAL SERVICES SCHOOL DISTRICT, BERGEN COUNTY,	:	
RESPONDENT.	:	

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

Upon such review, the Commissioner is compelled to reject the instant agreement, as it concurrently resolves both the present petition and tenure charges which are the subject of a separate proceeding, and is not, for reasons set forth in the Commissioner's decision of even date regarding the latter, an acceptable resolution to the tenure charges. As the settlement is, by its own terms, material in all respects, the Commissioner cannot accept it in one context while rejecting it in the other.

Accordingly, the initial decision of the Office of Administrative Law accepting the proposed settlement is reversed, and this matter remanded to the Office of Administrative Law for revision of the settlement agreement as directed in the Commissioner's decision on the concurrent tenure matter, or for such further proceedings as are warranted in the event settlement in the tenure matter cannot be reached.[1]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MARCH 11, 1998
DATE OF MAILING MARCH 11, 1998

108-98

IN THE MATTER OF THE TENURE HEARING OF JAMES B. LEDERER, BERGEN COUNTY SPECIAL SERVICES SCHOOL DISTRICT, BERGEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

Board certified tenure charges of unbecoming conduct against respondent superintendent. ALJ recommended acceptance of settlement agreement.

Commissioner rejected the proposed agreement as it failed to comport with the *Cardonick* standard and remanded matter to OAL for revision of settlement.

MARCH 11, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2992-95

AGENCY. NO.: 36-2/95

In the Matter of the Tenure Hearing of JAMES B. LEDERER,

Petitioner,

v.

BOARD OF EDUCATION OF THE BERGEN COUNTY SPECIAL SERVICES SCHOOL DISTRICT,

Respondent.

Raymond F. Flood, Esq., for petitioner

Fredric J. Sirota, Esq., for respondent
(Wiley, Malehorn and Sirota, attorneys)

Record Closed: January 13, 1998 Decided: January 21, 1998

BEFORE: **JEFFREY A. GERSON**, ALJ

This matter was transmitted to the Office of Administrative Law (OAL) on March 22, 1995, for determination as a contested case, pursuant to *N.J.S.A. 52:14B et seq. and N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached documents.

Having reviewed the contents of the attached documents, I **FIND** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached documents meet the requirements of *N.J.A.C. 1:1-19.*1 and I hereby approve same. In conjunction therewith, I **ORDER** that the parties comply with their contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

Jan 21 98
DATE

JEFFREY A. GERSON,
Administrative Law Judge

Receipt Acknowledged:

Feb. 3, 1998
DATE

D. M. Antonaitis /gc
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 5 1998
DATE

Barbara A Hervey
OFFICE OF ADMINISTRATIVE LAW

/g

WILEY, MALEHORN AND SIROTA
250 Madison Avenue
Morristown, New Jersey 07960
(201) 539-1313
Attorneys for Petitioner,
Board of Education of the Bergen County
Special Services School District

IN THE MATTER OF THE TENURE HEARING OF JAMES LEDERER,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
BOARD OF EDUCATION OF THE BERGEN COUNTY SPECIAL SERVICES SCHOOL DISTRICT	:	AGENCY REF. NO. 36-2/95 O.A.L. DOCKET NO. 02992-95N

BOARD OF EDUCATION OF THE BERGEN COUNTY SPECIAL SERVICES SCHOOL DISTRICT,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO. BER-L-2094-95
Plaintiff,	:	
v.	:	Civil Action
JAMES B. LEDERER,	:	
Defendant.	:	

JAMES LEDERER	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF
v.	:	ADMINISTRATIVE LAW
BOARD OF EDUCATION OF THE BERGEN COUNTY SPECIAL SERVICES SCHOOL DISTRICT	:	AGENCY REF. NO. 152-4/95 O.A.L. DOCKET NO. EDU 5712-95

STIPULATION OF SETTLEMENT

This Stipulation of Settlement is made by and between Dr. James B. Lederer (hereinafter "Dr. Lederer"), residing at 202 Spring Valley Road, Oradell, New Jersey, and the Board of

Education of the Bergen County Special Services School District (hereinafter "Board"). In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the undersigned state:

WHEREAS, Dr. Lederer was appointed by the Board as the District's Assistant Superintendent in 1980 and Superintendent in 1985; and

WHEREAS, the Board certified Tenure Charges against Dr. Lederer to the Commissioner of Education on February 15, 1995, Agency Reference Number 36-2/95; and

WHEREAS, the Tenure Charges were transmitted for a hearing to the Office of Administrative Law, OAL Docket Number 02992-95N; and

WHEREAS, the Board brought an Ethics Complaint against Dr. Lederer to the School Ethics Commission on February 15, 1995; and

WHEREAS, the Board brought a civil action against Dr. Lederer before the Superior Court of New Jersey Law Division, Bergen County, on March 1, 1995, Docket Number BER-L-2094-95; and

WHEREAS, Dr. Lederer brought a petition against the Board to the Commissioner of Education of New Jersey demanding payment for his unused vacation, sick leave, and personal days, Agency Reference Number 152-4/95; and

WHEREAS, Dr. Lederer's action was transmitted for a hearing to the Office of Administrative Law, O.A.L. Docket Number EDU 5712-95; and

WHEREAS, a criminal prosecution of Dr. Lederer has resulted in a guilty plea by Dr. Lederer to the misapplication o government funds; and

WHEREAS, the Board has determined that further proceedings in this matter given the total circumstances are moot in light of Dr. Lederer's guilty plea;

IT IS on this _____ day of _____, 1997, agreed that:

THE PARTIES AGREE TO DISMISS ALL MATTERS CURRENTLY OUTSTANDING BETWEEN THEM.

1. The Board agrees to dismiss, with prejudice, the Tenure Charges, currently outstanding before the Commissioner of Education, Agency Ref. No. 36-2/95, and the Office of Administrative Law, Docket Number 02992-95N, against Dr. Lederer as moot, subject to the approval of the Office of Administrative Law and the Commissioner of Education.

2. The Board agrees to dismiss, with prejudice, the civil action, brought against Dr. Lederer before the Superior Court of New Jersey Law Division, Bergen County, Docket No. BER-L-2094-95.

3. Dr. Lederer agrees to dismiss, with prejudice, his petition for payment for his unused vacation, sick leave, and personal days, currently outstanding before the Commissioner of Education, Agency Ref. No. 152-4/95, and the Office of Administrative Law, Docket No. EDU 5712-95, subject to the approval of the Office of Administrative Law and the Commissioner of Education.

4. The parties shall exchange mutual general releases in the forms attached hereto. Such releases indicate that each party will retain the right to enforce this Agreement, that the Board retains the right to bring a third party complaint or cross-claim against Dr. Lederer in the event that the Board or any of its employees, members, agents or representatives are joined in a suit by any party based upon any alleged action or inaction of Dr. Lederer, and that Dr. Lederer retains the right to bring a cross-claim or third party complaint against the Board in the event that he is joined in a suit by any party based upon any alleged action or inaction of the Board. Said release of the Board by Dr. Lederer shall further exclude Workers Compensation cases numbers 95010937 and 95020147, with respect to both of which Dr. Lederer is the petitioner and the Board is a respondent.

5. The originals of said releases shall be signed but held in escrow by each party's respective counsel until approval of the dismissal of the Board's Tenure Charges and Dr. Lederer's Petition is received from the Commissioner of Education and finalization of this Stipulation of Settlement before the Superior Court of New Jersey.

OUTSTANDING PAYMENTS

6. Payroll checks directed to Dr. Lederer by the District between the date of his resignation and the commencement of the tenure proceeding and his suspension (which checks have been held and not deposited by Dr. Lederer) are hereby stopped and canceled and Dr. Lederer waives any claim with respect to the foregoing as

well as all other monies and claims that are or may be alleged to be due to Dr. Lederer by the Board, its employees representatives, members or agents. Dr. Lederer shall immediately return all uncancelled checks.

NO FURTHER ACTION WITH RESPECT TO THE ETHICS COMPLAINT, DR. LEDERER'S TEACHING CERTIFICATE, AND DR. LEDERER'S PENSION.

7. The Board agrees that the Ethics Complaint known as Board of Education of the Bergen County Special Services School District with respect to Dr. James B. Lederer, is moot.

8. The Board shall not initiate or prosecute any action with respect to a review by the State Board of Examiners as to whether or not an Order to Show Cause should be instituted seeking the revocation or suspension of Dr. Lederer's educational certificates and endorsements or with respect to any consideration by the New Jersey Division on Pensions as to Dr. Lederer' pension benefits. The Board shall complete the relevant Certification of Service and Final Salary form with respect to Dr. Lederer.

MISCELLANEOUS

9. As both parties acknowledge that the dismissal of the Board's Tenure Charges against Dr. Lederer and Dr. Lederer's petition against the Board are subject to the approval of the Office of Administrative Law and the Commissioner of Education. If any such approval, or that of the Superior Court of New Jersey, is not received, this entire agreement, including the releases

attached hereto and the dismissal of the aforementioned Superior Court matter, shall be null and void.

10. Dr. Lederer acknowledges that he has hereby been advised in writing that he has the right to consult with an attorney or a representative of his own choosing prior to signing this Agreement, and has done so, and that he signs this Agreement as his own voluntary act and deed, and that he fully understands the duties and obligations enumerated herein.

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

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

13. Nothing in this Agreement shall be deemed to constitute precedent, past practice or policy as to the rights of any Board employee, nor any future Board employee, other than Dr. Lederer.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals.

Raymond F. Flood, Esq.

James B. Lederer

Board of Education of the
Bergen County Special Services
School District

Fredric J. Sirota, Esq.

By: Wolfgang Albrecht
Board President

Robert Aloia
Board Secretary

DATED: 11/16/20

RELEASE

This Release, dated Nov 10, 1997 is given

BY the Releasor(s) BOARD OF EDUCATION OF THE BERGEN COUNTY SPECIAL SERVICES SCHOOL DISTRICT referred to as the "Board",

TO JAMES B. LEDERER referred to as "You".

1. **Release.** The Board releases and gives up any and all claims and rights which the Board may have against you. This releases all claims, including those of which the Board is not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. The Board specifically releases the following claims: those relevant to In the Matter of the Tenure Hearing of James Lederer, Board of Education of the Bergen County Special Services School District before the Commissioner of Education, Office of Administrative Law, Agency Ref. No. 36-2/95, O.A.L. Docket No. 02992-95N; and Board of Education of the Bergen County Special Services School District v. James B. Lederer, Superior Court of New Jersey, Law Division, Bergen County, Docket No. BER-L-2094-95.

Notwithstanding the foregoing and anything in this Release to the contrary, this release shall not bar and the Board shall retain the right to bring a third-party complaint or cross-claim against Dr. Lederer in the event that the Board or any of its employees, members, agents or representatives are joined in a suit by any party based upon any alleged action or inaction of you. Further, this Release does not preclude enforcement of the Stipulation of Settlement to which this Release is an exhibit.

2. **Payment.** The Board has been paid a total of $1.00 and other good and valuable consideration, in full payment for making this Release. The Board agrees the it will not seek anything further including any other payment from you.

3. **Who is Bound.** The Board is bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. **Signatures.** The Board understands and agrees to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal is affixed.

Witnessed or Attested by:

Robert Aloia
Board Secretary

BOARD OF EDUCATION OF THE BERGEN COUNTY SPECIAL SERVICES SCHOOL DISTRICT

By: Wolfgang Albrecht
President

STATE OF NEW JERSEY, COUNTY OF **ss.:**
I CERTIFY that on Nov 10, 1997,

Robert Aloia personally came before me and this person acknowledged under oath, to my satisfaction, that:

(a) this person is the Board Secretary of the Bergen County Special Services Board of Education, the entity named in this document;

(b) this person is the attesting witness to the signing of this document by the proper corporate officer who is Wolfgang Albrecht, the President of the Bergen County Special Services Board of Education;

(c) this document was signed and delivered by the Board as its voluntary act duly authorized by a proper resolution of its Board of Education;

(d) this person knows the proper seal of the Board of Education which was affixed to this document; and

(e) this person signed this proof to attest to the truth of these facts.

Signed and sworn to before me on
Nov 10, 1997

Barbara Sirota
A Notary Public of NJ.

RELEASE Dated: , 19

Record and return to:

TO

RELEASE

This Release, dated Oct. 24, 1997 is given

BY the Releasor(s) JAMES B. LEDERER referred to as "I",

TO BOARD OF EDUCATION OF THE BERGEN COUNTY SPECIAL SERVICES SCHOOL DISTRICT, its employees, members, agents and representatives referred to as the "Board".
If more than one person signs this Release, "I" shall mean each person who signs this Release.

1. **Release.** I release and give up any and all claims and rights which I may have against the Board. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. I specifically release the following claims: those relevant to James Lederer v. Board of Education of the Bergen County Special Services School District, before the Commissioner of Education, Office of Administrative Law, Agency Ref. No. 152-4/95, O.A.L. Docket No. EDU 5712-95.

Notwithstanding the foregoing and anything in this Release to the contrary, this release does not include and the releasor shall retain the right to bring a third-party complaint or crossclaim against the Board of Education of the Bergen County Special Services School District in the event that the Releasor is joined in a suit by any party based upon any alleged action or inaction of the Board. Said Release shall further exclude and be inapplicable to workers compensation cases number 95010937 and 95020147, with respect to which I am the petitioner and the Board is the respondent. Finally this Release does not preclude enforcement of the Stipulation of Settlement to which this Release is an exhibit.

2. **Payment.** I have been paid a total of $1.00 and other good and valuable consideration, in full payment for making this Release. I agree that I will not seek anything further including any other payment from the Board.

3. **Who is Bound.** I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. **Signatures.** I understand and agree to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal is affixed.

Witnessed or Attested by:

Raymond Flood, Esq.

JAMES B. LEDERER

STATE OF NEW JERSEY, COUNTY OF **SS.:**
I CERTIFY that on Oct. 24, 1997,

James B. Lederer personally came before me and stated to my satisfaction that this person (or if more than one, each person):

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as his or her act and deed.

Raymond F. Flood

Prepared by:

RELEASE **Dated:** , 19

Record and return to:

TO

OAL DKT. NO. EDU 2992-95
AGENCY DKT. NO. 36-2/95

IN THE MATTER OF THE TENURE HEARING OF JAMES B. LEDERER, BERGEN COUNTY SPECIAL SERVICES SCHOOL DISTRICT, BERGEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

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

Upon such review, the Commissioner determines to reject the proposed agreement as it is presently written, in that it fails to comport with the *Cardonick* standard for review of settlements in tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. Specifically, neither the agreement nor the underlying record indicate respondent's understanding of the Commissioner's duty to refer this matter to the State Board of Examiners for possible revocation of respondent's certificate(s), nor does the District Board which certified the tenure charges acknowledge its duty to cooperate with the Board of Examiners in any proceeding that body may elect to undertake with regard to such revocation. *N.J.A.C.* 6:11-3.5, 6:11-3.6. Particularly under circumstances such as exist in this matter, in order to meet his obligation to the schools and children of this State, the Commissioner cannot permit resolution of tenure proceedings through an agreement that is not clear and explicit on these points.

Accordingly, for the reasons expressed herein, the initial decision recommending acceptance of the settlement agreement is reversed and this matter remanded to the Office of Administrative Law for revision of the settlement agreement consistent with the requirements set forth above.[1]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MARCH 11, 1998
DATE OF MAILING MARCH 11, 1998

108-98

375-98 R
(108-98)

IN THE MATTER OF THE TENURE HEARING OF JAMES B. LEDERER, SCHOOL DISTRICT OF BERGEN COUNTY SPECIAL SERVICES, BERGEN COUNTY,	:	
AND	:	
JAMES B. LEDERER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN COUNTY SPECIAL SERVICES SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

AUGUST 28, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. EDU 3263-98
OAL DKT. NO. EDU 3240-98
CONSOLIDATED

JAMES B. LEDERER,

Petitioner,

v.

BOARD OF EDUCATION OF THE BERGEN COUNTY SPECIAL SERVICES SCHOOL,

Respondent.

Raymond F. Flood, Esq., for petitioner (Flood & Basile, attorneys)

Fredric J. Sirota, Esq., for respondent (Wiley, Malehorn & Sirota, attorneys)

Record Closed: July 8, 1998 Decided: July 14, 1998

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

These two matters, now consolidated by consent, are before the Office of Administrative Law on remand from two decisions of the Commissioner of Education, dated March 11, 1998. In those remands the Commissioner determined that proposed Settlement Agreements failed to comport with the standard for settlements in tenure cases as set forth in the case of *In re Cardonick*, decided by the Commissioner April 7, 1982, affirmed State Board of Education April 6, 1983, 1990 *S.L.D.* 842,846. As a

result of the remands a supplemental hearing was conducted by the undersigned administrative law judge on July 8, 1998. At that time, as set forth in the transcript of that proceeding which is attached hereto and expressly made a part hereof, Board counsel set forth the additional information required by the remands, to which counsel for Lederer gave consent on his client's behalf.

Also attached hereto are the original Stipulations which have now been supplemented. I have reviewed the terms of the original settlements, the remand decisions by the Commissioner and the supplemental language agreed to by counsel and **FIND** they are consistent with law and fully dispose of all issues in controversy.

Therefore, I **ORDER** that the parties comply with the terms of the settlements in these consolidated cases and that the proceedings be and now hereby are **CONCLUDED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

July 23, 1998
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

7/28/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 30 1998
DATE

Barbara A Kerner
OFFICE OF ADMINISTRATIVE LAW

\mvh

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORAL TRANSCRIPT
OAL DKT. NO. EDU 3263-98
OAL DKT. NO. EDU 3240-98
CONSOLIDATED

JAMES B. LEDERER,

Petitioner,

v.

BOARD OF EDUCATION OF THE BERGEN COUNTY SPECIAL SERVICES SCHOOL,

Respondent.

Raymond F. Flood, Esq., for petitioner (Flood & Basile, attorneys)

Fredric J. Sirota, Esq., for respondent (Wiley, Malehorn & Sirota, attorneys)

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

Judge Weiss: We are now on the record. Let me officially convene the proceedings. This was the date which I had scheduled for the purposes on placing on the record a settlement with respect to the matter of James B. Lederer v. Board of Education of the Bergen County Special Services School District, OAL Dkt. No. EDU 3240-98, which was a remand from the Commissioner of Education in OAL Dkt. No. EDU 5712-95. Following discussion with counsel today there shortly will be a motion to consolidate this case with a companion matter involving the same parties which I will

address shortly. First let me take the appearances, beginning with counsel for Mr. Lederer (appearances identified - as above).

As I indicated there is a companion case which had been assigned to and heard by Judge Gerson which also was the subject of an initial decision and a remand. The remand docket number in the case entitled In the Matter of the Tenure Hearing of James B. Lederer is EDU 3263-98 which is a remand of the determination by Judge Gerson in EDU 2992-92. In light of the similarity with respect to the remand decisions and their inter-relationship, as it were, it is my understanding that a motion will now be made to consolidate the matter before Judge Gerson into the matter before me. Is that correct, counsel?

Mr. Sirota: That's correct. If Your Honor, please, I do so make that motion to consolidate the two matters Your Honor previously identified.

Judge Weiss: Okay, with the consent of Mr. Flood, the motion to consolidate therefore will be granted. My decision recommending the settlement to the Commissioner will therefore reflect that it is a consolidated case. In any event, with respect to the purpose today, it is my understanding that counsel wish to put on the record the precise language of the agreement that has been reached with regard to the settlement following the Commissioner's remand and taking into account what the Commissioner's remand said. Therefore, let me turn over to either of you - Mr. Sirota do you want to state for the record what counsel have agreed to?

Mr. Sirota: Thank you, Your Honor. The following is the Stipulation of Settlement responsive to the remands of the Commissioner of Education in the two referenced decisions, previously referenced, and the Stipulation of Settlement is as follows. Firstly, Dr. James B. Lederer agrees and acknowledges that it is the duty of the Commissioner of Education to refer this matter to the State Board of Examiners for possible action as set forth in the decision of remand of the Commissioner of Education of March 11, 1998 and that the State Board of Examiners will decide if any action

should be taken. Two, that the Board of Education of the Bergen County Special Services School District agrees and acknowledges that it is its duty to cooperate with the Board of Examiners in any proceeding that body may elect to undertake with regard to such action as set forth in the decisions of remand of the Commissioner of Education of March 11, 1998. I make that stipulation on behalf of my client, Your Honor.

Judge Weiss: Mr. Flood do you have anything? Do you agree with the articulation of the settlement agreement as just set forth by Mr. Sirota orally on the record?

Mr. Flood: I do, Your Honor.

Judge Weiss: Okay, what I then will do is have a transcript prepared to be attached to a recommended I.D. Settlement which I will send to the Commissioner of Education in the consolidated cases which will make reference and to which there will be attached what Mr. Sirota just stated for the record and Mr. Flood's statement of consent.

WILEY, MALEHORN AND SIROTA
250 Madison Avenue
Morristown, New Jersey 07960
(201) 539-1313
Attorneys for Petitioner,
Board of Education of the Bergen County
Special Services School District

IN THE MATTER OF THE TENURE HEARING OF JAMES LEDERER,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
BOARD OF EDUCATION OF THE BERGEN COUNTY SPECIAL SERVICES SCHOOL DISTRICT	:	AGENCY REF. NO. 36-2/95 O.A.L. DOCKET NO. 02992-95N

BOARD OF EDUCATION OF THE BERGEN COUNTY SPECIAL SERVICES SCHOOL DISTRICT, Plaintiff, v. JAMES B. LEDERER, Defendant.	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO. BER-L-2094-95 Civil Action

JAMES LEDERER v. BOARD OF EDUCATION OF THE BERGEN COUNTY SPECIAL SERVICES SCHOOL DISTRICT	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 152-4/95 O.A.L. DOCKET NO. EDU 5712-95

STIPULATION OF SETTLEMENT

This Stipulation of Settlement is made by and between Dr. James B. Lederer (hereinafter "Dr. Lederer"), residing at 202 Spring Valley Road, Oradell, New Jersey, and the Board of

Education of the Bergen County Special Services School District (hereinafter "Board"). In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the undersigned state:

WHEREAS, Dr. Lederer was appointed by the Board as the District's Assistant Superintendent in 1980 and Superintendent in 1985; and

WHEREAS, the Board certified Tenure Charges against Dr. Lederer to the Commissioner of Education on February 15, 1995, Agency Reference Number 36-2/95; and

WHEREAS, the Tenure Charges were transmitted for a hearing to the Office of Administrative Law, OAL Docket Number 02992-95N; and

WHEREAS, the Board brought an Ethics Complaint against Dr. Lederer to the School Ethics Commission on February 15, 1995; and

WHEREAS, the Board brought a civil action against Dr. Lederer before the Superior Court of New Jersey Law Division, Bergen County, on March 1, 1995, Docket Number BER-L-2094-95; and

WHEREAS, Dr. Lederer brought a petition against the Board to the Commissioner of Education of New Jersey demanding payment for his unused vacation, sick leave, and personal days, Agency Reference Number 152-4/95; and

WHEREAS, Dr. Lederer's action was transmitted for a hearing to the Office of Administrative Law, O.A.L. Docket Number EDU 5712-95; and

WHEREAS, a criminal prosecution of Dr. Lederer has resulted in a guilty plea by Dr. Lederer to the misapplication o government funds; and

WHEREAS, the Board has determined that further proceedings in this matter given the total circumstances are moot in light of Dr. Lederer's guilty plea;

IT IS on this ____ day of _____, 1997, agreed that:

THE PARTIES AGREE TO DISMISS ALL MATTERS CURRENTLY OUTSTANDING BETWEEN THEM.

1. The Board agrees to dismiss, with prejudice, the Tenure Charges, currently outstanding before the Commissioner of Education, Agency Ref. No. 36-2/95, and the Office of Administrative Law, Docket Number 02992-95N, against Dr. Lederer as moot, subject to the approval of the Office of Administrative Law and the Commissioner of Education.

2. The Board agrees to dismiss, with prejudice, the civil action, brought against Dr. Lederer before the Superior Court of New Jersey Law Division, Bergen County, Docket No. BER-L-2094-95.

3. Dr. Lederer agrees to dismiss, with prejudice, his petition for payment for his unused vacation, sick leave, and personal days, currently outstanding before the Commissioner of Education, Agency Ref. No. 152-4/95, and the Office of Administrative Law, Docket No. EDU 5712-95, subject to the approval of the Office of Administrative Law and the Commissioner of Education.

4. The parties shall exchange mutual general releases in the forms attached hereto. Such releases indicate that each party will retain the right to enforce this Agreement, that the Board retains the right to bring a third party complaint or cross-claim against Dr. Lederer in the event that the Board or any of its employees, members, agents or representatives are joined in a suit by any party based upon any alleged action or inaction of Dr. Lederer, and that Dr. Lederer retains the right to bring a cross-claim or third party complaint against the Board in the event that he is joined in a suit by any party based upon any alleged action or inaction of the Board. Said release of the Board by Dr. Lederer shall further exclude Workers Compensation cases numbers 95010937 and 95020147, with respect to both of which Dr. Lederer is the petitioner and the Board is a respondent.

5. The originals of said releases shall be signed but held in escrow by each party's respective counsel until approval of the dismissal of the Board's Tenure Charges and Dr. Lederer's Petition is received from the Commissioner of Education and finalization of this Stipulation of Settlement before the Superior Court of New Jersey.

OUTSTANDING PAYMENTS

6. Payroll checks directed to Dr. Lederer by the District between the date of his resignation and the commencement of the tenure proceeding and his suspension (which checks have been held and not deposited by Dr. Lederer) are hereby stopped and canceled and Dr. Lederer waives any claim with respect to the foregoing as

well as all other monies and claims that are or may be alleged to be due to Dr. Lederer by the Board, its employees representatives, members or agents. Dr. Lederer shall immediately return all uncancelled checks.

NO FURTHER ACTION WITH RESPECT TO THE ETHICS COMPLAINT, DR. LEDERER'S TEACHING CERTIFICATE, AND DR. LEDERER'S PENSION.

7. The Board agrees that the Ethics Complaint known as Board of Education of the Bergen County Special Services School District with respect to Dr. James B. Lederer, is moot.

8. The Board shall not initiate or prosecute any action with respect to a review by the State Board of Examiners as to whether or not an Order to Show Cause should be instituted seeking the revocation or suspension of Dr. Lederer's educational certificates and endorsements or with respect to any consideration by the New Jersey Division on Pensions as to Dr. Lederer' pension benefits. The Board shall complete the relevant Certification of Service and Final Salary form with respect to Dr. Lederer.

MISCELLANEOUS

9. As both parties acknowledge that the dismissal of the Board's Tenure Charges against Dr. Lederer and Dr. Lederer's petition against the Board are subject to the approval of the Office of Administrative Law and the Commissioner of Education. If any such approval, or that of the Superior Court of New Jersey, is not received, this entire agreement, including the releases

attached hereto and the dismissal of the aforementioned Superior Court matter, shall be null and void.

10. Dr. Lederer acknowledges that he has hereby been advised in writing that he has the right to consult with an attorney or a representative of his own choosing prior to signing this Agreement, and has done so, and that he signs this Agreement as his own voluntary act and deed, and that he fully understands the duties and obligations enumerated herein.

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

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

13. Nothing in this Agreement shall be deemed to constitute precedent, past practice or policy as to the rights of any Board employee, nor any future Board employee, other than Dr. Lederer.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals.

Raymond F. Flood, Esq.

James B. Lederer

Board of Education of the
Bergen County Special Services
School District

Fredric J. Sirota, Esq.

By: Wolfgang Albrecht
Board President

Robert Aloia
Board Secretary

DATED: 11/16/05

RELEASE

This Release, dated Nov 10, 1997 is given

BY the Releasor(s) BOARD OF EDUCATION OF THE BERGEN COUNTY SPECIAL SERVICES SCHOOL DISTRICT referred to as the "Board",

TO JAMES B. LEDERER referred to as "You".

1. **Release.** The Board releases and gives up any and all claims and rights which the Board may have against you. This releases all claims, including those of which the Board is not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. The Board specifically releases the following claims: those relevant to In the Matter of the Tenure Hearing of James Lederer, Board of Education of the Bergen County Special Services School District before the Commissioner of Education, Office of Administrative Law, Agency Ref. No. 36-2/95, O.A.L. Docket No. 02992-95N; and Board of Education of the Bergen County Special Services School District v. James B. Lederer, Superior Court of New Jersey, Law Division, Bergen County, Docket No. BER-L-2094-95.

Notwithstanding the foregoing and anything in this Release to the contrary, this release shall not bar and the Board shall retain the right to bring a third-party complaint or cross-claim against Dr. Lederer in the event that the Board or any of its employees, members, agents or representatives are joined in a suit by any party based upon any alleged action or inaction of you. Further, this Release does not preclude enforcement of the Stipulation of Settlement to which this Release is an exhibit.

2. **Payment.** The Board has been paid a total of $1.00 and other good and valuable consideration, in full payment for making this Release. The Board agrees the it will not seek anything further including any other payment from you.

3. **Who is Bound.** The Board is bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. **Signatures.** The Board understands and agrees to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal is affixed.

Witnessed or Attested by:

Robert Aloia
Board Secretary

BOARD OF EDUCATION OF THE BERGEN COUNTY SPECIAL SERVICES SCHOOL DISTRICT

By: Wolfgang Albrecht
President

STATE OF NEW JERSEY, COUNTY OF **SS.:**
I CERTIFY that on Nov 10, 1997,

Robert Aloia personally came before me and this person acknowledged under oath, to my satisfaction, that:

(a) this person is the Board Secretary of the Bergen County Special Services Board of Education, the entity named in this document;

(b) this person is the attesting witness to the signing of this document by the proper corporate officer who is Wolfgang Albrecht, the President of the Bergen County Special Services Board of Education;

(c) this document was signed and delivered by the Board as its voluntary act duly authorized by a proper resolution of its Board of Education;

(d) this person knows the proper seal of the Board of Education which was affixed to this document; and

(e) this person signed this proof to attest to the truth of these facts.

Signed and sworn to before me on
Nov 10, 1997

Barbara Sirota
A Notary At Law
of N.J.

RELEASE Dated: , 19

Record and return to:

TO



RELEASE

This Release, dated Oct. 24, 1997 is given

BY the Releasor(s) JAMES B. LEDERER referred to as "I",

TO BOARD OF EDUCATION OF THE BERGEN COUNTY SPECIAL SERVICES SCHOOL DISTRICT, its employees, members, agents and representatives referred to as the "Board".
If more than one person signs this Release, "I" shall mean each person who signs this Release.

1. **Release.** I release and give up any and all claims and rights which I may have against the Board. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. I specifically release the following claims: those relevant to James Lederer v. Board of Education of the Bergen County Special Services School District, before the Commissioner of Education, Office of Administrative Law, Agency Ref. No. 152-4/95, O.A.L. Docket No. EDU 5712-95.

Notwithstanding the foregoing and anything in this Release to the contrary, this release does not include and the releasor shall retain the right to bring a third-party complaint or crossclaim against the Board of Education of the Bergen County Special Services School District in the event that the Releasor is joined in a suit by any party based upon any alleged action or inaction of the Board. Said Release shall further exclude and be inapplicable to workers compensation cases number 95010937 and 95020147, with respect to which I am the petitioner and the Board is the respondent. Finally this Release does not preclude enforcement of the Stipulation of Settlement to which this Release is an exhibit.

2. **Payment.** I have been paid a total of $1.00 and other good and valuable consideration, in full payment for making this Release. I agree that I will not seek anything further including any other payment from the Board.

3. **Who is Bound.** I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. **Signatures.** I understand and agree to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal is affixed.

Witnessed or Attested by:

Raymond Flood, Esq.

JAMES B. LEDERER

STATE OF NEW JERSEY, COUNTY OF **SS.:**
I CERTIFY that on OCT. 24, 1997,

James B. Lederer personally came before me and stated to my satisfaction that this person (or if more than one, each person):

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as his or her act and deed.

Raymond F. Flood

Prepared by:

RELEASE **Dated:** , 19

Record and return to:

TO

OAL DKT. NOS. EDU 3263-98 (On Remand from EDU 2992-92) AND
EDU 3240-98 (On Remand from EDU 5712-95) (CONSOLIDATED)
AGENCY DKT. NOS. 36-2/95 AND 152-4/95

IN THE MATTER OF THE TENURE HEARING OF JAMES B. LEDERER, SCHOOL DISTRICT OF BERGEN COUNTY SPECIAL SERVICES, BERGEN COUNTY,	:	
AND	:	
JAMES B. LEDERER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN COUNTY SPECIAL SERVICES SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

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

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement. However, in light of the seriousness of the underlying allegations involved in this case, the Commissioner determines to forward this matter to the State Board of Examiners for action as it deems appropriate.*

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

AUGUST 28, 1998
DATE OF MAILING AUGUST 28, 1998

109-98

DELAWARE VALLEY REGIONAL EDUCATION ASSOCIATION,

PETITIONER,

V.

BOARD OF EDUCATION OF THE DELAWARE VALLEY REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY, AND HUNTERDON COUNTY EDUCATIONAL SERVICES COMMISSION,

RESPONDENTS,

AND

HOLLAND TOWNSHIP BUS DRIVERS' ASSOCIATION,

PETITIONER,

V

BOARD OF EDUCATION OF THE TOWNSHIP OF HOLLAND, HUNTERDON COUNTY, AND HUNTERDON COUNTY EDUCATIONAL SERVICES COMMISSION,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In consolidated matter, Petitioning Education and Bus Drivers' Associations challenged Boards' contracts with County Educational Services Commission (ESC) to provide transportation services to regular education students.

Commissioner found that the ESC and respondent Boards did not act improperly or in contravention of school law or regulation when they entered into agreements to provide transportation services to regular education students. *N.J.S.A.* 18A:6-51 et seq.; *Colantoni*; *Impey*. When applying to the New Jersey Department of Education in 1989 to enlarge the scope of its services, the ESC fairly represented that its services, although restricted at the time to the transportation of special education students, could potentially expand to include "overall transportation for districts." Commissioner found it noteworthy that the State Board of Education placed no limits whatsoever on its approval of the ESC's application, notwithstanding the ESC's use of broader language in its appended documents. Petitions were dismissed.

AGENCY DKT. NOS. 92-3/97 and 125-4/97 (CONSOLIDATED)

DELAWARE VALLEY REGIONAL EDUCATION ASSOCIATION, PETITIONER, V. BOARD OF EDUCATION OF THE DELAWARE VALLEY REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY, AND HUNTERDON COUNTY EDUCATIONAL SERVICES COMMISSION, RESPONDENTS, AND HOLLAND TOWNSHIP BUS DRIVERS' ASSOCIATION, PETITIONER, V. BOARD OF EDUCATION OF THE TOWNSHIP OF HOLLAND, HUNTERDON COUNTY, AND HUNTERDON COUNTY EDUCATIONAL SERVICES COMMISSION, RESPONDENTS.	:	COMMISSIONER OF EDUCATION DECISION

This consolidated matter comes before the Commissioner by way of two Petitions of Appeal filed on March 13, 1997 and April 10, 1997 by the Delaware Valley Regional Education Association (hereinafter, "Delaware Association") and the Holland Township Bus

Drivers' Association (hereinafter, "Holland Association"), respectively. While the petition filed by Petitioner Delaware Association was initially transmitted to the Office of Administrative Law for determination, in accordance with *N.J.A.C.* 1:1-3.3, the Commissioner subsequently requested that the matter be returned to the Department of Education for determination. In that identical claims have been raised in both cases, and the parties were amenable to consolidation, the Commissioner approved consolidation of these matters, and further determined that petitioners' claims could be adjudicated without plenary hearing. Additionally, by letter dated May 22, 1997, the parties were informed that they were to submit a briefing schedule to the Department. Having received a Joint Stipulation of Facts, primary briefs from all parties and reply briefs from petitioners and respondent Hunterdon County Educational Services Commission (hereinafter, ESC), the record in this matter closed on December 2, 1997.[1] Petitioners move for summary decision in this matter, as does the respondent ESC. The respondent school boards do not contest the motions for summary decision.

UNDISPUTED FACTS

1. Petitioner Delaware Association is the majority representative of a bargaining unit which includes among other employees, school bus drivers employed by respondent, Board of Education of the Delaware Valley Regional High School District (hereinafter, "Delaware Board");

2. Petitioner Holland Association is the majority representative of a bargaining unit which includes among other employees, school bus drivers employed by respondent, Board of Education of the Township of Holland (hereinafter, "Holland Board");

[1] On December 18, 1997, petitioners filed a correction to their previously filed reply brief.

3. Respondent Delaware Board is Responsible for the administration and operation of the schools within the Delaware Valley Regional High School District in accordance with the provisions of Title 18A;

4. Respondent Holland Board is responsible for the administration and operation of the schools within the Holland Township School District in accordance with the provisions of Title 18A;

5. Respondent Hunterdon County ESC is an educational services commission established and operating pursuant to the provisions of *N.J.S.A.* 18A:6-51. The ESC is responsible for providing educational services to respondents, Delaware Board and Holland Board;

6. When the ESC was first approved on December 6, 1979, it served solely for the purpose of providing services for adult and continuing education programs;

7. As a result of a needs assessment profile conducted by the ESC from June 1988 through November 1988, the ESC was able to determine that additional services were needed, including, but not limited to cooperative transportation services. Hence, on or about February 17, 1989, the ESC applied to the New Jersey State Department of Education to enlarge the scope of the services it can provide to school districts within Hunterdon County;

8. The ESC attached to said application a comprehensive document, entitled *A Plan for the Future*, dated September 1988, which reflects the resources relied upon by the ESC to conduct a needs assessment profile and the data therefrom. The plan states, in pertinent part:

Under "Mission Statement"

> Two services are identified as initial priorities in the action plan for expansion:
> 1. Special Education Transportation
> 2. Group Purchasing

Following closely will be:

3. Special Education Services
   Occupation and physical therapies, coordination of county public school classes, child study team services
4. Programs for Disaffected Youth
5. Planning, Evaluation, Research and In-Service for Curriculum and Instruction ***

Under "Goals"

> To administer a coordinated transportation system for eligible students of participating districts in accordance with New Jersey Statute and Code. *** (Joint Stipulation of Facts, Exhibit A at pp. 2, 3 and 5)

9. The ESC also attached to its application an *Expanded Mission Statement*, dated September 28, 1988, describing all the expanded services and the manner by which these services would be provided. The statement provided, in pertinent part,

> Under "Expanded Mission Statement"
>
> 4. Transportation - Twenty-seven of the 28 districts, with operational schools, who were contacted expressed the need for cooperative transportation for special education students attending classes outside of their home districts. The success of other Commissions in this area supports the projected success of this arrangement.
>
> High schools in Hunterdon County provide shared time vocational programs for each other's students, requiring transportation. Some interest has been expressed in exploring the cost effectiveness of the Commission providing this service.
>
> Cooperative jointure transportation arrangements are presently in use in the county. More extensive use of this concept will provide more effective transportation. This could lead to the Commission providing transportation for field trips, athletic contests and other activities, as well as overall transportation for districts.
>
> Costs should be no greater than at present and routes should be more efficient. Cost would be shared proportionate to pupil use by districts, with State Transportation Aid continuing to the district of residence. (Joint Stipulation of Facts, Exhibit C at p. 16)

10. On or about December 6, 1989, the State Board of Education approved the ESC's application for enlargement of purposes;

11. On or about January 21, 1997, the respondent Delaware Board passed a resolution that the ESC and Delaware Board agree to enter into a three-year agreement to provide pupil transportation services, commencing July 1, 1997 through June 30, 2000;

12. The respondent Holland Board passed a resolution that the ESC and Holland Board agree to enter into a three-year agreement to provide pupil transportation services commencing July 1, 1997 through June 30, 2000;

13. Prior to the dates specified herein, the respondent Delaware Board and the respondent Holland Board provided school bus transportation services to some of its pupils through bus drivers employed by its school districts, who are and were members of the Delaware Association and the Holland Association;

14. Respondent Delaware Board and the ESC entered into a contract on or about June 6, 1997, whereby the ESC agreed to provide all school bus transportation services for the Delaware Board for the period beginning July 1, 1997 through June 30, 2000; and

15. Respondent Holland Board and the ESC entered into a contract on or about July 9, 1997, whereby the ESC agreed to provide all school bus transportation services for the Holland School District for the period July 1, 1997 through June 30, 2000.

POSITIONS OF THE PARTIES

Petitioners Delaware Association and Holland Association

Petitioners initially assert that the ESC lacks the statutory authority to contract with the respondent Boards for districtwide pupil transportation services. Citing *N.J.S.A.* 18A:6-

63[2], petitioners argue that the plain language of the statute requires the ESCs to act only in accordance with the regulations promulgated by the State Board of Education. (Petitioners' Primary Brief at pp. 2-3) In turn, petitioners reason, the State Board regulations only authorize an ESC to provide programs for pupils with educational disabilities, as per *N.J.A.C.* 6:28-7.1. (*Id.*) Petitioners argue that while such services to students with disabilities may include transportation services, the ESC is not authorized to provide transportation services on a district-wide basis to other students.

As to the plan which the ESC submitted for expansion of its services, petitioners contend that the stated purpose in seeking expansion was, as stated *supra*, to "administer a coordinated transportation system for eligible students of participating districts ***." (Joint Stip., Ex. A at p. 5) Petitioners further cite to the related objective for this purpose, as noted in the ESC's *A Plan for the Future* document. To the extent the ESC suggested in broader terms an interest in providing "cooperative jointure transportation," petitioners claim the ESC could only have been offering such services to special education students, in view of its stated plan and its limited authority. (Petitioners' Primary Brief at pp. 4, 5) The "eligible students" to which the ESC refers are, by definition and its own acknowledgment, students with disabilities.

Petitioners further contend that their position is consistent with "***the well settled principle that governmental entities, particularly school boards, have no greater authority than permitted by the legislature." (Citations omitted). (*Id.* at pp. 5, 6) Moreover, petitioners reason that, where the language of a statute is plain and unambiguous, the statute must be

[2] The statute provides: "a. The representative assembly shall from time to time determined what services and programs shall be provided by the commission, subject to approval of and pursuant to rules of the State Board of Education. It shall determine the fee to be charged for providing each service and program, and enter into contracts with school districts, whether member districts of the commission or not, to provide any or all such services and programs. *** b. Commissions may enter into contracts with other public and private agencies for the provision of approved services and programs to participating public school districts and nonpublic schools. These contractual arrangements shall conform to the rules of the State Board of Education and be approved by the county superintendent or superintendents, as the case may be." *N.J.S.A.* 18A:6-63.

construed in accord with its plain language. (*Id.* at p. 6) Here, petitioners reason that the ESC's authority is limited to what is authorized by the State Board of Education regulations, and no State Board regulation authorizes ESCs to provide districtwide transportation. (*Id.*) To adopt a reading of the statute which allows that an ESC must act, in general, in accordance with the State Board's regulations governing public educational entities would, according to petitioners, lead to an absurd result since "[t]he ESC must already follow school law statutes and regulations of general applicability. ***" (*Id.* at p. 7)

Petitioners additionally argue that, even assuming, *arguendo*, that the ESCs are authorized to provide district-wide transportation services, the Hunterdon ESC failed to obtain the approval from the State Board of Education for the provision of such services, and therefore violated *N.J.S.A.* 18A:6-63 and *N.J.A.C.* 6:28-7.1 . (*Id.* at p. 8) Petitioners thus maintain that the ESC's application for expanded services addressed only special education matters:

> The ESC's stated objectives for 1991 refer to special education transportation. The same document refers also to cooperative jointure transportation. Moreover, the term "jointure" is an educational term of art, signifying special education. (*Id.* at pp. 8-9)

In reply to respondents' positions, *infra*, petitioners argue that the decisions rendered in *Colantoni v. Board of Education of the Township of Long Hill, Morris County*, 97 *N.J.A.R.* 2d (EDU) 326 and *Impey v. Board of Education of the Borough of Shrewsbury*, 142 *N.J.* 388 (1995) are not dispositive in the instant matter.

> ***In *Colantoni*, the issue before the court was whether the board acted within its discretion when it abolished petitioner's position as a guidance counselor and later contracted out those services to the county jointure commission, and not an ESC. Significantly, while a jointure commission and ESC are obligated to act in accordance with the rules of the state board, *** the statute governing a jointure commission *** specifically delineates the powers and duties of a jointure commission. *** In sharp contrast, the statute governing ESC's does not provide powers by the same mechanism.

> On the contrary, the programs and services which an ESC may provide are "subject to the approval of *and* in accordance with the rules governing the state board of education." Under those rules, those services and programs are limited to special education pupils and do not extend to the general student population. (emphasis in text) (Petitioners' Reply Brief at pp. 5, 6)

Further, although the ALJ in *Colantoni* suggested in *dicta* that an ESC's services are not limited to those for handicapped pupils, this opinion is not controlling, according to petitioners. (*Id.* at p. 6) Similarly, petitioners reason that *Impey* does not control the instant matter, since that case concerned a contract between a local board and an ESC for the provision of remedial services to classified pupils.

Finally, in its reply, petitioners object to the ESC's submission of the certification of John F. Stansky, Superintendent and Business Administrator for the ESC. Here, petitioners charge that the parties agreed to submit this matter based upon stipulated facts, and the ESC's submission was an attempt to submit additional facts through the certification. Petitioners further contend that the certification is not relevant to the within issue. (*Id.* at p. 2)

Respondent Hunterdon County ESC

The ESC contends that the State Board of Education expressly authorized it to provide cooperative transportation services to regular education pupils attending its member school boards. (ESC's Primary Brief at p. 11) The ESC points to the statute which defines it as

> an agency established or to be established in one or more counties *for the purpose of carrying on programs of educational research and development and providing to public school districts such educational and administrative services* as may be authorized pursuant to the rules of the state board of education. (emphasis in text) (*N.J.S.A.* 18A:6-51(a))

The enabling statute further provides, the ESC adds, for expansion or alteration of services under *N.J.S.A.* 18A:6-69, upon application and approval by the State Board of Education. The ESC

contends that it complied with this procedure when it applied for, and obtained, as stated, *supra*, such approval. The ESC points out that the documents attached to its application consistently identify a need to provide transportation services beyond special education. In the document entitled *A Plan for the Future*, the ESC notes that one of its goals for the 1989-90 school year was to "administer a coordinated transportation system for eligible students of participating districts ***. (*Id.* at p. 12, citing Joint Stip. Ex. A at p. 5) This goal, the ESC reasons, is not restricted to handicapped pupils. Additionally, the *Expanded Mission Statement*, as noted *supra*, refers to "overall transportation for students." (*Id.*, citing Joint Stip. Ex. C at p. 16) The ESC further notes that the mission statement states that "cooperative jointure transportation arrangements are presently in use in the county. More extensive use of this concept will provide more effective transportation." (*Id.*) Thus, the ESC concludes that it could not have more clearly stated its desire to provide general transportation services. (*Id.* at pp. 12, 13)

Moreover, the ESC avers that the cover letter to its formal application stated, in pertinent part,

> Following an in-depth needs assessment of and by the county school districts, the Commission Board requests approval to offer the following services in addition to our previously established mission of providing adult and continuing education which has been most successful in meeting the needs of the county: Cooperative Transportation ***. (*Id.* at p. 13, citing to Joint Stip. Ex. B)

The ESC further reasons that its position is buttressed by the fact that, notwithstanding referring to cooperative transportation services throughout its application documents, the State Board of Education did not qualify or limit its approval to certain services or purposes. (*Id.* at p. 13) Citing *Impey*, *supra*, the ESC argues that

> ***[i]t is implicit that if the same agency which makes the rules governing the authority of an ESC approves the Commission's application for enlargement purposes to utilize certain services,

then such services are, in fact, authorized under the rule of the State Board. (*Id.*)

The ESC next contends that the statutory scheme, regulations and case law authorize it to provide cooperative transportation services to regular education pupils. (*Id.* at p. 15) Here, the ESC first points to a 1985 document published by the New Jersey State Department of Education, entitled *Policies and Procedures for Pupil Transportation*, which established that ESCs may provide transportation for pupils under joint agreements with participating districts, pursuant to *N.J.S.A.* 18A:6-51. (*Id.* at p. 15, citing to *Pupils* document at p. 30) The ESC then claims that the statutory scheme reveals that the Legislature intended a broad spectrum of educational and administrative services to be available to school boards in order to effectuate cost savings. (*Id.*) There is no language in the statute, the ESC contends, which would limit the scope of its services; neither is there language which suggests that in the absence of a regulation, an ESC is prohibited from acting. (*Id.* at pp. 15-16)

The ESC points to the definition contained in *N.J.S.A.* 18A:6-51(a), *supra*, and notes that no services are therein delineated. Similarly, *N.J.S.A.* 18A:6-63(a) "provides further support that an ESC is not limited to providing those services which are explicitly enumerated." (*Id.* at p. 16) Rather, the ESC reasons that the Legislature contemplated that, as the needs of the school districts changed over time, the ESCs would need to expand the scope of their services. Hence, *N.J.S.A* 18A:6-69 was implemented to allow for an enlargement of an ESC's purposes. It is, according to the ESC, the intent of the Legislature which must control when construing statutory enactments. (*Id.* at pp. 16-17) Clearly, the ESC concludes, a reading of *N.J.S.A* 18A:6-51, *N.J.S.A.* 18A:6-63 and *N.J.S.A.* 18A:6-69 demonstrates that the Legislature intended for an ESC to provide a broad range of services within the educational and administrative realm. (*Id.*)

The ESC refers to statutes and regulations in other areas of school law which lend support to the notion that school boards are encouraged to utilize cooperative or joint transportation arrangements for regular education pupils. See *N.J.S.A.* 18A:39-11.1; *N.J.A.C.* 6:21-16.11. Similarly, the ESC argues that an examination of other statutory enactments and pending bills compels the Commissioner to be guided by a trend toward regionalization among school districts, shared costs, savings and services outside the realm of special education. (*Id.* at p. 22) Here, for example, the ESC cites to the Comprehensive Improvement and Financing Act (CEIFA) at *N.J.S.A.* 18A:7F-1 *et seq.* "which encourages school districts to regionalize or share services for '. . . education and administrative services . . . [such] as transportation.' *N.J.S.A.* 18A:7F-31." (*Id.*) The ESC continues,

> ***the current outgrowth of pending legislation reflects a trend toward broadening the services which can be supplied jointly through the assistance of educational commissions. Senate Bill No. 1856, 207th Leg., 2d. Sess., (1977) [sic][,] introduced into Senate on March 3, 1997, seeks to broaden the scope of services a jointure commission can provide, by expanding educational programs and services to non-handicapped pupils. As this proposed legislation makes clear, drawing trivial distinctions between services for special education pupils and regular education pupils will not serve to promote the intended purpose of established agencies, such as ESCs and jointure commissions. (*Id.* at p. 23)

Finally, the ESC argues that the Commissioner has previously determined, in *Colantoni, supra*, that where nothing in an enabling statute precludes cooperative transportation services for regular education, such services may be provided where the contracting districts find such expansion to be in the best interest of efficient delivery of services. The ESC recounts that, in *Colantoni*, the ALJ found that an ESC may provide services to the handicapped but is not limited by statute to this role, as is a jointure commission. Yet, the Commissioner reversed the ALJ's decision and, thus, his distinction between the ESCs and the jointure commissions, noting

that, notwithstanding the express mention of handicapped pupils in the jointure commission statute, while the primary purpose of a jointure commission is to assist boards of education in carrying out their common duties with respect to the training and education of handicapped pupils, there is nothing in the statute which would preclude it from expanding its services to include nonhandicapped pupils, where the contracting districts find such expansion to be in the best interest of the delivery of services. Thus, the ESC finds that *Colantoni* stands for the proposition that, absent prohibitory language, an agency is authorized to act. (*Id.* at p. 20)

In reply to petitioners' primary brief, the ESC notes that, contrary to petitioners' contention, the ESC's reference to "eligible students" in its document appended to its application for expansion does not refer to "special education pupils." Rather, the ESC argues that, in prior paragraphs, it specifically refers to "special education pupils" and "common sense" dictates that if the ESC had intended the terms "eligible students" to be construed as special education pupils, it would have stated the same. (ESC's Reply Brief at p. 6)

As to petitioners' objection to the ESC's submission of Stansky's certification, the ESC maintains that it merely exercised its right to serve its motion for summary decision with supporting affidavits, pursuant to *N.J.A.C.* 1:1-12.5(b).

Respondent Delaware Board

The Delaware Board concurs with the ESC's view that the State Board of Education approved the ESC's application to provide general transportation services for member school districts. (Delaware Board's Primary Brief at pp. 6, 7) It further agrees that the statutory scheme permits the ESC to provide general transportation services, after approval by the State Board of Education. Urging a statutory interpretation which is consistent with the purpose of the statute which, in this case, is to effectuate cost savings among local boards, (*id.* at p. 8) the

Delaware Board points to a Senate Education Committee Statement to the 1989 amendment to *N.J.S.A.* 18A:6-51 which "specifically mentions the 'transportation program' as one which can legitimately generate revenues for the ESC. The 'transportation program' would not have been mentioned in the seventh paragraph of the Statement," the Board argues, "if it was not intended to be a statutorily authorized ESC service." (*Id.* at p. 9)

The Delaware Board contends that a common sense reading of *N.J.S.A.* 18A:6-51(a) supports its position. That statute

> makes reference to "such educational and administrative services as may be authorized *pursuant to* rules of the State Board of Education." (emphasis added) If the [Associations'] argument is to be credited, the Legislature could have easily stated that ESC's may provide such services as may be authorized *by* State Board rules. The use of the phrase "pursuant to," rather than "by," is critical to a determination of the Legislature's intent ***. When the word "authorized" was combined with "pursuant to," it is apparent that the Legislature intended that "authorized" be synonymous with "approved." Thus, *** the Legislature intended that the State Board must follow its own rules in the approval process for ESC programs. ***(*Id.* at pp. 9, 10)

Similarly, the Delaware Board reasons that, where *N.J.S.A.* 18A:6-63(a) states that services and programs shall be "***subject to approval of and pursuant to rules of the State Board of Education," the statute is requiring that, once the State Board approves an ESC program, the ESC must conduct that program in accordance with State Board rules. (*Id.* at pp. 10, 11)

The Delaware Board concludes that

> [t]he task at hand is to read the three statutes [*N.J.S.A.* 18A:6-51(a), *N.J.S.A.* 18A:6-63(a) and *N.J.S.A.* 18A:6-69] *in pari materia* in order to arrive at a sensible balanced interpretation. ***[T]hat interpretation is as follows: (1) the State Board must approve ESC services and enlargements of purposes, (2) the State Board must act in accordance with its procedural rules in granting such approval, and (3) once approved, ESC services and programs must comply with State Board regulations.***" (*Id.* at pp. 11, 12)

Respondent Holland Board

Respondent Holland Board concurs with respondents ESC and the Delaware Board that the statutory scheme permits joint transportation contracts for regular education pupils, and further argues that such contracts are in keeping with the public policy of this state that cooperative agreements among governmental agencies are to be encouraged.

DETERMINATION

Upon careful review of the arguments presented in this matter, the Commissioner finds that the ESC and respondent Boards did not act improperly or in contravention of school law or regulation when they entered into agreements to provide transportation services to regular education students. The Commissioner notes that he makes this determination without reaching to the facts presented in the Stanksy certification, as offered by the ESC.

A plain reading of *N.J.S.A.* 18A:6-51 *et seq.* leads to the inevitable finding that *nowhere* in the statute is the scope of services to be offered by an ESC circumscribed as petitioners contend. To the contrary, the statutes merely refer to the "educational and administrative services" to be offered by ESCs. See *N.J.S.A.* 18A:6-51(a) and *N.J.S.A.* 18A:6-52. Petitioners' argument that an ESC is only authorized, pursuant to *N.J.S.A.* 18A:6-63 and *N.J.A.C* 6:28-7.1(a) to provide services to special education students is specious. Here, the Commissioner finds that the statute's language, "subject to approval of and pursuant to rules of the State Board of Education" does not require, as petitioners suggest, that an ESC's authorization to provide services may *only* follow the State Board's adoption of *specific rules.* Rather, the Commissioner finds respondents' interpretation of the applicable statute to be more consistent with its overall purpose and intent. Furthermore, that the State Board has chosen to include in its special education code a provision for programs offered by the ESCs does not in

any way suggest that it has, by such reference, defined or delineated the range of services which may be offered by an ESC.

Further, the Commissioner finds that, based on the passages cited, *supra*, from the ESC's application and cover letter to the State Board for enlargement of its purposes, pursuant to *N.J.S.A.* 18A:6-69, the Commission fairly represented that its services, although perhaps restricted at the time to the transportation of special education students, could potentially expand to include "overall transportation for districts." (Joint Stip., Ex. C at p. 16) Further, the Commissioner finds it noteworthy that the State Board of Education placed no limits whatsoever on its approval of the ESC's application, notwithstanding the ESC's use of broader language in its appended documents. Finally, the Commissioner finds that the position set forth by respondents reflects sound educational and fiscal policy, as well as consistency with the law.

Accordingly, the Commissioner finds that respondent ESC has not violated either state education statute or code by its entry into an agreement to provide transportation services to respondents Delaware Board and Holland Board. The Petitions of Appeal in this matter are, therefore, dismissed.[3]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[3] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MARCH 12, 1998
DATE OF MAILING MARCH 12, 1998

127-98

BARBARA MORA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY AND BLUE CROSS AND BLUE SHIELD OF NEW JERSEY,	:	DECISION
RESPONDENTS.	:	

MARCH 18, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2458-97

AGENCY DKT. NO. 367-8/96

BARBARA MORA,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY AND BLUE CROSS AND BLUE SHIELD OF NEW JERSEY,

Respondents.

Richard A. Friedman, Esq., for the petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

George Frino, Esq., for the Board of Education of the City of Atlantic County

Joseph A. Pelizzoni, III, Esq., for the Blue Cross and Blue Shield of New Jersey

Record Closed: February 2, 1998 Decided: February 4, 1998

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

This matter concerns the claim of the petitioner, Barbara Mora, that she and her dependents are entitled to health insurance coverage through the group health insurance plan of

the Board of Education of the City of Atlantic City (Board), pursuant to N.J.S.A. 18A:16-12 et seq., specifically, N.J.S.A. 18A:16-16, N.J.S.A. 18A:16-18 and N.J.S.A. 18A:16-19. The petitioner requested a hearing and the matter was transmitted to the Office of Administrative Law (OAL) on March 26, 1997, for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14B-1 to -13.

On April 18, 1997, I received an unsigned letter from George G. Frino, Esq., on behalf of the Board stating that the matter had been settled. Since the OAL had not received a stipulation of settlement, I sent a letter on June 9, 1997, to Mr. Frino and Richard A. Friedman, Esq., who represents the petitioner, requesting a signed letter from the petitioner withdrawing her request for a hearing.

On June 24, 1997, I received a response from Mr. Friedman stating that the matter was probably settled and asking that I hold the matter till he could consult with the petitioner. Thereafter, I received a letter from Mr. Friedman stating a stipulation of settlement had been prepared and was sent to the parties.

On February 2, 1998, I received a fully signed stipulation of settlement, which sets forth the terms of the settlement. This settlement is attached and is incorporated herein.

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

1. The parties have voluntarily agreed tot he settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

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

February 4, 1998
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

2/6/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 10 1998
DATE

Barbara A Hennel
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

None

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

OAL DKT. NO. EDU 2458-97
AGENCY DKT. NO. 367-8/96

BARBARA MORA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY AND BLUE CROSS AND BLUE SHIELD OF NEW JERSEY,	:	DECISION
RESPONDENTS.	:	

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

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MARCH 18, 1998
DATE OF MAILING MARCH 18, 1998

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

1998 FEB -2 A 9:55

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
150 West State Street
Trenton, NJ 08608
(609) 392-8172
Attorneys for Petitioner

BARBARA MORA, Petitioner, v. BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY AND BLUE CROSS and BLUE SHIELD OF NEW JERSEY, Respondents.	BEFORE THE OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDUOA 02458-97S **STIPULATION OF SETTLEMENT AND DISMISSAL**

The parties to this matter, recognizing that petitioner has been provided with the health insurance coverage that she seeks in this matter, pursuant to the provisions of N.J.S.A. 18A:16-12 et. seq., hereby agree that this matter shall be deemed settled and resolved based upon the fact that petitioner is currently receiving such health insurance coverage. The parties further agree that they shall take no steps to discontinue such coverage, and that if such coverage is discontinued, petitioner may file an action to enforce this agreement, a Petition of Appeal, or take other legal action, and that any such petition or action shall be deemed timely filed.

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

Barbara Mora, Petitioner
Dated: 12/22/97

Zazzali, Zazzali, Fagella & Nowak
Attorneys for Petitioner

By: _____
Richard A. Friedman, Esq.
Dated: 12/26/97

George Frino, Esq.
Attorney for Respondent
Atlantic City Board of Education
Dated: 1/9/98

Blue Cross/Blue Shield of New Jersey

By: _____
Joseph A. Pelizzoni, III, Esq.
Attorney for Respondent
Blue Cross Blue Shield of New Jersey
Dated: 1/16/98

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

128-98

128-98

IN THE MATTER OF THE TENURE HEARING OF DAVID MONTGOMERY, SCHOOL DISTRICT OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY.	:	
AND	:	COMMISSIONER OF EDUCATION
DAVID MONTGOMERY,	:	DECISION
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

MARCH 18, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	OAL DKT. NO. EDU 4899-96
Petitioner,	AGENCY DKT. NO. 169-5/96
v.	
DAVID MONTGOMERY,	and
Respondent.	
and	
DAVID MONTGOMERY,	OAL DKT. NO. EDU 4967-96
Petitioner,	AGENCY DKT. NO. 197-5/96
v.	(CONSOLIDATED)
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	
Respondent.	

Joan Kane Josephson, Esq., for Board of Education of the Township of Willingboro (Hill Wallack, attorneys)

Steven R. Cohen, Esq., for David Montgomery (Selikoff & Cohen, attorneys)

Record Closed: February 3, 1998 Decided: February 3, 1998

BEFORE **STEVEN C. REBACK**, ALJ:

These matters were transmitted to the Office of Administrative Law (OAL) June 19, 1996 (EDU 4899-96) and June 21, 1996 (EDU 4967-96) for determination as contested cases, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. At the prehearing conference of August 26, 1996, it was agreed that the matters be consolidated.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

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

2/3/98
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

2/6/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 10 1998
DATE

Barbara A Harnack
OFFICE OF ADMINISTRATIVE LAW

ej

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
1998 FEB -3 A 9:36

	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
IN THE MATTER OF THE TENURE HEARING OF DAVID MONTGOMERY, BOARD OF EDUCATION OF WILLINGBORO TOWNSHIP, BURLINGTON COUNTY.	OAL DKT NO. EDUTH 04899-96S AGENCY REF. NO. 169-5/96
	CONSOLIDATED WITH
DAVID MONTGOMERY, an individual, Petitioner, v. BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, COUNTY OF BURLINGTON, Respondent.	OAL DKT NO. EDUOR 04967-96S AGENCY REF. NO. 197-5/96 JOINT REQUEST FOR APPROVAL OF SETTLEMENT, PROVIDING FOR WITHDRAWAL OF TENURE CHARGES AND PETITION OF APPEAL

INTRODUCTION

Counsel for the Board of Education of Willingboro Township ("Board") and counsel for its tenured employee ("Montgomery") join in moving for an order finding that the Settlement Agreement between the parties, attached hereto as Exhibit A, meets the requirements of N.J.A.C. 1:1-19.1, recommending that the Settlement Agreement be adopted by the Commissioner of Education, and ordering on condition that the Commissioner approves the Settlement Agreement without modification, that the Settlement Agreement be implemented and the tenure charges filed by the Board, and the Petition of Appeal filed by Montgomery each be withdrawn and these matters be dismissed with prejudice.

PROCEDURAL STATEMENT

This matter arises out of tenure charges against a tenured teaching staff member on grounds of unbecoming conduct, and that staff member's petition of appeal from a subsequent increment withholding on those same grounds. The tenure charges and petition were transmitted to the Office of Administrative Law (OAL) on July 25, 1996 and June 26, 1996 respectively, and consolidated for hearing pursuant to N.J.S.A. 52:14F-1 to 10.

Meanwhile, on or about January 16, 1997, Mr. Montgomery and his spouse filed a civil action in the Burlington County Superior Court denominated BUR-L-00150-97, asserting various claims against the Board and several of its employees, including claims for defamation, interference with a contractual relationship and prospective economic advantage and loss of consortium, which suit is still pending in superior court.

A hearing concerning the Board's tenure charges and Mr. Montgomery's petition of appeal commenced before the Honorable Steven Reback, A.L.J. on November 5, 1997 and continued on November 6 and 7, 1997. On November 18, 1997, counsel for both parties appeared before Judge Reback and informed him on the record that they had reached a Settlement Agreement under which, subject to approval by the Commissioner of Education, the tenure charges and petition of appeal might be withdrawn. Both Mr. Montgomery and the Board, through its authorized representative, stated on the same record that the parties had approved the settlement and agreed to it voluntarily.

The parties have agreed under the terms of the Settlement Agreement attached hereto as Exhibit A that Mr. Montgomery will be reinstated to a position consistent with his certification as a special education teacher at the salary step to which he would have been assigned had the tenure charges never been brought against him and his increments never been withheld.

The parties have further agreed under the terms of the Settlement Agreement attached hereto as Exhibit A that Mr. Montgomery is entitled to full backpay and restoration of benefits from the date he was suspended without pay through the date of his reinstatement, including the salary he would have received had his employment and adjustment salary increments never been withheld, less any amounts paid to him after his 120 day suspension without pay expired.

The parties have further agreed under the terms of the Settlement Agreement attached hereto as Exhibit A that conditioned upon the Commissioner's approval of the Settlement Agreement without modification, the tenure charges against Mr. Montgomery and Mr. Montgomery's Petition of Appeal from the withholding of his increment shall both be withdrawn and dismissed with prejudice. Furthermore, should the Commissioner fail to approve the Settlement Agreement attached hereto as Exhibit A without modification, the parties have agreed to make every reasonable effort to reform their Settlement Agreement to meet his objections.

Finally, the parties have agreed that any statements by the Board's attorney concerning the reasons she believes this settlement is not inconsistent with the public interest shall be not be presented by Mr. Montgomery or his spouse in any pending litigation as admissions, admissions against interest or competent evidence of any fact.

THE BOARD'S JUSTIFICATION FOR WITHDRAWAL OF TENURE CHARGES

The Board, through its counsel, Joan Kane Josephson, Esq., makes the following representations:

On May 9, 1997 the Willingboro Board of Education certified tenure charges against David Montgomery, a teaching staff member in the employ of the Board.

There were charges of (1) Unbecoming Conduct, and (2) a Pattern of Conduct. These charges were based upon allegations that Mr. Montgomery had shown videos in his class that had no educational relevance and/or included objectionable content such as sex, profanity and nudity, and that inappropriate films had been shown for the prior two years.

Sustaining these charges was dependent upon testimony of students who were in Mr. Montgomery's class during the time period noted above. At the time of the administrative law hearing, after interviewing the students who were in the classes, the students' testimony would not have sustained the allegations contained in the charges.

Under the circumstances, the Board of Education has directed its counsel to withdraw the charges and request that the Commissioner of Education approve the withdrawal.

CONCLUSION

The Settlement Agreement was negotiated between counsel well versed in school law and the Commissioner's prior decisions approving settlements based upon all the attendant facts and circumstances, some of which did not come to light until the hearing had already commenced. Additionally, no testimony was adduced by the Board during the three days of hearings into these matters which would have sustained the tenure charges against Mr. Montgomery or the withholding of his salary increments. Counsel, as well as Mr. Montgomery and the Board which unanimously approved it, are satisfied with the Settlement Agreement and believe that it fulfills the public interest with respect to these matters. For the reasons outlined above, and for good cause shown, this tribunal should conclude that the Settlement Agreement meets the requirements of N.J.A.C. 1:1-19.1, recommend that the Settlement Agreement be adopted without modification by the Commissioner of Education, order that the Settlement Agreement be implemented on condition that it is so approved, and therefore upon such approval dismiss with prejudice the tenure charges and petition of appeal in this consolidated matter.

Respectfully submitted,

HILL WALLACK
Attorneys for Board of Education of Willingboro Township

BY: Joan Kane Josephson
JOAN KANE JOSEPHSON

SELIKOFF & COHEN, P.A.
Attorneys for David Montgomery

BY: Steven R. Cohen
STEVEN R. COHEN

SETTLEMENT AGREEMENT REGARDING ACTIONS PENDING BEFORE THE COMMISSIONER OF EDUCATION

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
1996 FEB -3 A 8:36

This Settlement Agreement is entered into by and between the Board of Education of Willingboro Township ("Board") and its tenured employee David Montgomery ("Montgomery").

WHEREAS, Montgomery has been continuously employed by the Board as a teaching staff member since September 1, 1991; and

WHEREAS, on May 9, 1996 the Board certified tenure charges against Montgomery to the Commissioner of Education under the Tenure Employees Hearing Law, which charges were captioned:

IN THE MATTER OF THE TENURE HEARING OF DAVID MONTGOMERY, BOARD OF EDUCATION OF WILLINGBORO TOWNSHIP, BURLINGTON COUNTY.

OAL DKT NO. EDUTH 04899-96S
AGENCY REF. NO. 169-5/96

AND, WHEREAS Montgomery filed an answer contesting the tenure charges, and

WHEREAS, on May 9, 1996, the Board adopted a resolution withholding Montgomery's increment for the same reasons specifie in its tenure charges, and

WHEREAS, on May 29, 1996 Montgomery filed a Petition of Appeal with the Commissioner of Education alleging that the Board's action to withhold his increments was arbitrary and capricious, which petition was captioned:

DAVID MONTGOMERY, an individual,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, COUNTY OF BURLINGTON,

Respondent.

OAL DKT NO. EDUOR 04967-96S
AGENCY REF. NO. 197-5/96

AND WHEREAS, the Board filed an answer contesting Montgomery's Petition; and

3f

WHEREAS, the aforesaid tenure charges and petition of appeal were consolidated for hearing before Administrative Law Judge Steven Reback; and

WHEREAS, hearing of the consolidated proceeding began on November 5, 1997 and continued for two more days, and

WHEREAS, during the course of the hearing and preparing witnesses to appear at the hearing the Board, on the advice of its attorney, concluded that in light of Mr. Montgomery's unblemished record over the course of his employment, and the witnesses' expected testimony, it could not have sustained the allegations contained in its tenure charges and increment withholding, it would be in the best interest of the Board and the students of the district for which it is responsible to reinstate Montgomery to his position as an active member of the teaching staff, and compensate him for any lost salary and benefits he sustained as result of the charges being filed;

NOW THEREFORE, the matters in dispute having been amicably adjusted by and between the parties, it is hereby stipulated and agreed as follows:

1. The Board will seek the Commissioner's approval for this Settlement Agreement, and if the Commissioner approves the Settlement Agreement without modification, ask the Commissioner to allow the tenure charges against Montgomery to be withdrawn and dismissed with prejudice;

2. Montgomery will cooperate with the Board in seeking the Commissioner's approval for this Settlement Agreement, and if the Commissioner approves the Settlement Agreement without modification, ask the Commissioner to dismiss his petition of appeal with prejudice;

3. Should the Commissioner fail to approve the Settlement Agreement attached hereto as Exhibit A without modification, the parties have agreed to make every reasonable effort to reform their Settlement Agreement to meet his objections;

4. The Board shall reinstate Montgomery to a position consistent with his certification as a special education teacher at the salary step to which he would have been assigned had the tenure charges never been brought and his increments never been withheld;

5. The Board shall pay Montgomery full backpay and restoration of benefits from the date he was suspended without pay through the date of his reinstatement, including the salary he would have received had his employment and adjustment salary increments never been withheld, less any amounts paid to him after his 120 day suspension without pay expired.

6. Montgomery agrees in consideration of this Settlement Agreement being presented for approval to the Commissioner of Education that he and his spouse will not assert in related civil litigation that any statements by the Board through its attorney concerning the reasons it believes this settlement is not inconsistent with the public's interest are admissions, admissions against interest or competent evidence of any fact.

DATED:

HILL WALLACK
for the Board of Education
Education of Willingboro
Township

BY: _____
JOAN KANE JOSEPHSON

SELIKOFF & COHEN, P.A.
for David Montgomery

BY: Steven R. Cohen
STEVEN R. COHEN

OAL DKT. NOS. EDU 4899-96 and EDU 4967-96 (CONSOLIDATED)
AGENCY DKT. NOS. 169-5/96 and 197-5/96

IN THE MATTER OF THE TENURE HEARING OF DAVID MONTGOMERY, SCHOOL DISTRICT OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY.	:	
AND	:	COMMISSIONER OF EDUCATION
DAVID MONTGOMERY,	:	DECISION
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MARCH 18, 1998
DATE OF MAILING MARCH 18, 1998

129-98

L.S., on behalf of minor child, S.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MARCH 18, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11159-96

AGENCY REF. NO. 405-9/96

L.S. on behalf of minor child, S.F.,

Petitioner,

v.

BOARD OF EDUCATION OF SOUTH ORANGE AND MAPLEWOOD, ESSEX COUNTY.

L.S., *pro se*

Joanne L. Butler, Esq., for respondent
(Schenk, Price, Smith & King, attorneys)

Record Closed: January 30, 1998 Decided: February 10, 1998

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

This matter was transmitted to the Office of Administrative Law on October 23, 1997 as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties agreed to settle the matter and prepared the attached Stipulation of Settlement and Mutual Dismissal of Petition and Counterclaim.

Having reviewed the record and the settlement terms, I **FIND:**

1. The parties have agreed to the settle the matter as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the settlement be approved. It is further **ORDERED** that the parties comply with the settlement terms and that the proceedings in this matter be concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision on this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

long as she satisfies the statutory criteria set forth in N.J.S.A. 18A:38-1, et seq.

4. As a result of the foregoing, Petitioner hereby withdraws the Petition filed pursuant to N.J.S.A. 18A:38-1, with prejudice, and Respondent/Counterclaimant hereby withdraws its Counterclaim pursuant to N.J.S.A. 18A:38-1, with prejudice.

LONEY SMITH

BOARD OF EDUCATION OF SOUTH ORANGE AND MAPLEWOOD

F:\APPS\SSOLDATA\WP\JLB\306768.1

OAL DKT. NO. EDU 11159-96
AGENCY DKT. NO. 405-9/96

L.S., on behalf of minor child, S.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MARCH 18, 1998
DATE OF MAILING MARCH 18, 1998

130-98

IN THE MATTER OF THE APPROVAL :

OF THE TEANECK COMMUNITY : COMMISSIONER OF EDUCATION

CHARTER SCHOOL, BERGEN COUNTY : DECISION ON MOTION

:

For Movant Teaneck Board of Education, Schenck, Price, Smith & King
(Sidney A. Sayovitz, Esq.)

For Respondent, Amy Kaiman, Representative, Teaneck Community Charter School

This matter was opened by way of a motion filed on February 27, 1998, by the Board of Education of the Borough of Teaneck ("Board"). Therein, the Board seeks a stay of the Commissioner of Education's January 21, 1998 determination, currently on appeal to the State Board of Education pursuant to *N.J.S.A.* 18A:36A-4d, to grant a charter to the Teaneck Community Charter School ("Teaneck Charter School") by virtue of the authority granted him by *N.J.S.A.* 18A:36A-1 *et seq.* The Board seeks to stay, pending resolution of the appeal, both the Commissioner's approval of the charter and any action necessary to implement it. For the reasons which follow, the Board's motion is denied.

The standards for granting injunctive relief are well-established. The party seeking such relief must demonstrate the existence of each of the following four separate conditions: 1) that in the absence of such a stay, the movant will suffer irreparable injury; 2) that there is a clear probability that the movant will prevail on the merits of the underlying

controversy; 3) that the probability of harm to other persons will not be greater than the harm the movant will suffer in the absence of such a stay; and 4) that the public interest will not be adversely affected by such a stay. See *Crowe v. DeGioia*, 90 *N.J.* 126, 132-134 (1982) My review of the Board's submission vis-à-vis these stated legal requirements reveals that it has not established any of these required criteria.

The Board argues that it will suffer irreparable harm absent the grant of a stay herein in that it will be required to turn over nearly a million dollars to the Teaneck Charter School, with such money allocation having to be reflected in the District's 1998-99 budget, which is required to be submitted to the Department of Education and published in March 1998. It proffers that the reallocation of this money from the District would necessitate significant budget cuts in programs and services to its own students and result in tax increases for District citizens. The Board advances that the inclusion of these additional moneys in its budget would result in the District voters being asked to vote on a budget which may be seeking unnecessary taxes to fund a charter school which will never materialize.

Upon his review, the Commissioner finds that the reasons advanced by the Board are unpersuasive in establishing irreparable harm, as loss of money or uncertainty with respect to some aspects of preparing its budget for the upcoming school year does not rise to the level of irreparable harm. If the Board's advanced assertions in this regard were to be accepted as valid, each school district where a charter school has been approved would be similarly irreparably harmed by budgetary impacts. Such a contention is without foundation. Notwithstanding any short-term uncertainty which may be occasioned by the grant of a charter school, the Board will still be responsible for performing its required functions within the parameters of its budget.

Moreover, it is clear that if reallocation of moneys for a charter school ultimately proves to be unnecessary, such moneys may eventually be returned to provide tax relief for taxpayers.

As such, the Commissioner finds that the Board has failed to demonstrate irreparable harm absent the grant of a stay in this matter.

With respect to the second prong of the required criteria, the probability of its success on the merits, the Board advances that in rendering his January 21, 1998 approval of the Teaneck Charter School, the Commissioner rejected the Board's comments and recommendations, without explanation. Further, citing *N.J.S.A.* 18A:36A-5j, the Board contends that a charter school application is required to contain a description of, and an address for, its physical facility and given that the application of this particular charter did not have such mandated information, and in that the Charter School Act makes no provision for an extension of time within which to provide this data, it should have been rejected. The Board also alleges that the Teaneck Charter School's application contains "other statutory infirmities."

A review of the Board's arguments here reveals them as specious. Initially, the applicable statute, *N.J.S.A.* 18A:36A-1 *et seq.* contains no requirement that the Commissioner, in his determination granting a charter application, specifically discuss comments and recommendations submitted by a board of education with respect to the application. While the Commissioner will carefully weigh all available information before making a decision, the absence of a written response to the Board's concerns cannot be advanced as an impropriety in the granting of a charter.

With respect to the Board's assertions regarding the absence of a designated physical location in the Charter's application, it is noted that Teaneck Charter School's submitted

materials indicate that it has identified four possible location facilities but had not yet made any *definite* commitment. As was specifically stated in the Affidavit of Harold Morris submitted with the Board's motion in this matter, the January 21, 1998 letter which granted the within charter stated that the Charter School must "supply further information on or before May 15, 1998, July 31 and the opening of school." It is without question that documentation as to where the facility will be located is included in the required additional information and the failure to provide this data would result in the charter being rescinded. As such, the Commissioner finds that, under the circumstances, the Teaneck Charter School's failure to identify a *specific* site at the time of its application is not singularly sufficient justification to render its application fatally flawed necessitating its out of hand rejection. Notwithstanding that the Board urges the existence of "other statutory infirmities," in the charter's application, such claim is made without substantiating elaboration precluding evaluation of its veracity or impact. As such, the Commissioner concludes that the Board's articulated arguments, standing alone, are wholly insufficient to satisfy its burden of establishing that it has a reasonable probability of prevailing on the merits of this matter on appeal.

As to the final two criteria, the weighing of the relative harms to the parties and the public interest, the Board has failed to establish that it will be harmed in any significant way if the Commissioner does not stay his approval of the within charter. On the other hand, irreparable harm will inure to Teaneck Community Charter School if it is denied the moneys necessary to obtain a facility to house its school, begin to admit students and take other preparatory steps necessary to begin operations in September 1998. Finally, the Commissioner observes that public policy militates against the granting of a stay here. As set forth in

N.J.S.A. 18A:36A-2, "[t]he Legislature *** finds that the establishment of a charter school program is in the best interests of the students of this State and it is therefore the public policy of the State to encourage and facilitate the development of charter schools."

As such, based on the foregoing, the Commissioner determines that the Board has not satisfied the required criteria necessary for issuance of a stay and, therefore, its application for stay of the Commissioner's January 21, 1998 grant of a charter to Teaneck Charter School is hereby denied. *

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 18, 1998
Faxed and Mailed, March 18, 1998

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

134-98

134-98 E

W.W., Sr., on behalf of minor child, W.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF PENNS GROVE-:		DECISION ON MOTION
CARNEYS POINT REGIONAL SCHOOL	:	
DISTRICT, SALEM COUNTY,	:	
RESPONDENT.	:	
	:	

March 20, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
DENYING MOTION FOR
EMERGENT RELIEF
OAL DKT. NO. EDU 2059-98
AGENCY DKT. NO. 44-2/98

W.W., SR., ON BEHALF OF MINOR CHILD, W.W.,

Petitioner,

v.

BOARD OF EDUCATION OF PENNS GROVE-CARNEYS POINT REGIONAL SCHOOL DISTRICT,

Respondent.

Emmett E. Primas, Jr., Esq., for petitioner

John E. Bergh, Esq., for respondent

This is a transcript of the administrative law judge's oral order rendered pursuant to *N.J.A.C.* 1:1-18.2.

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

W.W. alleges his expulsion from school by the Penns Grove-Carneys Point Board of Education (Board) was arbitrary and capricious. He seeks an order lifting the expulsion, providing tutoring to W.W., and requiring the Board to expunge all records of the expulsion.

The matter was opened before the Commissioner of Education and, because of its emergent nature, transmitted to the Office of Administrative Law (OAL) pursuant to *N.J.S.A.* 52:14F-1 through -13, but without answer. Oral argument on the motion was heard on March 6, 1998, at the OAL, Trenton.

This matter arises from an incident that followed a football game on November 27, 1997. Although the factual representations vary widely, it appears there was a confrontation between W.W. and an assistant football coach at about the time the team was boarding buses to return to its own school. The incident may have continued when buses returned to the home school. W.W.'s father met with the football coach late on the evening of November 27. On Monday, December 1, 1997, a due process hearing was held with the student, his father, the high school principal and the high school assistant principal in attendance. A second due process hearing was held before the superintendent on December 8, 1997. The student and one or both parents were present as were the high school principal and the high school assistant principal. W.W. was aware of the charges against him and was provided an opportunity to give his side of the story. On the next day, W.W. was provided a letter from the superintendent of schools advising that a hearing was scheduled before the full Board on December 15, 1997. The charges, names of adverse witnesses, and witness statements were provided as was a recommendation that the family seek counsel.

The hearing was held on December 15, 1997. W.W., Sr., was again advised he had the right to counsel and was offered time to secure counsel, but declined. After a hearing of more than two hours, the Board voted to expel. The present petition of appeal, including a request for emergent relief, was timely filed.

Having heard the arguments of counsel, I ruled from the bench as follows.

Gentlemen, obviously this is not a happy case. Having looked at the very scant record, obviously immediacy of harm and irreparability of harm are shown. Irreparability not as clearly as immediacy, but it's there. Home instruction or adult school do not equal the high school experience. I am unpersuaded by possible athletic opportunities. As you might imagine, this has

been argued in other cases. This does not make weight in an evidential sense. The burden falling more heavily on the movant than the opponent is probably the case, but that is concededly a very close call. Even assuming the movant prevails on the first, second and fourth elements, I am not persuaded that there is a real likelihood of prevailing on the merits, not when the facts are so differently represented. Therefore, I am directing that first the motion for emergent relief be denied and, second, that this matter proceed to hearing next week. I would allow enough time so that you can serve witnesses with subpoenas if they do not come voluntarily and I direct counsel to meet with me upon close of the record this morning so that we can gauge persons who might be called and the amount of time that might be needed. It is my intention to start this hearing on Tuesday morning at 9:00 a.m. and go until we are finished. That might be Wednesday, it might be Thursday, but we're going to do this expeditiously. As the school is hanging in the balance, that's not something we can wait around for. I'll close the record at this point. We'll reduce the order denying the motion to writing and I'll give it to you on Tuesday when you come in. Now, you should know that this can be taken interlocutorily back to the Commissioner of Education, but the taking of interlocutory appeal does not stay the proceedings. We go to hearing Tuesday morning, 9:00 a.m.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

END OF TRANSCRIPT

I, Maryann Lyden, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Campbell's oral order rendered in the above-matter on March 9, 1998.

March 10, 1998
DATE

Maryann Lyden
Maryann Lyden

10 MARCH 1998
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

ml

OAL DKT. NO. EDU 2059-98
AGENCY DKT. NO. 44-2/98

W.W., Sr., on behalf of minor child, W.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF PENNS GROVE-:		DECISION ON MOTION
CARNEYS POINT REGIONAL SCHOOL	:	
DISTRICT, SALEM COUNTY,	:	
RESPONDENT.	:	
	:	

The record of this matter, the audio-tape of the hearing, and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner affirms the initial decision of the Administrative Law Judge (ALJ) that emergent relief in this matter must be denied in that Petitioner has failed to meet the standards for such relief as set forth in *Crowe v. DeGioia*, 90 N.J. 126 (1982). The Commissioner finds that irreparable harm has not been demonstrated by the facts herein, as noted by the ALJ, particularly in that W.W. was offered several options, outside of the regular educational program, which would allow him to earn his high school diploma. Further, petitioner has not demonstrated a likelihood of success on the merits of this matter in that the Commissioner may not upset a school board's determination unless it can be demonstrated to be patently arbitrary, capricious or unreasonable. *Thomas v. Board of Education of Morris Township*, 89 N.J. Super., 327, 332. The burden of proof that an action was so deficient rests with the person(s) challenging the decision. *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). Herein, W.W. was determined to have participated in an altercation

and the Board exacted what it determined to be an appropriate penalty following a hearing. It is well-settled in law that the Board has the discretion and authority to employ appropriate measures of discipline against violations of Board Policy and Board regulations. See, *N.J.S.A.* 18A:11-1, and *Gertner et als. v. Bd. of Ed of Elmwood Park*, 1974 *S.L.D.* 611, 613 (1974), *Kopera, Supra*. Lastly, a weighing of the equities demands this result.

Accordingly, the Motion for Emergent Relief is denied and the matter is ordered to proceed at the Office of Administrative Law in accordance with the ALJ's instructions.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 20, 1998
Date of Mailing, March 20, 1998

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

136-98 SEC

136-98

IN THE MATTER OF JAMES FAMULARO, :

ASBURY PARK BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION

MONMOUTH COUNTY. : DECISION

MARCH 16, 1998



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

9 Quakerbridge Plaza
PO Box 049
Trenton, NJ 08625-0049

A copy of the administrative law judge's

decision is enclosed.

This decision was mailed to the

parties on JAN 30 1998.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EEC 2723-97
AGENCY DKT. NO. C23-96

SCHOOL ETHICS COMMISSION,
Petitioner,
v.
JAMES FAMULARO,
Respondent.

Arlene Goldfus Lutz, Deputy Attorney General, for petitioner (Peter Verniero, Attorney General of New Jersey, attorney)

Robin S. Perry, Esq., for respondent (Kim A. Fellenz, attorney)

Record Closed: December 11, 1997 Decided: January 27, 1998

BEFORE **JEFF S. MASIN**, ALJ:

The School Ethics Commission ("SEC") found probable cause to believe that James Famularo, a member of the Board of Education of the Asbury Park School District, violated the School Ethics Act, *N.J.S.A.* 18A:12-21 *et seq.*, more especially subsection 24(c), when he moved for and voted upon the hiring of Albert Reinoso for the position of principal of the Thurgood Marshall Elementary School located within the Asbury Park School District. The theory upon which the alleged violation is founded is that Mr. Famularo, who had served as the unpaid treasurer of Mr. Reinoso's campaign for election to the Asbury Park City Council and in that capacity had signed a number of required financial documents which were filed with the Election Law Enforcement Commission ("ELEC"), had a conflict of interest either actual or reasonably perceived because he should not have been involved in any capacity with the subsequent attempt of Mr. Reinoso to obtain the principalship. Famularo's motion and vote purportedly ran afoul of

the Ethics Act's prohibition against acting in a matter which "might reasonably be expected to impair his objectivity or independence of judgment."

After reviewing a complaint filed with it, the SEC determined at its meeting of February 25, 1997, that probable cause existed to credit the allegations against Mr. Famularo. A letter describing the SEC's determination was issued on April 9, 1997, (which also referred to a series of other allegations about others not determined to warrant findings of probable cause). The SEC ordered that the case against Mr. Famularo be transmitted to the Office of Administrative Law ("OAL") as a contested case. Following its transmission on April 11, 1997, a prehearing conference was held on July 16 and a prehearing order was issued on July 21, 1997. A motion seeking summary decision was filed by counsel for the SEC on October 20, 1997, and a response thereto on December 2. A reply brief was received on December 11 and the record closed at that time.

According to its motion brief, the SEC believes that the only material facts in this matter are that Famularo and Reinoso were both members of a political group known as Asbury United, that Famularo was the treasurer of Reinoso's successful campaign for the City Council which culminated in Reinoso's election to the Council in February 1996, that Reinoso later applied for and became one of the candidates for the principal's position when it was re-advertised in June 1996 (a prior attempt to hire a principal had led to a decision to re-advertise, Reinoso was not an applicant in the original search), that Famularo participated in the executive and public meeting sessions regarding the hiring decision, that he made a motion to hire Reinoso and then voted thereon. The respondent does not dispute these facts. He does dispute the suggestion which arises from assertions by the SEC that after all of these events, when Mr. Famularo was later appointed as Assistant City Manager for Asbury Park, that Reinoso had any role in or ability to influence that hiring decision. However, from the SEC's view, all of that is largely irrelevant, as the violation of the School Ethics Act took place at the time of Famularo's motion and vote. Thus, while the later hiring of Famularo by the City might perhaps be a factor in some public perception of undue influence occurring at the time of the school hiring decision, for the purposes of this case, the later actions are not material to proof of the ethics violation.

Additionally, while the respondent's brief is charged with commentary on the state of the Asbury Park District before and after changes in the composition of the Board and suggestions that the cause of this complaint to the SEC and other similar ones is racially motivated, the SEC simply notes that the issue of motivation is not relevant: either a violation occurred or it did not. Similarly, the merits of the appointment of Mr. Reinoso are not relevant, for even if Mr. Famularo had the proper intent to judge the candidate and others on the merits and even if his motion and favorable vote helped secure the best candidate for the job, nevertheless, the ethics issue is an independent matter, unrelated to the underlying merits of the vote.

The SEC argues that Famularo was a political confidant of Reinoso and at the same time a member of the Board of Education. When Reinoso became a candidate for the principalship, a conflict of interest arose for Famularo, one which should have lead him to remove himself from any and all involvement in the Board's consideration of the Reinoso candidacy and the entire appointment process. Recognizing that it is doubtful that mere membership in the same political organization, without more, can in and of itself constitute a conflict of interest in a situation such as this, the SEC emphasizes Mr. Famularo's role as campaign treasurer, a significant and legally important position in a campaign. Thus the political relationship between the two men was "more than a casual" one. Under the circumstances, it would be reasonable to interpret the situation as one where Mr. Famularo could be tempted to depart from his duty to independently consider the several candidates without any partisanship or favoritism. The public perception of the relationship of the two could reasonably lead to perceptions of improper action on Mr. Famularo's part, the specter of cronyism could be raised. Indeed, while the violation would have occurred at the time of the motion and vote by the School Board, the later appointment of Famularo to the Assistant City Manager's position by a Council on which Reinoso sat could be seen by the public as having a relationship to Famularo's role in the appointment of Reinoso to the principalship, regardless of whether the actual process for appointment of the Assistant City Manager under the form of government in Asbury Park is such as to legally preclude any influence or decision making on the appointment by the Council and/or its members.

In response to the motion for summary decision, Reinoso argues that there are material facts in dispute and that therefore, under the *Brill* standard summary decision may not be granted. *Brill v. The Guardian Life Insurance Company of America*, 142 *N.J.* 520 (1995). He points to

the dispute over what if any role Reinoso had in the decision to hire him to the city position. He also disputes the facts regarding the number of candidates recommended for the principal's position by the School Superintendent, disputing whether the Board appointed a person not recommended by the Chief School Administrator in violation of *N.J.S.A.* 18:27-4.1. On the merits, Famularo argues that any preclusion of a board member from voting on matters involving someone who has "the same or similar political goals" would unduly restrict the board's ability to function. The respondent's service as Reinoso's campaign treasurer six months prior to the hiring action cannot constitute a conflict of interest, as it is too remote an event. Finally, he argues that *N.J.S.A.* 18A:12-24(h), which provides that there is no conflict created if one votes on a matter and by that vote accrues no "material or monetary gain" to the voting member "as a member of any business, profession, occupation or group, to any greater extent than any gain could reasonably be expected to accrue to any other member of that business, profession, occupation or group" provides an absolute defense for Famularo.

Neither party cites any case law which has addressed this type of "political" connection as a possible source of a conflict of interest. It is certainly accurate for the respondent to say that the mere membership of two persons in a political group cannot by itself serve to disqualify one from acting where any other may benefit. Something more, be it a monetary benefit, a family or close personal relationship, etc., must be present in addition to such mutual membership which can serve to disqualify a board member. But the SEC here argues that the prominence of the treasurer as an official within the Reinoso campaign places Mr. Famularo in a different status than a mere member of the Asbury United group might be.

Since I see no merit whatsoever to the alleged "defense" of *N.J.S.A.* 18A:12-24(h), which addresses situations totally unlike the alleged conflict herein, the real issue is whether Famularo's role as treasurer some months earlier is enough to require that he step out of the picture in this hiring process so as to avoid reasonable concern that his role in the process was tainted by his previous close association with Reinoso. I believe that this is a very close question.

Since the current matter involves nothing so definable as a family relationship, or a monetary relationship (at least as of the time when Famularo acted on Reinoso's hiring), the key issue is whether a reasonable public would perceive a problem with Famularo's ability to properly

and independently judge Reinoso's qualifications and those of the others competing with him. Some in the public would perhaps view any "political" tie which existed between the men as enough to taint Famularo, thus necessitating his withdrawal even if they were simply members of the same party, association, etc. But I do believe that merely because this sort of perception would be generally an unreasonable one, and would certainly cause severe difficulties for public officials charged with the responsibility to act on behalf of the public, that a restriction which accepts that where one has been a prominent political official and supporter within a political campaign one should step aside when the person whom he or she so publicly supported seeks a job with a public body on which the supporter serves, is unwarranted. Such a restriction acknowledges that the public can reasonably view the actions of the supporter on behalf of the candidate as simply a further gesture of "political" support, an effort to further enhance the stature, pocketbook, or other interests of the candidate, or, if the candidate was unsuccessful in the campaign for elected office, as an attempt to provide the candidate with "something" as a reward, a consolation prize, a job, or otherwise.

It is recognized that there must be some time limits that reasonably apply to such a restriction upon a supporter's ability to act in a matter involving a candidate where such a prominent and official relationship has existed in the past. The exact parameters of such a limit are not readily definable, except that if the intervening period between a time of campaigning and active, official involvement and the time of consideration by a public body on which the supporter serves has been one during which no such open, active, official relationship has existed then the mere passage of time itself should often be enough to reduce any remaining public perception of favoritism or influence to a level which is merely an expression of unreasonable speculation and cynicism. However, if the causes which the candidate campaigned about and the supporter so prominently supported remain matters of public debate and controversy then the mere passage of time may not be enough to persuade reasonable persons that the former ties are so irrelevant to the supporter's actions as to make any thoughts of impropriety unreasonable. The test then is not an easy one to apply and this difficulty is recognized as a serious concern. Only careful assessment of all relevant factors can lead a public official to the correct result when faced with the choice to participate or withdraw. Such uncertainty is often a factor in matters involving the "reasonable perception" test. Nevertheless, in the absence of an easily defined bright line test, and in recognition that it is indeed reasonable that the public have concern where close political allies

act in ways that favor each other, some standard, however, flexible, must be recognized. As in all such matters, caution and public interest demand that when reasonable doubt as to the perception of conduct exists, the decision be such as to avoid the perception, that is, to refrain from involvement.

In the instant case, I **FIND** that there are no material facts in dispute and that it is appropriate to resolve the matter on this motion for summary decision. *N.J.A.C.* 1:1-12.5. I further **FIND** that the limited time between the campaign in which Famularo served as Reinoso's campaign treasurer and the time when Famularo acted in regard to the hiring decision was clearly insufficient to eliminate reasonable public apprehension. It appears that the political scene in the city was then still one of controversy and strife. Under the circumstances, it would have been appropriate for Famularo to refrain from involvement when Reinoso was considered for a job with the Board of Education. The later hiring of Famularo for a city job, even if Reinoso could play no role therein, surely could have heightened suspicion among members of the public, even if they misapprehended the process by which the Assistant City Manager was selected. However, the decision here is made independent of this latter development, and is reached only upon the fact of Mr. Famularo's role in the School Board action.

Given the nature of the conflict here, the lack of clear precedent and the difficulty in defining the exact parameters of such a restriction, I do not see any reason to entertain a suggestion that Mr. Famularo be removed from his position as a Board member. I **CONCLUDE** that a written reprimand is a sufficient form of response to his inappropriate conduct. *N.J.S.A.* 18A:12-29(c). The Commission may find it proper to advise Board members and other covered by the School Ethics Act as to the need for caution and the considerations to be taken into account when faced with similar "political" relationship questions.

I hereby **FILE** my initial decision with the **SCHOOL ETHICS COMMISSION.** Pursuant to *N.J.S.A.* 18A:12-29, the School Ethics Commission has jurisdiction to determine whether a violation of the School Ethics Act occurred. If it concludes that the conduct constitutes a violation of the School Ethics Act, it shall recommend an appropriate penalty to

the Commissioner of Education. The Commissioner of Education shall issue the final decision in this matter.

The recommendations of this decision as to whether the conduct constitutes a violation of the School Ethics Act may be adopted, modified or rejected by the **SCHOOL ETHICS COMMISSION**. If the School Ethics Commission does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision.

If the School Ethics Commission determines that a violation has occurred, it shall issue a written decision recommending to the Commissioner of Education an appropriate penalty and shall forward the record, including this recommended decision and its decision, to the Commissioner of Education. The Commissioner of Education may subsequently render a final decision as to the appropriate penalty. If the Commissioner of Education does not render a final decision within forty-five (45) days of its receipt of this initial decision, and unless such time period is otherwise extended, the recommended decision of the School Ethics Commission shall become the final decision.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **SCHOOL ETHICS COMMISSION, DEPARTMENT OF EDUCATION, CN 500, Trenton, NJ 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 27, 1998
DATE

JEFF S. MASIN, ALJ
Receipt Acknowledged:

January 29, 1998
DATE

SCHOOL ETHICS COMMISSION
Mailed to Parties:

JAN 30 1998
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONER:

Exhibit A — Reports of Contributions and Expenditures; Minutes of Closed Executive Session of Asbury Park Board of Education, July 1, 1996; Minutes of Special Meeting of Board of Education of Asbury Park, July 8, 1996; Minutes of Closed Executive Session of Board of Education of Asbury Park July 8, 1996; Complaint in Matter of *Olson v. Asbury Park Board of Education*, filed July 30, 1996; Letter dated April 9, 1997 to Kim Fellenz, Esq.

Exhibit B — School Ethics Commission Advisory Opinion, A01-93, dated 10/26/93

Exhibit C — School Ethics Commission Advisory Opinion, A10-93(b) and A07-94, dated 6/23/94

FOR THE RESPONDENT:

Exhibit A — 2/25/97 letter decision of School Ethics Commission, dated 4/9/97

Exhibit B — 7/21/97 Prehearing Order of Judge Masin

Exhibit C — Transcript T70-T72 School Ethics Hearing 1/28/97

Exhibit D — Transcript T56-T59 School Ethics Hearing 1/28/97

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: C23-96**
JAMES FAMULARO,	:	
ASBURY PARK	:	**DECISION**
BOARD OF EDUCATION	:	
MONMOUTH COUNTY	:	

The School Ethics Commission has reviewed the record of this matter and the Initial Decision finding that James Famularo violated the School Ethics Act, N.J.S.A. 18A:12-24(c), when he made the motion and voted in favor of appointing Albert Reinoso to a position as principal within the Asbury Park school district. The Administrative Law Judge (hereinafter "ALJ") set forth that a reprimand was an appropriate penalty. Upon mailing of the Administrative Law Judge's decision to the parties on January 30, 1998, the parties were provided 13 days to file written exceptions to the School Ethics Commission for its consideration. Deputy Attorney General Arlene Lutz filed timely exceptions on February 11, 1998. Kim Fellenz, Esq. indicated that his office did not receive the DAG's exceptions until February 17, 1998. Thus, he filed a reply and cross exceptions on behalf of James Famularo on February 23, 1998, pursuant to N.J.A.C. 1:1-18.4. The Commission considered the record, the Initial Decision and the exceptions and cross-exceptions in rendering its decision.

DAG Lutz supports the conclusion of the ALJ that Mr. Famularo violated the Act; however, she excepts to the sanction of reprimand recommended by the ALJ. Regarding the violation, she argues that Mr. Famularo, as Mr. Reinoso's campaign treasurer, had a relationship that might "reasonably be expected to impair his objectivity or independence of judgment" in violation of N.J.S.A. 18A:12-24(c). Further, she argues that the public perception is that Mr. Famularo was providing for a political crony. Thus, he should have abstained from the vote and his failure to recuse himself was a violation of the Act.

Regarding the violation, Mr. Fellenz argues two points on Mr. Famularo's behalf. First, he argues that Mr. Famularo's status as a new board member coupled with the lack of clear precedent concerning the vote at issue makes dismissal appropriate. Second, he argues that the lapse of time between Mr. Famularo's conduct as Mr. Reinoso's campaign treasurer and his vote on the position of principal make dismissal appropriate.

The Commission now addresses the arguments as to whether to accept the findings and conclusions of the Administrative Law Judge setting forth that Mr. Famularo

violated the School Ethics Act, N.J.S.A. 18A:12-24(c) when he made the motion and voted for Mr. Reinoso's appointment.

Subsection c sets forth:

> No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

Respondent's argument regarding the status of Mr. Famularo as a new board member is more appropriate for determination of penalty, not whether a violation occurred. There is no new member exception to subsection c that would permit the Commission to overlook conduct in violation of this subsection. Similarly, the argument that there is a lack of clear precedent goes to the penalty determination. The issue is whether respondent acted in his official capacity in a matter in which he had a personal involvement that might reasonably be expected to impair his objectivity. The Commission may not have been previously presented with a case to apply subsection c to a political relationship. However, the Act is clear that if it is a relationship reasonably expected to impair a school official's objectivity, then he should abstain.

In determining whether there is a violation of N.J.S.A. 18A:12-24(c), the determinative factor is the public's perception and not the school official's belief as to whether he could participate in a matter objectively. This is different from relying on only an "appearance of impropriety," standard as respondent suggests. The violation is based on an actual relationship that a reasonable person would expect to create a conflict of interest. Thus, Mr. Famularo may have believed that he was voting for the best candidate when he voted for Mr. Reinoso. However, if the public would reasonably expect that the motion and vote were tainted by his personal involvement, then he should have abstained from the discussion and vote.

The Commission agrees with the Administrative Law Judge's conclusion that Mr. Famularo's position as Mr. Reinoso's campaign treasurer created a personal involvement that might reasonably be expected to impair his objectivity in making and supporting the motion for Mr. Reinoso's appointment to the position of principal. In so concluding, the ALJ did not set a new standard and apply it retroactively as respondent suggests when he cites to Crema v. New Jersey Department of Environmental Protection, 94 N.J. 286 (1983). The Court in Crema discussed when rulemaking is more appropriate than adjudication. The reliance on Crema is thus misplaced since the ALJ certainly was not addressing a broad policy issue that affects the public at large. Rather, he interpreted the phrase "personal involvement" in the Act to apply to the facts of this case, using his reasoned judgment. For the reasons set forth in the Initial Decision, the Commission concludes that Mr. Famularo's conduct violated N.J.S.A. 18A:12-24(c).

In addition to the ALJ's reasoning, the Commission agrees with the DAG, that the Commission must look to the Legislature's findings and declarations set forth at N.J.S.A. 18A:12-22a, which state:

> The Legislature finds and declares:
>
> a. In our representative form of government it is essential that the conduct of members of local boards of education and local school administrators hold the respect and confidence of the people. These board members and administrators must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.

The Legislature's findings and declarations do not constitute the violation, but they reinforce the principal that the purpose of the act is to develop standards that avoid not just unethical conduct but also avoid the perception thereof. Mr. Famularo's service with Mr. Reinoso's campaign as his campaign treasurer created a justifiable impression among the public that Mr. Famularo's support of his appointment to the position of principal was based more on his political ties to Mr. Reinoso, than Mr. Reinoso's qualifications as a principal. The Commission rejects the argument that the six-month lapse between Mr. Famularo's service as campaign treasurer and the vote in question was enough time to dilute any reasonable suspicion of favoritism. From respondent's own submissions, and as the ALJ found, Mr. Reinoso's election to council in February 1996 clearly was still a matter of great public debate when he applied for the principal position in June 1996. Respondent's reliance on attorney conflict of interest cases is misplaced since such cases do not address the standards by which public officials must abide. Thus, the Commission hereby determines that a violation of the Act occurred.

Regarding the penalty, the ALJ concluded that a written reprimand is a sufficient response to Mr. Famularo's conduct considering the nature of the conflict, the lack of clear precedent and the difficulty in defining the exact parameters of such a restriction. In her exceptions, DAG Lutz argues that the nature of the conduct warrants a more serious penalty than reprimand since a reprimand is a private sanction, directed only to the school official. She argues that the Commission should make the public aware that it will penalize such conduct. Further, she argues that Mr. Famularo's conduct warrants a stronger sanction because he made a conscious choice to elevate his political connections over his ethical obligations. Mr. Fellenz argues that the singular and appropriate sanction is reprimand if the Commission determines that there has been a violation of the Act.

The Commission disagrees with the ALJ and the respondent that the nature of the conflict merits the lowest sanction. The nature of the conflict, here political cronyism, is surely one that Legislature drafted the School Ethics Act to eliminate. Mr. Famularo's vote on July 8, 1996, was to hire Mr. Reinoso to one of the highest positions in the district. He participated in the executive and public meeting sessions regarding the hiring decision giving no consideration to the public's perception of his vote. He did so despite the politically charged atmosphere in which he cast that vote. Furthermore, pursuant to

N.J.S.A. 18A:27-4.1, a board can appoint a certificated employee only with a majority vote of the full membership of the board. Thus, the Asbury Park board needed five votes to appoint Mr. Reinoso. The ALJ recognized as undisputed fact the events occurring at July 8, 1996, meeting. As the minutes indicate, with Mr. Famularo's vote, the board hired Mr. Reinoso by a vote of five in favor, one opposed and one abstention.

The Commission agrees that there is a lack of precedent directly on point with the nature of the conflict. However, there is precedent for the Commission going beyond the familial and financial relationships that would clearly result in a conflict for a board member. See In the Matter of Salvatore Buono, Pennsauken, SEC C16-94, April 9, 1996. In Buono, the Commissioner ordered that Mr. Buono be suspended from the board for one month for voting for the reappointments of his business partner and his emancipated daughter. The Commission believes that a political association such as this one, that is greater than just a shared political affiliation, constitutes as serious a conflict as a relationship with a business partner. However, the Commission recognizes as mitigating factors that it has not previously ruled that a political association such as this constitutes a conflict of interest and that Mr. Famularo was a new board member. Therefore, the Commission recommends a penalty of a censure.

DECISION

For the foregoing reasons, the School Ethics Commission adopts the Initial Decision, with a slight clarification in the reasoning pertaining to Legislative intent. It concludes that James Famularo violated N.J.S.A. 18A:12-24(c) of the School Ethics Act by making the motion and voting for Albert Reinoso as principal when he had previously served as Mr. Reinoso's campaign treasurer. The Commission modifies the ALJ's recommendation regarding sanction for the reasons set forth above and recommends that the Commissioner of Education impose a sanction of censure.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.



Paul C. Garbarini
Chairperson

Resolution Adopting Decision -- C23-96

Whereas, the Commission found probable cause to credit the allegations in the complaint and transmitted this matter for a hearing at the Office of Administrative Law; and

Whereas, the School Ethics Commission has considered the Initial Decision in this matter and has considered the exceptions and cross-exceptions of the parties and the record below; and

Whereas, the Commission has reviewed all of the information and now agrees with the conclusion of the Administrative Law Judge that respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act; and

Whereas, the Commission has reviewed the proposed decision of its staff setting forth the reasons for its conclusion; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby adopts the Initial Decision with a clarification and hereby finds that James Famularo violated N.J.S.A. 18A:12-24(c) of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of censure against Mr. Famularo; and

Be It Further Resolved that the Commission adopts the enclosed decision referenced as its decision in this matter.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on February 24, 1998.

Lisa James-Beavers
Executive Director

[c2396dec/c:lisajb/decisions]

OAL DKT. NO. EEC 2723-97
AGENCY DKT. NO. 49-1/98

IN THE MATTER OF JAMES FAMULARO, :

ASBURY PARK BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION

MONMOUTH COUNTY. : DECISION

The record of this matter and the decision of the School Ethics Commission ("Commission") have been reviewed. Comments were timely filed by respondent and were duly considered by the Commissioner in rendering the within decision.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that censure is the appropriate penalty in this matter for Mr. Famularo for the reasons expressed in its decision.[1] The Commissioner is cognizant that this determination represents a modification of the Administrative Law Judge's (ALJ) determination with regard to penalty, however, he is satisfied that the Commission considered and addressed all aggravating and mitigating factors raised by the parties in reaching its penalty determination and concurs that the present violation was sufficiently serious to warrant the imposition of censure as it is defined at *N.J.A.C.* 6:3-9.19(c)1.

Accordingly, it is hereby ORDERED that James Famularo be censured as a school official found to have violated the School Ethics Act and issues the attached Resolution of Censure.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] The determination of the Commission as to violation of the Act is not reviewable by the Commissioner herein, pursuant to *N.J.S.A.* 18A:12-29(c). Therefore, this decision is limited to a review of the recommended penalty and its implementation.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MARCH 16, 1998

DATE OF MAILING MARCH 19, 1998

139-98

EVELYN JACKSON-ALLEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

MARCH 25, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6092-97
AGENCY DKT. NO. 201-6/97

EVELYN JACKSON-ALLEN,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,
Respondent.

Kathleen A. Naprstek, Esq., for petitioner (Zazzali, Zazzali, Fagella and Nowak, attorneys)

Thomas W. Sumners, Jr., Esq., for respondent (Sumners, Council, George & Dortch, attorneys)

Record Closed: February 23, 1998 Decided: February 23, 1998

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

This matter was transmitted to the Office of Administrative Law on July 11, 1997, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

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

Feb 23, 1998
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

2/27/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 2 1998
DATE

Barbara A Harnett
OFFICE OF ADMINISTRATIVE LAW

cc

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
1998 FEB 23 P 1:00

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
One Riverfront Plaza
Newark, New Jersey 07102-5410
(201) 623-1822
Attorneys for Petitioner

EVELYN JACKSON-ALLEN Petitioner, v. BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 201-6/97 OAL DOCKET NO. EDU-06092-97S STIPULATION OF SETTLEMENT

The parties, by and through their attorneys, hereby agree to settle this matter in accordance with the following terms:

1. Petitioner will withdraw her appeal filed with the Commissioner of Education on or about June 10, 1997.

2. Respondent will reimburse Petitioner the sum of $1,818.16 less normal employee payroll deductions, which was heretofore deducted from Petitioner's payroll checks beginning on or about March 15, 1997. Said reimbursement shall be made to Petitioner in a separate check, not as part of Petitioner's regular payroll check.

3. The parties hereto stipulate that this agreement shall fully dispose of all issues in controversy between them with

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

regard to this matter.

Kathleen A. Naprstek, Esq.
ZAZZALI, ZAZZALI, FAGELLA
& NOWAK, P.C.
For Petitioner,
Evelyn Jackson-Allen

Dated: 2/4/98

Thomas W. Sumners, Jr., Esq.
SUMNERS, COUNCIL, GEORGE
& DORTCH, P.C.
For Respondent, Board of
Education of the City of
Trenton, Mercer County

Dated: 2/17/98

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

1998 FEB 23 P 1:00

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
One Riverfront Plaza
Newark, New Jersey 07102-5410
(201) 623-1822
Attorneys for Petitioner

EVELYN JACKSON-ALLEN Petitioner, v. BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 201-6/97 OAL DOCKET NO. EDU-06092-97S STIPULATION OF SETTLEMENT

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3. The parties hereto stipulate that this agreement shall fully dispose of all issues in controversy between them with

ZAZZALI, ZAZZALI, FAGELLA & NOWAK PROFESSIONAL CORPORATION ATTORNEYS AT LAW

regard to this matter.

Kathleen A. Nadrstek, Esq.
ZAZZALI, ZAZZALI, FAGELLA
& NOWAK, P.C.
For Petitioner,
Evelyn Jackson-Allen

Dated: 2/4/98

Thomas W. Sumners, Jr., Esq.
SUMNERS, COUNCIL, GEORGE
& DORTCH, P.C.
For Respondent, Board of
Education of the City of
Trenton, Mercer County

Dated: 2/17/98

OAL DKT. NO. EDU 6092-97
AGENCY DKT. NO. 201-6/97

EVELYN JACKSON-ALLEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MARCH 25, 1998
DATE OF MAILING MARCH 25, 1998

142-98

142-98

KELVIN O. EVANS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY AND ERNESTINE HARRIS, BOARD PRESIDENT,	:	DECISION
RESPONDENT.	:	

MARCH 26, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9686-96
AGENCY DKT. NO.230-6/96

KELVIN O. EVANS,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY and ERNESTINE HARRIS, BOARD PRESIDENT

Respondents.

Kelvin O. Evans, petitioner, *pro se* ,

Melvin C. Randall, Esq., for respondent
(Love & Randall, attorney)

Record Closed: January 29, 1998 Decided: February 11, 1998

BEFORE **ARNOLD SAMUELS**, ALJ:

In July 1996 the petitioner, Kelvin Evans, filed a verified petition with the Commissioner of Education, alleging that the respondent, Board of Education of the City of East Orange (Board), wrongfully removed him from his position as a Board

Member. The removal action taken by the Board occurred on September 19, 1995. The petitioner sought reinstatement to the Board so that he could serve as a Board Member for seven additional months, the length of time he would have continued to serve from the date of his removal until expiration of his term of office in May 1996. In the alternative, petitioner sought a Declaratory Ruling stating that his removal was unjustified. The reason for petitioner's removal from his position was an alleged violation of a Board rule that permits such action to be taken against a Board Member who misses three or more consecutive public meetings, without good cause.

On September 27, 1996 the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to 13. A hearing was scheduled to be held in the OAL in Newark, New Jersey on November 13 and 14, 1997.

On the first hearing day, November 13, 1997, the parties discussed the facts and the matters in issue. The respondent moved, orally, for dismissal based on the ninety-day filing limitation in *N.J.A.C.* 6:24-1.2(c). A total of sixty-days was allowed for the filing of a formal motion urging such a Summary Decision, including the filing of papers in opposition. Avenues of possible settlement were also explored at the same time.

By letter dated January 5, 1998, counsel advised that the matter had been resolved. A stipulation of settlement, signed by the petitioner and by the attorney for respondents, was filed in the OAL on January 29, 1998. The stipulation provided that petitioner will withdraw his petition of appeal in consideration of the Board's presentation to him of a plaque in recognition of the period of time that he served as a member of the East Orange Board of Education.

A copy of the stipulation is attached hereto and made a part hereof.

Having reviewed and considered the issues involved in this dispute, it is **CONCLUDED** that the parties have voluntarily and knowingly agreed to the settlement and withdrawal, as evidenced by the attached document. It is further **CONCLUDED** that the settlement is fair and fully dispositive of all issues in controversy.

It is therefore **ORDERED** that the withdrawal of the petition, based on the settlement attached hereto, be approved, subject to approval by the Commissioner of Education.

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

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

February 11, 1998
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

2/17/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 19 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

Love & Randall
ATTORNEYS AT LAW

MELVIN C. RANDALL
MARVIN L. COMICK

JOHN C. LOVE - 1964-1989

57 WASHINGTON STREET
EAST ORANGE, NEW JERSEY 07017

(973) 674-6000
FAX: (973) 674-8813

JAN 29 11 37 AM '98

January 28, 1998

Office of Administrative Law
185 Washington Street
Newark, NJ 07102
ATTENTION: JUDGE ARNOLD SAMUELS

RE: Kelvin Evans vs. East Orange Board of Education

Honorable Samuels:

Attached please find an original and a copy of Stipulation of Settlement, regarding the above-referenced matter.

Said settlement disposes of this matter and no further action by the court is required.

As always, thank you for your courtesy and cooperation.

Very truly yours,

Melvin C. Randall

Melvin C. Randall, Esq.

MCR:sd
Enclosures

CC: Kelvin Evans

LOVE & RANDALL, ESQS.
57 WASHINGTON STREET
EAST ORANGE, NEW JERSEY 07017
(973) 674-6000
ATTORNEY(S) FOR DEFENDANT, EAST ORANGE BOARD OF EDUCATION

Commissioner of Education
Docket No. EDUOT 09686-96N

Kelvin Evans - Petitioner

vs.

East Orange Board of Education
And Ernestine Harris
Respondent

STIPULATION OF SETTLEMENT

THE PARTIES HERETO MUTUALLY AGREE to amicably resolve the differences that exist between them. Neither party admits any wrong doing. The settlement agreement between the parties is set forth as follows:

(1) The East Orange Board of Education will present Kelvin O. Evans with a plaque in recognition of the period of time that he served as a member of the East Orange Board of Education.

(2) Kelvin O. Evans will withdraw his petition of appeal filed with the Commissioner of Education under Docket No. EDUOT 09686-96N.

LOVE AND RANDALL ESQS.
Attorney(s) for Defendants
East Orange Board of Education &
Ernestine Harris

BY: _____
MELVIN C. RANDALL, ESQ.

Kelvin Evans
Petitioner Pro Se

BY: K. O. Evans
KELVIN EVANS

OAL DKT. NO. EDU 9686-96
AGENCY DKT. NO. 230-6/96

KELVIN O. EVANS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY AND ERNESTINE HARRIS, BOARD PRESIDENT,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MARCH 26, 1998
DATE OF MAILING MARCH 26, 1998

143-98

143-98

IN THE MATTER OF THE TENURE	:	
HEARING OF CAPTAIN CHARLES DREYER,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF PEMBERTON, BURLINGTON	:	
COUNTY.	:	
	:	

MARCH 26, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 615-97

AGENCY DKT. NO. 3-1/97

IN THE MATTER OF THE TENURE HEARING OF CAPTAIN CHARLES DREYER, BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY.

Frederick W. Hardt, Esq., for the petitioner

Richard A. Friedman, Esq., for the Board of Education of the Township of Pemberton (Zazzali, Zazzali, Fagella and Nowak, attorneys)

Record Closed: February 18, 1998 Decided: February 19, 1998

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

This matter concerns the charges brought against the petitioner, Charles Dreyer, by the respondent, Board of Education of the Township of Pemberton, Burlington County, alleging that the petitioner no longer holds the appropriate qualification to teach military science and seeks his dismissal. The petitioner requested a hearing, and the matter was transmitted to the Office of Administrative Law on February 4, 1997, for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14B-1 to -13.

A telephone prehearing conference was held on March 21, 1997, and the matter was scheduled for a hearing. The hearing was adjourned and I had nine settlement conferences with the parties between May 29, 1997 and December 15, 1997. On the latter date, the parties informed me that the matter was settled.

On February 18, 1998, I received a fully signed stipulation of settlement, which sets forth the terms of the settlement. This settlement is attached and is incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

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

February 19, 1998
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

2/20/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 24 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

None

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

Law Offices of
FREDERICK W. HARDT
300 Chester Avenue, Suite 101
P.O. Box 840
Moorestown, NJ 08057
(609) 234-4141
Attorney for Pemberton Township Board of Education

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

1998 FEB 18 A 10:33

IN RE TENURE CHARGES AGAINST CHARLES DREYER	:	Before the Commissioner of Education Agency Docket No: 3-1/97
	:	Stipulation of Settlement

The parties to this matter, the Pemberton Township Board of Education and Captain Charles W. Dreyer, Jr., having reached an Agreement to resolve the matter before the Court and it being determined that it is appropriate and necessary to reduce this understanding to writing to avoid confusion during its implementation:

NOW THEREFORE IT IS Agreed by and between the Parties subject to approval of the Commissioner of Education as follows:

1. Resignation For and in consideration of the mutual covenants and understandings set forth in this stipulation, Captain Charles W. Dreyer, Jr., upon execution of this agreement hereby resigns his position with the Pemberton Township School District (District) as its instructor of Army Junior R.O.T.C. It is understood that submittal of this resignation will allow the District to fill the instructor position with another and that Captain Dreyer will no longer have any right, or entitlement to this position but subject to the Commissioner's approval.

2. Payment For and in consideration of the mutual covenants and understandings set forth in this stipulation the District agrees to continue to pay Captain Dreyer his salary for the position he enjoyed with the District prior to the withdrawal of his Army J.R.O.T.C. authorization for a period of one (1) year after the Commissioner's approval of this settlement. This payment will be in two (2)

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P.O. BOX 840
MOORESTOWN, NJ 08057

installments. The first will be within 30 days of the date of approval of this settlement by the Commissioner; the second will be within 30 days of July 1, 1998. This shall not include any entitlement to benefits.

3. Payment until approval In accordance with N.J.S.A 18A:6-14 the District will pay Captain Charles W. Dreyer, Jr., his salary and benefits until the Commissioner approves the settlement.

4. Drever Authorization On or about October 15, 1996 the Department of the Army in a letter signed by Colonel Roy Zinser withdrew Captain Dreyer's authorization as a Army Junior ROTC instructor effective September 27, 1996. The District contends that this withdrawal eliminates one of the two elements needed under N.J.A.C. 6:11-8.7 to obtain an endorsement under N.J.A.C. 6:11-6.2(a) 15 to teach military science in a New Jersey school system. To the District the endorsement is a nullity and without it, Captain Charles W. Dreyer, Jr., is not permitted to teach military science in this state. Captain Charles W. Dreyer, Jr., asserts that the District's position is incorrect, that he still holds a valid endorsement as a teacher of military science, and that with the sole exception of Army J.R.O.T.C. he is still authorized to teach military science and to fill any position that requires instructional certification, but no particular endorsement. Captain Charles W. Dreyer, Jr., also asserts that his withdrawal was improperly brought about in derogation of both procedural and substantive rights which he possesses. See: Washington v. Kirksey, 811 F2d. 561 (11th Cir., 1987); The District denies this. See: Rivkin v. Dover Tp. Rent Leveling Board, 143 N.J. 352 (1996) This Settlement resolves all claims against any entity or person which were or which could have been brought under the facts of this case either in this

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administrative proceeding or in any other forum having jurisdiction over any potential claim, suspension, or other legal action suggested by the facts under review, including any request for revocation or suspension of or action against Captain Charles W. Dreyer. Jr.'s teaching certificate by the Board or its employees. The settlement shall act as a complete bar to the assertion of these claims. In furtherance of this understanding it is agreed that:

a. The District will respond to all inquiries concerning Captain Charles W. Dreyer, Jr.'s employment with the District by providing the fact of such employment, his position, its duration, and the fact that he resigned his position in good standing on the date of this stipulation. The personnel file for Captain Charles W. Dreyer, Jr. will be sealed.

b. Although the parties agree that its restoration will not create any right to re-employment with the District, the District agrees to use its good faith best efforts to have Captain Charles W. Dreyer, Jr.'s Authorization to teach Army J.R.O.T.C. restored by the Department of the Army. To this end its agrees to issue a letter to be reviewed and approved prior to submission by Captain Charles W. Dreyer, Jr.'s attorney to the Department of the Army. This letter will indicate that the Board of Education has not conducted any hearing to determine or evaluate any of the underlying facts involved in the withdrawal, can not comment on the accuracy of any of the observations previously made by supervisors of the District, did not prior to the request for withdrawal authorize the request to be made, and notes that two (2) of the supervisors who had made earlier requests for withdrawal are no longer in the employ of the District. The District does not warrant that the Department of the Army will grant the request for authorization.

cw 1/22/98

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MOORESTOWN, NJ 08057

c. By signing this stipulation Captain Dreyer waives any right to re-employment with the District in any job title or classification. This agreement, however, does not prevent or bar re-employment of Captain Charles W. Dreyer, Jr. by the District.

d. Within 30 days of the date of this agreement is approved, the parties agree to issue a joint public statement which will indicate that the proceedings were not based on any allegation of wrongdoing or misconduct on the part of Captain Dreyer.

e. Within 30 days of the date of this agreement the parties agree to issue a letter of recommendation covering Captain Charles Dreyer, Jr.'s employment with the District. This statement shall be approved by Captain Dreyer's counsel REVIEWED AND 1/22/98 prior to issuance. The statement shall be issued at any time another employer seeks comment on Captain Dreyer's employment with the District.

IN WITNESS HEREOF the parties have set there hands and seals this 18 day of December 1997

Attest:

Witness

Carrie Jo R. Hulbert

Pemberton Board of Education

By

1/22/98

Captain Charles W. Dreyer, Jr.

H:\MUN\PBED\DOCS\STIPSET

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OAL DKT. NO. EDU 00615-97
AGENCY DKT. NO. 3-1/97

IN THE MATTER OF THE TENURE	:	
HEARING OF CAPTAIN CHARLES DREYER,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF PEMBERTON, BURLINGTON	:	
COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) in the form of a joint stipulation of settlement have been reviewed.

Upon careful and independent review of the full record of this matter and the terms of the proposed settlement agreement, the Commissioner is compelled to reject such agreement as it is currently structured since he cannot be satisfied by the present record that the proposed settlement meets the *Cardonick* standards for settlement of tenure matters. (*In re Cardonick*, decided by the Commissioner April 7, 1982, affirmed State Board of Education April 6, 1983, 1990 S.L.D. 842, 846.)

It is well established that, having once taken up the burden of tenure charges, the Board may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges can no longer be pursued or why it is now in the public interest not to pursue them. (*In the Matter of the Tenure Hearing of Kenneth Smith, School District of the City of Orange*, Essex County, decided by the Commissioner March 22, 1982, decision on

remand June 16, 1983, affirmed with modification by the State Board of Education November 2, 1983, affirmed Superior Court January 30, 1986.) The present record contains no such explanation.

Moreover, the Commissioner notes that while the Board is not specifically required to provide publicly the reasons for separation, it must make such information available upon requests, pursuant to Executive Order No. 11 (1974), which states, in pertinent part, that the following information be public:

> a. An individual's name, title, position, salary, payroll record, length of service in the instrumentality of government and in the government, *date of separation from government service and the reason therefor*; and the amount and type of pension he is receiving;
> b. Data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but in no event shall detailed medical or psychological information be released. *** (emphasis added)

While the Commissioner allows parties broad latitude in crafting settlement agreements and may approve a settlement which limits the release of information concerning a party's performance and conduct while employed by the district, see *Barbara Holder v. Board of Education of the Township of Piscataway, Middlesex County*, reversed State Board April 7, 1993, the Commissioner will not approve a settlement term that would expressly require a district to falsely represent that a resignation was in good standing or preclude release of information covered by Executive Order No. 11. See, *In the Matter of the Tenure Hearing of Donald Yandolino, School District of the City of Union, Hudson County*, decided by the Commissioner November 21, 1997.

Further, there is no indication that the within teaching staff member was advised of the Commissioner's duty, pursuant to *N.J.A.C.* 6:11-3.6, to refer tenure determinations for possible revocation of certificate.

While the Commissioner does not preclude the possibility of settlement in this matter, he stresses that in order for him to meet his own obligation to the school and children of this state, he must be assured that any settlement is consistent with appropriate standards for setting aside tenure matters as expressed in *Cardonick, supra.*

Accordingly, the proposed settlement is rejected for the reasons expressed herein. The Commissioner hereby remands this matter to the OAL for further settlement negotiations consistent with the concerns herein expressed. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to a plenary hearing.*

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MARCH 26, 1998
DATE OF MAILING MARCH 26, 1998

144-98

144-98

IN THE MATTER OF THE TENURE	:	
HEARING OF WENDY STUART,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF IRVINGTON,	:	DECISION
ESSEX COUNTY.	:	
	:	

MARCH 26, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1185-97
AGENCY DKT. NO. 442-9/96

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,

Petitioner,

v.

WENDE STUART,

Respondent.

Denise P. Coleman, Esq., for petitioner
(Schwartz, Simon, Edelstein, Celco & Kessler, attorneys)

Christopher M. Hartwiyk, Esq., for respondent

Record Closed: January 26, 1998 Decided: February 17, 1998

BEFORE **ARNOLD SAMUELS**, ALJ:

In September 1996 the petitioner, Board of Education of the Township of Irvington, Essex County, filed a certificate of determination and written charges against

the respondent, pursuant to *N.J.S.A.* 18A:6-11 and *N.J.A.C.* 6:24-5.1 *et seq.*, seeking dismissal of the petitioner from her tenured position, for unbecoming conduct, incapacity, and other just cause (more specifically, excessive absenteeism and abandonment of position), pursuant to *N.J.S.A.* 18A:6-10 *et seq.* The respondent filed an answer with the Commissioner of Education on December 24, 1996.

On January 10, 1997 the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to 13.

Prehearing conferences were scheduled several times, but were adjourned for various reasons, including difficulties experienced by respondent's attorney in reaching and conferring with his client, who was located, for the most part, in the Southwestern part of the United States. A plenary hearing was ultimately scheduled for December 18 and 19, 1997 at the OAL in Newark, New Jersey. However, prior to the hearing counsel advised that the matter had been settled by and between the parties and that respondent's attorney had obtained Ms. Stuart's consent to the settlement. The petitioner, Irvington Board of Education, also approved of the terms. A letter from respondent's attorney to counsel for the petitioner contained the full and complete terms of settlement, which were approved on behalf of the Board and by counsel for petitioner. A copy of the letter of settlement, filed in the OAL on January 26, 1998, is attached hereto and made a part hereof.

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

1. The parties have voluntarily agreed to the settlement as evidence by the signatures of their attorneys.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

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

February 17, 1998
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

2/20/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 25 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

SCHWARTZ SIMON
EDELSTEIN CELSO &
KESSLER COUNSELLORS AT LAW
(A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION)

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* ALSO MEMBER OF NY BAR
† ALSO MEMBER OF PA BAR
+ MEMBER OF FL BAR ONLY
° ALSO MEMBER OF PR BAR
□ ALSO MEMBER OF DC BAR
◊ ALSO MEMBER OF FL BAR

REPLY TO: Florham Park Office

January 23, 1998

VIA LAWYERS SERVICE

Hon. Arnold Samuels, A.L.J.
State of New Jersey
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: Bd. of Ed. of the Twp. of Irvington, Essex Cty. v. Wende Stuart
OAL DKT. No. EDU 1185-97

Dear Judge Samuels:

Enclosed please find an original and two copies of the settlement in the above matter. Please be advised that the Irvington Board of Education approved the settlement at its January 21, 1998 regular Board meeting. By copy of this letter I am informing counsel for Ms. Stuart of the Board's approval.

Respectfully,
SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER

By: _____
Denise P. Coleman

Encl.
c: Belinda Smiley, Dir. Human Resources (w/encl.)
Christopher M. Hartwyk, Esq. (w/encl.) (Via Fax & Lawyers Service)

January 23, 1998
No. 25433

CHRISTOPHER M. HARTWYK
COUNSELLOR AT LAW
250 SOUTH RIDGEWOOD ROAD
SOUTH ORANGE, NEW JERSEY 07079

TEL. (973) 762-4946
FAX: (973) 762-9593

Via Telefax (973) 301-0203 and Regular U. S. Mail

December 16, 1997

Denise P. Coleman, Esq.
Schwartz, Simon, Edelstein, Celso & Kessler
10 James Street
Florham Park, New Jersey 07932

Re: Board of Education of the Township of Irvington v. Wende Stuart
OAL Docket No.: EDU 1185-97
Agency Docket No.: 442-9/96

Dear Ms. Coleman:

Please accept this letter as my client's, Ms. Wende Stuart, notice of Retirement from the Irvington School District. Further, please accept this letter as confirmation of our phone conversation this date, where we (You and I, as representatives of the above referenced parties) specifically agree to and understand the following:

1. Wende Stuart will resign effective immediately upon receipt of this letter;

2. Irvington Board of Education representatives will assist in processing a disability retirement application to the Division of Pensions;

3. This will resolve the tenure charges and this matter will be dismissed; and

4. You will communicate/notify Judge Samuels of the settlement.

In the interest of expediency please sign where indicated below acknowledging receipt and acceptance of the terms of settlement stated herein. Upon completion please telefax an executed copy of this letter to my attention.

Thank you for your cooperation in this regard. Should you have any questions please do not hesitate to call. My warmest regards for the Holiday Season.

Very truly yours,
LAW OFFICES OF CHRISTOPHER M. HARTWYK

By: Christopher M. Hartwyk
Christopher M. Hartwyk
Counsellor At Law

CMH/pfb

By signing below I, Denise P. Coleman acknowledge receipt and acceptance of the terms set forth herein, subject to the approval of the Irvington Bd. of Education and the Commissioner of Education.
Schwartz, Simon, Edelstein, Celso & Kessler

By: Denise P. Coleman
Denise P. Coleman, Esq

OAL DKT. NO. EDU 1185-97
AGENCY DKT. NO. 442-9/96

IN THE MATTER OF THE TENURE	:	
HEARING OF WENDY STUART,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF IRVINGTON,	:	DECISION
ESSEX COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) in the form of a joint stipulation of settlement have been reviewed.

Upon careful and independent review of the full record of this matter and the terms of the proposed settlement agreement, the Commissioner is compelled to reject such agreement as it is currently structured since he cannot be satisfied by the present record that the proposed settlement meets the *Cardonick* standards for settlement of tenure matters. (*In re Cardonick*, decided by the Commissioner April 7, 1982, affirmed State Board of Education April 6, 1983, 1990 S.L.D. 842, 846.)

It is well established that, having once taken up the burden of tenure charges, the Board may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges can no longer be pursued or why it is now in the public interest not to pursue them. (*In the Matter of the Tenure Hearing of Kenneth Smith, School District of the City of Orange*, Essex County, decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, affirmed with modification by the State Board of Education

November 2, 1983, affirmed Superior Court January 30, 1986.) The present record contains no such explanation.

Further, there is no indication that the within teaching staff member was advised of the Commissioner's duty, pursuant to *N.J.A.C.* 6:11-3.6, to refer tenure determinations for possible revocation of certificate.

While the Commissioner does not preclude the possibility of settlement in this matter, he stresses that in order for him to meet his own obligation to the school and children of this state, he must be assured that any settlement is consistent with appropriate standards for setting aside tenure matters as expressed in *Cardonick, supra.*

Lastly, it appears that the terms of the settlement have already been effectuated through respondent's resignation. The parties are, therefore, admonished that settlement agreements of controverted matters are of no force and effect and may not be implemented absent the Commissioner's approval pursuant to *N.J.A.C.* 1:1-19.1.

Accordingly, the proposed settlement is rejected for the reasons expressed herein. The Commissioner hereby remands this matter to the Office of Administrative Law for further settlement negotiations consistent with the concerns herein expressed. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to a plenary hearing.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MARCH 26, 1998
DATE OF MAILING MARCH 26, 1998

145-98

145-98

REGINA VILLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF COMMERCIAL, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MARCH 26, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4347-97

AGENCY DKT. 150-5/97

REGINA VILLA,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF COMMERCIAL, CUMBERLAND COUNTY,

Respondent.

Ned P. Rogovoy, Esq., for petitioner (Waltman, Reilly & Rogovoy, attorneys)

Richard H. Daniels, Esq., for respondent

Record Closed: February 11, 1998 Decided: February 13, 1998

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

This matter was transmitted to the Office of Administrative Law on May 23, 1997, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14-F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of the settlement.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does

not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

13 February 1998
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

2/18/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 19 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lmh

Law Offices
WALTMAN, REILLY & ROGOVOY
23 North High Street
Millville, New Jersey 08332
(609) 825-2228
Attorneys for Petitioner

REGINA VILLA, Petitioner, vs. COMMERCIAL TOWNSHIP BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAL DOCKET NO. EDU-4347-97 AGENCY DOCKET NO. 150-5/97 Civil Action CONSENT ORDER

This matter having come before the Court, wherein the Petitioner, Regina Villa, was represented by Ned P. Rogovoy, Esquire, of the firm of Waltman, Reilly & Rogovoy; and the Respondent, Commercial Township Board of Education, was represented by Richard H. Daniels, Esquire; and the matter, after being conferenced before the Honorable Lillard E. Law, was resolved as follows:

IT IS, on this 11th day of February, 1998, ORDERED that the matter be resolved between the parties by Respondent paying to the Petitioner the amount of Thirteen Hundred Dollars ($1,300.00) within thirty (30) days, and that upon payment the matter is dismissed with prejudice.

Lillard E. Law
HONORABLE LILLARD E. LAW, ALJ

We hereby consent to the form and entry of the above Order:

WALTMAN, REILLY & ROGOVOY
Attorney for Petitioner

By: _____
Ned P. Rogovoy, Esquire

_____
Richard H. Daniels, Esquire
Attorney for Respondent

OAL DKT. NO. EDU 04347-97
AGENCY DKT. NO. 150-5/97

REGINA VILLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF COMMERCIAL, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MARCH 26, 1998
DATE OF MAILING MARCH 26, 1998

148-98

1/8-98

ROSA ASTACIO-BORJA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASSAIC COUNTY TECHNICAL-VOCATIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning teacher sought to have the Board institute tenure charges against fellow teacher, Robert Thomas, for alleged verbal assault.

Citing N.J.S.A. 18A:6-11, the ALJ concluded the Board's action in determining not to certify tenure charges against Mr. Thomas was unreasonable and constituted an abuse of its discretion. ALJ ordered that Count 1 of petitioner's Statement of Tenure Charges and Verified Petition be certified and forwarded to the Commissioner of Education.

Commissioner concurred with the initial decision, remanded the matter to the Board and ordered that the Board act, within 45 days of the date of this decision, to certify Count 1 of the charges as such charges relate to the December 5, 1995 incident, in accordance with *N.J.S.A.* 18A:6-11.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5963-96

AGENCY. NO. 173-5/96

ROSA ASTACIO-BORJA,

Petitioner,

v.

BOARD OF EDUCATION OF THE PASSAIC COUNTY TECHNICAL–VOCATIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,

Respondent.

Patrick C. English, Esq., represented petitioner
(Dines and English, attorneys)

Gerald Sean Keegan, Esq., represented respondent

Record Closed: December 30, 1997 Decided: February 13, 1998

BEFORE **JEFFREY A. GERSON**, ALJ:

BACKGROUND

On December 5, 1995, Robert B. Thomas, a tenured teaching staff member, verbally assaulted petitioner, Rosa Astacio-Borja, in a lunchroom filled with students. The verbal assault was without provocation and was racially and ethnically based. Mr. Thomas called Ms. Astacio-Borja an "illegal alien" who "swam here across the Rio Grande." He stated to Ms. Astacio-Borja, Hispanics "should not be in this country," and "You and all your people should be sent home." Mr. Thomas pointed to Ms. Astacio-Borja's school identification card and yelled that she should instead be wearing a "green card." These allegations are stipulated as fact by both sides.

Respondent, Board of Education of the Passaic County Technical–Vocational High School District, conducted an investigation and found probable cause that the December 5, 1995 incident took place as set forth above. The superintendent of schools immediately suspended Mr. Thomas.

On January 22, 1996, the Board met to review the suspension. At that time, it was agreed that:

1. Mr. Thomas's suspension would continue until the next scheduled Board meeting; and,

2. Mr. Thomas would be examined by a psychologist or psychiatrist of the Board's choosing and a psychologist or psychiatrist of Mr. Thomas's choosing.

On February 8, 1996, the Board reviewed the reports of the two psychiatrists, and entered into a Stipulation of Agreement with Mr. Thomas, which stated, in part, that:

1. Mr. Thomas would be reinstated to full active teaching duties. on February 12, 1996;

2. The Board reserved the right to withhold Mr. Thomas's increment;

3. Mr. Thomas agreed to follow-up counseling;

4. Mr. Thomas would be observed by a supervisor at least once per week for the balance of the school year; and,

5. Mr. Thomas would provide a written apology to Ms. Astacio-Borja.

Mr. Thomas sent an "apology" letter to petitioner on February 14, 1996, in which he stated, "I do not believe that my comments were racially disparaging." Despite the fact that petitioner and Mr. Thomas had been colleagues at the school for four years, and despite the fact that the spelling of petitioner's name was readily available from numerous school-related

documents, he misspelled her name.[1] Mr. Thomas has abided by all of the other requirements in the Stipulation of Agreement.

On April 18, 1996, the Board voted not to certify tenure charges against Mr. Thomas. Based upon statements from representatives of the Board, the Board concluded that the incidents occurred, but that they were not serious enough to certify tenure charges.

On May 9, 1996, Ms. Astacio-Borja filed a Verified Petition before the Commissioner of Education, seeking to direct the Board to certify tenure charges against Mr. Thomas.

On May 28, 1996, the Board met and resolved to withhold Mr. Thomas's increment for the upcoming year.

Petitioner alleges that the Board abused its discretion in failing to certify tenure charges against Mr. Thomas. Respondent claims that it is within its discretion to determine when tenure charges should be certified. In addition, respondent claims that its determination must be given a presumption of correctness and must be upheld unless arbitrary, capricious or unreasonable.

DISCUSSION

The Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 *et seq.*, governs the filing of tenure charges against tenured teaching staff members of the State's public school system. *N.J.S.A.* 18A:6-10, which provides for the dismissal or salary reduction of such teaching staff members, in relevant part provides as follows:

> No person shall be dismissed or reduced in compensation,
>
> > (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, . . .
>
> except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charge(s), of the cause or causes of complaint, shall have been preferred against such person, . . . and filed and proceeded upon as in this subarticle provided.

---

[1] Mr. Thomas referred to petitioner as "Rosa *Anastasio-Borgia*."

The procedure for filing and certifying tenure charges to the commissioner is set forth in *N.J.S.A.* 18A:6-11. In relevant part, *N.J.S.A.* 18A:6-11 provides the following:

> Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. *After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary.*
>
> [Emphasis added.]

See also Manalapan-Englishtown Educ. Ass'n v. Board of Educ. of the Manalapan-Englishtown Reg. Sch. Dist., *187 N.J. Super.* 426, 429 (App. Div. 1981) (stating that the local board must answer two questions: 1) Is there probable cause to credit the evidence in support of the charge, and 2) is such a charge, if credited, sufficient to warrant dismissal or a reduction in salary?). Whether the Board complied with the above standards and, if so, whether it did so properly are the issues to be decided. *Bey v. Newark Bd. of Educ.*, 93 *N.J.A.R.*2d (EDU) 288, 291.

"When a board of education properly follows the statutory mandate in reviewing and acting upon tenure charges, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious, or unreasonable." *Id.* at 292; *see Thomas v. Morris Tp. Bd. of Educ.*, 89 *N.J. Super.* 327, 328 (App. Div. 1965), *aff'd*, 46 *N.J.* 581 (1966); *Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ.*, State Bd. of Educ. Decision at 6 (February 6, 1985), *aff'd*, No. A-2859-84T7 (App. Div. Dec. 24, 1985) (stating that when a local board bases its evaluation on the affidavits submitted and goes through an intense deliberation, its decision is not arbitrary or capricious).

There is ample precedent for certification of tenure charges in cases where racial or ethnic epithets are used by a tenured employee of a board of education. In *In re Tenure Hearing of Emma Matecki*, 1971 *S.L.D.* 566, *aff'd*, State Bd. of Educ., 1973 *S.L.D.* 773, *aff'd*, App. Div., 1973 *S.L.D.* 773, a white student was attempting to straighten up his books and

clean the room when teacher Emma Matecki told him to sit down and not do "nigger work." This was the only incident of Ms. Matecki making a racial comment, or being in any kind of trouble with the board. Nevertheless, the Commissioner considered this incident to be grounds for dismissal. He stated:

> The fact that this is a single incident does not bar the imposition of the penalty of dismissal.
>
> As the Court stated in *In re Fulcomer*, [93 *N.J. Super.* 404 (App. Div. 1967)] at p. 421:
>
> > "Nor have we any doubt that unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant."
>
> [1971 *S.L.D.* at 574.]

The Commissioner held that the conduct of Ms. Matecki was "a demonstration of unprofessional conduct so gross, and so fraught with peril to the continued safety and well-being of both the teacher and the pupils, as to warrant the forfeiture of tenure rights." *Id.* at 575.

In *In re Tenure Hearing of Mark Blasko*, 1980 *S.L.D.* 987, a school district sought the dismissal of teacher Mark Blasko for directing numerous ethnic comments at the Jewish students in his class.[2] In determining his penalty, the administrative law judge (ALJ) stated:

> What must be remembered above all else is that the person or persons to whom he expressed himself on these occasions were children, albeit 12 or 13 year olds, but still within an age where they are quite impressionable, unsophisticated and open to suggestions as to the nature of acceptable values, conduct, and feelings. *In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County*, 1974 *S.L.D.* 97. As such, the type of ethnic remarks made by this teacher carried with them a great potential for creating an impression that might have been entirely undesired by the speaker. . . . It is not necessary to state at length in this opinion either the history of Anti-Semitism or the psychology of racial and ethnic hatred, but it is probably sufficient to say that no one is born with preconceived notions about any racial or ethnic group and must, therefore, learn them from some figure, most often quite possibly and importantly from parents and teachers and other such authority figures.
> [1980 *S.L.D.* at 998.]

---

[2] Mr. Blasko gave out Christmas candy to his students and then made the Jewish students give the candy back or spit it into the garbage, because they did not celebrate Christmas. On another occasion, Mr. Blasko took out a ruler and measured the nose of one of his Jewish students to determine the length of a "Jewish nose." On a third occasion, Mr. Blasko said he thought all Jewish people "didn't have to work for [their] money" and that "it all came easy to [them]," or that they "simply asked [their] parents for money."

Surprisingly, the ALJ only recommended a fine amounting to two weeks' pay. The Commissioner, however, rejected the proposed penalty and directed Mr. Blasko's dismissal. He stated:

> The Commissioner cannot condone the use of ethnic materials, jokes, or actions that ridicule any racial group directly or by implication. Such disparagement has no place in the classroom.
>
> . . . .
>
> The Commissioner determines that teachers carry a heavy responsibility by their actions and comments in setting examples for the pupils with whom they have contact. The kind of behavior which stands unrefuted on the record herein cannot and will not be condoned. . . .
>
> The Commissioner finds and determines that respondent's lack of judgment and his overt display of insensitivity precludes his continued employment with the Board of Education.
>
> [*Id.* at 1003.]

In both *Blasko* and *Matecki*, as in the case at bar, the incidents occurred in the presence of pupils and much was made out of that fact by the local boards. *See also In re Tenure Hearing of Peter J. Romanoli*, 1975 *S.L.D.* 352, 356 (Commissioner looked at an incident differently because it was "private in nature and limited in scope" between the two parties involved). In addition, "significant public policy considerations . . . are called into play when a Board, by its refusal to pursue official charges against its educators who have seemingly engaged in wrongdoing, creates the public perception that it condones or ignores unprofessional conduct on the part of these educators." *Bey, supra*, 93 *N.J.A.R.*2d (EDU) at 296.

The role a teacher plays in shaping the lives of his/her students is an extremely important one. In *In re Tenure Hearing of Jacque L. Sammons*, 1972 *S.L.D.* 302, 321, the Commissioner stated:

> [T]eachers . . . are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal.

It was stated in *In re Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County*, 1974 *S.L.D.* 97, 98-99, that:

> Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully violates the law, as in this matter, and consequently violates the public trust placed in him, he must expect dismissal or other severe penalty as set forth by the Commissioner.

Of significant interest is the case of *Ridgefield Park Education Association v. Ridgefield Park Board of Education*, OAL Dkt. No. EDU 9169-83 (May 8, 1984), *aff'd*, Comm'r of Educ. (June 25, 1984), *rev'd*, State Bd. of Educ. (Feb. 6, 1985), *aff'd*, No. A-2859-84T7 (App. Div. Dec. 24, 1985), in which an assistant superintendent of schools was charged with uttering a racially disparaging remark to an African-American custodian. Specifically, the assistant superintendent said to the custodian, "Do you know what all these people have in common - - - they have pussy hair on their heads." OAL Dkt. No. 9169-83 at 2.

The local board refused to certify the charge, contending that though it found probable cause to credit the charge, it did not merit either a dismissal or a reduction of salary.

The ALJ, citing *Matecki* and *Blasko*, concluded:

> I entertain no doubt, however, that [the assistant superintendent's conduct] is patently serious enough so that the Board's finding that dismissal or reduction in [the assistant superintendent's] salary could not possibly flow from it, if the charge is sustained, was an arbitrary, capricious and unreasonable determination.
>
> [*Id.* at 7.]

The ALJ went on to say:

> However, giving due deference to the principle that board action is entitled to a presumption of correctness does not mean that every act that a board takes is, in fact, correct.
>
> [*Id.* at 7-8.]

In the Commissioner of Education's decision affirming the ALJ's decision, the Commissioner said:

> With respect to Charge 1, while the Board determined probable cause, it did not deem the charge sufficient to warrant a sanction stated in statute, that is, dismissal or reduction in salary. The Commissioner concurs with the judge's determination that the Board was remiss in its obligation under *N.J.S.A.* 18A:6-11 when it failed to forward Charge 1 to him. The Commissioner finds that [the ALJ] appropriately weighed the thrust of the *Matecki* and *Blasko* decisions, *supra.* He believes that, despite factual differences between the instant matter and the two decisions cited above, reliance on them is warranted given the nature of Charge 1, which involves a racial remark, of a derogatory nature, made by an assistant superintendent of schools to a custodial employee in the presence of others. Such a charge is certainly one that a board must determine as sufficient to warrant sanction pursuant to *N.J.S.A.* 18A:6-11 in light of *Matecki* and *Blasko* and notwithstanding [*In re Romanoli*, 1975 *S.L.D.* 352]. That the comment was purportedly made in a joking manner is irrelevant.
>
> [Commissioner's Decision at 15-16.]

The State Board of Education reversed the Commissioner. The State Board's reversal was subsequently affirmed by the Appellate Division.

The reasoning of the State Board was as follows:

> The Ridgefield Park Board determined that the charge at issue did not warrant a penalty only after assessment of the affidavits and briefing by its counsel on the case law involving sexually and racially derogatory language by teaching staff members. See Minutes of Executive Session, July 21, 1983. In examining the Assistant Superintendent's conduct on this occasion in the context of the case law and his overall pattern of conduct, the Board concluded that this one isolated incident was not sufficiently flagrant to warrant a penalty. *Id.* We find that the Board's determination, based on evaluation of the affidavits and arrived at only after intense deliberation, *see id.*, was not arbitrary or capricious and that the conclusion reflected a correct understanding of the existing law.
>
> The decisions of the Commissioner and the State Board of Education concerning the use of sexually or racially derogatory language clearly demonstrate that such language is not acceptable in an educational setting. *See In re Matecki, supra*; *In re Blasko, supra.* However, each of those cases involved offensive remarks directed toward students or comments made in their presence. *See In re Matecki, supra*; *In re Blasko, supra.* Review of the case law reveals no case in which a single incident involving an offensive comment made after school hours to a non-student where no students were present was the basis for dismissal or reduction in salary. We therefore conclude that, given the status of the existing law, it was proper for the Ridgefield Board to conclude that, in light of the Assistant Superintendent's overall pattern of conduct, this one isolated incident in which a comment was

> made to an adult employee after the workday during casual discussion was not sufficiently flagrant to warrant a penalty. *See Redcay v. State Bd. of Ed.*, 130 *N.J.L.* 369 (Sup. Ct. 1943), *aff'd*, 131 *N.J.L.* 326 (E.P.A. 1944).
>
> The State Board emphasizes that nothing in our holding today should be construed as condoning the kind of remark made in this case. Nor do we hold that a sexually or racially offensive remark made to individuals other than students may never warrant dismissal or reduction in salary. Rather, we hold only that under the existing law as applied to the facts in this case, the determination of the Ridgefield Board that no penalty was warranted was proper.
>
> [State Board Decision at 6-7.]

It appears that the matter *sub judice* can be easily differentiated from the *Ridgefield* matter in that the derogatory racial slurs in this case took place in front of a cafeteria full of students and several other school employees, all of whom confirmed the occurrence.

In the case at bar, the allegations are clearly sufficient to warrant the certification of tenure charges. Mr. Thomas made numerous and highly inappropriate ethnic comments to Ms. Astacio-Borja. He called her an "illegal alien" who "swam here across the Rio Grande." He stated that Hispanics "should not be in this country," and that all Hispanics "should be sent home." Mr. Thomas also stated that Ms. Astacio-Borja should be wearing a "green card" on her, and not the school identification card. In his "apology" letter to Ms. Astacio-Borja, he misspelled her name (twice) and inappropriately referred to her as "Rosa." In addition, he stated that he did "not believe that [his] comments were racially disparaging."

CONCLUSION

The Board's action in determining not to certify tenure charges against Mr. Thomas was unreasonable and constitutes an abuse of its discretion. Not only is the charge in this matter admittedly creditable, but prior cases clearly indicate that either a dismissal or reduction of salary would be warranted. I agree with petitioner that Count 1 of the Statement of Tenure Charges and Verified Petition should be forwarded to the Commissioner.

The Board itself, for all practical purposes, obviously recognized the seriousness of the allegations when it immediately suspended Thomas, and subsequently decided to withhold his increment. Undoubtedly, the Board recognized the extremely disparaging nature of the unsolicited comments, for the Board required not only an apology by Thomas, but clearance by

two medical professionals from the fields of either psychology or psychiatry before his return to the classroom. It is quite clear that the Board failed to properly apply the standards enunciated in prior decisions of both the Commissioner and the courts.

ORDER

It is **ORDERED** that Count 1 of Ms. Astacio-Borja's Statement of Tenure Charges and Verified Petition be certified and forwarded to the Commissioner of the Department of Education.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

FEB 13 98
DATE

JEFFREY A. GERSON, ALJ

2/20/98
DATE

Receipt Acknowledged:
DNA
DEPARTMENT OF EDUCATION

FEB 25 1998
DATE

Mailed to Parties:
Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 5963-96
AGENCY DKT. NO. 173-5/96

ROSA ASTACIO-BORJA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASSAIC COUNTY TECHNICAL-VOCATIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ that the Board abused its discretion by failing to certify tenure charges to the Commissioner of Education, in accordance with *N.J.S.A.* 18A: 6-11. As the ALJ correctly observed, *N.J.S.A.* 18A:6-11 "*** requires that a local board address two questions when it decides whether to certify tenure charges: 1) Is there probable cause to credit the evidence in support of the charge, and 2) Is such charge, if credited, sufficient to warrant dismissal or reduction in salary?***" (citation omitted) (*Ridgefield Park Educ. Assn. and Clifton L. West, Jr. v. Ridgefield Park Board of Education,* State Board of Education decision, Slip Opinion at p. 4, (February 6, 1985), aff'd N.J. Superior Court, Appellate Division, A-2859-84T7,

December 24, 1985. Further, the Commissioner recognizes that, in reviewing a local board's conclusion, he may not substitute his judgment for that of the board, but may only determine whether the board properly answered the questions that it was required to address. (*Id.*)

Here, the Commissioner notes that the Board concedes that it found probable cause to credit the facts involving the December 5, 1995 incident which took place in the cafeteria involving petitioner and Robert Thomas. (Board's Brief, December 17, 1997 at p. 2) Further, the Board states

> At its meeting to determine whether or not [to certify tenure charges], [it] recognized that the trial of a contested tenure charge is a lengthy, extremely costly and protracted proceeding under existing law. The Board had already entered into an agreement dated February 8, 1996 with Robert Thomas, wherein it was stipulated that Mr. Thomas would undergo follow up counselling as recommended by the psychiatrist selected by the Board of Education. In addition, the Board reserved all rights *** to [withhold] Mr. Thomas' increment. At the Superintendent's option, Mr. Thomas' class would be observed by a supervisor at least once per week and Mr. Thomas was to provide a written apology to Ms. Rosa Astacio-Borja, which could be distributed to the staff at the Superintendent's option. Additionally, the Board at [its] May 28, 1996 meeting voted and withheld the [salary increment] increase for the 1996-97 school year from Robert Thomas.
>
> It is the position of the Respondent that the Respondent's actions are entitled to a presumption of correctness and that, especially with regard to disciplinary decisions, the Commissioner should not interfere unless presented with evidence of illegality or shocking abuse of discretion. (*Id.* at pp. 3, 4)

Indeed, the Board does not even contend that it properly engaged in the required analysis, *i.e.*, an evaluation of the affidavits and examination of the existing law in order to determine whether the charges, *which it found creditable, in part*, would warrant dismissal or reduction in salary. Had the Board done so, it would, or should, have found that relevant case law supports the conclusion

that the allegations, if credited, *are* sufficient to warrant dismissal or reduction in salary. (Initial Decision at p. 9) In this regard, the Commissioner observes that the Board does not dispute that the incident was witnessed by other staff members and by "a cafeteria full of students***." (*Id.*) The pertinent statute further instructs that where a board finds that probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction in salary, "***then it *shall* forward such written charge to the commissioner for a hearing pursuant to *N.J.S.* 18A:6-16, together with a certificate of such determination.***" (emphasis added) (*N.J.S.A.* 18A:6-11) Therefore, the Board's decision not to certify tenure charges to the Commissioner in connection with the December 5, 1995 incident was not based on a correct understanding of the existing law, and cannot be upheld.

Accordingly, the Commissioner adopts the initial decision for the reasons expressed therein, and amplified above. The Commissioner remands this matter to the Board and orders that the Board act, within 45 days of the date of this decision, to certify Count I of the charges as such charges relate to the December 5, 1995 incident, in accordance with *N.J.S.A.* 18A:6-11. This order does not preclude the Board from considering the remaining counts listed in petitioner's charges, consistent with its obligations under *N.J.S.A.* 18A:6-11.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MARCH 30, 1998
DATE OF MAILING MARCH 30, 1998

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149-97 M

JACQUELINE HOLMES-WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

APRIL 6, 1998

MURRAY , MURRAY & CORRIGAN
25 Sycamore Avenue
Little Silver, New Jersey 07739
(732) 747-2300
Attorneys for Respondent
Camden Board of Education

98 MAR 30 PM 3:13

JACQUELINE HOLMES-WILLIAMS,	STATE OF NEW JERSEY
	OFFICE OF ADMINISTRATIVE LAW
Petitioner,	
	HON. ROBERT S. MILLER, A.L.J.
v.	OAL DOCKET NO. EDU-OR-2388-98S
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, AND STATE BOARD OF EXAMINERS,	AGENCY REF. NO. 57-3/98
Respondents.	ORDER DENYING EMERGENT RELIEF

THIS MATTER having been opened to the Court by Jamie Epstein, Esq., attorney for Petitioner, Valerie J. Dion, Esq., appearing for Respondent Camden Board of Education, and Arlene Goldfus Lutz, D.A.G., appearing for the State Board of Examiners, and the Court having heard oral argument and having reviewed the moving papers and all opposition thereto;

IT IS ON THIS 27 day of March, 1998;

ORDERED, that Petitioner's Application for Emergent Relief is DENIED for the reasons set forth on the record on March 18, 1998; and it is further

ORDERED, that a copy of this order shall be served on all counsel of record within 10 days of this date.

[ ] opposed
[ ] unopposed

Hon. Robert S. Miller, A.L.J.

Dated:

This order may be reviewed by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** either upon interlocutory review pursuant to *N.J.A.C.* 1:1-14.10 or at the end of the contested case, pursuant to *N.J.A.C.* 1:1-18.6.

March 27 1998
DATE

ROBERT S. MILLER, ALJ

98 MAR 30 P1 3:13

OAL DKT. NO. EDU 2388-98
AGENCY DKT. NO. 57-3/98

JACQUELINE HOLMES-WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter, including the audiotape of proceedings before the Administrative Law Judge (ALJ), and the Order denying Emergent Relief of the Office of Administrative Law (OAL) have been reviewed.

Upon careful and independent review, the Commissioner determines to affirm the ALJ's denial of emergent relief herein in that he concurs with the determination of the ALJ, articulated on the audiotape of the hearing in this matter, that petitioner has failed to meet the standards for the granting of injunctive relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, petitioner's application for injunctive relief is denied. In that the relief requested by petitioner was limited to a request for emergent relief, the within decision represents a final decision in this matter. As such the OAL is requested to close this case and return the file to the Agency.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 6, 1998
DATE OF MAILING APRIL 6, 1998

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ARTHUR V. PASQUALE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

APRIL 6, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12389-95

AGENCY DKT. NO. 410-10/95

ARTHUR V. PASQUALE,

Petitioner

BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,

Respondent.

Sanford R. Oxfeld, Esq., for petitioner (Balk, Oxfeld, Mandell & Cohen, attorneys)

Kenneth J. Lindenfelser, Esq., for respondent

Record Closed: February 23, 1998 Decided: February 25, 1998

BEFORE **MARIE P. SIMONELLI**, A.L.J.:

On December 10, 1995, the Department of Education transmitted this matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A hearing was scheduled at 9:00 a.m. on November 13, 1997 at the OAL, 185 Washington Street, Newark.

Prior to the hearing date, the parties advised the undersigned that they had resolved this matter. On February 23, 1998, the parties submitted the attached Stipulation of Dismissal with Prejudice which sets forth the terms of the settlement and is incorporated herein by reference.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

FEB. 25, 1998
DATE



MARIE P. SIMONELLI, A.L.J.

Receipt Acknowledged:

2/27/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 0 3 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

md

BALK, OXFELD, MANDELL & COHEN, P.A.
50 Commerce Street
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Petitioner

FEB 25 11 30 AM '98

ARTHUR V. PASQUALE, Petitioner, vs. **BOARD OF EDUCATION TOWN OF KEARNY, HUDSON COUNTY,** Respondent.	**BEFORE THE COMMISSIONER OF EDUCATION** **OAL Docket No. EDUOR-12389-95N** **STIPULATION OF DISMISSAL WITH PREJUDICE**

The matter in controversy having been resolved upon the following terms it is hereby agreed by and between the parties that same shall be dismissed with prejudice and without cost:

1. In an Order signed by a Judge of Workers' Compensation dated April 29, 1997 Petitioner, Arthur Pasquale was awarded the sum of $2,750 as payment of his workers' compensation claim.

2. N.J.S.A. 18A:30-2.1 mandates that when an employee of the Board of Education is absent from his post of duty as a result of a personal injury "arising out of an in the course of his employment. . ." his employer shall pay such employee up to one full year salary or wages.

3. In Forgash vs. Lower Camden County School, 208 N.J. Super 461 (App. Div. 1985) the Appellate Division ruled that the determination of the Workers' Compensation Court is binding upon the Administrative Agency interpreting 18A:30-2.1.

4. In Outland vs. Monmouth-Ocean Educational Services Commission, 295 N.J. Super 390 (App. Div. 1966) the court held the teacher who was disabled as a result of an injury arising out and in the course of his employment was entitled to benefits only for the period of time that said teacher was out of work.

5. The Kearny Board of Education will restore Mr. Pasquale's sick leave time for the period from May 5, 1995 thru June 5, 1995 and those sick days will be returned to his sick leave bank. In addition, Mr. Pasquale will receive his full salary for that period of twenty one (21) working days.

6. The within Petition of Appeal is dismissed with prejudice and subject to the approval of the Administrative Law Judge and the Commissioner of Education.

SANFORD R. OXFELD
Attorney for Petitioner

Dated: 2-17-98

KENNETH J. LINDENFELSER
Attorney for Kearny Board of Education

Dated: December 23, 1997

OAL DKT. NO. EDU 12389-95
AGENCY DKT. NO. 410-10/95

ARTHUR V. PASQUALE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

APRIL 6, 1998
DATE OF MAILING APRIL 6, 1998

151-98

151-98

IN THE MATTER OF THE TENURE	:	
HEARING OF CATHERINE OPDYCKE,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF FRANKLIN, SOMERSET COUNTY.	:	DECISION
	:	

APRIL 6, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8647-97
AGENCY DKT. NO. 309-8/97

BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,
Petitioner,
v.

CATHERINE OPDYCKE,
Respondent.

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

Michael T. Barrett, Esq., for respondent (Bergman & Barrett, attorneys)

Record Closed: February 9, 1998 Decided: February 20, 1998

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

The within matter was commenced on August 29, 1997, by the Board of Education of the Township of Franklin (hereinafter petitioner) with the filing of tenure charges in accordance with the requirements of N.J.S.A. 18A:6-11 against Catherine Opdycke (hereinafter respondent). Petitioner certified charges alleging unbecoming conduct, dereliction of duties and insubordination. Specifically petitioner charges that respondent engaged in a pattern of unprofessional conduct in her interactions with her students in her high school English classes, by using profanity and making derisive and derogatory comments, by displaying an insensitivity toward pupils with medical or health problems, and by throwing a book bag owned by a student in his direction down a hallway; that she failed to return student tests and assignments; that she

failed to communicate with parents appropriately and effectively; and that she failed to comply with reasonable directives of her supervisors with respect to submission of grades, lessons plans, district prewriting samples and other teacher communications to parents and/or students. On August 15, 1997, respondent filed an answer denying the charges, and on October 20, 1997, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15. A prehearing conference was conducted on January 13, 1998 at which time the parties advised that they were in the process of resolving the matter. On February 9, 1998, they presented a signed Stipulation of Settlement together with certified board minutes adopting the Stipulation of Settlement subject to approval by the Commissioner and the certification of William J. Stratton, Director of Personnel for petitioner, all of which are attached hereto and made a part hereof as if set forth herein at length.

I have reviewed the record and the terms of settlement and I **CONCLUDE** that in view of all of the circumstances it would not be improper for the Commissioner of Education to approve this settlement as an appropriate voluntary resolution of this matter entirely consistent with the law and the philosophy expressed in Cardonick v. Board of Education of the Borough of Brooklawn, EDU 7093-81, 7094-81 and 100-82, decided April 6, 1983 by the State Board of Education. The parties have set forth in their written settlement agreement all of the circumstances which have caused petitioner to conclude that a hearing on the merits in this matter would probably not serve the public interest. Respondent will be eligible to retire without a penalty pursuant to the provisions of N.J.S.A. 18A:66-37, on December 1, 1998, the first of the month following her fifty-fifth birthday. Since she may not simultaneously teach in any public school and receive pension benefits from TPAF, the likelihood is that she will not obtain another teaching job in any district under the Commissioner's jurisdiction. Resumption of salary payments to respondent pursuant to N.J.S.A. 18A:6-14 has occurred already and will continue until the Commissioner of Education issues a final decision in the matter. As noted by the parties, the earliest date for that eventuality is probably November 1998. The additional payments to respondent pursuant to the settlement agreement total $50,471 ($26,908 for the 120-day period of suspension without pay and $23,563 in restored increments). Petitioner has concluded that this dollar amount will be less than the cost of litigating the matter to conclusion (with no guarantee that respondent will be removed from the system). Resolution of this matter prior to hearing will avoid the necessity for expenditure of petitioner's staff's resources to prepare the case and will permit petitioner to avoid having to prepare and produce numerous student witnesses. Since N.J.A.C. 6:11-3.5 requires petitioner's chief school administrator to notify the State Board of Examiners of the alleged conduct in cases in which teaching staff members accused of unbecoming conduct resign or retire from their positions before tenure proceedings have been

concluded, the State Board of Examiners may determine to issue an order to show cause why respondent's teaching certificate should not be revoked and should that happen, it is the responsibility of petitioner to cooperate with the Board of Examiners in ascertaining and presenting the facts underlying the allegations. Under all of the circumstances, the proposed settlement agreement and the stipulation of dismissal appear to be an appropriate resolution of this matter.

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

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

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

Feb 20, 1998 — M. Kathleen Duncan

DATE — **M. KATHLEEN DUNCAN, ALJ**

Receipt Acknowledged:

2/27/98 — DNA

DATE — DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 2 1998 — Barbara A Harned

DATE — OFFICE OF ADMINISTRATIVE LAW

cc

Rand, Algeier, Tosti & Woodruff, P.C.
60 Washington Street
Morristown, NJ 07960
(973) 539-2600
Attorneys for Petitioner, Board of Education of the Township of Franklin

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
1998 FEB -9 P 2:38

IN THE MATTER OF THE TENURE HEARING OF CATHERINE OPDYCKE, BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDUTH-08647-97S AGENCY REF. NO. 309-8/97 CERTIFICATION OF WILLIAM J. STRATTON

WILLIAM J. STRATTON, of full age, hereby certifies as follows:

1. At all relevant times, I have been the Director of Personnel employed by the Franklin Township Board of Education ("Board"), the petitioner in the above-referenced matter.

2. This certification is submitted in support of the Board's request that the Court, and subsequently, the Commissioner of Education approve the proposed Settlement in this matter, as described in the attached Stipulation of Settlement (Exhibit A). This settlement was formally authorized by the Board at a public meeting on January 21, 1998, subject to the approval of the Commissioner of Education. (Exhibit B).

3. On July 31, 1997, I filed tenure Charges against the respondent, Catherine Opdycke ("Ms. Opdycke"), a tenured

teacher who had served as an English teacher at Franklin High School since 1972.

4. These Charges focused on information I had received and reviewed regarding the manner in which Ms. Opdycke had conducted herself during the 1995-96 and 1996-97 school years. Based upon this information, it was my belief that charges of unbecoming conduct, insubordination and dereliction of professional duties were appropriate. I was particularly concerned about the manner in which Ms. Opdycke interacted with certain students and their parents and her alleged failure to comply with the reasonable directives of her supervisors.

5. As a necessary condition to the successful prosecution of the pending Charges, the Board would be required to rely upon the testimony of approximately twelve (12) current or former students who were in Ms. Opdycke's classes at Franklin High School. Most of these students remain at Franklin High School.

6. The involvement of these students, who range in age from sixteen to eighteen years, is highly problematic and serves as a real justification to support the settlement of this matter. The factors supporting the settlement are based upon the students' involvement including, but not necessarily limited to, the following:

- While these students have given statements and made representations to the District regarding Ms. Opdycke, their recollections and memories may be somewhat faded by the fact that some of the incidents which they recalled occurred over two (2) years ago during the 1995-96 school year.

- The involvement of the students will, no doubt, potentially involve a traumatic experience for them in view of the fact that they will be subject to intense cross-examination and contradiction. Ms. Opdycke has generally denied the allegations of fact to which the students would testify.

- Because of the important nature of the testimony, if this matter were, in fact, tried, a great deal of time would have to be spent preparing the students for testimony as well as actually adducing such testimony at the hearing to be conducted at the Office of Administrative Law's facility in Ewing, New Jersey. The preparation and actual testimony would consume many hours of each student's time. Such an event, most certainly, would affect their concentration and ability to focus on their studies. The Board wishes, to the extent possible, to minimize the adverse impact of such appearance in this matter upon the students.

- The Board has a real concern that the students who testify against Ms. Opdycke may be affected emotionally by the experience. While it is understood that such testimony must be presented were there no other alternative, the proffered settlement avoids this factor and clearly is in the best interest of the students involved.

7. While the Charges are serious and warranted the action of the Board, the Board understands that the Charges, even if proven true, may not result in the dismissal of Ms. Opdycke. The Board is also cognizant of the fact that Ms. Opdycke received full salary increments throughout her long career at Franklin Township until the 1995-96 school year.

8. The Board's Special Counsel has indicated that approximately ten (10) hearing days would be required in this matter, leading to the expenditure of considerable funds for legal fees and expenses. He has also advised the Board that he would not expect that a decision of the Commissioner of Education would be issued in this matter until sometime in the fall of 1998 at the earliest. While this matter is pending, Ms. Opdycke would remain on paid suspension pursuant to N.J.S.A. 18A:6-14. From the point of view of the School District, when the cost of litigation is considered together with the obligation of the District to pay Ms. Opdycke through the decision of the Commissioner, it clearly emerges that the cost of the settlement is favorable to the Board.

9. Academically and programmatically, the settlement is beneficial to the District. The settlement allows for a permanent replacement to be hired in Ms. Opdycke's place. This action removes uncertainty from the English Department at Franklin High School and allows for planning and continuity of education within the department.

10. It is highly unlikely that Ms. Opdycke will seek employment in another public school district. Nothing in this settlement requires the School District to give an affirmative recommendation to any third party regarding Ms. Opdycke's service. Ms. Opdycke has acknowledged in the Stipulation of

Settlement that she understands that this matter may be referred to the State Board of Examiners.

11. It is my understanding that Ms. Opdycke will not be eligible for an ordinary service age retirement through the Teachers Pension Annuity Fund ("TPAF") until after her birthday on November 29, 1998. Based upon this consideration, the proposed settlement provides for her to resign for purposes of retirement as of the close of business on November 30, 1998.

12. Given the above factors, I recommended, with the support of the superintendent of schools, that the Board authorize the proposed settlement with Ms. Opdycke, subject to the approval of the Court and the Commissioner of Education.

13. After reviewing the factors discussed above, including the costs which would be incurred in proceeding with a hearing, the Board determined that the proposed settlement would be in the public interest.

14. The foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

William J. Stratton

WILLIAM J. STRATTON

Date: January 28, 1998

rjs\documents\cert-stratton

Rand, Algeier, Tosti & Woodruff, P.C.
60 Washington Street
Morristown, NJ 07960
(973) 539-2600
Attorneys for Petitioner, Board of Education of the
Township of Franklin

IN THE MATTER OF THE TENURE HEARING OF CATHERINE OPDYCKE, BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDUTH-08647-97S AGENCY REF. NO. 309-8/97 STIPULATION OF SETTLEMENT

The parties in the above-captioned matter, having resolved their dispute, agree as follows, subject to the approval of this Stipulation of Settlement by the Commissioner of Education:

1. As evidenced by the letter annexed hereto as Exhibit "A," the respondent, Catherine Opdycke ("Ms. Opdycke") has submitted an irrevocable letter of resignation for purposes of retirement from all employment with the petitioner, Franklin Township Board of Education ("Board") effective at the close of business on November 30, 1998. The Board will, by separate resolution, accept Ms. Opdycke's resignation at a public meeting, to be held on January 21, 1998.

2. The Board will grant Ms. Opdycke a leave of absence with pay and continued health insurance coverage through November 30, 1998.

EXHIBIT "A"

3. The Board will adjust Ms. Opdycke's annual salaries as follows by restoring salary increments which were withheld for the 1996-97 and 1997-98 school years: * This agreement contemplates the restoration of salary increments for the 1996-97 and 98 contract years. Respondent is to be properly placed on the salary guide as though increments were never withheld. It is believed that the figures set forth here in are accuratebut the salary guide shall control this agreement. There is no and will be no claim for mitigation.

1996-97: $61,743

1997-98: $67,270

1998-99: $67,395 (pro-rated for period of September 1-November 30, 1998).

4. The Board will restore the salary withheld from Ms. Opdycke for 120 days during the period in which she was suspended without pay in accordance with N.J.S.A. 18A:6-11 (pro-rated based upon an annual salary ~~of $26,908.~~ (The amount payable for this period of time is 26, 908.00).

5. In the event that Ms. Opdycke applies for retirement pursuant to the Rules of the New Jersey Teachers Pension and Annuity Fund, New Jersey Division of Pensions, the Board agrees to comply with the "standard procedures" required by the New Jersey Teachers Pension and Annuity Fund necessary for Ms. Opdycke to pursue retirement. The Board, however, shall bear no responsibility for any matter related to the retirement of Ms. Opdycke, including but not limited to the amount of any pension payments she may be entitled to receive.

6. The parties recognize that Ms. Opdycke has claims and certain rights, including status as a tenured teacher, arising from her employment by the Board. In exchange for the foregoing promises made by the Board, Ms. Opdycke hereby releases the Board, its members, officers, agents, servants, employees, attorneys and representatives, from all claims, liabilities or

expenses which it or they may be subject to arising from Ms. Opdycke's employment with the Board, except for any claim Ms Opdycke may assert for benefits under the state workers compensation laws arising from an alleged incident reported by Ms. Opdycke on March 24, 1997. However, nothing in this Agreement, or the general release given by Ms. Opdycke, shall preclude either party from bringing an action to enforce performance of any term of this Agreement should there be a default of performance.

7. This stipulation of settlement incorporates the complete financial obligation of the Board with respect to Ms. Opdycke's employment relationship and separation of employment from the Board. Ms. Opdycke will not make claim to or receive any additional monies or benefits which may be provided t teachers in the Franklin Township School District pursuant to any collective bargaining agreement or board policy, including but not limited to any claim for payment for unused sick days or any other adjustments in compensation.

8. All terms of this Agreement are deemed material. This document constitutes the entire understanding of the parties and may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties. Duly executed copies of this Agreement shall be deemed originals.

9. This Stipulation of Settlement and the actions required hereby shall be subject to the approval of t!

Commissioner of Education and shall not be binding upon the parties until (a) Ms. Opdycke has caused to be delivered to the Board a duly executed letter of resignation as required by this Agreement; (b) a duly executed copy of this Agreement; (c) the Board has approved this Stipulation of Settlement and (d) the Board has duly accepted Ms. Opdycke's resignation at a public meeting.

10. Ms. Opdycke acknowledges that she has been represented by counsel, that she understands the terms and conditions of this Stipulation of Settlement, and that she enters into this agreement voluntarily. In addition, Ms. Opdycke acknowledges that she has been advised that the Commissioner may to refer tenure determinations to the State Board of Examiners for possible revocation of certificate.

IN WITNESS WHEREOF, the parties have set their hands and seals as of the date first above written.

ATTEST:

1/21/98

FRANKLIN TOWNSHIP BOARD OF EDUCATION

By Eva M. Nagy
Eva Nagy, President

WITNESS:

Michael T. Barrett, Esq.
Attorney at Law of New Jersey

Catherine Opdycke
Catherine Opdycke

Dated: 1/19/98

rjs\document\settlement-opdycke

January 19, 1998

I, Catherine Opdycke, herely resign my employment with the Franklin Township Board of Education effective December 1, 1998.

Catherine Opdycke

Catherine Opdycke

EXHIBIT "A"

30

PERSONNEL

P-1 Personnel Report No. - January 15, 1998
P-2 Voluntary Separation Program

Moved: Mr. McKenzie Seconded: Mr. Gianotto

I hereby certify this to be a true copy of the minutes of the Franklin Township Board of Education Meeting held on 1/21/98

P-1 Personnel Report No. - January 15, 1998

a. Professional Staff

As recommended by the Superintendent of Schools, approve resolution Nos. 1 through 6 of Personnel Report No.14 for professional staff. (Exhibit P-1.a, attached hereto and made a part of the minutes.)

b. Support Staff

As recommended by the Superintendent of Schools, approve resolution Nos. 1 through 4 of Personnel Report No.14S for support staff. (Exhibit P-1.b, attached hereto and made a part of the minutes.)

P-2 Voluntary Separation Program

Approve the implementation of the Voluntary Separation Program as attached hereto and made a part of the minutes as Exhibit P-2.a, and to accept participation of the individuals attached hereto and made part of the minutes as Exhibit P-2.b.

yes	yes	yes	yes	yes	yes	yes	yes	yes
Banko	Bonanno	Exter	Gianotto	McKenzie	Retz	Siegel	Webb	Nagy

P-3 Resolution to Execute a Stipulation of Settlement

Moved: Mr. McKenzie Seconded: Mr. Gianotto

BE IT RESOLVED that the Board approves the Stipulation of Settlement referenced in Schedule "A" and authorizes and directs the Board President and Board Secretary to execute the Stipulation of Settlement on its behalf; and

BE IT FURTHER RESOLVED that the Board authorizes and directs its administrators and attorneys to take all reasonable and necessary steps to obtain the approval of the Stipulation of Settlement by the Commissioner of Education; and

BE IT ALSO RESOLVED that the Board accepts the resignation of the employee identified on Schedule "a".

yes	yes	yes	yes	yes	yes	yes	yes	yes
Banko	Bonanno	Exter	Gianotto	McKenzie	Retz	Siegel	Webb	Nagy

ADJOURNMENT

Moved: Mr. Siegel Seconded: Mr. Bonanno

Action to adjourn at 11:55 PM.

yes	yes	yes	yes	yes	yes	yes	yes	yes
Banko	Bonanno	Exter	Gianotto	McKenzie	Retz	Siegel	Webb	Nagy

EXHIBIT "B"

SCHEDULE A

Catherine Opdycke, an English teacher at Franklin High School, has submitted her resignation effective December 1, 1998, pursuant to a Stipulation of Settlement she executed on January 19, 1998, with respect to the matter captioned as In the Matter of the Tenure Hearing of Catherine Opdycke, Board of Education of the Township of Franklin, Somerset County, OAL Docket No. EDUTH-08647-97S, Agency Ref. No. 309-8/97. The stipulation of settlement is subject to the approval of the Commissioner of Education.

OAL DKT. NO EDU 8647-97
AGENCY DKT. NO. 309-8/97

IN THE MATTER OF THE TENURE	:	
HEARING OF CATHERINE OPDYCKE,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF FRANKLIN, SOMERSET COUNTY.	:	DECISION
	:	

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

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement. The Commissioner underscores that such dismissal is subject to the Board's compliance with *N.J.A.C.* 6:11-3.5, which requires, upon the resignation of a teaching staff member accused of unbecoming conduct prior to the conclusion of the tenure proceedings, that the chief school administrator notify the State Board of Examiners of the alleged conduct, and that the District cooperate, should the Board elect to take action against the staff member's certificate. By copy of this decision, the State Board of Examiners is notified of the within matter and circumstances underlying its withdrawal.*

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

APRIL 6, 1998
DATE OF MAILING APRIL 6, 1998

152-98

S.C. and L.C., on behalf of minor child, S.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF AUDUBON, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

APRIL 7, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4537-97
AGENCY DKT. NO. 148-5/97

S.C. and L.C. on behalf of minor child, S.C.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF AUDUBON, CAMDEN COUNTY,
Respondent.

S.C. and L.C. on behalf of S.C., petitioners, *pro se*

Frank P. Cavallo, Jr., Esq., for respondent (Parker, McCay & Criscuolo, attorneys)

Record Closed: February 25, 1998 Decided: March 3, 1998

BEFORE **ANTHONY T. BRUNO**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 4, 1997, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

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

March 3, 1998
DATE

Anthony T. Bruno
ANTHONY T. BRUNO, ALJ

Receipt Acknowledged:

3/9/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 10 1998
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

tmp

File No. 5528-0008 FPC
Law Offices
PARKER, McCAY & CRISCUOLO, P.A.
Three Greentree Centre, Suite 401
Marlton, NJ 08053
(609) 596-8900
Attorneys for Respondent, Board of Education of the Borough of Audubon, Camden County

	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDS-04537-97S AGENCY NO. 148-5/97
S.C. and L.C., on behalf of minor child, S.C., Petitioners, vs. BOARD OF EDUCATION OF THE BOROUGH OF AUDUBON, CAMDEN COUNTY, Respondent.	Civil Action **STIPULATION OF SETTLEMENT**

BACKGROUND

WHEREAS, the Petitioners have filed a Petition of Appeal in the above matter alleging that S.C.'s grade for physical education for the third marking period of the 1996-1997 school year should be changed; and, that the Respondent, Board of Education of the Borough of Audubon provide tuition to transfer S.C. to another school district;

WHEREAS, the Respondent filed an Answer denying the allegations, in part, and that S.C. was entitled to the relief requested in the Petition of Appeal;

WHEREAS, the Petitioners and the Respondent have conducted a Settlement Conference before the Honorable Anthony Bruno, A.L.J.;

WHEREAS, as a result of that Settlement Conference and further settlement negotiations between the Petitioners and the Respondent, the parties desire to resolve this dispute in an amicable fashion.

AGREEMENT

The Petitioners and the Respondent, for the mutual promises and consideration contained herein, agree as follows:

1. The Petitioner shall withdrawal the Petition of Appeal and the Amended Petition of Appeal.

2. S.C.'s Physical Education grade for the third marking period of the 1996-1997 school year will be changed to a "C" so as to give S.C. credit for an after school weight lifting program in accordance with N.J.A.C. 6:29-3.2(d).

3. S.C.'s final grade in Physical Education shall be changed to a "B" and his final cumulative average for the 1996-1997 school year will be adjusted in accordance with Paragraph 2 above. A copy of S.C.'s transcript will be provided to Petitioners following that change.

4. S.C. will, retroactively, be placed on the student honor role for the third marking period of the 1996-1997 school year.

5. In future school years, commencing with the second marking period of the 1997-1998 school year, Petitioners, L.C. and S.C. shall be notified 48 hours in advance of the posting of S.C.'s

Physical Education grade. Thereafter, Petitioner shall have 48 hours to review the proposed Physical Education grade for S.C. and appeal same directly to the Superintendent of Schools, in the event they disagree.

6. The Superintendent of Schools shall have the authority to change S.C.'s Physical Education grade after meeting with and discussing same with the Petitioners.

7. Petitioners shall, after appealing S.C.'s Physical Education grade to the Superintendent retain the right to appeal further to an Administrative Law Judge, S.C.'s Physical Education grade.

Stephen J. Carlisle
STEPHEN J. CARLISLE, Petitioner

Linda Carlisle
LINDA CARLISLE, Petitioner

PARKER, McCAY & CRISCUOLO, P.A.
Attorneys for the Board of Education of the Borough of Audubon

By: _____
FRANK H. CAVALLO, JR., ESQUIRE

DATED:

OAL DKT. NO. EDU 4537-97
AGENCY DKT. NO. 148-5/97

S.C. and L.C., on behalf of minor child, S.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF AUDUBON, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

APRIL 7, 1998
DATE OF MAILING APRIL 7, 1998

153-98

153-98

IN THE MATTER OF THE TENURE :

HEARING OF NANCY MC NABB, SCHOOL : COMMISSIONER OF EDUCATION

DISTRICT OF KITTATINNY REGIONAL : DECISION

HIGH SCHOOL, SUSSEX COUNTY. :

_____:

APRIL 7, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7332-96
AGENCY DKT. NO. 203-6/96

IN THE MATTER OF THE TENURE HEARING OF NANCY MCNABB, BOARD OF EDUCATION OF KITTATINNY REGIONAL HIGH SCHOOL DISTRICT, SUSSEX COUNTY

Craig U. Dana, Esq., for petitioner, Kittatinny Regional High School District

Sanford R. Oxfeld, Esq., for respondent
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: February 23, 1998 Decided: March 5, 1998

BEFORE **IRENE JONES**, ALJ:

The Kittatinny Regional Board of Education High School District (District), Sussex County certified charges of unbecoming conduct against the respondent, Nancy McNabb (McNabb). McNabb is a tenured teacher employed by the District. On May 29, 1996, the District found probable cause to certify the tenure charge of

unbecoming conduct which, if true, would warrant McNabb's termination. On May 31, 1996 the District filed the written charges with the Commissioner of Education.

The Department of Education transmitted the matter to the Office of Administrative Law on June 28, 1996 for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to 15 and 52:14F-1 to -13. Hearings were held on October 7 and 10, 1997.

During the hearings, the parties agreed to settle this matter. A stipulation of settlement was filed on February 23, 1998 which is attached hereto. In accordance with the decision of the State Board of Education in *Cardonick v. Brookline Board of Education*, 1990 *S.L.D.* 842, the record of any proposed settlement must include:

> [T]he nature of the charges, circumstances justifying the settlement, consent or authorization by the board of education and the teacher to the proposed agreement, the Administrative Law Judge's findings that the teacher entered into the agreement with a full understanding of his rights and that the agreement is consistent with the public interest. See Cardonick at 850-51.

At the hearing, McNabb was carefully examined by her attorney wherein she was advised that the settlement agreement was subject to the approval of the Commissioner of Education. *Cardonick v. Brookline Board of Education*, 1990 *S.L.D.* 842. Further, that the Commissioner could refer this matter to the State Board of Examiners for further action. Thereafter, McNabb acknowledged that she fully understood the charges ad the consequences of this settlement.

After a review of the entire record, I **FIND** that the proposed settlement is consistent with the public interest because it will save significant legal expenses and costs as well as time expended by administrative and witnesses. I further **FIND** that McNabb had full opportunity to consult with legal counsel prior to entering into the

agreement. She is aware that pursuant to *N.J.A.C.* 6:11-3.6, the Commissioner may refer this matter to the State Board of Examiners for any action which he may deem appropriate. Further, McNabb was informed by counsel that notwithstanding the parties agreement to settle this matter, the Commissioner may not approve the settlement agreement. Thus, any execution of the settlement prior to the approval by the Commissioner is done at the peril of the parties.

I **CONCLUDE** that the proposed settlement fully disposes of all issues and controversies. I further **CONCLUDE** that the terms of this settlement are in the public interest.

It is therefore **ORDERED** that upon approval by the Commissioner that the parties comply with the settlement terms and that the proceedings are hereby **CONCLUDED**.

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

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

3/5/98
DATE

IRENE JONES, ALJ

Receipt Acknowledged:

3-11-98
DATE

DNH
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 12 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

PROPOSED SETTLEMENT AGREEMENT

THIS AGREEMENT, made and entered into on December , 1997, by and between the **KITTATINNY REGIONAL BOARD OF EDUCATION,** hereinafter "Board", having a mailing address of 77 Halsey Road, Newton, NJ 07860, and **NANCY McNABB**, hereinafter "McNabb", having a mailing address of 8 Maple Avenue, Newton, New Jersey 07860 ; and

WHEREAS, McNabb is a tenured teacher who has been employed by the Board since 1987; and

WHEREAS, the Board, by its resolution adopted on May 29, 1996, found probable cause to certify Sworn Tenure Charges of Unbecoming Conduct, pursuant to N.J.S.A. 18A:6-11 and other just causes which, if true, were sufficient to warrant McNabb's dismissal or reduction in salary; and

WHEREAS, the charges allege the following:

1. She failed to follow Board policy in administering prescription medication;

2. She stole prescription medication (pills) belonging to various students and administered them to other students, which constitutes a theft;

3. She administered prescription medication to a student who did not have a valid prescription for said medication;

4. When one of the parents of a student discovered her child's medication had been given to other children, she thereafter replaced that student's missing medication by stealing the same from other students.

WHEREAS, The Board contends that Mrs. McNabb's conduct and behavior evidenced a complete and total disregard for applicable law and Board procedure, which constitutes conduct unbecoming a teacher; and

WHEREAS, on May 31, 1996, the Board filed its written Tenure Charges with the Commissioner of Education to which McNabb filed an Answer on June 21, 1996. The Commissioner transmitted the matter to the Office of Administrative Law on June 28, 1996, for determination as a contested case pursuant to N.J.S.A. 52:14(b)-1 to 15 and N.J.S.A. 52:14(f)-1 to 13; and

WHEREAS, the parties have agreed to a proposed settlement which is subject to approval by the Commissioner of Education, the terms of which provide as follows:

A. McNabb has submitted her resignation effective October 31, 1997;

B. The Board shall withdraw its Tenure Charges and take no further action against McNabb, including taking no action concerning her nurse's licence.

C. McNabb shall receive no further remuneration from the Board of Education; and

WHEREAS, the parties acknowledge that this proposed Settlement Agreement is conditioned upon the approval of the same by the Commissioner of Education pursuant to the standards set forth in Cardonick v. Brooklawn Board of Education, OAL Docket No. EDU 7093-81 (February 17, 1982); Commissioner of Education (April 7, 1982); State Board (April 6, 1983); and

WHEREAS, the proposed settlement between the parties came after two full days of hearing before the Honorable Irene Jones, A.L.J., which hearing dates were October 7 and October 10, 1997, during which time the Board of Education presented its entire case in chief and McNabb testified and presented testimony from two character witnesses; and

WHEREAS, the parties contend that the circumstances justify a settlement as follows:

A. McNabb, having resigned effective October 31, 1997, will result in substantial economic savings to the Board which will not have to proceed with the conclusion of this case which is anticipated will take an additional nine months to two years to bring to conclusion, including all necessary and applicable periods of time for appeal, during which time the Board would have been responsible to continue payment to McNabb of her salary and benefits and that the Board will not be required to expend additional public funds for attorneys fees; and

B. McNabb has no prior instances of any charges being brought against her by the Board of Education and has ten (10) years experience as a school nurse during which time the record reveals no actions by the Board to withhold any increments; and

C. McNabb presented the Administrative Law Judge character references consisting of testimony of both a parent and a fellow teaching staff member which would establish that these instances which gave rise to the Tenure Charges would appear to be aberrations on an otherwise satisfactory record as a Certified School Nurse; and

D. McNabb testified herself and disputed many of the allegations; and

E. The Board believes that the charges and the settlement have made McNabb fully aware of the seriousness nature of her behavior; and

WHEREAS, before entering into this Agreement, McNabb had full opportunity to consult with legal counsel who is experienced in this area of the law and fully explained the meaning of the settlement to her; **and**

WHEREAS, the parties understand that this Agreement will become effective only when it is approved by the Office of Administrative Law and the Commissioner of Education; and

WHEREAS, this settlement fully disposes of all issues in controversies; and

YC

WHEREAS, any disapproval shall not interfere with the rights of the Board to pursue this matter further.

Attest:

THE BOARD OF EDUCATION OF THE KITTATINNY REGIONAL HIGH SCHOOL

John McDonald

John McDonald, Board Secretary

Eleanore Shaffer

Eleanore Shaffer, President

Witness:

-1-26-98

Sanford R. Oxfeld, Esq.

nancymcnabb 1-26-98

Nancy McNabb

4d

OAL DKT. NO. EDU 7332-96
AGENCY DKT. NO. 203-6/96

IN THE MATTER OF THE TENURE	:	
HEARING OF NANCY MC NABB, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF KITTATINNY REGIONAL	:	DECISION
HIGH SCHOOL, SUSSEX COUNTY.		
	:	

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

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



COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

APRIL 7, 1998
DATE OF MAILING APRIL 7, 1998

154-98

154-98

IN THE MATTER OF THE TENURE	:	
HEARING OF ANTHONY CAVALLO,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	

APRIL 7, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 03292-97
Agency Dkt. No. 63-2/97

IN THE MATTER OF THE TENURE HEARING OF ANTHONY CAVALLO and THE STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY

Gregory G. Johnson, Esq., for petitioner, the State Operated School District of the City of Newark,

Anthony G. Liss, Esq., for respondent, Anthony Cavallo

Record Closed: March 5, 1998 Decided: March 9, 1998

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

STATEMENT OF CASE

This case was transmitted to the Office of Administrative Law (OAL) on March 11, 1997 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

The parties entered into an agreement and have prepared a stipulation of settlement which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to a settlement of this matter.

2. The agreement fully disposes of all issues in controversy and is consistent with the law.

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 9, 1998
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

3/16/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 16 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cb

GREGORY G. JOHNSON, ESQ.
Counsellor at Law
17 Academy Street
Suite 208
Newark, New Jersey 07102

GREGORY G. JOHNSON, ESQ.
LOUIS M. FLORA, ESQ., *of Counsel*

Phone (973) 642-0001
Fax (973) 642-0127

March 5, 1998

Hon. Mumtaz Bari-Brown, A.L.J.
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: ***IMO the Tenure Hearing of Anthony Cavallo, Newark***
OAL Dkt. No: EDUTH 03392-97

Dear Judge Bari-Brown:

Enclosed please find the original, fully executed Stipulation of Settlement, for the above captioned matter.

By copy of this letter, a copy of this Settlement Agreement is being forwarded to opposing counsel, Eugene Liss, Esq.

Thank you for your courtesies in this matter.

Very truly yours,

Gregory G. Johnson

GGJ:bb

Enclosure

cc: Eugene Liss, Esq.

Gregory G. Johnson, Esq.
17 Academy Street, Suite 208
Newark, New Jersey 07102
973-642-0001
Attorney for the Newark Public Schools

IN THE MATTER OF THE TENURE HEARING OF ANTHONY CAVALLO,

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.

BEFORE THE COMMISSIONER OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW

OAL Docket No. EDUTH 03392-97N

STIPULATION OF SETTLEMENT

This Agreement made this on February___, 1998, by and between the parties, petitioner State-Operated School District of the City of Newark ("District"), and respondent Anthony Cavallo, a tenured teacher, residing at 405 Parker Avenue, Hackensack, New Jersey 07601

WHEREAS, Mr. Cavallo is a tenured teacher employed by the District;

WHEREAS, on or about December 18, 1996, tenure charges were filed against M. Cavallo based upon Corporal Punishment, Conduct unbecoming; and Insubordination;

WHEREAS, on February 11, 1997, the State District Superintendent acted to certify the charges against Mr. Cavallo, and suspended him for a 120 day suspension without pay pending a hearing pursuant to *N.J.S.A.* 18A:6-14.

WHEREAS, on or about February 25, 1997, Mr. Cavallo's attorney filed an Answer denying the Charges with the Commissioner of Education; and

WHEREAS, in light of Mr. Cavallo's retirement, the nature of charges, and potential for protracted litigation, it is in the best interest of the parties to resolve the charges before the Commissioner of Education;

NOW THEREFORE BE IT RESOLVED, the parties hereby stipulate and agree as follows:

1. The District agrees to withdraw the tenure charges in this case. Mr. Cavallo hereby resigns his teaching position, effective June 30, 1998. (See attached letter as Exhibit "A")

2. Mr. Cavallo is entitled to his full salary and health insurance benefits until June 29, 1998. Mr. Cavallo is not entitled to payment for accumulated sick days. Mr. Cavallo agrees never to seek employment with the District in the future.

3. Mr. Cavallo specifically acknowledges that he has been advised of the duty of the Commissioner of Education pursuant to *N.J.A.C.* 6:11-3.6(a)(1) and *In re Cardonick* concerning referral to the State Board of Examiners for possible action regarding Mr. Cavallo's teaching certification. Mr. Cavallo agrees to voluntarily relinquish his teaching certificates within 30 days from the date of final approval of the Settlement Agreement by the Commissioner.

4. The parties respectively acknowledge that each has had ample opportunity to seek independent legal counsel, financial or other advice regarding this Agreement, and that each is signing this Agreement freely and voluntarily, without coercion, duress or pressure from the other party.

5. This Agreement constitutes the full Agreement between the parties.

6. By entering this Agreement, each party releases and discharges the other with respect to all claims or rights that either party may have against the other. This includes all claims, including those of which either party is not aware and those not mentioned herein. It specifically includes all claims which Mr. Cavallo may have respecting tenure, discrimination on any basis, rights under any collective bargaining agreement, disability payments, sick leave, salary or any other matter pertaining to his employment, except the salary and benefits stated in Paragraph 2.

7. This Agreement is subject to approval by the State District Superintendent, Office Administrative Law, and Commissioner of Education.

FOR THE EMPLOYEE

Anthony Cavallo

Dated: February 16, 1998

Eugene G. Liss, Esq.
Attorney for Mr. Cavallo

Dated: February 16, 1998

FOR THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK

Dr. Beverly L. Hall

Dated: 3/4/98

Gregory G. Johnson, Esq.

Dated: 2/19/98

February 16, 1998

Dr. Beverly L. Hall
State District Superintendent
Newark Public Schools

Dear Dr. Hall:

In accordance with the Settlement Agreement, I hereby resign my tenured teaching position effective June 30, 1998.

Very truly yours,

Anthony Cavallo

Anthony Cavallo

Exhibit "A"

Feb. 25, 1998

RECEIVED
98 FEB 26 PM 3:19
[illegible] OF
NUM & RESOURCE SERVICES

Wanda Hunter
Acting District Assistant
Superintendent

Dear Mr. Randall:

I do hereby hunter my resignation as a school teacher in the school district of Newark, N.J. This is for the purpose of retirement and will be effective July 1, 1998.

Yours truly,
Anthony Carello

2/27/98
Please...
☐ Read
☐ Handle
ROUTING & REQUEST
To: C. To Legal

OAL DKT. NO. EDU 3292-97
AGENCY DKT. NO. 63-2/97

IN THE MATTER OF THE TENURE	:	
HEARING OF ANTHONY CAVALLO,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	

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

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

In accordance with the terms of the settlement agreement, this matter shall be transmitted to the State Board of Examiners for revocation of respondent's certification. In this regard, it is directed that the original of each instructional certificate issued by the State Board of Examiners possessed by respondent be submitted by respondent's attorney to the State Board of Examiners by certified mail within 30 days of the date of this decision together with a sworn statement of respondent that he does not oppose the revocation of such certificate(s).[1,2]

COMMISSIONER OF EDUCATION

[1] It is noted that the within agreement provides that respondent will be resigning his teaching position, effective June 30, 1998. As such, final action with respect to revocation of his certificate(s) should be accomplished subsequent to this date.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

APRIL 7, 1998
DATE OF MAILING APRIL 7, 1998

155-98

155-98 SEC

IN THE MATTER OF MICHAEL K[redacted]L MURRAY, :

LACEY TOWNSHIP BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION

OCEAN COUNTY. : DECISION

:

APRIL 15, 1998

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	**Docket No.: C12-94**
MICHAEL KILMURRAY, *LACEY TOWNSHIP BOARD OF EDUCATION, OCEAN COUNTY*	:	**DECISION**

The School Ethics Commission has reviewed the record of the above-captioned matter and the decision of Administrative Law Judge Kathleen Duncan finding that Michael Kilmurray violated the School Ethics Act, N.J.S.A. 18A:12-24(c), in connection with the board's hiring of his sister-in-law in June 1994. The Administrative Law Judge (hereinafter "ALJ") set forth that a reprimand was an appropriate penalty. Upon mailing of the Administrative Law Judge's decision to the parties on January 16, 1998, the parties were provided 13 days to file written exceptions to the School Ethics Commission for its consideration. Deputy Attorney General Arlene Lutz filed timely exceptions on January 28, 1998. Lawrence Silver, Esq. filed a timely reply and cross-exceptions on behalf of Michael Kilmurray on February 3, 1998. DAG Lutz then filed a timely reply to Mr. Silver's cross-exceptions on February 6, 1998. The Commission considered the Initial Decision, the exceptions, cross-exceptions and replies at its meeting of February 24, 1998.

The School Ethics Commission adopts the procedural history and the findings of fact set forth in the ALJ's decision. The Commission defers to the Administrative Law Judge's credibility determinations since she had full opportunity to perceive all of the witnesses. However, the Commission would not give any special commendation to Mr. Kilmurray for being candid in his testimony, as the ALJ did, since he was under oath and required to be truthful. The Commission does, however, disagree with some of the conclusions reached by the ALJ and discusses same below.

The Administrative Law Judge concluded that Mr. Kilmurray violated the School Ethics Act, N.J.S.A. 18A:12-24(c) when he interfered with the hiring of his sister-in-law. Subsection c sets forth:

> No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

DAG Lutz supports the conclusion of the ALJ that Mr. Kilmurray violated the School Ethics Act three times when he participated in the Lacey Township board's consideration of the candidacy of his sister-in-law, Theresa Kilmurray. However, she excepts to the sanction of reprimand recommended by the ALJ. Regarding the violation, she argues that the evidence supports the conclusion that he violated the act three times on June 20, 1994: 1) when he interjected himself into deliberations on the proposed appointment of his sister-in-law in the closed session; 2) when he commented that his sister-in-law and another candidate were both good candidates; and 3) when he made and supported the motion to re-vote on the appointment of Ms. Kilmurray.

Conversely, in his cross-exceptions, Mr. Silver argues that Mr. Kilmurray should not be found in violation of the Act. He states that what DAG Lutz refers to as "interjecting himself" was the making of merely two comments as they entered the executive session meeting, "What the hell is going on here? Why are we not supporting the superintendent's recommendations?" He argues that these two comments had no effect on the outcome, whatsoever.

The Commission notes that the issue is not whether the comments affected the outcome, but whether a reasonable person would expect that Mr. Kilmurray's independence of judgment was impaired when he was making such comments in a matter in which he had a personal involvement. Mr. Kilmurray had a personal involvement with the sister-in-law's appointment that may reasonably be expected to impair his objectivity. Therefore, the Commission concludes that Mr. Kilmurray violated N.J.S.A. 18A:12-24(c) of the Act when he made comments that clearly indicated his support for the appointment of his sister-in-law. Even if his goal were solely to get the board to support the superintendent's recommendations, he acted in his official capacity in a matter in which he had a personal involvement in violation of the Act.

The Commission also agrees with the Administrative Law Judge's conclusions that Mr. Kilmurray's statement that Theresa Kilmurray and another candidate were both good candidates, and his motion for and support of a re-vote after the motion to appoint Ms. Kilmurray failed, were violations of his ethical obligation to refrain from any official action in matters of personal interest to him. The Commission rejects the argument of Mr. Silver that the statement and the motion were of such minute consequence that they are hardly ethical violations. Regarding the statement, if Mr. Kilmurray had just said Theresa Kilmurray is a good candidate, there would be no doubt that there was an ethical violation. The fact that he said both candidates are good does not obviate the fact that the statement promotes the candidacy of Theresa Kilmurray. Regarding the motion for a re-vote on the failed appointment, this motion clearly had no purpose other than to further the hiring of Ms. Kilmurray. The fact that the superintendent called for such a motion certainly did not require that Mr. Kilmurray make it. Again, in both instances, Mr. Kilmurray acted in his official capacity in matters in which he had a personal involvement that might reasonably be expected to impair his objectivity in violation of N.J.S.A. 18A:12-24(c).

The Commission disagrees with the conclusion that Mr. Kilmurray did not violate the Act when he sat in on private session discussions concerning the appointment of his sister-in-law. As the ALJ reasoned, the Commission must look to the Legislature's findings and declarations set forth at N.J.S.A. 18A:12-22a, which state:

> In our representative form of government it is essential that the conduct of members of local boards of education and local school administrators hold the respect and confidence of the people. These board members and administrators must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.

The Legislature's findings and declarations reinforce the notion that the purpose of the act is to develop standards that avoid not just unethical conduct, but also the perception thereof. When a school official has a conflict of interest of which the public is aware, and that school official goes behind closed doors when that item is discussed, the situation creates a justifiable impression among the public that their trust is being violated. In the present case, the public may believe that the respondent is actively participating in the discussion behind closed doors, that the board member will tell his relative what was said, or at the least, that the other board members will be inhibited in their discussion of the matter because of his presence. The Commission understands the ALJ's concern for an elected member of the board's right to be privy to all discussions. However, in the present case, the Commission believes that his right is subordinate to the rest of the board's right to have an unfettered discussion of the qualifications of the relative. The board member's rights are not circumscribed by leaving the private session only while that particular item is being discussed. This is consistent with the Commission's public advisory opinion A33-95. This opinion advised that a board member who has a conflict prohibiting him from negotiating would be in violation of the Act if he sat in on the board's closed session strategy discussions. This advisory followed the Superior Court-Appellate Division's ruling in Scotch Plains v. Syversten, 251 N.J. 566 (App. Div. 1991)(School board member who had litigation pending against the district could not attend executive sessions of the board discussing that litigation.) Thus, the Commission concludes, contrary to the ALJ, that Mr. Kilmurray violated N.J.S.A. 18A:12-24(c) by acting in his official capacity in a matter in which he had a personal involvement when he sat in on the part of the private session when the board discussed his sister-in-law.

The Commission recognizes that the advisory opinion A33-95 had not issued at the time of the June 20, 1994 meeting. The Commission also recognizes that counsel advised Mr. Kilmurray that he could attend the private sessions. However, the Commission concludes, as did the ALJ, that these are considerations to take into account when determining the penalty. They do not constitute a defense to the violation. See, e.g., In re Harrison, 96 N.J.A.R. 2D (EDU) 553 and Dilzer v. Sweet, 96 N.J.A.R. 2D (EDU) 132.

Regarding the penalty, the ALJ concluded, "The sanction of reprimand is most commensurate with the nature of the offenses in the within matter and will fully serve to

penalize respondent for the conduct." (Initial Decision at p.16). In so ruling the ALJ noted that Mr. Kilmurray had been elected to the board in April 1994, two months before the June 20, 1994 meeting and had not yet gone through board member training. She also notes, as set forth above, that he thought he was abiding by the advice given by the board attorney. In addition, she states that Mr. Kilmurray testified credibly that the main motivating force for his comments was his annoyance at the behavior of some members for failing to support the superintendent's recommendations and his belief that they were abstaining in order to obtain an equal teaching position for another candidate.

In her exceptions, DAG Lutz argues first that a reprimand is inappropriate for a school official who violated the Act three times in one night. Second, she argues that the board attorney had advised Mr. Kilmurray to refrain from voting on matters involving members of his family prior to June 1994. Thus, he did not need board member training to know that he should not participate in such matters. She points to the ALJ's reference to two other matters from which Mr. Kilmurray abstained affecting his brother-in-law. DAG Lutz notes that Mr. Kilmurray refrained from interfering in his sister-in-law's appointment until the motion to appoint her failed. She suggests, therefore, that the Commission should be guided by the case, In the Matter of Carol Scudillo, 97 N.J.A.R. 2D (EDU) 617, where a board member voted for her son-in-law to become superintendent after she saw that his appointment was in trouble. In that case, the Commissioner of Education imposed the highest penalty possible for a former member of the board, a censure. She argues that Mr. Kilmurray should receive the highest penalty possible, which is removal.

Mr. Silver argues conversely that Mr. Kilmurray's conduct was of minute consequence, comparable to that in the case, In the Matter of Frank Montagna, C40-95, where a board member voted in favor of a list of 33 game personnel that included the name of his wife. He states that Scudillo is distinguishable because Mr. Kilmurray did not willfully or knowingly vote to appoint his sister-in-law. He also stresses that Mr. Kilmurray was a new board member and he believed that he was acting in accordance with advice from counsel. All of these factors, he argues, support the ALJ's decision to give the lowest penalty if the Commission finds a violation.

The Commission disagrees that Mr. Kilmurray's violations of the Act noted above merit the lowest sanction. The Commission notes the mitigating factors recognized by the ALJ that he was a new board member and he believed that he was acting in accordance with the advice of counsel, in determining penalty. However, since counsel's advice was to abstain from matters concerning his relatives, the Commission concludes that Mr. Kilmurray should have known, even without board member training, that he was violating the act when he approached board members going into private session and demanded to know why they were not supporting the superintendent's recommendations. The Commission also respectfully disagrees with the ALJ's characterization of Mr. Kilmurray's actions. She describes his conduct as lesser than a vote that is in conflict with his obligation to refrain from acting in a matter in which he had a personal interest.

The characterization is especially questionable since she notes that his actions appeared designed to secure employment for his sister-in-law. (Initial Decision at p.15.)

Having said that, however, the Commission does not agree that Mr. Kilmurray's violation was as egregious as that of Carol Scudillo. Likewise, it does not agree with respondent's counsel that the conduct is as innocuous as that of Frank Montagna. After all, game personnel are persons who receive a small stipend for assisting at school athletic events, as opposed to full-time teachers. Mr. Kilmurray violated the School Ethics Act four separate times in one night trying to revive the superintendent's recommended appointments, which included that of his sister-in-law. Thus, the Commission recommends a penalty of censure, which is a step higher than the lowest sanction of reprimand.

DECISION

For the foregoing reasons, the School Ethics Commission adopts the findings of fact of the Administrative Law Judge. Regarding the violations of the Act, the Commission rejects the conclusion of law that Michael Kilmurray did not violate N.J.S.A. 18A:12-24(c) of the School Ethics Act by attending the private session discussion of his sister-in-law's appointment. The Commission adopts the conclusions that he violated the Act when he made comments concerning the appointment to his colleagues as they entered the private session, when he described both his sister-in-law and another applicant as "good candidates" and when he made and supported the motion to re-vote after the vote to hire Ms. Kilmurray failed. The Commission modifies the ALJ's recommendation regarding the appropriate sanction for the above violations for the reasons set forth above. It therefore recommends that the Commissioner of Education impose a sanction of censure.

This decision has been adopted by formal resolution of the School Ethics Commission. The matter will now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.



Paul C. Garbarini
Chairperson

Resolution Adopting Decision -- C12-94

Whereas, the Commission found probable cause to credit the allegations in the complaint and transmitted this matter for a hearing at the Office of Administrative Law; and

Whereas, the School Ethics Commission has considered the Initial Decision in this matter and has considered the exceptions and replies of the parties regarding the decision; and

Whereas, the Commission has reviewed all of the information and now adopts the conclusion of the Administrative Law Judge that respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act when he interfered withthe hiring of his sister-in-law three times; and

Whereas, the Commission rejected the conclusion of the Administrative Law Judge that he did not violate the Act when he sat in on closed session discussions regarding the sister-in-law; and

Whereas, the Commission modified the recommended sanction from reprimand to censure; and

Whereas, the Commission has reviewed the proposed decision of its staff setting forth the reasons for its conclusion; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby finds that Michael Kilmurray violated N.J.S.A. 18A:12-24(c) of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of censure against him; and

Be It Further Resolved that the Commission adopts the enclosed decision referenced as its decision in this matter.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on February 24, 1998.

Lisa James-Beavers
Executive Director

[c1294dec/c:lisajb/decisions]

AGENCY DKT. NO. 48-2/98

IN THE MATTER OF MICHAEL KILMURRAY,	:	
LACEY TOWNSHIP BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
OCEAN COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission have been reviewed. Counsel for Mr. Kilmurray requested and was granted two extensions of time within which to file Comments with respect to the recommended sanction in this matter. Such comments were filed on March 25, 1998.[1]

Mr. Kilmurray's exceptions object to the Ethics Commission imposing the more severe sanction of censure rather than a reprimand as recommended by the Administrative Law Judge (ALJ). He proffers that, in making her penalty recommendation, the ALJ correctly determined that because Kilmurray was a new board member, did not cast a vote or have any influence on any vote being cast, previous decisions of the Commissioner supported a sanction of reprimand. (Kilmurray's comments at p. 2)

Upon a thorough review of the record, the Assistant Commissioner[2] is unpersuaded by Mr. Kilmurray's comments. Rather, given that the Commission's decision found four ethics violations on the part of Mr. Kilmurray, as opposed to three found by the ALJ, and

[1] It is noted that members of the public attempted to make submissions to the record in this matter. As there is no statutory or regulatory authorization for receipt or consideration of such submissions, these were neither reviewed nor taken into account in the Assistant Commissioner's within penalty determination.

[2] *N.J.S.A.* 18A:4-34 authorizes each assistant commissioner to hear and determine controversies and disputes which may arise under school laws, or the rules of the state board, or of the Commissioner of Education.

after fully considering all relevant existing mitigating factors, he concludes that censure is the appropriate penalty in this matter. As such, the Assistant Commissioner determines to accept the Commission's recommendation, in view of the Commission's determination, which is not reviewable by the Assistant Commissioner herein, that violations of the School Ethics Act occurred under the circumstances set forth in the decision.

Accordingly, IT IS HEREBY ORDERED that Michael Kilmurray be censured as a school official found to have violated the School Ethics Act.[3]

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

[3] This decision, as the Assistant Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

APRIL 15, 1998
DATE OF MAILING APRIL 15, 1998

156-98

156-98 SEC

IN THE MATTER OF JAMES RUSSO AND,	:	
THOMAS SCARANO, WOODBRIDGE TOWN-	:	
SHIP BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
MIDDLESEX COUNTY.	:	DECISION
	:	

APRIL 16, 1998

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket No.: C12-97**
JAMES RUSSO and THOMAS SCARANO,	:	
WOODBRIDGE TOWNSHIP BOARD OF EDUCATION MIDDLESEX COUNTY	:	**DECISION**

PROCEDURAL HISTORY

This matter arises from a complaint filed by Arthur Delaney, Jr. on May 12, 1997, alleging that James Russo and Thomas Scarano negotiated the contract with the Woodbridge Teacher Education Association (WTEA) in violation of the School Ethics Act, N.J.S.A. 18A:12-21 et seq. Mr. Russo and Mr. Scarano filed a joint answer with the School Ethics Commission on August 19, 1997, admitting to negotiating, but denying that they violated the School Ethics Act.

The Commission advised the parties that it would discuss this matter at its meeting of November 25, 1997. In the Commission's correspondence, it advised the parties that they had the right to have counsel present at the meeting and the right to bring witnesses. Mr. Delaney arrived with attorney Frank Campbell, Esq. The respondents came without counsel or witnesses. At that meeting, the Commission tabled its decision on the matter. At its meeting of December 16, 1997, the Commission found probable cause to credit the allegations that James Russo and Thomas Scarano violated N.J.S.A. 18A:12-24(c) of the School Ethics Act when they negotiated the collective bargaining agreement with the WTEA.

The Commission determined that the material facts of the case were undisputed. Thus, rather than send the case to the Office of Administrative Law, the Commission requested that the respondents file a written statement by January 16, 1998. Therein, they were to set forth why the Commission should not find them in violation of the School Ethics Act on the basis of the undisputed facts set forth in the probable cause letter. The Commission received a written statement from Mr. Scarano on January 16, 1998, setting forth several arguments that it will address below. On the same date, the Commission received a letter from Mr. Russo joining in the arguments of Mr. Scarano and adding additional comments that it will also address below. Mr. Delaney also faxed unsolicited comments on January 16, 1998, which the Commission also considered in reaching this decision at its January 27, 1998 meeting.

FACTS

The parties are in agreement that the following facts are undisputed. James Russo and Thomas Scarano are at all relevant times members of the Woodbridge Township Board of Education. The current board president appointed them to serve on the negotiating committee effective April 21, 1997. They engaged in collective bargaining with the WTEA as the only two members of the negotiating team. Respondent Russo has a sister who works as a secretarial clerk in the district. She is represented by the WTEA. Respondent Scarano has a brother and a fiancee, now wife, who work as teachers in the district and who are both represented by the WTEA. Mr. Scarano married his fiancee in November 1997.

At the first public meeting following the respondents' appointment to the negotiations committee, complainant Arthur Delaney, Jr., called attention to what he perceived to be conflicts of interest. He specifically referenced School Ethics Commission Advisory Opinion A23-94. He requested an opinion on whether the respondents had a conflict of interest from the board attorney. The board attorney advised that there was no conflict. The respondents did not seek an advisory opinion from the School Ethics Commission and the board attorney did not advise that they do so. The complainant then requested that the board president, Robert Mantz, reconsider his selection of members to serve on the negotiations committee. He refused, although there were three board members who do not have any relatives in the WTEA.

Respondents met with the WTEA representatives and a mediator on April 30, 1997 and May 12, 1997. After they completed negotiations, and the WTEA ratified the contract, the Woodbridge board voted on it. Four board members, including Mr. Delaney, abstained from the vote because they or their family members were members of the WTEA or the NJEA. The remaining five, including Mr. Russo and Mr. Scarano, voted to ratify the contract.

Mr. Scarano also desires that the Commission consider other facts that he believes are material to determining whether he violated the Act. Specifically, the Woodbridge Township school district has over twelve thousand students in twenty-four school buildings and eighteen hundred employees. The collective bargaining agreement was of significant concern to the public before the April 1997 elections because the district was without a collective bargaining agreement from June 30, 1996. In that election, Mr. Scarano ran against incumbent members of the board who were members of the negotiating team at the time. The board and the WTEA filed for an impasse, which resulted in the appointment of State Mediator James Mastriani.

When he ran for election, he disclosed that his brother and fiancee were employed as teachers in the district and represented by the WTEA. These facts became the subject of public debate during the campaign and he had to address the issue in public forums. Despite the disclosure of his relationship to WTEA members, he was elected with over 4300 votes. This compares with less than 1000 votes for the former negotiation's chair

and Janice Zaneski, the other incumbent who received approximately 1100 votes. Mr. Scarano also wants the Commission to note that his brother is twelve years younger than he is and was employed in the district before he became a board member. Also, he was not on the board when the board appointed his fiancee to a teaching position.

When Mr. Scarano and Mr. Russo began negotiations, he states that the negotiations were not full and free and open. The mediator required that both the board and the WTEA define and limit the issues to be addressed in mediation. The mediator required that they reduce the number of issues down to 15, which would be the only issues the sides would negotiate. He would allow no other matters on the negotiating table. Thus, Mr. Scarano and Mr. Russo did not have an unlimited right to negotiate all items in the contract, but were limited by parameters set by the mediator appointed by the predecessor board. The board's chief negotiator was the board attorney and he conducted all negotiations on behalf of the district. There was no exchange of dialogue and no independent meetings between Mr. Scarano and Mr. Russo and members of the WTEA or their negotiating team. Finally, he notes that although they participated in and approved the final agreement that was submitted to the final board members for approval, they did so with significant limitation.

The Commission's investigation has not uncovered any information to contradict the foregoing facts and therefore, finds them also to be undisputed. However, the Commission does not find these facts to be material to the dispute. Thus, there being no material factual disputes, there is no need to forward the matter to the Office of Administrative Law for a hearing. Rather, the Commission will address each of the respondents' arguments regarding why the Commission should not find them to have violated the Act.

ANALYSIS

I. The Commission Must Refer This Matter to the OAL for a Hearing

Respondent's first argument is procedural, rather than substantive. At the conclusion of the Commission's probable cause letter, the Commission advised respondents that the Commission would not refer this matter to the OAL since the material facts were undisputed. Rather, it invited respondents to provide a written statement setting forth why the Commission should not find them in violation of N.J.S.A. 18A:12-24(c) of the School Ethics Act for negotiating and voting on the contract with the WTEA. The respondents disagree with the Commission's procedure. They argue that N.J.S.A. 18A:12-29(b) of the School Ethics Act requires the Commission to refer the matter to the OAL, whether or not the parties agree that there are material facts in dispute. N.J.S.A. 18A:12-29(b) provides, in pertinent part:

> If the Commission determines that probable cause exists, it shall refer the matter to the Office of Administrative Law for a hearing to be conducted in accordance with the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), and shall so notify the complainant and each school official named in the complaint.

The Commission has addressed this argument in a prior case, but will reiterate it here. In In the Matter of Rodney Bond, C21/C24-96, the respondent also argued that the Commission is required to refer a matter in which it finds probable cause to the OAL pursuant to the language in N.J.S.A. 18A:12-29(b). There, the Commission noted that because the statute refers to the Administrative Procedure Act (APA), it must consider the APA when determining this issue. Pursuant to the APA, an agency head, here, the Commission, retains full authority to determine whether a case is contested and to make final decisions in contested cases. N.J.S.A. 52:14F-7; In Re Uniform Adm'n Procedure Rules, 90 N.J. 85 (1982). In the 1982 case, the New Jersey Supreme Court noted that the APA and the OAL's rules for implementing the APA "...do not interfere with the agency procedures for resolving cases, or to hear and decide contested cases." Id. at 105. The APA simply provides a mechanism for providing a hearing once the agency head has determined that a matter is contested and requires an evidentiary hearing. Valdez v. N.J. State Bd. of Medical Examiners, 205 N.J. Super. 398, 404 (App. Div. 1995).

Considering the agency head's authority under the APA, New Jersey courts have found that an agency head's discretion to determine how to handle a particular case is not circumscribed by the use of the word "shall" in a statutory provision relating to transfer of cases to the OAL. In Hills Development Co. v. Bernards Twp., 229 N.J. Super. 318 (App. Div. 1988) and In re Township of Warren, 247 N.J. Super. 146 (App. Div. 1991), certif. denied 127 N.J. 557 (1992), the Appellate Division concluded that the use of the word "shall" in a statutory provision did not require the Council on Affordable Housing (COAH) to automatically refer objections to a municipality's affordable housing plan to the OAL for a hearing. The Court dismissed the appellants' arguments for an OAL hearing and concluded that the Fair Housing Act's reference to the APA allowed the agency head to determine whether a case involved disputed material issues of fact requiring an evidentiary hearing. Although the language of the Fair Housing Act is not identical to that in the School Ethics Act, these cases demonstrate that the word "shall" does not abrogate the agency head's discretion to decline referral of a case to the OAL when the statutory provision references the APA. Thus, the School Ethics Commission appropriately declined to refer the present matter to the OAL where there were no material facts in dispute requiring an evidentiary hearing.

II. N.J.S.A. 18A:12-24(c) Prohibits a Board Member from Negotiating Only When His Immediate Family Member is a Member of the Local Union.

Respondent next argues that the language of N.J.S.A. 18A:12-24(c) of the School Ethics Act only prohibits board members from negotiating only if their "immediate family member" is a member of the local bargaining unit. Subsection c sets forth:

> No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

N.J.S.A. 18A:12-23 defines immediate family member as the "spouse or dependent child of a school official residing in the same household." Respondent Scarano argues that if the Legislature had intended for the Commission to prohibit a board member from negotiating when he has a sibling in the local union, it would have used the term "relative" in place of "member of his immediate family" in the above statute. N.J.S.A. 18A:12-23 defines "relative" as the "spouse, natural or adopted child, parent or sibling of a school official." He states that the Commission apparently gave no weight to the distinction. Further, he argues that the Legislature did not intend that a board member be prohibited from negotiating when his fiancee is a member of the union. If it had, it would have added "fiancee" to the definition of immediate family member or defined the term "spouse" more broadly than "the person to whom a school official is legally married under New Jersey law."

The Commission finds these arguments to be without merit. As the Commission stated in Advisory Opinion A23-94, the Commission is not constrained to recognize conflicts of interest only when a matter affects a board member's immediate family member. Rather, the Commission looks to the whole statute, which provides that a school official cannot act in a matter in which he has an indirect personal or financial involvement that might reasonably expected to impair his objectivity. The Commission finds that a board member who has a sibling in the local bargaining unit might reasonably be expected to be lacking objectivity when negotiating that sibling's contract. Thus, Mr. Scarano and Mr. Russo had an indirect personal involvement with the salary and benefits their siblings that prohibited them from negotiating without violating the Act.

The Commission finds Mr. Scarano's fiancee issue even more troubling. Clearly, the reasoning for the prohibition against a board member negotiating when his spouse is a member of the collective bargaining unit is that the benefits from that contract will directly enrich that board member's household. When a board member negotiates a fiancee's contract and the term of the contract goes beyond the date of marriage as it does here, the benefits of the contract still enrich the board member. Thus, since Mr. Scarano married his fiancee prior to the expiration of the contract, the Commission concludes that he had a financial involvement in the outcome of negotiations that might reasonably be

expected to impair his objectivity. Therefore, he was in violation of the N.J.S.A. 18A:12-24(c) when he negotiated and voted in favor of the contract.

III. Respondents Acted on the Advice of the Board Attorney

Respondents argue that they proceeded to negotiate on the basis of an opinion by the board attorney who said there was no conflict. They further argue that since the attorney's interpretation of N.J.S.A. 18A:12-24(c) was a reasonable one, which they believe is consistent with the language of the statute, the Commission should not find them in violation of the Act for following it. The Commission stated in In the Matter of Rodney Bond, supra, that it will consider the fact that an attorney advised that there was no conflict in determining sanction, but not in determining whether a violation occurred. The Commission is the sole arbiter of what constitutes an ethics act violation. If the Commission concludes that a type of conduct violated the Act, it cannot then say that there is no violation because an attorney advised that there was no violation. Rather, the Commission considers the advice a mitigating circumstance in determining what the penalty should be.

This interpretation is particularly appropriate where, as here, the Commission had issued a public advisory opinion indicating that it interpreted the Act differently than the board attorney. In Advisory Opinion A23-94, the Commission said that the issue is whether the board member has a personal involvement that might reasonably be expected to impair his objectivity when determining whether to prohibit the board member from negotiating pursuant to N.J.S.A. 18A:12-24(c). In A23-94, the Commission advised that a board member with an emancipated son or daughter-in-law in the local bargaining unit was prohibited from negotiating. Consequently, the Commission had already advised that N.J.S.A. 18A:12-24(c) prohibited board members from negotiating when a relative other than an immediate family member was a member of the local bargaining unit. Mr. Delaney brought the Commission's advice in Advisory Opinion A23-94 to the respondents' attention at the time the board president was choosing the negotiating committee. Thus, the Commission's decision in the present case is completely consistent with A23-94 and the Commission is not compelled to rule otherwise because an attorney advised respondents that they would not violate the Act if they negotiated the collective bargaining agreement.

IV. Respondents Were Not Advised of Their Right to Have an Attorney When They Appeared Before the School Ethics Commission

Respondent Mr. Scarano argues that while complainant Arthur Delaney had a lawyer present his arguments, he did not have counsel nor was he told that he could be represented by counsel. This argument is completely baseless as the respondent in every case before the Commission is notified of his right to have counsel when the Commission advises him that his case is going to be discussed at an upcoming meeting. Mr. Scarano and Mr. Russo were notified of their right to bring counsel and present witnesses by letter

dated November 6, 1997, attached hereto as Attachment A. They were also copied on Mr. Delaney's letter from the Commission of the same date stating that he could also bring counsel. A copy of this letter is attached as Attachment B.

Having so notified the respondents of their right to bring counsel, the Commission could discern no need to reiterate at its meeting that the respondents had a right to bring counsel. Indeed, for it to do so would have been unfair to Mr. Delaney who had retained counsel and ostensibly paid for him to travel from Neptune to appear before the Commission in Trenton and represent him. Respondents voiced no objection to Mr. Delaney's counsel nor did they inquire at the meeting as to whether they had a right to counsel. Considering the notification that the Commission provided respondents, the Commission properly assumed that respondents made a conscious, informed choice to come to its meeting without counsel.

Furthermore, in their subsequent submission to the Commission, respondents set forth the facts that they say that they would have presented had they had counsel present. The Commission does not dispute those facts and includes them as part of the factual record before it. The weight to be accorded those facts would be within the purview of the Commission whether counsel were present or not. Therefore, the respondents were not in any way prejudiced by not having counsel present.

V. The Commission Should Consider the Nature of the Siblings' Relationship

James Russo, in a separate submission to the Commission, sets forth that the Commission should consider the type of relationship that a board member has with a sibling before deciding that the board member is disqualified from negotiating. The Commission does not dispute that some siblings may be closer than others. It is precisely for this reason that Mr. Russo's suggestion is impracticable and not mandated by the law. It is important to note that the Legislature drafted N.J.S.A. 18A:12-24(c) in subjective rather than objective terms. The test is whether the school official's involvement might reasonably be expected to impair his objectivity, not whether he feels his objectivity is impaired. A board member's closeness to his sibling is of no relevance to the objective issue before the Commission. Thus, the Commission rejects the argument that it should consider the nature of a board member's relationship with his sibling before determining whether he has a conflict of interest that prohibits him from participating in negotiations.

The Commission now finds that respondents acted in their official capacity in a matter in which they had a direct or indirect personal involvement that might reasonably be expected to impair their independence of judgment in violation of N.J.S.A. 18A:12-24(c) of the School Ethics Act by serving on the negotiations committee and voting on the collective bargaining agreement with the Woodbridge Township Education Association (WTEA).

CONCLUSION

For all the foregoing reasons, the Commission concludes that James Russo and Thomas Scarano violated N.J.S.A. 18A:12-24(c) of the School Ethics Act when they negotiated the collective bargaining agreement with the teachers' union and voted in favor of it. The Commission recommends that the Commissioner of Education impose the sanction of censure on Mr. Russo and Mr. Scarano. In making the recommendation, the Commission has considered as a mitigating factor the fact that Mr. Russo and Mr. Scarano sought legal advice from the board attorney who advised that they could serve as the negotiating committee. However, the Commission finds it to be a serious violation that these two board members served as the only two members of the negotiating team. Thus, it finds it necessary to make a more public statement than a reprimand that negotiating a contract when the terms of that contract will benefit one's sibling and/or fiancee and ultimately, spouse, is a violation of the School Ethics Act.

Upon adoption of this decision by a formal resolution of the School Ethics Commission, the matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.



Paul C. Garbarini
Chairperson

Resolution Adopting Decision -- C12-97

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof and has considered the testimony of the respondents and the complainant; and

Whereas, the Commission found probable cause to credit the allegations in the complaint and invited respondents to file a written statement in response; and

Whereas, the Commission has reviewed respondents' written statement and now concludes that respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act; and

Whereas, the Commission has reviewed the proposed decision of its staff setting forth the reasons for its conclusion; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby finds that James Russo and Thomas Scarano violated the School Ethics Act and recommends that the Commissioner impose a sanction of censure against respondents Russo and Scarano; and

Be it Further Resolved that the Commission adopts the enclosed decision referenced as its decision in this matter.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on January 27, 1998.

Lisa James-Beavers
~~Executive Director~~

[c1297dec/c:lisa/decisions]

IN THE MATTER OF JAMES RUSSO AND,	:	
THOMAS SCARANO, WOODBRIDGE TOWN-	:	
SHIP BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
MIDDLESEX COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission ("Commission") have been reviewed. Comments were timely filed by complainant.

In his comments, Complainant Arthur Delaney urges that the Commissioner impose a stronger penalty than that of censure, as recommended by the Commission, opining that, notwithstanding the Board attorney's advice, respondents had a duty to at least investigate seeking an advisory opinion from the Commission once the idea was raised at a Board meeting. (Complainant's Comments at p. 1) Complainant further questions why Mr. Scarano received only a censure when the Commission noted it found that participation in negotiations and voting with a fiancee working in the District was even more troubling than the other votes taken, in that it served to directly enrich the Board member's household, particularly here, where the contract went beyond the date of the marriage. Complainant urges a more severe penalty, noting that the attorney was wrong in his advice and contending that respondents' actions were "ethically wrong and involved an outrageous abuse of the public trust***". (Complainant's Comments at p. 2)

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that censure is the appropriate penalty in these matters, for both

Mr. Russo and Mr. Scarano, for the reasons expressed in the Commissioner's decision finding that a violation of the School Ethics Act occurred[1] which is sufficiently serious to warrant the imposition of such penalty as is defined at *N.J.A.C.* 6:3-9.19(c)1. In so ruling, the Commissioner notes that the Commission considered and addressed all aggravating and mitigating factors raised by the parties in reaching each of its penalty determinations, and that the Commission was in the optimum position to make such determinations in that it had the opportunity to fully investigate the facts presented. Therefore, its recommended penalties in these matters will not be disturbed absent a compelling basis to do so.

Accordingly, it is hereby ORDERED that James Russo and Thomas Scarano be censured as school officials found to have violated the School Ethics Act and that separate Resolutions of Censure shall issue and progress in accordance with applicable regulation.[2]

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

[1] The determination of the Commission as to violation of the Act is not reviewable by the Commissioner herein, pursuant to *N.J.S.A.* 18A:12-29(c). Therefore, this decision is limited to a review of the recommended penalty and its implementation.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

APRIL 16, 1998
DATE OF MAILING APRIL 16, 1998

157-98

157-98

IN THE MATTER OF THE TENURE	:	
HEARING OF DORETHA BROWNLEE,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

SYNOPSIS

District certified tenure charges of inefficiency against principal due to alleged unsatisfactory performance in seven areas.

ALJ found that prior to certification of charges, the District followed the timelines with respect to correction of inefficiencies -- after providing respondent with written notice specifying areas of inefficiency, the District provided a minimum of at least 90 days in which to remedy them. *N.J.A.C.* 6:7-1.3(a). Thereafter, respondent was evaluated as to her success in correcting the inefficiencies. *N.J.A.C.* 6:7-1.3(b). Because respondent's inefficiencies remained uncorrected, the District had the option to dismiss respondent from her position as principal. ALJ concluded that respondent was appropriately dismissed.

Commissioner adopted the initial decision with modification. Notwithstanding respondent's contention that the ALJ's failure to specify findings of fact compelled remand, Commissioner held that, under these circumstances, his declaration of such findings would not offend the Administrative Procedures Act. Having stated findings and conclusions of law, the Commissioner concurred with the ALJ that the documentary and testimonial record in this matter supported the conclusion that respondent did not satisfactorily correct four of the seven areas of inefficiency noted. Commissioner further concurred with the ALJ that the District was not obliged to demote respondent or to rehire her. In that the District met its burden of proving the charges, the Commissioner found that the appropriate penalty was dismissal. Commissioner ordered respondent dismissed from her position as a tenured principal as of the date of this decision and the matter was referred to the State Board of Examiners for further appropriate action.

APRIL 16, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3634-97

AGENCY. NO.: 87-3/97

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,

Petitioner,

v.

DORETHA BROWNLEE,

Respondent.

Gregory Johnson, Esq., for petitioner

Nancy I. Oxfeld, Esq., for respondent
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: December 1, 1997 Decided: January 13, 1998

BEFORE: **JEFFREY A. GERSON**, ALJ

INTRODUCTION

Doretha Brownlee, respondent, was the tenured principal of Camden Middle School in the State-operated School District of Newark (District). She was given notice of tenure charges by petitioner, the District. The charges allege four areas of inefficiency and recommend Brownlee's removal. Respondent contends that both procedural and substantive errors in the charges warrant their dismissal.

STATEMENT OF CASE

Doretha Brownlee became principal of the Camden Middle School in Newark in 1993. She applied for principalship after 12 years performing in various capacities in the central office.

On June 19, 1997, Brownlee was served with a Notice of Inefficiency signed by Dr. Beverly L. Hall, State District Superintendent of the State Operated School District of the City of Newark. There were seven areas of alleged inefficiency. See J-1.

After being given time to correct the inefficiencies, Dr. Hall certified four of the seven tenure charges against Brownlee, three charges having been successfully remedied by Brownlee.

With respect to the four tenure charges, Brownlee makes three arguments in defense: 1) procedural errors; 2) the inefficiencies were corrected; and, 3) the penalty is too severe.

CHARGES

On June 21, 1997, Brownlee was served with a Notice of Inefficiency delineating seven areas of performance deficiency. These seven areas of performance deficiency arose from two summative evaluations, one from Annette Kearney dated December 5, 1995 and, second from Dr. James Lewis dated April 23, 1996.

Dr. Joseph A. Kreskey was retained by the District Superintendent, Dr. Hall, to acquaint Brownlee, among others, with the assessment process. The assessment process was essentially a monitoring of the evalutee over a time period and meeting with the evalutee for conferences and ultimately a final evaluation.

Dr. Kreskey was well qualified to perform this evaluation both by educational background and practical experience. He was educated at Seton Hall, Rutgers and NYU and had 40 years of experience in public education. Dr. Kreskey was a Deputy Superintendent for nine years and a Superintendent for three years, both in the Edison public school system.

Dr. Kreskey, on October 28, 1996, had a three hour and 45 minute conference with Brownlee about the inefficiency charges. Subsequently, Dr. Kreskey shadowed Brownlee approximately 15 times while she went about her duties as principal. He documented these sessions and did an extensive review of portfolio documents.

Dr. Kreskey impressed me as conscientious, intelligent, compassionate and most importantly, completely credible. His summative assessment report, in evidence as P-1, was essentially the subject matter of his testimony, and he varied little, if any, from its contents. The combination of Dr. Kreskey's report and his testimony convinced me that Brownlee's termination was warranted. There is no need to review in detail Dr. Kreskey's testimony but, for the record, I find his report completely credible from a factual standpoint and the findings therein to be completely compatible with his in person testimony. The charges which Dr. Kreskey found that Brownlee had either failed to, or inadequately addressed, subsequently became the charges which Dr. Hall certified.

It was apparent from Dr. Kreskey's testimony that he had a good relationship with Brownlee and actually respected her intellectual abilities. But, it was a lack of leadership skills that was the crux of Dr. Kreskey's criticism, albeit fortified with details. Observations by Dr. Marinaro and the other assessors confirmed the conclusion that Brownlee

intellectually was able to comprehend what was necessary to improve her school, she simply lacked the ability to move from theory to practice. This was not, surprisingly, a contention that Brownlee vigorously disputed. Make no mistake, Brownlee did contest all of the charges in this matter, but her defense was more of an expression of her disappointment in her own performance rather than a contradiction of the District's contentions. This was most visible when Brownlee, in essence, admitted that her major complaint was not that it had been determined that she had failed during the course of her principalship to provide the necessary leadership the school needed, but rather that she believed that she deserved more than a teaching position as offered by the District.

Ms. Brownlee's consternation is well founded emotionally and to some extent, logically. Her tenure in the Newark school system was long and successful. Why, after so many years of devoted service, should Ms. Brownlee now find herself terminated? Why could she not simply be returned to her supervisory position in the central office? It is these questions that burdened Brownlee. Other sections of this decision will deal with the legal aspects of this question. The fact is that an in-house hiring does not legally or statutorily bind the district to any greater degree than an out of District hiring. If the Newark school district had hired an applicant with the same qualifications and the same experience that was presented by Ms. Brownlee, except that the applicant was previously employed in another district, the applicant surely, upon succumbing to tenure charges, could not claim entitlement to demotion to a supervisory capacity. When Ms. Brownlee applied for the principalship, she took the risk she would not be successful. Though it would seem beneficial to the district to place Ms. Brownlee in a position where her knowledge and experience could be further utilized, they are simply not required to do so.

PROCEDURAL ERRORS

Brownlee contends that both procedural and substantive errors warrant dismissal of the tenure charges against her.

The State Department of Education assumed control of Newark Public Schools July 12, 1995. On June 21, 1996, the District served respondent with a "Notice of Inefficiency" (tenure charges). On January 29, 1997, the respondent received a "Notice of Uncorrected Deficiencies." She was suspended without pay on March 4, 1997.

Respondent maintains that statutory and regulatory requirements for implementing dismissal of a tenured principal were not met. First, respondent alleges the requirements of *N.J.S.A.* 18A:6-11 and its implementing regulations at *N.J.A.C.* 6:24-5.1 *et seq.* were unfulfilled because she was entitled to a determination on the charges by November 18, 1996, 90 school days subsequent to her receiving them. According to this calculation, the determination was 72 days late. Second, she maintains that the requirement at *N.J.A.C.* 6:7-1.3(g) specifying an assessment cycle of not less than 12 months before tenure charges can be lodged was unfulfilled because the State Superintendent did not take office until August, 1995, 11 months prior to her receipt of the Notice of Inefficiency.

The District argues that they provided respondent with "at least" 90 days to improve which was in accord with the language of the statute and inured to the benefit of respondent. In addition, the District contends that the charges were not certified until March, 1997, allowing respondent more than 12 months participation in the assessment process pursuant to *N.J.S.A.* 18A:7A:45.

DISCUSSION

Current law - ***Tenure***

Tenure of educational personnel is authorized by the Tenure Act, *N.J.S.A.* 18A:28-1 to -18. It is a status in a particular position created by statute, not the agreement of the parties, *Zimmerman v. Board of Education of Newark*, 38 *N.J.* 65, 72 (1962), and serves to provide a measure of security to teachers and other school employees who faithfully serve for the requisite period. *Barnes v. Bd. of Ed. of Jersey City,* 85 *N.J.Super.*, 42, 45 (App. Div. 1964), *certif. denied*, 43 *N.J.* 450(1964).

A regularly employed educator in a public school must normally hold ". . . a valid certificate to teach, administer, direct or supervise the teaching, instruction or educational guidance of . . . pupils in such public schools." *N.J.S.A.* 18A:26-2. He or she may hold any or all of three possible certificates: instructional, administrative, and educational services. *N.J.A.C.* 6:11-2.3. Under each of these can be "special endorsements" which identify subjects or assignments. *Ibid.*

An employee may receive tenure in a supervisory position. *N.J.S.A.* 18A:28-5. Having attained that status, an employee in such a position cannot be removed from that position and transferred to the separately tenurable position of teacher without his consent, the abolition of the position (*N.J.S.A.* 18A:28-9), or, as in the case *sub judice*, proceedings under the Tenure Employees Hearing Law (*N.J.S.A.* 18A:6-10 et seq.). *Guerra v. Bd. of Ed., Hudson County Area Vocational and Technical Schools*, 1990 *S.L.D.* 340, 352.

Enactments and caselaw regarding transfer of tenure rights are consistent in denying transferability. The statute states, in relevant part:

> For purposes of this chapter, tenure in any of the administrative or supervisory positions enumerated herein shall accrue only by employment in that administrative or supervisory position. Tenure so accrued shall not extend to any other administrative or supervisory position and nothing herein shall limit or restrict tenure rights which were or may be acquired pursuant to *N.J.S.*A.18A:28-6 in a position which the individual actually served. *N.J.S.A.* 18A:28-5.

It has been uniformly recognized by both the State Board of Education and the Commissioner that the positions specifically enumerated under *N.J.S.A.* 18A:28-5 are separately tenurable and not transferable **across** certificates. *Nelson v. Bd. of Educ. of Tp. of Old Bridge*, 148 *N.J.* at 365. *See also, Kaprow v. Bd. of Educ.*, 255 *N.J. Super* 76, 92 (App. Div. 1992) (agreeing that "Assistant Superintendent" is separately tenurable). The State Board asserts that it is unsound public policy to allow an educator to transfer tenure rights to a separately tenurable position. *Nelson*, 148 *N.J.* at 367. The *Nelson* Court reiterated the State Board's responsibility for and weighty authority over tenure matters because of the complexity and specialized nature of the subject of teacher tenure. *Id.* at 364, 365, citing *Ellicott v. Bd. of Educ.*, 251 *N.J. Super.* 342 (App. Div. 1991) in *Dennery v. Bd. of Educ.*, 131 *N.J.* 626, 637 (1993)(deferring to state board in interpreting tenure cases).

Not only is tenure untransferable between certificates, but it is also untransferable between endorsements for separately tenurable positions **within** a single certificate. *Id.* at 367, 368. Because an administrative certificate can have any of four separate endorsements: school administrator, principal, supervisor and school business administrator, *N.J.A.C.* 6:11-9.3, and there are nine different positions available under the

four separate endorsements (principal, assistant principal, vice-principal, supervisor of instruction, superintendent, assistant superintendent, finance manager, director, and superintendent for curriculum, *Ibid*), if tenure were transferable, a tenured finance manager, regardless of experience, would be transferable to a principalship. Each of these positions, however, requires expertise in a different area, is therefore separately tenurable, and requires actual experience in the position before tenure can be achieved in the position.

Absent inefficiency, incapacity, conduct unbecoming a teaching staff member, or other just cause, a tenured employee cannot lose tenure protections as long as she or he continues within the area of tenure. *N.J.S.A.* 18A:28-5; *see also Quinlan v. Bd. of Ed. Township of North Bergen,* 1959-60 *S.L.D.* 113, 144 *rev'd. on other grounds, State Board of Education,* 1960-61 *S.L.D.* 243, *aff'd* 73 *N.J.Super.* 40 (App. Div. 1962). Moreover, the law provides, in pertinent part, that when, as here, a teaching staff member is transferred or promoted with her consent:

> . . .[I]n the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred . . . . *N.J.S.A.* 18A:28-6

Thus, had Brownlee not achieved tenure status as principal of Camden Middle School, she would have been entitled to be returned to her former status as building level supervisor.

However, Brownlee did achieve tenure as principal. When a tenured employee has been terminated in a protected position due to abolition of a position or a reduction in force (RIF), such employee retains tenure and seniority rights in the position and is entitled to

preferential hiring and bumping rights. *N.J.S.A.* 18A:28-11 *et. seq.* However, it is fundamental that the consequences of "riffing" are clearly distinct from dismissals for cause.

In school districts generally, when a tenured employee is charged with inefficiency, a board must follow seven steps, four of them time-bound, before that employee can be dismissed:

1. Specific written charges, signed by the complainant(s) must be filed with the secretary of the board, together with a written sworn statement of evidence supporting the charges. *N.J.S.A.* 18A:6-10, 11.

2. The board must provide the employee with a copy of the charge and the statement of evidence. It must also provide the employee with an opportunity to submit a written position statement and statements of evidence under oath with respect to that statement. *N.J.S.A.* 18A:6-11, *N.J.A.C.* 6:24-5.1(c)1, 2.

3. When the charge is inefficiency, "the board shall provide the employee with written notice of the alleged inefficiency, specifying the nature thereto, and allow at least 90 days in which to correct and overcome the inefficiency." *N.J.A.C.* 6:24-5.1(c)3.

4. Upon completion of the minimal 90 day period for improvement, or **such longer period as may be provided** by the district board of education, the administrator or administrators responsible for bringing such charges to the attention of the board is required to notify the board in writing of what charges, if any, have not been corrected *N.J.A.C.* 6:24-5.1(c)5.

5. If the board subsequent to the correction period determines by a majority vote of its full membership that there remains probable cause to credit the charges, and if there does, whether the charges are sufficient to warrant dismissal or reduction of salary, then it must both notify the employee and certify the charges by sending a certificate of its determination by affidavit to the Commissioner. *Ibid.* The filing and proving of written tenure charges are the legal means by which a tenured employee can be dismissed or have her salary reduced. *Bey v. Bd. of Ed. of the City of Newark*, 93 *N.J.A.R.2d* (EDU) 288. Timelines in State take-over districts are different in some respects. (See, Table I, Appendix). With respect to the time required for the State-operated board to make its determination, the statute reads in its entirety: If the board does not make such a determination within 45 days after receipt of the written charge, or within 45 days after the expiration of the time for correction of the inefficiency, if the charge is inefficiency, the charge shall be deemed to be dismissed and no further proceeding or action shall be taken thereon. *N.J.S.A.* 18A:6-13.

In State-operated districts, where inefficiency charges have not been corrected, "the affected employee shall have an opportunity to respond within 15 days of the receipt of said notification of inefficiency by filing a statement of evidence under oath in opposition to those charges." *N.J.A.C.* 6:7-1.3(d). The 45-day period can be tolled up to 15 days for the employee's response to the charges, even if the employee chooses not to respond, as well as an additional day needed to serve notice upon the

employee. *In re Tenure Hearing of Cowan*, 224 *N.J.Super.* 737 (App. Div. 1988).

A statement of charges and evidence should be sent to the teacher, along with a letter from the secretary of the board granting the 15 days to answer, and should contain all the supporting evidence. The charges should be explicitly tied to that evidence. Although tenure charges will not be dismissed for "technical, insubstantial failure to follow *N.J.S.A.* 18A:6-10 to -14", it has been found that "a failure to give a teacher the time to answer and a board's failure to act roughly within 45 days, plus 15 days to respond are fatal defects." *In re Tenure Hearing of Carol Beam*, 93 *N.J.A.R.* (EDU) 320, 321. Thus, tenure charges will be dismissed if this timeline is violated. However, this result does not permanently bar the action. *Id* at 322.

6. Tenure charges, when certified by a board of education, are forwarded to the Commissioner of Education with a request that he or she authorize a plenary trial pursuant to the Tenure Employees' Hearing Law (*N.J.S.A.* 18A:6-10 *et seq.*). The commissioner shall hold a hearing within a 60-day period after all parties in interest have been notified. *N.J.S.A.* 18A:6-16.

7. The board may suspend the charged employee either with or without pay upon certification of charges to the Commissioner. If the Commissioner fails to make a determination of the charges 120 days after they have been certified, the person's full salary excluding that for the 120 days, shall be paid until the date of determination. *N.J.S.A.* 18A:6-14.

State Takeover

Where, as in the instant matter regarding the takeover of the Newark School District, the State Board of Education finds that a local school district fails to provide a "thorough and efficient" education for its students, the State shall remove the central administrators and supervisors and create a State-operated school district administered by State appointees. *N.J.S.A.* 18:7A-15, -15.1; *see*, *Contini v. Bd. of Ed. of Newark*, 286 *N.J.Super.* 106, 122 (App. Div. 1995) (documenting the circumstances of the takeover of the Newark School District).

Takeover legislation provides that a state-operated district remains a corporate entity despite the absence of a board of education. *N.J.S.A.* 18A:7A-37. Thus, the legislation delegates to the State-operated district the powers previously granted to the local school board. *N.J.S.A.* 18A:7A-35(e). This includes the express power to make all personnel determinations relative to all officers and employees of the district. *N.J.S.A.* 18A:7A-42(a)(3). Decisional law has consistently declined to abridge this power.

A succession of prescribed events, some with explicit time limits, ensues after State takeover (*see* Appendix). Thirty days after appointment, the State district superintendent is required to establish an "assessment unit" to evaluate a building principal's performance. *N.J.S.A.* 18A:7A-45(b), *N.J.A.C.* 6:7-1.2. Evaluation procedures require generally that no less than three evaluations of a building principal be performed within 18 months following the establishment of State operation. *N.J.S.A.* 18A:7A-45. The statutory time line was amended by L. 1995, *eff.* July 11, 1995. Prior to then, the law required three evaluations

within six months of the reorganization of the central administrative and supervisory staff. In the instant matter, the State-operated district was established on July 5, 1995. The statute thus allotted the Newark State-operated board a **maximum** of 18 months, or until January 3, 1997, to complete the requisite number of evaluations. (*N.J.A.C.* 6:7-1.2(b) does not yet reflect this change).

Subsequent to at least two of the mandatory evaluations, the District may allege areas of inefficiency and, after providing the principal with written notice specifying such areas, provide a **minimum** of at least 90 days in which to remedy them. *N.J.A.C.* 6:7-1.3(a). There must also then be a third evaluation which includes assessment of the principal's success in correcting the inefficiencies. *N.J.A.C.* 6:7-1.3(b). If the areas of inefficiency remain uncorrected, the charges will be certified to the Commissioner. *N.J.A.C.* 6:7-1.3(f).

Respondent asserts in her brief (p. 6) that she received "charges on June 21." The following paragraph refers to "November 18" as being the time respondent was entitled to a determination. Presumably, both of these dates refer to the year 1996, and the period in question was that specified at *N.J.A.C.* 6:7-1.3(a). Brownlee maintains that, despite the fact that she was afforded considerably longer, she was entitled to a determination after the 90 day period because the District mentioned the 90-day period in her notification letter. This is a trivial caveat in light of the fact that the statutory provision is for "at least 90 days." *Ibid.* A longer period might be chosen at the District's discretion. As in *In re Tenure Hearing of Carol Beam*, 93 *N.J.A.R.* (EDU) 320, where the allotted 45 days for a board to act on charges plus the 15 days for teacher's response was seen as a mandatory protection for the employee, the 90 days provides a minimum period for improvement rather than a

maximum time for the board to respond. Moreover, petitioner alleges no harm from being notified at this later date.

The Newark school district hired assessors to serve as agents for the District in their assessment of principals and vice-principals. Dr. Marinaro, the District Assistant Superintendent, assigned two initial assessors to Brownlee. The first was Annette Kearney who was assigned to Brownlee in September 1995. Her report, dated 12-5-95, and signed by Dr. Marinaro on 1-20-96, served as the basis for Marinaro's corrective action plan of 2-9-96. The second assessor, Dr. James Lewis, submitted his report on 4-26-96. Both of these evaluative reports were considered by the District to be unsatisfactory evaluations.

Dr. Kreskey, a former school superintendent with 40 years professional experience in public schools, was also hired as an assessor by the District. He first met respondent on 10-23-96 to discuss the inefficiency charges and the evaluation process. He then conducted an initial formal interview with Brownlee on October 28, 1996, and subsequently visited her for meetings and observations at the Camden Middle School approximately 15 times. He submitted his assessment report to Dr. Marinaro on 12-20-96, with a subsequent revision dated January, 1997.

I find that the first two "formative" evaluations are that of Drs. Kearney and Lewis, dated 12-5-95 and 4-23-96, respectively, and the third "summative" evaluation is that of Dr. Kreskey, dated 12-20-96. Thus, the District is in compliance with the 90-day correction period requirement. That is, at least 90 days elapsed between 4-23-96, the second formative evaluation, and 12-20-96, the completion of the third evaluation which included

assessment of respondent's performance with regard to overcoming the targeted areas of inefficiency.

With respect to standards, courts have found that an appropriate reading of the 90-day provision incorporates a guarantee of meaningful assistance to the principal during the 90-day period. *Rowley v. Bd. of Educ. of Manalapan-Englishtown Regional School Dist.*, 205 *N.J. Super* 64 (App.Div 1985). In *Rowley*, despite the fact that during the 90-day period, the teacher was evaluated five times, each followed by a post-evaluation conference, the court upheld the ALJ's finding that in light of "not only the documentary evidence of all the pertinent evaluations but the testimony of most of the evaluators," the board had failed to provide meaningful assistance as required by the statute. The ALJ determined that the evaluative observations were unrelated to the charges filed against the respondent. In addition, the supervisors failed "to synthesize or incorporate their evaluations with respondent's alleged inefficiencies" in order to assist respondent in improving his performance. *Id.* at 74. The court found this construction consistent with the statutory language and legislative purpose, and the construction put no burden on the local board or the public interest. *Id* at 73.

Where inefficiency is alleged, the criteria for evaluating building principals by State-operated districts are specified generally. *N.J.A.C.* 6:7-2.2. The assessment unit is required to evaluate each building principal and vice principal in accordance with these criteria, and to render evaluations to the State district superintendent. Thus, the established standard is that members of the administrative and/or supervisory staff should make reasonable efforts to provide assistance to the teaching staff member to overcome the

specific inefficiencies prior to initiating charges of good cause based on inefficiency against a tenured teacher. In school districts generally, such efforts must include suggestions for improvement in specific areas of inefficiency, rather than evaluations which are not tied to the charges. *In re Tenure Hearing of Cowan*, 224 *N.J.Super.* 737 (App. Div. 1988).

In the instant matter, respondent argues that the constructive advice and assistance mandated by *Rowley* was not provided. Petitioner argues to the contrary. The standards for appropriate assistance to principals in State-operated school districts have not been clearly established. An ALJ rejected a challenge to the regulations because they "lacked any definition or standard so as to provide both the evaluators and the evaluatees a more objective understanding of their respective responsibilities" for jurisdictional reasons. *Jersey City Administrators and Supervisors Assn. v. Jersey City School District,* 92 *N.J.A.R. 2d* (EDU) 150, 153. The ALJ found that the challenge as to legal insufficiency because of "standardlessness" could only be addressed in the abstract by appellate review, but that, should petitioners become subject to tenure charges, the "standardlessness" challenge would be reviewable as "applied" to them. *Id* at 153. The ALJ also declined to conclude whether *N.J.A.C.* 6:3-1.21[1] was applicable or in *pari materia* with *N.J.A.C.* 6:7-2.1, 2.1.

Respondent's brief argues that pursuant to *N.J.A.C.* 6:24-5.1(c)4, the employer is required to provide assistance to the individual charged with inefficiency by providing a modified individual professional improvement plan, thereby insuring that the specific charges of inefficiency are addressed. She claims that while the laws and regulations dealing with tenured principals in State-operated districts are separate, they are intended to

[1] That section has since been repealed and recodified as *N.J.A.C.* 6:8-4.8(a)3.

follow the guidelines generally applicable to all districts, and she relies on the specific incorporations cited at *N.J.S.A.* 18A:7A-45(c).

The cited *Code* provision appears under subchapter 5, "Tenure Employees' Hearing Act", *N.J.A.C.* 6:24-5.1 *et seq.*, but is not specifically incorporated under subchapter 1, "Procedure for Evaluation of Building Principals in State-Operated School Districts", *N.J.A.C.* 6:7-1.1 *et seq.* In the latter subchapter, however, the Department of Education (DOE) did explicitly incorporate three other *Code* provisions and seven statutes. Clearly, if DOE intended to incorporate a particular provision, it could have done so. Moreover, the concomitant statute is explicit in its intent to facilitate the State-operated district's ability to dismiss building principals, and is included in the procedures specifically designed for the purpose:

> Notwithstanding **any other provision of law or contract**, the State district superintendent, after completion of an assessment cycle of not less than 12 months, may dismiss any tenured building principal or vice-principal for inefficiency, incapacity, unbecoming conduct or other just cause **as defined by the criteria for principal or vice-principal performance in State-operated districts** established by the commissioner pursuant to subsection a. of this section. Nothing herein shall preclude the dismissal of a tenured building principal or vice-principal prior to the completion of an assessment cycle of not less than 12 months if the basis for the dismissal is incapacity or unbecoming conduct. All dismissals of tenured building principals or vice principals shall be conducted in accordance with the procedures set forth in sections 10, 11, 13, 14, 16 and 17 of chapter 6 of Title 18A, except that the State district superintendent shall act as the board of education in all respects (emphasis added). N.J.S.A. *18A:7A-45 (c).*

Thus, absent a challenge alleging "standardlessness", the generally applicable requirement that the school district provide a modified individual professional improvement plan can be overridden on this authority.

A **minimum** time limit before which principals cannot be dismissed from State-operated districts is also stipulated by the above-cited statute. In the matter *sub jure*, the District relies on the assertion that petitioner was afforded the opportunity to participate in the assessment cycle for more than 12 months before being dismissed for inefficiency. However, this assertion does not mirror the statutory language. The district superintendent is required to allow passage of a minimum of 12 months subsequent to establishing an assessment unit before dismissing a tenured principal.

If the assessment unit was not in place for the requisite period, the statutory requirement has not been fulfilled. Here, the appointment of Dr. Marinaro on 9-18-95 triggers the beginning of the 12-month minimum period. Respondent asserts that the Kreskey evaluation was not submitted until 12-20-96, 15 months later. I find that the Kreskey evaluation was the third evaluation, that petitioner received Notice of Uncorrected Deficiencies on 1-29-97, and that she was suspended on 3-4-97, thus the 12-month minimum period has been satisfied.

Alternatives to Tenure Charges - ***Generally***

Authority to decide contested cases transmitted from administrative agencies is conferred on the OAL by the Legislature. *N.J.S.A.* 52:14F *et seq*. Standing in the shoes of the Commissioner, an ALJ may decide all issues within his or her jurisdiction. Determinations as to appropriate penalties are integral to education law decisions. If, on appeal to the Commissioner, an interpretation by a board of education "is violative of the letter or sprit of [a] rule, the proper discharge of his duty requires corrective action." *In re Masiello*, 25 N.J. 590, 607 (1958).

In a leading case, the court found that all aspects of disputes arising under the Tenure Employees Hearing Act are to be decided by the Commissioner of Education, and that nothing in the act "suggests the local boards were intended to retain any part of the jurisdiction which they formerly exercised in such controversies other than a preliminary review of the charge and the required certification to the Commissioner." *In re Fulcomer*, 93 *N.J.Super.* 404, 412 (App. Div., 1967). Relying on the authority conferred by the Legislature to decide all controversies and disputes, the court found that all issues involved must be resolved by the Commissioner's decision. *Id* at 415. Despite the fact that this was a case of unbecoming conduct, the court held that *N.J.S.A.* 18A:6-10 to -29 did not necessarily require dismissal. "The Commissioner is required to consider respondent's prior record in the District, the nature and gravity of his offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation and must consider any harm or injurious effect which his conduct may have had in the maintenance of discipline and the proper administration of the school system. *In re Fulcomer* at 421-22. Although this case was eligible for summary judgment, the court remanded to the Commissioner for evidentiary proceedings necessary to make appropriate recommendations as to penalty. *Id* at 422.

Another instance of penalty adjustment can be found in *Hudson County Area Vocational Technical School v. Smith*, 96 *N.J.A.R.2d* (EDU) 903, where the facts were found to warrant pay reduction, not termination. The facts constituting charges of unbecoming conduct were attended by mitigating circumstances, the respondent had a prior record of fourteen years of unblemished conduct, the allegations were not sufficiently established, and inappropriate action by a teacher was provoked by students. *Id* at 912. The Commissioner modified the initial decision of the OAL, finding that although the

respondent should have exercised greater restraint, dismissal was not the appropriate penalty. The Commissioner imposed the loss of salary increments and the 120 days' salary withheld pursuant to *N.J.S.A.* 18A:6-14. *Id* at 913.

Considering another teacher's otherwise unblemished career, dismissal was found to be too harsh a punishment where he physically placed a student back in a seat and distributed to sixth graders a song with derogatory lyrics. *In re Tenure Hearing of Robbie MacDowell, State-Operated School District of the City of Paterson, Passaic County*, 96 *N.J.A.R.2d* (EDU) 644.

Though no specific citations for penalty adjustment in cases of inefficiency could be found, nevertheless, the cases plainly evidence the Commissioner's decisional authority, in all phases of an education proceeding, including penalty determination.

Demotion

The statutes are silent with respect to returning a tenured educator to former tenure status at a lower level subsequent to removal for inefficiency at a higher level. However, where teachers unsuccessfully attempted to assert bumping rights prior to enactment of "riffing" protections, Justice Heher explained that:

> Moreover, the right now asserted by prosecutrices must be found in the statute, or it does not exist; and we are not cited to any enactment prior to the act of 1935 . . . which bestows the right. . . . Whether a teacher so dismissed shall have such preferment as respects an after-occurring vacancy, and, if so, the conditions upon which the right is exercisable, e.g., whether it shall subsist indefinitely or for a limited period, the qualifications of the teacher asserting the right as regards the standards then obtaining, and so on, are legislative and not judicial questions: and here the legislature did not exercise its authority in the premises until the adoption of the act of 1935, . . . and then gave it a prospective view only. This enactment evidences the legislature's comprehension of the sense of the pre-existing law--i.e., that such preference was not implicit in the prior statutes. *Downs v. Bd. of Educ. of Hoboken,* 126 *N.J.L.* 11, 13 (Sup. Ct. 1940); *aff'd, Schlank v. Board of Educ. of Hoboken,* 127 *N.J.L.* 602 (E. & A. 1942).

In *Downs*, even though the legislature already had evidenced its desire to afford a remedy in similar situations through the then recently enacted riffing legislation, the Court refrained from applying the statute retroactively. By comparison to the instant matter, therefore, since no legislation exists mandating restoration to a former level of tenure subsequent to a dismissal for cause at a higher level, it is consistent to conclude with Justice Heher that judicial authority to order such a restoration also does not exist. *See also, Nelson v. Bd. of Educ. of Tp. of Old Bridge*, 148 *N.J.* 358 , 369 (1997) (citing *Phillips v. Curiale*, 128 *N.J.* 608, (1997) affirming court preference for prospective application of statutes). This result does not impact on the board's option to elect to rehire if it chooses to do so.

In addition, when it fashioned a remedy for central administrative or supervisory staff displaced by State takeover, the legislature provided the opportunity for employees to find re-employment within the district in other positions for which they might be qualified. "Any individual whose position is abolished by operation of this subsection shall be entitled to assert a claim to any position or to placement upon a preferred eligibility list." *N.J.S.A.* 18A:7A-44(a). The provision is permissive, not mandatory, and allows the State district superintendent at his or her discretion to appoint administrative and supervisory staff to positions which they formerly held. If the employee had tenure in that position, tenure must be granted if the employee is rehired. *N.J.S.A.* 18A:7A-44(c).

Although there has been no finding of individual inefficiencies in these summary dismissals, the necessity of state takeover gives rise to a reasonable inference of inefficiencies in the operation of at least some central office administrative and supervisory staff. Yet, the legislature concluded that for these employees, the alternative of re-

employment in other positions for which they might be qualified within the district would be appropriate.

These re-employment opportunities are clearly circumscribed. The Commissioner adopted an ALJ's finding that where central administrative or supervisory positions were abolished in a State takeover of the school district:

> legislative history as well as clear statutory language expressly disentitles petitioners from claiming tenure or seniority rights (1) to their former abolished supervisory positions or (2) to preferment in supervisory positions not abolished or (3) in supervisory positions to which present incumbents have been rehired by the district superintendent under *N.J.S.A.* 18A:7A-44(c). They only retain . . . rights of re-employment and preferred eligibility for any other positions to which they may be entitled by virtue of tenure or seniority.

Van Dyke v. State-Operated School District of the City of Jersey City, 91 *N.J.A.R.2d* (EDU) 43, 45. *See also*, *Cirasa v. State-Operated School District of the City of Paterson*, 95 *N.J.A.R.2d* (EDU) 147 (finding permissive, not mandatory statutory language provides central administrative with no legal entitlement to former supervisory positions after State takeover).

Building principals are addressed in the immediately subsequent statute. They are afforded no such option there. It is reasonable to conclude, therefore, that if the legislature wished to provide for similar re-employment, it was fully capable of doing so. Thus, while there is no prohibition preventing the District from undertaking to re-employ the respondent, there is no indication of legislative intent to provide this option for principals. To require the District to demote the respondent, therefore, would seem to go farther than the legislature intended with regard to the treatment of building principals.

In addition, it has been determined, that where tenured principals were transferred to the positions of vice-principals or department chair without their consent, the board was in violation of petitioners seniority rights. *Bush v. Bd. of Ed. of the City of Newark*, OAL DKT. EDU NOS. 10947-93, 10943-93, 10946-93, 10917-93 (Consolidated) (July 25, 1994). Thus, tenure charges must be affirmed in order for a demotion to be instituted.

Given the broad power of the District to hire teaching staff, it has the discretion to opt to rehire a dismissed principal in a teaching capacity subsequent to a dismissal at the principal level. However, no decisional precedent mandating such a rehiring was found.

Because this is not a case of riffing, seniority rights are not implicated. Seniority is a concept which applies to certain rights of tenured personnel which only come into play where a reduction in force is necessary in the judgment of the board of education under its authority at *N.J.S.A.* 18A:28-9. To effectuate a reduction in force, a board must determine the seniority of the persons affected and so notify those persons of their status. *N.J.S.A.* 18A: 28-11. Because respondent has not been removed from her position pursuant to a RIF, her seniority rights do not attach and she cannot demand transfer to a former position. *Carpenito v. Bd. of Ed. of the Borough of Rumson,* 96 *N.J.A.R. 2d* (EDU) 958.

CONCLUSION

Current law requires that if procedural guarantees with respect to timelines are met and inefficiencies remain uncorrected, the State-operated School District may dismiss a principal. The facts indicate that those contingencies were fulfilled, thus respondent has been appropriately dismissed. Options for penalties which can be ordered in this case do not include demotion, although that option may be elected by the District.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

1/13/98
DATE

JEFFREY A. GERSON, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 20 1998
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

APPENDIX: TABLE I

N.J.A.C. TIMELINE PURSUANT TO PRINCIPAL-EVALUATION AND DISMISSAL FOR INEFFICIENCY IN STATE-OPERATED SCHOOL DISTRICTS

d.1----------Inception of State-operated School District (pursuant to *N.J.S.A.* 18A 1-1, 18A:4-15, 18A.7A-15).

(d.1 + 30 days) = d.2----------Establishment of Assessment Unit. *N.J.A.C.* 6:7-1.2(a).

(d.2 + x) = d.3----------Completion of at least two written evalnation reports after which District provides principal with written Notice of Alleged Areas of Inefficiency. *N.J.A.C.* 6:7-1.3(a).

(d.3 + 90 days) = d.4----------Correction Period during which principal may correct or overcome areas of inefficiency *N.J.A.C.* 6:7-1.3(a).

(d.4 + x) = d.5----------Completion of a third evaluation which shall include assessment of principal's performance with respect to overcoming areas of inefficiency. *N.J.A.C.* 6:7-1.3(b).

(d.5 + x) = d.6----------District shall notify principal about status of correction. If uncorrected areas remain, the district presents principal with "Notice of areas of Uncorrected Inefficiencies", or "charges". *N.J.A.C.* 6:7-1.3(c).

(d.6 + 15 days) = d.7----------Principal may file affidavit of evidence opposing the charges. *N.J.A.C.* 6:7-1.3(d).

(d.7 + 45 days) = d.8----------District shall make a determination of whether there is probable cause to credit the charges, and if so, whether the charges warrant principal's dismissal. *N.J.A.C.* 6:7-1.3(e).

(d.8 + 15 days) = d.9----------Principal must be notified that he or she shall be retained. *N.J.A.C.* 6:7-1.3(e).

OR:

(d.8 + x) = d.10----------"Certification": If charges are sufficient to warrant dismissal, written charges, a certificate of determination congruent with the requirements of *N.J.A.C.* 6:24-5.2, and proof of service upon the employee, shall be filed with the Commissioner. *N.J.A.C.* 6:7-1.3(f)

(d.2 + 12 mos.)=d.11----------Minimum period after which principal may be dismissed. *N.J.A.C.* 6:7-1.3(g).

(d.1 + 18 mos.)=d.12----------Three evaluations must be completed for each building principal. *N.J.S.A.* 18A:7A-45.
(The time period at *N.J.A.C.* 6:7-1.2(b) has not yet been changed from the former 6-month limit to reflect the amended statute.)

IN THE MATTER OF THE TENURE	:	
HEARING OF DORETHA BROWNLEE,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Both respondent and the District submitted exceptions to the initial decision and both parties submitted replies in accordance with *N.J.A.C.* 1:1-18.4.

Respondent's exceptions primarily recast her arguments as presented to the Administrative Law Judge (ALJ), as she contends: (1) that the District is required to provide positive assistance to a tenured principal to help her overcome her inefficiencies (Respondent's Exceptions at p. 3); (2) that the District bears an affirmative duty to notify an employee with pending charges of inefficiency of the exact time period during which her job performance will be evaluated (*id.* at p. 9); and (3) that demotion is an available penalty in this matter (*id.* at p. 17). Respondent further objects to the ALJ's failure to make specific findings of fact on the allegations raised by the District, as the ALJ is required to do by law. (*Id.* at p. 11) Citing *State, Department of Health v. Tegnazian*, 194 *N.J. Super.* 435, 450, 451, respondent contends that this failure compels the Commissioner to remand this matter for said findings, as the Commissioner can only make specific findings of fact *after* the ALJ has made his findings. (*Id.* at pp. 15, 16)

In reply to respondent's exceptions, the District maintains that the ALJ correctly found that *N.J.A.C.* 6:24-5.1(c)4, which compels a district bringing tenured charges of inefficiency against a tenured staff member to modify her individual professional improvement plan, is not a required element for tenure dismissal procedures alleging inefficiency of a principal in a State-operated school district. (District's Reply at p. 2) The District maintains that the streamlined process for removal of tenured principals under the pertinent statute demonstrates "***that the legislative intent is contrary to the assistance to overcome deficiencies and the provision of individual improvement plans that respondent claims she is due in recognition of her many years of service." (*Id.* at p. 4) Moreover, the District asserts that it did provide respondent with support and assistance during the corrective period, as noted:

> a. Assistant Executive Superintendent Marinaro specifically re-located his office to Camden Middle School in order to be available to assist Respondent on a daily basis. (T2:105:1-8)
> b. Dr. Marinaro provided the respondent with a corrective action plan to address areas of deficiency. (P-19) (T2:117:11-20)
> c. Dr. Marinaro personally observed 17 teachers with the respondent and along with other staff, arranged for the transfer or removal of teachers identified as "problems" by the respondent.
> d. Other members of the administration, at Dr. Marinaro's request, assisted respondent in completing goals to implement the CALM (Camden Middle Attitude Learning Management) program.
> e. Prior evaluations included suggestions for improvement in the areas in which petitioner was determined to be weak. Of the seven charges of inefficiency originally identified to respondent, she was able to overcome three. (*Id.* at p. 5)

The District further counters that respondent suffered no injury as a result of her being granted an improvement period in excess of 90 days. (*Id.* at p. 6) As to the ALJ's failure to make specific findings of fact, the District disputes that such failure requires a remand. Distinguishing *Tegnazian, supra*, from the instant matter, the District argues that in *Tegnazian* the ALJ's decision was reversed by the Commissioner of Health, and, further,

> ***[t]he problem *** in that case was that the initial decision and final decision were not reconcilable due to the diversity and

> incompleteness of the findings at the two levels which resulted from the [conclusory] nature provided by the ALJ to certain issues and the failure of the Commissioner to address the ALJ's findings. (*Id.* at p. 8, citing *Tegnazian, supra*, at 449, 450)

Finally, the District refutes respondent's contention that it is obligated to demote her, rather than dismiss her. (*Id.* at p. 9)

In the District's exceptions to the initial decision, it first sets forth, in detail, its proposed findings of fact. (District's Exceptions at pp. 5-27) These findings are essentially as presented to the OAL in the District's post-hearing brief. The District next asserts that the Commissioner is authorized to modify the initial decision in accordance with the requirements of the Administrative Procedures Act, *N.J.S.A.* 52:14B-1 *et seq.*, and provide specific findings of fact and conclusions of law. (*Id.* at p. 28) Finally, the District urges that the Commissioner refrain from remanding this matter, as proposed by respondent, inasmuch as respondent has been collecting an annual salary of $80,000, in accordance with *N.J.S.A.* 18A:6-14, and additional delay will result in significant cost to the District. Moreover, the District concludes that further delay would frustrate the legislative intent to provide for prompt evaluation, and where necessary, removal of building principals in State-operated districts "***so as to enable those districts to move forward promptly with the effective leadership necessary to implement district plans to provide a thorough and efficient education to its pupils." (*Id.* at p. 32)

In reply to the District's exceptions, respondent affirms that the Administrative Procedures Act, compels that this matter be remanded, since that statute specifies that

> A recommended report and decision which contains recommended findings of fact and conclusions of *law shall be filed ... with the agency in such form that it may be adopted as the decision in the case*. (emphasis in text) (Respondent's Reply at p. 2, citing to *N.J.S.A.* 53:14B-10(c))

Respondent maintains that *Tegnazian, supra*, stands for the proposition that the ALJ must make findings of fact. (*Id.*) Respondent adds,

> To hold otherwise would be to reach the bizarre conclusion that the ALJ need not make findings of fact unless his decision is overturned by the administrative agency, a backwards method of dealing with the administrative process. By this theory, if the Commissioner decides to adopt the ALJ's determination, his decision stands as it is without findings of fact, but if the Commissioner decides to overturn the ALJ's decision, the Commissioner may not do so without remanding to the ALJ for findings of fact. (*Id.* at pp. 3, 4)

Having conducted an independent and exhaustive review of the record in this matter, which included a copy of the transcripts from the four days of hearing conducted at the OAL[1], the Commissioner determines to affirm the initial decision of the ALJ, with modification as set forth below.

Initially, the Commissioner concurs with the ALJ's view that, contrary to respondent's assertion, she was not "entitled to a determination" on November 18, 1996, the 90th day following the District's service of a Notice of Alleged Areas of Inefficiency, pursuant to *N.J.A.C.* 6:7-1.3(a). (Respondent's Exceptions at p. 9-10) Rather, the pertinent regulation requires that the District "***provide *at least* 90 days in which to correct or overcome the areas of inefficiency." (emphasis added) (*N.J.A.C.* 6:7-1.3(a)) As the ALJ notes, the intent of the law is to provide a minimum improvement period to the employee, not a deadline by which a district must act, and, further, "petitioner alleges no harm from being notified at [a] later date." (Initial Decision at pp. 13, 14)

The Commissioner further concurs with the ALJ's finding that the first two "formative" evaluations of respondent were dated December 5, 1995 and April 23, 1996.

[1] Said transcripts shall hereinafter be referred to as: "T1," the May 19, 1997 transcript; "T2," the May 20, 1997 transcript; "T3," the June 30, 1997 transcript; and "T4," the July 1, 1997 transcript.

Respondent was thereafter served with a Notice of Alleged Areas of Inefficiency as per *N.J.A.C.* 6:7-1.3(a) on June 21, 1996. (Initial Decision at pp. 13-14) The minimum 90-day corrective action period thus began on June 21, 1996, rather than on April 23, 1996, as noted in the initial decision. By respondent's calculations (*id.*), the 90-day period expired on November 18, 1996. The District's third, and summative, evaluation was dated December 20, 1996. (*Id.* at p. 14) Thus, the District met the regulatory requirement to provide respondent with at least 90 days in which to correct or overcome the areas of inefficiency. *N.J.A.C.* 6:7-1.3(a). Thereafter, respondent had "at least one evaluation conducted after the expiration of the time period given to correct or overcome the areas of inefficiency." *N.J.A.C.* 6:7-1.3(b).

As to respondent's claim that the District failed to comply with *N.J.A.C.* 6:24-5.1 because it did not inform her in writing that it would certify the charges of inefficiency if the inefficiencies were not corrected within the minimal 90-day period, *N.J.A.C.* 6:24-5.1(c)3, and because the District did not allow a modification of her professional improvement plan, *N.J.A.C.* 6:24-5.1(c)4 (Respondent's Exceptions at p. 4), the Commissioner notes that these requirements are *not* contained in the regulations which were specifically adopted to establish the procedures for evaluating and bringing inefficiency charges against building principals in State-operated school districts. In *Jersey City, supra*, petitioners challenged the principal evaluation procedures employed by the State-operated School District of the City of Jersey for failure to comply with the procedures set forth in regulation at *N.J.A.C.* 6:3-1.21[2], the regulations which govern the evaluation of tenured teaching staff members. There, the Commissioner found that

> ***both *N.J.S.A.* 18A:7A-45 and *N.J.A.C.* 6:7-2.1 and 2.2 provide a separate and distinct process for evaluating the performance of principals in a State-operated school district, thus precluding application of other criteria and procedures for the evaluation of

[2] That section has since been repealed and recodified as *N.J.A.C.* 6:8-4.8(a)3.

> teaching staff members. Had the Legislature wished that the provisions of *N.J.A.C.* 6:3-1.21 be criteria in addition to those extant for the evaluation of principals in State-operated school districts, it could have so stated. It did not do so. *Jersey City Administrators & Supervisors Assn. v. Jersey City School District,* 92 *N.J.A.R.* 2d (EDU) 150, 155.

Similarly, the State Board of Education, presumably aware of its existing regulations under *N.J.A.C.* 6:24-5.1(c), adopted more specific regulations governing the procedures for evaluating and bringing inefficiency charges against principals in State-operated school districts; said procedures [merely] require that "[t]he format of the certificate [of determination] shall be as set forth in *N.J.A.C.* 6:24-5.2 ***." *N.J.A.C.* 6:7-1.3(f). Moreover, although *N.J.A.C.* 6:7-1.3(h) establishes that all dismissals of tenured building principals in State-operated school districts "***shall be conducted in accordance with the procedures in *N.J.S.A.* 18A:6-10, 11, 13, 14, 16, 17 and 18A:7A-45d ***," contrary to respondent's position, there is no provision in these referenced statutes which contradicts the regulatory requirements found at *N.J.A.C.* 6:7-1.1 *et seq.*, or provides respondent with procedural protections *other than those* enumerated by law, or within *N.J.A.C.* 6:7-1.1 *et seq.*

Further, the Commissioner concurs with the ALJ's view that the District did not violate the conditions of *N.J.S.A.* 18A:7A-45c. That statute provides, in pertinent part that,

> Notwithstanding any other provision of law or contract, the State district superintendent, after completion of an assessment cycle of not less than 12 months, may dismiss any tenured building principal or vice principal for inefficiency, incapacity, unbecoming conduct or other just cause ***. (*N.J.S.A.* 18A:7A-45c)

Where the establishment of the District's assessment unit presumably took place on or before September 18, 1995 with the appointment of Dr. Marinaro (Initial Decision at p. 18) and where respondent was not served with a Notice of Uncorrected Ineficiencies until January 29, 1997

(*id.*), the Commissioner determines that the District acted well outside the minimum 12-month time frame required by statute.

The Commissioner further rejects respondent's claim that the District's charges must be dismissed as violative of the requirement in *Rowley, supra*, to incorporate "a guarantee of meaningful assistance" during her 90-day corrective period. (Initial Decision at p.15) To the extent the holding in *Rowley* applies to the instant matter, and the Commissioner makes no finding herein that it does, the record supports the conclusion that the District, within the period for correcting deficiencies, provided respondent with documentation sufficient for her to understand "clearly the basis for the criticism supporting the allegations of inefficiency" and was "offered constructive advice" as to how she could overcome the noted weaknesses in her leadership skills. See *Rowley, supra,* at 73.

With respect to respondent's contention that this matter must be remanded to OAL for specific factual findings, the Commissioner determines that, under these specific circumstances, where the Commissioner concurs with the ALJ's summary of the evidence, where he has fully reviewed the transcripts from each of the four days of hearing, together with all the related exhibits, and where respondent raises no exception to the credibility assessments rendered by the ALJ, but essentially objects to the import of the evidence presented by the District and to the procedures employed by the District in this matter, findings of fact as rendered herewith will not offend the Administrative Procedures Act.

Therefore, the Commissioner finds the following to be facts:

1. On July 5, 1995, the State Board of Education abolished the Newark Board of Education and thereby created the State-operated School District of the City of Newark, pursuant to *N.J.S.A.* 18A:7A-34 *et seq.*

2. The State Board of Education thereafter appointed Dr. Beverly L. Hall as the State District Superintendent, pursuant to *N.J.S.A.* 18A:7A-35.

3. Dr. Hall created an assessment unit, pursuant to *N.J.S.A.* 18A:7A-45, for the purpose of evaluating building principals and vice principals.

4. Dr. Don Marinaro was appointed Assistant Superintendent to the District on September 18, 1995. (T2:65) As Assistant Superintendent, Dr. Marinaro manages 15 schools assigned to Cluster V (also known as School Leadership Team V, or "SLT V"), including the Camden Middle School. Dr. Marinaro is responsible for instruction, student support services, and student achievement, as well as for the evaluation of principals and vice principals assigned to his schools. (T2:65)

5. While the overall responsibility for assessment rested with the particular assistant superintendent who recommended a rating to the State District Superintendent, (T2:67), assessors were also hired to serve as agents to conduct assessments during a three-cycle period. In each cycle, the assessor visits the principal or vice principal. At the conclusion of the cycle, the assessor meets with the assistant superintendent to discuss his/her findings. The assistant superintendent may then make a recommendation to the State District Superintendent.

6. The assessment process was initially conducted by Dr. Greta Shephard, then turned over to Dr. Frederick Hill. (T2:70)

7. According to Dr. Marinaro, the seven criteria noted in *N.J.A.C.* 6:7-1.3 are the sum total of what is necessary to make a successful school. Respondent's performance was measured against these criteria. (T2:74) (Exhibits P-2A and P-2B)

8. The State District Superintendent established goals and made it a major priority to focus on instruction and curriculum. The District's mission was to improve instruction in the classroom and improve student performance. (T2:77)

9. The District conducted a meeting to introduce the assessment process to the principals and vice principals. The process was explained and they were provided information regarding the performance indicators. (T2:70) Dr. Marinaro first met the respondent at this meeting in September 1995.

10. Respondent was appointed principal at the Camden Middle School in 1993. When she arrived, two vice principals were already in place, Robert Mobley and Walter Genuario. (T4:30, 31) Respondent has a B.A. degree in chemistry from Bloomfield College, a Master's in Science and Urban Education from Rutgers University, and has completed her course work for her Ed.D. from Rutgers University. (T4:26, 27) She was a science teacher in the District from 1974 until 1980, when she became a teacher advisor to secondary teachers for approximately two years, then a supervisor from approximately 1982 until 1984. Respondent was an administrative supervisor under Superintendent Columbus Salley for two years, then a basic skills supervisor until the principal's position opened up in 1993. (T4:27-30)

11. On October 5, 1995, Dr. Marinaro held a meeting with all principals in the cluster to review his goals and objectives for the year. He prepared a detailed agenda for the meeting. (P-20) Respondent attended the meeting. (T2:209) Dr. Marinaro shared, *inter alia*, his expectations for principals preparing observation reports and professional improvement plans. Specifically, he noted that all observation reports were to adhere to the following model:

a. Use of a lesson narrative as a record
   - objectively written
   - highlighting strengths/weaknesses

b. Post Observation Conference
   - suggestions
   - conference notes
   - Continuity of professional development throughout the year. (Exhibit P-20 at pp. 2, 3)

12. The District retained several assessors to perform evaluations, Dr. Annette Kearney, Dr. James Lewis, Jr., and Dr. Joseph A. Kreskey. Each performed an evaluation on respondent.

13. The assessment process utilized an assessment model, criteria used to judge the performance of principals (Exhibit P-2A), definitions of those criteria (Exhibit P-2B), an operation framework and indicators of the criteria. (T1:19) The process included a number of activities, beginning with an introductory interview with the principal, followed by a formal interview. The assessor would obtain portfolio information for review, would shadow the principal, observe the performance of his/her duties and would conduct a post-shadowing or debriefing session. The final step required the completion of a summative evaluation.

14. The first formative evaluation was performed by Dr. Kearney, dated December 5, 1995. (Initial Decision at p. 14)

15. After the first formative evaluation, Dr. Marinaro developed a corrective action plan, P-9, dated February 9, 1996 for respondent. (T2:82) The corrective action plan addressed two weaknesses: staff development and pupil progress indicators, which Dr. Marinaro believed to be the central areas of weakness. (T2:118) It was intended for implementation by respondent immediately before the next assessment period.

16. The second formative evaluation was performed by Dr. James Lewis, dated April 23, 1996. (Initial Decision at p. 14) Dr. Lewis did not receive the results from Dr. Kearney's evaluation. (T2:92) Dr. Lewis rated respondent as unsatisfactory in all seven areas. (T2:97)

17. Dr. Marinaro recommended filing inefficiency charges against respondent, (Exhibit J-1), based upon the following: a) Dr. Kearney's evaluation dated December 5, 1995, wherein respondent was rated unsatisfactory in four of the seven criteria; b) Dr. Lewis' evaluation dated April 23, 1996, wherein respondent was rated unsatisfactory in all seven criteria; and c) personal

observations by way of visits to the Camden Middle School; and d) observations by the SLT V (School Leadership Team V) staff. (T2:79) Respondent was served with a (first) Notice of Inefficiency Charges by letter dated June 19, 1996. She was advised that she would have 90 days from receipt of the letter, excluding summer recess, to remedy the inefficiencies. She was also advised that, during the 90-day period, she would be assessed at various intervals by external evaluators and by the Assistant Executive Superintendent so that she would have an opportunity to demonstrate that the inefficiencies had been remedied. (Exhibit J-1) However, if after the expiration of 90 days she was determined to have failed to correct identified inefficiencies, the Superintendent would make a determination as to whether there was probable cause to credit the evidence in support of the Charges and whether, if such evidence is credited, the charges are sufficient to warrant dismissal. (Exhibit J-1) Respondent testified that she received the (first) Notice of Inefficiency on June 21, 1996. (T4:172)

18. Dr. Marinaro subsequently met with respondent and her union representative after the inefficiency charges were served upon her in June 1996. (T2:98) Dr. Marinaro believes this meeting took place in July 1996. The parties discussed the charges, and the 90-day improvement, or corrective action, period. (T2:99)

19. Dr. Kreskey was hired by the District as one of the assessors. Before starting with the District, however, Dr. Kreskey met with Dr. Marinaro to review the inefficiency charges, the scope of his responsibilities and his function as an assessor. (T1:31) He attended his first training session on October 21, 1995, and later participated in training session in December 1995, February, March and May of 1996. (T1:22)

20. Dr. Kreskey first met with respondent on October 23, 1996. His purpose was to focus on the inefficiencies cited in the inefficiency charges. (T1:26) His responsibility was to determine

the degree to which respondent had corrected those deficiencies. He was not to provide respondent with any assistance or feedback. (T1:159)

21. The introductory conference lasted approximately three hours and forty-five minutes. A significant amount of time was dedicated to reviewing the charges. Dr. Kreskey gave respondent the opportunity to advise him how she felt about the charges and to identify her efforts to correct the inefficiencies. (T1:26)

22. Subsequent to the meeting, Dr. Kreskey visited respondent at the Camden Middle School on 15 occasions. (T1:27) During these visits, he shadowed her as she performed her duties; he attended various faculty, grade level and core team meetings; he attended classroom observations and post-classroom observations and conferences. Dr. Kreskey reviewed student portfolio documents, including the Educational Improvement Plans (EIPs) relative to student achievement, standardized test scores, attendance profiles, student performance and outcomes, mission statements, copies of observation reports, and staff development programs and activities. (T1:28)

23. Dr. Kreskey also conferred with Dr. Marinaro during respondent's corrective action period. (T1:31)

24. Dr. Kreskey prepared a summative assessment report which he submitted to Dr. Marinaro on December 20, 1996, and which was later revised in January 1997. (Exhibit P-1) (T1:31) The purpose of the report was to present his findings with respect to respondent's progress in addressing the deficiencies. It was intended for use only by the assistant superintendent. (T3:68)

25. Dr. Kreskey's report (Exhibit P-1) utilized the seven criteria as noted in *N.J.A.C.* 6:7-1.3, or "charges" as they were termed in P-1, which were broken down into subparts. He indicated whether respondent successfully corrected each inefficiency. (T1:35) Although Dr. Kreskey found that respondent successfully corrected Charge 1 (Curriculum Program), Charge 4

(Community Relationships) and Charge 7 (School Based Planning), he also found that respondent had *not* satisfactorily corrected the following inefficiencies:

> ***[Charge] 2: The respondent has failed to demonstrate consistent and effective leadership in the supervision of instruction by showing that observation of teaching and learning is a major priority. The respondent has specifically failed to:
>
> a. Consistently conduct classroom observations of all staff to ensure effective development and refinement of instructional skills. ***
> b. Demonstrate that student work products such as a student portfolio are reviewed as part of evaluating classroom instruction.***
> c. Demonstrate that professional growth via the professional improvement plans of staff is a priority during post-observation conferences. ***
> d. Conduct post-observation conferences with staff to promote effective teaching. ***
>
> Charge 3: The respondent has failed to demonstrate consistent and effective leadership in the area of staff development. The respondent has specifically failed to:
>
> a. Develop a comprehensive staff development plan for the Camden Middle School.
> i. Demonstrate that classroom observations are utilized to determine staff development needs.
> ii. Demonstrate that the school testing program is utilized to determine staff development needs. ***
> c. Identif[y] staff development skills necessary to improve teaching effectiveness.***
> d. Develop knowledge and skill in validated teaching and learning principles and share with staff.***
> e. *Demonstrate personal knowledge of innovative curricular programs and to introduce such programs to staff for discussion and adaptation/adoption.* ***
> f. Demonstrate that teachers share the results of their participation in in-service activities during faculty meetings.***
> g. Demonstrate that staff members learn from each other through peer observation/feedback and other forms of sharing.***
> h. Demonstrate that sufficient resources are utilized in support of staff improvement.***

i. Demonstrate that staff development efforts in previous years are reflected in current instructional practices.***

j. *Demonstrate the availability of technical assistance to staff as they develop school improvement activities.****

Charge 4: The respondent has failed to demonstrate consistent and effective leadership in establishing and maintaining an assessment program that measures individual and group achievements. The respondent has specifically failed to:

a. Establish an assessment program with clear relationships among learning goals, instructional activities and student assessments.***

b. Conduct teacher meetings to discuss student progress, review of test results, grade reports and other measures.***

e. Demonstrate that assessment results are utilized to make reteaching decisions.***

g. Demonstrate periodic review of student and staff attendance records, standardized test results, grade reports and school enrollment figures and to spot potential problems, and make changes in instructional programs to meet identified needs.***

Charge 6: The respondent has failed to demonstrate consistent and effective leadership in the are of school climate insuring that pupil and teacher behaviors support a productive learning environment. The respondent has specifically failed to:

a. Develop a set of shared values in consultation with staff, parents and the community.***

b. Develop a consistent, uniform code of conduct in consultation with staff and students which is linked to consequences and conspicuously posted in classrooms.***

e. Enforces firm policies regarding appropriate conduct of students and staff to maximize learning time.***

f. Identify indicators of low morale of staff and formulate steps to alleviate them.***

g Assessment of school climate on annual basis as part of school improvement plan.***

h. Demonstrate frequent classroom visitations to discuss school issues with teachers and students.*** (Exhibit P-1, emphasis added)

26. On January 29, 1997, the District presented respondent with a (final) Notice of Inefficiency Charges, which appended a formal Notice of Uncorrected Inefficiencies. (Exhibit J-2)

27. The inefficiencies in Exhibit J-2 are, for the most part, as noted above in Dr. Kreskey's report, with the following exceptions: a) Charges 2, 3, 4 and 6, *supra*, became Charges 1 through 4, respectively. b) The uncorrected inefficiencies, or subcharges, which are identified above in italics were inexplicably dropped from the District's final notice, notwithstanding that they were contained in Kreskey's report, P-1. Accordingly, these subcharges are *not* deemed as part of the tenure charges brought herein; and c) Without explanation, the District also included subcharges which Dr. Kreskey's report identified has having been satisfactorily addressed. Those subcharges are:

- Demonstrate staff involvement in planning, decision making, execution and evaluation of staff development programs. (Charge 2b in Exhibit J-2, Notice of Uncorrected Inefficiencies) and
- Demonstrate leadership in restructuring grouping and services to address deficits identified through assessments. (Charge 3d in Exhibit J-2, Notice of Uncorrected Inefficiencies).

Respondent is deemed to have satisfactorily addressed these inefficiencies.

28. Dr. Marinaro moved his office to the Camden Middle School, in part, so that he could provide respondent with resources and assistance during the corrective action period. (T2:105) Marinaro further instructed his staff that they were assigned to the Camden Middle School, in addition to any other schools to which they had been assigned, in order to be accessible. (T2:105) Dr. Marinaro engaged in informal dialogue with respondent on an almost daily basis during the corrective action period. (T2:105)

29. Dr. Marinaro scheduled a meeting with respondent on November 8, 1996 to discuss her progress. (T2:138) (Exhibit P-10) Dr. Marinaro conducted a building walk-through, where he visited 17 classrooms, looked at every student's notebook, and reported his findings relative to

supervision of instruction, school climate and staff development. (T2:139, 140) He prepared a detailed report, Exhibit P-11, entitled Summary of Formative Program Evaluation - Camden Middle School.

30. Based on Dr. Marinaro's walk-through, he concluded that there was a low level of instruction in the school. (T2:158) There was little evidence of lesson planning, higher order learning objectives and student participation in activities.

31. Dr. Marinaro received a teacher observation schedule from respondent, but was concerned that the teachers respondent was scheduled to evaluate were not core curriculum teachers who were identified as weak and needing support. (T4:217) Respondent was notified that the schedule was insufficient.

32. Dr. Marinaro developed an in-school suspension program which was called CALM (Camden Middle Attitude Learning Management). (T2:182) The CALM plan was to work in conjunction with the behavior modification program. The plan was written at his direction by Ms. Patricia Pallante and a committee. (Exhibits P-4, P-5)

33. Ms. Pallante has been employed by the District for 28 years. She is currently employed as an Assistant Director of Special Education, assigned to SLT V. Her responsibilities are primarily supervision of child study teams. She also supervises special education teachers, speech and language therapists in SLT V. (T4:13)

34. Ms. Pallante testified that the CALM room provides, for regular education students, an in-school suspension option similar to what is available for special education students. Ms. Pallante sat on the committee to develop the CALM plan, and later took over the committee. The plan, P-4, was developed by December 1995, and presented to administrative staff at Camden Middle School in draft form. It was formally adopted around January 1996, and scheduled for implementation in September 1996. (T4:16)

35. In November 1986, Ms. Pallante visited Camden Middle School to assess the implementation of the CALM plan. She visited both the crisis room (for special education students) and the CALM room, and made suggestions for both. (T4:19)

36. Ms. Pallante found that that implementation of the CALM program was disorganized. She found there were no materials in the room, there was no schedule posted for the teacher, and there were no lesson plans. The room was being used as a drop-off for teachers to send students to do their work. (T4:21) When the plan was initially drafted, it included a staff development component for all teachers. Ms. Pallante had a conference with Dr. Marinaro, who thereafter wrote P-11, a memorandum to respondent dated November 6, 1996, which noted the deficiencies Ms. Pallante observed in the implementation of the CALM program. (T4:21, 22) Although respondent refutes that there were no supplies available in the room, she could not recall whether the rules were posted in the room. (T4:182) Respondent also disputed the need for interest centers, as noted by Ms. Pallante, in a room which was for discipline. (T4:183) Respondent did not dispute that she failed to develop bar graphs for students who showed improvement in their behaviors. (T4:186)

37. Dr. Marinaro provided respondent with reviews and feedback regarding the monthly reports which she submitted to him, wherein he critiqued the teacher observations conducted by respondent and also gave her constructive advice. (T2:192-198, Exhibits P-12, P-13) Dr. Marinaro found that, despite training, respondent's evaluations lacked basic elements and were not useful.

38. Jill Watkins, Special Assistant assigned to the SLT V, is supervised by Dr. Marinaro. She has been employed by the District for 34 years. She acts as liaison between the central office and the schools. (T4: 4, 5) Ms. Watkins' office was in the Camden Middle School for the 1996-97 school year. She had frequent interactions with respondent during the 1996-97 school year.

39. Ms. Watkins collaborated with Dr. Marinaro in reviewing the monthly reports submitted by principals. She performed a formal observation of Dr. Elizabeth Melie, a teacher in the Camden Middle School. The respondent was concerned about Dr. Melie's ability to control her class; the class was frequently out of order, some of the students were in the hallway, etc. Ms. Watkins testified that respondent frequently expressed dissatisfaction with Dr. Melie, yet respondent had not observed Dr. Melie herself prior to Ms. Watkins' observation. (T4: 7, 8) A vice principal had observed Dr. Melie and rated her as satisfactory. Ms. Watkins rated Dr. Melie as unsatisfactory, noting that she struggled in the classroom. After the observation, Ms. Watkins recalled speaking to Dr. Melie again, and documenting her observations in a memorandum. Subsequently, Dr. Melie was transferred to another school in a home economics position. (T4:8)

40. By memorandum dated October 17, 1996, Dr. Marinaro informed respondent that the School Organization document she had submitted to him was incomplete. (Exhibit P-15) (T3:5) Dr. Marinaro considered the document essential to the operation of the school. (T3:5) This was the only school under his charge which had submitted an incomplete organization. (T3:7)

41. By memorandum dated December 5, 1996, Dr. Marinaro informed respondent that the Camden Middle School was the only school in the SLT V which was not represented by any staff developers at a professional development workshop conducted the day before at Kean College, despite prior notice and registration forms having been provided to respondent. (Exhibit P-16, T3:7) Dr. Marinaro does not know for certain, however, if respondent received the prior notice. (T3:102)

42. By memorandum dated December 6, 1996, Dr. Marinaro informed respondent that she had employed improper exiting and supervision procedures during the fire drill that day. (Exhibit P-17) (T3:9-13) Dr. Marinaro requested that respondent provide him with fire drill

procedures and directives, which she did, and that she include the information on an agenda for a future staff meeting.

43. On the day of the fire drill, Ms. Watkins heard a fire alarm, followed by conflicting announcements from respondent about whether to exit the building. Upon leaving the building, Ms. Watkins observed some boys playing basketball in the playground during the fire drill. Ms. Watkins also noted that she could not tell where the classes were; the teachers were all together in one area and the students were in the playground. There did not appear to be an organized plan to carry out the drill. (T4:11)

44. By memorandum dated December 13, 1996, Dr. Marinaro notified respondent that he had received written concerns from a teacher that there was inadequate supervision on the playground, resulting in vandalism to cars. (Exhibit P-18) (T3:13, 14) Dr. Marinaro testified that it is the responsibility of the administrative staff to ensure such supervision, along with school aides or teachers whose schedules permit such supervision. (T3:14)

45. Dr. Marinaro testified as to acts of vandalism at the school. He removed from a female student a can of spray paint which matched the paint which had been sprayed inside the school, his own car was vandalized, teachers and visitors had reported to him that their cars had been vandalized, and students had put a tire on top of a car belonging to a substitute teacher. (T3:15) Dr. Marinaro acknowledged that the parking lot was accessible to persons outside the school. (T3:104) Respondent did not dispute that these incidents occurred but, rather, explained that the Camden Middle School playground and parking lots are readily accessible, and she only provided security during lunch. (T4:139) Respondent affirmed that sometimes security guards were available, and she had no staff to safeguard the cars. (T4:140)

46. Dr. Marinaro met almost weekly, from October 23, 1996 until January 29, 1997, with Dr. Kreskey during respondent's corrective action period to discuss her progress. (T3:19)

47. Both Dr. Marinaro and Dr. Kreskey independently arrived at the conclusion that respondent had reached a level of competence in only three of the seven areas of inefficiency. (T3:20) Dr. Marinaro agreed fully with Dr. Kreskey's report, P-1. (T3:21)

48. On December 11, 1996, Dr. Marinaro provided respondent with a summary of a second formative evaluation which he had conducted. (Exhibit P-14) (T3:38) Also, Dr. Marinaro conducted a conference with respondent on December 17, 1996. She refused to sign the evaluation. (T3:39)

49. Dr. Marinaro provided respondent with assistance regarding supervision of instruction through the monthly meetings he had with principals, and through the selection of a new vice principal, David Wright, as respondent had requested, and through the accessibility of his staff. (T3:73) Dr. Marinaro never "[sat] down" with respondent and told her how to complete an appropriate formal observation report. (T3:75) However, on cross-examination, respondent affirmed that she performed annual teacher evaluations as an administrative supervisor and as a supervisor, prior to becoming a principal. (T4:161) Accordingly, she cannot credibly claim that she was a novice needing extra assistance in this area. Neither did Dr. Marinaro meet with respondent during the corrective period and review with her how to conduct a post-observation conference. (T3:76) As for respondent's performance in the area of assessment of pupil progress, Dr. Marinaro brought two of his resource teachers to work with respondent's staff developers. (T3:77) Additionally, there were meetings with the principals and vice principals on assessment of pupil progress. Dr. Marinaro did not provide, nor was he required to provide, respondent with one-on-one assistance. (T3:78) Dr. Marinaro's two special assistants, Eva Ortiz and Jill Watkins, provided technical assistance to respondent in the areas of school organization, budgeting, personnel, and conducting teacher observations. They were "on call" for her questions. (T3:98-101)

50. The Camden Middle School students were involved in a city-wide debate tournament in either the 1995-96 or the 1996-97 school year. (T3:93) They performed well.

51. Dr. Marinaro acknowledged that although respondent had some good ideas and tried to organize them, she was unable to bring them together to form a common consensus and lead her staff. Although she produced some good plans on paper, she was unable to follow through on those plans. (T3:117, 118)

52. Respondent describes the time when she arrived as principal of the Camden Middle School as a period of chaos. She felt she was receiving opposition from Vice Principal Mobley. (T4:32-34)

53. When she arrived in 1993, she placed emphasis on student test scores and, she asserts, the Camden Middle School did so well that, as a result, she lost all her basic skills teachers, as they were no longer needed. (T4:35)

54. Respondent presented a plan for discipline, as written by teachers on her staff, which was implemented in the 1994-95 school year. (T4:39, 40) A teacher was later assigned to effectuate the on-site suspension plan. (T4:45)

55. Respondent testified that whenever a teacher was rated as unsatisfactory in any category in an evaluation, the evaluator would provide suggestions for improvement. (T4:60) She also indicated that she always conducted post-observation conferences. (T4:60)

56. Respondent admitted that, at times, she went into classrooms and, upon finding a teacher trying to teach a concept which respondent knew she could teach better, she started teaching the class. (T4:66) However, respondent never memorialized such incidents in writing. (T4:67) Instead, she would provide feedback by chatting with the teachers. (T4:68)

57. Respondent stated that she had an "overall plan" for staff development which included focusing on a new reading series, on student achievement, sending a team of teachers to a middle

school in the Montclair School District to make observations and exchange ideas, and presenting a mini-series of workshops for teachers. (T4:84-89) Respondent affirmed that she used student test scores to determine staff development needs. By way of example, she indicated that where vocabulary development was found to be necessary, she purchased thesauruses for the eighth grade student class. (T4:90) This strategy, however, while it may have reaped some benefit, was not a demonstration that respondent had utilized the school testing program *to determine staff development needs.*

58. Respondent testified that the school obtained a grant which allowed instructors from Montclair State University to provide staff development, specifically, to assist the Camden Middle School with its program to design and implement innovative approaches for the integration of the creative arts throughout the curriculum. (T4:101) These instructors were her "external" source, while her "internal source" consisted of her staff developers who utilized faculty meetings for staff development. (T4:102, 103) The courses started in January of 1997.

59. When questioned by the ALJ, respondent stated that Exhibit P-3 was intended as her comprehensive plan for staff development, in response to the charges noted above. (T4:98)

60. Respondent acknowledged that, as the principal, she was responsible for the total student assessment program. (T4:117) Respondent testified that she and the vice principals targeted skills from the standardized tests on a monthly basis. (T4:119) That is, they encouraged teachers to concentrate on specific reading, writing and mathematics skills each month. They would also review lesson plans to see if the learning objectives correlated with the skills to be targeted. (T4:120) However, in response to the ALJ's question as to how she addressed Charge 3, *i.e.*, her failure to demonstrate consistent and effective leadership in establishing and maintaining an assessment program that measures individual and group achievement, respondent did not offer a clear and cogent response, but conceded that what she produced was "part of the program," as it

apparently was not completed. (T4:121-125) Respondent could not present evidence of formal, coordinated procedures for the utilization of teacher-made test data, district-made test data, student portfolio data and other sources of assessment in relation to student achievement, instructional activities and goals and objectives, as she testified she did not have access to her documents. (T4:189; Exhibit J-2)

61. Respondent testified that the teachers gave weekly tests, the results of which were used to make reteaching decisions. (T4:128, 129)

62. Respondent redesigned the groupings of students so that, similar to secondary school, students had difference teachers for reading, writing, and math. (T4:131) They had five different teachers in five disciplines. (T4:132)

63. Respondent affirmed that attendance was reviewed daily. (T4:132)

64. Respondent said the school had developed both a mission statement and a broader vision statement, which she identified as a "dream" for the school. (T4:133) Although she prepared the vision statement, she could not recall what it was, but said it was very general. (T4:132) She did not prepare the mission statement, but noted that a set of shared values were part of the mission statement which was on bulletin boards throughout the school. (T4:134, 135)

65. Respondent testified that a uniform code of conduct for staff and students was developed at grade level meetings. (T4:135) The rules were presented on posters throughout the school. She affirmed that she and the vice principals monitored rooms on a daily basis to ensure that the posters were in place. (T4:137) Although Dr. Marinaro's Summary of Formative Program Evaluation (Exhibit P-11) subsequent to his November 8, 1996 walk-through indicated that Mr. Howard, a seventh grade teacher, did not post the rules of behavioral management in his class, respondent could not recall whether this was true. (T4:177)

66. Respondent testified that the suspension of seven teachers during the 1996-97 from the Camden Middle School subsequent to an insurance fraud investigation negatively affected the morale of her teachers. (T4:143) In response to this morale problem, the school celebrated each teacher's birthday in the building every month. (T4:148) In addition, she allowed the union president to come into the building and talk to the teachers. (T4:148, 149) Dr. Marinaro also met with the staff and secured the services of an Employee Assistance Program to assist with teacher morale in the building. (T4:220, 221)

67. Respondent felt strongly, according to her testimony, that if she was undergoing an improvement or corrective action period, she should not "be dumped with teachers that are questionable or unsatisfactory." (T4:156) However, on cross-examination, she testified that, as of September or October of the 1996-97 school year, she had no problems with her teachers, save for one whom she had to closely monitor. (T4:193, 194) She further averred that, other than some of the problems she addressed to Dr. Marinaro in her monthly reports, the school was running smoothly and there was no division among the faculty. (T4:194)

68. The ALJ repeatedly questioned respondent about the actions she took to demonstrate that she had addressed the inefficiencies in the notice which had been served upon her by the District. In response to the ALJ's direct and pointed questions, respondent spoke about educational philosophy, and, at times, presented anecdotal information. (See T4, exchanges beginning at page 37 regarding student discipline, page 98 regarding staff development, page 105 regarding sharing information with staff members from in-services opportunities, page 121 regarding student assessment, page 137 regarding postings with rules of behavioral management, and page 146 regarding school climate.) In any event, respondent often did *not* give direct answers to the ALJ's questions, nor did she appear to grasp the notion that she bore the responsibility to not

only address the areas noted as inefficiencies, but to *demonstrate to her assessors that she was addressing those areas.* (See T4:106-110.) In one exchange, respondent's attorney interjected,

> MS. OXFELD: --I--I think that that may have been part of the communication problem between Mrs. Brownlee and the assessors, is that they are paper people and she's not a paper person. And so that her response would be to say, yes. It's happening. If you come here, you will see it happening. But not to create a document that says this is ---
> THE COURT: Okay.
> MS OXFELD: ---where it happens, or how it happens, or when it happens. She knows it's happening.
> THE COURT: All right. (T4:109, 110)

69. The District's witnesses were credible.

70. Respondent admitted to the ALJ that she does not so much dispute the fact that the District seeks to relieve her of her duties as principal, but rather that it seeks to dismiss her, rather than demote her to a vice principal or supervisory position. (T4:203, 204) She does not dispute that during the time that she was principal, she could have done a better job and did not. (T4:204)

71. But for the exceptions as noted in finding number 27 above, the documentary and testimonial record support the conclusion that respondent has not satisfactorily corrected the inefficiencies included in the Notice of Uncorrected Inefficiencies.

Finally, the Commissioner has carefully considered respondent's argument that, should the tenure charges against her be upheld, her employment in the District should not be terminated, but rather, she should be demoted, in recognition of her long history of service in the District and her asserted improvement in performance during the corrective action period. (Respondent's Exceptions at p. 17) However, such demotion is not an option to be ordered by the Commissioner; the sole question before him in this proceeding is whether the charges here proven warrant respondent's dismissal from her tenured position as principal or a reduction in

her salary. In this instance, the Commissioner is more than satisfied that the charges as proven, which evince inefficiencies uncorrected even after the remediation period prescribed by law, fully warrant respondent's dismissal, notwithstanding her history of success in other capacities while employed in the District and her improvement in some respects during the course of the present proceedings. Inefficiency is one of the bases expressly provided by the Legislature for loss of tenured employment, and where, as here, it is clear that the inefficiencies proven are sufficiently substantial to render the charged party's continued presence in a particular position untenable in view of the District's obligations to its students, the Commissioner will not impose a lesser penalty. As to respondent being employed by the District in another capacity, the Commissioner concurs with the ALJ that, while the District could have transferred respondent to, or may elect to hire her for, a different position within her area of certification, it is under no legal obligation to do so, and the Commissioner cannot direct such result herein.

Accordingly, the initial decision of the ALJ is adopted, as modified herein. Respondent is dismissed from her position as a tenured principal as of the date of this decision. This matter shall be referred to the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.6 for action against her certificate as it deems appropriate.[3]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[3] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

157-98

EDU #3634-97
C # 157-98
SB # 43-98

IN THE MATTER OF THE TENURE :
HEARING OF DORETHA BROWNLEE, :
STATE-OPERATED SCHOOL DISTRICT :
OF THE CITY OF NEWARK, ESSEX :
COUNTY. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, April 16, 1998

For the Petitioner-Respondent, McCarter & English (Steven B. Hoskins, Esq., of Counsel)

For the Respondent-Appellant, Balk, Oxfeld, Mandell & Cohen (Nancy I. Oxfeld, Esq., of Counsel)

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

February 3, 1999

Date of mailing FEB 05 1999

158-98

158-98

M.H.R., on behalf of minor child, L.C.G., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY, : DECISION

RESPONDENT. :

:

SYNOPSIS

Petitioning brother contested Board's determination that minor child, L.C.G., was not domiciled in the District and, therefore, was not entitled to a free public education in its schools.

ALJ found that L.C.G. was not seeking to be educated in the District solely for the purpose of receiving a free education and that L.C.G.'s natural parents in Mexico were unable to support him. ALJ found and concluded that petitioner satisfied the standard set forth in *N.J.S.A.* 18A:38-1 and, therefore, L.C.G. was entitled to admittance in the District.

Commissioner concurred with the ALJ that L.C.G. was deemed entitled to a free education in the District in accordance with *N.J.S.A.* 18A:38-1b(1), the "affidavit student" provision. Commissioner noted that the record did not sufficiently support that petitioner had been awarded legal custody of L.C.G. so as to find that L.C.G. was entitled to a free public education in the District pursuant to *N.J.S.A.* 18A:38-1a.

APRIL 16, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3005-96

AGENCY DKT. NO. 52-2/96

M.H.R. ON BEHALF OF MINOR CHILD L.C.G.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,

Respondent.

M.H.R., petitioner, *pro se*

Anthony D'Elia, Esq., for respondent

Record Closed: January 6, 1998 Decided: February 27, 1998

BEFORE **IRENE JONES**, ALJ:

On February 13, 1996, petitioner Maria H. Rodriguez (petitioner or M.H.R.) on behalf of a minor child L.C.G., filed a petition with the Commissioner of Education (Commissioner) seeking to have L.C.G. admitted to the Clifton Public School System. Respondent, Clifton Board of Education, filed an Answer to the petition on February 21,

1996 wherein it admitted that it had denied L.C.G. admission to its public school district because L.C.G. failed to meet the legal requirement for admission. On March 5, 1996, the Commissioner transmitted the matter to the Office of Administrative Law for a hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 14F-1 to 13. A hearing was scheduled for April 7, 1997. The hearing was adjourned and rescheduled for July 1, 1997 which date was also adjourned. A hearing was held on January 6, 1998 after which the record was closed.

ISSUE

Whether the petitioner has established that L.C.G. is entitled to a free public education in the respondent's school district pursuant to *N.J.S.A.* 18A:38-1.

STATEMENT OF THE FACTS

I **FIND** the following facts to be undisputed and thus they are adopted as the **FACTS**:

The petitioner, M.H.R., resides in Clifton, New Jersey. On September 23, 1995, petitioner's minor brother, L.C.G. came to the United States from Mexico to live with the petitioner. Prior to immigrating to the U.S.A., L.C.G. attended Antonio Caso Junior High School in Morelos, Mexico.

On or about October 19, 1995, petitioner filed an application for affidavit admission of L.C.G. with the respondent, Clifton Public School District. The affidavit alleged that L.C.G. was sixteen years old and a 10th grade student. Further, that prior to residing with the petitioner, L.C.G. resided in Oaxtepic Mor. (sic) Mexico with his parents, R.G. Ramirez and R.R. Ramirez. The Ramirez family consists of eight children. Mr. & Mrs. Ramirez continue to reside in Mexico. and are unable to work. Accordingly, Mr. and Mrs. Ramirez asked the petitioner to support L.C.G. with his education. (J-1)

The petitioner testified that she supports L.C.G. gratis. Further, that her household consists of herself, husband and two children. Her two children are students in the District. The family moved to Clifton in August 1995 prior to L.C.G.'s residency in the District. Petitioner is employed by Barton Press and the family's gross income is $45,000.

On November 9, 1995, the Ramirez' affidavit verified that they voluntarily gave custody of L.C.G. to the petitioner. Further, that they will not claim L.C.G. on their income taxes. (J-1)

Juan Guzman, (Guzman) the brother of the petitioner and L.C.G., corroborated that the petitioner was given custody of L.C.G. Guzman further states that he sends $300 per month to Mexico to assist his parents. His father had worked in construction until his retirement. His father is 74 and his mother is approximately 62 years old.

DISCUSSION, FINDINGS AND CONCLUSION

This matter is governed by *N.J.S.A.* 18A:38-1 which provides:

> a. Any person who is domiciled within the school district;
>
> b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable

> residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. . . .

There are four requirements imposed by *N.J.S.A.* 18A:38-1(b). First, the petitioners must establish domicile within respondent's school district. Second, the petitioner must demonstrate that she is supporting her brother gratis. Third, it must be shown that the child's family is not capable of supporting or providing care for them due to family or economic hardship. Fourth, it must be shown that the children are not residing with the petitioner solely for the purpose of receiving a free public education in respondent's school district. The burden of proof is on the petitioner to demonstrate each and every element. *N.J.S.A.* 18A:38-1(b).

N.J.S.A. 18A:38-1(b) provides that the child cannot reside with the resident of a school district solely for the purpose of receiving a free public education within the district. Thus, by the plain meaning of the statute, if other motives besides a desire to receive a free public education within that particular school district can be found to explain why the child has taken up residence with the person domiciled in the school district, this requirement of the "affidavit student" law has been satisfied.

In this case, L.C.G. have relatives domiciled in the United States who are willing to support him gratis, and this fact, more than a specific desire to go to school in Clifton that has dictated their choice of residence. Thus, I **FIND** L.C.G. is not seeking to be educated in Clifton solely for the purpose of receiving a free education.

By operation of the affidavit student law, it must also be shown that L.C.G. was sent to live with the petitioner due to "family or economic hardship". This requirement, however, has not been strictly construed by the Commissioner. In *Gunderson v. City of Brigantine Bd. of Ed.,* 95 *N.J.A.R.2d* (EDU) 39, the Commissioner ruled that"

> and where a literal reading will not accord with that purpose, the spirit of the law will control over its letter. *N.J. Builders, Owners, & Managers Association v. Blair*, 60 *N.J.* 330, 333 (1972). Moreover, the meaning of a statute is to be gathered from the mischief sought to be eliminated as well as the proposed remedy. Brewer v. Porch, 53 *N.J.* 167, 174 (1969); *San-Lan Builders, Inc. v. Baxendale,* 28 *N.J.* 148, 155 (1958).
>
> The amendments to *N.J.S.A.* 18A:38-1 effectuated by P.L. 1993, c. 380 were intended to ease the burden on local boards of education by attempting to remove illegally enrolled students, specifically those living with a parent or guardian who claims to be, but is not, domiciled within the district, and those living with a person other than the parent or guardian in order to obtain the benefit of a free public education in a district other than that of their entitlement by parental domicile. (See Sponsor's Statement, Senate Education Committee Statement and Governor's Conditional Veto Message to Senate Bill No. 1447 of 1993, enacted as c. 380).
>
> The intent of the "affidavit student" law is not now, and never has been, to deny an education to a child whose living arrangements may not be as contemplated by the statutory scheme when it is clear that the child has no home, or possibility of school attendance, other than with the nonparent district resident and that such resident is for all intents and purposes the sole caretaker and supporter of the child. Neither is its parental affidavit provision meant to act as a bar to a child who, do (sic) to particular circumstances, cannot produce such an affidavit but provides evidence that the underlying requirements of the law are being met. To hold otherwise harms a party the Legislature never meant to penalize, unreasonably places form over substance and overlooks the substantial State interest in ensuring the education of all its children. *Sabella v. Lacey Tp.* 204 *N.J. Super* 55, 60 (App. Div. 1985); *Restaurant Enterprises, Inc. v. Sussex Mutual Ins. Co.*, 52 *N.J.* 73, 77 (1968). [*Id.* at 42 (emphasis added)].

I **FIND** that L.C.G.'s natural parents are unable to support him because they have no visible means of support due to their advanced age. P-1 supports that the natural father is 74 years old and his wife is 62 years old. Further, it is undisputed that Guzman is supporting his parents. Moreover, the respondent failed to produce any

evidence, direct or circumstantial, that refutes that the family is not facing an economic hardship. Thus, I **FIND** and **CONCLUDE** that the petitioner has satisfied the standard set forth in *N.J.S.A.* 18A:38-1 and therefore L.C.G. is entitled to admittance in the respondent's school district.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

2/27/98
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

March 4, 1998
DATE

D. M. Centanaitis Jr.
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 0 6 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

OAL DKT. NO. EDU 3005-96
AGENCY DKT. NO. 52-2/96

M.H.R., on behalf of minor child, L.C.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner has demonstrated that L.C.G. is entitled to a free education in the District, pursuant to *N.J.S.A.* 18A:38-1b(1), the "affidavit student" provision.

While the Commissioner acknowledges petitioner's assertion that she has acquired custody of L.C.G. and recognizes that where petitioner is the legal guardian of L.C.G., and is indisputably a domiciliary of Clifton, then L.C.G.'s domicile is also considered to be Clifton, as the domicile of a child follows that of the parent or guardian having *legal control* over her, *Mansfield Twp. Board of Education v. State Board of Education*, 101 *N.J.L.* 474, 479, 480 (Sup. Ct. 1925), he is not persuaded that the record sufficiently supports the conclusion that

petitioner has, in fact, been awarded legal custody of L.C.G. so as to find that L.C.G. is entitled to a free public education in the District pursuant to *N.J.S.A.* 18A:38-1a.[1]

Accordingly, L.C.G. is deemed entitled to a free education in the Board's District in accordance with *N.J.S.A.* 18A:38-1b(1), his admission to continue so long as there is no change in petitioner's circumstances that would alter his entitlement.[2]

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

[1] The Commissioner further notes that such an entitlement to a free education pursuant to *N.J.S.A.* 18A:38-1a would also be dependent upon a finding of no evidence of fraud on the part of petitioner. *V.H. v. Board of Education of the Township of Quinton*, 97 *N.J.A.R.* 2d (EDU) 124, 125, aff'd State Board of Education 554.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

APRIL 16, 1998
DATE OF MAILING APRIL 16, 1998

159-98

IN THE MATTER OF THE TENURE :

HEARING OF VITO VALVANO, : COMMISSIONER OF EDUCATION

DEPARTMENT OF HUMAN SERVICES. : DECISION

:

APRIL 20, 1998

PETER VERNIERO
Attorney General of New Jersey
Attorney for New Jersey Juvenile
Justice Commission
R. J. Hughes Justice Complex
PO Box 112
Trenton, New Jersey 08625

By: Mary F. Rubinstein
Deputy Attorney General
(609) 292-5214

RECEIVED
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1998 FEB 20 A 10: 19

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET NO. EDUTH 06024-96S

I/M/O TENURE HEARING OF)
VITO VALVANO)

SETTLEMENT AGREEMENT

WHEREAS the parties agree to settle this matter, noting that the public policy of New Jersey strongly encourages settlement.

IT IS HEREBY AGREED AND STIPULATED by and between the parties to this action that this matter is settled for the following reasons:

1. On February 29, 1996, the Division of Juvenile Services of the New Jersey Department of Human Services filed tenure charges against Vito Valvano, specifying four acts of neglect in supervision, excessive absenteeism, abuse of sick leave, and leaving assigned work area without permission, all of which occurred in 1995. The Department of Human Services requested that Mr. Valvano be suspended without pay for the duration of the proceedings against him and that he be dismissed from his position

as a tenured employee. Mr. Valvano answered the charges and the matter was transmitted to the Office of Administrative Law in June 1996 and assigned to Administrative Law Judge Kathryn A. Clark.

2. After the creation of the Juvenile Justice Commission in December 1995, Mr. Valvano's work unit, which was the Division of Juvenile Services within the Department of Human Services, was made part of the Juvenile Justice Commission and the tenure charges against him were to be handled by that Commission.

3. The matter was set down for hearing on January 26 and 27, 1998. In the meantime, Mr. Valvano had returned to work for the Juvenile Justice Commission as a Teacher I, but with no classroom duties, in August 1996.

4. The Juvenile Justice Commission, having reviewed the conduct and pending request for removal, has determined that the 120 days suspension without pay was a sufficient penalty, given the nature of the conduct which did not allege any student abuse or moral turpitude, and that removal is not necessary.

5. The parties have reached a mutually acceptable agreement concerning the payment of salary and Respondent has agreed to waive attorneys fees.

IT IS HEREBY AGREED AND STIPULATED by and between the parties to this action that this matter is settled in accordance with the following terms:

1. Vito Valvano and the New Jersey Juvenile Justice Commission have reached an amicable and full settlement of any and all claims contained in the February 29, 1996 tenure charges.

2. Vito Valvano shall withdraw his appeal of the charges contained in the February 29, 1996 letter and waives any right to a hearing.

3. Vito Valvano agrees to waive any right to salary he would have received during the 120 days of unpaid leave following the certification of the charges against him.

4. The Juvenile Justice Commission agrees to withdraw the tenure charges against Vito Valvano and have the respondent's personnel file and computer records indicate that the tenure charges filed against him were withdrawn by the Juvenile Justice Commission under a Settlement Agreement and reflect the 120 days suspension as unpaid leave.

5. Nothing contained in this agreement shall be construed as an admission of liability by any party and shall not serve as a precedent in any subsequent matter.

6. The Respondent will not receive any counsel fees, costs or any monetary relief as a result of this settlement.

7. The parties agree to waive the filing of exceptions to the initial decision which would recommend the approval of the settlement agreement as a complete and final disposition of this matter.

8. The Respondent is aware that pursuant to N.J.A.C. 6:11-33.6(a)1, the Commissioner of Education shall forward this settlement agreement to the State Board of Examiners for review and determination of possible revocation or suspension of Respondent's certificate. The State Board of Examiners may make new factual findings and issue an order to show cause and a statement of charges upon which revocation or suspension may be considered.

9. The parties acknowledge that this Agreement may not be consummated until approved by the Commissioner of Education. Any disapproval by the Commissioner of Education shall not

interfere with the rights of either party to pursue this matter further.

Weissman & Mintz
Attorney for Vito Valvano

By: Sharra E. Greer, Esq. Dated: 2/12/98

Vito Valvano, Respondent Dated: 2/3/98

PETER VERNIERO
ATTORNEY GENERAL

By: Mary F. Rubinstein Dated: 2/17/98
Mary F. Rubinstein
Deputy Attorney General
Attorney for the Juvenile Justice Commission

OAL DKT. NO. EDU 6024-96
AGENCY DKT. NO. 80-3/96

IN THE MATTER OF THE TENURE	:	
HEARING OF VITO VALVANO,	:	COMMISSIONER OF EDUCATION
DEPARTMENT OF HUMAN SERVICES.	:	DECISION
	:	

The record of this matter and joint stipulation of settlement, returned by the Office of Administrative Law, have been reviewed. While this matter was apparently returned pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), the regulatory provisions which establish that when the agency head is a party to the matter, the stipulation of settlement is deemed the final decision, the Commissioner notes that he is *not* a party to the within matter, which consists of tenure charges filed by the Department of Human Services. Therefore, the Commissioner must review this matter, and proceeds to do so herein.

Having completed such review, the Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, 1990 *S.L.D.* 842, 846. This matter is hereby dismissed, subject to compliance with the terms of the settlement. This matter shall be forwarded to the State Board of Examiners for action as deemed appropriate pursuant to *N.J.A.C.* 6:11-3.6.*

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

APRIL 20, 1998
DATE OF MAILING APRIL 20, 1998

160-98

160-98

M.L.E., on behalf of minor children, D.M., D.L.H., AND D.E.H.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

APRIL 20, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5215-97

Agency Dkt. No. 131-4/97

M.L.E., on behalf of minor children,
D.M., DL.H. and D.E.H.,
Petitioner,

v.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,
Respondent.

M.L.E., petitioner, *pro se*

JOANNE L. BUTLER, Esq., for respondent
(Schenck, Price, Smith & King, attorneys)

Record Closed: March 3, 1998 Decided: March 10, 1998

BEFORE **DIANA C. SUKOVICH**, ALJ:

Petitioner filed a letter petition with the state Department of Education (DOE) on April 16, 1997, regarding action by respondent to remove petitioner's three grandchildren, of whom she is legal guardian, from the school district. Respondent's action was based upon a conclusion that petitioner and her grandchildren were no longer domiciled in the district. Respondent filed an answer to the petition on April 30,

1997, and the DOE transmitted the matter to the Office of Administrative Law on May 7, 1997 for determination of a contested case pursuant to *N.J.S.A.* 52:14F-1 to 13.

Conferences were conducted throughout the proceedings. Various scheduled hearing dates were adjourned at the requests of the parties.

The parties ultimately reached a resolution of the matter and filed an executed Stipulation of Settlement and Mutual Dismissal of Petition and Counterclaim on March 3, 1998, on which date the record was closed. Attached herewith is a copy of the stipulation.

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

1. The parties have voluntarily agreed to a settlement of this matter.

2. The agreement fully disposes of all issues in controversy and is consistent with the law.

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

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

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

3/16/98
DATE

DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

3/16/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 16 1998
DATE

OFFICE OF ADMINISTRATIVE LAW

cb

SCHENCK, PRICE, SMITH & KING
Attorneys at Law
10 Washington Street
P. O. Box 905
Morristown, New Jersey 07963-0905
(201) 539-1000
Attorneys for Respondent South Orange/
Maplewood Board of Education

M.L.E. Petitioner, v. BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DKT NO. EDU 5215-97 Agency Ref. No. 131-4/97 **STIPULATION OF SETTLEMENT AND MUTUAL DISMISSAL OF PETITION AND COUNTERCLAIM**

Petitioner Mary Louise Eagle and Respondent/Counterclaimant Board of Education of the School District of South Orange and Maplewood herein stipulate as follows:

1. This settlement is being made without any admission of liability or wrongdoing on the part of any party and is for the purpose of amicably resolving this dispute. The parties specifically deny any wrongdoing or liability relating to any other party's claim.

2. The parties waive any and all claims which were or could have been asserted in the within action or any other action, including attorneys fees and damages pursuant to any federal or State constitutional or civil rights claims, and specifically release the other party from any claims arising out of or related to these claims.

3. The pupils D.M., and D.H. will be permitted to continue to attend District schools so long as they satisfy the statutory criteria set forth in N.J.S.A. 18A:38-1, et seq.

4. As a result of the foregoing, Petitioner hereby withdraws the Petition filed pursuant to N.J.S.A. 18A:38-1, with prejudice, and Respondent/Counterclaimant hereby withdraws its Counterclaim pursuant to N.J.S.A. 18A:38-1, with prejudice.

MARY LOUISE EAGLE

BOARD OF EDUCATION OF SOUTH ORANGE AND MAPLEWOOD

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OAL DKT. NO. EDU 5215-97
AGENCY DKT. NO. 131-4/97

M.L.E., on behalf of minor children, D.M., D.L.H., AND D.E.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

APRIL 20, 1998
DATE OF MAILING APRIL 20, 1998

161-98

R.N., on behalf of minor, S.A.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HADDON HEIGHTS, CAMDEN COUNTY AND BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent challenged Board's residency determination based on his possession of a custody order for minor child, S.A.H.

ALJ concluded that petitioner did not show that the requirements of *N.J.S.A.* 18A:38-1(b), the "affidavit student" provision were met; thus, S.A.H. was not entitled to a free, public education from the District.

Commissioner affirmed the initial decision with modification. Commissioner noted that once petitioner became the legal guardian of S.A.H., the appropriate inquiry for the Board was whether S.A.H. and petitioner were domiciliaries of the District, pursuant to *N.J.S.A.* 18A:38-1a. Therefore, the matter should not be reviewed as a petition filed pursuant to *N.J.S.A.* 18A:38-1b(1). Moreover, when petitioner brought his initial Petition of Appeal before the Commissioner, prior to petitioner's obtaining the custody order, it was determined that S.A.H. lived with her mother outside of the District. Thus, without evidence of S.A.H. being domiciled in the District, the Commissioner determined S.A.H. was not entitled to a free public education on the District pursuant to *N.J.S.A.* 18A:38-1a.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2443-97

AGENCY DKT. NO. 14-1/97

R.N. ON BEHALF OF MINOR, S.A.H.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF HADDON HEIGHTS, CAMDEN COUNTY AND BOARD OF EDUCATION OF THE BOROUGH OF LAWSIDE, CAMDEN COUNTY,

Respondent.

No appearance by or on behalf of petitioner

Harvey C. Johnson, Esq., for respondent Board of Education of the Borough of Lawside

No appearance on behalf of respondent Board of Education of the Borough of Haddon Heights

Record Closed: January 16, 1998 Decided: March 2, 1998

BEFORE **KATHRYN A. CLARK**, ALJ:

PROCEDURAL HISTORY

On October 15, 1996, the Commissioner of the Department of Education entered an order approving the initial decision of this Administrative Law Judge (ALJ) in EDU 4457-96, which was the appeal of R.N. of the determination of residency of S.A.H.

On October 28, 1996, S.A.H. was removed from Haddon Heights High School and placed in Sterling High School. To the best of the information available to this bench and to respondent's attorney, S.A.H. has not attended Sterling High School, or Haddon Heights High School since then.[1]

On October 31, 1996 R.N. obtained an Order of Guardianship from Camden County Superior Court. Lawnside took the position that guardianship alone was insufficient to establish residency for the purposes of *N.J.S.A.* 18A:38-1(b).

On several occasions between October 31 and November 12, 1996, R.N. went to the County Superintendent of Schools' office to try to have S.A.H. enrolled through the Lawnside Board of Education in Haddon Heights High School, but the County Superintendent of Schools consistently refused, stating that S.A.H. should be enrolled in Sterling High School instead (in her mother's school district).

On November 12, 1996, a clerk, Annis Douglas, at the Lawnside Board of Education issued to R.N. a voucher for S.A.H.'s education at Haddon Heights High School. The counsel for respondent said that this action of the clerk was unauthorized and the voucher was issued in error. The voucher was immediately countermanded by the Superintendent, Ms. Payne, as soon as she learned of it, and Ms. Payne said that she notified R.N. that the voucher was withdrawn, and called Haddon Heights High School to tell them that they should not accept the voucher. Superintendent Payne said that R.N. had mislead her clerk into issuing the voucher.

[1] This will mean that there is no current issue of accrued tuition, beyond that already granted by the Commissioner of Education in his decision of October 15, 1996. Counsel for the school district stated that petitioner had already been billed for that tuition.

The Lawnside Board of Education meet on November 14, 1996, and considered the matter of the voucher. At this Board of Education meeting, R.N. was represented by Robert J. Bowman, Esq., of Camden Regional Legal Services. As R.N. had legal representation at that time, Lawnside's counsel dealt directly with R.N.'s counsel, Mr. Bowman, regarding the voucher.[2] On November 14, 1996, the Lawnside Board of Education determined that the voucher had been issued in error, and had been properly withdrawn. No appeal was taken of this action.

On December 27, 1996, R.N. filed a petition with the Department of Education, against the Borough of Haddon Heights. The petition was accompanied by documents (mortgage papers, doctor's note) and the custody order from Camden County Superior Court which granted R.N. custody of S.A.H[3]. R.N. again asserted that he met the standards of *N.J.S.A.* 18A:38-1(b), which allows for the education in district of a child who is kept in the home of another who is supported by that domiciliary as if that child were the domiciliary of the school district's own child.

The Commissioner of the Department of Education determined this matter to be a contested case, and ordered the joinder of the Borough of Lawnside.

On March 26, 1997, the Commissioner of the Department of Education transmitted this matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case, pursuant to *N.J.S.A.* 52: 14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.[4]

A hearing was scheduled for October 23, 1997.

On February 24, 1997, R.N. requested discovery of Lawnside. This discovery was provided by Lawnside in a letter of March 19, 1997.

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[2] It is not alleged that Mr. Bowman obtained the voucher, or mislead the assistant to the Board secretary into issuing the voucher.

[3] The voucher was not included in petitioner's appeal.

[4] R.N. obtained the services of Robert J. Bowman, Esq., of Camden Regional Legal Services. Mr. Bowman entered an appearance on behalf of R.N. with the Department of Education on November 15, 1996. Mr. Bowman withdrew his appearance by letter to the Department of Education dated December 12, 1996.

On April 3, 1997, Lawnside sent interrogatories to R.N.

On August 27, 1997, Lawnside informed this Administrative Law Judge (ALJ) that it had not received an answer to its interrogatories.

On September 8, 1997, this ALJ wrote to R.N. to remind him that the hearing date of October 23, 1997 was approaching, and that he was to answer the interrogatories, and that, if he had any difficulties in responding to the interrogatories, he should advise this ALJ.

On October 9, 1997, Lawnside wrote to this ALJ to advise that it had not received answers to its interrogatories, and requested that the hearing scheduled for October 23, 1997 be continued until that discovery was produced, and, in the alternative, moved for dismissal.

On October 13, 1997, R.N. sent a letter to this ALJ which mistakenly stated that the ALJ's letter of September 8 had been directed to Lawnside, that no response has been provided, and asked that the hearing scheduled for October 23, 1997 be continued until that discovery was produced.[5] No indication was given to R.N. that a "continuance"[6] or an adjournment had been granted, rather, R.N. was informed *in writing* that his request had been denied and that the hearing would be held as scheduled on October 23, 1997. R.N. was informed that his (R.N.'s) failure to respond to the school district's request for discovery was insufficient grounds upon which to base a request for an adjournment.

On October 15, 1997, this ALJ wrote to the parties that the hearing of October 23, 1997 would go on as scheduled, that discovery issues would be resolved at hearing, and that the requests for a continuance or dismissal were not granted.

On October 23, 1997, petitioner did not appear for his scheduled hearing.

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[5] As of that time, the only unanswered discovery request was Lawnside's request of R.N. R.N.'s discovery request had been answered by Lawnside on March 19, 1997.

[6] As the hearing had not yet been opened, the proper request would have been for an adjournment. The petitioner's letter of October 13, 1997, in which he asked for a continuance, was viewed as if it had been a request for adjournment. His request for adjournment or continuance was denied in the letter of October 15, 1997.

At 4:30 p.m. on October 23, R.N. called this ALJ's office to say that he thought that because he had requested a continuance, it would automatically be granted. R.N. was advised that he was incorrect in his assumption.

Because of the leniency afforded to pro se petitioners and because of R.N.'s possible confusion, R.N. was granted another hearing date, although he had made no request for a new hearing date, and over the objections of Lawnside. On October 29, 1997, petitioner was sent notice of the date (December 18, 1997), place (Office of Administrative Law, Building 9, Quakerbridge Plaza, Quakerbridge Road, Trenton, NJ), and time (9:00 a.m.) of the rescheduled hearing. In this notice, a due date of November 7, 1997 was set for R.N.'s response to Lawnside's request for discovery (interrogatories).

On November 7, 1997, R.N. sent Lawnside not a response to their interrogatories, but a list of case citations, and a copy of the pupil permit signed by Annis Davis.

On December 5, 1997, this ALJ sent R.N. a Letter Ruling and Order stating that his response of November 7 was inadequate. R.N. was ordered to provide a full response to the interrogatories by December 12, 1997. R.N. was also advised that the rescheduled hearing of December 18, 1997, would proceed, and that the hearing date was preemptory, and that no adjournments would be granted. The Letter Ruling and Order was subject to review by the Commissioner of Education, and no appeal was filed.

On December 12, 1997, R.N. submitted to Lawnside a copy of his deed, mortgage, and sewer tax bill, and another copy of the pupil permit signed by Annis Davis.

On the rescheduled date, place and time, there was no appearance by or for petitioner, and no telephone call or letter has been received, to the date of this Initial Decision, explaining petitioner's absence.

This ALJ opened the hearing in petitioner's absence, specifically to take testimony on the pupil voucher.

DISCUSSION OF THE TESTIMONY

The first witness to testify was J. Joyce Payne, Superintendent, who testified that Annis Douglas, who is the assistant to the Board of Education's secretary, worked in her office in a secretarial/clerical position. Ms. Payne said that, on November 12, 1997, Ms. Douglas was mislead into issuing a voucher for S.A.H. to attend Haddon Heights High School at Lawnside's expense. Ms. Payne said that the voucher was issued in error, and she immediately withdrew the voucher upon hearing of it. Ms. Payne learned of the issuance of the voucher on the afternoon it was issued, and called the parents and the Haddon Heights High School to notify them of the error, countermanding the voucher..

This concluded the presentation of testimony and evidence.

FINDINGS OF FACT

No evidence or testimony was presented to support R.N.'s contention that S.A.H. is entitled to a free, public education paid for by the Lawnside Board of Education. The custody order was presented in the appeal papers filed with the Department of Education, but custody alone does not establish residency.

DISCUSSION

The evidence produced by R.N. in his partial response to the interrogatories, and in his petition, prove that he, R.N., lives in Lawnside. There was never any question as to R.N.' s residence or domicile - he lives in Lawnside. The question is whether he keeps S.A.H. in his home as if she were his own child. There is still no evidence that S.A.H. lives in Lawnside. Custody does not determine where a child lives.

The statute, *N.J.S.A.* 18A:38-1(b), allows for the education in district of a child who is kept in the home of another person domiciled within the district and is supported by such other

person *gratis* as if that child were such other person's own child. "Keeping the child" and "support" are the crucial elements here, not custody alone.

CONCLUSION

R.N. has not shown that the requirements of *N.J.S.A.* 18A:38-1(b) have been met. S.A.H. is not entitled to a free, public education from the Lawnside Board of Education.

This ALJ supports the grant of interest to Lawnside, should Lawnside wish to have an order entered by Superior Court.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 2, 1998
DATE

Kathryn A. Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

3/10/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 11 1998
DATE

Barbara A. Harris
OFFICE OF ADMINISTRATIVE LAW

WITNESSES

For Petitioner:

None

For Respondent:

J. Joyce Payne, Superintendent

James Allen, District Investigator

OAL DKT. NO. EDU 2443-97
AGENCY DKT. NO. 14-1/97

R.N., on behalf of minor, S.A.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HADDON HEIGHTS, CAMDEN COUNTY AND BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm the decision of the ALJ, with modification as set forth below.

Initially, the Commissioner notes that once R.N. became the legal guardian of S.A.H., the appropriate inquiry for the Board was whether S.A.H. and R.N. were domiciliaries of the District, pursuant to *N.J.S.A.* 18A:38-1a; therefore, this matter should not be reviewed as a petition filed pursuant to *N.J.S.A.* 18A:38-1b(1), the "affidavit student" provision. In this regard, the Commissioner recognizes that the domicile of a minor child follows that of the parent or guardian having *legal control* over her, *Mansfield Twp. Board of Education v. State Board of*

Education, 101 *N.J.L.* 474, 479, 480 (Sup. Ct. 1925). Where there is no indication of fraud on the part of a petitioner, *V.H. v. Board of Education of the Township of Quinton*, 97 *N.J.A.R.* 2d (EDU) 124, 125, aff'd State Board of Education 554, and where it does not appear that the custody order is a temporary one, the custody order will be accepted on its face. *L.A. v. Town of West Orange*, 97 *N.J.A.R.* 2d (EDU) 266, 269, aff'd State Board of Education 554. Petitioner's motives for obtaining the custody order need not be determinative. (*Id.*)

However, in the instant matter, the Commissioner finds it noteworthy that petitioner failed to respond to the Board's interrogatories, despite repeated warnings, which forthrightly requested, *inter alia*, evidence that S.A.H was domiciled in the Borough of Lawnside and living with petitioner.[1] Although served with the interrogatories by letter dated April 3, 1997, and required to respond within 15 days, petitioner failed to do so.[2] Additionally, petitioner *twice* failed to appear at the scheduled hearings, despite fair notice of the dates. Thus, the record is devoid of evidence, save for petitioner's bare allegation in his Petition of Appeal, that S.A.H., in fact, lived with petitioner at the relevant time period in question. (Petition of Appeal, December 27, 1996)[3] Moreover, the Commissioner is mindful that, when petitioner brought his initial Petition of Appeal before him, prior to petitioner's obtaining the custody order, it was determined that

> [t]here seems to be no dispute in this matter that S.A.H. lives with her mother, B.N. in Stratford, which is not in the Lawnside School District. R.N. has admitted to this, in his [petition]. B.N. also states this in her submission. *R.N., on behalf of minor, S.A.H., v.*

[1] It is noted that, to the extent the Board's interrogatories also placed emphasis on the financial support which petitioner provided to S.A.H., such inquiries are relevant to an analysis under *N.J.S.A.* 18A:38-1b(1), the affidavit student provision. An analysis under *N.J.S.A.* 18A:38-1a, however, does not necessarily ascribe significance to financial circumstance.

[2] Petitioner merely submitted, on November 7, 1997, a list of case citations and a copy of a pupil permit, which were non-responsive. (Initial Decision at p. 5)

[3] At the time petitioner filed the Petition of Appeal, S.A.H. was a senior. The Board asserts, however, that S.A.H. did not finish the 1996-97 school year in its District. (Board's Letter to Judge Clark, October 27, 1997 at p. 2)

Board of Education of the Borough of Lawnside, decided October 15, 1996, Slip. Op. at p. 2.

Thus, under these particular circumstances, the Commissioner cannot be persuaded that petitioner has demonstrated by a preponderance of credible evidence that S.A.H. was, or is, entitled to a free public education in the Board's District pursuant to *N.J.S.A.* 18A:38-1a.

Accordingly, the initial decision of the ALJ is affirmed, as modified. The within Petition of Appeal is hereby dismissed.[4]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[4] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

APRIL 20, 1998
DATE OF MAILING APRIL 20, 1998

162-98

IN THE MATTER OF THE TENURE	:	
HEARING OF FRED ENGEL,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

SYNOPSIS

District certified tenure charges of unbecoming conduct against respondent tenured teaching staff member based on his having pled guilty to Disturbing Results of an Election, in violation of *N.J.S.A.* 18A:14-65, wherein he admitted knowingly interfering with the orderly conduct of the Newark School Board Election held on April 7, 1992, which resulted in the casting of illegal votes.

Commissioner determined that respondent's actions of fraudulently casting and aiding others in the casting of illegal votes were, standing alone, sufficient for the establishment of unbecoming conduct on behalf of a teaching staff member. However, having considered the proven charges and all the remaining factors, the Commissioner concluded that respondent's conduct, although egregious and unprofessional, did not, based upon the unique circumstances existing in this matter, warrant his dismissal from his tenured position. Commissioner ordered respondent to suffer a seven-month unpaid suspension, which period shall include the 120-day unpaid suspension already served, and forfeiture of his increments for the 1998-99 and 1999-2000 school years. Commissioner directed that a copy of this decision be forwarded to the State Board of Examiners, which is considering action against respondent's certificate based on the criminal conduct underlying the instant matter, and directed that the within penalty be in addition to any suspension which that Board may ultimately choose to impose.

AGENCY DKT. NO. 554-11/96

IN THE MATTER OF THE TENURE	:	
HEARING OF FRED ENGEL,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

For Petitioner, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Cherie L. Maxwell, Esq.)

For Respondent, Balk, Oxfeld, Mandell & Cohen (Sanford R. Oxfeld, Esq.)

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education on November 21, 1996, through the District's filing of tenure charges of unbecoming conduct against respondent.[1] Simultaneously with the submission of the tenure charges, the District submitted a Motion for Summary Decision seeking a judgment of forfeiture of respondent's public employment pursuant to *N.J.S.A.* 2C:51-2, as a result of his guilty plea to Disturbing Results of an Election, in violation of *N.J.S.A.* 18A:14-65 and *N.J.S.A.* 2C:2-6, wherein he admitted to knowingly interfering with the orderly conduct of the Newark School Board Election held on April 7, 1992, which resulted in the casting of illegal votes. By letter dated November 21, 1996, respondent was accorded 20 days within which to file an answer to the

[1] It is noted that the District initially filed charges in this matter on or about November 6, 1996, and by letter dated November 20, 1996, withdrew those charges, requesting their return to the District, and concurrently filed the within charges.

tenure charges and the motion for summary decision. Respondent's answer to the tenure charges was filed on November 27, 1996[2], and his response to the District's summary decision motion was filed on January 3, 1997. Upon review of the parties' papers with respect to the District's motion for summary forfeiture of respondent's employment, the Commissioner issued a letter decision on January 27, 1997, advising that pursuant to *N.J.S.A.* 2C:51-2, as amended by *P.L.* 1995, *c.* 250, he did not have jurisdiction to entertain applications for forfeiture of public employment and he, therefore, denied the District's motion for summary ruling, reminding the parties that there was, however, no preclusion to the District moving for summary decision with respect to any aspect of the pending tenure matters which were properly before him for adjudication. Subsequently, on March 5, 1997, the District filed a Motion for Summary Decision on the tenure charges of unbecoming conduct against respondent, seeking his removal from the District.[3] Respondent's reply to the motion was received on March 24, 1997, with the District's response to such reply being submitted on April 1, 1997. On April 22, 1997, respondent filed a motion to compel the District to return him to active salary status effective March 19, 1997. The

[2] By letter dated December 2, 1996, respondent was reminded that his response to the District's summary decision motion, which was not included with his answer, was due by December 13, 1996. On December 3, 1996, respondent requested an additional 30 days within which to respond to this motion, and was advised by letter dated December 6, 1996, that, in view of the fact the applicable regulations would have provided respondent two additional 10-day periods had he not filed a timely answer, and in consideration of the year-end holiday schedule, he would be accorded until January 6, 1997, or an additional 24 days, within which to file his answer to the motion.

[3] By letter dated March 10, 1997, respondent challenged the Commissioner's authority to entertain a motion for summary decision here, contending that, pursuant to *N.J.A.C.* 1:1-12.1 *et seq.*, when a case has not yet been assigned to a judge, such motions may be filed with the Clerk. He maintains that there is nothing in the regulations which permit the Commissioner to entertain a motion for summary decision and, therefore, the within motion has been brought prematurely and should, rather, be handled by the Administrative Law Judge assigned to the case. The Commissioner observes that unless and until a matter is transmitted to the Office of Administrative Law, it is governed by the regulations of this agency, specifically, *N.J.A.C.* 6:24-1.1 *et seq.* Given that *N.J.A.C.* 6:24-1.13 specifically contemplates summary judgment motions before the Commissioner, respondent's contention in this regard is without merit and will not be further addressed herein. Respondent's letter alternatively urged that, if it were determined that this motion was properly before the Commissioner, he be provided an additional period of time over and above the 10 days previously accorded him to respond to the District's motion. By letter dated March 14, 1997, respondent was advised that his objection with respect to the premature submission of motions was more appropriately addressed in reply submissions and, if so raised, would be decided by the Commissioner in his final decision in this matter. Concurrently, respondent's request for additional time to respond to the District's motion was extended to March 24, 1997 (an additional 8 days) with the proviso, as was urged by the District, that such extension would be deemed a delay in proceedings at respondent's request, and would operate, pursuant to *N.J.S.A. 18A:6-14*, to concomitantly defer respondent's resumption of salary during this period.

District's reply to this motion and respondent's response to the reply were filed May 5, 1997 and May 7, 1997, respectively.

BACKGROUND

The uncontroverted material facts advanced by the District in this matter state:

On or about April 7, 1992, Fred Engel, a tenured teacher employed by the Newark School District, assisted others in the casting of illegal votes in the school board election. By his own admission, he went inside the polling place and participated in the illegal voting which occurred at the polling place. See Appendix of Evidence 3, Transcript of Pleas, p. 12, lines 2-5. Mr. Engel acknowledges that he was aware that the purpose of this conduct was to cast illegal votes and secure the election of John Mavilla. *Id.* at p. 12, lines 4-5. By his own admission, he was aware this conduct was wrong. *Id.* at p. 12, line 10.

As a result of the behavior described above, Mr. Engel was indicted on September 28, 1995 for the following crimes: Conspiracy (*N.J.S.A.* 2C:5-2); Official Misconduct (*N.J.S.A.* 2C:2-6; *N.J.S.A.* 2C:30-2); Disturbing Results of an Election (*N.J.S.A.* 2C:2-6; *N.J.S.A.* 18A:14-65); and Illegal Voting (*N.J.S.A.* 18A:14-78). See Appendix of Evidence 1.

Mr. Engel subsequently pled guilty to Count four of the Indictment, involving violations of *N.J.S.A.* 18A:14-65; *N.J.S.A.* 2C:2-6. See Appendix of Evidence 2. The indictment states that Mr. Engel did knowingly interfere with the orderly conduct of the Newark School Board Election held on April 7, 1992 by casting and/or aiding others in the casting of illegal votes.

On October 17, 1996, tenure charges for unbecoming conduct were filed against Mr. Engel, by Petitioner, State-Operated School District of Newark. A response dated October 21, 1996 was submitted on his behalf.

(District's Brief in Support of Summary Decision, March 4, 1997, at p. 1)

The instant tenure charges were certified by the State-operated District on November 18, 1996, and filed with the Commissioner on November 21, 1996.

POSITION OF THE PARTIES

MOTION FOR RESUMPTION OF SALARY

Respondent

Respondent states that, pursuant to *N.J.S.A.* 18A:6-14[4], he was entitled to be returned to active salary status as of March 19, 1997. He reasons that the charges against him were processed as of November 18, 1996, and he was suspended without pay effective November 19, 1996, commencing the running of the 120-day time line specified in statute, which period, respondent argues, terminated on March 18, 1997. As such, he contends that he was statutorily entitled to be returned to salary status on March 19, 1997, the 121st day. (Respondent's Motion to Return to Active Salary Status, at p. 2)

He advances that the District's position that resumption of his salary should be delayed by 33 days due to his requested 26-day extension to file his response to the District's forfeiture motion in November 1996, and his 7-day requested extension for response to the Motion for Summary Decision on the tenure charges in March 1997, is meritless. (*Id.*) In this regard, respondent initially asserts that the extension granted him to reply to the forfeiture motion was not predicated on a delay under the 120-day rule, as envisioned by statute. (*Id.*) In support of this contention, he notes that, although the within charges were certified to the Commissioner on November 18, 1996, to date, the case has not been transmitted to the Office of Administrative Law (OAL), assigned to a judge or scheduled for hearing. As such, even conceding that he

[4] The relevant portion of this statute specifies "Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made.***"

requested and was granted 24 additional days to file his responsive brief to the District's forfeiture motion, which motion was ultimately denied by the Commissioner on January 27, 1997, he maintains that all of this time was within the 120-day period of his suspension and, as such, he queries "what was delayed?" "The hearing, which has not been scheduled, could not possibly have been delayed; the 120 day suspension without pay was not affected because the Commissioner's decision, even with the extension, was filed and decided within the 120 day period." (*Id.* at pp. 3-4) Therefore, he proffers, petitioner's argument that his salary reinstatement be extended 24 days is insupportable.

Likewise, respondent argues, the "alleged 'delay'," as a consequence of the 7-day extension for response to the summary decision motion on the charges is also insupportable. (*Id.* at p. 4) Notwithstanding that the extension was granted only under the condition that respondent agree that resumption of his salary be "concomitantly deferred," he maintains that he "implicitly agreed to those terms" because he had no viable option. (*Id.*) Again, he argues, as there is no hearing scheduled, there was no delay. Alternatively, he asserts that if the District is alleging that the "seven day delay" was related to the Commissioner's ability to decide this matter, this contention is also incorrect, respondent reasons, in that his 120-day suspension without pay expired on March 18, 1997, and, consequently, any delay must be measured as of March 19, 1997. (*Id.*) As such, respondent argues that he can be charged with a "delay" no greater than five days, *i.e.*, March 19, 1997 to March 24, 1997. (*Id.*)

Respondent, therefore, requests that he be reinstated to salary status, complete with related emoluments effective March 19, 1997 or, alternatively, if a delay attributable to him is found, *supra*, reinstatement be ordered as of March 24, 1997.

State-operated District

In reply, the District urges that, pursuant to *N.J.S.A.* 18A:6-14, it is clear that delays in tenure proceedings which are attributable to respondent are excluded from the period of time for which he is entitled to pay, (District's Letter Brief in Opposition to Respondent's Motion to Return to Active Salary Status as of March 19, 1997, at p. 3) buttressing such assertion with the citation of three Commissioner cases where individuals were not eligible for salary for 17 days, 23 days, and one month under what, it asserts, were similar type circumstances as exist here. It advances that the rationale for such a conclusion is founded on "basic equitable principles." (See *Ott v. Hamilton Twp. Bd. of Educ.,* 160 *N.J. Super.* 333 (App. Div. 1978), *cert. den.,* 78 *N.J.* 336 (1978).) (*Id.* at pp. 3-4)

Here, it proffers, respondent sought and received extensions of 26 days and 7 days, respectively, within which to reply to the District's motions, for a 33-day total delay attributable to his actions. (*Id.*) It further maintains that issues of whether such delays occurred during respondent's 120-day suspension period and/or prior to the scheduling of a hearing are of no importance or consequence whatsoever. Therefore, the District reasons that, as respondent is not entitled to salary for this period, it is entitled to extend his 120-day suspension without pay term by these additional days. (*Id.*)[5]

SUMMARY DECISION MOTION

State-operated District

The District advances that the within matter is clearly ripe for summary decision arguing

> [s]ummary decision should be granted if the pleadings and affidavits "show that there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law." *N.J.A.C.* 1:1-12.5; *Contini v. Bd. of Educ. of Newark,* 286 *N.J. Super.* 106, 121 (1995). The court must look to

[5] The District's submission reflects that respondent was returned to active salary status as of April 23, 1997, which reflects the additional 33-day delay which it argues herein was attributable to respondent.

> the evidentiary materials presented, viewed in a light most favorable to the non-moving party, and determine whether there is sufficient evidence to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. *Id.* at 122 (quoting *Brill v. Guardian Life Ins. Co.,* 142 *N.J.* 520, 523 (1995)) (District's Motion for Summary Decision, March 4, 1997, at p. 2)

Here, it proffers, the absence of genuine issues of material fact is fully evident in that respondent's conduct underlying these charges is undisputed. Respondent, a teacher whose position requires setting a positive example for his students, admittedly, knowingly interfered with the conducting of the school election held on April 7, 1992, by going to the polling place and assisting in illegal voting, in contravention of *N.J.S.A.* 18A:14-65 and *N.J.S.A.* 2C:2-6, fully aware that the purpose of this endeavor was to ensure that a particular candidate was elected. (*Id.* at p. 4) It maintains that such behavior on the part of a teaching staff member is unbecoming conduct must be the conclusion of any rational factfinder. (*Id.* at p. 3) Moreover, it observes that the Commissioner has long taken the position that, because of the influential position they occupy, criminal conduct of teachers is particularly egregious. In *In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson*, 1974 *S.L.D.* 97, 98-99, the Commissioner stated

> Teachers are public employees who hold positions demanding public trust, and in such positions, they teach, inform, and mold habits and attitudes and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully violates the law, as in this matter, and consequently violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner. (*Id.* at p. 3)

The District next advances that it is well-established that "unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant," *In re Fulcomer*, 93 *N.J. Super.* 404, 421 (App. Div. 1967) (*id.* at p. 4), particularly when the incident at issue is also a

criminal violation and the proffered evidence is a judgment of conviction supplemented by other legally competent proofs such as the indictment, transcripts of the pleas and sentencing and the respondent's own statements as to his culpability, as is the case here. See *In the Matter of the Tenure Hearing of Kenneth Henderek, School District of the Township of East Brunswick*, 94 *N.J.A.R.* 2d (EDU) 268, at 275. See also *Matter of Tanelli,* 194 *N.J. Super.* 492, at 497, 498 (1984). (*Id.)* The District urges that it be granted summary decision as a matter of law in this case as the uncontested proofs advanced clearly constitute sufficient competent evidence to support a finding of conduct unbecoming a teacher warranting respondent's removal from his position.

Respondent

Respondent contends that summary decision is inappropriate here in that there are unresolved factual issues as to whether respondent's guilty plea to a misdemeanor rises to the level of unbecoming conduct. (Respondent's Brief in Opposition to the District's Motion for Summary Decision, March 18, 1997, at p. 7) He further proffers, "even assuming[,] *arguendo*, some degree of conduct unbecoming, genuine issues exist regarding the nature of the penalty, if at all, to be imposed on respondent." (*Id.)* Respondent cites a number of cases decided by the Commissioner for the proposition that the term "unbecoming conduct" is amorphous, having been defined in "various ways" and resulting in varying degrees of penalty after the consideration of all mitigating circumstances. (*Id.* at p. 8) He distinguishes this matter from *Henderek, supra,* relied on by the District for the proposition "that a conviction warrants a termination," reasoning that this consequence occurred only after Henderek had received a full hearing, as required by *N.J.S.A.* 18A:6-10, and his mitigating circumstances were fully presented and considered. (*Id.* at p. 11) Respondent, therefore, advances that, at a very minimum, pursuant to *N.J.S.A.* 18A:6-10, "there *must* be a hearing to determine penalty," where he will be permitted to present witnesses

and to enter evidence on his own behalf and for this reason, standing alone, summary decision cannot be granted to the District. (emphasis in text) (*Id.* at p. 12)

DETERMINATION

Upon careful review of the record[6] and the advanced arguments of the parties, the Commissioner initially concurs with respondent that, under the circumstances existing in this matter, he was entitled to be returned to active salary status in March 1997. Notwithstanding this conclusion, the Commissioner determines, for the reasons outlined below, that the effective date of such restoration is March 26, 1997, rather than March 19, 1997 or March 24, 1997, as advanced by respondent.

Preliminarily, in his consideration of what appear to be respondent's two primary arguments in support of his motion, the Commissioner is compelled to discount them both. Inasmuch as the two instances of alleged delay occasioned by respondent herein were in connection with the filing of his responses to summary decision motions filed by the District for the Commissioner's consideration, his assertion that, because this case had not been set down for a hearing before an ALJ there was no "delay" in the proceedings, is specious. Likewise, untenable is his apparent contention that the timing of any delay, *i.e.,* whether occurring during the course of or after the expiration of the 120-day time period, has any impact whatsoever on the operation of this statutory provision, as its clear language makes no such distinction.

Irrespective of the dubious nature of respondent's proffered arguments on this issue, the Commissioner cannot concur with the District's position that the two instances of delay which occurred in this matter warrant a 33-day extension of respondent's unpaid suspension,

[6] It is noted that the District's submissions in this matter include an "Appendix of Evidence" containing Indictment No. 95-09-0308, Superior Court of New Jersey, Essex County, Law Division - Criminal; Judgment of Conviction, Superior Court of New Jersey, Essex County, Law Division - Criminal; Transcript of respondent's Pleas, Superior Court of New Jersey, Essex County, Law Division - Criminal, dated June 26, 1996; and Transcript of respondent's Sentencing, Superior Court of New Jersey, Essex County, Law Division - Criminal, dated September 5, 1996. Also included in the record is a copy of a sworn statement given by respondent to the Essex County Prosecutor's Office on April 20, 1995, with respect to his involvement in this matter.

rather, he concludes that only seven days of this period can be charged against respondent's salary entitlement computation, finding that such a result is dictated by the distinguishable nature of the two time periods under review. First, as to respondent's submission in connection with the District's simultaneous filing of tenure charges and its summary decision motion for forfeiture in November 1996, such response, pursuant to *N.J.A.C.* 6:24-5.3, was to be made in accordance with the regulatory provisions specified in *N.J.A.C.* 6:24-1.4 which on its face states

> Failure to answer within the 20 day period from receipt of service shall result in a notice to the respondent directing an answer within 10 days of receipt. Further failure to respond shall result in a second notice which shall inform the respondent that unless an answer is received within 10 days of the receipt of said notice, each count in the petition of appeal shall be deemed admitted and the Commissioner shall render a decision by way of summary judgment. (*N.J.A.C.* 6:24-1.4(e))

Moreover, *N.J.A.C.* 6:24-1.4(a) additionally specifies that "[u]pon written application by a party the Commissioner may extend the time for answer. Such application must be received prior to the expiration of the 20 day period." Here, while filing his Answer to the tenure charges on November 27, 1996, respondent on December 3, 1996, well within the allotted 20-day due date for his combined submission, requested and was granted a 24-day extension of time within which to reply to the motion portion of the District's filing, and did so in accordance with such granted extension. In that the applicable regulatory provisions governing this particular submission clearly contemplate the granting of an extension of time within which to file, the Commissioner cannot find justification for terming this granted extension a "delay" within the intendment of the statute and, therefore, ascribing penalty to respondent for this period of time.

On the other hand, the response schedule for the District's summary decision motion on the charges in March 1997, was established by the March 6, 1997 letter of the Director, Bureau of Controversies and Disputes, rather than by regulation, and unequivocally

granted respondent 10 days for his response.[7] Moreover, in reply to his request for extension of this period, respondent was specifically advised that such extension could only be granted with the understanding and agreement that his resumption of salary "shall be concomitantly deferred."[8] (See Director's March 14, 1997 letter.) Under these circumstances, respondent cannot now claim absolution from the consequences of the delay he occasioned.

In reviewing the appropriateness of summary decision in this matter, the Commissioner concludes that the District's motion for a finding of unbecoming conduct must be granted as he finds no outstanding issues of material fact herein and, therefore, the District is entitled to prevail on the truth of its charges as a matter of law. Notwithstanding respondent's urging to the contrary, the record reveals that his submissions to the record present no issue of material fact with respect to the conduct underlying his conviction but, rather, in actuality, challenge the conclusions to be drawn from this conduct and its effect on his employment under the tenure laws. As recognized by the Commissioner in *In the Matter of the Tenure Hearing of Andrew Phillips, School District of the Borough of Roselle, Union County*, decided by the Commissioner March 20, 1997, "'[i]t is well-established that where no disputed issues of material fact exist, an administrative agency need not hold an evidential hearing in a contested case.' *Frank v. Ivy Club*, 120 *N.J.* 73, 98, citing *Cunningham v. Dept. of Civil Service*, 69 *N.J.* 13, 24-25 (1975). 'Moreover, disputes as to the *conclusions to be drawn from the facts, as opposed to the facts themselves, will not defeat a motion for summary judgment.*' *Contini v. Board of Education of Newark*, 96 *N.J.A.R.* 2d (EDU) 196, 215, citing *Lima & Sons, Inc. v. Borough of Ramsey*, 269 *N.J. Super.* 469, 478 (App. Div. 1994)***." (emphasis in text) (Slip Opinion at pp. 10-11) Here, respondent engaged in a course of conduct intended to interfere with

[7] In that the expiration of this allotted period would occur on a Sunday, respondent's submission was due on the next business day, March 17, 1997.
[8] This response was filed with the Commissioner on March 24, 1997.

the conducting of a school election and, subsequently, admitted that he did so knowingly and willingly. The Commissioner determines that respondent's actions of fraudulently casting and aiding others in the casting of illegal votes is, standing alone, sufficient for the establishment of unbecoming conduct on behalf of a teaching staff member. As such, the Commissioner can find no justification for the expenditure of scarce time and resources to conduct a plenary hearing, as he determines that the undisputed conduct giving rise to respondent's conviction amply establishes the District's charges. See *In the Matter of the Tenure Hearing of Robert R. Vitacco, School District of the Borough of Lincoln Park, Morris County*, decided by the Commissioner March 24, 1997.

As to the evaluation/determination of the appropriate penalty to be imposed in this matter, the Commissioner is mindful of the District's legitimate concern over a situation where tenured teaching staff, who as role models for their pupils and holders of the public trust must be held to the highest standards of good conduct, are known to have been convicted of behavior that is both illegal and, at least facially, connected to their school employment. However, in considering whether to dismiss an individual from tenured employment, the Commissioner must also consider that individual's prior record in the District, the nature and gravity of his offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation and the harm or injurious effect which his conduct may have had in the maintenance of discipline and the proper administration of the school system. *In re Fulcomer*, 93 *N.J. Super.* 404, 421-22 (App. Div. 1967). Nonetheless, the Commissioner rejects respondent's claim of entitlement to a hearing in order to present such mitigating factors *in person.* He notes that respondent's submission to the record contains his four-page affidavit which specifically addresses his more than 27 years of successful service in the District and other mitigating factors, and is accompanied by 23 letters of support from colleagues, administrators, and community members.

A review of these comprehensive documents persuades the Commissioner that a hearing for the limited purpose of receiving additional evidence with respect to the assignment or mitigation of penalty is unnecessary, as a personal presentation of the extensive mitigating factors presented would serve to make no appreciable contribution to his consideration of the material.

Although in no way minimizing the extreme seriousness of this offense, the Commissioner, likewise, cannot ignore respondent's successful long history in the District without prior incident and all of the other mitigating factors which he has presented. Also particularly compelling was respondent's detailing of the pressure which he felt was placed on him to cooperate in this matter by persons in positions of influence and his very real fear of serious repercussions which might inure to him if he refused to do so. In this latter regard, the Commissioner is keenly aware of the deficiencies, irregularities and overall negative atmosphere which existed in the Newark School District at the time of respondent's actions, which situation ultimately necessitated the establishment of a State-operated school district in July 1995. While in no way serving as justification for respondent's criminal conduct, the circumstances under which such conduct occurred cannot be ignored by the Commissioner in determining the appropriate penalty to be assessed in this matter. Additionally, the Commissioner notes that the Superior Court of New Jersey, Essex County, Law Division, Criminal, having considered respondent's presentencing report and mitigating circumstances, imposed a penalty of two year's probation, $500 fine, $50 VCCB and 120 hours of community service, under a statute which permitted imprisonment.

Having considered the within charges and all of the remaining factors, therefore, the Commissioner concludes that respondent's conduct, although egregious and unprofessional, does not, *based upon the unique circumstances existing in this matter*, warrant his dismissal from his tenured position. Notwithstanding, he finds it necessary and appropriate to impress upon this

respondent and other individuals, through imposition of a very substantial penalty, the seriousness of such conduct and the degree to which it will not be tolerated in the school environment.

Accordingly, the Commissioner directs that respondent shall not be dismissed from his tenured position, but shall, in light of the unbecoming conduct at issue herein, suffer a seven-month unpaid suspension, which period shall include the 120-day unpaid suspension already served, as well as forfeiture of his employment and adjustment increments for the 1998-99 and 1999-2000 school years.[9] Additionally, a copy of this decision is hereby forwarded to the State Board of Examiners, which body the Commissioner notes is currently considering action against respondent's certificate based on the criminal conduct underlying the instant matter. As such, the Commissioner directs that the within penalty be *in addition* to any suspension which the Board of Examiners may ultimately choose to impose.[10]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[9] This penalty is the most severe penalty the Commissioner has ever imposed short of dismissal.

[10] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

APRIL 22, 1998
DATE OF MAILING APRIL 22, 1998

163-98

IN THE MATTER OF THE TENURE	:	
HEARING OF PASQUALE RAIMONDO,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

SYNOPSIS

District certified tenure charges of unbecoming conduct against respondent tenured teaching staff member based on his having pled guilty to Disturbing Results of an Election, in violation of *N.J.S.A.* 18A:14-65, wherein he admitted knowingly interfering with the orderly conduct of the Newark School Board Election held on April 7, 1992, which resulted in the casting of illegal votes.

Commissioner determined that respondent's actions of fraudulently directing others in the casting of illegal votes were, standing alone, sufficient for the establishment of unbecoming conduct on behalf of a teaching staff member. However, having considered the proven charges and all the remaining factors, the Commissioner concluded that respondent's conduct, although egregious and unprofessional, did not, based upon the unique circumstances existing in this matter, warrant his dismissal from his tenured position. Commissioner ordered respondent to suffer a seven-month unpaid suspension, which period shall include the 120-day unpaid suspension already served, and forfeiture of his increments for the 1998-99 and 1999-2000 school years. Commissioner directed that a copy of this decision be forwarded to the State Board of Examiners, which is considering action against respondent's certificate based on the criminal conduct underlying the instant matter, and directed that the within penalty be in addition to any suspension which that Board may ultimately choose to impose.

AGENCY DKT. NO. 555-11/96

IN THE MATTER OF THE TENURE	:	
HEARING OF PASQUALE RAIMONDO,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

For Petitioner, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross
(Cherie L. Maxwell, Esq.)
For Respondent, Balk, Oxfeld, Mandell & Cohen (Sanford R. Oxfeld, Esq.)

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education on November 21, 1996, through the District's filing of tenure charges of unbecoming conduct against respondent.[1] Simultaneously with the submission of the tenure charges, the District submitted a Motion for Summary Decision seeking a judgment of forfeiture of respondent's public employment pursuant to *N.J.S.A.* 2C:51-2, as a result of his guilty plea to Disturbing Results of an Election, in violation of *N.J.S.A.* 18A:14-65 and *N.J.S.A.* 2C:2-6, wherein he admitted to knowingly interfering with the orderly conduct of the Newark School Board Election held on April 7, 1992, which resulted in the casting of illegal votes. By letter dated November 21, 1996, respondent was accorded 20 days within which to file an answer to the tenure charges and the motion for summary decision. Respondent's answer to the tenure charges

[1] It is noted that the District initially filed charges in this matter on or about November 6, 1996, and by letter dated November 20, 1996, withdrew those charges, requesting their return to the District, and concurrently filed the within charges.

was filed on November 27, 1996[2], and his response to the District's summary decision motion was filed on January 3, 1997. Upon review of the parties' papers with respect to the District's motion for summary forfeiture of respondent's employment, the Commissioner issued a letter decision on January 27, 1997, advising that pursuant to *N.J.S.A.* 2C:51-2, as amended by *P.L.* 1995, *c.* 250, he did not have jurisdiction to entertain applications for forfeiture of public employment and he, therefore, denied the District's motion for summary ruling, reminding the parties that there was, however, no preclusion to the District moving for summary decision with respect to any aspect of the pending tenure matters which were properly before him for adjudication. Subsequently, on March 5, 1997, the District filed a Motion for Summary Decision on the tenure charges of unbecoming conduct against respondent, seeking his removal from the District.[3] Respondent's reply to the motion was received on March 24, 1997, with the District's response to such reply being submitted on April 1, 1997. On April 22, 1997, respondent filed a motion to compel the District to return him to active salary status effective March 19, 1997. The

[2] By letter dated December 2, 1996, respondent was reminded that his response to the District's summary decision motion, which was not included with his answer, was due by December 13, 1996. On December 3, 1996, respondent requested an additional 30 days within which to respond to this motion, and was advised by letter dated December 6, 1996, that, in view of the fact the applicable regulations would have provided respondent two additional 10-day periods had he not filed a timely answer, and in consideration of the year-end holiday schedule, he would be accorded until January 6, 1997, or an additional 24 days, within which to file his answer to the motion.

[3] By letter dated March 10, 1997, respondent challenged the Commissioner's authority to entertain a motion for summary decision here, contending that, pursuant to *N.J.A.C.* 1:1-12.1 *et seq.*, when a case has not yet been assigned to a judge, such motions may be filed with the Clerk. He maintains that there is nothing in the regulations which permit the Commissioner to entertain a motion for summary decision and, therefore, the within motion has been brought prematurely and should, rather, be handled by the Administrative Law Judge assigned to the case. The Commissioner observes that unless and until a matter is transmitted to the Office of Administrative Law, it is governed by the regulations of this agency, specifically, *N.J.A.C.* 6:24-1.1 *et seq.* Given that *N.J.A.C.* 6:24-1.13 specifically contemplates summary judgment motions before the Commissioner, respondent's contention in this regard is without merit and will not be further addressed herein. Respondent's letter alternatively urged that, if it were determined that this motion was properly before the Commissioner, he be provided an additional period of time over and above the 10 days previously accorded him respond to the District's motion. By letter dated March 14, 1997, respondent was advised that his objection with respect to the premature submission of motions was more appropriately addressed in reply submissions and, if so raised, would be decided by the Commissioner in his final decision in this matter. Concurrently, respondent's request for additional time to respond to the District's motion was extended to March 24, 1997 (an additional 8 days) with the proviso, as was urged by the District, that such extension would be deemed a delay in proceedings at respondent's request, and would operate, pursuant to *N.J.S.A. 18A:6-14*, to concomitantly defer respondent's resumption of salary during this period.

District's reply to this motion and respondent's response to the reply were filed May 5, 1997 and May 7, 1997, respectively.

BACKGROUND

The uncontroverted material facts advanced by the District in this matter state:

On or about April 7, 1992, Pasquale Raimondo, a tenured teacher employed by the Newark School District, directed others to vote illegally in the school board election. See generally Appendix of Evidence 3, Transcript of Plea. By his own admission, he directed others to go inside the polling place and vote under fictitious names. *Id.* at p. 8, lines 14-25; p. 9, lines 1-14. Mr. Raimondo acknowledges that his conduct was intended to secure the election of John Mavilla to the Newark Board of Education. *Id.* at p. 8, lines 8-16. Mr. Raimondo also acknowledges that his direct participation resulted in illegal votes being cast. *Id.* at p. 7, lines 12-23.

As a result of the behavior, Mr. Raimondo was indicted on September 28, 1995 for the following crimes: Conspiracy (*N.J.S.A.* 2C:5-2); Official Misconduct (*N.J.S.A.* 2C:2-6; *N.J.S.A.* 2C:30-2); Disturbing Results of an Election (*N.J.S.A.* 2C:2-6; *N.J.S.A.* 18A:14-65); and Illegal Voting (*N.J.S.A.* 18A:14-78). See Appendix of Evidence 1.

Mr. Raimondo subsequently pled guilty to violating *N.J.S.A.* 18A:14-65; *N.J.S.A.* 2C:2-6. See Appendix of Evidence 2. The indictment states that Mr. Raimondo did knowingly interfere with the orderly conduct of the Newark School Board Election held on April 7, 1992 by casting and aiding others in the casting of illegal votes.

On October 17, 1996, tenure charges for unbecoming conduct were filed against Mr. Raimondo, by Petitioner, State-operated School District of Newark. A response dated October 21, 1996 was submitted on his behalf.

(District's Brief in Support of Summary Decision, March 4, 1997, at pp. 1-2)

The instant tenure charges were certified by the State-operated District on November 18, 1996, and filed with the Commissioner on November 21, 1996.

POSITION OF THE PARTIES

MOTION FOR RESUMPTION OF SALARY

Respondent

Respondent states that, pursuant to *N.J.S.A.* 18A:6-14[4], he was entitled to be returned to active salary status as of March 19, 1997. He reasons that the charges against him were processed as of November 18, 1996, and he was suspended without pay effective November 19, 1996, commencing the running of the 120-day time line specified in statute, which period, respondent argues, terminated on March 18, 1997. As such, he contends that he was statutorily entitled to be returned to salary status on March 19, 1997, the 121st day. (Respondent's Motion to Return to Active Salary Status, at p. 2)

He advances that the District's position that resumption of his salary should be delayed by 33 days due to his requested 26-day extension to file his response to the District's forfeiture motion in November 1996, and his 7-day requested extension for response to the Motion for Summary Decision on the tenure charges in March 1997, is meritless. (*Id.*) In this regard, respondent initially asserts that the extension granted him to reply to the forfeiture motion was not predicated on a delay under the 120-day rule, as envisioned by statute. (*Id.*) In support of this contention, he notes that, although the within charges were certified to the Commissioner on November 18, 1996, to date, the case has not been transmitted to the Office of Administrative Law (OAL), assigned to a judge or scheduled for hearing. As such, even conceding that he

[4] The relevant portion of this statute specifies "Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made.***"

requested and was granted 24 additional days to file his responsive brief to the District's forfeiture motion, which motion was ultimately denied by the Commissioner on January 27, 1997, he maintains that all of this time was within the 120-day period of his suspension and, as such, he queries "what was delayed?" "The hearing, which has not been scheduled, could not possibly have been delayed; the 120 day suspension without pay was not affected because the Commissioner's decision, even with the extension, was filed and decided within the 120 day period." (*Id.* at pp. 3-4) Therefore, he proffers, petitioner's argument that his salary reinstatement be extended 24 days is insupportable.

Likewise, respondent argues, the "alleged 'delay'," as a consequence of the 7-day extension for response to the summary decision motion on the charges is also insupportable. (*Id.* at p. 4) Notwithstanding that the extension was granted only under the condition that respondent agree that resumption of his salary be "concomitantly deferred," he maintains that he "implicitly agreed to those terms" because he had no viable option. (*Id.*) Again, he argues, as there is no hearing scheduled, there was no delay. Alternatively, he asserts that if the District is alleging that the "seven day delay" was related to the Commissioner's ability to decide this matter, this contention is also incorrect, respondent reasons, in that his 120-day suspension without pay expired on March 18, 1997, and, consequently, any delay must be measured as of March 19, 1997. (*Id.*) As such, respondent argues that he can be charged with a "delay" no greater than five days, *i.e.*, March 19, 1997 to March 24, 1997. (*Id.*)

Respondent, therefore, requests that he be reinstated to salary status, complete with related emoluments effective March 19, 1997 or, alternatively, if a delay attributable to him is found, *supra*, reinstatement be ordered as of March 24, 1997.

State-operated District

In reply, the District urges that, pursuant to *N.J.S.A.* 18A:6-14, it is clear that delays in tenure proceedings which are attributable to respondent are excluded from the period of time for which he is entitled to pay, (District's Letter Brief in Opposition to Respondent's Motion to Return to Active Salary Status as of March 19, 1997, at p. 3) buttressing such assertion with the citation of three Commissioner cases where individuals were not eligible for salary for 17 days, 23 days, and one month under what, it asserts, were similar type circumstances as exist here. It advances that the rationale for such a conclusion is founded on "basic equitable principles." (See *Ott v. Hamilton Twp. Bd. of Educ.*, 160 *N.J. Super.* 333 (App. Div. 1978), *cert. den.*, 78 *N.J.* 336 (1978).) (*Id.* at pp. 3-4)

Here, it proffers, respondent sought and received extensions of 26 days and 7 days, respectively, within which to reply to the District's motions, for a 33-day total delay attributable to his actions. (*Id.*) It further maintains that issues of whether such delays occurred during respondent's 120-day suspension period and/or prior to the scheduling of a hearing are of no importance or consequence whatsoever. Therefore, the District reasons that, as respondent is not entitled to salary for this period, it is entitled to extend his 120-day suspension without pay term by these additional days. (*Id.*)[5]

SUMMARY DECISION MOTION

State-operated District

The District advances that the within matter is clearly ripe for summary decision arguing

> [s]ummary decision should be granted if the pleadings and affidavits "show that there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5; *Contini v. Bd. of Educ. of Newark*, 286 *N.J. Super.* 106, 121 (1995). The court must look to the evidentiary materials presented, viewed in a light most

[5] The District's submission reflects that respondent was returned to active salary status as of April 23, 1997, which reflects the additional 33-day delay which it argues herein was attributable to respondent.

> favorable to the non-moving party, and determine whether there is sufficient evidence to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. *Id.* at 122 (quoting *Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520, 523 (1995)) (District's Motion for Summary Decision, March 4, 1997, at p. 3)

Here, it proffers, the absence of genuine issues of material fact is fully evident in that respondent's conduct underlying these charges is undisputed. Respondent, a tenured teacher and Chairman of the Math Department, admittedly, knowingly interfered with the conducting of the school election held on April 7, 1992, by going to the polling place and directing others to cast votes in the name of individuals who did not vote, in contravention of *N.J.S.A.* 18A:14-65 and *N.J.S.A.* 2C:2-6, fully aware that the purpose of this endeavor was to ensure that a particular candidate was elected. (*Id.* at p. 4) It maintains that such behavior on the part of a teaching staff member is unbecoming conduct must be the conclusion of any rational factfinder. (*Id.* at p. 2) Moreover, it observes that the Commissioner has long taken the position that, because of the influential position they occupy, criminal conduct of teachers is particularly egregious. In ***In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson***, 1974 *S.L.D.* 97, 98-99, the Commissioner stated

> Teachers are public employees who hold positions demanding public trust, and in such positions, they teach, inform, and mold habits and attitudes and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully violates the law, as in this matter, and consequently violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner. (*Id.* at p. 4)

Also, particularly disturbing here, the District maintains, is that respondent who, as a tenured teacher and Chairman of the Math Department, would be expected to "guide young people through decision making processes" rather than "direct[ing] others in casting illegal votes in a school board election," at his sentencing in this matter attempted to justify his criminal behavior

by attributing it to a "mistake in judgment." (*Id.* at pp. 4-5) It proffers that respondent's behavior clearly transcends mere poor judgment, "[t]his conduct is blatantly and clearly criminal." (*Id.* at p. 5)

The District next advances that it is well-established that "unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant, *In re Fulcomer*, 93 *N.J. Super.* 404, 421 (App. Div. 1967) (*id.* at p. 5), particularly when the incident at issue is also a criminal violation and the proffered evidence is a judgment of conviction supplemented by other legally competent proofs such as the indictment, transcripts of the plea and sentencing and the respondent's own statements as to his culpability, as is the case here. See *In the Matter of the Tenure Hearing of Kenneth Henderek, School District of the Township of East Brunswick*, 94 *N.J.A.R.* 2d EDU) 268, at 275. See also *Matter of Tanelli,* 194 *N.J. Super.* 492, at 497, 498 (1984). (*Id.)* The District urges that it be granted summary decision as a matter of law in this case as the uncontested proofs advanced clearly constitute sufficient competent evidence to support a finding of conduct unbecoming a teacher warranting respondent's removal from his position.

Respondent

Respondent contends that summary decision is inappropriate here in that there are unresolved factual issues as to whether respondent's guilty plea to a misdemeanor rises to the level of unbecoming conduct. (Respondent's Brief in Opposition to the District's Motion for Summary Decision, March 18, 1997, at p. 7) He further proffers, "even assuming[,] *arguendo*, some degree of conduct unbecoming, genuine issues exist regarding the nature of the penalty, if at all, to be imposed on respondent." (*Id.)* Respondent cites a number of cases decided by the Commissioner for the proposition that the term "unbecoming conduct" is amorphous, having been defined in "various ways" and resulting in varying degrees of penalty after the consideration

of all mitigating circumstances. (*Id.* at p. 8) He distinguishes this matter from *Henderek, supra,* relied on by the District for the proposition "that a conviction warrants a termination," reasoning that this consequence occurred only after Henderek had received a full hearing, as required by *N.J.S.A.* 18A:6-10, and his mitigating circumstances were fully presented and considered. (*Id.* at p. 11) Respondent, therefore, advances that, at a very minimum, pursuant to *N.J.S.A.* 18A:6-10, "there *must* be a hearing to determine penalty," where he will be permitted to present witnesses and to enter evidence on his own behalf and for this reason, standing alone, summary decision cannot be granted to the District. (emphasis in text) (*Id.* at p. 12)

DETERMINATION

Upon careful review of the record[6] and the advanced arguments of the parties, the Commissioner initially concurs with respondent that, under the circumstances existing in this matter, he was entitled to be returned to active salary status in March 1997. Notwithstanding this conclusion, the Commissioner determines, for the reasons outlined below, that the effective date of such restoration is March 26, 1997, rather than March 19, 1997 or March 24, 1997, as advanced by respondent.

Preliminarily, in his consideration of what appear to be respondent's two primary arguments in support of his motion, the Commissioner is compelled to discount them both. Inasmuch as the two instances of alleged delay occasioned by respondent herein were in connection with the filing of his responses to summary decision motions filed by the District for the Commissioner's consideration, his assertion that, because this case had not been set down for a hearing before an ALJ there was no "delay" in the proceedings, is specious. Likewise,

[6] It is noted that the District's submissions in this matter include an "Appendix of Evidence" containing Indictment No. 95-09-0308, Superior Court of New Jersey, Essex County, Law Division - Criminal; Judgment of Conviction, Superior Court of New Jersey, Essex County, Law Division - Criminal; Transcript of respondent's Plea, Superior Court of New Jersey, Essex County, Law Division - Criminal, dated July 2, 1996; and Transcript of respondent's Sentencing, Superior Court of New Jersey, Essex County, Law Division - Criminal, dated September 5, 1996. Also included in the record is a copy of a sworn statement given by respondent to the Essex County Prosecutor's Office on June 26, 1996, with respect to his involvement in this matter.

untenable is his apparent contention that the timing of any delay, *i.e.*, whether occurring during the course of or after the expiration of the 120-day time period, has any impact whatsoever on the operation of this statutory provision, as its clear language makes no such distinction.

Irrespective of the dubious nature of respondent's proffered arguments on this issue, the Commissioner cannot concur with the District's position that the two instances of delay which occurred in this matter warrant a 33-day extension of respondent's unpaid suspension, rather, he concludes that only seven days of this period can be charged against respondent's salary entitlement computation, finding that such a result is dictated by the distinguishable nature of the two time periods under review. First, as to respondent's submission in connection with the District's simultaneous filing of tenure charges and its summary decision motion for forfeiture in November 1996, such response, pursuant to *N.J.A.C.* 6:24-5.3, was to be made in accordance with the regulatory provisions specified in *N.J.A.C.* 6:24-1.4 which on its face states

> Failure to answer within the 20 day period from receipt of service shall result in a notice to the respondent directing an answer within 10 days of receipt. Further failure to respond shall result in a second notice which shall inform the respondent that unless an answer is received within 10 days of the receipt of said notice, each count in the petition of appeal shall be deemed admitted and the Commissioner shall render a decision by way of summary judgment. (*N.J.A.C.* 6:24-1.4(e))

Moreover, *N.J.A.C.* 6:24-1.4(a) additionally specifies that "[u]pon written application by a party the Commissioner may extend the time for answer. Such application must be received prior to the expiration of the 20 day period." Here, while filing his Answer to the tenure charges on November 27, 1996, respondent on December 3, 1996, well within the allotted 20-day due date for his combined submission, requested and was granted a 24-day extension of time within which to reply to the motion portion of the District's filing, and did so in accordance with such granted extension. In that the applicable regulatory provisions governing this particular submission

clearly contemplate the granting of an extension of time within which to file, the Commissioner cannot find justification for terming this granted extension a "delay" within the intendment of the statute and, therefore, ascribing penalty to respondent for this period of time.

On the other hand, the response schedule for the District's summary decision motion on the charges in March 1997, was established by the March 6, 1997 letter of the Director, Bureau of Controversies and Disputes, rather than by regulation, and unequivocally granted respondent 10 days for his response.[7] Moreover, in reply to his request for extension of this period, respondent was specifically advised that such extension could only be granted with the understanding and agreement that his resumption of salary "shall be concomitantly deferred."[8] (See Director's March 14, 1997 letter.) Under these circumstances, respondent cannot now claim absolution from the consequences of the delay he occasioned.

In reviewing the appropriateness of summary decision in this matter, the Commissioner concludes that the District's motion for a finding of unbecoming conduct must be granted as he finds no outstanding issues of material fact herein and, therefore, the District is entitled to prevail on the truth of its charges as a matter of law. Notwithstanding respondent's urging to the contrary, the record reveals that his submissions to the record present no issue of material fact with respect to the conduct underlying his conviction but, rather, in actuality, challenge the conclusions to be drawn from this conduct and its effect on his employment under the tenure laws. As recognized by the Commissioner in *In the Matter of the Tenure Hearing of Andrew Phillips, School District of the Borough of Roselle, Union County*, decided by the Commissioner March 20, 1997, "'[i]t is well-established that where no disputed issues of material fact exist, an administrative agency need not hold an evidential hearing in a contested

[7] In that the expiration of this allotted period would occur on a Sunday, respondent's submission was due on the next business day, March 17, 1997.
[8] This response was filed with the Commissioner on March 24, 1997.

case.' *Frank v. Ivy Club*, 120 *N.J.* 73, 98, citing *Cunningham v. Dept. of Civil Service*, 69 *N.J.* 13, 24-25 (1975). 'Moreover, disputes as to the *conclusions to be drawn from the facts, as opposed to the facts themselves, will not defeat a motion for summary judgment.*' *Contini v. Board of Education of Newark*, 96 *N.J.A.R.* 2d (EDU) 196, 215, citing *Lima & Sons, Inc. v. Borough of Ramsey,* 269 *N.J. Super.* 469, 478 (App. Div. 1994)***." (emphasis in text) (Slip Opinion at pp. 10-11) Here, respondent engaged in a course of conduct intended to interfere with the conducting of a school election and, subsequently, admitted that he did so knowingly and willingly. The Commissioner determines that respondent's actions of going to the polling place and directing others to cast fraudulent votes is, standing alone, sufficient for the establishment of unbecoming conduct on behalf of a teaching staff member. As such, the Commissioner can find no justification for the expenditure of scarce time and resources to conduct a plenary hearing, as he determines that the undisputed conduct giving rise to respondent's conviction amply establishes the District's charges. See *In the Matter of the Tenure Hearing of Robert R. Vitacco, School District of the Borough of Lincoln Park, Morris County*, decided by the Commissioner March 24, 1997.

As to the evaluation/determination of the appropriate penalty to be imposed in this matter, the Commissioner is mindful of the District's legitimate concern over a situation where tenured teaching staff, who as role models for their pupils and holders of the public trust must be held to the highest standards of good conduct, are known to have been convicted of behavior that is both illegal and, at least facially, connected to their school employment. However, in considering whether to dismiss an individual from tenured employment, the Commissioner must also consider that individual's prior record in the District, the nature and gravity of his offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation and the harm or injurious effect which his conduct may have had in the maintenance of discipline

and the proper administration of the school system. *In re Fulcomer*, 93 *N.J. Super.* 404, 421-22 (App. Div. 1967). Nonetheless, he rejects respondent's claim of entitlement to a hearing in order to present such mitigating factors *in person.* The Commissioner notes that respondent's submission to the record contains his four-page affidavit which specifically addresses his more than 22 years of successful service in the District and other mitigating factors, and is accompanied by a number of letters of support from colleagues and administrators. A review of these documents persuades the Commissioner that a hearing for the limited purpose of receiving additional evidence with respect to the assignment or mitigation of penalty is unnecessary, as a personal presentation of the extensive mitigating factors presented would serve to make no appreciable contribution to his consideration of the material.

Although in no way minimizing the extreme seriousness of this offense, the Commissioner, likewise, cannot ignore respondent's successful long history in the District without prior incident and all of the other mitigating factors which he has presented. Also particularly compelling was respondent's detailing of the pressure which he felt was placed on him to cooperate in this matter by persons in positions of influence and his very real fear of serious repercussions which might inure to him if he refused to do so. In this latter regard, the Commissioner is keenly aware of the deficiencies, irregularities and overall negative atmosphere which existed in the Newark School District at the time of respondent's actions, which situation ultimately necessitated the establishment of a State-operated school district in July 1995. While in no way serving as justification for respondent's criminal conduct, the circumstances under which such conduct occurred cannot be ignored by the Commissioner in determining the appropriate penalty to be assessed in this matter. Additionally, the Commissioner notes that the Superior Court of New Jersey, Essex County, Law Division, Criminal, having considered respondent's presentencing report and mitigating circumstances, imposed a penalty of two year's

probation, $500 fine, $50 VCCB and 120 hours of community service, under a statute which permitted imprisonment.

Having considered the within charges and all of the remaining factors, the Commissioner concludes that respondent's conduct, although egregious and unprofessional, does not, *based upon the unique circumstances existing in this matter*, warrant his dismissal from his tenured position. Notwithstanding, he finds it necessary and appropriate to impress upon this respondent and other individuals, through imposition of a very substantial penalty, the seriousness of such conduct and the degree to which it will not be tolerated in the school environment.

Accordingly, the Commissioner directs that the respondent shall not be dismissed from his tenured position, but shall, in light of the unbecoming conduct at issue herein, suffer a seven-month unpaid suspension, which period shall include the 120-day unpaid suspension already served, as well as forfeiture of his employment and adjustment increments for the 1998-99 and 1999-2000 school years.[9] Additionally, a copy of this decision is hereby forwarded to the State Board of Examiners, which body the Commissioner notes is currently considering action against respondent's certificate based on the criminal conduct underlying the instant matter. As such, the Commissioner directs that the within penalty be *in addition* to any suspension which the Board of Examiners may ultimately choose to impose.[10]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[9] This penalty is the most severe the Commissioner has ever imposed short of dismissal.

[10] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

164-98

IN THE MATTER OF THE TENURE	:	
HEARING OF PHILIP MARAVIGLIA,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

SYNOPSIS

District certified tenure charges of unbecoming conduct against respondent tenured guidance counselor based on his having pled guilty to Disturbing Results of an Election, in violation of *N.J.S.A.* 18A:14-65, wherein he admitted knowingly interfering with the orderly conduct of the Newark School Board Election held on April 7, 1992, which resulted in the casting of illegal votes.

Commissioner determined that respondent's actions of fraudulently casting and aiding others in the casting of illegal votes were, standing alone, sufficient for the establishment of unbecoming conduct on behalf of a teaching staff member. However, having considered the proven charges and all the remaining factors, the Commissioner concluded that respondent's conduct, although egregious and unprofessional, did not, based upon the unique circumstances existing in this matter, warrant his dismissal from his tenured position. Commissioner ordered respondent to suffer a seven-month unpaid suspension, which period shall include the 120-day unpaid suspension already served, and forfeiture of his increments for the 1998-99 and 1999-2000 school years. Commissioner directed that a copy of this decision be forwarded to the State Board of Examiners, which is considering action against respondent's certificate based on the criminal conduct underlying the instant matter, and directed that the within penalty be in addition to any suspension which that Board may ultimately choose to impose.

AGENCY DKT. NO. 556-11/96

IN THE MATTER OF THE TENURE	:	
HEARING OF PHILIP MARAVIGLIA,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

For Petitioner, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross
(Cherie L. Maxwell, Esq.)
For Respondent, Balk, Oxfeld, Mandell & Cohen (Sanford R. Oxfeld, Esq.)

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education on November 21, 1996, through the District's filing of tenure charges of unbecoming conduct against respondent.[1] Simultaneously with the submission of the tenure charges, the District submitted a Motion for Summary Decision seeking a judgment of forfeiture of respondent's public employment pursuant to *N.J.S.A.* 2C:51-2, as a result of his guilty plea to Disturbing Results of an Election, in violation of *N.J.S.A.* 18A:14-65 and *N.J.S.A.* 2C:2-6, wherein he admitted to knowingly interfering with the orderly conduct of the Newark School Board Election held on April 7, 1992, which resulted in the casting of illegal votes. By letter dated November 21, 1996, respondent was accorded 20 days within which to file an answer to the

[1] It is noted that the District initially filed charges in this matter on or about November 6, 1996, and by letter dated November 20, 1996, withdrew those charges, requesting their return to the District, and concurrently filed the within charges.

tenure charges and the motion for summary decision. Respondent's answer to the tenure charges was filed on November 27, 1996[2], and his response to the District's summary decision motion was filed on January 3, 1997. Upon review of the parties' papers with respect to the District's motion for summary forfeiture of respondent's employment, the Commissioner issued a letter decision on January 27, 1997, advising that pursuant to *N.J.S.A.* 2C:51-2, as amended by *P.L.* 1995, *c.* 250, he did not have jurisdiction to entertain applications for forfeiture of public employment and he, therefore, denied the District's motion for summary ruling, reminding the parties that there was, however, no preclusion to the District moving for summary decision with respect to any aspect of the pending tenure matters which were properly before him for adjudication. Subsequently, on March 5, 1997, the District filed a Motion for Summary Decision on the tenure charges of unbecoming conduct against respondent, seeking his removal from the District.[3] Respondent's reply to the motion was received on March 24, 1997, with the District's response to such reply being submitted on April 1, 1997. On April 22, 1997, respondent filed a

[2] By letter dated December 2, 1996, respondent was reminded that his response to the District's summary decision motion, which was not included with his answer, was due by December 13, 1996. On December 3, 1996, respondent requested an additional 30 days within which to respond to this motion, and was advised by letter dated December 6, 1996, that, in view of the fact the applicable regulations would have provided respondent two additional 10-day periods had he not filed a timely answer, and in consideration of the year-end holiday schedule, he would be accorded until January 6, 1997, or an additional 24 days, within which to file his answer to the motion.

[3] By letter dated March 10, 1997, respondent challenged the Commissioner's authority to entertain a motion for summary decision here, contending that, pursuant to *N.J.A.C.* 1:1-12.1 *et seq.*, when a case has not yet been assigned to a judge, such motions may be filed with the Clerk. He maintains that there is nothing in the regulations which permit the Commissioner to entertain a motion for summary decision and, therefore, the within motion has been brought prematurely and should, rather, be handled by the Administrative Law Judge assigned to the case. The Commissioner observes that unless and until a matter is transmitted to the Office of Administrative Law, it is governed by the regulations of this agency, specifically, *N.J.A.C.* 6:24-1.1 *et seq.* Given that *N.J.A.C.* 6:24-1.13 specifically contemplates summary judgment motions before the Commissioner, respondent's contention in this regard is without merit and will not be further addressed herein. Respondent's letter alternatively urged that, if it were determined that this motion was properly before the Commissioner, he be provided an additional period of time over and above the 10 days previously accorded him to respond to the District's motion. By letter dated March 14, 1997, respondent was advised that his objection with respect to the premature submission of motions was more appropriately addressed in reply submissions and, if so raised, would be decided by the Commissioner in his final decision in this matter. Concurrently, respondent's request for additional time to respond to the District's motion was extended to March 24, 1997 (an additional 8 days) with the proviso, as was urged by the District, that such extension would be deemed a delay in proceedings at respondent's request, and would operate, pursuant to *N.J.S.A. 18A:6-14*, to concomitantly defer respondent's resumption of salary during this period.

motion to compel the District to return him to active salary status effective March 19, 1997. The District's reply to this motion and respondent's response to the reply were filed May 5, 1997 and May 7, 1997, respectively.

BACKGROUND

The uncontroverted material facts advanced by the District in this matter state: On or about April 7, 1992, Philip Maraviglia, a tenured guidance counselor employed by the Newark School District, voted illegally several times in the school board election. See generally, Appendix of Evidence 3, Transcript of Pleas. He also assisted others in the casting of illegal votes. *(Id.)* By his own admission, he went inside the polling place to keep track of the people who came in to vote. (*Id.* at p. 12, lines 13-14) Mr. Maraviglia acknowledges that when people signed the forms to vote, he gave the forms to other people. (*Id.* at lines 14-15) By his own admission, he then placed the illegal ballots into the voting machine. (*Id.* at lines 15-16) By his own admission, Mr. Maraviglia cast fraudulent votes for several individuals who had not come in to vote. *Id.* at lines 20-25; p. 13 at line 1. By his own admission, he was aware this conduct was wrong. *Id.* at p. 13, line 4.

As a result of the behavior described above, he was indicted on September 28, 1995 for the following crimes: Conspiracy (*N.J.S.A.* 2C:5-2); Official Misconduct (*N.J.S.A.* 2C:2-6; *N.J.S.A.* 2C:30-2); Disturbing Results of an Election (*N.J.S.A.* 2C:2-6; *N.J.S.A.* 18A:14-65); and Illegal Voting (*N.J.S.A.* 18A:14-78). See Appendix of Evidence 1.

Mr. Maraviglia subsequently pled guilty to violating *N.J.S.A.* 18A:14-65; *N.J.S.A.* 2C:2-6. See Appendix of Evidence 2. The indictment states that Mr. Maraviglia did

knowingly interfere with the orderly conduct of the Newark School Board Election held on April 7, 1992 by casting and/or aiding others in the casting of illegal votes.

On October 17, 1996, tenure charges for unbecoming conduct were filed against Mr. Maraviglia, by Petitioner, State-Operated School District of Newark. A response dated October 21, 1996 was submitted on his behalf.

(District's Brief in Support of Summary Decision, March 4, 1997, at pp. 1-2)

The instant tenure charges were certified by the State-operated District on November 18, 1996, and filed with the Commissioner on November 21, 1996.

POSITION OF THE PARTIES

MOTION FOR RESUMPTION OF SALARY

Respondent

Respondent states that, pursuant to *N.J.S.A.* 18A:6-14[4], he was entitled to be returned to active salary status as of March 19, 1997. He reasons that the charges against him were processed as of November 18, 1996, and he was suspended without pay effective November 19, 1996, commencing the running of the 120-day time line specified in statute, which period, respondent argues, terminated on March 18, 1997. As such, he contends that he was statutorily entitled to be returned to salary status on March 19, 1997, the 121st day. (Respondent's Motion to Return to Active Salary Status, at p. 2)

He advances that the District's position that resumption of his salary should be delayed by 33 days due to his requested 26-day extension to file his response to the District's

[4] The relevant portion of this statute specifies "Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made.***"

forfeiture motion in November 1996, and his 7-day requested extension for response to the Motion for Summary Decision on the tenure charges in March 1997, is meritless. (*Id.*) In this regard, respondent initially asserts that the extension granted him to reply to the forfeiture motion was not predicated on a delay under the 120-day rule, as envisioned by statute. (*Id.*) In support of this contention, he notes that, although the within charges were certified to the Commissioner on November 18, 1996, to date, the case has not been transmitted to the Office of Administrative Law (OAL), assigned to a judge or scheduled for hearing. As such, even conceding that he requested and was granted 24 additional days to file his responsive brief to the District's forfeiture motion, which motion was ultimately denied by the Commissioner on January 27, 1997, he maintains that all of this time was within the 120-day period of his suspension and, as such, he queries "what was delayed?" "The hearing, which has not been scheduled, could not possibly have been delayed; the 120 day suspension without pay was not affected because the Commissioner's decision, even with the extension, was filed and decided within the 120 day period." (*Id.* at pp. 3-4) Therefore, he proffers, petitioner's argument that his salary reinstatement be extended 24 days is insupportable.

Likewise, respondent argues, the "alleged 'delay'," as a consequence of the 7-day extension for response to the summary decision motion on the charges is also insupportable. (*Id.* at p. 4) Notwithstanding that the extension was granted only under the condition that respondent agree that resumption of his salary be "concomitantly deferred," he maintains that he "implicitly agreed to those terms" because he had no viable option. (*Id.*) Again, he argues, as there is no hearing scheduled, there was no delay. Alternatively, he asserts that if the District is alleging that the "seven day delay" was related to the Commissioner's ability to decide this matter, this contention is also incorrect, respondent reasons, in that his 120-day suspension without pay

expired on March 18, 1997, and, consequently, any delay must be measured as of March 19, 1997. (*Id.*) As such, respondent argues that he can be charged with a "delay" no greater than five days, *i.e.*, March 19, 1997 to March 24, 1997. (*Id.*)

Respondent, therefore, requests that he be reinstated to salary status, complete with related emoluments effective March 19, 1997 or, alternatively, if a delay attributable to him is found, *supra*, reinstatement be ordered as of March 24, 1997.

State-operated District

In reply, the District urges that, pursuant to *N.J.S.A.* 18A:6-14, it is clear that delays in tenure proceedings which are attributable to respondent are excluded from the period of time for which he is entitled to pay, (District's Letter Brief in Opposition to Respondent's Motion to Return to Active Salary Status as of March 19, 1997, at p. 3) buttressing such assertion with the citation of three Commissioner cases where individuals were not eligible for salary for 17 days, 23 days, and one month under what, it asserts, were similar type circumstances as exist here. It advances that the rationale for such a conclusion is founded on "basic equitable principles." (See *Ott v. Hamilton Twp. Bd. of Educ.,* 160 *N.J. Super.* 333 (App. Div. 1978), *cert. den.,* 78 *N.J.* 336 (1978).) (*Id.* at pp. 3-4)

Here, it proffers, the respondent sought and received extensions of 26 days and 7 days, respectively, within which to reply to the District's motions, for a 33-day total delay attributable to his actions. (*Id.*) It further maintains that issues of whether such delays occurred during respondent's 120-day suspension period and/or prior to the scheduling of a hearing are of no importance or consequence whatsoever. Therefore, the District reasons that, as respondent is

not entitled to salary for this period, it is entitled to extend his 120-day suspension without pay term by these additional days. (*Id.*)[5]

SUMMARY DECISION MOTION

State-operated District

The District advances that the within matter is clearly ripe for summary decision arguing

> [s]ummary decision should be granted if the pleadings and affidavits "show that there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law." *N.J.A.C.* 1:1-12.5; *Contini v. Bd. of Educ. of Newark,* 286 *N.J. Super.* 106, 121 (1995). The court must look to the evidentiary materials presented, viewed in a light most favorable to the non-moving party, and determine whether there is sufficient evidence to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. *Id.* at 122 (quoting *Brill v. Guardian Life Ins. Co.,* 142 *N.J.* 520, 523 (1995)) (District's Motion for Summary Decision, March 4, 1997, at p. 3)

Here, it proffers, the absence of genuine issues of material fact is fully evident in that respondent's conduct underlying these charges is undisputed. Respondent, a guidance counselor and a teacher, admittedly, knowingly interfered with the conducting of the school election held on April 7, 1992, by going to the polling place and casting multiple votes in the name of individuals who did not vote and assisting others in the casting of fraudulent votes, all in contravention of *N.J.S.A.* 18A:14-65 and *N.J.S.A.* 2C:2-6, fully aware that the purpose of this endeavor was to ensure that a particular candidate was elected. (*Id.* at p. 5) It maintains that such behavior on the part of a teaching staff member is unbecoming conduct must be the conclusion of any rational factfinder. (*Id.* at p. 3) Moreover, it observes that the Commissioner has long taken the position that, because of the influential position they occupy, criminal conduct

[5] The District's submission reflects that respondent was returned to active salary status as of April 23, 1997, which reflects the additional 33-day delay which it argues herein was attributable to respondent.

of teachers is particularly egregious. In *In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson*, 1974 *S.L.D.* 97, 98-99, the Commissioner stated

> Teachers are public employees who hold positions demanding public trust, and in such positions, they teach, inform, and mold habits and attitudes and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully violates the law, as in this matter, and consequently violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner. (*Id.* at p. 4)

Also, particularly disturbing here, the District maintains, is respondent's statement at his sentencing in this matter where, in an attempt to justify his criminal behavior, he claimed that he felt he was doing something that was "helping the community." (*Id.* at p. 5) It argues that for a guidance counselor, an individual who, more than any other teacher with whom they come in contact, has the ability to affect students' decision making processes, to harbor the perspective that corrupting the election process could be so justified is "outrageous" and "frightening." (*Id.* at pp. 5-6)

The District next advances that it is well-established that "unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant," *In re Fulcomer*, 93 *N.J. Super.* 404, 421 (App. Div. 1967) *(id.* at p. 5), particularly when the incident at issue is also a criminal violation and the proffered evidence is a judgment of conviction supplemented by other legally competent proofs such as the indictment, transcripts of the pleas and sentencing and the respondent's own statements as to his culpability, as is the case here. See *In the Matter of the Tenure Hearing of Kenneth Henderek, School District of the Township of East Brunswick*, 94 *N.J.A.R.* 2d (EDU) 268, at 275. See also *Matter of Tanelli,* 194 *N.J. Super.* 492, at 497, 498 (1984). *(Id.)* The District urges that it be granted summary decision as a matter of law in this

case as the uncontested proofs advanced clearly constitute sufficient competent evidence to support a finding of conduct unbecoming a teacher warranting respondent's removal from his position.

Respondent

Respondent contends that summary decision is inappropriate here in that there are unresolved factual issues as to whether respondent's guilty plea to a misdemeanor rises to the level of unbecoming conduct. (Respondent's Brief in Opposition to the District's Motion for Summary Decision, March 18, 1997, at p. 7) He further proffers, "even assuming[,] *arguendo*, some degree of conduct unbecoming, genuine issues exist regarding the nature of the penalty, if at all, to be imposed on respondent." (*Id.*) Respondent cites a number of cases decided by the Commissioner for the proposition that the term "unbecoming conduct" is amorphous, having been defined in "various ways" and resulting in varying degrees of penalty after the consideration of all mitigating circumstances. (*Id.* at p. 8) He distinguishes this matter from *Henderek, supra,* relied on by the District for the proposition "that a conviction warrants a termination," reasoning that this consequence occurred only after Henderek had received a full hearing, as required by *N.J.S.A.* 18A:6-10, and his mitigating circumstances were fully presented and considered. (*Id.* at p. 11) Respondent, therefore, advances that, at a very minimum, pursuant to *N.J.S.A.* 18A:6-10, "there *must* be a hearing to determine penalty," where he will be permitted to present witnesses and to enter evidence on his own behalf and for this reason, standing alone, summary decision cannot be granted to the District. (emphasis in text) (*Id.* at p. 12)

DETERMINATION

Upon careful review of the record[6] and the advanced arguments of the parties, the Commissioner initially concurs with respondent that, under the circumstances existing in this matter, he was entitled to be returned to active salary status in March 1997. Notwithstanding this conclusion, the Commissioner determines, for the reasons outlined below, that the effective date of such restoration is March 26, 1997, rather than March 19, 1997 or March 24, 1997, as advanced by respondent.

Preliminarily, in his consideration of what appear to be respondent's two primary arguments in support of his motion, the Commissioner is compelled to discount them both. Inasmuch as the two instances of alleged delay occasioned by respondent herein were in connection with the filing of his responses to summary decision motions filed by the District for the Commissioner's consideration, his assertion that, because this case had not been set down for a hearing before an ALJ there was no "delay" in the proceedings, is specious. Likewise, untenable is his apparent contention that the timing of any delay, *i.e.*, whether occurring during the course of or after the expiration of the 120-day time period, has any impact whatsoever on the operation of this statutory provision, as its clear language makes no such distinction.

Irrespective of the dubious nature of respondent's proffered arguments on this issue, the Commissioner cannot concur with the District's position that the two instances of delay which occurred in this matter warrant a 33-day extension of respondent's unpaid suspension,

[6] It is noted that the District's submissions in this matter include an "Appendix of Evidence" containing Indictment No. 95-09-0308, Superior Court of New Jersey, Essex County, Law Division - Criminal; Judgment of Conviction, Superior Court of New Jersey, Essex County, Law Division - Criminal; Transcript of respondent's Pleas, Superior Court of New Jersey, Essex County, Law Division - Criminal, dated June 26, 1996; and Transcript of respondent's Sentencing, Superior Court of New Jersey, Essex County, Law Division - Criminal, dated September 5, 1996. Also included in the record is a copy of a sworn statement given by respondent to the Essex County Prosecutor's Office on June 21, 1996, with respect to his involvement in this matter.

rather, he concludes that only seven days of this period can be charged against respondent's salary entitlement computation, finding that such a result is dictated by the distinguishable nature of the two time periods under review. First, as to respondent's submission in connection with the District's simultaneous filing of tenure charges and its summary decision motion for forfeiture in November 1996, such response, pursuant to *N.J.A.C.* 6:24-5.3, was to be made in accordance with the regulatory provisions specified in *N.J.A.C.* 6:24-1.4 which on its face states

> Failure to answer within the 20 day period from receipt of service shall result in a notice to the respondent directing an answer within 10 days of receipt. Further failure to respond shall result in a second notice which shall inform the respondent that unless an answer is received within 10 days of the receipt of said notice, each count in the petition of appeal shall be deemed admitted and the Commissioner shall render a decision by way of summary judgment. (*N.J.A.C.* 6:24-1.4(e))

Moreover, *N.J.A.C.* 6:24-1.4(a) additionally specifies that "[u]pon written application by a party the Commissioner may extend the time for answer. Such application must be received prior to the expiration of the 20 day period." Here, while filing his Answer to the tenure charges on November 27, 1996, respondent on December 3, 1996, well within the allotted 20-day due date for his combined submission, requested and was granted a 24-day extension of time within which to reply to the motion portion of the District's filing, and did so in accordance with such granted extension. In that the applicable regulatory provisions governing this particular submission clearly contemplate the granting of an extension of time within which to file, the Commissioner cannot find justification for terming this granted extension a "delay" within the intendment of the statute and, therefore, ascribing penalty to respondent for this period of time.

On the other hand, the response schedule for the District's summary decision motion on the charges in March 1997, was established by the March 6, 1997 letter of the

Director, Bureau of Controversies and Disputes, rather than by regulation, and unequivocally granted respondent 10 days for his response.[7] Moreover, in reply to his request for extension of this period, respondent was specifically advised that such extension could only be granted with the understanding and agreement that his resumption of salary "shall be concomitantly deferred."[8] (See Director's March 14, 1997 letter.) Under these circumstances, respondent cannot now claim absolution from the consequences of the delay he occasioned.

In reviewing the appropriateness of summary decision in this matter, the Commissioner concludes that the District's motion for a finding of unbecoming conduct must be granted as he finds no outstanding issues of material fact herein and, therefore, the District is entitled to prevail on the truth of its charges as a matter of law. Notwithstanding respondent's urging to the contrary, the record reveals that his submissions to the record present no issue of material fact with respect to the conduct underlying his conviction but, rather, in actuality, challenge the conclusions to be drawn from this conduct and its effect on his employment under the tenure laws. As recognized by the Commissioner in *In the Matter of the Tenure Hearing of Andrew Phillips, School District of the Borough of Roselle, Union County*, decided by the Commissioner March 20, 1997, '"[i]t is well-established that where no disputed issues of material fact exist, an administrative agency need not hold an evidential hearing in a contested case.' *Frank v. Ivy Club*, 120 *N.J.* 73, 98, citing *Cunningham v. Dept. of Civil Service*, 69 *N.J.* 13, 24-25 (1975). 'Moreover, disputes as to the *conclusions to be drawn from the facts as opposed to the facts themselves, will not defeat a motion for summary judgment.*' *Contini v. Board of Education of Newark*, 96 *N.J.A.R.* 2d (EDU) 196, 215, citing *Lima & Sons, Inc. v.*

[7] In that the expiration of this allotted period would occur on a Sunday, respondent's submission was due on the next business day, March 17, 1997.
[8] This response was filed with the Commissioner on March 24, 1997.

Borough of Ramsey, 269 *N.J. Super.* 469, 478 (App. Div. 1994)***." (emphasis in text) (Slip Opinion at pp. 10-11) Here, respondent engaged in a course of conduct intended to interfere with the conducting of a school election and, subsequently, admitted that he did so knowingly and willingly. The Commissioner determines that respondent's actions of fraudulently casting and aiding others in the casting of illegal votes is, standing alone, sufficient for the establishment of unbecoming conduct on behalf of a teaching staff member. As such, the Commissioner can find no justification for the expenditure of scarce time and resources to conduct a plenary hearing, as he determines that the undisputed conduct giving rise to respondent's conviction amply establishes the District's charges. See *In the Matter of the Tenure Hearing of Robert R. Vitacco, School District of the Borough of Lincoln Park, Morris County,* decided by the Commissioner March 24, 1997.

As to the evaluation/determination of the appropriate penalty to be imposed in this matter, the Commissioner is mindful of the District's legitimate concern over a situation where tenured teaching staff, who as role models for their pupils and holders of the public trust must be held to the highest standards of good conduct, are known to have been convicted of behavior that is both illegal and, at least facially, connected to their school employment. However, in considering whether to dismiss an individual from tenured employment, the Commissioner must also consider that individual's prior record in the District, the nature and gravity of his offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation and the harm or injurious effect which his conduct may have had in the maintenance of discipline and the proper administration of the school system. *In re Fulcomer*, 93 *N.J. Super.* 404, 421-22 (App. Div. 1967). Nonetheless, he rejects respondent's claim of entitlement to a hearing in order to present such mitigating factors *in person.* The Commissioner notes that respondent's

submission to the record contains his eight-page affidavit which specifically addresses his more than 27 years of successful service in the District and other mitigating factors, and is accompanied by 24 letters of support from friends, colleagues, administrators, parents and students. A review of these comprehensive documents persuades the Commissioner that a hearing for the limited purpose of receiving additional evidence with respect to the assignment or mitigation of penalty is unnecessary, as a personal presentation of the extensive mitigating factors presented would serve to make no appreciable contribution to his consideration of the material.

Although in no way minimizing the extreme seriousness of this offense, the Commissioner, likewise, cannot ignore respondent's successful long history in the District without prior incident and all of the other mitigating factors which he has presented. Also particularly compelling was respondent's detailing of the pressure which he felt was placed on him to cooperate in this matter by persons in positions of influence and his very real fear of serious repercussions which might inure to him if he refused to do so. In this latter regard, the Commissioner is keenly aware of the deficiencies, irregularities and overall negative atmosphere which existed in the Newark School District at the time of respondent's actions, which situation ultimately necessitated the establishment of a State-operated school district in July 1995. While in no way serving as justification for respondent's criminal conduct, the circumstances under which such conduct occurred cannot be ignored by the Commissioner in determining the appropriate penalty to be assessed in this matter. Additionally, the Commissioner notes that the Superior Court of New Jersey, Essex County, Law Division, Criminal, having considered respondent's presentencing report and mitigating circumstances, imposed a penalty of two year's

probation, $500 fine, $50 VCCB and 120 hours of community service, under a statute which permitted imprisonment.

Having considered the within charges and all of the remaining factors, therefore, the Commissioner concludes that respondent's conduct, although egregious and unprofessional, does not, *based upon the unique circumstances existing in this matter*, warrant his dismissal from his tenured position. Notwithstanding, he finds it necessary and appropriate to impress upon this respondent and other individuals, through imposition of a very substantial penalty, the seriousness of such conduct and the degree to which it will not be tolerated in the school environment.

Accordingly, the Commissioner directs that the respondent shall not be dismissed from his tenured position, but shall, in light of the unbecoming conduct at issue herein, suffer a seven-month unpaid suspension, which period shall include the 120-day unpaid suspension already served, as well as forfeiture of his employment and adjustment increments for the 1998-99 and 1999-2000 school years.[9] Additionally, a copy of this decision is hereby forwarded to the State Board of Examiners, which body the Commissioner notes is currently considering action against respondent's certificate based on the criminal conduct underlying the instant matter. As such, the Commissioner directs that the within penalty be *in addition* to any suspension which the Board of Examiners may ultimately choose to impose.[10]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[9] This penalty is the most severe penalty the Commissioner has ever imposed short of dismissal.

[10] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

165-98

IN THE MATTER OF THE TENURE :

HEARING OF TERESE CAPRIGLIONE, :

STATE-OPERATED SCHOOL DISTRICT : COMMISSIONER OF EDUCATION

OF THE CITY OF NEWARK, ESSEX : DECISION

COUNTY. :

:

SYNOPSIS

District certified tenure charges of unbecoming conduct against respondent tenured guidance counselor based on her having pled guilty to Disturbing Results of an Election, in violation of *N.J.S.A.* 18A:14-65, wherein she admitted knowingly interfering with the orderly conduct of the Newark School Board Election held on April 7, 1992, which resulted in the casting of illegal votes.

Commissioner determined that respondent's actions of fraudulently casting and aiding others in the casting of illegal votes were, standing alone, sufficient for the establishment of unbecoming conduct on behalf of a teaching staff member. However, having considered the proven charges and all the remaining factors, the Commissioner concluded that respondent's conduct, although egregious and unprofessional, did not, based upon the unique circumstances existing in this matter, warrant her dismissal from her tenured position. Commissioner ordered respondent to suffer a seven-month unpaid suspension, which period shall include the 120-day unpaid suspension already served, and forfeiture of her increments for the 1998-99 and 1999-2000 school years. Commissioner directed that a copy of this decision be forwarded to the State Board of Examiners, which is considering action against respondent's certificate based on the criminal conduct underlying the instant matter, and directed that the within penalty be in addition to any suspension which that Board may ultimately choose to impose.

APRIL 22, 1998

AGENCY DKT. NO. 557-11/96

IN THE MATTER OF THE TENURE	:	
HEARING OF TERESE CAPRIGLIONE,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	
	:	

For Petitioner, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross
(Cherie L. Maxwell, Esq.)
For Respondent, Balk, Oxfeld, Mandell & Cohen (Sanford R. Oxfeld, Esq.)

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education on November 21, 1996, through the District's filing of tenure charges of unbecoming conduct against respondent.[1] Simultaneously with the submission of the tenure charges, the District submitted a Motion for Summary Decision seeking a judgment of forfeiture of respondent's public employment pursuant to *N.J.S.A.* 2C:51-2, as a result of her guilty plea to Disturbing Results of an Election, in violation of *N.J.S.A.* 18A:14-65 and *N.J.S.A.* 2C:2-6, wherein she admitted to knowingly interfering with the orderly conduct of the Newark School Board Election held on April 7, 1992, which resulted in the casting of illegal votes. By letter dated November 21, 1996, respondent was accorded 20 days within which to file an answer to the tenure charges and the motion for summary decision. Respondent's answer to the tenure charges

[1] It is noted that the District initially filed charges in this matter on or about November 6, 1996, and by letter dated November 20, 1996, withdrew those charges, requesting their return to the District, and concurrently filed the within charges.

was filed on November 27, 1996[2], and her response to the District's summary decision motion was filed on January 3, 1997. Upon review of the parties' papers with respect to the District's motion for summary forfeiture of respondent's employment, the Commissioner issued a letter decision on January 27, 1997, advising that pursuant to *N.J.S.A.* 2C:51-2, as amended by *P.L.* 1995, *c.* 250, he did not have jurisdiction to entertain applications for forfeiture of public employment and he, therefore, denied the District's motion for summary ruling, reminding the parties that there was, however, no preclusion to the District moving for summary decision with respect to any aspect of the pending tenure matters which were properly before him for adjudication. Subsequently, on March 5, 1997, the District filed a Motion for Summary Decision on the tenure charges of unbecoming conduct against respondent, seeking her removal from the District.[3] Respondent's reply to the motion was received on March 24, 1997, with the District's response to such reply being submitted on April 1, 1997. On April 22, 1997, respondent filed a motion to compel the District to return him to active salary status effective March 19, 1997. The District's reply to this motion and respondent's response to the reply were filed May 5, 1997 and May 7, 1997, respectively.

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[2] By letter dated December 2, 1996, respondent was reminded that her response to the District's summary decision motion, which was not included with her answer, was due by December 13, 1996. On December 3, 1996, respondent requested an additional 30 days within which to respond to this motion, and was advised by letter dated December 6, 1996, that, in view of the fact the applicable regulations would have provided respondent two additional 10-day periods had she not filed a timely answer, and in consideration of the year-end holiday schedule, she would be accorded until January 6, 1997, or an additional 24 days, within which to file her answer to the motion.

[3] By letter dated March 10, 1997, respondent challenged the Commissioner's authority to entertain a motion for summary decision here, contending that, pursuant to *N.J.A.C.* 1:1-12.1 *et seq.*, when a case has not yet been assigned to a judge, such motions may be filed with the Clerk. She maintains that there is nothing in the regulations which permit the Commissioner to entertain a motion for summary decision and, therefore, the within motion has been brought prematurely and should, rather, be handled by the Administrative Law Judge assigned to the case. The Commissioner observes that unless and until a matter is transmitted to the Office of Administrative Law, it is governed by the regulations of this agency, specifically, *N.J.A.C.* 6:24-1.1 *et seq.* Given that *N.J.A.C.* 6:24-1.13 specifically contemplates summary judgment motions before the Commissioner, respondent's contention in this regard is without merit and will not be further addressed herein. Respondent's letter alternatively urged that, if it were determined that this motion was properly before the Commissioner, she be provided an additional period of time over and above the 10 days previously accorded her to respond to the District's motion. By letter dated March 14, 1997, respondent was advised that her objection with respect to the premature submission of motions was more appropriately addressed in reply submissions and, if so raised, would be decided by the Commissioner in his final decision in this matter. Concurrently, respondent's request for additional time to respond to the District's motion was extended to March 24, 1997 (an additional 8 days) with the proviso, as was urged by the District, that such extension would be deemed a delay in proceedings at respondent's request, and would operate, pursuant to *N.J.S.A 18A:6-14*, to concomitantly defer respondent's resumption of salary during this period.

BACKGROUND

The uncontroverted material facts advanced by the District in this matter state:

On or about April 7, 1992, Terese Capriglione, a guidance counselor employed by the Newark School District, assisted others in the casting of illegal votes in the school board election. By her own admission she went to the polling place where her sister-in-law, Maryann Capriglione, was working as a challenger, to insure that Maryann wouldn't panic if people voted more than once. See Appendix of Evidence 3, Transcript of Pleas, p. 12, lines 13-16. Ms. Capriglione acknowledges that she watched her sister-in-law to make sure she would do nothing to stop individuals from voting more than once. *Id.* at p. 12, lines 22-25. If Maryann reacted to this scheme, Terese Capriglione was to hold her back, tell her to ignore it. *Id.* at p. 12, lines 23-25. By her own admission, she was aware that the purpose of this activity was to cast illegal votes and elect a certain candidate. *Id.* at p. 13, lines 1-5. As a result of this behavior, Ms. Capriglione was indicted on September 28, 1995 for the following crimes: Conspiracy (*N.J.S.A.* 2C:5-2; Official Misconduct (*N.J.S.A.* 2C:2-6; *N.J.S.A.* 18A:14-65); and Illegal Voting (*N.J.S.A.* 18A:14-78). See Appendix of Evidence 1.

Ms. Capriglione subsequently pled guilty to violating *N.J.S.A.* 18A:14-65; *N.J.S.A.* 2C:2-6. See Appendix of Evidence 2. The indictment states that Terese Capriglione did knowingly interfere with the orderly conduct of the Newark School Board Election held on April 7, 1992 by casting and/or aiding others in the casting of illegal votes.

On October 17, 1996 tenure charges for unbecoming conduct were filed against Terese Capriglione, by Petitioner, State-Operated School District of Newark. A response dated October 21, 1996 was submitted on her behalf.

(District's Brief in Support of Summary Decision, March 4, 1997 at pp. 1-2)

The instant tenure charges were certified by the State-operated District on November 18, 1996, and filed with the Commissioner on November 21, 1996.

POSITION OF THE PARTIES

MOTION FOR RESUMPTION OF SALARY

Respondent

Respondent states that, pursuant to *N.J.S.A.* 18A:6-14[4], she was entitled to be returned to active salary status as of March 19, 1997. She reasons that the charges against her were processed as of November 18, 1996, and she was suspended without pay effective November 19, 1996, commencing the running of the 120-day time line specified in statute, which period, respondent argues, terminated on March 18, 1997. As such, she contends that she was statutorily entitled to be returned to salary status on March 19, 1997, the 121st day. (Respondent's Motion to Return to Active Salary Status, at p. 2)

She advances that the District's position that resumption of her salary should be delayed by 33 days due to her requested 26-day extension to file her response to the District's forfeiture motion in November 1996, and her 7-day requested extension for response to the Motion for Summary Decision on the tenure charges in March 1997, is meritless. (*Id.*) In this regard, respondent initially asserts that the extension granted her to reply to the forfeiture motion was not predicated on a delay under the 120-day rule, as envisioned by statute. (*Id.*) In support of this contention, she notes that, although the within charges were certified to the Commissioner on November 18, 1996, to date, the case has not been transmitted to the Office of Administrative Law (OAL), assigned to a judge or scheduled for hearing. As such, even conceding that she requested and was granted 24 additional days to file a responsive brief to the District's forfeiture motion, which motion was ultimately denied by the Commissioner on January 27, 1997, she maintains that all of this time was within the 120-day period of her suspension and, as such, she

[4] The relevant portion of this statute specifies "Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person, shall be paid beginning on the one hundred twenty-first day until such determination is made.***"

queries "what was delayed?" "The hearing, which has not been scheduled, could not possibly have been delayed; the 120 day suspension without pay was not affected because the Commissioner's decision, even with extension, was filed and decided within the 120 day period." (*Id.* at pp. 3-4) Therefore, she proffers, petitioner's argument that her salary reinstatement be extended 24 days is insupportable.

Likewise, respondent argues, the "alleged delay," as a consequence of the 7-day extension for response to the summary decision motion on the charges is also insupportable. (*Id.* at p. 4) Notwithstanding that the extension was granted only under the condition that respondent agree that resumption of her salary be "concomitantly deferred," she "implicitly agreed to those terms" only because she had no viable option. (*Id.*) Again, she argues, as there is no hearing scheduled, there was no delay. Alternatively, she asserts that if the District is alleging that the "seven day delay" was related to the Commissioner's ability to decide this matter, this contention is also incorrect, reasoning, in that her 120-day suspension without pay expired on March 18, 1997, and, consequently, any delay must be measured as of March 19, 1997. (*Id.*) As such, respondent argues that she can be charged with a "delay" no greater than five days, *i.e.,* March 19, 1997 to March 24, 1997. (*Id.*)

Respondent, therefore, requests reinstatement to salary status, complete with related emoluments effective March 19, 1997 or, alternatively, if a delay attributable to her is found, *supra*, reinstatement be ordered as of March 24, 1997.

State-operated District

In reply, the District urges that, pursuant to *N.J.S.A.* 18A:6-14, it is clear that delays in tenure proceedings which are attributable to respondent are excluded from the period of time for which she is entitled to pay, (District's Letter Brief in Opposition to Respondent's Motion to Return to Active Salary Status as of March 19, 1997, at p. 3) buttressing such assertion with the citation of three Commissioner cases where individuals were not eligible for salary for

17 days, 23 days, and one month under what, it asserts, were similar type circumstances as exist here. It advances that the rationale for such a conclusion is founded on "basic equitable principles." (See *Ott v. Hamilton Twp. Bd. of Educ.*, 160 *N.J. Super.* 333 (App. Div. 1978), *cert. den.*, 78 *N.J.* 336 (1978).) (*Id.* at pp. 3-4)

Here, it proffers, respondent sought and received extensions of 26 days and 7 days, respectively, within which to reply to the District's motions, for a 33-day total delay attributable to her actions. (*Id.*) It further maintains that issues of whether such delays occurred during respondent's 120-day suspension period and/or prior to the scheduling of a hearing are of no importance or consequence whatsoever. Therefore, the District reasons that, as respondent is not entitled to salary for this period, it is entitled to extend her 120-day suspension without pay term by these additional days. (*Id.*)[5]

SUMMARY DECISION MOTION

State-operated District

The District advances that the within matter is clearly ripe for summary decision arguing

> [s]ummary decision should be granted if the pleadings and affidavits "show that there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law." *N.J.A.C.* 1:1-12.5; *Contini v. Bd. of Educ. of Newark*, 286 *N.J. Super.* 106, 121 (1995). The court must look to the evidentiary materials presented, viewed in a light most favorable to the non-moving party, and determine whether there is sufficient evidence to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. *Id.* at 122 (quoting *Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520, 523 (1995)) (District's Motion for Summary Decision, March 4, 1997, at p. 3)

Here, it proffers, the absence of genuine issues of material fact is fully evident in that respondent's conduct underlying these charges is undisputed. Respondent, a guidance counselor who possesses a Master's degree with Ph.D. equivalency, admittedly, knowingly interfered with

[5] The District's submission reflects that respondent was returned to active salary status as of April 23, 1997, which reflects the additional 33-day delay which it argues herein was attributable to respondent.

the conducting of the school election held on April 7, 1992, by going to the polling place where her sister-in-law was working as a challenger with the purpose and intent of "hold[ing] her back, [and] to tell her to ignore" any illegal voting, all in contravention of *N.J.S.A.* 18A:14-65 and *N.J.S.A.* 2C:2-6, fully aware that the purpose of this endeavor was to ensure that a particular candidate was elected. (*Id.* at pp. 5-6) It maintains that such behavior on the part of a teaching staff member is unbecoming conduct must be the conclusion of any rational factfinder. (*Id.* at p. 3) Moreover, it observes that the Commissioner has long taken the position that, because of the influential position they occupy, criminal conduct of teachers is particularly egregious. *In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson*, 1974 *S.L.D.* 97, 98-99, the Commissioner stated

> Teachers are public employees who hold positions demanding public trust, and in such positions, they teach, inform, and mold habits and attitudes and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully violates the law, as in this matter, and consequently violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner. (*Id.* at pp. 4-5)

Also, particularly disturbing here, the District maintains, is that respondent who, as a guidance counselor, would be expected to "guide young people through decision making processes" rather than "assist[ing] other teachers in the casting of illegal votes," at her sentencing in this matter attempted to justify her criminal behavior by labeling it "poor judgment." (*Id.* at pp. 5-6) It proffers that respondent's behavior clearly transcends mere poor judgment, "[t]his conduct is blatantly and clearly criminal." (*Id.* at p. 6) Even more troubling, it argues, is the fact that respondent, again at her sentencing, demonstrated a "distorted perspective" and a "failure to understand the enormous impact of her actions" when she was queried by the court as to the effect this matter has had on her students and she responded

> They don't seem to be effected (sic) by it. I mean not to me. I don't know what they might say to anybody else but to me

> personally I don't think they are affected by it. I think some of that may be that they live in an atmosphere of so many bad things that I don't think they look at this in the same way. (District's Motion for Summary Decision at p. 6, quoting Transcript of Sentencing of Terese Capriglione, p. 8, lines 13-18)

It advances that respondent's apparent attitude, evidenced here, is that students who are exposed to wrongdoing on a regular basis become immune to the actions of a lawbreaker. Even accepting that this might be true, it argues, teachers, and especially guidance counselors, have a "heightened responsibility" to serve as role models to these students and to convey the message that, although evidence of wrongdoing may surround them, they all should strive, individually and collectively, to "do the right thing." (*Id.* at p. 7)

The District next proffers that it is well-established that "unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant, *In re Fulcomer*, 93 *N.J. Super.* 404, 421 (App. Div. 1967) (*id.* at p. 5), particularly when the incident at issue is also a criminal violation and the proffered evidence is a judgment of conviction supplemented by other legally competent proofs such as the indictment, transcripts of the pleas and sentencing and the respondent's own statements as to her culpability, as is the case here. See *In the Matter of the Tenure Hearing of Kenneth Henderek, School District of the Township of East Brunswick*, 94 *N.J.A.R.* 2d (EDU) 268, at 275. See also *Matter of Tanelli,* 194 *N.J. Super.* 492, at 497, 498 (1984). (*Id.)* The District urges that it be granted summary decision as a matter of law in this case as the uncontested proofs advanced clearly constitute sufficient competent evidence to support a finding of conduct unbecoming a teacher warranting respondent's removal from her position.

Respondent

Respondent contends that summary decision is inappropriate here in that there are unresolved factual issues as to whether respondent's guilty plea to a misdemeanor rises to the level of unbecoming conduct. (Respondent's Brief in Opposition to the District's Motion for

Summary Decision, March 18, 1997, at p. 7) She further proffers, "even assuming[,] *arguendo*, some degree of conduct unbecoming, genuine issues exist regarding the nature of the penalty, if at all, to be imposed on respondent." (*Id.*) Respondent cites a number of cases decided by the Commissioner for the proposition that the term "unbecoming conduct" is amorphous, having been defined in "various ways" and resulting in varying degrees of penalty after the consideration of all mitigating circumstances. (*Id.* at p. 8) She distinguishes this matter from *Henderek, supra,* relied on by the District for the proposition "that a conviction warrants a termination," reasoning that this consequence occurred only after Henderek had received a full hearing, as required by *N.J.S.A.* 18A:6-10, and his mitigating circumstances were fully presented and considered. (*Id.* at p. 11) Respondent, therefore, advances that, at a very minimum, pursuant to *N.J.S.A.* 18A:6-10, "there *must* be a hearing to determine penalty," where she will be permitted to present witnesses and to enter evidence on her own behalf and for this reason, standing alone, summary decision cannot be granted to the District. (emphasis in text) (*Id.* at p. 12)

DETERMINATION

Upon careful review of the record[6] and the advanced arguments of the parties, the Commissioner initially concurs with respondent that, under the circumstances existing in this matter, she was entitled to be returned to active salary status in March 1997. Notwithstanding this conclusion, the Commissioner determines, for the reasons outlined below, that the effective date of such restoration is March 26, 1997, rather than March 19, 1997 or March 24, 1997, as advanced by respondent.

[6] It is noted that the District's submissions in this matter include an "Appendix of Evidence" containing Indictment No. 95-09-0308, Superior Court of New Jersey, Essex County, Law Division - Criminal; Judgment of Conviction, Superior Court of New Jersey, Essex County, Law Division - Criminal; Transcript of respondent's Pleas, Superior Court of New Jersey, Essex County, Law Division - Criminal, dated July 15, 1996; and Transcript of respondent's Sentencing, Superior Court of New Jersey, Essex County, Law Division - Criminal, dated September 5, 1996. Also included in the record is a copy of a sworn statement given by respondent to the Essex County Prosecutor's Office on June 26, 1996, with respect to her involvement in this matter.

In his consideration of what appear to be respondent's two primary arguments in support of his motion, the Commissioner is compelled to discount them both. Inasmuch as the two instances of alleged delay occasioned by respondent herein were in connection with the filing of her responses to summary decision motions filed by the District for the Commissioner's consideration, her assertion that, because this case had not been set down for a hearing before an ALJ there was no "delay" in the proceedings, is specious. Likewise, untenable is her apparent contention that the timing of any delay, *i.e.,* whether occurring during the course of or after the expiration of the 120-day time period, has any impact whatsoever on the operation of this statutory provision, as its clear language makes no such distinction.

Irrespective of the dubious nature of respondent's proffered arguments on this issue, the Commissioner cannot concur with the District's position that the two instances of delay which occurred in this matter warrant a 33-day extension of respondent's unpaid suspension, rather, he concludes that only seven days of this period can be charged against respondent's salary entitlement computation, finding that such a result is dictated by the distinguishable nature of the two time periods under review. First, as to respondent's submission in connection with the District's simultaneous filing of tenure charges and its summary decision motion for forfeiture in November 1996, such response, pursuant to *N.J.A.C.* 6:24-5.3, was to be made in accordance with the regulatory provisions specified in *N.J.A.C.* 6:24-1.4 which on its face states

> Failure to answer within the 20 day period from receipt of service shall result in a notice to the respondent directing an answer within 10 days of receipt. Further failure to respond shall result in a second notice which shall inform the respondent that unless an answer is received within 10 days of the receipt of said notice, each count in the petition of appeal shall be deemed admitted and the Commissioner shall render a decision by way of summary judgment. (*N.J.A.C.* 6:24-1.4(e))

Moreover, *N.J.A.C.* 6:24-1.4(a) additionally specifies that "[u]pon written application by a party the Commissioner may extend the time for answer. Such application must be received prior to the expiration of the 20 day period." Here, while filing her Answer to the tenure charges on

November 27, 1996, respondent on December 3, 1996, well within the allotted 20-day due date for her combined submission, requested and was granted a 24-day extension of time within which to reply to the motion portion of the District's filing, and did so in accordance with such granted extension. In that the applicable regulatory provisions governing this particular submission clearly contemplate the granting of an extension of time within which to file, the Commissioner cannot find justification for terming this granted extension a "delay" within the intendment of the statute and, therefore, ascribing penalty to respondent for this period of time.

On the other hand, the response schedule for the District's summary decision motion on the charges in March 1997, was established by the March 6, 1997 letter of the Director, Bureau of Controversies and Disputes, rather than by regulation, and unequivocally granted respondent 10 days for her response.[7] Moreover, in reply to her request for extension of this period, respondent was specifically advised that such extension could only be granted with the understanding and agreement that her resumption of salary "shall be concomitantly deferred."[8] (See Director's March 14, 1997 letter.) Under these circumstances, respondent cannot now claim absolution from the consequences of the delay she occasioned.

In reviewing the appropriateness of summary decision in this matter, the Commissioner concludes that the District's motion for a finding of unbecoming conduct must be granted as he finds no outstanding issues of material fact herein and, therefore, the District is entitled to prevail on the truth of its charges as a matter of law. Notwithstanding respondent's urging to the contrary, the record reveals that her submissions to the record present no issue of material fact with respect to the conduct underlying her conviction but, rather, in actuality, challenge the conclusions to be drawn from this conduct and its effect on her employment under the tenure laws. As recognized by the Commissioner in *In the Matter of the Tenure Hearing of*

[7] In that the expiration of this allotted period would occur on a Sunday, respondent's submission was due on the next business day, March 17, 1997.

[8] This response was filed with the Commissioner on March 24, 1997.

Andrew Phillips, School District of the Borough of Roselle, Union County, decided by the Commissioner March 20, 1997, "'[i]t is well-established that where no disputed issues of material fact exist, an administrative agency need not hold an evidential hearing in a contested case' *Frank v. Ivy Club*, 120 *N.J.* 73, 98, citing *Cunningham v. Dept. of Civil Service*, 69 *N.J.* 13, 24-25 (1975). 'Moreover, disputes as to the *conclusions to be drawn from the facts, as opposed to the facts themselves, will not defeat a motion for summary judgment.*' *Contini v. Board of Education of Newark*, 96 *N.J.A.R.* 2d (EDU) 196, 215, citing *Lima & Sons, Inc. v. Borough of Ramsey*, 269 *N.J. Super.* 469, 478 (App. Div. 1994)***." (emphasis in text) (Slip Opinion at pp. 10-11) Here, respondent engaged in a course of conduct intended to interfere with the conducting of a school election and, subsequently, admitted that she did so knowingly and willingly. The Commissioner determines that respondent's actions of purposely aiding in the casting of illegal votes is, standing along, sufficient for the establishment of unbecoming conduct on behalf of a teaching staff member. As such, the Commissioner can find no justification for the expenditure of scarce time and resources to conduct a plenary hearing, as he determines that the undisputed conduct giving rise to respondent's conviction amply establishes the District's charges. See *In the Matter of the Tenure Hearing of Robert R. Vitacco, School District of the Borough of Lincoln Park, Morris County*, decided by the Commissioner March 24, 1997.

As to the evaluation/determination of the appropriate penalty to be imposed in this matter, the Commissioner is mindful of the District's legitimate concern over a situation where tenured teaching staff, who as role models for their pupils and holders of the public trust must be held to the highest standards of good conduct, are known to have been convicted of behavior that is both illegal and, at least facially, connected to their school employment. However, in considering whether to dismiss an individual from tenured employment, the Commissioner must also consider that individual's prior record in the District, the nature and gravity of her offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation

and the harm or injurious effect which her conduct may have had in the maintenance of discipline and the proper administration of the school system. *In re Fulcomer*, 93 *N.J. Super.* 404, 421-22 (App. Div. 1967). Nonetheless, the Commissioner rejects respondent's claim of entitlement to a hearing in order to present such mitigating factors *in person.* He notes that respondent's submission to the record contains her five-page affidavit which specifically addresses her 22 years of successful service in the District and other mitigating factors, and is accompanied by 36 cards and letters of support from friends, colleagues, administrators, parents and students. A review of these comprehensive documents persuades the Commissioner that a hearing for the limited purpose of receiving additional evidence with respect to the assignment or mitigation of penalty is unnecessary, as a personal presentation of the extensive mitigating factors presented would serve to make no appreciable contribution to his consideration of the material.

Although in no way minimizing the extreme seriousness of this offense, the Commissioner, likewise, cannot ignore respondent's successful long history in the District without prior incident and all of the other mitigating factors which she has presented. Also particularly compelling was respondent's detailing of the pressure which she felt was placed on her to cooperate in this matter by persons in positions of influence and her very real fear of serious repercussions which might inure if she refused to do so. In this latter regard, the Commissioner is keenly aware of the deficiencies, irregularities and overall negative atmosphere which existed in the Newark School District at the time of respondent's actions, which situation ultimately necessitated the establishment of a State-operated school district in July 1995. While in no way serving as justification for respondent's criminal conduct, the circumstances under which such conduct occurred cannot be ignored by the Commissioner in determining the appropriate penalty to be assessed in this matter. Additionally, the Commissioner notes that the Superior Court of New Jersey, Essex County, Law Division, Criminal, having considered respondent's presentencing report and mitigating circumstances, imposed a penalty of two year's

probation, $500 fine, $50 VCCB and 120 hours of community service, under a statute which permitted imprisonment.

Having considered the within charges and all of the remaining factors, therefore, the Commissioner concludes that respondent's conduct, although egregious and unprofessional, does not, *based upon the unique circumstances existing in this* matter, warrant her dismissal from her tenured position. Notwithstanding, he finds it necessary and appropriate to impress upon this respondent and other individuals, through imposition of a very substantial penalty, the seriousness of such conduct and the degree to which it will not be tolerated in the school environment.

Accordingly, the Commissioner directs that respondent shall not be dismissed from her tenured position, but shall, in light of the unbecoming conduct at issue herein, suffer a seven-month unpaid suspension, which period shall include the 120-day unpaid suspension already served, as well as forfeiture of her employment and adjustment increments for the 1998-99 and 1999-2000 school years.[9] Additionally, a copy of this decision is hereby forwarded to the State Board of Examiners, which body the Commissioner notes is currently considering action against respondent's certificate based on the criminal conduct underlying the instant mater. As such, the Commissioner directs that the within penalty be *in addition* to any suspension which the Board of Examiners may ultimately choose to impose.[10]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[9] This penalty is the most severe penalty the Commissioner has ever imposed short of dismissal.

[10] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

166-98

166-98

IN THE MATTER OF THE TENURE	:	
HEARING OF GREGORY PALUMBO,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

SYNOPSIS

District certified tenure charges of unbecoming conduct against respondent tenured teaching staff member based on his having pled guilty to Disturbing Results of an Election, in violation of *N.J.S.A.* 18A:14-65, wherein he admitted knowingly interfering with the orderly conduct of the Newark School Board Election held on April 7, 1992, which resulted in the casting of illegal votes. Respondent submitted Motion to Dismiss based on procedural defects.

Commissioner denied respondent's Motion to Dismiss, determining that defects herein were technical and insubstantial in nature and insufficient to render the process unfair. Commissioner determined that respondent's actions of fraudulently casting and aiding others in the casting of illegal votes were, standing alone, sufficient for the establishment of unbecoming conduct on behalf of a teaching staff member. However, having considered the proven charges and all the remaining factors, the Commissioner concluded that respondent's conduct, although egregious and unprofessional, did not, based upon the unique circumstances existing in this matter, warrant his dismissal from his tenured position. Commissioner ordered respondent to suffer a seven-month unpaid suspension, which period shall include the 120-day unpaid suspension already served, and noting that respondent's certificate was currently suspended, pursuant to a separate State Board of Examiners action, until October 9, 1998, the remaining portion of the within suspension would commence upon his eligibility to return to certificated employment. Commissioner additionally directed that respondent forfeit his increments for the 1998-99 and 1999-2000 school years.

AGENCY DKT. NO. 558-11/96

IN THE MATTER OF THE TENURE	:	
HEARING OF GREGORY PALUMBO,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

For Petitioner, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross
(Cherie L. Maxwell, Esq.)

For Respondent, Eugene G. Liss, Esq.

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education on November 21, 1996, through the District's filing of tenure charges of unbecoming conduct against respondent.[1] Simultaneously with the submission of the tenure charges, the District submitted a Motion for Summary Decision seeking a judgment of forfeiture of respondent's public employment pursuant to *N.J.S.A.* 2C:51-2, as a result of his guilty plea to Disturbing Results of an Election, in violation of *N.J.S.A.* 18A:14-65, wherein he admitted to knowingly interfering with the orderly conduct of the Newark School Board Election held on April 7, 1992,

[1] It is noted that the District initially filed charges in this matter on or about November 6, 1996, and by letter dated November 20, 1996, withdrew those charges, requesting their return to the District, and concurrently filed the within charges.

which resulted in the casting of illegal votes. By letter dated November 21, 1996, respondent was accorded 20 days within which to file an answer to the tenure charges and the motion for summary decision, and such submission was made by respondent on December 13, 1997.[2] Upon review of the parties' papers with respect to the District's motion for summary forfeiture of respondent's employment, the Commissioner issued a letter decision on January 27, 1997, advising that pursuant to *N.J.S.A.* 2C:51-2, as amended by *P.L.* 1995, *c.* 250, he did not have jurisdiction to entertain applications for forfeiture of public employment and he, therefore, denied the District's motion for summary ruling, reminding the parties that there was, however, no preclusion to the District moving for summary decision with respect to any aspect of the pending tenure matters which were properly before him for adjudication. Subsequently, on March 5, 1997, the District filed a Motion for Summary Decision on the tenure charges of unbecoming conduct against respondent, seeking his removal from the District.[3] On March 24, 1997, respondent filed a reply to the District's motion for summary decision, and contemporaneously submitted a motion to dismiss. By letter dated March 25, 1997, the District was afforded 10 days to reply to respondent's motion and respondent, upon his receipt of any filing made by the District was accorded five days within which to reply to such filing. The

[2] By letter dated December 20, 1996, the District attempted to file a reply to respondent's brief in opposition to the motion for summary decision. It was notified that, as there was no provision made for any submission beyond an answer and a reply in the Director's November 21, 1996 letter, this submission and any response thereto which might subsequently be submitted, would not be considered in these proceedings.

[3] In a letter dated March 13, 1997, respondent challenged the Commissioner's authority to entertain a motion for summary decision. He contends that, pursuant to *N.J.A.C.* 1:1-12.1 *et seq.*, when a case has not yet been assigned to a judge, motions may be filed with the Clerk. He maintains that there is nothing in the regulations which permit the Commissioner to entertain a motion for summary decision and, therefore, this motion has been brought prematurely and should, rather, be handled by the Administrative Law Judge assigned to the case. The Commissioner observes that unless and until a matter is transmitted to the Office of Administrative Law, it is governed by the regulations of this agency, specifically, *N.J.A.C.* 6:24-1.1 *et seq.* Given that *N.J.A.C.* 6:24-1.13 specifically contemplates summary judgment motions before the Commissioner, respondent's contention in this regard is without merit and will not be further addressed herein.

District's response to respondent's motion was filed on April 8, 1997, with no reply being filed by respondent.[4]

BACKGROUND

The uncontroverted material facts advanced by the District in this matter state: On or about April 7, 1992, Gregory Palumbo, a tenured teacher employed by the Newark School District, repeatedly cast illegal votes and assisted others in the casting of illegal votes in the school board election. By his own admission, he went inside the polling place and forged the names of voters on the voting list. See Appendix of Evidence, Transcript of Plea, p. 11, lines 11-14. Mr. Palumbo acknowledges that he personally forged the names of at least one hundred twenty-eight (128) individuals. *Id.* at p. 11, lines 12-14. He further acknowledges that he tripped the voting lever and voted for people who were not there. *Id.* at p. 10, lines 1-3. This resulted in one hundred twenty-eight (128) fraudulent votes being cast. *Id.* at p. 11, lines 14-16. By his own admission, he observed others participating in this fraudulent, illegal, criminal conduct. *Id.* at p. 11, lines 20-25. He was aware that the purpose of this conduct was to cast illegal votes and secure the election of certain individuals to the school board. By his own admission, he was guilty of disturbing the results of an election. *Id.* at p. 10, lines 15-19.

As a result of the behavior described above, Mr. Palumbo was accused of Disturbing Results of an Election (*N.J.S.A.* 2C:2-6; *N.J.S.A.* 18A:14-65) ***. See Appendix of Evidence 1.

Mr. Palumbo waived indictment and subsequently pled guilty to an accusation of violations of *N.J.S.A.* 18A:14-65; *N.J.S.A.* 2C:2-6. See Appendix of Evidence 2 & 3. The

[4] On April 25, 1997, respondent filed a motion to return him to active salary status as of March 26, 1997. Such motion was subsequently withdrawn pursuant to respondent's letter dated May 9, 1997, which indicated that this issue had been satisfactorily resolved by the parties.

accusation states that Mr. Palumbo did knowingly interfere with the orderly conduct of the Newark School Board Election held on April 7, 1992 by casting and/or aiding others in the casting of illegal votes. See Appendix of Evidence 1.

On October 17, 1996, tenure charges for unbecoming conduct were filed against Mr. Palumbo, by Petitioner, State-Operated School District of Newark. A response dated October 21, 1996 was submitted on his behalf.

(District's Brief in Support of Summary Decision, March 4, 1997, at pp. 1-2)

On November 21, 1996, the State-Operated District of Newark certified the instant tenure charges to the Commissioner.

POSITION OF THE PARTIES

MOTION TO DISMISS

Respondent

Respondent argues that this matter should be dismissed because of the District's failure to comply with *N.J.S.A.* 18A:6-11 and *N.J.A.C.* 6:24-5.1 in the service of the within tenure charges. In this regard, he states that the District originally filed tenure charges against him on or about October 17, 1996; he filed a response to such charges on or about October 31, 1996; and on or about November 8, 1996, he received the Certificate of Determination on these charges. (Respondent's Brief in Support of Motion to Dismiss and in Opposition to Petitioner's Motion for Summary Judgment, at p. 3) Respondent avers that on or about November 20, 1996, the District withdrew these charges and refiled new charges against him, accompanied by a new Certificate of Determination. He states that, although his attorney received the new charges, he, personally, "was never notified of the charges or given the

opportunity to respond," in contravention of *N.J.S.A.* 18A:6-11. *(Id.)* Respondent further contends that *N.J.A.C.* 6:24-5.1, which dictates the procedures to be utilized in *all* instances of the filing and certification of tenure charges, requires service of such charges upon the affected employee and that proof of this service accompany the filing. *(Id.)* Moreover, respondent asserts that the District's failure to follow required procedures is not a merely a technical or insubstantial defect. In support of this assertion, respondent cites *In the Matter of the Tenure Hearing of Carol Beam,* 93 *N.J.A.R.* 2d (EDU) 320 where, in reviewing procedural and technical errors by school districts, the court stated

> Dismissal of tenure charges is not required for technical, insubstantial failure to follow *N.J.S.A* 18A:6-10 to 14. The Appellate Division has distinguished the significance of various technical violations in *In the Matter of the Tenure Hearing of Cowan,* 224 *N.J. Super.* 737 (App. Div. 1988). Many are simply insufficient to render the process unfair and contrary to the statutory intendment.... On the other hand, a failure to give a teacher the time to answer and a board's failure to act roughly within 45 days, plus 15 days to respond are fatal defects.
> *(Id.* at p. 5)

Therefore, respondent maintains that the District's failure to provide him time to answer the newly filed charges, instead just resubmitting the withdrawn charges along with his answer to those charges, its submission of a new determination, and its failure to serve him with the new charges, personally or by certified mail, as mandated by statute and regulation, clearly evidences a fatal defect necessitating dismissal of these charges.

State-operated District

In response, the District urges that respondent's argument that failure to deliver the within charges to him *directly* is a fatal flaw obliging dismissal of the charges, "exalts form over substance." (District's Brief in Response to Respondent's Motion to Dismiss and to

Respondent's Opposition to Petitioner's Motion for Summary Decision, at p. 2) It advances that respondent, admittedly, was personally served with the first set of tenure charges filed which, subsequently, were withdrawn due to a technical error having no impact whatsoever on the charges, and replaced by the filing of "identical charges" which were served on respondent through his attorney, who had entered an appearance on his behalf in this matter. *(Id.)* Moreover, the District points out that, notwithstanding respondent's current argument, he "*answered* the charges which he now claims should be dismissed for lack of personal jurisdiction and notice." (emphasis in text) *(Id.)* The District further urges that at no time prior to the filing of his motion did respondent advance a defense of "lack of service" nor did he indicate that his attorney would not accept service on his behalf. *(Id.)* As such, the District contends that service upon respondent through his attorney, rather than directly to him, is no more than a technical violation, which did not in any way prejudice respondent in this matter. (*Id.* at p. 3)

SUMMARY DECISION MOTION

State-operated District

The District advances that the within matter is clearly ripe for summary decision arguing

> [s]ummary decision should be granted if the pleadings and affidavits "show that there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5; *Contini v. Bd. of Educ. of Newark,* 286 *N.J. Super.* 106, 121 (1995). The court must look to the evidentiary materials presented, viewed in a light most favorable to the non-moving party, and determine whether there is sufficient evidence to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. *Id.* at 122 (quoting *Brill v. Guardian Life Ins. Co.,* 142 *N.J.* 520, 523 (1995)) (District's Motion for Summary Decision, March 4, 1997, at p. 3)

Here, it proffers, the absence of genuine issues of material fact is fully evident in that respondent's conduct underlying these charges is undisputed. He has admitted fraudulently casting illegal votes by forging the names of at least 128 voters, pulling the lever to cast the votes and assisting other teachers in the casting of illegal votes in the school election held on April 7, 1992, all in contravention of *N.J.S.A.* 18A:14-65 and *N.J.S.A.* 2C:2-6. (*Id.* at pp. 5-6) It maintains that such behavior on the part of a teaching staff member is unbecoming conduct must be the conclusion of any rational factfinder. (*Id.)* Moreover, it observes that the Commissioner has long taken the position that, because of the influential position they occupy, criminal conduct of teachers is particularly egregious. In *In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson,* 1974 *S.L.D.* 97, 98-99, the Commissioner stated

> ***Teachers are public employees who hold positions demanding public trust, and in such positions, they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully violate the law, as in this matter, and consequently violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner. (*Id.* at pp. 4-5)

The District further urges that it is well-established, that "unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant," *In re Fulcomer,* 93 *N.J. Super.* 404, 421 (App. Div. 1967) (*id.* at p. 5) particularly when the incident at issue is also a criminal violation and the proffered evidence is a judgment of conviction supplemented by other legally competent proofs such as the accusation, transcripts of the plea and sentencing and the respondent's own statements as to his culpability, as is the case here. See *In the Matter of the Tenure Hearing of Kenneth Henderek, School District of the Township of East Brunswick,*

Middlesex County, 94 *N.J.A.R.* 2d (EDU) 268, at 275. See also *Matter of Tanelli,* 194 *N.J. Super.* 492, at 497, 498 (1984). (*Id.* at p. 5) The District urges that it be granted summary decision as a matter of law in this case as the uncontested proofs advanced clearly constitute sufficient competent evidence to support a finding of conduct unbecoming a teacher warranting respondent's removal from his position.

Respondent

Respondent argues that the applicable statutes in this matter do not permit summary judgment in a tenure hearing, and alleges that the District's reliance on *Contini, supra.* is inappropriate here. He maintains that the applicable statutory provision which governed the *Contini* matter, *N.J.S.A.* 18A:7A-15, specifically contemplates the possibility of summary decision in that it states "upon its determining that the school district is not providing a thorough and efficient system of education, the State board may direct the removal of the district board of education and the creation of a State-operated school district." (Respondent's Motion to Dismiss and Response to Petitioner's Motion for Summary Judgment, at pp. 6-7) Respondent contends that statutes governing tenure, *N.J.S.A.* 18A:28-5 and *N.J.S.A.* 18A:6-16, on the other hand, "do not call for the immediate 'per se' dismissal of school teachers for unbecoming conduct/commission of a crime." (*Id.* at p. 7) Rather, he asserts that *N.J.S.A.* 18A:6-16 specifically directs that he is entitled to a hearing on the tenure charges, the "pivotal words of the statute [being] that the Commissioner shall 'conduct a hearing' on the charge and 'render a decision.'" (*Id.)*

Respondent further advances that the Commissioner has previously commented on cases similar to his matter herein, stating

> The Commissioner thus concludes that in the tenure matter where a respondent has been convicted of an indictable offense(s), which forms the basis for the certification of tenure charges, no obligation exists to retry such individual's guilt. The doctrines of res judicata and collateral estoppel bar relitigation of such conviction. However, a review of the legal documents related to such conviction and the taking of testimony in consideration of mitigation circumstances surrounding the fact underlying any such conviction is acceptable and consistent with law.
> (Respondent's Motion to Dismiss and Response to Petitioner's Motion for Summary Judgment, at p. 8)

As such, respondent maintains that, notwithstanding whether the District establishes that his conduct rises to the level of unbecoming conduct as a matter of law, because issues of fact remain with respect to an appropriate penalty, he "is entitled to a hearing and the opportunity to supply witnesses, additional evidence, and to present mitigating factors in person." (*Id.* at p. 9) Respondent "demands that he be given a tenure hearing as a matter of law[,] [as t]here is no jurisdiction for an Administrative Law Judge or the Commissioner of Education to grant automatic dismissals in a tenure hearing without the consideration of mitigating factors and a hearing thereon." *(Id.)*

DETERMINATION

Upon careful review of the record[5] and arguments of the parties advanced in this matter, the Commissioner initially denies respondent's Motion to Dismiss the within tenure charges predicated upon the assertion that the District's service of the charges in this matter upon

[5] It is noted that the District's submissions in this matter include an "Appendix of Evidence" containing Accusation #95-7-1203, Superior Court of New Jersey, Essex County, Law Division - Criminal; Waiver of Indictment and Trial by Jury, Accusation #95-7-1203, Superior Court of New Jersey, Essex County, Law Division - Criminal; Judgment of Conviction, Superior Court of New Jersey, Essex County, Law Division - Criminal; Transcript of respondent's Plea, Superior Court of New Jersey, Essex County, Law Division - Criminal, dated July 28, 1995; and Transcript of respondent's Sentencing, Superior Court of New Jersey, Essex County, Law Division - Criminal, dated August 31, 1995. Also included in these materials is a Transcript of Sentencing of another individual involved in the election fraud incidents. The Commissioner finds that this document is not germane to the instant matter and it was, therefore, not considered in reaching the determination herein.

his attorney, rather than on him personally, is violative of the requirements of *N.J.S.A.* 18A:6-11 and *N.J.A.C.* 6:24-5.1, and that this, along with the District's failure to provide him an opportunity to answer these charges, are fatal defects necessitating dismissal of the charges. The Commissioner determines that such defects, under the particular circumstances existing in this matter, are "technical and insubstantial" in nature and are "simply insufficient to render the process unfair and contrary to statutory intendments." *Beam, supra,* at 321.

In this regard, the Commissioner observes that the procedures outlined by statute and regulation are clearly designed to protect the rights of tenured employees when tenure charges against them, seeking their dismissal or reduction in salary, are undertaken, and are intended to insure that notions of due process and fundamental fairness are observed in this process. Moreover, it is well-established that the Commissioner will not automatically dismiss tenure charges on procedural grounds and has declined to do so where the defect at issue did not, under the particular circumstances, prejudice a respondent's rights or represent an egregious and unwarranted disregard of tenure proceeding law. See *In the Matter of the Tenure Hearing of James Andrews, School District of the City of Newark, Essex County,* 1991 *S.L.D.* 1286; *In the Matter of the Tenure Hearing of Thomas Puryear, School District of the City of Newark, Essex County,* 1977 *S.L.D.* 934; *In the Matter of the Tenure Hearing of Eddie Lee Harrell, School District of the City of Paterson, Passaic County,* decided by the Commissioner August 30, 1985. Under the totality of the circumstances presented in the instant matter, the Commissioner cannot conclude that the procedural defects at issue can reasonably be termed to have substantially violated these statutory and regulatory mandates and intendments. Specifically, respondent's own submission herein confirms the sequence of events which occurred in this matter. On or

about October 17, 1996, he was personally served with tenure charges of unbecoming conduct by the District and on or about October 31, 1996 respondent, through his attorney, filed his answer to such charges. Thereafter, on or about November 8, 1996, the charges were certified to the Commissioner. (Respondent's Motion to Dismiss and Response to Petitioner's Motion for Summary Judgment, at p. 3) The Commissioner observes that shortly thereafter, by letter dated November 20, 1996, the District withdrew these charges, due to what it, uncontrovertedly, asserted was a "technical error which in no way affected the charges," (District's Response to Respondent's Motion to Dismiss, at p. 2) and *simultaneously* replaced them with an *identical* set of charges, serving respondent's attorney of record with a full copy of this entire submission. As such, given that respondent was, in fact, served with and answered the District's tenure charges, the Commissioner concludes that respondent cannot credibly claim that his rights were prejudiced by the District's failure to personally serve him or provide him an opportunity to answer the identical in content substituted charges.

In reviewing the appropriateness of summary decision in this matter, the Commissioner concludes that the District's motion must be granted as he finds no outstanding issues of material fact herein and, therefore, the District is entitled to prevail on the truth of its charges as a matter of law. Notwithstanding respondent's urging to the contrary, the record reveals that his submissions to the record present no issue of material fact with respect to the conduct underlying his conviction but, rather, in actuality, challenge the conclusions to be drawn from this conduct and its effect on his employment under the tenure laws. As recognized by the Commissioner in *In the Matter of the Tenure Hearing of Andrew Phillips, School District of the Borough of Roselle, Union County,* decided by the Commissioner March 20, 1997, "'[i]t is well-

established that where no disputed issues of material fact exist, an administrative agency need not hold an evidential hearing in a contested case.' *Frank v. Ivy Club,* 120 *N.J.* 73, 98, citing *Cunningham v. Dept. of Civil Service,* 69 *N.J.* 13, 24-25 (1975). 'Moreover, disputes as to the *conclusions to be drawn from the facts as opposed to the facts themselves, will not defeat a motion for summary judgment.' Contini v. Board of Education of Newark,* 96 *N.J.A.R.* 2d (EDU) 196, 215, citing *Lima & Sons, Inc. v. Borough of Ramsey,* 269 *N.J. Super.* 469, 478 (App. Div. 1994)***." (emphasis in text) (Slip Opinion at pp. 10-11) Here, respondent engaged in a course of conduct intended to interfere with the conducting of a school election and, subsequently, admitted that he did so knowingly and willingly. The Commissioner determines that respondent's actions of fraudulently casting and aiding others in the casting of illegal votes are, standing alone, sufficient for the establishment of unbecoming conduct on behalf of a teaching staff member. As such, the Commissioner can find no justification for the expenditure of scarce time and resources to conduct a plenary hearing, as he determines that the undisputed conduct giving rise to respondent's conviction amply establishes the District's charges. See *In the Matter of the Tenure Hearing of Robert R. Vitacco, School District of the Borough of Lincoln Park, Morris County,* decided by the Commissioner March 24, 1997.

As to the evaluation/determination of the appropriate penalty to be imposed in this matter, the Commissioner rejects respondent's arguments that he is necessarily entitled to a hearing in this matter in order to present mitigating factors *in person.* The Commissioner notes that respondent's submission with respect to the issue of penalty specifically "relies on [his] attached affidavit***as to mitigating factors of his conduct." (See Respondent's Motion to Dismiss and Response to Petitioner's Motion for Summary Decision, at p. 9.) A review of this

comprehensive, six-page affidavit persuades the Commissioner that a hearing for the limited purpose of receiving additional evidence with respect to the assignment or mitigation of penalty is unnecessary, as a personal presentation of the extensive mitigating factors presented would serve to make no appreciable contribution to his consideration of the material.

In making his assessment of an appropriate penalty in this matter, the Commissioner is mindful of the District's legitimate concern over a situation where tenured teaching staff, who as role models for their pupils and holders of the public trust must be held to the highest standards of good conduct, are known to have been convicted of behavior that is both illegal and, at least facially, connected to their school employment. However, in considering whether to dismiss an individual from tenured employment, the Commissioner must also consider that individual's prior record in the District, the nature and gravity of his offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation and the degree of harm or injurious effect which his conduct may have had in the maintenance of discipline and the proper administration of the school system. *In re Fulcomer*, 93 *N.J. Super.* 404,421-22 (App. Div. 1976).

In the instant matter, while in no way minimizing the extreme seriousness of respondent's offense, the Commissioner cannot ignore respondent's long and successful employment history in the District, his lack of prior incident or discipline, his full cooperation with all investigating authorities in the underlying criminal matter, and his attempts to minimize deleterious consequences of his actions on students, supervisors and co-workers upon his return to work following conviction, which predated the instant tenure charges by nearly a year and which resulted in positive performance evaluations. Neither can the Commissioner ignore the

pressure which respondent felt was brought to bear upon him to engage in his wrongful behavior, in that he was led to believe, by persons including his supervising officials, that not only his job but also his personal physical safety would be in jeopardy if he failed to honor the well-established expectation of staff cooperation in suspect election activities. In this latter regard, the Commissioner is keenly aware of the deficiencies, irregularities and overall negative atmosphere which existed in the Newark School District at the time of respondent's actions, which situation ultimately necessitated the establishment of a State-operated school district in July 1995. While in no way serving as justification for respondent's criminal conduct, the circumstances under which such conduct occurred cannot be ignored by the Commissioner in assessing the appropriate penalty to be assessed in this matter. Additionally, the Commissioner notes that the Superior Court of New Jersey, Essex County, Law Division, Criminal, having considered respondent's presentencing report and mitigating circumstances, imposed a penalty of one year's probation and a $375 fine under a statute which permitted imprisonment. Similarly, the State Board of Examiners, upon consideration of respondent's conduct, elected to suspend his certificate for one year rather than to revoke it. *In the Matter of the Licenses of Gregory Palumbo*, decided by the State Board of Examiners October 9, 1997.

Having considered the proven charges and all of the remaining factors, therefore, the Commissioner concludes that respondent's conduct, although egregious and unprofessional, does not, *based upon the unique circumstances existing in this matter*, warrant his dismissal from his tenured position. Notwithstanding, he finds it necessary and appropriate to impress upon this respondent and other individuals, through imposition of a very substantial penalty, the

seriousness of such conduct and the degree to which it will not be tolerated in the school environment.

Accordingly, the Commissioner directs that the respondent shall not be dismissed from his tenured position, but shall, in light of the unbecoming conduct at issue herein, suffer a seven-month unpaid suspension, which period shall include the 120-day unpaid suspension already served, said suspension to commence upon his eligibility to return to certificated employment on October 9, 1998, as well as forfeiture of his employment and adjustment increments for 1998-99 and 1999-2000 school years. [6] The State Board of Examiners having already considered and taken action against respondent's certificate based on the conduct underlying the charges herein, a copy of this decision shall be forwarded to the Board for informational purposes only.[7]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[6] It is noted that this penalty is the most severe penalty he has ever imposed short of dismissal.

[7] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

APRIL 22, 1998
DATE OF MAILING APRIL 22, 1998

167-98

J.M.G., on behalf of minor son, J.G,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION ON MOTION
RESPONDENT.	:	

SYNOPSIS

By way of petition and motion for emergent relief, petitioning parent sought reversal of the NJSIAA's determination precluding her son, J.G., from participating as a member of the Hamilton Township West High School baseball team during the 1997-98 school year and sought waiver of the NJSIAA's eligibility standards. Petitioner contended J.G. failed to earn requisite academic credits through no fault of his own as he was "forced" to take a calculus course that he failed.

Having reviewed the record of the proceedings before the NJSIAA, as well as the legal arguments of the parties, the Commissioner determined to deny petitioner emergent relief. Commissioner concluded that petitioner failed to satisfy the requirements of the *Crowe* standard in the granting of emergent relief. Moreover, the Commissioner concluded were this matter to be reviewed on its merits, it is likely to be found that J.G. was afforded the due process to which he was entitled and that the Eligibility Appeals Committee's determination was not arbitrary, capricious or unreasonable so as to warrant the Commissioner's intervention. Thus, the Commissioner denied emergent relief. Petition was dismissed.

APRIL 24, 1998

AGENCY DKT. NO. 80-3/98

J.M.G., on behalf of minor son, J.G,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION ON MOTION
RESPONDENT.	:	

For Petitioner: David B. Beckett, Esq. (Szaferman, Lakind, Blumstein, Watter & Blader)

For Respondent: Michael J. Herbert, Esq. (Herbert, Van Ness, Cayci & Goodell)

This matter has come before the Commissioner of Education by way of a Petition of Appeal and Motion for Emergent Relief filed on March 30, 1998 by petitioner seeking a reversal of the decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) to preclude her son, J.G., from participating as a member of the Hamilton Township West High School baseball team during the 1997-98 school year, and further seeking a waiver of the NJSIAA's eligibility standards. Respondent's Answer was filed on April 2, 1998, together with a complete record of the proceedings before the NJSIAA Eligibility Appeals Committee (EAC); a brief was filed thereafter. On April 15, 1998, petitioner filed a reply brief.

In accordance with *N.J.A.C.* 6:24-1.5, a grant of emergent relief is considered an extraordinary remedy which can only be issued upon a finding that petitioner has met the four-

pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). The *Crowe* standard requires petitioner to demonstrate that J.G. will be irreparably harmed if not permitted to participate in interscholastic baseball games; that the legal right underlying petitioner's claim is settled; that petitioner has a substantial likelihood of prevailing on the merits of the claim; and that in balancing the interests of the parties, the harm to J.G. will be greater than the harm to the Board, should the requested relief not be granted.

The relevant facts in this matter are not disputed. J.G. is a senior at Hamilton Township High West in the Hamilton Township School District. He was ranked eleventh in his class with a grade point average of 3.821. By the conclusion of his third year in high school, he had exceeded the number of credits needed for graduation. He elected to remain at Hamilton High School, and, in so doing, opted for a rigorous program, which included Calculus I, a half-year course, since it was apparently the only math course which fit into his schedule. In the Fall semester, J.G. received a B in Calculus I for the first marking period, and an F in the second marking period. It is acknowledged that J.G. is also taking Advanced Placement Biology which is currently valued at 5 credits, notwithstanding that it occupies two periods daily. The Board is apparently planning to modify its accreditation policy, and is considering awarding students 10 credits for taking this advanced Biology course, beginning with the current ninth grade class. Therefore, J.G. cannot benefit from this proposed change.

As a result of failing Calculus I, J.G. did not have the 13.75 passing grade credits for the Fall semester. By letter dated February 4, 1998, the Board appealed to the NJSIAA, asserting that J.G. should be determined eligible for participation, in that the accrediting of his AP Biology course, the limited academic offerings and the half-year structure of his calculus

course were all factors beyond his control. [1] On February 5, 1998, petitioner's request for a waiver of the Academic Credit Rule was heard by the Association's Eligibility Committee; the committee unanimously denied the appeal. (NJSIAA's Brief at p. 5) On March 2, 1998, Principal Laird appealed the decision to the EAC. The EAC heard the matter on March 11, 1998, and by a vote of 3-2, denied J.G. a waiver of the Academic Credit Rule. (*Id.* at p. 6) The Committee's determination was memorialized by letter decision dated March 18, 1998.

PARTIES' POSITIONS

Petitioner argues that J.G. will be irreparably harmed if a waiver of the Academic Credit rule is not granted, so as to allow him to play baseball this season. In this regard, petitioner contends that J.G. has been accepted by the University of Rhode Island with a partial academic scholarship. As such, she asserts that "***Rhode Island's baseball coach *** wants to scout JG during this semester and indicated that there may be some athletic scholarship for JG depending, in part, upon his performance at a game." (Petition of Appeal at p. 4) If the coach is unable to see J.G. play baseball during this season, petitioner concludes, J.G.'s "ability to obtain a scholarship will be irreparably harmed." (*Id.*) Petitioner distinguishes this matter from *John Dean IV and John Dean III, on behalf of his minor son, T.D. v. New Jersey State Interscholastic Association and the Board of Education of the Township of Deptford, Gloucester County*, 94 *N.J.A.R.* 2d (EDU) 437 (1994), noting that here, "***there is strong proof that minor child JG will be deprived of the ability to compete for a baseball scholarship." (Petitioner's Brief at p. 8)

Petitioner further contends that "***irreparable harm is shown because the minor JG will be absolutely deprived of his ability to play baseball if the matter is not decided on an

[1] The District asserts that, had the Calculus I class been structured like other academic math offerings for one full year, J.G. "would have earned a passing grade after two marking periods." (Michael D. Laird, Principal, Hamilton High School West, Petition of Appeal, Exhibit 2 at p. 2)

emergent basis. The *res* of the entire matter will disappear if the matter is not handled on anything other than an interim relief basis." (*Id.*) Here, there is no monetary relief which can be granted petitioner's son, should she not prevail on this emergent claim.

The NJSIAA counters that petitioner cannot demonstrate irreparable harm, since no student has a constitutional right to participate in interscholastic sports, and neither the Commissioner nor the Courts has viewed the denial of athletic eligibility as irreparable injury. (NJSIAA's Brief at p. 8) Rather, participation in interscholastic sports is deemed a privilege.

Further, the NJSIAA contends that petitioner has provided no proof that her son could lose a baseball scholarship if he cannot play this spring. Thus, respondent finds such potential harm to be speculative. (*Id.* at p. 10)

Petitioner, however, contests the NJSIAA's claim that there is no evidence of a potential baseball scholarship, asserting that the testimony by J.G.'s father "***was that he has received an academic scholarship and that if [he were] permitted to play[,] there would be people looking for him and he might receive an athletic scholarship for his baseball skills." (Petitioner's Reply at p. 3, citing to NJSIAA's Exhibit G at p. 101) Thus, petitioner maintains that she has demonstrated irreparable harm will follow absent the requested relief since "***there is no way to compensate [her son] for the losses that he will endure after the fact ***." (*Id.*)

As to the likelihood of success on the merits, petitioner asserts that the NJSIAA's determination is contrary to this State's emphasis on academic achievement. Although petitioner recognizes that NJSIAA's eligibility standards are an effort to "'***assure that athletic competition is subordinate to the academic goals of its member schools,"' (Petition of Appeal at p. 5, citing to *New Jersey State Interscholastic Athletic Association Handbook*, 1997-97, at p. 61), she reasons that the NJSIAA's decision in this matter has the opposite effect. She argues,

> Given [J.G.'s] extensive credits, and given his excellent achievement and efforts to reach for academic excellence, the failure to waive the 13.75 credit rule in the instant case is contrary to the purposes of the guidelines and to the educational goals within the State of New Jersey. It will penalize a student who is attempting to achieve academic excellence and would reward students for taking simple courses that are well below their level.
>
> (*Id.* at pp. 5, 6)

Petitioner further argues that, due to circumstances beyond his control, J.G. was forced to take an "AP" calculus course, as there was no other math course meeting his requirements which would fit into his schedule. (*Id.* at p. 6) Further, because the Board did not offer sufficient credits for the biology course which J.G. is taking, "***he was in a precarious position as he was only to meet the 13.75 credit requirement by passing all courses. Unfortunately, he did not pass calculus." (*Id.*) Petitioner thus concludes that it was arbitrary and capricious for the NJSIAA to deny the waiver request.

The NJSIAA counters that petitioner cannot make a preliminary showing of reasonable probability of ultimate success on the merits. Here, respondent reviews the Academic Credit Rule and notes that the purpose of the rule is to encourage "***students to complete their studies and is an essential eligibility requirement of the NJSIAA, critical for maintaining the integrity of competition and providing students with incentives for academic development.***" (NJSIAA's Brief at p. 11) Citing prior decisions involving the NJSIAA, respondent further argues that the Commissioner and the Courts have "consistently ruled that eligibility requirements are fundamental to the operation of a sports program." (*Id. at p. 12*) The Association points out that the rule applies to all students equally, and the rule reflects its desire to ensure that academics come before athletics. (*Id.*) Moreover, to the extent petitioner asserts

that it has abused its discretion by denying J.G. "a break" because he was taking a difficult course, the NJSIAA asserts,

> ***the EAC should never be put in the position of having to evaluate which courses were more worthy than others. The EAC must be impartial, and cannot determine whether failing a calculus course is less significant than failing a PE course. All students should be expected to challenge themselves and take courses commensurate with their abilities. The EAC will not discriminate among courses or make value judgments regarding the difficulty of courses. (*Id.* at pp. 13)

Further, the Association disputes petitioner's contention that her son's failure was beyond his control. Here, NJSIAA affirms that J.G. "had no hospitalization, no disability, no sick parent at home that he had to care for; no excuse that the EAC had the power to consider under the eligibility guidelines***." (*Id.*) If the administration of the Hamilton High School West had any question that petitioner's son did not deserve his failing grade, the NJSIAA contends that the school could have reviewed the grade. Likewise, the school could have reconsidered how to weight the course. Respondent underscores that these decisions are not within its jurisdiction and it cannot "second guess" a school's grading policy. (*Id.* at pp. 13, 14)

The Association advises that the EAC's decision was reflective and deliberative, rendered after having reviewed all the arguments. While petitioner may disagree with its decision, respondent maintains that its decision was, nevertheless, rendered after a fair and deliberate process. Thus, it should not be set aside. (*Id.* at p. 15)

In her reply, petitioner contends that the NJSIAA is attempting to "shift the blame" to the Hamilton Township Board of Education. (Petitioner's Reply at p. 1) Petitioner continues,

> The NJSIAA, unlike the Commissioner, does not have the responsibility for academic integrity and academic policy in the State. As such, it could not fully adjudicate the claim and its

> attempt to suggest that the Hamilton School Board should have adjusted its grading or credit practices when there was a viable and clear way to resolve this matter -- namely, to have the waiver rules applied by the NJSIAA, is simply an attempt to avoid responsibility to enforce its rules appropriately. (*Id.* at p. 1, 2)

Petitioner concludes that, because the NJSIAA's decision did not take into consideration "broader educational policy" and the laudable goal that students should be rewarded for taking higher level courses, its decision is not entitled to deference. (*Id.* at p. 2)

Petitioner argues that equity favors granting emergent relief. Absent said relief, petitioner contends that J.G. will be deprived of his ability to play baseball and to compete for an academic scholarship; he will also be penalized for his pursuit of academic excellence. (Petitioner's Brief at p. 9) Whereas, the harm to NJSIAA, according to petitioner, is minimal. That is, NJSIAA will not be compelled to change its Guidelines, "but will simply emphasize that the Guidelines are subordinate to the overall objectives of the educational policies of the State of New Jersey, which is the same exception that is already included within the Guidelines." (*Id.*)

Petitioner, therefore, seeks immediate reinstatement of J.G. to the boy's varsity baseball team of Hamilton High School West, with full ability to play for the boy's varsity baseball team in all interscholastic games and practices. (Petition of Appeal at p. 7)

The Association, however, argues that, absent the relief requested, there is nothing preventing petitioner's son from continuing his education and from practicing with the baseball team. (NJSIAA's Brief at p. 16) It further argues that, should emergent relief be granted, the baseball teams could suffer a hardship if petitioner's son is later found ineligible. That is, since the eligibility rule and guidelines provide that when a member school uses an ineligible player in a game, the contest must be forfeited, if petitioner does not prevail on the merits of her claim

after having been granted emergent relief, her son's teams will be required to forfeit those games in which he participated. (*Id.*)

Finally, the NJSIAA argues that allowing J.G. to play baseball under these circumstances presents a hardship to the other schools who are members of the Association and whose athletes have met the Academic Credit Rule, not to mention the athlete from J.G.'s own team who met the academic standard but will be displaced because petitioner's son is playing. (*Id.* at pp. 16, 17) Petitioner, however, views the Association's arguments in this regard to be "speculative and unsupported." (Petitioner's Reply at p. 3)

DETERMINATION

Having carefully reviewed the record of proceedings before the NJSIAA[2], as well as the legal arguments presented by the parties, the Commissioner determines to deny petitioner emergent relief, as requested.

In accordance with prior case law, the inability to participate in interscholastic sports, alone, does not constitute irreparable injury. Thus, petitioner cannot demonstrate irreparable harm merely because her son is precluded from playing baseball; nor can she establish that a settled legal right is underlying her claim, *Crowe, supra*, at 133, where J.G. possesses no legal right to participate in such extracurricular activities. *Martin A. Domacasse v. Board of Education of the North Warren Regional School District, Warren County*, decided by the Commissioner April 4, 1996, affirmed State Board April 17, 1996; *Camden City Board of Education v. NJSIAA*, N.J. Superior Court Appellate Division decision of February 18, 1992, Docket No. A-2802-91T2; *Burnside et al. v. NJSIAA*, 1984 *S.L.D.* 1695 (App. Div. 1984), *cert. denied*, 101 *N.J.* 236 (1985). In the instant matter, the Commissioner notes that even assuming,

[2] The record includes a transcript of the hearing before the EAC.

arguendo, that the petitioner has demonstrated that her son has been offered the chance to compete for an athletic scholarship, and assuming deprivation of said opportunity rises to the level of irreparable harm sufficient to warrant extraordinary remedy, petitioner has not satisfied the remaining prongs sufficient to warrant emergent relief.

The Commissioner determines that petitioner has failed to demonstrate a likelihood of success on the merits of her claim. In this regard, he recognizes that the NJSIAA is a voluntary association. In cases involving the Association, the Commissioner's scope of review is an appellate one. *N.J.S.A.* 18A:11-3; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 183. As such, he may not overturn an action by NJSIAA in applying eligibility rules absent a finding that the Association applied the rules in a patently arbitrary, capricious and unreasonable manner. *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987). Further, the burden of proof that an action was so deficient rests with the person challenging the decision. *Kopera v. West Orange Bd. of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960). Thus, the Commissioner may not substitute his judgment for that of the NJSIAA, even when he might judge otherwise in a *de novo* review. *Dam Jin Koh and Hong Jun Kim v. NJSIAA*, 1987 *S.L.D.* 259.

In the instant matter, two separate committees of educators convened to consider petitioner's request for a waiver of the NJSIAA's Academic Credit Rule. The EAC held a hearing at which Principal Laird, petitioner, J.G.'s father and the athletic director appeared to testify on J.G.'s behalf. (NJSIAA's Brief at p. 6) Upon review, the EAC fairly determined

> *** there are no exceptions to [the Academic Credit Rule] so as to distinguish between underachieving students and those who have maintained a high level of academic performance. The rule is intended to encourage the general student population alike to achieve at the highest level of their ability using sports as an incentive for that purpose.

> While the committee is most sympathetic to the problems faced by this young man, it could not find any circumstances that would justify a waiver of the Academic Credit Rule. He voluntarily decided to take the course in questions [sic], was given an opportunity to pass and regrettably was not able to do so. There was no demonstration that his failure to achieve the required academic standards was because of circumstances beyond his control. (NJSIAA's Brief at pp. 6, 7, citing to the EAC's decision of March 18, 1998)

Were this case to be reviewed on its merits, the Commissioner notes it is unlikely that petitioner would be successful in asserting that J.G.'s failing grade in Calculus I was a circumstance which was not within his control, where petitioner fails to allege that her son made any extraordinary efforts to ensure his passing the course, having been presented with a progress report which clearly indicated that he was struggling in that class. (NJSIAA's Brief at Exhibit C) Instead, petitioner makes the highly implausible claim that, "***through no fault of his own he received a failing grade." (Petition of Appeal at p. 2) That petitioner chooses to focus on the Board's scarcity of course offerings and its accreditation policies does not mask the relevant issue of her son's performance in his chosen Calculus class. Indeed, at the hearing before the EAC, counsel for petitioner never squarely addresses the reason why J.G. was *unable to pass the course*. Instead, counsel reiterates that J.G. was *unable to drop the course*, due to limited offerings, and returns to the issue of the accreditation of his biology course. (NJSIAA's Brief at Exhibit G at pp. 103, 104) One of the committee members pressed petitioner's counsel:

> DR. KUPERSMITH: I'd like to -- just can I follow up for you with this question in mind: What effort did the student, [J.G.], here put into the passing of his course? What sort of circumstances did he face? We want to hear about what was in his control, what was outside his control in terms of passing this course, specific course that he took in Calculus. (Tr. 104)

Here, petitioner's counsel deferred to Mr. Laird, principal of Hamilton High School West, who acknowledged that J.G. "ran into problems after he received a B in the first marking period." (Tr. 105) Mr. Laird, however, merely stated that the work got more difficult, that J.G. "hit the wall" and the only other math course available as an option for him was "a math topics course which is for students who basically have gotten D or [have] not been able to do the Pre-Calc," a course which J.G. passed in his junior year. (Tr. 105, 106) Given the lack of evidence to support petitioner's claim that her son's failure was not within his control, and having been accorded due process in this matter, the Commissioner finds that petitioner is not likely to establish that the determination by the NJSIAA was arbitrary, capricious and unreasonable, so as to prevail on the merits of her claim.

The Commissioner further notes his concurrence with the NJSIAA's view that, to the extent petitioner contends the local Board's grading and accreditation policies are inequitable, it was not within the Association's authority to offer a remedy. As the Association correctly stated,

> Like the student, Hamilton's administration also had in its power [the ability] to remedy this unfortunate situation. This particular grade could have been reviewed, if there were any question that the student might not have deserved it. The school grading policy that dictated how the final grade was calculated could have been reviewed to see if this situation was appropriate. Most importantly, the school could have considered how to weight the [Biology] course in terms of credits to be awarded, especially if it is now claiming that the [Biology] course should actually have been worth more credits than petitioner earned. However, it did none of these things, and none of those decisions [is] within the jurisdiction of the NJSIAA to make. (NJSIAA's Brief at p. 13)

Finally, the Commissioner determines that the equities in this matter lie on the side of NJSIAA, since the issuance of a stay of its decision, under less than "truly extraordinary

circumstances" may result not only in a weakening of the NJSIAA's Academic Credit Rule, but may also jeopardize the high school baseball teams' chances for interscholastic competition.

Accordingly, the Commissioner finds that petitioner has failed to meet the legal standard necessary to warrant the extraordinary remedy of emergent relief. Inasmuch as petitioner recognizes that the subject of this appeal will be lost if a decision is not made on an emergent basis, and noting that a review of the merits of this matter is not guaranteed to occur before the end of the baseball season, the Commissioner determines that no purpose would be served by ordering further proceedings. Accordingly, the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

APRIL 24, 1998
DATE OF MAILING APRIL 24, 1998

172-98

172-98

R.L., on behalf of minor children, C.L. AND K.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent appealed Board's determination to bar his children's attendance under *N.J.S.A.* 18A:38-1, as well as the authority to conduct reregistration under that statute.

ALJ concluded that the action of the District in undertaking reregistration of students was consistent with the general powers granted a local board under *N.J.S.A.* 18A:11-1, as well as the law governing attendance at school free of charge; thus, the District has the authority to require reregistration. ALJ further concluded that since petitioner failed to sustain the burden of proof as required by statute, the Board's determination to bar the children was proper and the Board was entitled to reimbursement of tuition costs.

Matter was resolved as petitioner's wife provided the necessary proofs of domicile and the Board, therefore, determined not to remove petitioner's children and not to seek any tuition from petitioner. Commissioner, however, affirmed ALJ's determination that the Board had the authority to conduct a reregistration process.

April 27, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11248-97

AGENCY DKT. NO. 380-10/97

R.L. ON BEHALF OF MINOR CHILD, C.L. AND K.L.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,

Respondent.

Dr. Roger E. Lope, D.C., *pro se*

Anthony D'Elia, Esq., for respondent

Record Closed: February 27, 1998 Decided: March 6, 1998

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

Petitioner is challenging the determination Respondent, the Board of Education of Clifton, to bar his two children from attending the Clifton public schools. In addition, Petitioner is challenging Respondent's authority to conduct re-registration under the statute.

This matter was transmitted by the Department of Education, Bureau of Controversies and Disputes to the Office of Administrative Law (OAL) as a contested case on November 18, 1997, pursuant to *N.J.S.A.* 52:14B -1 to -15 and *N.J.S.A.* 52:14B-1 to -13.

FINDINGS OF FACT

Based on the evidence presented at the hearing, as well as on the opportunity to observe the witnesses and assess their credibility, I make the following findings of fact which are essentially undisputed in this matter.

1. Petitioner is the father of two school aged children who were enrolled in the Clifton public school in September 1996.

2. In order to enroll the children, Petitioner and/or his wife were required to produce three current valid proofs of address such as driver's license, lease, mortgage, or utility bill.

3. Sometime in late 1996 or early 1997, the District embarked upon an initiative to re-register all students then enrolled in the school system, except those who had registered in the month immediately preceding the commencement of the re-registration effort.

4. The first notices to parents and guardians of all enrollees was dated January 31, 1997.

5. Consequently, the only students who were not subject to the re-registration requirement were any who may have registered during the month of January 1997.

6. Petitioner was notified of the re-registration requirement; he failed to comply with the request for documentation of his family's domicile in Clifton.

7. Petitioners was notified by letter dated June 4, 1997, that a hearing would be held on June 16, 1997, at which time he would again be given the opportunity to document his domicile in Clifton. The letter also set forth the consequences which would ensue if Petitioner should fail to appear at the meeting and to produce the required information. Petitioner was also advised of his right to counsel.

8. Petitioner did not produce the required documentation nor did he or his wife attend the June 16, 1997, meeting.

9. Petitioner was afforded another opportunity to comply with the re-registration initiative on July 16, 1997; once again, he failed to do so.

10. The children have been permitted to attend public school pending the outcome of this hearing.

DISCUSSION AND CONCLUSIONS

Petitioner presents two issues for resolution. The first is a challenge to the District's determination to bar his children from attending public school in the District because he and his wife failed to comply with the re-registration initiative undertaken by the District. The second is a challenge of the authority of the District to undertake such an initiative. Logic dictates that the issue of whether the District has the authority to conduct a re-registration of all enrollees must be resolved before a determination can be made on the issue of whether the Board acted appropriately in barring the children from attending the District schools.

Respondent asserts that the authority for conducting the re-registration effort is derived from the general mandatory powers and duties granted by the Legislature to the local boards, pursuant to *N.J.S.A.* 18A:11-1. That statute specifically provides that the Board shall perform all acts and do all things consistent with law for the local conduct of the public schools of the District. *Id.*

Accordingly, the question to be resolved is whether the action of the District in undertaking the re-registration is consistent with the law. Review of the statute governing attendance at school free of charge discloses that the Legislature delegated to the Superintendent or Administrative Principal of the District the authority in the event that she/he finds that the parents of children enrolled in the District are not domiciled therein, to apply to the Board of Education for removal of those children from the rolls of the District. *N.J.S.A.* 18A:38-1.

Consequently, in view of the delegation to the Board by the Legislature of the power to do all things consistent with the law and, further, the authority of the Superintendent and the Board to act with regard to the specific issue of domicile within the District, I **CONCLUDE** that the District has the authority to require re-registration.

I take note of the assertion by Mrs. L. that there does not seem to be any protection against harassment by the District. It is, however, clear that in this case, the requirement to re-register was uniformly enforced. Moreover, I accept the testimony of Respondent's witness that this is the first and, most likely, the last re-registration initiative conducted by this District.

In view of the conclusion that the District did, indeed, have the authority to embark on the re-registration, it is clear that Petitioner was required to comply with the request for documentation and verification of his domicile.

There is no dispute that he failed to produce the required three proofs of address. In addition, although Mrs. L. produced her driver's license bearing the

address the family claims as its domicile in Clifton, neither she nor Petitioner produced further documentation. I take note of the witness, Mr. Caruso, who was called to testify on Petitioner's behalf. The statute provides, however, that the parent has the burden of proving, by a preponderance of evidence that the child is eligible for a free education *under the criteria listed* in the subsection, such as through driver's license, credit card and mortgage bills. *N.J.S.A.* 18A:38-1(b)(2). Emphasis supplied.

Since the Petitioner produced only one piece of documentation, Mrs. L's driver's license, I **CONCLUDE** that Petitioner has failed to sustain the burden of proof as required by statute. I further **CONCLUDE** that the determination of the Board to bar these children should be **AFFIRMED.** Moreover, I **CONCLUDE** that Respondent is entitled to reimbursement of tuition costs in accordance with the provisions of the statute.

Therefore, it is hereby **ORDERED** that the determination of Respondent be and hereby is **AFFIRMED**; it is further **ORDERED** that this petition be **DISMISSED WITH PREJUDICE**; it is further **ORDERED** that Petitioner reimburse Respondent for the cost of tuition of the two children in accordance with the provisions of the statute. *N.J.S.A.* 18A:38-1(b)(2).

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 6, 1998
DATE

Marcia M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

3-11-98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 12 1998
DATE

Barbara A Harnes
OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

WITNESSES:

For Petitioner:

D.L.

Carl Caruso

For Respondent:

Barry Mascari

EXHIBITS:

P-1 Letter to Mr. D'Alia from Dr. Lope dated April 7, 1997

P-2 Letter to Mr. D'Alia from Dr. Lope dated July 14, 1997

P-3 Letter to Ms. Perkins from Dr. Lope dated July 16, 1997

P-4 Policy 5600 pages 6-9 of 22

R-1 Policy 5600 page 3 of 22

R-2 Policy 5600 page 1 of 22

R-3 Letter to Dr. Lope from Mr. D'Alia dated June 4, 1997

R-4 Letter to Dr. Lope from Mr. D'Alia dated July 1, 1997

OAL DKT. NO. EDU 11248-97
AGENCY DKT. 380-10/97

R.L., on behalf of minor children, C.L. AND K.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions were untimely filed, in that the initial decision of the ALJ was mailed to the parties on March 12, 1998, and petitioner's exceptions were received by the Department on March 26, 1998, which is outside the 13-day submission period provided by regulation. (See *N.J.A.C.* 1:1-18.4 and Initial Decision at p. 6.) In its reply, the Board urges affirmance of the initial decision as to its authority to conduct a reregistration, but notes that, inasmuch as petitioner's wife provided, subsequent to the issuance of the initial decision, the necessary proofs of domicile in the District, it will not remove petitioner's children and will not seek any tuition from petitioner. (Board's Reply)

Upon careful and independent review of the record in this matter, and in light of the Board's recent notification that it no longer seeks removal of petitioner's children or

reimbursement for tuition, the Commissioner affirms the ALJ's conclusion that the Board's decision to conduct a reregistration process was not inconsistent with relevant law, but sets aside the recommended penalty determination.

Accordingly, the initial decision of the ALJ is affirmed with modification, as set forth above.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

April 27, 1998
Date of Mailing, April 27, 1998

173-98

E.F., on behalf of minor child, R.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent and resident of Branchburg sought to have minor son's (R.F.) tuition to Hunterdon Central Regional High School (HCRHS) paid for by respondent Board for school years 1996-97 and 1997-98. Under a sending-receiving relationship, Somerville High School is the designated high school for residents of Branchburg Township. Petitioner contended despite the sending-receiving relationship, there has been a long-standing de facto sending-receiving relationship with HCRHS.

ALJ determined that petitioner failed to demonstrate any legal entitlement to R.F.'s attendance at HCRHS and further failed to show that the Branchburg Board abused its discretionary powers in refusing to pay R.F.'s tuition to said high school.

Commissioner concurred with the ALJ's determination and adopted the decision as his own. Petition was dismissed.

April 27, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6593-96

AGENCY DKT. NO. 234-6/96

E.F. ON BEHALF OF
MINOR CHILD, R.F.,

Petitioner,

v.

BOARD OF EDUCATION OF THE
TOWNSHIP OF BRANCHBURG,
SOMERSET COUNTY,

Respondent.

Michael T. Barrett, Esq., for petitioner (Bergman & Barrett, attorneys)

David B. Rubin, Esq., for respondent

Record Closed: January 26, 1998 Decided: March 11, 1998

BEFORE **KATHRYN A. CLARK**, ALJ:

STATEMENT OF THE CASE

Petitioner, a resident of the Township of Branchburg, is seeking to have the Branchburg Board of Education pay the tuition (accrued and prospective) for his son, R.F., at Hunterdon Central High School. R.F. attended Hunterdon Central High School in school year 1996-1997 as

a ninth grade student, and is attending Hunterdon Central High School this school year, 1997-1998, as a tenth grade student. Somerville High School is the designated high school for residents of Branchburg Township.

PROCEDURAL HISTORY

The petitioner appealed the denial of tuition by the Branchburg Board of Education to the Commissioner of Education and on July 26, 1996, the Commissioner transmitted this matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case, pursuant to *N.J.S.A.* 52: 14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

After an adjournment, the matter was heard on February 25, February 28, adjourned for May 1 and July 8, and heard on September 18, 1997, at the Office of Administrative Law, Quakerbridge Road, Hamilton, New Jersey. The parties requested leave to submit their written summations a month after their receipt of transcripts. Summations were received and the record was closed on January 26, 1998.

SUMMARY OF TESTIMONY AND EVIDENCE

Petitioner teaches mathematics at Hunterdon Central High School (HCHS). He has been with HCHS in this capacity, and as a baseball and football coach, for almost 30 years. Petitioner requests that tuition for R.F., his child, to attend HCHS be paid by the board of education of the Township of Branchburg (Branchburg) for the 1996-97 and 1997-98 school years. Petitioner's son, R.F., has an aptitude for math and has an interest in computers.

Branchburg has operated under a court-ordered sending/receiving relationship with Somerville High School since 1980, *Board of Educ. of Branchburg Tp. v. Board of Educ. of Borough of Somerville*, 173 *N.J. Super.* 268, (App. Div. 1980). The March 25, 1996 minutes of the Branchburg Board of Education admit to a long-standing board policy of paying tuition to HCHS for students who attend the vocational/agricultural program at HCHS. However, evidence indicates the practice was to pay tuition for <u>any</u> student who enrolled at a program not offered at

Somerville, even though there were a few students from Branchburg attending HCHS who took few or no agricultural courses. One of petitioner's older children, K.F., was among those students.

In the 1992-93 school year, Branchburg attempted to limit the sending/receiving relationship with HCHS exclusively to agricultural education students. There were at least two exceptions to this "tightened up" policy: one student who moved to Branchburg was permitted to complete his senior year at HCHS having been a student at HCHS previously; and another student enrolled at HCHS without the permission or knowledge of Branchburg.

In January, 1996, at a private meeting with the school principal/acting superintendent of Branchburg Schools, the board president, and the new superintendent-elect, petitioner made his request for tuition to HCHS for his child, R.F. There is testimony that the board representative at that time approved R.F.'s attendance at HCHS provided that permission was also given by the Somerville High School superintendent. In addition, at an earlier private meeting, the principal/acting superintendent of the Branchburg School System had indicated that he supported R.F.'s attendance at HCHS.

Petitioner subsequently met with the Somerville superintendent who indicated she had no authority to grant such permission.

To a board "work session" on March 4, 1996, the board attorney reported that because of the sending/receiving relationship with Somerville High School, and because agricultural courses are now available through Somerville Vocational School, with the exception of classified students placed by an I.E.P., the board should not send students to other high schools. Thus, at the March 25, 1996 regular public meeting when petitioner applied for tuition to HCHS, the Branchburg school superintendent recommended that the board deny the funding. The board adopted his recommendation.

The written policy limiting students to Somerville High School was first officially read to the public on April 22, 1996; the second reading was May 23, 1996.

Petitioner feels that this is unfair, to "tighten up" the policy just as his son is entering high school, and that the injustice has been compounded by racial discrimination. Because of racial discrimination, petitioner states that he was unable to obtain housing within the Hunterdon school district when he first began teaching at HCHS. Now, his child may be the first student from Branchburg to be denied free attendance at HCHS because he does not live in the district.

R.F. began attending HCHS in September, 1996 with tuition paid by his family. He has continued to do so in the 1997-98 school year.

LEGAL DISCUSSION

SEVERANCE OF SENDING/RECEIVING RELATIONSHIP

Petitioner argues that, despite the absence of a formal sending/receiving relationship, there has been a long-standing de facto sending/receiving relationship with HCHS. He cites *N.J.S.A.* 18A:28-6.1, teacher tenure on discontinuance of school, to suggest a formal relationship. Petitioner may also refer to *N.J.S.A.* 18:38-11, which mandates that lacking a high school, a school district shall designate one for its pupils to attend. Alternatively, he may also refer to *N.J.S.A.* 18A:38-13, which states that no designation of a high school shall be changed or withdrawn except for good and sufficient reason upon application made to and approved by the Commissioner of Education. The power of the Commissioner to supervise all sending-receiving relationships was intended to provide the Commissioner with continuous supervisory powers over all sending/receiving relationships, whether created by fixed-term contracts or not, in order to provide stability to such relationships and to allow their dissolution only for good and sufficient reasons. *Board of Educ. of Borough of Merchantville v. Board of Educ. of Pennsauken Tp.*, 204 *N.J. Super.* 508 (App. Div. 1985). Termination of relationship is subject not only to the desires of the parties, but also to the approval of the Commissioner. *Board of Educ. of Borough of Englewood Cliffs, Bergen County v. Board of Educ. of City of Englewood*, 257 *N.J. Super.* 413 (App. Div. 1992)), *aff'd*, 132 *N.J.* 327 (1993).

In an instance where severance would have inflicted a substantial, irremediable negative impact on a board's ability to deliver educational services to students, despite the lack of a formal written agreement, the petitioner was required to continue sending its students to respondent despite certain positive outcomes for petitioner. *Bloomingdale Borough Bd. of Educ. v. Butler Borough Bd. of Educ.* 94 *N.J.A.R. 2d* 553. Although positive impacts would have accrued to petitioner, severance is forbidden where a substantial negative impact will also ensue. *Ibid.* However, when there is no impact, severance not an issue. *Englewood Cliffs v. Englewood*, 132 *N.J.* 327 (1993). In the current matter, clearly there is no substantial negative impact on the receiving district. Only a very few Branchburg students have ever attended HCHS. Thus, severance would have no impact and is not a determining factor here.

PAST PRACTICE

Petitioner argues that because the board has a past practice of paying tuition costs of similarly situated students, notably his own older child, K.F., in the absence of an adopted policy, the board is bound to pay tuition in this case. Respondent answers that rules and regulations adopted by a local board of education die with the annual reorganization meeting of the board unless expressly or impliedly adopted anew by the succeeding board. *Rall v. Board of Educ. Of the City of Bayonne*, 104 *N.J. Super.* 236, 244 (App. Div. 1969). Thus, because there was no formally adopted policy in this case, petitioner may be relying on an implied policy. However, the facts indicate that the policy was to review such applications on a case-by-case basis and that, with one exception, at least since the 1993-94 school year, the board granted support for attendance at HCHS only to students in vocational programs which were otherwise unavailable at Somerville High School. *N.J.S.A.* 18:38-15 (providing the board discretion in paying tuition for a course of study not furnished by the district).

It is clear that the board was lax in enforcing that policy because until 1993-94, students often took one initial course in agriculture, then none for the remainder of their high school years. In addition, there is evidence to indicate two further lapses which the board did not intend. Nevertheless, such lapses cannot be construed as an implied policy, particularly when the consistent procedure was to make the decisions on a case-by-case basis. The weight of the

evidence is that after the 1992-93 school year, the board consistently acted to limit its sending to only those students enrolling in otherwise unavailable vocational courses; namely, agriculture, and in one case, journalism.

Petitioner did not demonstrate that the decision of the board was outside the area of its discretionary powers, patently arbitrary and capricious, without rational basis, or induced by improper motives, therefore, the board's action may not be upset. *Thomas v. Morris Tp. Bd. of Educ.*, 89 *N.J. Super.* 327 (App. Div. 1965), aff'd 46 *N.J.* 581 (1966); *Quinlan v. Board of Educ. of North Bergen*, 73 *N.J. Super.* 40 (App. Div. 1962); *S.P. v. Board of Educ. of the Borough of Metuchen*, 96 *N.J.A.R. 2d* (EDU) 804; *K.L. v. Matawan/Aberdeen High School Dist.*, 91 *N.J.A.R. 2d* (EDU) 74; *M.G. v. Monmouth Regional High School*, 91 *N.J.A.R. 2d* (EDU) 38.

No such arbitrariness can be found here. Granting petitioner's request would obviate the policy which the board is obligated by law to implement. *Board of Educ. of Branchburg, supra.* Moreover, even if it were within the board's discretion to grant petitioner's request, where an issue is one involving the exercise of a local board's discretion, the scope of the Commissioner's review is "not to substitute his judgment or that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions." *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Sper.* 288 (App. Div. 1960).

ESTOPPEL

Respondent may be arguing that because school officials at two separate private meetings led him to believe that his child was granted permission to attend HCHS tuition free, the board may not now deny that permission. That argument is not persuasive in this matter. Equitable estoppel operates to prevent a party from disavowing its previous conduct if such a repudiation would violate the demands of justice and good conscience. *Carleson v. Masters, Mates and Pilots Pension Plan Trust,* 80 *N.J.* 334, 339 (1979); *Connel v. American Funding Ltd.,* 231 *N.J. Super.* 409, 416 (Ch. Div. 1987). It can arise from any type of conduct of a party, including spoken or written words, positive acts, and silence or omission to do anything. *State v. U.S. Steel Corp.*, 22 *N.J.* 341 (1956), citing, 3 *Pomeroy on Equity Jurisprudence* §802 (5th ed. 1941);

Royal Association v. Concannon, 200 *N.J. Super.* 84, 92 (App. Div. 1985) (Landlord's express permission to allow tenant to obtain and keep dog was sufficient to bind landlord).

However, estoppel is rarely enforced against a government entity. *Greater Egg Harbor Regional High School District. v. D.D. and E.D,* 97 *N.J.A.R. 2d* (EDU) 307, citing, *Skulski v. Nolan,* 68 *N.J.* 179, 198 (1975); *O'Neill v. State Highway Dept.,* 50 *N.J.* 307, 319 (1967); *Kaufmann v. Borough of North Haledon,* 229 *N.J. Super.* 349, 362 (L. Div. 1988). Estoppel is only applied "where the interests of justice, morality and common fairness clearly dictate that course." *Gruber v. Raritan Tp.*, 39 *N.J.* 1, 13 (1962). See also, *Guidebook to Chancery Practice in New Jersey,* Hon. William A. Drier, J.A.D. (3rd ed. 1991). Thus, where there was no intentional violation of school laws, the school board was estopped from recouping tuition during a period in which it failed to act quickly enough. The board notified the family of their true domicile 31 months after it had reason to believe that there was an erroneous designation of domicile. *Zadran v. Belleville Bd. of Educ.*, 97 *N.J.A.R. 2d* (EDU) 336, citing, *Fort Lee Bd. of Educ. v. Kintos*, No. A-4944-93T5 (App. Div. Oct. 13, 1995).[1]

However, in the case at bar, less than three months after school officials indicated that R.F. could probably attend HCHS, the board acted at the March 25 meeting to rectify that belief. Moreover, that meeting took place approximately five months prior to R.F.'s entering high school. The formal written policy was publicly read one month later. In a case dealing with sufficiency of period of notice to the family regarding which school district a student would attend, the Commissioner directed that any tuition recovery would be made retroactive to

[1] In another domicile case with some facts superficially analogous to the present matter, respondents did not prevail in their contention that board personnel led them to believe respondents were acting properly when they enrolled their two children at the school at which their father was employed as a mathematics teacher and sports coach. *Greater Egg Harbor Bd. of Educ. v. DiDonato*, 97 *N.J.A.R. 2d* (EDU) 11. They asserted that in the past, nonresident pupils who had been scouted by petitioner's football coach were required only to attend a vocational-agricultural course in order to be eligible to attend its school and participate in its sports events. Although the practice was discontinued in the mid-1980's, school staff remained concerned about the number of nonresident students. Respondent parents claimed that the board was estopped from asserting its claim for back tuition because the superintendent had approved respondents' affidavit establishing legal residence within the district, and because the board failed to abide by the statute requiring further documentation and investigation after affidavits were submitted. However, although respondents alleged that they believed the affidavits were merely a formality, the statements therein were false. Thus, estoppel would not operate to absolve them because they did not demonstrate that the board knew or should have known that the children were not bona fide residents of the district. By contrast, in the present matter, the board was aware that R.F. was not a qualified exception to the sending/receiving relationship with Somerset, and acted in the appropriate forum to correct the erroneous representations previously made privately.

September 1970, since notice of transfer was afforded petitioner in July 1970 and thus afforded petitioner sufficient time to anticipate the move. *Laufer v. Board of Educ. Of Scotch* Plains, 1970 *S.L.D.* 424. Thus, it would seem that the approximately five months afforded R.F. was sufficient time to prepare for the September attendance at Somerset High School.

In another case with some facts superficially analogous to the present matter, respondents did not prevail in their contention that board personnel led them to believe respondents were acting properly when they enrolled their two children at the school at which their father was employed as a mathematics teacher and sports coach. *Greater Egg Harbor Bd. of Educ. v. DiDonato*, 97 *N.J.A.R. 2d* (EDU) 11. They asserted that in the past, nonresident pupils who had been scouted by petitioner's football coach were required only to attend a vocational-agricultural course in order to be eligible to attend its school and participate in its sports events. Although the practice was discontinued in the mid-1980's, school staff remained concerned about the number of nonresident students. Respondent parents claimed that the board was estopped from asserting its claim for back tuition because the superintendent had approved respondents' affidavit establishing legal residence within the district, and because the board failed to abide by the statute requiring further documentation and investigation after affidavits were submitted. However, although respondents alleged that they believed the affidavits were merely a formality, the statements therein were false. Thus, estoppel would not operate to absolve them because they did not demonstrate that the board knew or should have known that the children were not bona fide residents of the district. By contrast, in the present matter, the board was aware that R.F. was not a qualified exception to the sending/receiving relationship with Somerset, and acted in the appropriate forum to correct the erroneous representations previously made privately.

NOTICE

Nor may petitioner rely on any constitutional right to notice. The New Jersey Constitution requires that the legislature provide for the maintenance and support of a thorough and efficient system of free public schools. *N.J. Const.*, (1947), Art. VIII, §.IV, par. 1. Local school districts generally are responsible to provide a thorough and efficient education for children within their bounds. *West Morris Reg'l Bd. of Educ. v. Sills, 58 N.J. 464 (1971).*

Further, a child's attendance at school is compulsory. *N.J.S.A.* 18A:38-25. However, parents have a federal constitutional as well as a State statutory right to choose among educational programs according to their own preferences. *Pierce v. Society of Sisters,* 268 *U.S.* 510 (1925); *N.J.S.A.* 18A:54-5 to -7, N.J.S.A. 18A:54-20 and *N.J.S.A.* 18A:38-15. Moreover, "the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away . . . without adherence to the minimum procedures required by that clause ." *Goss v. Lopez,* 419 *U.S.* 565, 574; 42 *L.Ed.2d* 725, 734 (1975).

In the present matter, however, there has been no attempt to deprive petitioner of his right to the free, public education which New Jersey guarantees, *N.J.S.A.* 18A:7A-2a, because neither *Pierce* nor any other federal or state law has established a right to choose among public schools. Where no property right is threatened, no process is constitutionally required. Notice of a strict policy enforcement by the board is thus not constitutionally mandated.

OPEN PUBLIC MEETINGS ACT

Each local board of education is defined as a "public body" by the Open Public Meetings Act (Sunshine Law), *N.J.A.C.* 10:4-8a, and thus is covered by its provisions. *Davis v. Willingboro Bd. of Educ.*, 95 *N.J.A.R. 2d* (EDU) 352. The Sunshine Law establishes that the public has a right to advance notice of meetings of public bodies, that the public has the right to attend such meetings, and that all discussions and official actions, unless specifically exempted, must take place in public. There are a total of nine exceptions. A discussion concerning the necessity to pay tuition for a non-classified student to a school district other than the designated receiving district is "public business" as defined at *N.J.S.A.* 10:4-8c, is not one of the listed exceptions, and is thus subject to the Sunshine Law.

On the other hand, a meeting which includes a representative of the school board but no majority has no effective authority to expend public monies and is not subject to the requirements of the Sunshine Law. Thus, there was no right to notice of the tightened up policy required at the private meetings, particularly when the policy had not yet been clarified by the board. Even had

the private meetings been so governed, decisions a public body makes at a meeting held in violation of the Sunshine Law may be remedied by a subsequent meeting held in conformity with that law. *Davis*, *supra*, at 360; *Houman v. Mayor and Coun. Bor. Pompton Lakes,* 155 *N.J. Super.* 129, 162 (Law Div. 1977); *Atty.Gen.F.O.*1976, No. 19. The April and May meetings appropriately adopting the tightened up policy could have cured such hypothetical violation. Moreover, the March 25 decision to deny tuition was not a per se violation. Rather, it could reasonably be construed as consistent with the formerly unwritten policy already in effect.

Invalidation of a public action is an extreme remedy which should be reserved for violations of basic purposes underlying the Open Public Meetings Act. *Liebeskid v. Mayor and Mun. Council of Bayonne,* 265 *N.J. Super.* 389. (App. Div. 1993). No such violation can be found in this case. To the contrary, the April and May meetings demonstrate the board's desire to apprise the public of the adoption of a clear, consistent policy.

DISCRIMINATION

Where discrimination is alleged, the burden is on the petitioner to make a prima facie case. No such allegation nor prima facie case is presented here. Petitioner is not alleging discrimination by the board, rather, he is alleging past discriminatory practices in housing in communities within Hunterdon Central High School's school district. Nevertheless, it is well settled that the impact of discriminatory practices is a very serious matter to be carefully considered. Allegedly discriminatory decisions by a board of education are the proper jurisdiction of the Commissioner of Education to investigate and refer to the Division on Civil Rights. *Davis v. Board of Educ. of Borough of Willingboro*, 95 *N.J.A.R.* 2d(EDU) 352 (1994). Allegedly discriminatory practices in housing in communities within HCHS's school district similarly should be referred to the Division on Civil Rights.

DECISION

Petitioner has no legally cognizable right nor legitimate legal expectation of tuition reimbursement for either school year 1996-1997, or for school year 1997-1998, and no right to expect tuition to be paid by Branchburg for R.F.'s attendance at HCHS in future years.

Neither severance of a de facto sending/receiving relationship, practices of past Branchburg boards of education, equitable estoppel, the constitutional and statutory rights to notice, the constitutional rights to choose among educational programs and to a public education, nor past lack of enforcement of laws against housing discrimination entitles petitioner to a free out-of-district public education, where special education laws or lawfully drafted and applied school board policy do not so mandate.

Petition is **DENIED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 11, 1998
DATE

Kathryn A. Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

March 12, 1998
DATE

DNA/fc
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 13 1998
DATE

Barbara A. Hermes
OFFICE OF ADMINISTRATIVE LAW

DOCUMENTS IN EVIDENCE

For Petitioner:

P-1 Tuition Contract Agreement, 1991-1992

P-2 Letter, Mary Costello, May 21, 1996

P-3 Letter, Leary to Sopko, February 2, 1996

P-4 Memorandum, Herman to E.F., September 4, 1996

For Respondent:

R-1 Packet of Documents (44 pages)

WITNESSES

For Petitioner:

E.F., petitioner

G.F., wife of petitioner

K.F., daughter of petitioner

Connie Maute, Guidance Coordinator, Hunterdon Central School District

Roland Pare, Director of Information Systems, Hunterdon Central School District

For Respondent:

Robert Sopko, Superintendent, Branchburg Township Schools

Carolyn Rosenberg, Director of Curriculum, Somerville Schools

Timothy O'Halloran, Principal, Somerville High School

OAL DKT. NO. EDU 6593-96
AGENCY DKT. NO. 234-6/96

E.F., on behalf of minor child, R.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.

Upon careful and independent review of the record in this matter,[1] the Commissioner concurs that petitioner has failed to demonstrate a legal entitlement to R.F.'s attendance at the Hunterdon Central Regional High School, and has further failed to show that the Branchburg Board has abused its discretionary powers in refusing to pay R.F.'s tuition to said high school.

Accordingly, the initial decision of the OAL is adopted for the reasons expressed therein, and the Petition of Appeal is hereby dismissed.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] It is noted that the record included copies of transcripts from the hearing conducted on February 25, 1997 and September 18, 1997, but does not include a copy of the transcript of the proceedings held February 28, 1997. (Initial Decision at p. 2)

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

174-98

EDU #7081-97
C # 174-98
SB # 49-98

BOARD OF EDUCATION OF THE TOWNSHIP OF CHESTER, MORRIS COUNTY,

PETITIONER-RESPONDENT,

V.

WALTER RILEY AND DONALD BEATTY,

RESPONDENTS-APPELLANTS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, April 27, 1998

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

For the Respondents-Appellants, Pearce & Massler (Randy T. Pierce, Esq., of Counsel)

The determination of the Commissioner of Education to deny appellants' request for indemnification of their legal expenses incurred in defense of this matter is affirmed for the reasons expressed therein. In so doing, we emphasize that the merits of the petition filed against appellants by the Chester Board are not before us in this appeal.

August 5, 1998

Date of mailing AUG 07 1998

174-98

BOARD OF EDUCATION OF THE TOWNSHIP OF CHESTER, MORRIS COUNTY,	:	
PETITIONER,	:	
v.	:	COMMISSIONER OF EDUCATION
WALTER RILEY AND DONALD BEATTY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning Board sought removal of respondent Board members for alleged unethical and improper conduct. Board contended respondents' involvement in challenging a special election that approved a referendum relating to District schools created a conflict of interest.

ALJ analyzed respondents' conduct under *N.J.S.A.* 18A:12-2 and the School Ethics Act, *N.J.S.A.* 18A:12-22 et seq. and concluded that respondents had an indirect personal interest in the outcome of a challenge to invalidate a special election that approved a referendum relating to the District's schools that might reasonably be expected to impair their objectivity or independence of judgment in violation of *N.J.S.A.* 18A:12-24(c). ALJ concluded reprimand was the appropriate penalty.

Commissioner rejected the initial decision as the ALJ erroneously mixed and melded two discrete statutory provisions, *N.J.S.A.* 18A:12-2 and the School Ethics Act (*N.J.S.A.* 18A:12-21 *et seq.*), violations of which are under the jurisdictional purview of two distinct entities. Petition was dismissed with respect to question under jurisdiction of Commissioner, *i.e.*, disqualifying conflict of interest under *N.J.S.A.* 18A:12-2. A copy of this decision and the record of the matter was transmitted to the School Ethics Commission for action, as it deems appropriate, with respect to issues of alleged School Ethics Act violations.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7081-97

AGENCY DKT. NO. 473-10/96

BOARD OF EDUCATION OF THE
TOWNSHIP OF CHESTER, MORRIS COUNTY,

Petitioner,

v.

WALTER RILEY AND DONALD BEATTY,

Respondents.

David Rand, Esq., for petitioner (Rand, Algier, Tosti & Woodruff, attorneys)

Randy T. Pearce, Esq., for respondents (Pearce & Massler, attorneys)

Record Closed: January 20, 1998 Decided: March 6, 1998

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Board of Education of the Town of Chester (Board), seeks the removal of respondents, Walter Riley and Donald Beatty, from the Board for unethical and improper conduct. The Board asserts that respondents' involvement in challenging a special election that approved a referendum relating to Chester schools created a conflict of interest. Thus, respondents engaged in intentional unethical conduct when

they did not abstain from participating in school matters relating to the referendum during the litigation on the special election.

Respondents argue that the petition challenging the special election was not a legal action against the Board. Moreover, they were acting in the public interest and stood to derive no material or monetary gain from the outcome of the challenge. Thus, no conflict of interest existed to preclude respondents from participating in all Board matters.

The matter was transmitted to the Office of Administrative Law (OAL) on July 8, 1997, as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The parties agreed to submit a stipulation of undisputed facts and legal briefs. The record closed on December 15, 1997. On January 20, 1998, I reopened the record to request additional information from counsel. The record closed on January 20, 1998.

ISSUES

The issues are as follows: (1) Whether respondents' status as members of the Chester Board of Education and supporters of a petition to invalidate a special election that approved a referendum concerning the Chester schools created a conflict of interest. If so, whether respondents should have abstained from deliberating on Board actions concerning the referendum during the litigation. (2) Whether respondents' conduct warrants sanctions.

STIPULATION OF FACTS

The following stipulated facts are adopted as **FACT**:

1. The Chester Township Board of Education is a public body organized under the laws of the state of New Jersey.

2. The Board maintains and operates a public K-8 school district which serves the residents of both the Borough and Township of Chester, Morris County, New Jersey.

3. Respondents, Walter Riley and Donald Beatty, are members of the Board, having been elected to their offices at the Annual School Election conducted on April 15, 1997.

4. On December 10, 1996, a special school election was held within the Chester School District for the purpose of seeking voter approval for an $8.4 million capital project and related school bond financing. The Board sought to obtain this approval for the construction of additions, renovations and improvements to the Chester schools.

5. The ballot box count revealed that the referendum had been defeated, with 794 votes against and 771 votes in favor of the referendum. However, when 56 absentee ballots were cast, the result of the special election as certified by the Morris County Board of Elections and Morris County clerk was 823 "yes" (in favor), and 798 "no" (opposed). The question was deemed "approved."

6. Of the 1,621 votes cast in the election, 56 were cast by absentee ballot. A recount confirmed that of the 56 absentee ballots cast, 52 were "yes" and 4 were "no." Attached is a Certification of Kathy McGrath Green. Exhibit A.

7. On or about January 16, 1997, a Verified Petition was filed with the Superior Court of New Jersey, Law Division, Morris County, in a matter known as "In Re The December 10, 1996 Special School Election of Chester Township/Chester Borough, County of Morris, State of New Jersey." Exhibit B.

8. The petition had attached to it the verifying signatures of fifteen Chester residents, including Mr. Beatty. Mr. Riley did not sign the petition.

9. Mr. Riley was a financial supporter of the petition filed on January 16, 1997. Mr. Riley maintains that he withdrew his personal financial support on February 4, 1997.

10. The attorneys representing the petitioners in the election challenge, Pearce and Massler, also represent a business for which Mr. Riley acts as chief executive officer.

11. A "campaign flyer" issued by Mr. Riley is attached as Exhibit C.

12. On January 24, 1997, the court considered the Order to Show Cause regarding the challenge to the referendum. See transcript attached as Exhibit D.

13. On February 4, 1997, the Honorable Reginald Stanton, A.J.S.C., entered an Order dismissing the January 16, 1997 petition. Exhibit E.

14. On February 21, 1997, the petitioners in the election challenge matter caused a Notice of Appeal to be filed with the Superior Court of New Jersey, Appellate Division. The appeal sought a reversal of Judge Stanton's dismissal Order. Exhibit F.

15. Attached hereto as Exhibit G is a copy of the Case Information Statement which accompanied the aforementioned appeal.

16. A Chester School Board meeting was held on February 25, 1997.

17. The Board conducted a meeting on April 15, 1997, the date of the Annual School Election.

18. At a Board meeting conducted on April 21, 1997, David B. Rand, Esq., attorney for the Board, was asked to give an opinion as to whether Mr. Beatty and Mr. Riley could be seated as members of the Board. Mr. Beatty and Mr. Riley were both present at the April 21, 1997 meeting. Copies of relevant portions of the minutes of the April 21, 1997, meeting are attached as Exhibit J.

19. Mr. Beatty and Mr. Riley were formally seated as members of the Board at its April 29, 1997 meeting.

20. The minutes of the April 29, 1997 meeting are attached as Exhibit K.

21. At the June 3, 1997, meeting of the Board, it publicly voted to authorize the filing of this petition.

22. At a public meeting of the Board conducted on June 3, 1997, Mr. Riley and Mr. Beatty both voted "no" in connection with the approval of a bond anticipation note required to fund aspects of the challenged project.

23. Copies of minutes of the Board meeting of June 3, 1997, are attached hereto as Exhibit L.

DISCUSSION

Conflict of Interest

Members of boards of education are public officers and have a fiduciary duty to serve the public with the highest fidelity. *Cullum v. North Bergen Bd. of Educ.*, 27 *N.J. Super.* 243 (App. Div. 1953). The pivotal question is whether Board members Beatty and Riley had a conflict of interest with matters regarding the referendum. *N.J.S.A.* 18A:12-2 provides that "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board." Additional legislation set forth a code of ethics for school officials that specifically prohibits "official acts in which financial or personal involvement may impair judgment." *Statement of the Senate Education Committee* (Dec. 12, 1991). In the School Ethics Act, the Legislature declared that "members of local boards of education and local school administrators . . . must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated." *N.J.S.A.* 18A:12-22(a). Thus, the act prohibits a broad range of conduct, from that which involves direct, intentional, financial gain, to that which creates a public perception of a violation of the public trust.

Further, the courts recognize the basic tenet that no member of a board should participate in any deliberations or vote on any question in which he has a personal or pecuniary interest. Indeed, "The law tolerates no mingling of self interest; it demands exclusive loyalty." *Aldom v. Borough of Roseland*, 42 *N.J. Super.* 495, 500 (App. Div. 1956). Where no actual conflict of interest exists, a board member should abstain from matters where there is a potential for conflict. *Id.* at 501-02. What particular interest is sufficient to create a conflict depends on the circumstances of each factual situation. In *Aldom*, the court provided guidance in determining when a Board member should abstain from joining in deliberative action:

> The interest which disqualifies is not necessarily a direct pecuniary one, nor is the amount of such an interest of paramount importance. It may be indirect; it is such an interest as is covered by the moral rule: no man can serve two masters whose interests conflict. Basically the question is whether the officer, by reason of a personal interest in the matter, is placed in a situation of temptation to serve his own purposes to the prejudice of those for whom the law authorizes him to act as a public official.
>
> [42 *N.J. Super.* at 502.]

To maintain confidence in the actions of public bodies it is essential that the public be assured that their elected representative has no real or apparent conflict of interest.

Here, the Board avers that Beatty and Riley "had a direct and substantial involvement in a pending claim against the Board of Education." Petitioner's Brief at 5. Specifically, Beatty and Riley were part of the group of citizens who sought to overturn the results of the special election that authorized an $8.4 million capital project for the construction of additions, renovations and improvements to the Chester schools. The outcome of the petition affected all taxpayers in Chester and directly affected respondents' personal tax dollars. Thus, as Board members, respondents had a conflict of interest with matters regarding the referendum. Accordingly, at a public meeting on April 21, 1997, the Board advised respondents to abstain from any participation in matters relating to the referendum being challenged under the petition. The Board maintains that respondents' failure to abstain from voting on referendum issues and their participation in discussions regarding the referendum constituted

intentional unethical conduct. Therefore, respondents should be removed as members of the Chester Board of Education.

Respondents acknowledge that Beatty was a petitioner in the complaint that challenged the results of the special election held on December 10, 1996. Respondents argue, however, that Beatty was not a "litigant" whose position is "more confrontational in nature, frequently seeking personal and pecuniary gain." Respondents' Brief at 6. Rather, Beatty was a petitioner "purely acting in the matter of public interest" and sought to derive no material or monetary gain from the outcome of the challenge. *Ibid.* Moreover, respondents assert that the petition was not filed against the Board. Therefore, no conflict of interest existed. Accordingly, they were not disqualified from participating in any Board matters.

To determine whether there existed a potential or an actual conflict of interest, I have considered respondents' involvement in the challenge to the special election and their positions on the Board. Where the potential for a division of loyalties exists, the administrative law judge must scrutinize closely the personal interest of the official and his civic duty "to render a righteous judgment . . . in such a manner as will beget no suspicion of the pureness and integrity of his action." *Aldom, supra*, 42 *N.J. Super.* at 502. Although Riley and Beatty have no direct claim against the Board, the petition, signed by Beatty and financed in part by Riley, sought to overturn an election that approved an $8.4 million bond for the benefit of the Chester schools. While Riley and Beatty would not obtain any individual material or monetary gain from the outcome of the election challenge, as taxpayers and residents of the school district, "the outcome would directly affect their personal tax dollars." Petitioner's Brief at 7. Therefore, I have considered whether these circumstances reasonably suggest a "likely capacity to tempt the official to depart from his sworn public duty." *Van Itallie v. Franklin Lakes*, 28 *N.J.* 258, 268 (1958).

The potential for conflict and the "potential of psychological influences cannot be ignored." *Griggs v. Princeton*, 33 *N.J.* 207, 220 (1960). However, the courts recognize the importance of maintaining balance even if the official is not aware of a conflict. On

one hand, "[l]ocal governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official." *Van Itallie, supra*, 28 *N.J.* at 269. On the other hand, the courts have cautioned not to engage in "too much refinement . . . in an effort to uphold the municipal action on the ground that the [officer's] interest is so little or so indirect." *Aldom, supra*, 42 *N.J. Super.* at 502. Thus, it remains the policy of law that "a public officer in the discharge of his duties as such should be absolutely free from any influence other than that which may directly grow out of the obligations that he owes to the public at large." *Id.* at 503 (quoting *Stockton Plumbing & Supply Co. v. Wheeler*, 229 *P.* 1020, 1024 (App. Ct. 1924)).

The evidence supports close links connecting the petitioners and financial supporters who challenged the special election, the Chester Board of Education, and Board members Riley and Beatty. I am persuaded by the evidence that respondents' interests were sufficient to disqualify their participation on matters regarding the referendum. The petition filed on January 16, 1997, alleged in part that the Board engaged in certain illegal activities. For example, the petitioners asserted that the Board solicited and partially completed applications for absentee ballots and then provided the applications to the students to give to their parents. The petition charged that such conduct resulted in "malconduct, fraud and/or corruption" (J-1 at Exhibit B). Further, the petitioners asserted election irregularities, such as the Board holding a special election at the polling place on the night of the election, contrary to prior policy, and "absentee ballots being distributed by teachers, with the -- being condoned by the Board of Education" (J-1 at Exhibit D).

Beatty was one of fifteen petitioners who challenged the results of the special election. The petition was filed by attorneys who represent a business interest of Riley. Riley was a financial supporter of the petition. Thus, Riley did more than merely express his opinion about the matter. Riley provided the financial support to help ignite the challenge, which, if successful, would have relieved the taxpayers from spending $8.4 million on the Chester schools. The petition was dismissed on February 4, 1997.

Thereafter, Riley maintained that he withdrew his financial support and that the attorneys continued to represent the petitioners' challenge *pro bono*.

As private citizens and taxpayers, Beatty and Riley opposed the expenditure of tax funds on the school bond referendum. As candidates for Board membership, they represented a group of like-minded community citizens and formed the "Committee to Elect Riley-Beatty." J-1 at Exhibit C. In a campaign flier entitled "TIRED OF THE TAX & SPEND SCHOOL BOARD? TO HOLD TAXES DOWN VOTE FOR BEATTY & RILEY," Riley acknowledged his involvement in the lawsuit. J-1 at Exhibit C. Once elected to the Board and seated, Beatty and Riley continued to pursue the lawsuit that sought to overturn the special election that approved the referendum to spend $8.4 million of taxpayer money on new construction for and renovation of Chester schools.

In addition to Beatty's initiation of the petition and Riley's financial support of the challenge, also constituting a potential or actual conflict is respondents' campaign promise to hold taxes down from "THE TAX & SPEND SCHOOL BOARD." Indeed, Beatty and Riley were involved in a legal challenge to invalidate approval to spend taxpayer dollars on school construction and renovations. They ran for positions on the Board and promised to hold down taxes on school spending. After they were seated on the Board they swore to discharge their public duties with undivided loyalty, independent judgment and unbiased discretion. Beatty did not withdraw his name from the election challenge petition. Under the circumstances, it is reasonable to conclude that that Beatty and Riley intended to remain loyal to their campaign promises to hold taxes down. Respondents were unequivocally committed to overturn the special election that authorized an $8.4 million spending project. Such pressure would have the natural tendency to influence their votes, consciously or unconsciously, on any bond referendum matter.

The overwhelming evidence supports the conclusion that during the pending litigation, Beatty and Riley, as Board members, had at minimum an "indirect personal interest" in the outcome of the litigation. "Indirect personal interest" occurs "when an official votes on a matter in which an individual's judgment may be affected because of

membership in some organization and a desire to help that organization further its policies." *Wyzykowski v. Rizas*, 132 *N.J.* 509, 525-26 (1993). Riley's and Beatty's substantial personal involvement with the election challenge created a potential, if not an actual, conflict of interest. Thus, Riley and Beatty should have abstained from Board matters concerning the referendum.

I reject respondents' argument that the Board failed to provide any legal reason that Riley and Beatty should abstain from voting on bond referendum matters. On April 21, 1997, the Board fully discussed the litigation and respondents' status as Board members. The minutes reflect that the Board's attorney advised the Board that pursuant to the education laws and the School Ethics Act, Riley and Beatty should be seated but they should not participate "in any matter relating to the pending litigation and should not speak out as Board members regarding that litigation." Respondents' Brief, Exhibit J. Moreover, respondents were present at the meeting and Riley engaged in a circular debate with the Board's attorney regarding the Board's status in pending litigation challenging the election. On April 29, 1997, the Board seated Riley and Beatty "with the hope that they would recuse themselves from any discussion or voting on the referendum or the litigation." *Ibid.* Once seated, Beatty and Riley could have sought an advisory opinion as to whether any proposed activity or conduct would constitute a violation of the School Ethics Act. *N.J.S.A.* 18A:12-31.

Finally, respondents' claim that the Board acted in bad faith by filing a petition to remove them as members of the Board is unsupported. The courts and the Commissioner of Education have repeatedly held that a board of education's decision is entitled to a presumption of correctness, and its decision will not be set aside unless there is a clear showing of abuse of discretion or error. *Thomas v. Morris Bd. of Educ.*, 89 *N.J. Super.* 327 (App. Div. 1965); *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288 (App. Div. 1960);

I **CONCLUDE** that Beatty and Riley had full rights to deliberate and vote on all Board matters, unless they had "a direct or indirect financial or personal involvement that might reasonably be expected to impair [their] objectivity or independence of

judgment." *N.J.S.A.* 18A:12-24(c). I **CONCLUDE** that Beatty and Riley had an indirect personal interest in the outcome of a challenge to invalidate a special election that approved a referendum relating to Chester schools. I **CONCLUDE** that Beatty's and Riley's involvement in the litigation created a conflict of interest. Thus, I **CONCLUDE** that Beatty's and Riley's failure to abstain from school matters relating to the referendum while the litigation was pending constituted intentional unethical conduct.

Penalty

I have concluded that respondents' participation on bond referendum issues violated the education laws and the ethical standards governing members of a board of education. The Commissioner has dealt severely with board members who violate the public trust. *Hawthorne Bd. of Educ. v. Taliaferro*, 94 *N.J.A.R.*2d (EDU) 197; *Jackson Bd. of Educ. v. Acevedo*, 92 *N.J.A.R.*2d (EDU) 163; *In re Wilgus, Kingsway Bd. of Educ.*, 96 *N.J.A.R.*2d (EDU) 1041. Thus, I have carefully considered the appropriate penalty for respondents' conduct.

The Board urges this tribunal to sanction respondents with removal. It argues that respondents were expressly advised that discussions on the referendum issues "would rise to a breach of their ethical obligations." Petitioner's Brief at 8. Respondents disregarded this advice. Thus, the Board submits that they cannot be "trusted to learn from a reprimand, or other lessor sanction, to conduct themselves appropriately in the future." *Id.* at 9.

Respondents argue that the alleged conflict of interest has been eliminated since the petition that challenged the special election has been dismissed. Respondent's Brief at 13. I agree. Nevertheless, Beatty's and Riley's conduct cannot be ignored. Members of boards of education hold positions of public trust. They must be diligent, conscientious, and ethical in all dealings concerning board matters. Above all they must "display good faith, honesty and integrity." *Cullum, supra*, 27 *N.J. Super.* at 248 (quoting *Driscoll v. Burlington-Bristol Bridge Co.*, 8 *N.J.* 433, 474 (1952). Respondents' involvement in the litigation to overturn a bond referendum to spend $8.4

million on the Chester schools was of no import until they ran for seats on the Board and campaigned to curtail spending. I am mindful that respondents were elected to the Board by like-minded citizens. Their primary concern was overturning the bond referendum. "[N]o man can serve two masters whose interests conflict." *Aldom, supra,* 42 *N.J.* Super. at 502. Thus, while the litigation was pending, divided loyalties precluded Beatty and Riley from participating on Board matters concerning the bond issue.

Based on the whole of the record, I **CONCLUDE** that a reprimand is the appropriate penalty. I further **CONCLUDE** that the reprimand shall reflect the deliberate and intentional misconduct of Beatty and Riley. Further, Beatty's and Riley's reprimand shall contain a warning that future conduct in violation of the School Ethics Act will result in the more severe sanction of removal from the Board.

It is so **ORDERED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 6, 1998
DATE

Mumtaz Bari Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

3-11-98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 12 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Exhibits:

J-1 Joint Stipulation with attached Exhibits A to Exhibit L.

J-2 Video Tape - Emergency Board of Education Meeting, dated April 21, 1997.

OAL DKT. NO. EDU 7081-97
AGENCY DKT. NO. 473-10/96

BOARD OF EDUCATION OF THE TOWNSHIP OF CHESTER, MORRIS COUNTY,	:	
PETITIONER,	:	
v.	:	COMMISSIONER OF EDUCATION
WALTER RILEY AND DONALD BEATTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of the Board and those of respondents were timely filed pursuant to *N.J.A.C* 18A:1-1-18.4 and were duly considered in the Commissioner's within determination.

Upon careful and independent review, the Commissioner is compelled to reject, in its entirety, the recommended decision of the OAL, as the Administrative Law Judge therein erroneously mixed and melded two discrete statutory provisions, *N.J.S.A.* 18A:12-2 and the School Ethics Act (*N.J.S.A.* 18A:12-21 *et seq.),* violations of which are under the jurisdictional purview of two distinct entities. The sole issue rightfully before the Commissioner of Education herein is whether the facts in this matter, which are essentially undisputed, constitute a situation where, pursuant to *N.J.S.A.* 18A:12-2, the respondents can be said to have a disqualifying direct

or indirect interest in any claim against the Board so as to disqualify them from Board membership. As to whether respondents can be found to have violated provisions of the School Ethics Act, *N.J.S.A. 18A:*12-21 *et seq.*, the Commissioner observes that, with the implementation of this Act in April 1992, such determinations are solely within the jurisdictional purview of the School Ethics Commission. Consequently, upon issuance of this decision, the matter will be transmitted to that body for action as it deems appropriate.

In addressing the substantive issue properly before him, namely, whether Respondents Beatty and Riley were in violation of *N.J.S.A.* 18A:12-2 and, thus, disqualified from continuing in office, the Commissioner observes that it is well settled that not every claim lodged against a board of education automatically disqualifies the person making such claim from serving on the board. Rather, as was recognized in *Board of Education of the Township of Holmdel v. O'Connell*, 1990 *S.L.D.* 674

> Case law has *** established that any such claim must be examined on a case-by-case basis in arriving at a determination as to whether the circumstances in the matter demonstrate that the board member would benefit in a substantial and material way from said claim. If so, the statute should be applied and the board member disqualified from serving on said board. See *Board of Education of the City of Newark, Essex County v. Edgar Brown and Oliver Brown,* [1984 *S.L.D.* 671, aff'd State Board, 1984 *S.L.D.* 683.] See *Thomas D. Hogan et al. v. Kearny Board of Education and Kearny Board of Education v. Thomas D. Hogan,* decided April 12, 1982, aff'd State Board of Education August 4, 1982.*** (*Holmdel, supra,* at 680)

In examining the circumstances surrounding the within matter, even accepting, *arguendo,* the level of participation on behalf of both respondents as charged by the Board in the lawsuit at issue, which was seeking to invalidate the results of a special referendum conducted by the school district, the Commissioner concludes that such participation would not have resulted

in "substantial and material benefit" to either of the respondents sufficient to disqualify them from holding a seat on the Board pursuant to *N.J.S.A. 18A:*12-2.

Finally, it is noted that the within respondents, in their pleadings and again in their exceptions, request that the Commissioner impose sanctions on the Board for "its vindictive behavior" and also award indemnification for their attorney's fees in this matter, both of which the Commissioner declines to do. Consideration of the record here provides the Commissioner with no basis to conclude that the Board acted egregiously or in deliberate violation of law. Moreover, notwithstanding that *N.J.S.A.* 18A:12-20 provides for board member indemnification in the defense of civil and criminal matters, there is no legal authority for indemnification in administrative proceedings. See *Board of Education of the City of Passiac, Passaic County, v. Gerardo Fernandez, Jr.*, decided by the Commissioner October 10, 1996 (relying on the Appellate Division's decision in *In the Matter of the Tenure Hearing of David C. Borrelli, Waterford Township Board of Education,* 96 *N.J.A.R.* 2d (EDU) 163).

Accordingly, the initial decision of the OAL is rejected and the within Petition of Appeal is dismissed. A copy of this decision and the record of this matter will be transmitted to the School Ethics Commission for action, as it deems appropriate, with respect to issues of alleged School Ethics Act violations.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 27, 1998
DATE OF MAILING APRIL 28, 1998

175-98

175-98

RICHARD WILLE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

APRIL 28, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7568-96
AGENCY DKT. NO. 241-6/96

RICHARD WILLE,
Petitioner
SADDLE BROOK BOARD OF EDUCATION,
Respondent.

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

Anthony N. Gallina, Esq., for respondent

Record Closed: March 12, 1998 Decided: March 12, 1998

BEFORE **MARIE P. SIMONELLI**, A.L.J.:

On July 22, 1996, the Department of Education transmitted this matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A hearing scheduled on July 16 and 17, 1997 was adjourned and subsequently rescheduled for March 5 and 6, 1998 at the OAL, 185 Washington Street, Newark.

Prior to the hearing date, the parties advised the undersigned that they had resolved this matter. On March 12, 1998, the parties submitted the attached Settlement Agreement which sets forth the terms of the settlement and is incorporated herein by reference.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

March 12, 1998
DATE

MARIE P. SIMONELLI, A.L.J.

Receipt Acknowledged:

March 17, 1998
DATE

D. N. Catanzaro Jr.
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 18 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

md

STATE OF NEW JERSEY
Mar 12 1 22 PM '98



BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(973) 773-5665
Counsel for Petitioner

RICHARD WILLE,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
v.	:	AGENCY NO. 241-6/96 OAL DOCKET NO. EDU 07568-96N
SADDLE BROOK BOARD OF EDUCATION,	:	
Respondent,	:	**SETTLEMENT AGREEMENT**

THIS AGREEMENT made this 11 day of March, 1998, between the petitioner, Richard Wille (hereinafter the "petitioner" or "Mr. Wille"), and the Saddle Brook Board of Education (hereinafter the "respondent" or the "Board");

WITNESSETH

WHEREAS, Mr. Wille filed a petition with the Commissioner of Education alleging that the Board improperly charged him sick and vacation days during the period of time from February 2 through March 27, 1996; and

WHEREAS, the parties wish to resolve this matter and accordingly enter into this Agreement;

NOW THEREFORE, the parties agree as follows:

1. The Board will restore to Mr. Wille a total of thirteen (13) sick days and two (2) vacation days. These days

shall be restored to Mr. Wille's sick leave bank and vacation bank for his use.

2. Mr. Wille agrees to withdrawn, with prejudice, his petition to the Commissioner of Education, bearing Docket No. 241-6/96 (O.A.L. Docket No. EDU 7568-96).

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

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

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

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals on the dates set forth below.

SADDLE BROOK BOARD OF EDUCATION:

By: _____, President

Attest:

By: _____

Dated: 3/11/98

RICHARD WILLE

_____
Richard Wille

Witness:

_____
Gregory T. Syrek

Dated: 2/25/98

OAL DKT. NO. EDU 7568-96
AGENCY DKT. NO. 241-6/96

RICHARD WILLE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

APRIL 28, 1998
DATE OF MAILING APRIL 28, 1998

176-98

176-98

IN THE MATTER OF THE TENURE	:	
HEARING OF DONALD PANTALONE,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
SOMERSET COUNTY VOCATIONAL	:	DECISION
SCHOOL, SOMERSET COUNTY.	:	
_____	:	

APRIL 28, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 04141-97

AGENCY DKT. NO. 135-4/97

BOARD OF EDUCATION OF THE SOMERSET COUNTY VOCATIONAL SCHOOL, SOMERSET COUNTY,

Petitioner,

v.

DONALD PANTALONE,

Respondent.

Judith A. Babinski, Esq., for petitioner (Bivona, Cohen, Kunzman, Coley, Yospin, Berstein and DiFrancesco, attorneys)

Sanford R. Oxfeld, Esq., for respondent (Balk, Oxfeld, Mandell and Cohen, attorneys)

Record Closed: March 12, 1998 Decided: March 19, 1998

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from a filing by the Board of Education of the Somerset County Vocational School ("petitioner") of tenure charges against Donald Pantalone ("respondent") with the Commissioner of Education on April 18, 1997. The matter was transmitted to the Office of Administrative Law on May 8, 1997, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached Settlement Agreement indicating the terms of settlement.

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

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

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

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

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

March 19, 1998
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

3/24/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 25 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

mjm

Attachment

OAL DKT. NO. EDU 04141-97
AGENCY DKT. NO. 135-4/97

IN THE MATTER OF THE TENURE	:	
HEARING OF DONALD PANTALONE,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
SOMERSET COUNTY VOCATIONAL	:	DECISION
SCHOOL, SOMERSET COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) in the form of a joint stipulation of settlement have been reviewed.

Upon careful and independent review of the full record of this matter and the terms of the proposed settlement agreement, the Commissioner is compelled to reject such agreement as it is currently structured since he cannot be satisfied by the present record that the proposed settlement meets the *Cardonick* standards for settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, affirmed State Board of Education April 6, 1983, 1990 *S.L.D.* 842, 846.

It is well established that, having once taken up the burden of tenure charges, the Board may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges can no longer be pursued or why it is now in the public interest not to pursue them. *In the Matter of the Tenure Hearing of Kenneth S. Smith, School District of the City of Orange*, Essex County, decided by the Commissioner March 22, 1982, decision on

remand June 16, 1983, affirmed with modification by the State Board of Education November 2, 1983, affirmed N.J. Superior Court January 30, 1986. The present record contains no such explanation.

Additionally, there is no indication that the within teaching staff member was advised of the Commissioner's duty, pursuant to *N.J.A.C.* 6:11-3.6, to refer tenure determinations for possible revocation of certificate.

While the Commissioner does not preclude the possibility of settlement in this matter, he stresses that in order for him to meet his own obligation to the schools and children of this State, he must be assured that any settlement is consistent with appropriate standards for setting aside tenure matters as expressed in *Cardonick, supra.*

Accordingly, the proposed settlement is rejected for the reasons expressed herein. The Commissioner hereby remands this matter to the OAL for further revision of the documents and expansion of the record, consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to a hearing on the merits.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

APRIL 28, 1998
DATE OF MAILING APRIL 28, 1998

177-98

C #177-98
SB # 50-98

DENISE JONES ET AL.,

PETITIONERS-APPELLANTS,

V.

LEO F. KLAGHOLZ, COMMISSIONER OF EDUCATION, AND NEW JERSEY STATE BOARD OF EDUCATION,

RESPONDENTS-RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION ON MOTION

Decided by the Commissioner of Education, April 28, 1998

For the Petitioners-Appellants, Education Law Center (David G. Sciarra, Esq., of Counsel) and Gibbons, Del Deo, Dolan, Griffinger & Vecchione (David B. Thronson, Esq., of Counsel)

For the Respondents-Respondents, Peter Verniero, Attorney General of New Jersey, and Nancy Kaplen, Deputy Attorney General

On August 1, 1997, a group of students and parents of children attending school in the Plainfield school district (hereinafter "petitioners") filed the instant petition with the Commissioner of Education, seeking a determination that the School District of the City of Plainfield continued to be a poorer urban school district as defined by the Supreme Court in Abbott v. Burke, 119 N.J. 287 (1990) (Abbott II). Petitioners claimed that the District's students were therefore entitled to the benefit of the remedial measures mandated by the Court's subsequent decisions in that case, including Abbott v. Burke, 149 N.J. 145 (1997) (Abbott IV, requiring parity funding), and the Court's most recent decision of May 21, 1998 (Abbott V, directing supplemental programs, preschool and facilities). Acting on a motion to dismiss filed by the State respondents, the

AUG. 5, 1998

Commissioner dismissed the petition in its entirety by a summary decision issued on April 28, 1998.

On May 26, 1998, petitioners filed a notice of appeal to the State Board, and on June 15 they filed their appeal brief. The appeal brief was accompanied by a motion to supplement the record on appeal pursuant to N.J.A.C. 6:2-1.9 with the affidavit of Joan Ponessa, the Director of Research for the Education Law Center, and a supplemental affidavit of Dr. Larry Leverett, Superintendent of the Plainfield School District. Petitioners argue that the affidavits contain updated information and data that was not available to them when they filed their petition with the Commissioner last year.

On July 7, 1998, the State respondents filed a brief in opposition to petitioners' motion and also moved to stay the briefing schedule pending the State Board's determination of petitioners' motion.[1] In the event their motion to stay the briefing schedule is denied, the State respondents request a 20-day extension following our determination of petitioners' motion to file their answer brief on the merits of the case.

After consideration of the parties' submissions, we grant petitioners' motion to supplement the record with the affidavits of Ms. Ponessa and Dr. Leverett. As petitioners point out, the supplemental information consists of updated data on the performance of the District's students on the Early Warning Test and the High School Proficiency Test, updated data on graduation rates, updated demographic data, and data on Plainfield's funding under CEIFA for 1998-99. This information is material to the issues now on appeal. Furthermore, most of the information included in the affidavits is from the State Department of Education and is information of which we could appropriately take notice even in the absence of a motion.

[1] The State respondents have not yet filed their answer brief, which was due on July 6, 1998.

State respondents answer brief was due on July 6, 1998. They have not however filed any brief at this point.[2] Hence, as a practical matter, unless we preclude them from filing their answer brief by our decision today, State respondents have received the benefit of their motion to stay the briefing schedule regardless of whether we grant or deny it.

In order to assure that the State Board has an adequate record upon which to decide the merits of this matter, we will not bar State respondents from filing their answer. However, given the amount of time that has passed since petitioners filed their petition with the Commissioner, we decline to prolong the briefing schedule any more than is necessary. As previously indicated, most of the supplemental information upon which petitioners seek to rely is from the Department of Education. State respondents have had both petitioners' motion and their appeal brief since they were filed in June. We therefore deny any further extension of the briefing schedule and direct that the State respondents file their answer brief within ten days of the date of this decision.

August 5, 1998

Date of mailing AUG 07 1998

[2] We note that the State respondents did not request an extension for filing their answer brief pursuant to either N.J.A.C. 6:2-1.5(b) (extensions with consent of all parties) or N.J.A.C. 6:2-1.5(c) (extensions without consent of other parties).

177-98

DENISE JONES, on behalf of herself and her minor children; AIDA FARFAN, on behalf of herself and her minor child; NATALIE F. SEALS, on behalf of herself and her minor child; ARTINA FOSTER, on behalf of herself and her minor child; AIYSHA WILSON, on behalf of herself; and DIETRA JACKSON, on behalf of herself and her minor children,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION
V.	:	
LEO F. KLAGHOLZ, COMMISSIONER OF EDUCATION, AND NEW JERSEY STATE BOARD OF EDUCATION,	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioning parents and residents of Plainfield School District sought classification of the District as an "Abbott district" under the Comprehensive Educational Improvement and Financing Act of 1996 (CEIFA), thereby entitling it to heightened levels of State aid and mandatory spending, among other special considerations. Petitioners sought relief on the facts pled, contending that such facts demonstrated membership in the class of districts found by the Court to be entitled to extraordinary remedy and, thus, on their face entitled the District to the requested relief. Respondents sought dismissal of the petition.

Commissioner held that petitioners did not plead facts sufficient to warrant the relief sought, in that they failed to allege severe educational deficiencies or specific links to the provisions of the funding law under challenge. Commissioner dismissed petition on these grounds and on grounds of prematurity, in that no claim was made that the District attempted to utilize the applicable provisions of CEIFA or to implement identified remedial programs in order to address its alleged needs. Dismissal was made expressly without prejudice to the filing of a new appeal should petitioners allege that deficiencies of constitutional magnitude remain *after* the District has fully and fairly attempted to implement the provisions of CEIFA and the appropriate programmatic recommendations.

AGENCY DKT. NO. 280-7/97

DENISE JONES, on behalf of herself and her minor children; AIDA FARFAN, on behalf of herself and her minor child; NATALIE F. SEALS, on behalf of herself and her minor child; ARTINA FOSTER, on behalf of herself and her minor child; AIYSHA WILSON, on behalf of herself; and DIETRA JACKSON, on behalf of herself and her minor children,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION
V.	:	
LEO F. KLAGHOLZ, COMMISSIONER OF EDUCATION, AND NEW JERSEY STATE BOARD OF EDUCATION,	:	
RESPONDENTS.	:	

For Petitioners, Education Law Center (David G. Sciarra, Esq.) and Crummy, Del Deo, Dolan, Griffinger and Vecchione, P.C. (James E. Ryan, Esq.)

For Respondents, Peter Verniero, Attorney General (Nancy Kaplen, DAG)

This matter was opened before the Commissioner of Education on July 31, 1997, by the filing of a Petition for Declaratory and Injunctive Relief. Therein, petitioners sought immediate inclusion of the Plainfield School District as a "Special Needs District (SND)"[1] so as to entitle it, prior to the 1997-98 school year, to the remedies ordered by the New Jersey Supreme Court in *Abbott v. Burke*, 149 *N.J.* 145 (1997) ("*Abbott IV*"). The District had been excluded from such classification by the

[1]Notwithstanding the stated nomenclature, in actuality, petitioners seek inclusion as an "Abbott district" under the Comprehensive Educational Improvement and Financing Act of 1996 (CEIFA).

language of the Comprehensive Educational Improvement and Financing Act of 1996 (CEIFA), which defined "Abbott district" as "one of the 28 urban districts in district factor groups A and B specifically identified in the appendix" to *Abbott v. Burke*, 119 *N.J.* 287, 394 (1990) ("*Abbott II*"), and which directed mandated spending and heightened aid levels for such districts so as to rectify what the Court found to be their longstanding and severe educational deficiencies. In *Abbott IV,* the Court recognized the District's exclusion from "Abbott" status under CEIFA,[2] and declined to include it within the scope of ordered remedies, finding that the Legislature, State Board and Commissioner should properly determine which districts qualify as "poorer urban districts." In the latter regard, the Court held that a district which questions its classification may challenge that determination before the Commissioner; hence, the present appeal.

A reply to petitioners' motion for emergent relief was filed by respondents ("State"), together with a motion to dismiss the appeal in its entirety. On September 5, 1997, the Commissioner issued a letter decision denying petitioners' request for emergent relief, noting that the record remained open for the conclusion of briefing on the State's motion for summary dismissal. That motion now proceeds to determination herein.[3]

THE STATE'S POSITION ON MOTION TO DISMISS

The State initially contends that Count One of the petition should be dismissed on grounds that it was neither unfair nor arbitrary for the Legislature, in enacting CEIFA, *N.J.S.A.* 18A:7F-1 *et seq.*, to have excluded Plainfield from classification as an Abbott district. The Legislature, the State argues, determined that the 28 districts designated in the appendix to *Abbott II* were those which had proven the educational inequities requisite to special remedy as directed by the Court. In designating

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[2] The Plainfield Board of Education had been granted *amicus curiae* participation in the *Abbott IV* proceedings.

[3] Prior to the Commissioner's letter decision on emergent relief in this matter, the Plainfield Board of Education submitted, through its attorney, a letter supporting and endorsing petitioners' arguments and reserving the right to join in the controversy as a "party plaintiff or amicus." However, no such application was ultimately made.

these 28 districts, the State contends, the Court was well aware that the census data and resultant classifications based upon it were not current; however, because the Court was focusing on the long duration and severity of problems, it understood the continuing validity of the data before it and specifically excluded from remedy, for lack of sufficient factual proofs, those districts then classified in District Factor Group (DFG) C based on 1980 census figures. It was, therefore, not inappropriate for the Legislature to limit extraordinary remedy to those districts identified by the Court as suffering deprivation of Constitutional magnitude. Plainfield cannot, the State argues, claim similarity to the identified districts, in that it has not proven the "glaringly clear" and "dramatic" deficiencies found to have been demonstrated by the Abbott districts in proceedings before the Court.

Neither can Plainfield, according to the State, contend that any of its claimed deficiencies are attributable to CEIFA. To the contrary, the State argues, CEIFA takes careful account of Plainfield and other similarly situated districts. This is so, the State observes, in that the very factor that caused Plainfield to be designated a Special Needs District (SND) under CEIFA's predecessor, the now-defunct Quality Education Act (QEA), generates several types of additional aid under CEIFA. Specifically, Plainfield's high concentration of low-income students qualifies it for Early Childhood Program Aid to fund required prekindergarten and full-day kindergarten for all four- and five-year olds, and for Demonstrably Effective Program Aid to fund programs and services addressing the special needs of district students. Additionally, as a low-income district with municipal overburden concerns, Plainfield qualifies for Supplemental Core Curriculum Standards Aid. Finally, CEIFA provides for an additional layer of budgetary scrutiny for districts like Plainfield, that is, non-Abbott districts which qualified as SNDs under QEA, so as to ensure on an annual basis that funds are appropriately allocated to provide a thorough and efficient system of public education (T&E). *N.J.S.A.* 18A:7F-5(g). Thus, the State concludes, petitioners cannot possibly claim legislative arbitrariness or unfairness in Plainfield's exclusion as an Abbott district.

The State next contends that the petition should be dismissed because, even accepting its allegations as true, *arguendo*, it fails to plead facts supporting the

requisite determination that educational inequities exist so as to establish an entitlement to classification as an Abbott district, or to link such inequities to CEIFA. While, the State observes, petitioners cite standardized test scores, graduation rates, per pupil income, municipal overburden, low property ratables, and minority enrollment percentages, they fail to allege anything approaching the "tragically inadequate" and "significantly inferior" level of education that the Court found to exist in Abbott districts; nor do they plead low spending, one of the most fundamental facts necessary to demonstrate similarity to Abbott districts. Finally, the State argues, petitioners do not point to any aspects of CEIFA which purportedly cause the alleged deficiencies, nor can they, in view of the fact that CEIFA takes specific account, as demonstrated above, of the factors which render Plainfield eligible for special additional aids.

The State lastly contends that dismissal is warranted because petitioners have failed to name an indispensable party to the instant matter; that is, notwithstanding petitioners' allegation that the Plainfield School District is failing to provide T&E, they have not named the district as a respondent. The district must be named, the State contends, both because the Commissioner must consider factual issues specific to the district, such as the quality and scope of course offerings, and because of the integral role the local district plays in partnership with the Legislature in providing T&E in accordance with the Constitutional mandate. Additionally, petitioners seek reliefs that will accord particular obligations, as well as benefits, to the district. Therefore, the State contends, the Plainfield School District has a material interest in the outcome of these proceedings and must be considered an indispensable party to them.

In reply, petitioners first reassert their claim that the Legislature's removal of Plainfield from the category of poor, urban districts, when it unrefutedly remains such a district, is inherently irrational and arbitrary. Petitioners contend that the State mischaracterizes the Court's findings in *Abbott II*, as the Court did not itself classify districts as poor and urban based on the proofs presented to it, but rather generalized from the proofs offered for specific districts to conclude that the students of *all* districts of the same State classification category (DFG A or B) were similarly deprived. Thus, petitioners argue, the *Abbott* remedies were not limited to those districts where

deficiencies were most fully proven, but, rather, were extended to all members of a class sharing common educational characteristics and problems with those districts. Had more current (1990) census data been before the Court at the time it reached its conclusions, petitioners note, Plainfield would have been included within the DFG B/urban classification found by the Court to be in need of remedy. Moreover, the position taken by the State, according to petitioners, assumes that the Court did not envision that any district other than the 28 then identified would ever be classified as poor and urban, whereas, in fact, the Court expressly recognized that changes would occur and assigned responsibility for making the resultant determinations to the Legislature, State Board and Commissioner. Indeed, both the Legislature and the Commissioner previously concluded that Plainfield was a poor, urban district by including it in that category, then called "Special Needs District," under the QEA enacted in 1990 and in the 1993 DFG classifications based on 1990 census figures. It thus makes no sense whatsoever, according to petitioners, for the Legislature to have effectively "de-designated" Plainfield as poor and urban by returning to pre-QEA classifications which were no longer valid. In this latter regard, petitioners distinguish Plainfield from that category of districts expressly discussed by the Court as having "some similarities" with poor, urban districts, but not rising to the level of need uniquely associated with that group. Plainfield, petitioners contend, is undeniably both poor and urban, and shares the requisite characteristics of that group so as to entitle it to full remedy.

Petitioners next aver that the State has once again mischaracterized the nature of the Court's decision in its contention that petitioners' pleadings are insufficient to warrant the remedy sought. The question is not, according to petitioners, whether specific proofs of deprivation of Constitutional dimension are brought forth, but, rather, whether petitioners can demonstrate that Plainfield is a member of the class to which the Court extended relief. Placed in this context, petitioners contend, there can be no doubt that both their allegations and their supporting proofs place them within this class, a placement the State itself recognized in its 1990 QEA designations and 1993 DFG assignments, as well as in its continued denial (since 1984) of State certification to the district.

Finally, petitioners assert that the State respondents are the only indispensable party to their petition, as the fundamental principle underlying all of the *Abbott* decisions is that it is the *State's* obligation to provide T&E and that the *State* must act to remedy violations of students' Constitutional entitlement. In this regard, petitioners note that the poor, urban districts were neither parties in the *Abbot* litigation nor required by the Court to participate therein. According to petitioners, that claim, like the present one, involves the failure of the State to meet its Constitutional obligation, not the failure of any individual district; moreover, the relief sought is from the State.

COMMISSIONER'S DETERMINATION

Petitioners have claimed entitlement to the reliefs directed by the Court in *Abbott IV* specifically on the facts pled, claiming that no further factual showing is necessary. They contend that Plainfield clearly belongs to the class of districts identified by the Court as warranting extraordinary remedy, that is, those districts which are both DFG A/B and urban; indeed, had DFGs already been recalculated based on the 1990 census at the time of the Court's decision in *Abbott II*, Plainfield would have been included in the Court's remedy, as it had moved from DFG C to DFG B based on that census. Additionally, they claim, the district undisputedly shares with the 28 identified Abbott districts a history of poor performance on standardized tests, a large percentage of disadvantaged students, an excessive municipal tax burden, a large percentage of students of color, and a tax base of low equalized valuation per pupil; indeed, the State itself recognized this by classifying the district as "special needs" under the funding law (QEA) developed in response to *Abbott II*. No further demonstration is needed, petitioners contend, to require the Legislature, State Board and Commissioner to find, upon the consideration delegated to them by the Court, that the district falls within the precise scope of classification entitled to *Abbott* remedies.

Clearly, the factual information presented by petitioners in support of their claims is not materially in dispute. The question that remains, however, is whether the remedy they seek can, in fact, be granted on those facts and on the grounds upon which it is claimed. In addressing this question, the Commissioner finds that, contrary to

petitioners' assertions, it is not enough to merely demonstrate membership in the basic class of districts which might potentially be entitled to *Abbott* remedies. Indeed, the very question of a change in entitlement, based upon reclassification as the result of a more recent census from DFG C to DFG B, has already been addressed by the Court. Facing arguments similar to those made herein, the Court held that such movement, alone, does not entitle a district to the remedies of *Abbott.* Rather, any petitioners seeking such remedy must demonstrate educational inequities similar to those suffered by the *Abbott* plaintiffs, and, further, link those inequities specifically to the funding formula being challenged. *Board of Education of the Borough of Carteret, Board of Education of the Town of Kearny, and Board of Education of the Township of North Bergen v. State of New Jersey et al.,* Superior Court, Chancery Division, Mercer County, Dkt. No. MER-C-0079-94, decided October 7, 1994, aff'd Superior Court, Appellate Division, Dkt. No. A-1340-94T1, decided October 3, 1995, *cert. denied,* 143 *N.J.* 329 (1996)

In the present instance, petitioners note low test performance and graduation rates, high numbers of poor and minority students, low property valuations and high tax rates; they do not, however, link these facts to underlying or resultant educational deficiencies, let alone to deficiencies of the depth and persistence found by the Court in *Abbott.* Nor do they link these facts to CEIFA, the funding formula being challenged herein; on the contrary, Plainfield has not historically been a low-spending district, thus not fulfilling the expenditure disparity criterion of *Abbott,* and no claim has been made that CEIFA will result in such disparity. Absent these links, the Commissioner cannot make a facial finding that CEIFA is unconstitutional in its failure to include Plainfield as an "Abbott district," especially given that CEIFA makes express provision for additional funds to address the very factors which resulted in Plainfield's classification as a "special needs" district under the prior funding scheme, and that the Commissioner has now, at the Court's directive, specifically identified those regular and supplemental programs that will address such factors within the parameters of CEIFA. See *A Study of Supplemental Programs and Recommendations for the Abbott Districts,* New Jersey State Department of Education, November 1997.

This does not mean, however, that Plainfield is foreclosed from the possibility of future remedy. While nothing in the pleadings herein would entitle petitioners to the remedy sought, even accepting their factual allegations as true, the Commissioner cannot dismiss the possibility that CEIFA might in fact, when implemented in accordance with the Commissioner's guidance as set forth in the study cited above, prove to be inadequate to enable the district to meet its constitutional obligation without classification as an Abbott district. Therefore, the Commissioner rejects the instant appeal in this regard as premature, in that the record evinces no claim that the District has attempted to utilize the applicable provisions of CEIFA or to implement programs of the type identified by the Commissioner in order to address its alleged needs. Such rejection, however, is without prejudice to the filing of a new appeal should petitioners eventually be in a position to allege that deficiencies of constitutional magnitude remain *after* the district has fully and fairly attempted to implement the provisions of CEIFA and the recommendations of the Commissioner.[4]

Accordingly, the instant Petition of Appeal is dismissed for the reasons expressed herein, without prejudice to petitioners' right to file a subsequent appeal alleging insufficiency of funding notwithstanding District implementation of the provisions of CEIFA and the recommendations of the Commissioner as set forth above.[5]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[4] Such appeal would require the naming of the Plainfield Board of Education as an indispensable party, for the reasons given by the State in conjunction with the present appeal.

[5] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

APRIL 28, 1998
DATE OF MAILING APRIL 28, 1998

177-98

C #177-98
SB # 50-98

DENISE JONES ET AL.,

PETITIONERS-APPELLANTS,

V.

LEO F. KLAGHOLZ, COMMISSIONER OF EDUCATION, AND NEW JERSEY STATE BOARD OF EDUCATION,

RESPONDENTS-RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION ON MOTION

Decided by the Commissioner of Education, April 28, 1998

Decision on motion by the Sate Board of Education, August 5, 1998

For the Petitioners-Appellants, Education Law Center (David G. Sciarra, Esq., of Counsel) and Gibbons, Del Deo, Dolan, Griffinger & Vecchione (David B. Thronson, Esq., of Counsel)

For the Respondents-Respondents, Peter Vemiero, Attorney General of New Jersey, and Nancy Kaplen, Deputy Attorney General

We grant respondents' motion to supplement the record on appeal pursuant to N.J.A.C. 6:2-1.9 with the affidavits of Assistant Commissioners Michael Azzara and Barbara Anderson.

October 7, 1998

Date of mailing OCT 09 1998

178-98

A.L.M., on behalf of minor son, T.L.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent sought reversal of the NJSIAA's determination precluding her son, T.L.M, from participating as a member of the Parsippany High School track team during the 1997-98 school year and sought waiver of the NJSIAA's eligibility standards. Petitioner contended T.L.M. failed to earn requisite academic credits through circumstances beyond his control.

Having reviewed the record of the proceedings before the NJSIAA, as well as the legal arguments of the parties, the Commissioner determined to dismiss the petition. Commissioner concluded that T.L.M. was afforded the due process to which he was entitled. Petitioner, however, failed to demonstrate that the Eligibility Appeals Committee's determination denying waiver of the Academic Credit Rule was arbitrary, capricious or unreasonable so as to warrant the Commissioner's intervention. Petition was dismissed.

AGENCY DKT. NO. 87-4/98

A.L.M., on behalf of minor son, T.L.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

For Petitioner: A.L.M., *pro se*

For Respondent: Michael J. Herbert, Esq. (Herbert, Van Ness, Cayci & Goodell, attorneys)

This matter has come before the Commissioner of Education by way of a Petition of Appeal filed on April 2, 1998 by petitioner seeking a reversal of the decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) to preclude her son from participating as a member of the Parsippany High School track team during the 1997-98 school year, and further seeking a waiver of the NJSIAA's eligibility standards. Respondent's Answer and brief were filed on April 13, 1998, together with a complete record of the proceedings before the NJSIAA Eligibility Appeals Committee (EAC). Although petitioner was provided an opportunity to submit a reply to the NJSIAA's submission, no reply was submitted.

Petitioner's son is a sophomore at Parsippany High School. He failed his Biology course last fall, thereby rendering him unable to earn the 13.75 credits required by

NJSIAA guidelines in order to be eligible for high school athletics in the spring semester. *NJSIAA Handbook,* 1997-98, at p. 38. Because petitioner's request for a waiver of the Academic Credit Rule was filed so close to the start of the spring sports season, this matter was heard directly by the Eligibility Appeals Committee (EAC) on March 11, 1998. After hearing testimony and reviewing the record, the EAC voted unanimously to deny the student a waiver of the Academic Credit Rule. (NJSIAA's Brief at p. 4) The Committee noted, in pertinent part,

> ***Although there was an illusion to "medical reasons," none of the testimony or the materials presented demonstrated that the student was physically unable to pass the required academic standard to be eligible for sports this spring. Indeed, the major complaint brought to the Committee was a disagreement with the Biology teacher and his method of evaluating this student.
>
> The Committee also notes that this student will be eligible to participate on the spring track team, as long as he does not engage in interscholastic sports. In addition, as a sophomore, he will have two full years to participate in high school sports, assuming that he improves his academic performance. (*Id.* at p. 5, citing to EAC decision, March 18, 1988)

PETITIONER'S POSITION

Petitioner's submission to the Commissioner of Education essentially incorporates, by reference to appended documents, her arguments presented before the NJSIAA, asserting that her son's failure in Biology class was a circumstance beyond his control. Petitioner attributes her son's failing grade to a stressful family situation, which, apparently necessitated him being in court last fall for substantial periods of time. Petitioner supplemented her appeal with a letter dated March 31, 1998 from a Superior Court Judge who affirmed, in pertinent part,

> While I do not have an intimate familiarity with the daily social and academic functioning of [T.], I do believe that it is reasonable to surmise that these [family] issues affected [T.'s] ability to perform effectively in his academic studies, and may have substantially contributed to his failing grade. *** (Letter from

Reginald Stanton, Judge of the Superior Court, Morris/Sussex Vicinage, March 31, 1998)

RESPONDENT'S POSITION

The Association initially contends prior case law has established that participation in interscholastic sports is not a constitutional right, but a privilege, and participation in such sports is subject to eligibility requirements and preconditions. (NJSIAA's Brief at p. 6, citing *Burnside v. NJSIAA,* unpublished decision of the Appellate Division dated November 15, 1984, Docket No. A-625-84T7; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2D (EDU) 182, 188)

The Association next asserts that the purpose of the Academic Credit Rule is to encourage "students to complete their studies and is an essential eligibility requirement of the NJSIAA, critical for maintaining the integrity of competition and providing students with incentives for academic development." (NJSIAA Brief at p. 7) Citing prior decisions involving the NJSIAA, respondent further argues that "[t]he Commissioner and the courts have consistently ruled that eligibility requirements are fundamental to the operation of a sports program." (*Id.* at p. 8)

Notwithstanding petitioner's arguments to the contrary, the Association maintains that petitioner has failed to establish that her son was unable to meet the credit requirements due to circumstances beyond his control. In this regard, the NJSIAA argues that petitioner's assertion that her son suffered "medical hardship" lacks merit. (*Id.*) The Association reasons that "[t]he note petitioner submitted from the doctor does not diagnose any illness, nor does it even imply than an illness caused [T.] to fail his course." (*Id.*) Further, petitioner's second contention was that the failing grade was due, in part, to a "personality conflict" between her son and his teacher.

However, the NJSIAA notes that it does not establish grading policies or standards for granting credits, nor will it interfere with the grading decisions of teachers or schools. (*Id.*) Finally, as to petitioner's contention that her son's involvement in a court proceeding last fall rendered him unable to pass Biology, the Association argues that

> [t]his argument did not appear in the papers submitted to the NJSIAA, and was first raised, briefly, at the hearing.*** A letter from Judge Stanton was submitted to the Commissioner, although the letter was not presented to the EAC, is not part of the record, and should not be considered. (*Id.* at p. 9, footnote omitted)

Thus, the Association affirms that the EAC was within its discretion when it found that the status of petitioner's son was not caused by circumstances beyond his control.

DISCUSSION AND CONCLUSION

The NJSIAA is a voluntary association. The Commissioner's scope of review in NJSIAA determinations is an appellate one. *N.J.S.A.* 18A:11-3; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 183. The Commissioner may not overturn an action by NJSIAA in applying eligibility rules absent a finding that the Association applied the rules in a patently arbitrary, capricious and unreasonable manner. *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987) Further, the burden of proof that an action was so deficient rests with the person challenging the decision. *Kopera v. West Orange Bd. of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960). In such cases, the Commissioner may not substitute his judgment for that of the NJSIAA, even when he might judge otherwise in a *de novo* review. *Dam Jin Koh and Hong Jun Kim v. NJSIAA*, 1987 *S.L.D.* 259.

Having carefully reviewed the record of proceedings before the NJSIAA[1], as well as the arguments presented by the parties, the Commissioner concludes there is no indication that the NJSIAA's action was arbitrary, capricious or unreasonable. The Commissioner notes that the EAC rendered its decision based upon the evidence presented by petitioner, including all documents submitted by the school. (NJSIAA's Brief at p. 9) Petitioner had an opportunity to be represented by counsel, to examine and cross-examine witnesses. The Commissioner is satisfied, then, that the NJSIAA fairly examined the purpose of the Academic Credit Rule, and whether petitioner had demonstrated that her son met the rule's exception. Further, the Commissioner notes that the letter from Judge Stanton was not before the NJSIAA when it rendered its decision; however, even considering such evidence on appeal, *arguendo*, it is insufficient to establish the claim made by petitioner herein.

Accordingly, the Commissioner concludes that petitioner has failed to demonstrate that the determination by the NJSIAA was arbitrary, capricious and unreasonable. Thus, the Commissioner adopts as his own the findings and conclusions of the NJSIAA and dismisses this Petition of Appeal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] The record includes a transcript of the hearing before the EAC.

179-98

BRUNILDA BAUER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, tenured special education teacher, alleged the District improperly withheld her salary increment for the 1996-97 school year under *N.J.S.A.* 18A:29-14.

ALJ concluded that the action of the District withholding petitioner's increment should be set aside as arbitrary, capricious and unreasonable, finding that the factual record failed to establish unsatisfactory performance of the degree sufficient to warrant withholding; that the District blurred the distinct roles of providing support to its staff and evaluating teacher performance rendering the process flawed and unfair; and that the District improperly failed to consider the building principal's favorable recommendation to grant petitioner's increment. ALJ ordered the District to restore petitioner's salary increment.

Commissioner reversed the ALJ's determination, finding that the ALJ utilized a "heightened" standard of review in examining the District's action in this matter. Instead, he concluded that under the proper standard, the withholding must be upheld as a valid exercise of the District's discretionary authority. Citing *Kopera,* the scope of the Commissioner's review in increment withholding matters is "not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions." Moreover, the burden of proving unreasonableness lies with petitioner. Commissioner determined that the record confirmed that the District had a "reasonable basis" for withholding petitioner's increment and petitioner did not meet her burden of establishing that the District's action was arbitrary, capricious or unreasonable. Commissioner reversed ALJ's decision and upheld the withholding. Petition was dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11161-96
AGENCY DKT. NO. 414-9/96

BRUNILDA BAUER,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY,
Respondent.

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

Charlotte Kitler, General Counsel, for respondent,

Record Closed: October 20, 1997 Decided: March 6, 1998

BEFORE: **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal by a teacher from the decision of the State-Operated School District of Jersey City ("District") to withhold her salary increment for the 1996-97 academic year under *N.J.S.A.* 18A:29-14.

Procedural History

Initially this matter was one of fifteen consolidated cases filed with the Commissioner of Education ("Commissioner") on September 13, 1996. Count One of the multi-count petition alleged the wrongful withholding of the increment of petitioner Brunilda Bauer ("Bauer"). On October 2, 1996, the District filed its answer. Subsequently, on October 23, 1996, the Commissioner forwarded all fifteen cases to the Office of Administrative Law ("OAL") for hearing as a contested case under OAL Dkt. No. EDU 11161-96. Since each petitioner's situation involved different factual circumstances and different witnesses, the OAL divided them into separate cases for convenience of hearing.[1] The OAL held a hearing in the *Bauer* case on October 20, 1997. Witnesses and exhibits are listed in the appendix.

Findings of Fact

Most of the relevant evidence is undisputed. **I FIND:**

Background Information

Brunilda Bauer has been a special education teacher in the Jersey City public school system for twenty-three years. She holds an instructional certificate which authorizes her to serve as a teacher of the handicapped. In the 1995-96 academic year, she taught a small class of children with communication disabilities, ranging in age from five to eight years old. Throughout her long career, she had always previously received her annual salary increment. However, on June 18, 1996 the District withheld her 1996-97 increment in reliance on the recommendation of a central-office supervisor. It appears that the District reached its determination without

[1] Uniform Administrative Procedural Rules permit consolidation of separate cases only where a single proceeding will promote savings of time and expense and avoidance of duplication and inconsistency. *N.J.A.C.* 1:1-17.3.

considering the input of her building principal, who recommended that she be given a salary increment for that year.

Both parties agree that Bauer experienced some problems in classroom management at the beginning of the 1995-96 year. Building principal Daniel Cupo requested that she receive supervisory support to improve her instructional technique and behavioral approach. As a result, Thomas VanNote, a supervisor of special education, conducted a series of in-service training sessions with her. He viewed his role as "pinpointing troublesome areas and [offering] suggestions for improvement." During his first two visits in late February 1996, he worked primarily "on creating rapport and developing trust with the teacher." VanNote volunteered that Bauer was "always cordial to me" and that they developed "a good relationship." Ms. Bauer agreed that she was receptive to his intervention, accepting his representation "that he was there to help me manage my class and give me some advice."

In-Service Training and Assistance

In rapid succession, VanNote made five consecutive visits within a one-week period, starting in late February 1996. Typically these counseling sessions lasted no more than half an hour. Some of these sessions occurred at odd times or places, such as before school when the children were eating breakfast or at the end of the day when the children were putting on their coats. At the first visit, VanNote gave Bauer a list of materials and other handouts, which he asked her to read. At the second visit, he gave her another list of special-education methods and explained the use of the approved curriculum and texts. In the remaining three visits, VanNote observed her classroom performance and offered his ideas on more effective teaching techniques. Much of his advice was unhelpfully vague and overly general, such as his suggestion that she "must adapt all required skills for the child" and that she "must have materials to address all learning modalities." Even when he was specific, VanNote's comments were not particularly insightful or constructive, for example, his criticism of her for storing books in the classroom bookcases rather than in the children's desks.

VanNote's efforts at providing assistance were undercut by his dual role as the person responsible for evaluating her job performance. According to Bauer, VanNote "never inquired about my problems" and his comments were largely negative. She felt that he was unwilling to acknowledge honest differences of opinion and "conveyed the message that everything had to be done his way." Unknown to her, VanNote was submitting regular reports documenting her alleged deficiencies to his superiors. Bauer never saw copies of these reports until they were supplied during discovery in connection with this litigation.

Reasons for Denial of the Salary Increment

The District's decision to withhold Bauer's 1996-97 salary increment was based solely on the results of two formal evaluations prepared by VanNote on March 6, 1996 and April 23, 1996 respectively. On each occasion, VanNote spent roughly forty-five minutes to an hour in her classroom. Many of VanNote's criticisms deal with Bauer's purported failure to employ teaching methods designed to address a child's unique learning style.[2]

As VanNote entered her classroom on March 6, 1996, Bauer was engaged in reading a story aloud to the entire class seated around a table. Like much of his other broad criticism, the precise nature of VanNote's objection is unclear. Apparently he equated sitting together in a circle and reading a story with "just lecturing to students." In his written report prepared at the time of his visit, VanNote stated that "[t]he use of this story from the kindergarten reading program does not address the individual needs of the higher functioning students," and that these students dominated the discussion. In his testimony, however, he contradicted himself by claiming that the story was at too

[2]Special-education teachers have a particular obligation to deliver instruction tailored to meet the specific needs and abilities of children with learning disabilities 20 *U.S.C.A.* §1401(16). *See Hendrick Hudson Cent.. Dist. Bd. of Educ. v. Rowley*, 468 *U.S.* 883, 104 *S. Ct.* 3371, 82 *L. Ed.* 2d 664 (1984).

high a level for the remaining children, and that some of them "started to fidget and not pay attention."

It turns out that the story book, entitled "Mr. Rabbit and the Lovely Present," was from the District's own approved reading series published by Houghton Mifflin. Bauer researched its suitability for the age-range of her students and determined that Barnes and Noble Bookstore recommends the book for ages five to eight and that the Hoboken Public Library regards it as appropriate for grades one to three. More importantly, Bauer testified that she personally enjoys this story even though she is an adult, and her enthusiasm as she described her own enjoyment was infectious. She could tell that her students were listening and enjoying the book "by the questions they asked at the end." None of the proofs contradict Bauer's assertion that her lessons were consistent with the curriculum guide, even though the content might something go beyond what was minimally required.

Bauer had carefully selected this particular story because it reinforced a lesson on naming colors. Although VanNote would have preferred that she introduce her lesson with a "picture walk" to provide visual clues, Bauer explained that the children were already getting too much visual stimulation and would benefit from listening-comprehension skills to stretch their imagination. Besides, she thought that showing the pictures in advance would "give away [the plot of] the story." She did, however, display the pictures in the book when the story was over. After finishing the story, she divided her class of eleven students into two groups, one of which worked on cutting and pasting pictures related to the story while the other worked on labeling and drawing. Nevertheless, VanNote faulted her for lack of individualization. Frequently his criticisms appeared trivial or hypertechnical. For instance, he complained that the children drew bowls of fruit to illustrate the theme of the story, whereas "most gardens have vegetables."

While Bauer's lesson plans were "complete to date," VanNote suggested that they be kept "on a weekly basis" to improve "continuity of instruction." Certainly VanNote raises a valid point, but the mere fact that improvement is possible does not

justify the withholding of a salary increment of a teacher willing to adapt to new techniques. Similarly, VanNote was critical of Bauer's assessment of student progress and, in particular, of her allegedly inadequate student portfolios. Bauer keeps track of attendance and completion of homework assignments in her grade book and puts all graded paperwork into a folder for each individual student. VanNote believes that a portfolio should contain selected items "truly indicative of the progress a student has made" rather than everything a student has ever done. Now that Bauer fully appreciates the distinction, she promises to be more selective in compiling her student portfolios.

When VanNote made his second formal observation on April 23, 1996, the children were participating in "a fairly structured lesson on telling time." Again the class was separated into two groups, six students led by Bauer herself and five students led by her teaching assistant. Significantly, VanNote acknowledged in his written report that Bauer "utilized appropriate strategies and methods" and properly "monitored the teacher aide, making suggestions regarding method and pace." Moreover, Bauer made the lesson meaningful to her students by "us[ing] real class schedule times and introduc[ing] the concept of being late."

Nonetheless, VanNote opined that there could have been a third ability group for a couple of more advanced students. To do this, Bauer would have had to "rotate assignments" and work with students "on a revolving basis." Evidently the number of separate ability groupings is a professional judgment call, since VanNote recognizes that a fourth group "would have been spreading it too thin." Indeed, Bauer had chosen this particular lesson to demonstrate that she consciously addressed the needs of the higher-functioning group by giving them her personal attention. Not realizing that the lesson was a review of concepts introduced earlier, VanNote criticized it as covering too much material "which should be spread out over several days." On cross-examination, he admitted that Bauer had made "some progress" in upgrading her teaching skills over the course of his observations. He praised her for showing genuine concern for her students' welfare and for disciplining an unruly student "with patience and understanding."

Building principal Daniel Cupo, who interacts with Bauer on a more regular basis and had a greater opportunity to observe her performance, was never called by the Board as a witness. He too completed a written annual report on Bauer's performance, in which he gave her the highest rating in all categories and recommended that she be granted her salary increment. Insofar as the record reflects, the District gave no consideration whatsoever to the principal's evaluation and offered no explanation of why his recommendation was ignored.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the action of the District should be set aside as arbitrary, capricious and unreasonable.

N.J.S.A. 18A:29-14 provides that a board of education may withhold a teacher's salary increment "for inefficiency or other good cause." Courts recognize that salary increments are "a reward for meritorious service." *Probst v. Haddonfield Bd. of Educ.*, 127 *N.J.* 518, 527 (1992). Section 14 is clearly meant to vest local school districts with the ability to withhold increments from teachers who have not performed well during the previous year. *Probst*, at 526. Appeals from such action may be taken to the Commissioner, who may either affirm or direct that an increment be paid.[3] A decision to withhold an increment is a matter of essential managerial prerogative, which has been delegated by the Legislature to the local school board. *North Plainfield Educ. Ass'n v. North Plainfield Bd. of Educ.*, 96 *N.J.* 587 (1984); *Bernards Twp. Bd. of Educ. v. Bernards Twp. Educ. Ass'n*, 79 *N.J.* 336 (App. Div. 1975). When reviewing such

[3] As the result of legislation effective January 4, 1990, an increment withholding "for predominately disciplinary reasons" is subject to grievance procedures. *N.J.S.A.* 34:13A-26. The withholding of a teaching-staff member's increment based on actual teaching performance is still appealable to the Commissioner of Education. *Assembly Labor Committee Statement to Assembly Bill No. 4706* (1989). *See River Dell Bd. of Educ. v. Canal*, 93 *N.J.A.R.* 2d (EDU) 784 (Comm'r of Educ.). Because the withholding in this case arose out of petitioner's teaching performance, the Commissioner has jurisdiction over the appeal.

determinations, the Commissioner is prohibited from substituting his own judgment for that of the local board. His scope of review is limited to assuring that there exists a reasonable basis for the decision.

Exercise of the discretionary powers of the local board may not be upset unless patently arbitrary, or without reasonable basis, or induced by improper motives. *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288 (App. Div. 1960). The burden of providing unreasonableness rests upon the party challenging the board's action. *Kopera*, at 297. Accordingly, the Commissioner's scope of review is limited to determining: (1) whether the underlying facts were as those who made the evaluation claimed; and (2) whether it was reasonable for them to conclude as they did upon those facts, bearing in mind that they were experts.

Notwithstanding such a heavy impediment to the granting of relief, the District's action here must be overturned on several grounds. In the first place, the factual record simply fails to establish unsatisfactory performance of the degree sufficient to warrant the withholding of her increment. Instead, the evidence shows an experienced teacher who willingly sought help in refreshing some of her obsolete teaching techniques. Bauer displays many positive points in her favor, including a sincere interest in the success of her students, a depth of knowledge of her subject area, and a willingness to cooperate with district policies. She is not the type of unfit or incompetent teacher deserving of condemnation.

Secondly, the District's own blurring of the distinct roles of providing support to its staff and evaluating teacher performance rendered the whole process fundamentally flawed and unfair. On the one hand, VanNote encouraged Bauer to confide in him so that he could assist her in improving her performance. *See Rowley v. Manalapan-Englishtown Bd. of Educ.*, 205 *N.J. Super* 65, 72 (App. Div. 1985) regarding the administration's important responsibility "to render positive assistance to the teacher in an effort to overcome his inefficiencies." On the other hand, VanNote was secretly reporting on Bauer's areas of weakness to be used against her later in increment-withholding proceedings. Combining these conflicting functions in one supervisor

compromised the teacher's trust, impaired the usefulness of in-service training, and tainted the evaluation procedures.

Last but not least, the District acted arbitrarily, capriciously and unreasonably by failing to consider the building principal's favorable recommendation to grant petitioner's increment. Of course, the District is not bound by the principal's evaluation and is free to adopt whichever advice it deems best, provided that it articulates adequate reasons for preferring one view over the other. Here, however, the District did not make a reasoned choice, but merely followed the supervisor's conclusions, without taking the principal's opinion into account.

Order

It is **ORDERED** that the State-Operated School District of Jersey City fully restore Bauer's 1996-97 salary increment.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 6, 1998
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

3/16/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 16 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

1. Thomas VanNote, supervisor of special education curriculum and instruction, Jersey City school district

2. Brunilda Bauer, special education teacher, Jersey City school district

List of Exhibits

No.	Description
P-1	Copy of instructional annual written performance report, dated May 14, 1996
P-2	Copy of Special education supervisory assistance visit, dated February 28, 1996
P-3	Copy of special education supervisory assistance visit, dated February 29, 1996
P-4	Copy of special education supervisory assistance visit, dated March 1, 1996
P-5	Copy of special education supervisory assistance visit, dated March 4, 1996
P-6	Copy of special education supervisory assistance visit, dated March 5, 1996

P-7 Copy of Jersey City public schools observation report, dated March 6, 1996

P-8 Copy of Jersey City public schools instructional observation report, dated April 23, 1996

P-9 Copy of letter to Ms. Brunilda Bauer from Judi Granick, dated June 18, 1996, together with copy of green return receipt, dated June 21, 1996

v. State-Operated Sch. Dist. of Jersey City
Outline of Proofs

P. Procedural History
- a) Withhold increment for 1996-97
- b) Bd. Resolution - Date: Exhibit

1. Background and Employment History
- a) Certifications Held
- b) Begin
- c) Duties

2. Warnings and Prior Notices

3. Classroom Observations
- (a) Formal Evaluation by - Date; **Exhibit**
- (b) Formal Evaluation by - Date; **Exhibit**
- (c) Formal Evaluation by - Date; **Exhibit**
- (d) Formal Evaluation by - Date; **Exhibit**

4. Reasons for Withholding
- (a) Proficiency in Subject Matter
- (b) Assessment of Student Needs
- (c) Organization and Planning
- (d) Instructional Technique
- (e) Affective Domain
- (f) Other

4. Past Disciplinary Record

BRUNILDA BAUER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of respondent, State-operated School District of the City of Jersey City, and petitioner's reply thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

The District's exceptions charge that the Administrative Law Judge (ALJ) in his decision erred in applying the applicable standard of review for increment withholding matters, thereby effectively "treating this case as if it were an action to terminate employment rather than the withholding of an increment***." (District's Exceptions at p. 2) In this connection, it posits that the applicable standard under which a district's decision to withhold the increment of a teaching staff member must be reviewed was established in *Kopera v. West Orange Bd. of Ed.*, 60 *N.J. Super.* 288 (App. Div. 1960), wherein the Court stated that the district's action in this regard

> "lies within the area of its discretionary powers," and "even though that discretion is not completely uninhibited[,] . . .the scope of the

> Commissioner's review is, as respondents say, not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions." *Id.* at 294, 296. Accordingly, the appropriate issues for determination are "(1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts***. *Id.* at 296-297. (District's Exceptions at pp. 2-3)

Here, the District advances, while correctly reciting the applicable standard of review in his initial decision, the ALJ proceeded to overlook key undisputed facts and "substitute[d] his judgment for that of the District as to the quality of instruction, methods of instructional delivery and the process for evaluating teaching performance[,]" (*id.* at p. 2), finding, for example, "that the supervisor's comments 'were not particularly insightful or constructive' (Initial Decision, page 3), that the supervisor's criticisms of the petitioner's teaching appeared 'trivial or hypertechnical' (Initial Decision, page 5), and that the petitioner 'is not the type of unfit or incompetent teacher deserving of condemnation' (Initial Decision, page 8)." The District observes that "[t]he purpose of an increment withholding is not to 'condemn' a teacher as 'unfit' or 'incompetent'" but, rather, increments are intended to reward those who have contributed to the educational process, in the expectation this will contribute to "encouraging *high* standards of performance." (emphasis in text) (*Id.* at p. 4) Moreover, the District asserts that it is well-settled that

> "[t]o withhold an increment***, it is not necessary to show shortcomings on the part of a teacher sufficient to justify dismissal under the Teachers' Tenure Act," and "it is not necessary for the Board to have a quantum of proof...sufficient to justify dismissal," *Hillman v. Caldwell-West Caldwell Bd. of Ed.,* 1977 *S.L.D.* 218, 224, 226 (Comm'r of Ed.). An increment can be withheld for performance which simply "did not meet the expectations or standards of excellence required by the Board...," *Gnatt v. Manalapan-Englishtown Reg'l School Dist.,* 92 *N.J.A.R. 2d* (EDU) 589, 594, and which was less than the minimum quality of teaching which the District had every right to expect.
>
> (District's Exceptions at p. 4)

The District urges that, in this matter, the ALJ's initial decision did not turn on any factual dispute with respect to deficiencies in petitioner's performance as reported on her formal observation reports but, rather, reflects, "the opinions to be drawn from the facts." (District's Exceptions at p. 5) It avers that the uncontested facts as concluded in the ratings of performance factors completed by the special education supervisor demonstrate that petitioner

> was not proficient in addressing the individual needs of her special education students, that she was not properly assessing their needs or evaluating their progress, that she was not planning and organizing her lessons effectively to meet the individual needs of the students, and that she was not utilizing effective instructional techniques. (*Id.* at p. 7)

Notwithstanding this, it argues, the ALJ concluded that "the record failed to establish 'unsatisfactory performance of the degree sufficient to warrant the withholding of her increment' because the petitioner 'willingly sought help in refreshing some of her obsolete teaching techniques' and 'is not the type of unfit or incompetent teacher deserving of condemnation.' (Initial Decision, page 8)" (District's Exceptions at p. 7) The District, thus proffers, that such statements by the ALJ clearly evidence that he applied the rigorous standard of review necessitated in a tenure dismissal case rather than the limited standard applicable in an increment withholding matter.

The District next excepts to the ALJ's finding of procedural flaws in the process of evaluating petitioner, specifically, his conclusion that because the special education supervisor, who had provided assistance to petitioner, was the individual who formally evaluated her, "the combination of 'these conflicting functions in one supervisor...tainted the evaluation procedures' (Initial Decision, pages 8-9)" (District's Exceptions at p. 8) The District further advances that the ALJ's "new procedural rule" which, essentially calls for rigid separation of the

functions of providing support and evaluating performance, finds no support in statute, regulation or case law. (*Id.* at p. 11) Rather, it avers, *N.J.A.C.* 6:3-4.1(f) appears to contemplate that "the rendering of assistance is part of, and intertwined with, the process of evaluation." (*Id.* at pp. 11-12) Moreover, it advances, the ALJ's rigid separation of these duties can be, pragmatically, difficult to achieve, especially in districts lacking a sufficient number of supervisory or administrative staff. (*Id.*) Most importantly, the District advances, it must be recognized that the purpose of providing assistance to teachers is not, as espoused by the ALJ, to gather "information 'to be used against her later in increment-withholding proceedings' (Initial Decision, page 8)" but, rather, to ensure quality education for students, which objective is not advanced by prohibiting an administrator or a supervisor from performing both the assistive and evaluative functions. (District's Exceptions at p. 12)

Even more disturbing, the District argues, is that in reaching his conclusion "that the District's 'blurring of the distinct roles of providing support to its staff and evaluating teacher performance rendered the whole process fundamentally flawed and unfair' (Initial Decision, page 8)[,] [t]he [ALJ] cited to the case of *Rowley v. Manalapan-Englishtown Bd. of Ed.,* 205 *N.J. Super.* 65, 72 (App. Div. 1985) regarding 'the administration's important responsibility "to render positive assistance to the teacher in an effort to overcome his inefficiencies'" (Initial Decision, page 8)" (District's Exceptions at p. 9) The District points out that *Rowley, supra,* "was a case involving the DISMISSAL of a tenured teacher on the grounds of inefficiency," wherein the Court held that "administrative/supervisory staff must make reasonable efforts to provide assistance to a teacher charged with inefficiency during the 90-day period which must be accorded before the tenure charges are determined by the district and filed with the Commissioner." (*Id.* at p. 10) Again, it stresses, the within case is not a termination of

employment matter but, rather, an increment withholding case, where the District is under no obligation to provide an individual assistance prior to acting to withhold her increment. (*Id.*)

The District urges that after providing assistance to petitioner, the supervisor conducted two formal evaluations of her performance, one on March 6, 1996 (Exhibit R-6), and the other on April 23, 1996 (Exhibit R-7), and, as even the ALJ concedes on page 4 of his initial decision, the District's determination to withhold petitioner's increment was based on the two formal evaluations and not on the prior visits. (*Id.* at p. 8) Despite this acknowledgment, the District asserts that "the ALJ characterized Mr. Van Note's action in preparing reports of his five visits as 'secretly reporting on Bauer's areas of weakness to be used against her later in increment-withholding proceedings' (Initial Decision, page 8)", *id.* at p. 9, a characterization which the District posits is blatantly incorrect. In this regard, it advances that, as the reports of Mr. Van Note's visits were never intended to be "formal evaluations," there was no necessity for him to share these with the petitioner. Additionally, it observes, the decision to withhold petitioner's increment was made by the State District Superintendent months after the two formal evaluations had been conducted. (*Id.*)

Lastly, the District argues that the ALJ's reliance on its failure to consider the building principal's favorable recommendation with respect to the granting of petitioner's increment as further evidence of improper conduct on behalf of the District in this matter is misplaced. It points out that such recommendation of the principal was not signed off on by the principal and petitioner until June 19, 1996, after the decision to withhold petitioner's increment had been made by the superintendent and the day after this determination was communicated to petitioner by letter sent on June 18, 1996. (*Id.* at p. 13)

In conclusion, the District argues "[w]hen the proper standard of review is properly applied to the undisputed facts in this case, there is surely more than an adequate and reasonable basis to support the withholding of petitioner's increment for her lack of a consistent level of teaching performance meeting minimal standards of quality." (District's Exceptions at pp. 7-8)

Petitioner's reply exceptions support the ALJ's "well thought and well written Initial Decision" (Petitioner's Reply Exceptions at p. 1), which correctly concludes that petitioner "clearly met" her "heavy burden" of proving that the District's action in withholding her increment was arbitrary, capricious and unreasonable. (*Id.* at p. 3)

Upon independent and comprehensive review of the within record, which it is noted did not include transcripts of the hearing below, the Commissioner is compelled to reverse the determination of the ALJ. The Commissioner fully concurs with the District's advanced exception argument, that in reaching his determination herein, the ALJ, although recognizing the Commissioner's circumscribed standard of review in increment withholding matters, erroneously proceeded to apply a heightened standard of review. The Commissioner finds, contrary to the conclusion of the ALJ, that when the District's action of withholding petitioner's increment for the 1996-97 school year is examined under the proper standard, it must be upheld as a valid exercise of that body's discretionary authority.

As was correctly argued in the District's exceptions, the scope of the Commissioner's review in increment withholding matters is "not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions." (*Kopera, supra,* at 296) As such, there are *only two* determinations to be made when reviewing a District's decision to withhold a teaching staff member's increment, *i.e.,*

(1) whether the underlying facts were as those who made the evaluations claimed, and (2) whether it was unreasonable for them to conclude as they did based upon those facts. Moreover, the burden of proving unreasonableness lies with petitioner. (*Id.* at 296-297) Simply stated, under the applicable standard of review in increment withholding matters, neither the ALJ nor the Commissioner is empowered to redetermine for himself whether the petitioner had, in fact, been unsatisfactory as a teacher, as this particular issue is irrelevant as a matter of law.

The Commissioner finds that the record in this matter evidences no factual dispute that petitioner's performance as a special education teacher was deficient to the extent determined by the District, and that petitioner recognized that assistive intervention was necessary.[1] Additionally, the record confirms that after receiving five assistive sessions with the special education supervisor, evaluations conducted by the supervisor on March 6, 1996 and April 23, 1996, establish that although petitioner's performance had improved somewhat between the first and second evaluations, her overall performance still fell short of the standards which the District finds "adequate" for one of its special education teachers. As such, it is fully evident that the District had a "reasonable basis" for determining to withhold petitioner's increment for the 1996-97 school year, and, consequently, pursuant to *Kopera, supra,* the Commissioner's review of this matter must conclude.

The Commissioner specifically disavows the ALJ's conclusion that there is an "inherent conflict" when assistive and evaluative functions are performed by a single individual. Rather, he agrees with the District's advanced observations in this regard that a rigid separation

[1] It is instructive to note that petitioner's perceived deficiencies were in areas of planning and organizing her lessons and utilizing effective instructional techniques to adequately address the particularized needs of her special education students. As noted in a footnote on page 4 of the ALJ's initial decision, delivering instruction which is tailored to address and meet the specific needs and abilities of children with learning disabilities is a particular obligation of a special education teacher.

of these functions is not defensible legally or pragmatically nor does it serve to advance the paramount objective of providing a high quality of educational services for students.

Based on the above, the Commissioner concludes that the within petitioner has not met her burden of establishing that the District's determination to withhold her 1996-97 increment was arbitrary, capricious or unreasonable, procedurally or substantively, and, therefore, the determination must be sustained.

Accordingly, the initial decision of the OAL is reversed for the reasons articulated above and the within Petition of Appeal is hereby dismissed.[2]

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

180-98

P.J. AND K.J., on behalf of D.J., AND C.J. AND G.J., on behalf of A.J.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY, AND LEONARD KELPSH,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning parents challenged as unreasonable the 10-day suspensions of their minor daughters for allegedly fighting.

ALJ determined that petitioners failed to establish that Board's Policy of a 10-day suspension for fighting a first time is improper. Moreover, students were notified that the Board had changed its suspension period from three days to ten days. Suspensions were upheld and petition was dismissed.

Commissioner concurred that petitioners failed to establish that the Board's actions suspending their children for 10 days were arbitrary, capricious or unreasonable. Petition was dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2387-98

AGENCY DKT. NO. #60-3/98

P.J. & K.J. ON BEHALF OF D.J.

AND C.J. & G.J. ON BEHALF OF A.J.,

Petitioners,

v.

BOARD OF EDUCATION

OF THE TOWNSHIP OF EGG HARBOR

AND LEONARD KELPSH,

Respondents.

P.J. & K.J. on behalf of D.J., their daughter, petitioners

C.J. & G.J. on behalf of A.J., their daughter, petitioners

Craig Bailey, Esq., for respondents (Capehart & Scatchard, attorneys)

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

This case concerns the rights of two students alleged to have engaged in fighting in the school system operated by the Board of Education of the Township of Egg Harbor (BOE). The students have been suspended from school for ten days.

More particularly, the BOE adopted a policy requiring that, for fighting a first time, a student will be suspended for ten days. The issues in this matter include: Did D.J. and A.J. engage in fighting, so that they are subject to suspension? Is the BOE's policy of a ten-day suspension so severe that it is arbitrary, capricious and/or unreasonable? That is, for such misconduct, should some lesser period of suspension be imposed?

PROCEDURAL HISTORY

On March 10, 1998, a petition was filed with the Department of Education. N.J.S.A. 18A:6-9. The Department transmitted the matter to the Office of Administrative Law (OAL) where, on March 13, 1998, it was filed as a contested case. N.J.S.A. 52:14B-2(b). Because the suspensions had already begun, the petition was treated as a motion for emergent relief and, on March 18, 1998, the case was heard in the OAL, Trenton. N.J.A.C. 1:1-12.6; R. 4:52-1; Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982). Having heard the witnesses and studied the exhibits, I conclude that all issues can be addressed in this decision; no further proceedings are necessary; and this decision and the case should be submitted to the Commissioner of Education. So, I have not merely issued an interlocutory order on the motion.

FINDINGS OF FACT

For the 1997-98 school year, the BOE's school system issued a student handbook for its Middle School. The handbook includes a list of types of misconduct and types of discipline required therefor. The list includes "fighting," which is defined as "a. shoving, scuffling, pushing, b. willfully, deliberate (intent to harm)," and for fighting a first time, a three-day suspension and a parent conference were required. J-1. Students were also notified that, instead of resorting to fighting, a peer mediation dispute resolution system could be used.

The Board found that the number of fights among its 5,000 students was increasing and, during a December 1997 meeting, in an effort to decrease the number of fights, on the recommendation of new superintendent Leonard Kelpsh, Ph.D., the BOE adopted a new policy requiring that, for fighting a first time, there would be a ten-day suspension. School administrators then assembled all of the students and notified them of the new policy. Thereafter, the number of fights decreased from eighteen in December 1997, to ten in January 1998, to five in February 1998.

D.J. and A.J. are seventh-grade students in the BOE's Middle School. They are friends, very good students, very active in school activities and in sports, and never before have they been charged with violation of a school policy. (They were also courteous witnesses in the hearing.) By way of the above-described assembly, i.e., before March 5, 1998, D.J. and A.J. had notice of the BOE's above-described policy relative to fighting. That is, they knew that a ten-day suspension would be imposed for fighting.

During the morning of March 5, 1998, in the Middle School, the following occurred: While D.J. and A.J. were walking together, D.J. said "something" to A.J. and A.J., who is about five feet, eight inches tall, shoved D.J., who is only five feet tall (although about the same weight). There was no teacher or other school official nearby and D.J. pushed back, i.e., A.J. and D.J. engaged in a fight, as defined in the handbook. Later, in the locker room, D.J. pushed A.J.'s books off a bench onto the floor and A.J. grabbed D.J. and hit D.J. in the eye. Both times, no teacher or other school official was nearby. D.J., who was hurt and crying, left the locker room; saw Pam Crawford, a teacher; and told Ms. Crawford that A.J. had hit her in the eye. Ms. Crawford then asked A.J. what had happened and A.J. said that D.J. had pushed her books off a bench and that she had hit her (D.J.) in the eye. Later, in the nurse's office, Zed Robinson, the assistant principal, asked the students if they knew the penalty for fighting and they both responded that it was a ten-day suspension. Mr. Robinson then notified the students' parents that, based upon the allegation that they were fighting, they would be suspended for ten days. The parents objected, saying that ten days was too long. BOE-2; BOE-3.

During a March 10, 1998 meeting, the BOE was made aware of the matter and it determined that the ten-day suspensions should stand.

As suspended students, A.J. and D.J. may call in to learn their assignments and, upon their return, they will be given an opportunity to make up work missed during their suspensions.

CONCLUSIONS OF LAW

Students such as A.J. and D.J. are entitled to a thorough and efficient public education and related services. N.J. Const. art. VIII, § 4, ¶ 1.

Public school students are also entitled to an education in a reasonably safe environment. Consequently, for good cause, including an assault upon another student, a student may be suspended and/or expelled from school, subject to due process requirements, including notice of the charge on which the demand for suspension or expulsion is based; a statement of the factual allegation on which a charge is based; discovery of the name of any person with knowledge of any relevant fact and discovery of any relevant document; and a hearing, during which the student may confront any witness against her. N.J.S.A. 18A:37-1 to -5; Tibbs v. Franklin Bd. of Educ., 59 N.J. 506 (1971).

Where a school administrator has a reasonable basis for a belief that a student presents a danger to herself or to others or to school property, he may temporarily suspend the student, pending and conditioned upon notice and a hearing before the board of education. N.J.S.A. 18A:37-5. However, where a suspended student is not provided, e.g., a preliminary hearing and instruction to allow her to keep up with her class, she may be ordered readmitted to school. R.R. v. Shore Regional High Sch. Bd. of Educ., 109 N.J. Super. 337 (Ch. Div. 1970), where it is also held that the hearing before the board of education should be held not more than twenty-one days after the suspension.

The hearing in this case satisfies the above-described rights.

The BOE was confronted with an increasing number of fights in its schools. The BOE reasonably determined that it had a duty to reduce the incidence of fights and, to do so, in its policy, it raised the number of suspension days for fighting a first time from three to ten. School administrators notified the students of the increase in suspension days and, thereafter, the incidence of fights decreased. Therefore, the BOE's policy appears effective. Fighting disrupts the educational process and can leave someone permanently injured, and public entities and officials are presumed to have acted reasonably and in good faith. A ten-day suspension for fighting is not unreasonable, etc., and I conclude that the suspensions should not be vacated as arbitrary, capricious and/or unreasonable.

A.J.'s and D.J.'s parents allege that they did not receive written notice of the new policy (and the BOE should send notice to parents). However, A.J. and D.J. were notified of the policy well before March 5, 1998, and it is not alleged that, had their parents known of the suspension-length increase, the fight would not have occurred. So, I conclude that there was no lack of notice which could be a basis for vacating the orders of suspension and ordering the students readmitted.

D.J. said something (probably insulting) to A.J. and, knowing that for fighting a ten day suspension would be imposed, they both engaged in shoving, a fight, as defined in the handbook. Later, in the locker room, D.J. pushed A.J.'s books to the floor, inviting a continuation of the fight, and A.J. hit D.J. in the eye.

A.J. and D.J. are two good students from caring parents. Fortunately, D.J.'s eye was not permanently injured. Hopefully, no similar incident will occur in the future.

ORDERS

The ten-day suspension remains effective and this petition is **DISMISSED WITH PREJUDICE**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 18, 1998
DATE

John R. Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

3/21/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 23 1998
DATE

Barbara A Hamel
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

Joint:

J-1 Egg Harbor Township Middle School Student Handbook (1997-98)

For Petitioners:

None

For Respondents:

BOE-1 Disciplinary Infraction Report, by Crawford

BOE-2 Memo from Robinson

BOE-3 Memo from Crawford

WITNESSES

For Petitioners:

A.J.

D.J.

For Respondents:

Donald Robertson

Philip Heery, Ed.D.

OAL DKT. NO. EDU 2387-98
AGENCY DKT. NO. 60-3/98

P.J. AND K.J., on behalf of D.J., AND C.J. AND G.J., on behalf of A.J.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY, AND LEONARD KELPSH,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.

Upon careful and independent review of the record in this matter, the Commissioner concurs that petitioners have failed to establish that the Board's actions to suspend D.J. and A.J. for a period of ten days for fighting in school were arbitrary, capricious and unreasonable, or otherwise unlawful.

To the extent that petitioners challenge the ALJ's finding that D.J. was, indeed, involved in a "fight," the Commissioner notes that the record before him does not include

transcripts or an audiocassette tape recording of the hearing conducted at the OAL in this matter. In the absence of transcripts or tape from the hearing, due regard should be given to the person who heard the live testimony and assessed the witnesses' behavior at the hearing. *Close v. Kordulak Bros.*, 44 *N.J.* 589, 599 (1965). Thus, the Commissioner finds no cause to disturb the ALJ's findings of fact.

Additionally, the Commissioner observes that petitioners' assertion that the students should have been permitted to remain in school during the pendency of the proceedings, as established by *N.J.S.A.* 18A:38-1 *et seq.*, is misplaced. The cited provision pertains to appeals of decisions made by a local board which concern a student's residency, but does not in any way prohibit the Board herein from precluding the students from attending school during the pendency of these proceedings.

Further, although petitioners object to the Board's failure to provide the students with a hearing prior to their suspension, the Commissioner recognizes that, since the students were not being suspended for a longer period than ten days, a formal hearing was not required. *Goss v. Lopez*, 419 *U.S.* 565 (1975).

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MAY 4, 1998
DATE OF MAILING MAY 4, 1998

181-98

MICHELLE A. POLK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIVERDALE, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MAY 4, 1998

State of New Jersey
Office of Administrative Law

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9729-97
AGENCY DKT. NO. 308-8/97

MICHELLE A. POLK,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF RIVERDALE
Respondent.

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

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

Record Closed: March 23, 1998 Decided: March 23, 1998

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of Facts

This matter was transmitted to the Office of Administrative Law on October 15, 1997 for a hearing pursuant to 20 *U.S.C.A.* §1415 and 34 *C.F.R.* §§300.500 to 300.587.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 23, 1998
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

March 25, 1998
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 26 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

MAR 23 1 48 PM '98

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(973) 773-5665
Counsel for Petitioner

MICHELLE A. POLK,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF
Petitioner,	:	ADMINISTRATIVE LAW
v.	:	AGENCY REF. NO. 308-8/97 O.A.L. DOCKET NO. EDU 9729-97N
RIVERDALE BOARD OF EDUCATION,	:	
Respondent.	:	**STIPULATION OF SETTLEMENT**

Petitioner, Michelle A. Polk, residing at 3 David Drive, Montville, New Jersey 07045 (hereinafter "Ms. Polk"), and the Board of Education of the Borough of Riverdale , Morris County (hereinafter the "Board"), with offices at 52 Newark-Pompton Turnpike, Riverdale, New Jersey 07457, hereby stipulate and agree as follows:

1. In return for compliance with this Agreement, Ms. Polk agrees to withdraw and dismiss the above-captioned matter, with prejudice as to her claim for 1997-98 only. Ms. Polk shall retain all rights to tenure and seniority with regard to any future reduction in force or change in the composition of her assignment.

2. Ms. Polk will continue in her current position of employment through June 30, 1998.

3. Effective for the 1998-99 school year, Ms. Polk will be assigned to a full-time position consisting of approximately one-third social studies teaching, one-third social work and one-third guidance counseling. This position will be the same subject area composition as the position she held in 1996-97. Any future changes in the composition of her position may be challenged by Ms. Polk based on her tenure and seniority rights, if those rights are violated.

4. This agreement is subject to approval by the Office of Administrative Law and the Commissioner of Education. If not so approved, it will be null and void.

5. The parties recognize that each has been represented by legal counsel or a representative of her or its own choosing and that they sign this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein. This Agreement shall be subject to the laws of the State of New Jersey.

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

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

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

Witness:

Michelle A. Polk

Dated: 2-2-98

Louis P. Bucceri, Esq.

Dated:

RIVERDALE BOARD OF EDUCATION

By: Stephen W. Reed

Board President

Dated: 3-17-98

By:

Board Secretary/Business Administrator

Dated: 3-17-98

OAL DKT. NO. EDU 9729-97
AGENCY DKT. NO. 308-8/97

MICHELLE A. POLK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIVERDALE, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MAY 4, 1998
DATE OF MAILING MAY 4, 1998

182-98

182-98

BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
FAUSTO CHAVEZ AND PALMIRA CHAVEZ,	:	DECISION
RESPONDENTS.	:	

MAY 4, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO.: EDU 7689-96
AGENCY DKT. NO. 134-4/96

BOARD OF EDUCATION OF TOWN OF KEARNY, HUDSON COUNTY,

Petitioner,

v.

FAUSTO CHAVEZ and PALMIRA CHAVEZ,

Respondents.

Kenneth J. Lindenfelser, Esq., represented petitioner
(Koch, Koch & Bennett, attorneys)

Fausto Chavez and Palmira Chavez, *pro se,* respondents

Record Closed: March 13, 1998 Decided: March 18, 1998

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

This matter was transmitted to the Office of Administrative Law (OAL), on July 31, 1996 for determination as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached papers.

Having reviewed the contents of the attached papers, I **FIND** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached papers meet the requirements of *N.J.A.C. 1:1-19.1* and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with their contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

3/18/98
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALJ

Receipt Acknowledged:

March 25, 1998
DATE

W. A. Anastasio Jr.
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 26 1998
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

/g

KOCH, KOCH & BENNETT, ESQS.
70 Midland Avenue
P.O. Box 495
Kearny, New Jersey 07032
Phone: (201) 991-1111

Attorney for Petitioner
Board of Education of the Town of Kearny

BOARD OF EDUCATION OF TOWN OF KEARNY, HUDSON COUNTY plaintiff, -vs- **FAUSTO CHAVEZ and PALMIRA CHAVEZ on behalf of their minor children, K.C.** defendant.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW DEPARTMENT OF EDUCATION OAL DOCKET NO. EDU 7689-96 **STIPULATION OF SETTLEMENT**

It is hereby stipulated and agreed by and between the parties, the Board of Education of the Town of Kearny (hereinafter "KBOE"), by and through their attorney, and Fausto and Palmira Chavez, pro se, as follows:

WHEREAS, KBOE has filed the above petition against Fausto and Palmira Chavez alleging improper attendance in the KBOE school district by their child, K.C.; and

WHEREAS, said petitions sought tuition reimbursement in excess of $7,300.00 for the periods in question*; and

WHEREAS Fausto Chavez and Palmira Chavez dispute the facts and amounts.

* i.e. September of 1993 through September of 1995.

NOW THEREFORE in consideration of their mutual promises and other valuable consideration, the parties agree as follows:

1. Mr. and Mrs. Chavez agree to pay the KBOE ~~$[redacted]~~ a total of 3,500.00 as tuition reimbursement for K.C.; In this regard, Mr. Chavez is fully authorized to act on behalf of Ms. Chavez in entering into this agreement. F.CH. 1/5/98

2. Said amount will be paid as follows: An initial payment of ~~$[redacted]~~ $1,000.00 due and payable no later than ~~December 1, 1997~~ MAR. 17, 1998; followed by a monthly payment of $125.00 due and payable on the ~~first~~ Fifteenth of each month beginning ~~January 1, 1998~~ April 15, 1998, through and with the final payment on ~~[redacted]~~ November 15, 19 ~~1, 1999~~. Checks should be made payable to the Kearny Board of Education and mailed in care of Kenneth J. Lindenfelser, Esq., Koch, Koch & Bennett, P.O. Box 495, Kearny, New Jersey 07032. The Above is subject to Approval by the KBOE which will be sought on March 3, 1998 F.CH 1/5/98

3. In the event any payment is not received within 10 days of its due date, it is hereby agreed that KBOE may enter judgment against Fausto and Palmira Chavez for the full amount remaining unpaid in the Superior Court of New Jersey.

4. The parties hereby release and waive any claims or counterclaims that each may have against the other with respect to the subject matter of this lawsuit, except as otherwise provided herein.

5. ~~KBOE~~ and respondent, Fausto Chavez do hereby withdraw their request for an OAL hearing in this matter. F.CH. 1/5/98 ~~[redacted]~~

Dated: 10/24/97

Kenneth J. Lindenfelser, Esq.
Petitioner's Attorney

Dated: 2/19/98

Fausto Chavez,
Pro Se

KOCH, KOCH & BENNETT
ATTORNEYS AT LAW
70 MIDLAND AVENUE
P.O. BOX 495
ABOVE VALLEY NATIONAL BANK
KEARNY, NEW JERSEY 07032
(201) 991-1111
Fax (201) 991-4328

CALVIN S. KOCH, JR.
GARY D. BENNETT
KENNETH J. LINDENFELSER*

FRANK KOCH, 1898-1948
CALVIN S. KOCH, 1929-1991

***member NY & NJ Bars**

March 11, 1998

Judge Thomas E. Clancy
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: Kearny Board of Education -vs- Fausto Chavez and Palmira Chavez

Dear Judge Clancy:

Enclosed, please find an original certified, raised seal copy of a portion of the minutes from a Kearny Board of Education meeting. This excerpt contains the Board's approval of your judgment in the above matter.

Please contact me should you require anything additional at this time.

Yours very truly
KOCH, KOCH & BENNETT

Kenneth J. Lindenfelser

KJL:kat

CERTIFIED TO BE A TRUE EXCERPT FROM THE MINUTES OF THE KEARNY BOARD OF EDUCATION SPECIAL MEETING OF MARCH 2, 1998

BY: Leslie J. Gaueton
Business Administrator/Board Secretary

MOTION RE: RESIDENCY MATTER - "K.C."

It was moved by Mrs. Cifelli-Pettigrew, seconded by Miss Cali and unanimously carried that the Kearny Board of Education hereby approves the judgement rendered by the Office of Administrative Law in the matter of "K.C.", in the amount of $3,500.

OAL DKT. NO. EDU 7689-96
AGENCY DKT. NO. 134-4/96

BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
FAUSTO CHAVEZ AND PALMIRA CHAVEZ,	:	DECISION
RESPONDENTS.	:	

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

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter.[1] To the extent that the terms of the settlement have already been effectuated through respondent's initial payment to the Board no later than March 17, 1998, the parties are admonished that settlement agreements of controverted matters are of no force and effect and may not be implemented absent the Commissioner's approval pursuant to *N.J.A.C.* 1:1-19.1.

The matter is hereby dismissed, subject to compliance with the terms of the settlement.[2]

COMMISSIONER OF EDUCATION

[1] It is noted that Term 2 of the Stipulation of Settlement specifies that the payment schedule is subject to the approval of the Board. Because agency approval renders this settlement a final decision pursuant to *N.J.A.C.* 1:1-19.1(c)2, accord to its terms by all necessary parties must be accomplished prior to the Commissioner's approval. However, in that the record of this matter indicates that Board approval of the agreement was achieved on March 2, 1998, the Commissioner determines that approval of this settlement can be granted.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MAY 4, 1998
DATE OF MAILING MAY 4, 1998

188-98

C #188-98L
SB # 54-98

MARIE PEASE,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WALDWICK, SALEM COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, May 4, 1998

For the Petitioner-Appellant, Marie M. Pease, pro se

For the Respondent-Respondent, Fogarty & Hara (Rodney T. Hara, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. In so doing, we add only that petitioner acknowledges in her reply brief that the teacher from whom she seeks an apology is no longer in the employ of the Waldwick Board.

In view of our determination, we find it unnecessary to address the Board's motion to exclude documents appended to petitioner's appeal brief.

October 7, 1998

OCT 09 1998

Date of mailing _____

189-98

189-98

EDNA ATKINSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MAY 7, 1998

OAL DKT. NO. EDU 3287-97
AGENCY DKT. NO. 45-2/97

EDNA ATKINSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

MAY 7, 1998
DATE OF MAILING MAY 7, 1998

190-98

190-98

ELAINE MEYER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MAY 7, 1998

OAL DKT. NO. EDU 5139-97
AGENCY DKT. NO. 414-9/96

ELAINE MEYER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

MAY 7, 1998
DATE OF MAILING MAY 7, 1998

191-98

D.S., on behalf of minor child,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOODLYNNE, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MAY 7, 1998

OAL DKT. NO. EDU 8850-97
AGENCY DKT. NO. 333-9/97

D.S., on behalf of minor child,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOODLYNNE, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

MAY 7, 1998
DATE OF MAILING MAY 7, 1998

192-98

192-98

ROSEANN WHITE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROCKAWAY, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

MAY 7, 1998

OAL DKT. NO. EDU 7991-97
AGENCY DKT. NO. 278-7/97

ROSEANN WHITE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROCKAWAY, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

MAY 7, 1998
DATE OF MAILING MAY 7, 1998

193-98

193-98

KENNETH BITZER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WYCKOFF, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

MAY 7, 1998

OAL DKT. NO. EDU 11478-96
AGENCY DKT. NO. 504-10/96

KENNETH BITZER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WYCKOFF, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

MAY 7, 1998
DATE OF MAILING MAY 7, 1998

194-98

194-98

WILLIAM R. BRENDEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTHVALE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MAY 7, 1998

OAL DKT. NO. EDU 11120-96
AGENCY DKT. NO. 430-9/96

WILLIAM R. BRENDEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTHVALE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

MAY 7, 1998
DATE OF MAILING MAY 7, 1998

195-98

195-98

JAMES NICHOLS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PALISADES PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MAY 7, 1998

OAL DKT. NO. EDU 11285-96
AGENCY DKT. NO. 440-9/96

JAMES NICHOLS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PALISADES PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

MAY 7, 1998
DATE OF MAILING MAY 7, 1998

201-98

BOARD OF EDUCATION OF THE WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT, SOMERSET COUNTY,

PETITIONER,

V.

BOARD OF EDUCATION OF LONG HILLS TOWNSHIP, MORRIS COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board contended respondent Board should be responsible for tuition, related services and transportation expenses for classified student, R.B., for the 1996-97 school year.

ALJ concluded that respondent was responsible for R.B.'s education for the 1996-97 school year as the decision to retain R.B. at Children's Institute for the 1996-97 school year was based on the appropriate criteria set forth in the regulation governing the transition to secondary school. ALJ concluded that the placement determination was a consensus of the opinions of those involved in developing an IEP, not only a reliance on petitioner's policy of not accepting classified students in secondary school until the age of fifteen.

Commissioner adopted initial decision as his own, noting that following petitioner's revision, the policy in question is to be forwarded to the Somerset County Superintendent of Schools for review in order to ensure compliance with *N.J.A.C.* 6:28-4.7.

MAY 11, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3638-97

AGENCY DKT. NO. 65-2/97

BOARD OF EDUCATION OF THE WATCHUNG REGIONAL HIGH SCHOOL DISTRICT, SOMERSET COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF LONG HILLS TOWNSHIP, MORRIS COUNTY,

Respondent.

William S. Jeremiah, Esq., for petitioner (Buttermore, Mullen, Jeremiah & Phillips, attorney)

Robert M. Tosti, Esq., for respondent (Rand, Algeier, Tosti & Woodruff, attorneys)

Record Closed: March 2, 1998 Decided: March 24, 1998

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

Petitioner, Board of Education of the Watchung Hills Regional High School District (Watchung) asserts Respondent, Board of Education of Long Hill Township (Long Hill), should be responsible for the tuition, related services and transportation

expenses for R.B., a special education student, for the 1996-97 school year. The Petitioner seeks reimbursement of those costs from Respondent.

The petition in this case was filed in the Department of Education, Bureau of Controversies and Disputes on February 20, 1997, as a Petition for Declaratory Ruling. On March 11, Respondent filed an Answer and Cross Petition for Declaratory Ruling. By letter dated March 17, 1997, the Commissioner of Education advised the parties of his determination not to consider the matter as one for declaratory ruling, pursuant to his authority under *N.J.A.C.* 6:24-1.2; the matter was, however, considered to be a contested case and was transmitted to the Office of Administrative Law (OAL) on March 27, 1997, in accordance with *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. It was scheduled for hearing on October 29, and November 13, 1997, both of which were adjourned at the request of counsel. The hearing was held on February 9, 1998; the record was held open until March 2, 1998 in order to permit counsel to submit written summations.

FINDINGS OF FACT

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I make the following findings of fact, which are essentially undisputed, in this matter.

1. Petitioner is a limited purpose regional high school district for grades 9 through 12.

2. Respondent is an elementary school district, grades K through 8; Respondent is a constituent district of Petitioner.

3. R. B. is a 15 year old pupil who resides in Long Hill Township with his parents.

4. R.B. has been classified since the age of three. He has been in an out of district placement since September 1988.

5. In October 1995, Petitioner's Director of Special Services, Dr. Gloria Zucker, attended a conference with R.B.'s parents and representatives of Children's Institute. A representative of Respondent's Child Study Team (CST), who had been R.B.'s case manager and who has since retired, also attended.

6. R.B. attended the middle school program at Children's Institute in accordance with his IEP during the 1996-97 school year.

7. R.B. attended Long Hill Township Public Schools' Eighth Grade Promotion Exercises held on June 20, 1996.

8. In March 1996, R.B.'s name had been submitted to the Petitioner as one of the students who would become the high school's responsibility as of July 1, 1996 in March 1996.

9. In April 1996, Respondent's CST attended a meeting at which Petitioner was also represented and which was designed to plan for transitioning students to the high school. At that time, once again, it was agreed that R.B. needed one more year of middle school before going on to a high school program. No transition goals were written for R.B. to move on to secondary education.

10. In July 1996, Mrs. B., R.B.'s mother, advised Petitioner that she had been told by Respondent that Watchung was handling her son's out of district placement for the 1996-97 school year.

11. In order to avoid disruption of R.B.'s education, Petitioner has been paying the cost of tuition related services, and transportation, without prejudice to the regional district's right to seek reimbursement from Respondent.

12. The parties stipulated that the total cost of R.B.'s education for the 1996-97 school year was $33,487.01. In addition, they also stipulated that the cost of his triennial evaluation, performed by the Morris-Union Jointure Commission, was $780.

DISCUSSION AND CONCLUSIONS

Nothwithstanding Respondent's assertion to the contrary, the issue of which of the parties bears the financial responsibility for R.B.'s education during the 1996-97 school year turns on whether this student was ready to engage in a high school program during that year.

The regulation governing transition from elementary to secondary education is clear: the determination that a classified student is ready to move from the elementary to the secondary level of education shall be guided by factors including number of years in school, social, academic and vocational development, and chronological age. In addition, the determination shall be specified in the pupil's IEP. *N.J.A.C.* 6:28-4.7(a)

The testimony of Petitioners' witnesses, Mrs. B, Ms. Cunningham, and Ms. McGowan is consistent with that of Dr. Zucker in regard to the consensus of opinion of those present at the October, 1995 meeting, one of whom was R.B.'s case manager, Ms. Herman,[1] that this student was not ready to enter high school. Ms. B. and the personnel from Children's Institute, none of whom had anything to gain or lose by their testimony, were clear in their recollection of the meeting, as was Dr. Zucker.

Respondent asserts that it is clear from the memorandum authored by Ms. Cunningham that, at the October, 1995 meeting, a decision had been made by the regional high school that Watchung would not accept R.B. until he had actually reached the chronological age of 15,[2] which is a violation of the requirement that an annual review be conducted. The testimony of the professionals from Children's

[1] It should be noted Ms. Herman had been R.B.'s case manager since he had begun to receive services from Long Hills, apparently, at the age of three.
[2] R.B. reached the age of 15 on January 25, 1997.

Institute indicated, however, that R.B. was having difficulty in adjusting to the new format of moving from room to room for classes. In addition to his faulty organizational skills, he continued to display inappropriate, "silly" behavior, and he was having difficulty completing homework assignments. His mother, Ms. Cunningham, and Ms. McGowan all testified that it was their opinion, stated at that time, that R.B. needed another year in the middle school program before transitioning to the high school.

Moreover, Ms. Cunningham noted that there had been no transition planning at the October, 1995, meeting because the determination had been made to keep the child at Children's Institute for the next school year. Since there would be an annual meeting sometime early in the 1996-97 school year, transition to secondary school could be addressed at that time.[3]

Respondent failed to present any evidence to rebut Petitioner's assertion that R.B. was not ready to attend secondary school beginning in September 1996. Moreover, the fact that he attended Long Hill Township's Promotion Exercises and received a diploma must be considered in the context of Mrs. B.'s unrebutted testimony that she had been advised that, since these were the children with whom her son began school, he was entitled to participate with them and it would be a good social experience for him. She further testified that she was unaware that he would actually receive a diploma.

I note Respondent's assertion that R.B. had been under the auspices of Long Hill for eleven years. The number of years in school is just one of the criteria to be considered in determining when a classified student is ready to transition to the secondary level. *Id.*

Respondent raised the case of another Long Hill classified student, E.S., who was also in an ungraded class at the Center School and who participated in Respondent's Promotion Exercises, to illustrate the inefficacy of Watchung's Policy 5150. The testimony, however, demonstrates that this student was accepted by

[3] Ms. Cunningham also testified that there was, indeed, an annual meeting in October 1996, at which time the recommendation was made to move R. B. the secondary school.

Petitioner at age 13, specifically because he had graduated from Center School, was accepted into the ninth grade, and Watchung special education personnel made the specific assessment that his needs could be better met on the secondary level. His chronological age was not a consideration in coming to the decision.

Based on the foregoing, I **CONCLUDE** that the determination that R.B. should remain in the middle school program during the 96-97 school year was based on the appropriate factors as set forth in the regulation; I further **CONCLUDE** that the determination was a consensus of the opinions of those involved in the meeting of October 1995, in accordance with the requirements of the regulations found at *N.J.A.C.* 6:24-3.6 and 6:24-2.3(h), which provide for a cooperative planning effort in developing an IEP; I further **CONCLUDE** that reliance on Policy 5150 by Watchung in coming to a decision with regard to R.B.' s placement was one factor to bolster and support the determination that R.B. was not yet ready to transition to secondary school.

Respondent's assertion that the issue to be resolved by this case is Watchung's readiness to assume responsibility for R.B.'s education rather than R.B.'s readiness to proceed to the secondary issue, is erroneous. While I agree with the assertion that some children with disabilities may never be capable of functioning at a high school level and at some point the CST in a secondary school becomes better qualified to address the needs of such students, there is absolutely no indication in the record that R.B. was one of those students. Indeed, the record clearly reflects that all who participated in the October 1995 meeting anticipated that R B. would be ready for transition to secondary school the following school year.

This particular assertion by Respondent serves to demonstrate the need for a policy for uniformly accepting responsibility for students who may never be appropriate for inclusion in a secondary setting. This is precisely what Watchung's policy accomplishes, according the testimony of Petitioner's witnesses.[4] Because Respondent's witness, Mr. McTeigue, testified that the information he had received

[4] I note Respondent's characterization of the policy as anachronistic and Dr. Zucker's reluctant agreement; I further note the testimony of Dr. Zucker that Watchung's special education policy is being revised.

regarding the policy was consistent with the testimony of Petitioner's witnesses, I **FIND** that the testimony of Respondent's witnesses is credible and I **CONCLUDE** that the policy addresses the issue of when Petitioner will ultimately accept responsibility for children in out of district ungraded placements who may not be otherwise ready for transition to the secondary unit.

In addition, Respondent makes the conclusory statement that R.B. was at an age and point in his educational development which required the expertise of a secondary level CST; however, Respondent offered no evidence to support this conclusion. I also note that there is no reference, as required by regulation, to the transition to secondary school in the IEP dated October 1995, which was supported by Respondent and in the development of which Respondent participated through Ms. Herman.

Finally, with respect to Respondent's assertion that the regulations require that post secondary transition planning commence at age 14, I note that R.B. had not yet attained the age of 14 in October 1995; arguably post secondary transition planning could begin, with the next IEP, based on this student's specific educational, emotional and social needs.

I **CONCLUDE** that the decision to retain R.B. at Children's Institute for the 1996-97 school year was based on the appropriate criteria as set forth in the regulation governing the transition to secondary school; consequently, I further **CONCLUDE** that Respondent Board of Education of Long Hill Township should bear the financial responsibility R.B.'s education for the 1996-97 school year, including the cost of the triennial evaluation performed by the Morris-Union Jointure Commission.

ORDER

Accordingly, based on the foregoing conclusions, it is hereby **ORDERED** that Respondent Board of Education of Long Hill Township reimburse Petitioner Board of Education of the Watchung Hills Regional High School in the amount of $33,487.01; it is further **ORDERED** that the cross petition be **DISMISSED WITH PREJUDICE**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 24 1998
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

3/27/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 31 1998
DATE

Barbara A Harnek
OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

WITNESSES:

For Petitioner

C.B.

Amy Patricia Cunningham

Jennifer McGowan

Dr. Gloria H. Zucker

Robert W. Baly

For Respondent

James A. Durante

Francis McTeigue

Dr. Mary Louise Malyska

Elizabeth Richards

EXHIBITS:

P-1 1996-97 IEP for R.B.

P-2 The Children's Institute Annual Review Meeting dated October 5, 1995

P-3 Policy 5150 for Watchung Hills Regional High School Bd. of Educ.

P-4 Morris-Union Jointure Commission evaluation dated February 25, 1997

R-1 The Eighth Grade of Long Hill Township Schools Promotion Exercises dated June 20, 1996

R-2 Long Hill Township public Schools eligibility statement for 8th grade students dated March 5, 1996

R-3 Letter to Boyle dated July 30, 1996

R-4 Letter to Boyle dated March 12, 1996

R-5 Letter from Superintendent Baly to Durante dated November 7, 1996

R-6 Letter to Baly from Durante dated November 13, 1996

R-7 Letter to Baly from Mosey dated February 12, 1997

R-8 Memo to Durante from Salsovic dated January 15, 1997

R-9 Letter to Zucker from Mosey dated March 24, 1997

R-10 Letter to Baly from Durante dated October 31, 1996

R-11 Fax cover sheet dated April 8, 1996

R-12 Watchung Hills Regional High School IEP 1997-98 school year

R-13 Attendance sheet IEP meeting June 3, 1997

R-14 The Eight Grade of Long Hill Township Schools Promotion Exercises dated June 20, 1995

OAL DKT. NO. EDU 3638-97
AGENCY DKT. NO. 65-2/97

BOARD OF EDUCATION OF THE WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT, SOMERSET COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF LONG HILLS TOWNSHIP, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.

Upon careful and independent review of the record in this matter, the Commissioner finds that the fundamental issue herein is whether R.B. was able to be served at the high school level in the 1996-97 school year; petitioner has shown by a preponderance of credible evidence that he was not. Additionally, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner's position was not substantially based on its policy of not accepting classified students until the age of fifteen.

Further, to the extent respondent challenges the credibility determinations and factual findings rendered by the ALJ, the Commissioner notes that the record before him does not include transcripts of the hearing conducted at the OAL in this matter. Challenges to the factual findings predicated upon credibility determinations made by an administrative law judge require the party to supply the agency head with the relevant and necessary portion of the transcript. See *In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987) In the absence of transcripts from the hearing, due regard should be given to the person who heard the live testimony and assessed the witnesses' behavior at the hearing. *Close v. Kordulak Bros.*, 44 N.J. 589, 599 (1965).

Finally, the Commissioner notes petitioner's representation that its Policy 5150 is under revision (Initial Decision at p. 6, note 4). As the current policy set forth in the present decision is clearly contrary to provisions of special education law requiring individual determinations based on a variety of factors, the Commissioner directs that, upon the planned revision, petitioner's new policy be forwarded to the Office of the Somerset County Superintendent of Schools for review in order to ensure compliance with *N.J.A.C.* 6:28-4.7.

Accordingly, the initial decision of the OAL is affirmed, with clarification as set forth above. A copy of this decision shall be forwarded to the Somerset County Superintendent of Schools. *

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

202-98

202-98

DIANE WALLER-MORGAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, tenured teaching staff member, alleged the Board failed to pay full salary without loss of sick time for work-related injury due to assaults by students.

ALJ concluded petitioner's claims were barred as untimely filed pursuant to *N.J.A.C.* 6:24-1.2(c). After medical examination approving petitioner's return to work, petitioner was notified by letter dated November 18, 1996 that her absences from September 1996 were not being treated as work-related. Thus, November 18 was the date of accrual of her claim for relief. Moreover, since she alleged the injuries from the same accidents at school in January and February 1996 were the basis for her continuing absence and gave rise to her claim for continuation of salary from November 27, 1996, with no deduction from sick days, the date of accrual for this claim was also the notification date of November 18, 1996. Therefore, the ALJ concluded the claims were untimely filed; petition was dismissed.

Commissioner adopted the initial decision as his own.

MAY 11, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 3356-97
AGENCY DKT. NO. 104-3/97

DIANE WALLER-MORGAN,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Alan S. Porwich, Esq., for petitioner (Feintuch, Porwich & Feintuch, attorneys)

Charlotte Kitler, General Counsel, for respondent

Record Closed: February 27, 1998 Decided: March 19, 1998

BEFORE **MARIA MANCINI La FIANDRA,** ALJ:

STATEMENT OF THE CASE

This matter was opened by respondent, the State-Operated School District of the City of Jersey City, Charlotte Kitler, General Counsel, appearing on February 17, 1998, as an application for an order dismissing the petition as untimely. Petitioner was

notified of the application through her attorney, Alan S. Porwich. No response has been received to date, although the time to respond expired on or about February 27, 1998.

FINDINGS AND CONCLUSIONS

I have reviewed the papers submitted by respondent, including the Certification of Judith N. Granick and the supporting documents, and I make the following Findings of Fact, which are uncontroverted, and conclusions of law.

1. Petitioner was granted approved absence for a service-connected disability for the period from January 23 to January 27, 1996. These days were not charged to her personal sick bank. Petitioner was also granted similar approval for February 15 and February 27, 1996 and for February 27 to June 23, 1996.

2. Petitioner did not return to work in September 1996.

3. An IME was conducted on October 15, 1996, and Dr. Lee, an orthopedic spine specialist, determined that there was no physical impediment to petitioner returning to work.

4. By letter dated November 18, 1996, petitioner was notified of the results of the IME and advised to contact her employer to schedule her return to work. The letter also clearly stated that the respondent's carrier would not be responsible for any lost time incurred since September 1996.

5. Petitioner did not return to work until March 24, 1997. She received full pay from September 1996 to January 1, 1997, and her absences were charged to her personal illness days in her sick bank, which was exhausted by November 26, 1996.[1]

[1] She continued to be paid, however, until January 1, 1997, which resulted in an overpayment of $16,295.50.

The Commissioner of Education has subject matter jurisdiction to determine a timely claim for benefits under *N.J.S.A.* 18A:30-2.1 which sets forth the benefits which may be accorded to an employee (of a board of education) who is absent as the result of a personal injury caused by an accident arising out of his employment. Where an issue arises as to whether the injury is work-related, the Commissioner of Education should defer action until the issue of cause is determined in the Division of Workers' Compensation. *Tompkins v. Hamilton Bd. of Ed.*, 11 *N.J.A.R.* 520 (ALJ, 1986) The State Board of Education has ruled, however, that the deferral of action over claims for benefits under *N.J.S.A.* 18A:30-2.1 applies only to claims which were filed within the 90-day period prescribed by *N.J.A.C.* 6:24-1.2(c). *Verneret v. Elizabeth Bd. of Ed.*, 95 *N.J.A.R.* 2d (EDU) 134.

In this case, petitioner was notified by letter dated November 18, 1996, that her absences from September 1996 were not being treated as work related. Thus, November 18, 1996 is the date of accrual of her claim for relief from this determination. Moreover, since she alleges that injuries from the same accidents at school in January and February 1996 are the basis for her continuing absence and give rise to her claim for continuation of salary from November 27, 1996, with no deduction from sick days, the date of accrual for this claim is also November 18, 1996. Although petitioner's two claims are separately stated, they are grounded on identical circumstances, derived from and related to injuries alleged to be suffered in the work-related accidents reported in January and February 1996. Since petitioner had been notified by the letter dated November 18, 1996, that her continued absences since September 1996 were not considered to be work related, she certainly should have known that all of her absences from September and thereafter would be charged to her accumulated sick days.

Accordingly, I **CONCLUDE** that petitioner's claims are barred as untimely, pursuant to *N.J.A.C.* 6:24-1.2(c).

Therefore, it is hereby **ORDERED** that this petition be and hereby is **DISMISSED WITH PREJUDICE**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 19, 1998
DATE

Maria M. La Fiandra
MARIA MANCINI La FIANDRA, ALJ

Receipt Acknowledged:

March 25, 1998
DATE

L. M. Contaxakis Jr.
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 26 1998
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

md

OAL DKT. NO. EDU 3356-97
AGENCY DKT. NO. 104-3/97

DIANE WALLER-MORGAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon careful and independent review of the record in this matter, the Commissioner concurs that petitioner's claims are barred by *N.J.A.C.* 6:24-1.2(c). In so finding, the Commissioner notes that petitioner specifically sought restoration of all sick days deducted from her sick leave bank between September 3, 1996 and November 27, 1996, as well as full wages with no deduction of sick days from November 27, 1996 to February 14, 1997. (Petition of Appeal at p. 3) As the District contends, "The only basis for petitioner's claim for payment of full salary is that her absences were the result of injuries allegedly sustained from an accident at work on February 14, 1996 and should have been compensated pursuant [to] *N.J.S.A.* 18A:30-2.1 without deduction from her sick days." (District's Motion to Dismiss at p. 12, citing to Petition of Appeal at paragraphs 3, 4) However, as determined by the ALJ, petitioner was duly notified

by letter dated November 18, 1996 that her absences from September 1996 would not be treated as compensable for a work-related accident. (Initial Decision at p. 3)

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MAY 11, 1998
DATE OF MAILING MAY 11, 1998

203-98

H.O., on behalf of minor child, J.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning parent contested Board's residency determination denying her son, J.C., a free public education . Petitioner contended J.C. lived with his uncle because his mother could not support him.

Having reviewed the documentation of the family's economic hardship and noting that J.C. was emancipated when he turned eighteen on October 10, 1997, the ALJ found that neither J.C. nor his parent was liable for any tuition to the District in 1996 or 1997.

Commissioner adopted the initial decision as his own, noting that prior to October 10, 1997, the date on which J.C. turned eighteen, this matter was governed by *N.J.S.A.* 18A:38-1b(1), the "affidavit student" provision; after October 10, the matter was governed by *N.J.S.A.* 18A:38-1a, J.C. was emancipated and chose his own residence.

MAY 11, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10698-97
AGENCY DKT. NO. 431-11/97

H.O., on behalf of minor child, J.C.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD, SOMERSET COUNTY,

Respondent.

H.O., petitioner, *pro se*

Theodore Gast, Esq., for respondent (Vogel & Gast, attorneys)

Record Closed: February 9, 1998 Decided: March 25, 1998

BEFORE **ANTHONY T. BRUNO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals respondent's determination that her son, J.C., was not domiciled in the Borough of North Plainfield and not entitled to free education within respondent's school district.

The school district held a due process hearing on July 30, 1997 which was continued to October 13, 1997 to afford petitioner the opportunity to file additional proofs of J.C.'s domicile. When proofs were not forthcoming the school district determined J.C. was not legally domiciled in North Plainfield, New Jersey.

H.O. petitioned the Commissioner of Education on October 23, 1997 for a hearing on her appeal of the school district's decision. On December 18, 1997 the matter was transmitted to the Office of Administrative Law for hearing of a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. An expedited hearing was scheduled for February 3, 1998 at Mercerville, New Jersey. On that date the hearing was conducted and concluded. The record was left open to permit the school district to review, photocopy and forward to the Office of Administrative Law the 1996 U.S. Income Tax Return and New Jersey Income Tax Return of E.O. and H.O. (Exhibit J-1) and the Summary Report issued on October 24, 1997 by the Internal Revenue Service for E.O. and H.O. (Exhibit J-2). The hearing record closed on February 9, 1998 upon receipt of the said exhibits.

FACTUAL DISCUSSION

The material facts in this matter are not in dispute. The following factual statements are therefore the **FINDINGS of FACT** made with respect to this matter:

On October 10, 1997 J.C. became 18 years old. Because H.O.'s home had only 2 bedrooms and H.O.'s family consisted of H.O., her husband, E.O., 2 other sons - E.C. and "John" and daughter K.O., there was no room for J.C. in the home. Prior to 1997 J.C. moved into a 9 room house owned by H.O.'s former brother-in-law, M., and located in North Plainfield.

J.C. works to earn money for his clothes and personal needs, but J.C. pays no rent or board to his uncle M. J.C. has his own bedroom in the house, does his homework at the North Plainfield address, and his only contact with his mother is their day visits. J.C. enlisted in the Marine Corps for service to begin in July 1998. H.O. testified that her family's gross income is

less than $19,000 (Exhibit J-1), and that she and E.O. were in arrears in their rent and could not afford to support J.C.

Exhibits J-1 and J-2 corroborate H.O.'s testimony. J.C. is not listed as a dependent on the 1996 form 1040A U.S. Income Tax return of H.O. and "3" is the number of qualified dependent children claimed on the 1996 New Jersey Income Tax return. Exhibit J-2 is Internal Revenue Service verification that the information shown on Exhibit J-1 is the same as that shown on the filed return.

DISCUSSION AND CONCLUSION

In addition to the school district being satisfied that a school-aged person is living with another person domiciled within the district "gratis as if he were such person's child," *N.J.S.A.* 18a:38-16 requires the parent or guardian of the person to swear or affirm that the parent or guardian "is not capable if supporting or providing care for the [person] due to a family or economic hardship." ". . . [D]ocumentation to support the validity of the sworn statements . . . only to the extent that it directly pertains to the support or nonsupport of the child" must accompany the sworn statements.

I **CONCLUDE** that unless and until H.O. provided documentation of her family's economic hardship and of the nonsupport of J.C., the school district was obliged to deny J.C. free public schooling. Once H.O. provided the requested documentation (copies of income tax returns) that J.C. was not being claimed as a dependent on H.O.'s tax returns, and the district being satisfied that J.C. was a full time resident in North Plainfield, I **CONCLUDE** H.O. has sustained the statutory burden of proof "by a preponderance of the evidence "that J.C. is eligible for a free education within the North Plainfield school district.

No issue is made about the length of time that J.C. attended school in North Plainfield and whether the school district may assess tuition for a period prior to 1996. I **FIND** that J.C. resided with his uncle in North Plainfield from 1996. I **CONCLUDE** that the school district is not entitled to collect any tuition from J.C. or his parent, H.O. for any education from 1996.

Upon J.C. becoming 18 years of age the issues of support and purpose of residency became moot. I **CONCLUDE** that as of October 10, 1997, J.C. was domiciled in the Borough of North Plainfield and entitled to a free education within the North Plainfield school district pursuant to *N.J.S.A.* 18A:38-1a.

ORDER

Accordingly, it is **ORDERED** that J.C. be deemed eligible for a free public education in the North Plainfield School District. It is further **ORDERED** that neither J.C. nor his parent, H.O. is liable for any tuition to the North Plainfield School District.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 25, 1998
DATE

ANTHONY T. BRUNO, ALJ

Receipt Acknowledged:

March 27, 1998
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 31 1998
DATE

OFFICE OF ADMINISTRATIVE LAW

tmp

OAL DKT. NO. EDU 10698-97
AGENCY DKT. NO. 431-11/97

H.O., on behalf of minor child, J.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm the initial decision of the Administrative Law Judge (ALJ). In so doing, the Commissioner underscores that, *prior to October 10, 1997*, the date on which J.C. turned 18 years old, this matter was governed by *N.J.S.A.* 18A:38-1b(1), that portion of the relevant statute known as the "affidavit student" provision, which permits a child who is living with another person who is domiciled in the district to attend school free of charge, under certain conditions, where the domiciliary provides the requisite affidavits and proofs. Like the ALJ, the Commissioner is satisfied that, for the aforementioned period of time, J.C. was entitled to attend school in the District pursuant to *N.J.S.A.* 18A:38-1b(1).[1]

[1] It is also noted that, where a Board determines that a student is not entitled to attend school free of charge within its districts, pursuant to *N.J.S.A.* 18A:38-1b(1), it is the *resident* who is authorized to appeal the Board's decision to the Commissioner of Education.

The Commissioner recognizes that "[a] child, in law, can have no residence of its own, and can only lawfully acquire one when it has been emancipated.***" *Mansfield Township Board of Education v. State Board of Education*, 101 *N.J.L.* 474 (1924). As the *Mansfield* case established, the domicile of a child follows that of his father, parent or guardian having legal control over him, until he is emancipated and chooses his own residence. *Mansfield* at 478, 479, 480. Further, "[r]eaching the age of 18 establishes *prima facie*, but not conclusive proof of emancipation." *Bishop v. Bishop,* 287 *N.J. Super.* 593, 597 (Chan. Div. 1995). That is,

> ***the emancipation of a child occurs when the fundamental dependent relationship between parent and child is terminated. When *a child* moves beyond the sphere of influence and responsibility exercised by a parent and obtains independent status on his or her own, generally he or she will be deemed emancipated.*** (*Id.* at 598) (emphasis in text)

In that the Board presents no evidence to rebut the presumption that J.C. was emancipated by virtue of his turning 18 years of age, and does not except to the ALJ's finding that J.C. was a domiciliary of the Borough of Plainfield, the Commissioner accepts the ALJ's conclusion that J.C. was entitled to a free public education in the Board's District after October 10, 1997, pursuant to *N.J.S.A.* 18A:38-1a.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein, and the Board is hereby ordered to continue to allow J.C. to attend school in its District, free of charge.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

204-98

IN THE MATTER OF THE SPECIAL	:	
ELECTION OF THE BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION OF THE TOWNSHIP	:	DECISION
OF UPPER PITTSGROVE, SALEM	:	
COUNTY.	:	
	:	

SYNOPSIS

Following special election wherein proposition for supplemental tax was defeated, the Board sought Commissioner's order for a total supplemental tax of $103,000 for the purpose of eliminating current expense and capital projects deficits incurred for the tax years 1996-97 and 1997-98.

The Board having developed a Corrective Action Plan and having attested that without the approval of the additional tax monies, it would be unable to provide T & E for its students, the Commissioner authorized the supplemental tax and ordered the County Board of Taxation to make the necessary adjustments in the 1996-97 and 1997-98 General Fund tax levies to certify a total supplemental tax of $103,000. Commissioner further ordered that any undesignated surplus as of June 30, 1998, as reported in the annual audit for the 1997-98 budget year, in excess of three percent of the 1998-99 General Fund budget, shall be reserved as excess surplus to be appropriated in the 1999-2000 budget for purposes of tax relief.

MAY 11, 1998

AGENCY DKT. NO. 40-2/98

IN THE MATTER OF THE SPECIAL	:	
ELECTION OF THE BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION OF THE TOWNSHIP	:	DECISION
OF UPPER PITTSGROVE, SALEM	:	
COUNTY.	:	
	:	

For the Board, Gary D. Wodlinger, Esq. (Lipman, Antonelli, Batt, Dunlap, Wodlinger & Gilson)

This matter having been opened before the Commissioner of Education on February 17, 1998 through the filing of a Petition of Appeal by the Board of Education requesting that the Commissioner order a supplemental tax in the amount of $78,000 for the tax year 1997-98, and $25,000 for the tax year 1996-97, for a total supplemental tax of $103,000 to be certified to the Salem County Board of Taxation for the purpose of eliminating current expense and capital projects deficits incurred for those respective tax years; and

The Department of Education having been informed by letter dated March 26, 1998 that the Township of Upper Pittsgrove would submit no Answer in this matter, and the Board having filed, on April 29, 1998, the supporting papers requested by the Commissioner; and

The Board of Education having averred that it discovered a former business administrator fraudulently converted to himself a sum of $129,896.80 and submitted a false budget to the New Jersey State Department of Education so as to obscure the fact that the Board would have been operating in a deficit, in violation of law; and

The Board having contacted the appropriate State and Federal authorities and having instituted legal action in Superior Court seeking to recover the amount converted; and

The Board having learned by audit completed in September of 1997 that its deficit was $310,763, with a capital projects deficit of $24,991; and

The Board, in conjunction with the Salem County Superintendent's Office and in consultation with Township representatives, having developed a Corrective Action Plan in accordance with *N.J.A.C.* 6:20-2A.10; and

The Corrective Action Plan having been approved by the Salem County Superintendent's Office and the New Jersey State Department of Education, Division of Finance; and

The Corrective Action Plan having anticipated a Special Election on February 3, 1998 seeking a supplemental tax in the sum of $78,000 for tax year 1997-98 and $25,000 for tax year 1996-97 for a total supplemental tax of $103,000; and

The Special Election having been conducted on February 3, 1998; and

The proposition having been defeated; and

The Board having attested that, without the approval of the additional tax monies, it will be unable to provide a thorough and efficient system of education for its students, as required by law; and

The Corrective Action Plan having ensured that significant cuts were made in the operation expenses of the school district, and extracurricular activities having been eliminated in their entirety; and

The Board having attested that, if the requested monies are not restored, its only recourse is to further reduce staff who are independently operating such programs as, *inter alia,* Technology Education, Guidance, Art, Music, Physical Education/Health and Library services; and

The Board having averred that, with the entire amount restored, it will end the year with a prudent level of surplus, but further noting that if no funds are restored, it anticipates a deficit of between $60,000 and $80,000 and will be unable to make a transfer to cover the capital projects deficit; and

The Township of Upper Pittsgrove, by its cooperation with the Corrective Action Plan and its decision not to contest the within matter, having demonstrated an understanding of the critical situation faced by the Board; and

In accordance with the Commissioner's power to authorize a supplemental tax, see *In the Matter of the Special Election of the Board of Education of Stafford*, 95 *N.J.A.R.* 2d (EDU) 373; now, therefore,

IT IS ORDERED on this 11th day of May 1998 that the Salem County Board of Taxation make the necessary adjustments in the 1996-97 and 1997-98 General Fund tax levies in order to certify a supplemental amount of $78,000 for deficit elimination purposes for the 1997-98 tax year, and a supplemental amount of $25,000 for deficient elimination purposes for the 1996-97 tax year, for a total supplemental tax of $103,000.

IT IS FURTHER ORDERED that any undesignated unreserved surplus as of June 30, 1998, as reported in the annual audit for the 1997-98 budget year, in excess of three percent of the 1998-99 General Fund budget, shall be reserved as excess surplus to be appropriated in the 1999-2000 budget for purposes of tax relief.*

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MAY 11, 1998
DATE OF MAILING MAY 11, 1998

205-98

BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
OLGA TIKHONVA,	:	DECISION
RESPONDENT.	:	

MAY 12, 1998

AGENCY DKT. NO. 4-1/98

BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
OLGA TIKHONVA,	:	DECISION
RESPONDENT.	:	

For the Board, Robert Tessaro, Esq.
For Respondent, Olga Tikhonva, *Pro Se*

This matter having been opened before the Commissioner of Education on January 8, 1998, by way of a Petition of Appeal alleging respondent failed to pay the District outstanding tuition for the illegal attendance of her minor child, N.O., at petitioning School District; and

The Commissioner having directed respondent to file an answer on January 12, 1998, and February 5, 1998, and again by letter sent by both regular and certified mail on February 11, 1998 to respondent's last known address in Cliffside Park, and the certified mail having been returned as unclaimed; and

Respondent having failed as of this date, notwithstanding apparent regular mail receipt of such notices, to comply with the directive of the Commissioner so that each count of the charges against her is deemed to be admitted pursuant to *N.J.A.C.* 6:24-1.4; now therefore

IT IS ORDERED as of the date of this decision that summary judgment shall be granted to the Board wherein Respondent Olga Tikhonva is hereby assessed tuition in the amount of $7,951.77 for the period of minor N.O.'s ineligible attendance in the public schools of the Borough of Fort Lee.*



COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MAY 12, 1998
DATE OF MAILING MAY 12, 1998

206-98

206-98

ALEXANDER PAGNETTI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MAY 12, 1998

OAL DKT. NO. EDU 5142-97
AGENCY DKT. NO. 414-9/96

ALEXANDER PAGNETTI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

MAY 12, 1998
DATE OF MAILING MAY 12, 1998

207-98

207-98

IN THE MATTER OF THE TENURE	:	
HEARING OF CHERYL NIAS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF RAHWAY, UNION COUNTY.	:	
	:	

MAY 12, 1998

OAL DKT. NO. EDU 1748-96
AGENCY DKT. NO. 476-12/95

IN THE MATTER OF THE TENURE	:	
HEARING OF CHERYL NIAS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF RAHWAY, UNION COUNTY.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed. The Assistant Commissioner underscores that such dismissal is expressly subject to the Board's compliance with *N.J.A.C.* 6:11-3.5, which requires, upon the resignation of a teaching staff member accused of unbecoming conduct prior to the conclusion of the tenure proceedings, that the chief school administrator notify the State Board of Examiners of the alleged conduct, and that the District cooperate, should the Board elect to take action against the staff member's certificate. By copy of this decision, the State Board of Examiners is notified of the within matter and circumstances underlying its withdrawal.*

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MAY 12, 1998
DATE OF MAILING MAY 12, 1998

208-98

208-98 DHP

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM SCHOOL	:	COMMISSIONER OF EDUCATION
EMPLOYMENT OF S.N.	:	DECISION

MAY 12, 1998

OAL DKT. NO. EDU 3823-97
AGENCY DKT. NO. DHP 69-96

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM SCHOOL	:	COMMISSIONER OF EDUCATION
EMPLOYMENT OF S.N.	:	DECISION
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

MAY 12, 1998
DATE OF MAILING MAY 12, 1998

209-98

IN THE MATTER OF THE TENURE	:	
HEARING OF CARLTON MATTHEWS,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

MAY 15, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7424-97

I/M/O THE TENURE HEARING OF
CARLTON MATTHEWS
STATE OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK, ESSEX COUNTY

Gregory G. Johnson, Esq., for petitioner, State Operated School District of the City of Newark

Alan Dexter Bowman, Esq., for respondent, Carlton Matthews

Record Closed: March 27, 1998 Decided: March 30, 1998

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

This tenure matter was transmitted to the Office of Administrative Law by the Department of Education on July 29, 1997 and involved charges of unbecoming conduct against the respondent, a tenured teaching staff member of the State Operated School District of the City of Newark. A prehearing conference was conducted by the undersigned administrative law judge on October 30, 1997 and a hearing was scheduled for March 20, 1998.

On the date scheduled for the plenary hearing I conducted settlement discussions with counsel and, as a result, the parties reached agreement with respect to

the terms and conditions of a Stipulation of Settlement. That Stipulation, now signed by the petitioner's superintendent, her attorney, the respondent and his attorney is attached hereto and made a part hereof. Importantly, it specifically provides that the respondent acknowledges that he has been made aware of the provisions of *N.J.A.C.* 6:11-3.6(a) and the decision by the Commissioner in the *Cardonick* case.

In light of the contents of the Stipulation of Settlement I **FIND** as follows:

1. The parties voluntarily have agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy before me and is consistent with law.

Therefore, I **ORDER** that the parties comply with the terms of the settlement and that these proceedings be and are hereby **CONCLUDED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

March 30, 1998
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

April 1, 1998
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 2 1998
DATE

OFFICE OF ADMINISTRATIVE LAW

\mvh

Gregory G. Johnson, Esq.
17 Academy Street, Suite 208
Newark, New Jersey 07102
973-642-0001
Attorney for the Newark Public Schools

IN THE MATTER OF THE TENURE HEARING OF CARLTON MATTHEWS, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.	**BEFORE THE COMMISSIONER OF EDUCATION** **OFFICE OF ADMINISTRATIVE LAW** **OAL Docket No. EDUTH 07424-97N** **Agency Reference No. 211-6/97** **STIPULATION OF SETTLEMENT**

This Agreement made this 20th day of March, 1998, by and between the parties, petitioner State-Operated School District of the City of Newark ("District"), and respondent Carlton Matthews, a tenured teacher, residing at 90 Girard Place, Newark, New Jersey 07108.

WHEREAS, Mr. Matthews is a tenured teacher employed by the District;

WHEREAS, on or about January 14, 1997, Mr. Matthews was arrested by the Newark Police Department and charged with possession of CDS (cocaine) in violation of *N.J.S.A.* 2C: 35-10, later amended to *N.J.S.A.* 2C: 36-2. On or about April 20, 1997, the Newark Municipal Court granted Mr. Matthews a conditional discharge under the First Offenders Program.

WHEREAS, on or about May 21, 1997, tenure charges were filed against Mr. Matthews based upon conduct unbecoming for possession of a controlled dangerous substance (cocaine);

WHEREAS, on June 12, 1997, the State District Superintendent acted to certify the charges against Mr. Matthews, and suspended him for a 120 day suspension without pay pending a hearing pursuant to *N.J.S.A.* 18A:6-14.

WHEREAS, on or about July 22, 1997, Mr. Matthews' attorney filed an Answer essentially denying the charges with the Commissioner of Education; and

WHEREFORE, in light of the nature of charges, Mr. Matthews' willingness to res his position, and potential for protracted litigation, it is in the best interest of the parties to amicably resolve the charges before the Commissioner of Education;

NOW THEREFORE BE IT RESOLVED, the parties hereby stipulate and agree as follows:

1. The District agrees to withdraw the tenure charges in light of Mr. Matthews' resignation from the District, effective March 31, 1998.

2. Mr. Matthews is entitled to his full salary and health insurance benefits (COBRA notice provisions apply) until March 31, 1998. Mr. Matthews is not entitled to payment for accumulated sick days.

3. Mr. Matthews specifically acknowledges that he has been advised of the duty of the Commissioner of Education pursuant to *N.J.A.C.* 6:11-3.6(a)(1) and *In re Cardonick* concerning referral to the State Board of Examiners for possible action regarding Mr. Matthews' teach certification.

4. Mr. Matthews expressly waives and releases the District from any and all claims to salary or benefits in return for the District's compliance with this agreement. Mr. Matthews agrees not to seek employment with the District in the future.

5. The parties respectively acknowledge that each has had ample opportunity to seek independent legal counsel, financial or other advice regarding this Agreement, and that each is signing this Agreement freely and voluntarily, without coercion, duress or pressure from the other party.

6. This Agreement constitutes the full Agreement between the parties.

7. By entering this Agreement, each party releases and discharges the other with respect to all claims or rights that either party may have against the other. This includes all claims, includ those of which either party is not aware and those not mentioned herein. The releases by each party

apply to all claims resulting from anything which has happened up to now. It specifically includes, without limitation, all claims which Mr. Matthews may have respecting tenure, discrimination on any basis, rights under any collective bargaining agreement, disability payments, sick leave, salary or any other matter pertaining to his employment.

8. This Agreement is subject to approval by the State District Superintendent, Office of Administrative Law, and Commissioner of Education.

FOR THE EMPLOYEE

Carlton Matthews

Dated: 3-20-98

Alan Dexter Bowman, Esq.
Attorney for Mr. Matthews

Dated: 3-20-98

FOR THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK

Dr. Beverly L. Hall

Dated: 3/24/98

Gregory G. Johnson, Esq.

Dated: March 20, 1998

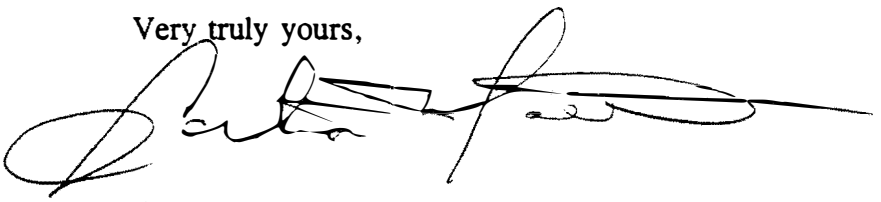
March 20, 1998

Dr. Beverly L. Hall
State District Superintendent
Newark Public Schools

Dear Dr. Hall:

In accordance with the Settlement Agreement, I hereby resign my tenured teaching position effective March 31, 1998.

Very truly yours,



Carlton Matthews

Exhibit "A"

3d

OAL DKT. NO. EDU 7424-97
AGENCY DKT. NO. 211-6/97

IN THE MATTER OF THE TENURE	:	
HEARING OF CARLTON MATTHEWS,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MAY 15, 1998
DATE OF MAILING MAY 15, 1998

210 -98

EDU #7548-94
C # 210-98
SB # 51-98

NICHOLAS A. CIUFI,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, May 15, 1998

For the Petitioner-Appellant, Wayne J. Oppito, Esq. and Teitelbaum & Caccavale (Edward Teitelbaum, Esq., of Counsel)

For the Respondent-Respondent, Schwartz, Simon, Edelstein, Celso & Kessler (Joseph R. Morano, Esq., of Counsel)

The decision of the Commissioner of Education dated May 15, 1998 denying petitioner's request for indemnification of his legal fees incurred in the defense of criminal charges alleging improper sexual contact with a student is affirmed for the reasons expressed therein. We fully agree with the Commissioner that petitioner has not met his burden of demonstrating that the criminal charges arose "out of and in the course of the performance of [his] duties" as an assistant principal, a statutory requirement for indemnification. N.J.S.A. 18A:16-6.1. See N.J.S.A. 18A:16-6. Under these circumstances, we find it unnecessary to determine whether the criminal charges

SEPT. 2, 1998

had been "dismissed or result[ed] in a final disposition in [petitioner's] favor" within the intent of the statute.

We note, in addition, that subsequent to the Commissioner's decision denying petitioner's request for indemnification, we affirmed the Commissioner's determination to dismiss petitioner from his tenured employment on the basis of tenure charges arising from the same incident which formed the basis for the criminal charges. In the Matter of the Tenure Hearing of Nicolas Ciufi, decided by the Commissioner of Education, September 3, 1996, aff'd by the State Board of Education, July 1, 1998, appeal pending (App. Div.). We agreed that the Irvington Board had proven the tenure charges against petitioner by a preponderance of the credible evidence and that dismissal was the appropriate penalty under the circumstances.

September 2, 1998

Date of mailing SEP 04 1998

210-98

NICHOLAS A. CIUFI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, tenured vice principal who was dismissed from his position based on tenure charges of unbecoming conduct, sought to compel Board to pay legal costs of defending criminal matter which allegedly arose in the course of his employment and was ultimately dismissed by the court.

N.J.S.A. 18A:16-6.1 prescribes a two-part test for determining whether board of education employees are entitled to indemnification of counsel fees and expenses incurred in the defense of criminal charges: 1) the charges must either be dismissed or result in a final disposition favorable to the employee; and 2) any act or omission on which the criminal charges are based must arise "out of and in the course of performance of the duties" of the position held by the employee. (*Bower*) ALJ concluded that the tenure findings, which resulted in petitioner's dismissal from his position, precluded indemnification of petitioner's criminal defense costs. ALJ granted Board's motion for summary decision; petition was dismissed.

Noting that unlike the situation in *Bower*, there was evidence on the record of the specific conduct which formed the basis of the criminal charge brought against petitioner, the Commissioner concurred with the ALJ that petitioner was now precluded, by specific findings to the contrary in an administrative forum, from asserting that the criminal charge brought against him involved an act or omission arising out of and in the course of the performance of his duties as an assistant principal. Petition was dismissed.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7548-94

AGENCY DKT. NO. 277-7/94

NICHOLAS A. CIUFI,

Petitioner,

v.

BOARD OF EDUCATION OF

THE TOWNSHIP OF IRVINGTON,

Respondent.

Wayne J. Oppito, Esq., (New Jersey Principals & Supervisors Association) and **Edward M. Teitelbaum**, Esq. (Teitelbaum & Caccavale, attorneys), co-counsel for petitioner

Joseph R. Morano, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: August 15, 1997 Decided: March 30, 1998

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal by a school administrator who seeks indemnification of criminal defense costs under *N.J.S.A.* 18A:16-6.1. On or about December 4, 1992, a

sixteen-year-old student at the school where petitioner worked brought a criminal complaint against him charging unlawful sexual contact. Two years later, in or about the week of January 13, 1994, the Essex County Grand Jury entered a "no bill," thereby declining to return an indictment.

Basically, the case raises two issues: (1) whether the criminal proceeding was "dismissed" or resolved in petitioner's favor; and (2) whether the charge involved an act or omission "arising out of and in the course of the performance" of petitioner's duties. Recently, in *Bower v. East Orange Board of Educ.*, 149 *N.J.* 416 (1997), the New Jersey Supreme Court had occasion to clarify the scope and meaning of the school-employee indemnification statute. The outcome here turns mainly on how the Court's analysis in *Bower* applies to the specific facts of this case. For the reasons that follow, Ciufi is collaterally estopped from denying that his misconduct occurred outside the scope of his regular duties.

Procedural History

On July 7, 1994, petitioner Nicholas A. Ciufi ("Ciufi") filed a verified petition with the Commissioner of Education ("Commissioner"). Respondent Board of Education of the Township of Irvington ("Board") filed its answer on July 25, 1994. Subsequently, on August 5, 1994, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for determination as a contested case.

At the request of both parties, the OAL placed the case on inactive status pending disposition of a related tenure charge alleging essentially the same conduct on which the criminal complaint had been based. On September 3, 1996, the Commissioner sustained the tenure charge and ordered that Ciufi be removed from employment. Shortly thereafter, on or about December 13, 1996, the parties filed cross-motions for summary decision, supported by various exhibits, certifications and legal briefs. The OAL held oral argument on January 22, 1997. After the New Jersey Supreme Court rendered its opinion in *Bower*, the parties filed supplemental briefs on

August 15, 1997. Both sides agree that the facts are undisputed and that the legal issues may be decided on the papers.

Findings of Fact

From the pleadings, contents of the moving papers and stipulations of counsel, **I FIND** the following facts:

Nicholas Ciufi was formerly an assistant vice principal at Irvington High School. One of the female students at the high school, a sixteen-year old identified by her initials "N.M.," accused him of making improper sexual advances toward her. She claimed that the incident occurred on December 2, 1992 on school property and during regular school hours. Specifically, the criminal complaint filed on her behalf alleges that Ciufi "took her hand and placed it on his penis." and characterizes him as having "supervisory power over the victim." State child-welfare authorities, known as the Division of Youth and Family Services ("DYFS"), conducted an investigation and, on or about June 2, 1993, "administratively substantiated the allegation of sexual abuse."[1] As previously noted, the Essex County Prosecutor's Office presented the case to a grand jury, which in January 1994 returned a "no bill." A notice from the Essex County Clerk recites that the complaint against Ciufi "was *dismissed* by the Grand Jury." (Emphasis added).

Criminal defense attorney Sanford Amdur represented Ciufi in connection with a defense to the criminal charge as well as the DYFS investigation. In his certification of counsel fees, he seeks payment of a bill totaling $18,906 for services rendered and costs incurred prior to dismissal of the criminal complaint. Answers to interrogatories given by Mr. Amdur show a breakdown of $9,420 related to the Grand Jury proceeding and $8,970 related to the DYFS investigation. Mr. Amdur maintains that the two

[1]While the details of the DYFS investigation were not made part of the record, petitioner's counsel acknowledges that allegations of sexual abuse had been substantiated and became "part of Ciufi's permanent record."

matters are inextricably linked because any evidence gathered by DYFS could be used against his client in the criminal proceeding. But the Board contends that, even if Ciufi is entitled to indemnification for a successful criminal defense, he should not recover for legal services pertaining to a DYFS investigation resulting in an adverse determination.

Meanwhile, the Board filed tenure charges against Ciufi and the matter was referred to the OAL for a tenure hearing. Administrative Law Judge Marylouise Lucchi-McCloud ("ALJ") presided over five days of hearings commencing on October 10, 1995. At the tenure hearing, N.M. testified that on December 2, 1992 she had gone to Ciufi's office to obtain a hall pass. According to her sworn testimony, Ciufi told her how pretty she was and that "he gets jealous when he sees me with other guys[.]" Then, her testimony continued, he started "rubbing my hand" and blocked her exit when she tried to open the door. Next, he "moved his body up toward me," "started kissing me" and "put his tongue in [my] mouth." He also took her hand and put it on his penis, "forcing my hand to feel it." *Transcript* (Oct. 10, 1995), pp. 62-66.

The ALJ accepted N.M.'s version of what had occurred. Her factual findings, which were adopted by the Commissioner, expressly determined that Ciufi and N.M. were "alone" together in Ciufi's office, that Ciufi closed the door "when N.M. attempted to leave the room," that he "took N.M.'s hand and kissed N.M. placing his tongue in her mouth," and that he "took N.M.'s hand and forced her to feel his penis." *In re Tenure Hearing of Nicholas Ciufi*, 96 *N.J.A.R.* 2d (EDU) 980, 988 (Comm'r Sept. 3, 1996), *appeal docketed*, No. 69-96 (State Bd. Sept. 19, 1996). Having had the opportunity to observe the demeanor of the witnesses, the ALJ commented negatively on Ciufi's credibility:

> Ciufi fidgeted, perspired and was evasive in his answers and the totality of the circumstances regarding his demeanor as well as contradictory answers given by him led the undersigned to determine that he did not make a credible witness. *Tenure Hearing*, at 989

As a result of this administrative record, the Commissioner sustained the charge of unbecoming conduct and ordered that Ciufi be dismissed from his tenured position. *Tenure Hearing*, at 990.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the tenure findings preclude indemnification of Ciufi's criminal defense costs.

N.J.S.A. 18A:16-6.1 obligates a school board to reimburse its employees for the cost, including reasonable counsel fees and expenses, of defending against certain criminal actions. If the statutory standard is met, indemnification is "mandatory." *Bower*, 149 *N.J.* at 419. Read in conjunction with the immediately preceding statutory section, *N.J.S.A.* 18A:16-6.1 prescribes a two-part test for determining whether board of education employees are entitled to indemnification of counsel fees and expenses incurred in the defense of criminal charges: (1) the charges must either be dismissed or result in a final disposition favorable to the employee; and (2). any act or omission on which the criminal charges are based must arise "out of and in the course of performance of the duties" of the position held by the employee. *Bower*, 149 *N.J.* at 423.

Like the present case, *Bower* also involved a school employee charged with sexual abuse of students. However, *Bower* followed a more convoluted procedural path.[2] Bower, a kindergarten teacher, had been previously indicted on four counts of aggravated sexual assault and three counts of endangering the welfare of children. When the administrative matter was first decided, the criminal court had dismissed the original indictment against Bower because the State was unprepared to proceed to trial. Nevertheless, a grand jury had already returned a second indictment against Bower on the same charges. Therefore, relief was denied on the basis that, among

[2]A thorough summary of the procedural history is recounted in the Supreme Court's opinion. *Bower*, 149 *N.J.* at 421-422.

other reasons, dismissal of the first indictment without prejudice was not a "final disposition" in his favor. While the case was pending on appeal before the State Board of Education, the trial judge dismissed the second indictment "with prejudice." Consequently, the State Board remanded the matter for reconsideration of whether the criminal disposition was now final. On remand, the Commissioner concluded that the second dismissal constituted a final favorable disposition, but still denied relief due to Bower's failure to establish affirmatively that the criminal charges arose out of the performance of his teaching duties. By the time that *Bower* reached the higher courts, all parties agreed that dismissal of the second indictment satisfied the finality requirement, so that the only remaining issue was whether the criminal charges arose within the legitimate scope of Bower's teaching duties. Although the Supreme Court split four to three on that question, the entire Court, including the dissent, recognized that "dismissal of Mr. Bower's second indictment with prejudice satisfies the first prong of the test, because it constitutes a final disposition in his favor." 194 *N.J.* at 435

Comparing a grand jury finding of "no bill" to a dismissal "without prejudice," the Board contends that Ciufi has not demonstrated an actual dismissal or final disposition of the criminal charge in his favor. Since a second grand jury is free to return a new indictment, the Board argues that Ciufi has not been "determined innocent, or exonerated" of the criminal charge made against him. It is undoubtedly true that:

> . . . t]he return of a grand jury of a "no bill" is determinative of nothing more than the fact that that particular grand jury, at that particular time, found that the proof presented was insufficient to establish either that a crime had been committed or, if the crime had been committed, that the accused should be charged with its commission. Indeed, the same grand jury, or its successor, might properly, within the period of the statute of limitations, review and reconsider the charges and return an indictment against an accused. *Rosetty v. Hamilton Twp. Comm.*, 82 *N.J. Super.* 340, 349 (Law Div. 1964), *aff'd per curiam*, 96 *N.J. Super.* 66 (App. Div. 1967).

Ciufi's situation, however, is distinguishable from *Bower*. While in *Bower* a second indictment had already been brought at the time of the administrative hearing,

currently there are no criminal charges pending against Ciufi. During oral argument, board counsel conceded that he is unaware of any immediate plans to indict Ciufi for alleged criminal wrongdoing. Often the failure to obtain an indictment is a reflection of the weakness of the State's case. In a somewhat different context, the Appellate Division held that an administrative dismissal of a criminal complaint constitutes "a favorable termination of a criminal proceeding for purposes of a malicious prosecution action." *Rubin v. Nowak*, 248 *N.J. Super.* 80, 84 (App. Div. 1991). Speaking in terms of "a presumption of favorable termination," the Court found nothing in the record to suggest that the prosecutor acted "for any reason other than a careful determination of plaintiff's innocence." 248 *N.J. Super.* at 84. In language which seems equally appropriate here, the Appellate Division commented "the irony . . . is that it is precisely in those cases where the proof of probable cause is most wanting that the prosecutor will probably be inclined to invoke an administrative dismissal, thus denying the accused a remedy when it is most deserved." (at 85).

Moreover, the unworkability of the Board's approach is shown by its suggestion that indemnification must be delayed until the applicable criminal statute of limitations has run. By the Board's calculations, the five-year statute of limitations in Ciufi's case would not commence until the victim attained eighteen years of age, so that "the State may initiate criminal proceedings against Mr. Ciufi any time prior to February 13, 1999." *N.J.S.A.* 2C:1-6. Certainly there is no indication that the Legislature intended a genuinely innocent teaching staff member to wait so long before receiving reimbursement of the costs of a successful defense. If a complainant were only five years old at the time of the alleged occurrence, a teacher would have to wait eighteen years before becoming eligible for compensation. Presumably a teacher falsely accused of criminal homicide would never receive payment, since there is no statute of limitations applicable to the crime of murder.

With respect to the second prong of the test, the majority in *Bower* held that dismissal of the indictment alone "requires the assumption that Bower committed no acts other than to perform his duties as a kindergarten teacher." 149 *N.J.* at 431. Rejecting the minority view that the Bower had failed to show that he was acting within

the scope of his teaching duties, the majority presumed that, "the indictment and its dismissal - unrebutted by any other evidence - clearly satisfy Bower's burden of proof under the statute." (at 434). Even the majority, however, went out of its way to explain:

> No proceedings were instituted to dismiss Bower, a tenured teacher, on the basis of his alleged misconduct. See *N.J.S.A.* 18A:6-10. Had the local board seen fit to institute such dismissal proceedings, we assume that *any evidence adduced at the hearing addressing those charges would have been material to the proceeding instituted by Bower for indemnification of his legal expenses. Id.* at 433. (Emphasis added).

Our own case presents the precise situation that the Supreme Court had envisioned. Here the Board did file tenure charges and, after a trial-type hearing, including full opportunity for discovery, cross-examination and subpoena of witnesses, the Commissioner made findings that Ciufi committed a sexual assault against a student. In order to sustain the tenure charge, the Commissioner must necessarily have determined that Ciufi's improper conduct occurred outside the regular course of his teaching duties.

Collateral estoppel applies to bar relitigation of any issue which was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action. *State v. Hanemann*, 180 *N.J. Super.* 544, 522 (App. Div. 1981), *certif. den.* 88 *N.J.* 506 (1981). None of the exceptions to the general rule of preclusion are present here.[3] *See Ensslin v. Twp. of North Bergen*, 275 *N.J. Super.* 352, 370 (App. Div. 1994), *certif. den.* 142 *N.J.* 446 (1995). Utilization of court-made procedural tools, such as collateral estoppel, depends upon the nature of the agency's regulatory responsibility toward the subject matter of the controversy as well as toward

[3] Ciufi has an opportunity to obtain appellate review of the Commissioner's tenure decision. The issue is not simply one of law. Both the tenure proceeding and the indemnification proceeding are administrative hearings governed by same evidential standard. Since the Board bears the burden of persuasion in the tenure proceeding, Ciufi had a lighter burden than he would in an indemnification proceeding. There is no clear and convincing need for a new determination of the issue which has been fully litigated between the same parties.

the particular parties. *City of Hackensack v. Winner*, 82 *N.J.* 1, 30 (1980). It would clearly be incongruous for the Commissioner to uphold the Board's dismissal of Ciufi for unbecoming conduct, while ordering the Board to pay his counsel fees for defense of criminal charges arising out of the same transaction. Rather, as the Supreme Court anticipated, the evidence adduced at the tenure hearing must be regarded as "material" to the indemnification proceeding. *Bower*, at 433 Accordingly, the Commissioner's prior determination that Ciufi committed a sexual assault against his student is binding on the parties and dispositive of Ciufi's claim for indemnification of counsel fees.

Order

It is **ORDERED** that the Board's motion for summary decision is granted.

And further **ORDERED** that the relief requested by petitioner is denied.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 30, 1998
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

April 1, 1998
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 2 1998
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 7548-94
AGENCY DKT. NO. 277-7/94

NICHOLAS A. CIUFI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

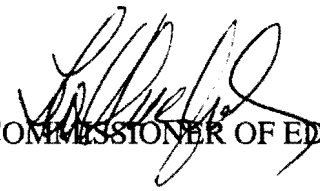
The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.

Upon careful and independent review of the record in this matter, and noting that petitioner's exception arguments reiterate those advanced at the OAL, the Commissioner concurs with the findings and conclusions of law rendered by the Administrative Law Judge. Unlike the situation in *Bower, supra*, there *is* evidence on the record of *the specific conduct which formed the basis of the criminal charge* brought against petitioner, see *Bower, supra,* at 433, as such evidence was adduced at the prior tenure proceeding involving petitioner, see *In the Matter of the Tenure Hearing of Nicholas Ciufi*, 96 *N.J.A.R.* 2d (EDU) 980. Further, in view of the Supreme Court's admonition that such evidence, were it available in *Bower*, "***would have been

material to the proceeding instituted by Bower for indemnification of his legal expenses" *Bower, supra,* at 434, the Commissioner concurs that petitioner is now precluded, by specific findings to the contrary in an administrative forum, from asserting that the criminal charge brought against him involved an act or omission arising out of and in the course of the performance of his duties as an assistant principal. Petitioner does not, therefore, meet the legal standard for indemnification of his counsel fees under *N.J.S.A.* 18A:16-6.1.

Accordingly, the initial decision of the OAL is adopted for the reasons expressed therein, and the within Petition of Appeal is hereby dismissed.*

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MAY 15, 1998
DATE OF MAILING M AY 15, 1998

211-98

211-98

P.S., on behalf of her minor son, B.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning parent sought to have her son admitted to the County Alternative School.

ALJ determined that under the present ~~circum~~stances, petitioner could not claim entitlement which would compel the Board to place B.G. at the Alternative High School and that the Board's refusal to do so was not arbitrary, capricious or unreasonable. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

MAY 15, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 08241-97S
AGENCY DKT. NO. 343-9/97

P.S., ON BEHALF OF HER MINOR SON, B.G.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,
Respondent.

P.S., petitioner, *pro se*

Joan Kane Josephson, Esq., for respondent (Carroll, Weiss and Josephson, attorneys)

Record Closed: March 24, 1998 Decided: April 1, 1998

BEFORE **JEFF S. MASIN**, ALJ:

P.S., acting on behalf of her minor son, B.G., seeks an order from the Commissioner of Education ordering the respondent Board of Education to place her son in the Mercer County Alternative School. The Board has refused her request for this placement. He was schooled at home beginning in January 1997 and now attends Mercer County Vocational-Technical School in the morning and adult school classes in the evenings at the Nottingham High School. B.G. turned 17 on March 19, 1998. Although it is reported that he has some residual effects of Attention Deficit Disorder (ADD), and at one time he was classified, he is nevertheless not now a classified student, and a Child Study Team evaluation performed in January 1998 confirmed he now is not

classifiable. Thus this case proceeds as a regular education proceeding under the Commissioner's jurisdiction, rather than a special education proceeding.

According to Ms. S.'s testimony, she relocated to New Jersey from New Mexico in June of 1996. Her son was then 15 years old, and he was not classified. Before coming to New Jersey, B. had been enrolled in the Hope Connection Alternative School, a private school in Albuquerque, New Mexico. He started in Hope Connection on December 4, 1995, after having begun the 1995-96 school year at Eldorado High School, also located in Albuquerque. Apparently he performed well in Hope Connection, after academic and social difficulties in the public school. Ms. S. discussed the possibility of an alternative school placement with Michael Gilbert, a vice principal at Hamilton West High School prior to B.'s enrollment in that school for the 1996-97 school year, but according to her, Gilbert said that he did not know of any alternative school in the area and B. therefore began as a student at Hamilton West. However, during the first two quarters of the academic year, B. experienced low grades and even failed some courses for the marking period. He was disciplined once for leaving the school grounds to have a cigarette, and was threatened physically by some students. His mother described B. as a thin, non-violent individual. He worked in the school office, and made some friends, three of whom he still sees even after having left the High School. In January 1997, B. refused to return to school and Ms. S. began to school him at home, obtaining a curriculum from the Hamilton Board of Education and hiring teachers for writing and study skills. Somewhere around April 1, 1997, she learned of the existence of the Mercer County Alternative High School. When she inquired about having her son placed in that school prior to the 1997-98 school year, the Board refused her request and she was then offered alternatives by the Superintendent. B. could attend Steinert High School, but he did not want to attend day classes. Instead, he opted for the combination of vocational-technical and adult evening school. After a rough start, he is doing better this semester in the vo-tech classes.

Michael Gilbert, vice principal of Hamilton West, testified that he handled the enrollment of B.G. at the school on August 5, 1996. At the time Mrs. S. advised that B. had at one time been classified. The protocol in such a case was to have a Child Study Team ("CST") evaluation to determine whether the child was classifiable, but Ms. S. advised him that she did not agree to an evaluation. The child was enrolled in the school without an evaluation. Contact was made

with the school district in New Mexico, and it was determined that it was neither a special education program nor was it congruent with the local alternative school. According to the information which he received during this contact, B. was not a disciplinary problem at Hope, although he did have an attendance problem. Gilbert deemed B. to not be a candidate for the alternative school.

The district places two students a year from each of its three high schools in the Mercer County Alternative High School. The Board of Education provides funds only for this number of students. Hamilton West has 1,140 students. Selection of the students to fill the two slots allocated to Hamilton West is made by the administrative staff, counselors and teachers. The type of student generally selected demonstrates aggressive behavior, wanders the building, engages in fights and has been the subject of at least a year of attempts to work with the student and his or her family regarding the student's academic, truancy, control and discipline problems. Several approaches to resolve these issues are tried, before the "last resort" of alternative schooling, which is only used when all other alternatives have been unsuccessful. Mr. Gilbert estimated that there are probably 50-100 students currently attending Hamilton West who were candidates for placement in the alternative school and B.G. simply does not "fit the mold." He saw B.G. almost daily while the student attended Hamilton West, and found him to be pleasant and personable toward everyone. During the second quarter the boy missed nine days of school, while in the first quarter he missed none. The number of absences in the second quarter resulted in the placement of a "X" warning on his grades.

Michael Vincent Luciano, Assistant Superintendent of the Hamilton District, testified that the participation of local boards of education in the alternative school program is voluntary and during the last budget year the Hamilton Board eliminated the funding for the attendance of any of its students. It then changed its mind and reauthorized six slots, allocated two to each of the three district high schools. In addition to the students at Hamilton West, Steinert High has 1,400 students and Nottingham has 1,200.

M.S., the mother of B.G., testified that she visited the Mercer County Alternative School and believed that many of the students in attendance there had been able to improve their academic performance. She acknowledged that B. is not a behavior problem.

DISCUSSION

In this matter the petitioner understandably seeks what she believes to be the best setting for her son to achieve academically. His history prior to enrollment at Hamilton West shows that he has done better in academic settings other than the traditional environment. However, he is not a classified special education student, and at the time that he was first enrolled at Hamilton West his mother resisted an evaluation by the child study team. The district did not see fit to force that issue, but recently an evaluation has confirmed that he is not classifiable. This being the case, he is a regular education student, and as such, the several mandated policies regarding the educational opportunity which must be provided to special education students do not pertain to this child. The parent's understandable desire to place her son in a school that she thinks will enhance his chances at academic success notwithstanding, the Board of Education is under no legal compulsion to create additional funded slots for its students in the Alternative High School. Additionally, and of some importance, no evidence has been produced to support the appropriateness of placing this particular student in that school even if the Board could be made to fund such added slots. The credible testimony of Mr. Gilbert as to the type of student who the Board does place in that school strongly supports the view that B.G., whatever his academic needs, is not a proper candidate for a position in the Alternative High School, where the Board places a very limited number of students who have serious behavior problems in addition to academic problems and who have exhausted any efforts to deal with these difficulties in more conventional settings.

There is no basis for any relief in this matter. The petition is therefore **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is

otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 1, 1998
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

April 2, 1998
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 3 1998
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EVIDENCE LIST

FOR THE PETITIONER:

P-1 VHS Videocassette marked "August 27, 1997 - Regular Board Meeting, Discussion on Alternative School

P-2 Letter from Hope T. Lucero, Director, Hope Connection Alternative School, to the New Jersey Department of Education, dated 9/22/97

P-3 Psychiatric Evaluation of B G. by Carl J. Chiappetta, M.D., dated 1/8/98

FOR THE RESPONDENT:

None

OAL DKT. NO. EDU 8241-97s
AGENCY DKT. NO. 343-9/97

P.S., on behalf of her minor son, B.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon his careful and independent review, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that, under the circumstances existing in this matter, petitioner can claim no entitlement which might compel the Board to place her minor child, B.G., in a special placement at the Alternative High School and, therefore, its refusal to do so is not arbitrary, capricious or unreasonable.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons articulated therein and the within Petition of Appeal is hereby dismissed.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MAY 15, 1998
DATE OF MAILING MAY 14, 1998

214-98

214-98

ETORIA SNEAD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MAY 15, 1998

AGENCY DKT. NO. 478-12/97

ETORIA SNEAD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

For Petitioner, Arnold M. Mellk, Esq. (Wills, O'Neill & Mellk)

This matter having been opened before the Commissioner of Education by way of Petition of Appeal filed on December 11, 1997, seeking compensation for petitioner in accordance with *N.J.S.A.* 18A:30-2.1, which requires a local board of education to pay the full salary, for up to one calendar year, for an absent employee who sustains an injury in the course of employment, without having such absence charged to petitioner's annual sick leave or accumulated sick leave, which salary shall be reduced by the amount of any workers' compensation award made to the employee for temporary disability; and

The Commissioner having directed respondent by notices dated December 15, 1997, January 8, 1998 and January 27, 1998, a letter sent by certified mail,[1] to file an Answer to the charges against it; and

[1] Return card number Z451849080 evidences receipt on January 29, 1998.

As of this date, neither respondent, nor any attorney on its behalf, having filed an Answer to the charges against it, and each count of the charges against the respondent having been deemed to be admitted;

The respondent Board is accordingly deemed to have violated the mandates of *N.J.S.A.* 18A:30-2.1; now therefore

IT IS ORDERED on this 15 day of May 1998 that summary judgment shall be granted to petitioner and that the respondent Board shall compensate petitioner, pursuant to *N.J.S.A.* 18A:30-2.1.[2]

COMMISSIONER OF EDUCATION

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MAY 15, 1998
DATE OF MAILING MAY 15, 1998

215-98

MURPHY BUS SERVICES, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MAY 15, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENCY RELIEF
OAL DKT. NO. EDU 4264-98
AGENCY DKT. NO. 131-5/98

MURPHY BUS SERVICES, INC.,

Petitioner,

v.

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

Respondent.

Daniel J. Himelman, Esq., for petitioner (Himelman & Himelman, attorneys)

Richard K. Sacks, Esq., for respondent

Record Closed: May 11, 1998 Decided: May 11, 1998

BEFORE **STEVEN C. REBACK**, ALJ:

This ruling embodies an order, denying the request by the petitioner (Murphy) seeking emergent relief, which would preclude respondent (Lakewood) from awarding a contract at its meeting to be conducted this evening, May 11, 1998. More specifically, Murphy seeks to order Lakewood to reject all bids opened on May 5, 1998, in respect to bus transportation for students within the district for the school years 1998 through 2002 inclusive. Murphy seeks to restrain

Lakewood from awarding the contract to the lowest bidder for this period of time; to reject all bids that had been opened on May 5, 1998; to order that bid specifications be modified and amended; and to direct Lakewood to place the transportation contract at issue for the time period 1998-2002 for rebid after the bid specifications had been modified. For the reasons that follow the motion seeking this emergent relief is **DENIED**. The brevity of this ruling is due exclusively to the fact that oral argument on the issues was held from late morning through the early afternoon of May 11th and the decision was required to be completed and sent to the Commissioner of Education by 4 p.m. of the same date in order, had the moving party prevailed, to have granted the relief at issue.

Murphy has failed to demonstrate the standards of proof necessary to obtain emergency relief as found in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). It failed to demonstrate the reasonable likelihood that it will prevail on the merits at the full plenary disposition of these proceedings; that an immediate and irreperable harm will result to Murphy should the motion be denied; or that the issues are well settled and the remedy requested is limited in scope.

Lakewood published specifications for the school bus contract for the period at issue on April 23, 1998. On April 28, 1998, a prebid meeting was held at which Murphy raised some issues concerning the specifications. Apparently as a result a relatively insignificant number of school routes were changed. Bids were opened on May 5, 1998. Counsel for the Lakewood has represented that at the school board meeting this evening it will award fifty-one "packages" of various routes to a company, Student Transportation of America, Inc." Twelve packages will be awarded to Murphy and five packages will be rejected and be the subject of rebidding.

Murphy filed its petition seeking emergent relief on May 8, 1998. Objection to the specifications was based upon Murphy's assertion that they were impracticable and the routes as set forth could not be reasonably accomplished. The successful bidder did not in any fashion object to the specifications and presumably has agreed to complete the contract as specified.

Initially it must be noted that, in my view, and based upon the evidence offered, Murphy lacks standing to challenge the specification at this time. It is essentially well settled and

established that an unsuccessful bidder cannot challenge specifications after the opening of bids. See *Waszen v. Atlantic City* 1 *N.J.* 272, 276 (1949). As was noted bids were opened on May 5, 1998 and Murphy challenged the specifications on May 8, 1998 after it had learned that it was going to lose substantial portions of the contract. The inference may be drawn that Murphy seeks the relief at issue because it was not the winning bidder. If Murphy felt that the specifications were impracticable or unreasonable it should not have submitted a bid but should have attacked the specifications as improper and/or unlawful as soon after they were published.

The certifications submitted by Lakewood include one from Mr. Ross Haber, of a consulting firm specializing in demographics and transportation, particularly for school districts, which clearly indicates that, contrary to the movant's assertion, the routes that have been granted in the packages will meet Lakewood's needs and will not create problems as predicted by Murphy. Consequently, there has been no demonstration that Murphy will in no likelihood prevail on the merits of this matter.

Murphy has not established that harm will be irreparable and immediate. Counsel for Murphy acknowledged that even if the Board were allowed to vote and award the contracts as noted, Murphy would still be in a position to challenge the results in an appropriate forum In addition, the arguments offered by counsel in respect to monetary loss based upon the specifications were, in my opinion, too speculative on which to base a finding that Murphy will suffer irreperable harm merely because the Board will vote as it is anticipated.

Finally, the ostensible winning bidder, Student Associates, has never been placed on notice in this matter nor was it made a party. Clearly it has a vested interest in this case particularly since it did not question the validity of the specifications and in all likelihood it will be awarded a substantial portion of the contract. In my judgment the absence of the winning bidder results in the failure to include a necessary party in these emergency relief proceedings. For all of the foregoing reasons Murphy's request for emergency relief is **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

5/11/98
DATE

STEVEN C. REBACK, ALJ

OAL DKT. NO. EDU 4264-98
AGENCY DKT. NO. 131-5/98

MURPHY BUS SERVICES, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this emergent matter and the order of the Office of Administrative Law (OAL) have been reviewed.

Upon such review, the Commissioner adopts the Administrative Law Judge's (ALJ) order denying emergent relief in this matter, as he concurs that petitioner has not satisfied the requisite standard necessary for the granting of such relief pursuant to *Crowe, supra.* The Commissioner further notes that petitioner's pleadings in this matter were not clear with respect to whether it had bid on the contracts at issue herein. In that the ALJ's recitation of facts adduced at the hearing below reveals that Murphy Bus was, indeed, an unsuccessful bidder, as was correctly noted by the ALJ in his order, it lacks standing to challenge the bid specifications at this time. As such, the Commissioner finds there is no need for a plenary hearing on the merits of this matter, and the OAL is hereby requested to return the file in this matter to the Agency.

Accordingly, the order of the OAL denying emergent relief in this matter is adopted as the final decision in this matter and the within Petition of Appeal is hereby dismissed.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MAY 15, 1998
DATE OF MAILING MAY 15, 1998

216-98

EILEEN WENDE AND THE NORTH BERGEN FEDERATION OF TEACHERS, LOCAL 1060, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, an unincorporated labor organization,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

MAY 19, 1998

OAL DKT. NO. EDU 11880-95
AGENCY DKT. NO. 350-8/95

EILEEN WENDE AND THE NORTH BERGEN FEDERATION OF TEACHERS, LOCAL 1060, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, an unincorporated labor organization,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on March 31, 1998, providing them ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the parties, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.*

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MAY 19, 1998
DATE OF MAILING MAY 19, 1998

217-98

217-98

BOARD OF EDUCATION OF THE BOROUGH OF RINGWOOD, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,	:	DECISION
RESPONDENT.	:	
	:	

MAY 19, 1998

OAL DKT. NO. EDU 9949-96
AGENCY DKT NO. 381-9/96

BOARD OF EDUCATION OF THE BOROUGH OF RINGWOOD, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and joint stipulation of settlement, returned by the Office of Administrative Law, have been reviewed. This agency being a party to the present matter, the appended stipulation of settlement is deemed the final decision, pursuant to *N.J.A.C.* 1:1-19.2(b) and (c), and the within matter is accordingly dismissed.*

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MAY 19, 1998
DATE OF MAILING MAY 19, 1998

PETER VERNIERO
Attorney General of New Jersey
Attorney for Respondent,
N.J. Department of Education, Office of Compliance
Richard J. Hughes Justice Complex
P.O. Box 112
Trenton, New Jersey 08625

By: Michelle L. Miller
Deputy Attorney General
(609) 984-8464

FEB 13 11 28 AM '97

OFFICE OF ADMINISTRATIVE LAW
OAL Dkt. No. EDU 9949-96

RINGWOOD BOARD OF EDUCATION, Petitioner,	)	Civil Action
v.	)	STIPULATION OF SETTLEMENT
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE, Respondent.	)	

Petitioner, Ringwood Board of Education, and Respondent, New Jersey Department of Education, Office of Compliance, have mutually agreed to settle the above-captioned matter, with Peter Verniero, Attorney General of New Jersey, by Michelle L. Miller, Deputy Attorney General, appearing on behalf of Respondent Office of Compliance, and Vito Gagliardi, Jr., Esq., appearing on behalf of Petitioner Ringwood Board of Education, which arose from an audit conducted by the Office of Compliance of the transportation contract between Ringwood Board of Education, Lakeland Regional Board of Education, and Wanaque Board of Education, upon the following terms:

1. The Ringwood Board of Education will refund to the Lakeland Regional Board of Education $8,218.98.

2. The Ringwood Board of Education will refund to the Wanaque Board of Education $8,518.40.

3. Petitioner Ringwood Board of Education does not concede that the allegations in the petition in this matter were not justified, nor does Respondent Office of Compliance admit or concede the truth of the allegations in the petition filed in this matter and both parties have entered into this agreement for the purposes of settlement only.

4. Upon the execution of this Stipulation of Settlement, Ringwood Board of Education will withdraw its appeal currently before the Office of Administrative Law.

5. The parties agree that this Stipulation of Settlement fully resolves all issues between them arising from the audit conducted by the Department of Education, Office of Compliance, that is the subject of this appeal.

Vito Gagliardi, Jr., Esq.
Attorney for Petitioner,
Ringwood Board of Education Date: 2-10-98

Michelle L. Miller
Deputy Attorney General
Attorney for Respondent,
Department of Education,
Office of Compliance Date: 2/9/98

219-98

219-98 DHP

IN THE MATTER OF THE DISQUALIFICATION	:	COMMISSIONER OF EDUCATION
FROM SCHOOL EMPLOYMENT OF L.C.J.	:	DECISION
	:	

MAY 19, 1998

OAL DKT. NO. EDU 1189-97
AGENCY DKT. NO. DHP 83-96

IN THE MATTER OF THE DISQUALIFICATION	:	COMMISSIONER OF EDUCATION
FROM SCHOOL EMPLOYMENT OF L.C.J.	:	DECISION
	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the appellant by OAL on March 25, 1998, providing him ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the appellant, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.*

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MAY 19, 1998
DATE OF MAILING MAY 19, 1998

223-98

223-98

LYNNETTE JOY GOODMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NEW MILFORD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MAY 22, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9486-96
Agency Dkt. No. 277-7/96

LYNNETTE JOY GOODMAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF NEW MILFORD, BERGEN COUNTY
Respondent.

Alfred F. Maurice, Esq., for petitioner
(Springstead & Maurice, attorneys)

Gerald L. Dorf, Esq., for respondent
(Dorf & Dorf, attorneys)

Record Closed: March 27, 1998 Decided: April 1, 1998

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

STATEMENT OF CASE

This case was transmitted to the Office of Administrative Law (OAL) on September 17, 1996, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

The parties entered into an agreement and have prepared a stipulation of settlement which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to a settlement of this matter.

2. The agreement fully disposes of all issues in controversy and is consistent with the law.

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 1, 1998
DATE

Mumtaz Bari Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

April 8, 1998
DATE

D'Antanasio/fe
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR - 9 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release is entered into by and between Lynnette Joy Goodman ("Goodman"), the New Milford Education Association (the "Union") and the New Milford Board of Education (the "Board"), all of which are collectively referred to hereinafter as the "Parties."

WHEREAS, Goodman has filed a Verified Petition of Appeal before the New Jersey Department of Education entitled Lynnette Joy Goodman v. New Milford Board of Education, Agency Docket No. 277-7/96, OAL Docket No. EDUOA-09486-96N (the "Verified Petition");

WHEREAS, Goodman has filed a Charge of Discrimination before the New Jersey Division on Civil Rights (FEPA Docket No. EB38WE40847) and the Equal Employment Opportunity Commission (EEOC Docket No. 17E960736)(collectively, the "Charge of Discrimination");

WHEREAS, Goodman has filed grievances with the Board;

WHEREAS, Goodman has been employed by the Board as a Social Worker on a half-time basis from September 1, 1996 through June 30, 1997;

WHEREAS, the Board is offering to take the actions set forth in paragraphs 2 through 7 of this Settlement Agreement and General Release and to which Goodman would not otherwise be entitled;

NOW, THEREFORE, in consideration of the mutual promises, covenants and representations contained herein, Goodman, the

Union and the Board covenant and agree as follows:

1. Goodman hereby knowingly, voluntarily, permanently and irrevocably resigns from employment with the Board effective November 30, 1997. The Parties acknowledge and agree that this resignation includes, but is not limited to, Goodman's knowing, voluntary, permanent and irrevocable waiver, abandonment and relinquishment of all seniority, tenure and employment rights that she has and/or may have. The Parties further acknowledge and agree that:

a. Effective November 30, 1997, Goodman's employment relationship with the Board is permanently and irrevocably severed;

b. Goodman shall not apply for or otherwise seek any job, reinstatement, employment or reemployment with the Board; and

c. The Board has no obligation, contractual or otherwise, to rehire, reemploy, recall or hire Goodman now or in the future.

2. The Board shall employ Goodman as a Social Worker on a half-time (0.5) basis from September 1, 1997 through September 30, 1997 and compensate Goodman at one-half of her then-effective full-time salary rate.

3. The Parties acknowledge and agree that if Goodman does not utilize any sick days or personal days prior to October 1,

1997, Goodman shall have a total of eighteen and one-half (18.5) accumulated unused sick days and two (2.0) accumulated unused personal days at the commencement of Goodman's leave of absence on October 1, 1997 as referenced in paragraph 4. In addition, Goodman shall earn one (1.0) sick day during the month of October 1997 and one (1.0) sick day during the month of November 1997.

4. Beginning October 1, 1997, Goodman shall commence a leave of absence from employment with the Board which leave shall end with the cessation of Goodman's employment with the Board on November 30, 1997. Goodman will be compensated during this leave at her then-effective full-time salary rate, subject to all appropriate deductions, through the utilization of her accumulated unused sick days and accumulated unused personal days. Goodman shall exhaust all of her accumulated unused sick days and accumulated unused personal days during this leave of absence. In accordance with its payroll periods and procedures, the Board shall pay Goodman for each accumulated sick day and accumulated personal day that she utilizes. Goodman's leave of absence shall be unpaid except for the payments that will be made through the utilization of Goodman's accumulated unused sick days and accumulated unused personal days as specified in paragraphs 3 and 4.

5. The Board shall submit to the Teachers' Pension and Annuity Fund ("TPAF") Goodman's portion of the TPAF contribution,

which shall be computed at Goodman's full-time salary, for the following time periods:

a. September 1, 1996 through June 30, 1997; and

b. September 1, 1997 through November 30, 1997.

6. The Board shall maintain Goodman's enrollment in its health insurance program through November 30, 1997.

7. The Board shall remove from Goodman's personnel file all documents pertaining to grievances filed by Goodman and discipline imposed against Goodman.

8. Goodman hereby knowingly and voluntarily releases and forever discharges the Board and all of its present and former officials, directors, officers, employees, superintendents, assistant superintendents, administrators, teachers, supervisors, psychologists, principals, chairmen, affirmative action officers, chairwomen, Board members, Child Study Team members, agents, representatives, attorneys, affiliated entities and all other related persons, entities and associations, whether referred to herein or not, their predecessors, successors and assigns and all persons acting by, through, under and/or in concert with any of them (all of which are collectively referred to herein as the "Releasees") of and from any and all actions, causes of action, suits, debts, charges, complaints, claims, grievances, liabilities, obligations, promises, agreements, controversies, damages and expenses (including, but not limited to, attorneys' fees and costs actually incurred) of any nature whatsoever from

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the beginning of time through the date of the execution of this Settlement Agreement and General Release, whether known or unknown, foreseen or unforeseen, in law or in equity, which Goodman ever had, now has and/or may have against any of the Releasees arising out of, based upon, by reason of and/or relating to any matter whatsoever including, but not limited to, all claims arising under the school laws of the State of New Jersey, N.J.S.A. 18A:1-1 et seq., N.J.A.C. 6:1-1.1 et seq., the Conscientious Employee Protection Act, the New Jersey Law Against Discrimination, the Americans with Disabilities Act, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §1983, the Age Discrimination in Employment Act, any contract(s) between Goodman and the Board, the collective bargaining agreement between the Board and the Union and all claims that were made or could have been made in the Verified Petition or the Charge of Discrimination.

9. Goodman covenants and agrees not to sue any of the Releasees and/or to commence any action in any forum against any of the Releasees arising out of, based upon, by reason of and/or relating to any of the matters released pursuant to this Settlement Agreement and General Release.

10. Goodman shall dismiss with prejudice and/or cause to be dismissed with prejudice the Verified Petition, the Charge of Discrimination and all other lawsuits, complaints, claims, charges, grievances and actions of any nature whatsoever which

have been and/or may have been commenced by Goodman in any federal, state and/or local court and/or agency and/or any other forum against any of the Releasees involving any matter whatsoever from the beginning of time through the date of the execution of this Settlement Agreement and General Release arising out of, based upon, by reason of and/or relating to any matter whatsoever including, but not limited to, all claims arising under the school laws of the State of New Jersey, N.J.S.A. 18A:1-1 et seq., N.J.A.C. 6:1-1.1 et seq., the Conscientious Employee Protection Act, the New Jersey Law Against Discrimination, the Americans with Disabilities Act, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §1983, the Age Discrimination in Employment Act, any contract(s) between Goodman and the Board, the collective bargaining agreement between the Board and the Union and all claims that were made or could have been made in the Verified Petition or the Charge of Discrimination.

11. This Settlement Agreement and General Release is not and shall not in any way be construed as an admission of liability by the Board of any liability, wrongdoing and/or culpability, or as an admission that the Board committed any act whatsoever which violated federal, state or local law. The Board expressly denies all liability, wrongdoing and culpability on its part.

12. The Union fully concurs in this Settlement Agreement and General Release and agrees not to initiate, commence and/or pursue any grievance or other action in any forum against any of the Releasees arising out of, based upon, by reason of and/or relating to any of the matters released pursuant to this Settlement Agreement and General Release.

13. Goodman is hereby advised to consult with an attorney prior to executing this Settlement Agreement and General Release. In addition, Goodman is hereby advised that she has a period of twenty-one (21) days in which to consider whether to execute this Settlement Agreement and General Release.

14. Goodman has seven (7) days following the execution of this Settlement Agreement and General Release in which to revoke this Settlement Agreement and General Release. The actions set forth in paragraphs 2 through 7 of this Settlement Agreement and General Release shall take place only after such revocation period has expired and provided that Goodman has not revoked this Settlement Agreement and General Release.

15. This Settlement Agreement and General Release sets forth the entire agreement between the Parties and fully supersedes any and all prior agreements and understandings between the Parties pertaining to the subject matter hereof.

16. This Settlement Agreement and General Release cannot be modified or amended except by written agreement signed by all of the Parties hereto.

17. Goodman, the Union and the Board represent and certify that they have carefully read and fully understand all of the provisions and effects of this Settlement Agreement and General Release and that they have had the opportunity to thoroughly discuss all aspects of this Settlement Agreement and General Release with their respective private attorneys and representatives and that they are voluntarily and knowingly entering into this Settlement Agreement and General Release.

IN WITNESS HEREOF and intending to be legally bound hereby, the Parties have executed the foregoing Settlement Agreement and General Release on this 17th day of September, 1997.

WITNESS:

Lori Novak

LYNNETTE JOY GOODMAN

Lynnette Joy Goodman

WITNESS:

NEW MILFORD
EDUCATION ASSOCIATION

By: Anthony J. Jakeck

WITNESS:

Edna Lalecki

NEW MILFORD BOARD OF
EDUCATION

By:

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OAL DKT. NO. EDU 9486-96
AGENCY DKT. NO. 277-7/96

LYNNETTE JOY GOODMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NEW MILFORD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter.[1] The matter is hereby dismissed, subject to compliance with the terms of the settlement.[2]

COMMISSIONER OF EDUCATION

[1] It appears that the terms of the agreement have already been effectuated and the parties are, therefore, admonished that settlement agreements of controverted matters are of no force and effect and may not be implemented absent the Commissioner's approval, pursuant to *N.J.A.C.* 1:1-19.1.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MAY 22, 1998
DATE OF MAILING MAY 22, 1998

224-98

DANIEL ANTONACCI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MAY 22, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10932-96
AGENCY DKT. NO. 487-11/96

DANIEL ANTONACCI,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,
Respondent.

Anthony P. Sciarrillo, Esq., for petitioner
(Lindabury, McCormick & Estabrook, attorneys)

Cherie Maxwell, Esq., for respondent,
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: April 8, 1998 Decided: April 8, 1998

BEFORE: **KEN R. SPRINGER**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on December 10, 1996, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

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

April 8, 1998
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

April 13, 1998
DATE

N. N. Castanuelas Jr.
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 14 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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MEMORANDUM OF AGREEMENT

This Agreement between DANIEL ANTONACCI, Petitioner, (hereafter referred to as "Petitioner') and the STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, Respondent, (hereafter referred to as "DISTRICT" and collectively referred to as the "Parties") in the matter before the State of New Jersey, Department of Education, Agency Reference No. 487-11/96, OAL Docket No. EDUOA 10932-96N, wherein the Parties desire to settle all items in dispute with respect to the above matter, hereby agree, as follows:

1. Effective July 1, 1997, and upon a satisfactory performance evaluation for the 1996-1997 school year, the DISTRICT agrees Petitioner's salary and placement on the appropriate salary guide shall be restored prospectively for the 1997-1998 school year. The increment shall not be restored in the event the Petitioner received an unsatisfactory performance evaluation for the 1996-1997 school year.

2. The effect of the restoration of Petitioner's salary increment is to place the Petitioner on the appropriate step of the salary guide as if the withholding of increment did not take place.

3. The Petitioner agrees to withdraw the Petition filed with the State of New Jersey, Department of Education, Agency Reference No. 487-11/96, OAL Docket No. EDUOA 10932-96N. This provision is applicable in the event of a satisfactory or unsatisfactory evaluation.

4. The DISTRICT agrees to withdraw its Answer to the Petition filed with the State of New Jersey, Department of Education, Agency Reference No. 487-11/96, OAL Docket No. EDUOA 10932-96N.

5. The Parties hereby release, waive, and forever discharge any and all past, present and future claims they may have against each other which arises out of this Petition.

6. This Agreement contains the entire agreement and understanding between the parties and constitutes full and final agreement on any and all issues relating to the Petition filed by Petitioner against the DISTRICT.

7. This Agreement shall be governed by the laws of the State of New Jersey.

8. If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

9. The Parties shall be bound by the terms and conditions of this Agreement, finding it to be fair and equitable under all circumstances surrounding this matter.

10. The terms and conditions of this Agreement are subject to the ratification and approval by the DISTRICT.

11. The parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement.

12. This Agreement may not be altered, amended or modified except by a writing, signed and duly authorized by all parties.

IN WITNESS WHEREOF, the parties hereunder set their hands and seals to this Agreement effective on the 1 day of April, 1997.

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK

By _____
BEVERLY HALL, Ed.D.
State District Superintendent

Witness

By _____
DANIEL ANTONACCI
Petitioner

Witness

OAL DKT. NO. EDU 10932-96
AGENCY DKT. NO. 487-11/96

DANIEL ANTONACCI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MAY 22, 1998
DATE OF MAILING MAY 22, 1998

225-98

225-98 SEC

IN THE MATTER OF RAYMOND	:	
BONKER, LENAPE VALLEY	:	COMMISSIONER OF EDUCATION
REGIONAL BOARD OF EDUCATION,	:	DECISION
SUSSEX COUNTY.	:	
	:	

SYNOPSIS

Board member violated the School Ethics Act, *N.J.S.A.* 18A:12-24(b), when he used his position as Board president and member to obtain the e-mail addresses of employees and release them as part of his personal campaign for reelection to the Board.

Commission found that although the e-mail addresses were not privileged and confidential information, they were not Mr. Bonker's to release, especially not on his personal campaign literature to promote himself. Thus, Commission concluded that Mr. Bonker violated *N.J.S.A.* 18A:12-24(b). Commission recommended the penalty of censure.

Commissioner accepted the Commission's recommendation that Mr. Bonker be censured as a school official found to have violated the School Ethics Act.

MAY 22, 1998

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket No.: C11-97**
RAYMOND BONKER,	:	
LENAPE VALLEY REGIONAL BOARD OF EDUCATION SUSSEX COUNTY	:	**DECISION**

PROCEDURAL HISTORY

This matter arises from a complaint filed by the Lenape Valley Teachers' Association on May 1, 1997, alleging that Raymond Bonker violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq. Specifically, the Association alleges that Mr. Bonker violated N.J.S.A. 18A:12-24(b) of the School Ethics Act when he used his position as Board President, Board member and member of the Board's Technology Committee to obtain privileged information and release it as part of his personal campaign for re-election to the Board. This "privileged" information was the personal e-mail address of every Lenape Valley Regional High School employee. The Association alleges that respondent's use of this information was for personal prestige and personal gain in the form of re-election. The Commission found probable cause to credit the allegation that Mr. Bonker violated N.J.S.A. 18A:12-24(b) of the School Ethics Act by obtaining e-mail addresses of the teachers through his membership on the technology committee and using them to secure unwarranted advantages in his school board election campaign. At its meeting of December 16, 1997, the Commission found probable cause to credit this allegation and dismissed several other allegations.

The Commission determined that the material facts of the case were undisputed. Thus, rather than send the case to the Office of Administrative Law, the Commission requested that the respondent file a written statement by February 28, 1998. Therein, he was to set forth why the Commission should not find that he violated the School Ethics Act on the basis of the undisputed facts set forth in the letter decision. The Commission received a timely written statement from Mr. Bonker setting forth several arguments that it will address below. The Commission considered his statement in reaching this decision at its March 30, 1998 meeting.

FACTS

The Commission finds the following facts to be undisputed. These facts have been amended based on respondent's written statement wherein he noted corrections to the statement of facts in the probable cause determination. The Commission is accepting the facts he submitted as undisputed.[1] Respondent is a member of the Lenape Valley Regional High School (LVR) Board of Education. He represents Byram Township, a sending district to LVR, along with Stanhope and Netcong. In January 1997, Mr. Bonker was a member of the ad-hoc technology committee. The committee consisted of citizens, teachers, students, board members and the Chief School Administrator. At some time in late 1996 or early 1997, the technology coordinator, David Naysmith, asked each teacher to choose an e-mail address. He did not advise the teachers how the e-mail addresses would be used. At a January 20, 1997 teacher in-service designed to improve teachers' skills, teachers received a copy of the e-mail addresses, but they were not told the purpose of the addresses. Minutes from a January 23, 1997 meeting of the technology committee indicate that Mr. Naysmith distributed e-mail addresses to the committee for 96 mailboxes "within the LVR intranet." Minutes from subsequent board meetings indicate that Mr. Bonker consistently gave a technology report. However, the Commission's investigation has shown that he did not state in his reports that the e-mail addresses would be provided to the public.

In April 1997, Mr. Bonker ran for re-election to the Lenape Valley Regional Board of Education. Just before the election, Mr. Bonker received an updated list of e-mail addresses from Mr. Naysmith. He then prepared campaign literature that detailed his accomplishments during his prior term as a board member. He distributed the literature only to the residents of Byram, who are the only citizens who could vote for him. The document stated, in pertinent part:

> We upgraded and increased the number of computers at LVR, again *not with new taxes* but with savings from other areas. LVR is now on the Internet (www.lvhs.org). Every teacher and administrator has a personal e-mail address, listed on the back of this page, so that you may easily contact them.

The e-mail address of each teacher was posted on the back of the document. At the time Mr. Bonker sent his campaign literature, neither the technology committee nor the board had authorized the public release or use of the e-mail addresses for any purpose. Mr. Bonker won re-election and became President of the LVR Board.

After the election, the Lenape Valley Education Association (LVEA), in a letter to the board, alleged that Mr. Bonker had acted unethically when he placed the e-mail addresses in his campaign material. At the April 28, 1997 meeting of the LVR board, Mr.

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[1] Mr. Bonker adds as a correction to the statement of facts that the email addresses are intended for all taxpayers, not just parents of students. The Commission considers this to be more of an argument than a fact and thus will address it in its analysis.

Bonker responded to the LVEA's charges. He denied any ethical violations and insinuated that the LVEA's objective was to curtail the public accountability that they would face once parents have an electronic means of becoming involved with their child's education. The LVEA responded that their only objection was to Mr. Bonker's release of the e-mail addresses as a private citizen running for elected office. He did not have the approval of the Board to release the information to the public. At the April 28, 1997 meeting, the Board passed three resolutions: 1) to publish the e-mail addresses annually in the student handbook calendar; 2) to publish the e-mail addresses on the LVR Home Page on the World Wide Web; and 3) to prohibit the changing of any e-mail address for any active employee of the school system except by the technology coordinator.

As set forth above, the LVEA filed this complaint on May 1, 1997.

ANALYSIS

The issue is whether Mr. Bonker violated N.J.S.A. 18A:12-24(b) of the School Ethics Act by obtaining e-mail addresses of the teachers through his membership on the technology committee and using them in his school board election campaign. Subsection (b) provides:

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

In its probable cause ruling, the Commission agreed with some of Mr. Bonker's defenses. It agreed that the listing of the names and e-mail addresses of the teachers did not violate the privacy rights of employees or breach confidentiality. The LVEA admitted at the April meeting that the public has a right to have the e-mail addresses and, indeed, the Board ultimately did approve the list for public dissemination. The Commission also noted that it is not an ethics violation for Mr. Bonker to breach the LVR board of education's code of ethics, so long as he does not violate the School Ethics Act, N.J.S.A. 18A:12-21 et seq. In summary, the Commission found no probable cause and dismissed the allegations that the listing could be construed as an LVEA endorsement, that his conduct violated employee privacy rights and that the conduct violated the LVR Board's policies. It also dismissed all claims that the information was privileged, because a citizen who desired to get the e-mail addresses could receive a copy from the Board.

The Commission found probable cause to credit the allegation that Mr. Bonker violated section 24(b) of the Act by releasing the e-mail addresses in his campaign literature before the board had discussed and approved releasing them to the public. The Commission also found probable cause to credit the allegation that Mr. Bonker sought to gain an unfair advantage over other candidates running for the board by obtaining and using the e-mail addresses as he did.

In response to the Commission's probable cause determination, Mr. Bonker argues that it is not unethical to publish non-privileged information. He argues that any other citizen, and specifically any other candidate, could have received a copy and published it. He notes that no other candidate has filed a complaint. He states that the Board did not need to formally authorize the release of the information since it was public domain. The information had already been distributed to the committee, which consisted of citizens and others. He concludes that if he used privileged information that other candidates did not have access to, then a charge could be filed. However, based on the finding that the information is non-privileged, he urges the Commission to conclude that there is no unwarranted privilege under subsection (b).

The Commission will address these arguments in turn. The Commission believes that it can be a violation of the School Ethics Act to publish non-privileged information if those who do not have access to inside information do not know that such information exists. Respondent's arguments fail on the basis that there is a difference between access in theory and access in reality. At the time that Mr. Bonker listed the e-mail addresses on the back of his campaign literature, he had access to them because of his work on the committee, but the public was not yet aware of their existence. Therefore, the public had access to the addresses in theory, but in reality, the public could ask for what they do not know exists. His releasing them on his campaign literature informed Byram residents of the existence of such information to the exclusion of the other towns' residents. A regional high school district should not provide information to one town and not the other two that form the district.

In addition, the Commission finds it significant that the technology coordinator notes in his correspondence that the addresses are for the LVR Intranet, not the Internet. Without being advised to the contrary, the employees had every reason to believe that they were choosing e-mail addresses for use within the school, not for use by every person in the three towns that make up the regional high school district. Clearly they believed that the e-mail addresses were for in-school use by the use of the cute names that some of the teachers picked that they would not likely choose if told that the addresses would be provided to the public. The Commission's staff searched several high school web sites on the internet and was unable to find any that provided all of the teachers' e-mail addresses. Thus, though the addresses were not confidential, the employees had the right to be advised prior to their release by the technology committee making such a recommendation to the full board at a public meeting.

The Commission thus concludes that the e-mail addresses were not privileged and confidential information. However, just as they were not the LVEA's to conceal, they were not Mr. Bonker's to release, especially not on his personal campaign literature to promote himself. In addition, he went to the technology coordinator to get the e-mail addresses because his status as a board member allowed him to do so. The Commission concludes that Mr. Bonker's unilateral dissemination was an attempt to secure unwarranted privileges or advantages for himself in violation of N.J.S.A. 18A:12-24(b).

If such information was going to be released, it should have been released officially, by resolution, as it ultimately was, and disseminated on an official Board document to the parents of students. The Commission sees little utility in disseminating teacher's e-mail addresses to all taxpayers in the regional school district, much less on the school's home page for anyone who may be browsing. This opens the teachers to e-mail solicitations that can waste the teacher's valuable time. Mr. Bonker's dissemination appears to have forced the district to distribute the information more widely than would have been necessary if he had not already distributed it to the residents of Byram. The Commission opines that the e-mail addresses of board members who are spending their tax dollars would be of greater interest to the public. The Commission notes that the home page does not set forth the names or e-mail addresses of the members of the Board.

CONCLUSION

For all the foregoing reasons, the Commission concludes that Raymond Bonker violated N.J.S.A. 18A:12-24(b) of the School Ethics Act.

In its probable cause letter, the Commission asked Mr. Bonker to comment on an appropriate penalty should the Commission find a violation. In his submission, Mr. Bonker filed this sarcastic response:

> While I must admit that such a request seems perverse given my innocence in this matter, I have nonetheless listed below some suggestions:
>
> 1. Write a 500 word essay on the joys of unpaid public service through school board membership.
> 2. Conduct a seminar on the difficulties of implementing change in tenured, litigious environment.

The Commission believes that Mr. Bonker's response is an indication that he does not take these proceedings seriously. Since censure is a public sanction, it will underscore for Mr. Bonker the importance of complying with the Act. Therefore, the Commission recommends that the Commissioner of Education impose a sanction of censure.

Now that the Commission has adopted this decision by a formal resolution, the matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within 13 days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini, Chairperson

Resolution Adopting Decision -- C11-97

Whereas, the School Ethics Commission has considered the pleadings, the testimony and the documents submitted in support thereof; and

Whereas, the Commission found probable cause to credit the allegations in the complaint and invited respondent to file a written statement in response; and

Whereas, the Commission has reviewed respondent's written statement and now concludes that respondent violated N.J.S.A. 18A:12-24(b) of the School Ethics Act; and

Whereas, the Commission has reviewed the proposed decision of its staff setting forth the reasons for its conclusion; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby finds that Raymond Bonker violated the School Ethics Act and recommends that the Commissioner impose a sanction of censure; and

Be It Further Resolved that the Commission adopts the enclosed decision referenced as its decision in this matter.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on March 30, 1998. Commissioner Rosalind Frisch dissented from the finding of a violation, but agreed that since the Commission found a violation, a censure was the appropriate recommended sanction.

Lisa James-Beavers, Executive Director

[c1197dec/c:lisa/decisions]

AGENCY DKT. NO. 91-4/98

IN THE MATTER OF RAYMOND	:	
BONKER, LENAPE VALLEY	:	COMMISSIONER OF EDUCATION
REGIONAL BOARD OF EDUCATION,	:	DECISION
SUSSEX COUNTY.	:	
	:	

The record of this matter and the decision of the School Ethics Commission have been reviewed. Written comments were submitted to the Commissioner by Mr. Bonker. These comments essentially addressed the factual findings rendered by the Commission, which findings are not reviewable by the Commissioner.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that censure is the appropriate penalty in this matter, in view of the Commission's determination that a violation of the act occurred under the circumstances set forth in the decision.

IT IS HEREBY ORDERED that Raymond Bonker be censured as a school official found to have violated the School Ethics Act.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MAY 22, 1998
DATE OF MAILING MAY 22, 1998

226-98

W.W., SR., on behalf of minor child, W.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PENNS GROVE-CARNEYS POINT REGIONAL SCHOOL DISTRICT, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent alleged the Board's decision to expel his son, W.W., was made in an arbitrary and capricious manner.

In light of testimony of witnesses and factual findings, the ALJ concluded that petitioner failed to show that the Board's actions were improper under the circumstances. The incident consisted of assaults on two persons, lying to a teacher, foul language and threats. Moreover, W.W. was afforded due process at the building, district and Board levels. Thus, ALJ concluded expulsion of W.W. was procedurally and substantively correct. ALJ, however, ordered the Board to review petitioner's case at the conclusion of the 1997-98 school year as it is within the Board's power to reinstate W.W. to attendance, whether conditioned on summer school attendance or other reasonable requirements, for the 1998-99 school year.

Commissioner adopted the initial decision as his own. Petition was dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2059-98

AGENCY DKT. NO. 44-2/98

W.W., SR., ON BEHALF OF MINOR CHILD, W.W.,

Petitioner,

v.

BOARD OF EDUCATION OF PENNS GROVE-CARNEYS POINT REGIONAL SCHOOL DISTRICT,

Respondent.

Emmett E. Primas, Jr., Esq., for petitioner

John E. Bergh, Esq., for respondent

Record Closed: March 10, 1998 Decided: April 8, 1998

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

W.W., petitioner, alleges his expulsion from school by the Penns Grove-Carneys Point Regional Board of Education, respondent or Board, was arbitrary and capricious.

This matter was opened by filing a verified petition of appeal before the Commissioner of Education. The petition included a request for emergent relief. The Department of Education

transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 through -13. Argument on the motion for emergent relief was held on March 6, 1998. The motion was denied and the matter was set down for plenary hearing on March 10, 1998, at the OAL, Trenton.

I required the Board to present its case first to aid in clarity and expedition. *N.J.A.C.* 1:1-14.6(l). The burden of proof remained with the petitioner.

The events that underlie this case occurred on Thanksgiving Day, November 27, 1997. Penns Grove-Carneys Point High School played its traditional Thanksgiving Day game at Kingsway Regional High School. At about 7:30 a.m. on that morning, Gregory B. Sipp, a certified athletic trainer, began taping Penns Grove-Carneys Point players for the game. Sipp stated that while W.W. was in or near the training room he made several statements to the effect that he was going to "curse out" and make other statements about at least two coaches. The witness was not present after the game when incidents that form the gravamen of the case occurred. There was objection to this testimony. The objection was overruled.

Melissa S. Guldin is a teacher employed by Penns Grove-Carneys Point. She also serves as cheerleader adviser. After the game at Kingsway High School, the witness and cheerleaders boarded a bus to return to their home school. Their bus was twenty to thirty feet from one of the players' buses. The buses were parallel parked.

The witness looked out a window and saw assistant coach Kline. The witness was standing in her bus and had a clear view of the coach. Kline was standing at the rear of a player bus. He was holding a mesh bag. The witness also saw W.W. The coach and W.W. were five to eight feet apart. W.W. was moving about and was yelling. The witness turned away for a moment to answer a question from a cheerleader. When she turned back, she saw W.W. push Kline with both hands. W.W.'s hands struck Kline's upper chest. Kline stepped back.

The witness again turned away to answer a question. When she looked through the window again, she saw head coach Burch trying to calm W.W. Burch approached from behind Kline, facing W.W. The coach had his arms extended, palms out and fingers up in what the

witness described as a calming gesture. The witness again was distracted and when she looked through the window again, the incident seemed to be over.

The witness also stated that the cheerleaders at first were looking for a piece of equipment, but as they became aware of the unfolding incident, began to watch through bus windows. One cheerleader wanted to leave the bus and assist W.W. The faculty member did not permit this.

Steven I. Kline testified. He has been a health and physical education teacher at the high school for fifteen years. He is assistant football coach and head basketball coach. He was serving in his football capacity at the Thanksgiving Day game.

The head coach, Allan T. Burch, directed Kline to collect the players' jerseys as they boarded the home-bound bus. The witness stood by the front bus door, held a mesh bag and collected jerseys as players entered.

All players but W.W. put their jerseys into the bag. The witness saw W.W. go to the rear of the bus. W.W. did not go through the line and enter the bus through the front door. The witness then observed W.W. seated in the bus, two or three seats from the open rear door. The witness went to the rear door and yelled up to W.W. to throw his jersey down. W.W. was kneeling on the seat at this time. W.W. said that his jersey was already in the bag.

The assistant coach told W.W. that he had not put his jersey in the bag. He also warned W.W. that if he did not turn in his jersey, he was to leave the bus. The witness reported that W.W. came to the back door of the bus and said, "If I get off this bus, I'll punch your [expletive] face in." W.W. approached the back door. He was not wearing helmet or pads at the time. W.W. jumped down from the door and simultaneously pushed Kline on the upper chest. Kline backed up a step.

W.W. stated that he would go home with his father. Kline then said words to the effect that if W.W. handed in his jersey, everyone would go home. The witness further testified that

W.W. again made the statement about punching Kline's face. W.W. then pushed Kline again. Kline put his hands behind his back, keeping hold of the bag.

The head coach appeared after the second shove. W.W. was yelling and making threats at the time. Coach Burch stepped between them. Burch told the assistant coach to get on the other players' bus. W.W. then stated to coach Burch, "Get out of my face or I'll punch you in the [expletive] face. Do you want some, too?"

W.W. struck Burch in the same manner he had pushed Kline. Burch put his hands up, at least at shoulder level. Burch kept trying to calm W.W. Kline went to the other player bus as the head coach had directed. W.W. yelled something to the effect that he would get Kline back at school.

When the buses arrived at the home school, police were there. W.W. said he was going home to get his father. He also stated to Kline that his father would "take care of you. This isn't over."

Allan T. Burch, head coach, testified. He coached W.W. W.W. was a quarterback and a kicker. On Thanksgiving Day, he did not start W.W. W.W., however, did play. After the game, the coach instructed Kline to collect jerseys from players before allowing them to get on the buses for the return trip. The head coach was in front of both buses. He heard a commotion at the rear of one of the buses and went to see what was happening.

The witness observed W.W. very upset. The witness got between W.W. and Kline. W.W. seemed out of control. The coach tried to calm W.W. and tried to gain eye contact with him as a first step. He did not touch W.W. He had his hands up, palms outward, in a "calm down" position. W.W. pushed him and knocked him off balance. W.W. asked Burch if he "wanted some, too," or words to that effect. W.W. then said he would punch Burch's [expletive] face in.

The coach proceeded to the equipment drying room upon return to his school. He met with W.W., Sr., who arrived a bit later as Burch was on the telephone with the athletic director to advise the director of the situation. Burch was alone in his office at the time.

Burch testified that he did not see W.W. push Kline and when W.W. pushed him, he did not believe W.W. was trying to knock him down.

The petitioner called T.W., a student at the school who also played football in the 1997 season. T.W. participated in the Thanksgiving Day game. He heard the testimony about the incident.

T.W. gave his jersey to Kline and boarded the bus. He sat near the back of the bus, with his back toward a window. He believes W.W. was on the bus when he got on the bus. T.W. saw W.W. in line to get on the bus, but did not see W.W. board the bus.

The witness then saw W.W. and Kline behind the bus. He saw W.W. push Kline. He heard yelling and cursing. Kline yelled; W.W. yelled and cursed. The two "bumped chests a couple of times." The witness saw W.W. push Kline to "get off of him." The witness saw the head coach approach and saw nothing else.

The petitioner called R.W. R.W. is a cheerleader and was present at the Thanksgiving Day game and boarded the cheerleader bus after the game. She sat near the rear of the bus on the side away from the players' bus. She heard coach Kline's voice, but could not make out the words. She looked out and saw W.W. and Kline approximately five or ten feet from her bus. She was kneeling on her seat and had a clear view. She saw W.W. confront Kline. W.W. seemed to be laughing. Kline, with his hands behind his back, was bumping W.W. with his chest. "It was just him [Kline] pushing him [W.W.] toward the front of the bus."

The witness did not hear W.W. say anything. The witness did not see W.W. push Kline. The witness' advisor was near the front of the bus and could see the incident area. Other cheerleaders observed the incident. W.W. is a friend of the witness, but she would not lie to support him.

T.P. also testified. He plays both football and basketball and was at the Thanksgiving Day game and started as quarterback. He went to and returned from the game on a players' bus.

The witness was on the bus, toward the rear, at the time of the incident. He saw W.W. on the bus, but did not see W.W. enter it. The witness had given his jersey to Kline and boarded the bus through the front door.

The witness heard Kline tell W.W. to give his jersey to Kline. Kline was near the rear of the bus, outside. W.W. was still in his seat. W.W. said he did not have his jersey and Kline instructed him to get off the bus. W.W. got off the bus by jumping from the rear [emergency] door. W.W. and Kline exchanged words, but the witness could not make out what was said.

The witness knew he had to hand in his jersey and he did.

W.W. testified in his own behalf. He was a junior in the 1997-98 school year. He played football and baseball. He went to the Thanksgiving Day game on a school bus and returned on a school bus. He had his ankles taped early in the day by the trainer. He made no statements about cursing coaches.

After the game, he reached the area where the buses were parked and walked between the cheerleaders' bus and the first players' bus. He threw his jersey to a friend in the cheerleaders' bus so that he could keep it as a souvenir.

He mounted the players' bus through the open emergency door in the rear and sat near the door. Kline came to the back of the bus but remained outside. Kline asked W.W. for the football jersey and W.W. responded that he did not have it. He testified that he did not tell Kline where the jersey was because he did not want to get the cheerleader in trouble.

Kline told W.W. to hand in his jersey or get off the bus. W.W. says he got off the bus and looked for his father. He did not see his father so he decided to reboard the bus. By this time, most players had their jerseys and pads off.

Kline grabbed W.W.'s left arm and said that W.W. could not board the bus until Kline got the jersey. W.W. testified that he then told Kline to let him go and that Kline was hurting him. W.W. pulled away and turned to reboard the bus. Kline again stated that W.W. could not board the bus until Kline got W.W.'s jersey. W.W. then stated, "Get your ass off a me." He then pushed Kline away. Kline put his hands behind his back and bumped W.W. with his chest, driving W.W. toward the front of the bus. W.W. asked Kline why Kline had to "keep bumping me?" W.W. stated Kline was belittling him and taunting him as Kline bumped him. Kline appeared to be angry.

W.W. did state that he would punch Kline, but after Kline began bumping W.W. W.W. testified that he had no intent to punch anyone. He stated, "We was in each other's face." At this point, coach Burch came around the door side of the bus and intervened. W.W. diagrammed the relative positions of the three buses.

W.W. saw players and cheerleaders in the buses. No other coaches intervened. He and Kline were face-to-face until Burch got between them. Burch held W.W. Kline, however, was still taunting W.W.

W.W. pulled away from Burch and told Burch to tell Kline to calm down. Coach Burch instructed both to board the bus.

W.W. went to the front door of the bus. A reporter was there. The reporter had spoken earlier to W.W. Burch told the reporter that the reporter could not talk to W.W. at that time and that Burch had no comment.

W.W. testified that he was not angry, but upset that he had no opportunity to tell the reporter about the incident. He recalls telling Burch to "get out of my face," but has no recall of saying, "You'll get some, too."

Upon return to the school, there were no problems. Before leaving Kingsway, W.W. told Kline that when W.W. told his father that Kline touched him, his father would be upset.

W.W. left his gear on the bus. He stated he did not know he had to turn in his jersey before boarding the bus. He did see others at the front of the bus, but did not know what they were doing. He threw his jersey onto the cheerleaders' bus through a window before he boarded his bus. When Kline observed W.W. on the bus and demanded the jersey, W.W. could have retrieved it.

W.W. also testified that he did not strike Kline as Kline had demonstrated at hearing. He did not strike Burch as Burch demonstrated at hearing. He did push Burch, however.

The petitioner argues that the case rests on credibility. He and his witnesses were open and forthright. The parties have to take responsibility for what they did, for good or ill. W.W. admitted wanting to keep his jersey. This is not uncommon, but is wrong. W.W. admitted he cursed and used foul languages to his coaches.

Only laypersons were witnesses here. Three pupils were clear and honest in their testimony. The power here is unevenly divided. Pupils who want to play any sport will have to deal with these coaches.

The athletic trainer's testimony was irrelevant. There was no premeditated action here. Even if W.W. said he would "get" Burch, he did nothing to confront Burch. Burch only became involved by walking up to the W.W. Kline confrontation.

The key testimony is coach Kline's. Kline withheld some important testimony; there was more to the incident. Up to the point at which W.W. left the school bus through the emergency door, the testimony is very much in agreement. When and after W.W. debused, differences appear. The credible testimony was that Kline was louder than W.W. One student saw Burch restrain W.W. physically. Coach Kline says he has no recall of calling W.W. "punk" or baiting him. One would certainly recall something of this magnitude. The witness' non-recollection here is less than forthright.

W.W. said that Kline bumped him. Kline denies this. If Kline's testimony is truthful, W.W. pushed Kline with considerable force and Kline put his hands behind his back. Kline's explanation, that he did not want the incident perceived wrongly, is inconsistent with this action. It is not logical to put one's self in a more vulnerable position unless the intent were to bait W.W. No one who believes he will be struck will make himself more vulnerable. Kline sought no help. He controlled the entire situation.

Kline and Burch are friends and colleagues. Burch said his attention was on W.W. when asked if Kline were yelling when Burch approached. Burch may be trying to protect Kline. He would not want to put a friend in a bad light. Burch did say that W.W. calmed down. Burch feared the story getting to the press and dismissed a reporter as he boarded the bus.

Expulsion here is arbitrary and capricious. The Board is composed of laypersons. Expulsion is the death penalty in an education matter. It means no activities and no participation in graduation. Expulsion should be the penalty only in the clearest cases. The long-term harm can be tremendous. Expulsion carries ramifications for the rest of the life of the expelled pupil. W.W. is not a student with a "record." He was insubordinate, he cursed and he kept his jersey. Punishment is deserved and even necessary, but expulsion is extreme.

The Board argues that its witnesses' testimony was buttressed by pupil witnesses. R.W. saw W.W. and Kline in proximity. R.W. saw Kline's hands behind his back. This corroborates Board witness testimony. R.W. also saw Burch put W.W. in a basket hold to separate him from Kline.

T.P. put his jersey in the bag held by coach Kline. T.P. saw W.W. in line to enter the bus before the incident, W.W. did not pass T.P. and yet, W.W. was on the bus when T.P. boarded the bus. T.P. heard Kline demand W.W.'s jersey.

The trainer's testimony is not irrelevant. The trainer heard W.W. say he would curse out coach Burch after the game and W.W. did. The trainer heard W.W. say he might curse out other coaches. W.W. did. There was plenty of time between those statements and the incidents several

hours later to cool down. Only W.W.'s testimony diverges from the others'. This is natural in that he has the most at stake.

The cheerleader advisor's testimony was clear and concise. Of what she saw of the confrontation, W.W. struck Kline, Kline did not strike W.W. Kline was struck two times and the second incident occurred after W.W. had once walked away.

Coach Burch was clear. He was assaulted. He was trying to calm W.W. W.W. was described as agitated and moving around.

On the testimony presented at hearing, the petitioner has failed to carry the burden of proof. The Board's witnesses were credible and straightforward. Their testimony was clear and truthful.

DETERMINATION AND ORDER

The trainer's testimony is not irrelevant. The traditional view has been that a prior statement of a witness is hearsay if offered to prove the happening of matters asserted in what he said. Categorizing the prior statement in that way, of course, did not preclude using the prior statement for other purposes such as to impeach the witness by showing a self-contradiction or to support his credibility under certain circumstances when the statement was consistent with his testimony. But the prior statement has been admissible as proof of the matter asserted; that is, as "substantive" evidence, only when falling into one of the exceptions to the hearsay rule. The logic of the traditional view is that the previous statement of the witness is hearsay since its value rests on the credit of the declarant who, when the statement was made, was not (1) under oath, (2) in the presence of the tier of facts, or (3) subject to cross-examination.

The counter-argument is simply stated. The oath is no longer a principal safeguard of the trustworthiness of testimony; affidavits, though under oath, are not exempted from the hearsay rule, and of the numerous exceptions where evidence is admitted despite its being hearsay, in only one instance is the out-of-court statement required to have been under oath. And that instance,

namely prior testimony, may arguably be regarded as a case of nonhearsay rather than a hearsay exception.

The trainer's testimony is not irrelevant and is hearsay. However, hearsay testimony may not be excluded in an administrative hearing. All ultimate findings of fact must be supported by competent evidence. Hearsay evidence may buttress competent evidence. In a proper case, competent evidence may qualify hearsay evidence for one of the several hearsay exceptions. The trainer's testimony was not incredible. W.W.'s testimony was not completely credible. This is not enough, in my opinion, to serve as foundation for a finding of fact. And I am unwilling to infer backwards; that is, to find W. W. made the statements earlier in the day because of his actions later in the day.

The burden of proof for establishing claims before state agencies in contested administrative adjudications is a fair preponderance of the evidence. *In re Polk License Revocation*, 90 *N.J.* 550, 560 (1982). I **FIND** that the following facts have been established:

1. W.W. was a member, and the starting quarterback for most of the 1997 season., of the Penns Grove-Carneys Point High School football team;
2. A series of incidents occurred on Thanksgiving Day, November 27, 1997 involving W.W. and members of the coaching staff high school;
3. Penns Grove-Carneys Point High School played at Kingsway Regional High School on that day. W.W. was not the starting quarterback;
4. Upon completion of the football game at Kingsway Regional High School, football team members and cheer-leaders returned to their buses for transportation to Penns Grove-Carneys Point High School;
5. Head Coach Burch directed assistant Coach Kline to collect each player's jersey before the players boarded a bus;

6. Kline stood near a players' bus door holding a fabric bag and took a jersey from each player as the players entered;
7. W.W. threw his jersey through an open window into the cheerleaders' bus;
8. W.W. then left the line entering a bus via the front door and boarded through the rear (emergency) door;
9. Coach Kline moved towards the rear of the bus and called to W.W. to turn in his jersey;
10. W.W., kneeling on a seat near the rear of the bus, replied that the jersey was in the bag;
11. Kline told W.W. to turn in his jersey or get off the bus;
12. W.W. replied that if he got off the bus, he would punch Kline's [expletive] face;
13. W.W. left the bus by jumping though the rear door, landing on the ground;
14. W.W. pushed Kline, either in the process of landing on the ground or immediately thereafter;
15. The two exchanged words and during the exchange, W.W. cursed;
16. The confrontation continued, W.W. again used foul language and again struck Kline;
17. Kline place his hands behind his back while retaining hold of the equipment bag;
18. In this posture, Kline was leaning forward from the waist toward W.W.;
19. Coach Burch, drawn by raised voices, appeared and stepped between the two men;
20. W.W. remained agitated and again used threatening, intemperate language;
21. W.W. pushed Burch as Burch attempted to quiet him;
22. Coach Burch directed Kline and W.W. to board the bus;

23. Upon return to the home school, W.W. made a statement to the effect that the incident was not over and that W.W.'s father would "take care of" Kline;
24. Coach Burch informed the Board's Director of Athletics of what had happened;
25. W.W., Senior, and Coach Burch met a while later;
26. All other relevant actions were administrative in nature and did not directly involve coaching staff.

None of the witness was completely credible. Where the standard is reasonable probability, that is, preponderance of the evidence, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." *Loew v. Union Beach*, 56 *N.J. Super.* 93, 104 (App. Div. 1959). One factor that must be considered in a determination as to which party's version of a incident has the "reasonable probability of truth" is that "the interest, motive, bias or prejudice of a witness any affect his credibility and justify the [trier of fact], whose province it is to past upon the credibility of an interested witness, in disbelieving his testimony." *State v. Salimone*, 19 *N.J. Super.* 600, 608 (App. Div 1952) certif. den. 10 *NJ* 316 (1952). Furthermore, [a] trier of fact may reject testimony because it is inherently incredible or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony." *Congleton v. Pura-Tex Stone Corp.*, 53 *N.J. Super.* 282, 287 (App. Div. 1958).

What this reduces to is straightforward. If nothing else had happened after W.W. jumped from the bus and pushed Kline, the Board's actions would unassailable. The fact that the evidence of events after that point is mixed does not mitigate what happened up to that point. The alleged pre-game statements, the attempted trickery, the lying about the location of the jersey, the verbal confrontation with Kline and the physical confrontation with Kline constitute reasonable grounds for expulsion. *N.J.S.A.* 18A:37-2.1 and *N.J.S.A.* 2C:12-1 command that a board immediately suspend a student who commits an assault, as defined at *N.J.S.A.* 2C:12-1, on a teacher. Expulsion proceedings before the board must take place not more than twenty-one calendar days following the day of suspension. Not withstanding the fact that no criminal charges were filed, the Board has cause to suspend and to expel.

Even if what happened after W.W. made contact with Kline happened as persistently as W.W. described it, this would not excuse what happened up to that point. This is the classic "two wrongs make a right" argument and must fail for obvious reasons.

I reject W.W.'s testimony that he did not know he had to turn in his jersey after the game and that he was unaware that players were turning in their jerseys as they boarded buses after the game. It simply is inconsistent with the totality of the circumstances. Similarly, I reject the petitioner's argument that Kline's actions and testimony were inconsistent. If, as the petitioner asserts, Kline was baiting W.W., it is likely that Kline, being the bigger man, would put himself in what the petitioner refers to as a more vulnerable position. Kline's placing his hands behind his back could be argued as simultaneously thrusting his upper body toward W. W. ---an aggressive gesture--- and demonstrating to any observers that he, Kline, had not raised a hand to W. W. notwithstanding that W.W. had touched him.

In *Scher v. Bd.of Ed. of West Orange*, 1968 *SLD* 92, the Commissioner stated

> Termination of a pupil's right to attend the public schools of a district is a drastic and desperate remedy which should be employed only when no other course is possible. It is obvious that a board of education cannot wash its hands of a problem by recourse to expulsion. While such an act may resolve an immediate problem for the school it may likewise create a host of others involving not only the pupil but the community and society at large. The commissioner suggests, therefore, that boards of education who are forced to take expulsion action can not shrug off responsibility but should make every effort to see that the child comes under the aegis of another agency able to deal with the problem. The commissioner urges boards of education, therefore, to recognize expulsion as a negative and defeatist kind of last-ditch expedient resorted to only after and based upon competent professional evaluation and recommendation.

In fact, the majority of expulsion cases do not involve a permanent removal of a pupil from a school system, nor do they terminate a board's responsibility to the pupil during the period he is barred from attendance. Boards often expel pupils for a long but definite period such as a school year or a semester. Where a board seeks to deny permanently the right to attend school, the Commissioner may confine the expulsion to a specific period.

by the rules of OAL, the application stated that the date the papers would be deemed submitted to the ALJ for disposition was April 20. As of the date of this decision, no response to the application has been received.

Accordingly, having reviewed the certification of counsel in support of the application, I **FIND** that Respondent has complied with the requirements as set forth in R. 4:23-5(a)(i) and R. 1:6-2(c), which are:

a). Movant, in this case, the Respondent, is not in default in answering his adversary's interrogatories;

b). Counsel for movant has advised the other party that failure to respond to the interrogatories will result in an appropriate motion;

c). Answers to interrogatories have not been provided and Petitioners continue to be non compliant with requests for discovery.

ORDER

Accordingly, it is hereby **ORDERED** that this petition be and hereby is **DISMISSED** for failure to answer interrogatories.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 28, 1998
DATE

Marcia M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

May 1, 1998
DATE

D Mantarantes/fc
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 4 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

jb

OAL DKT. NO. EDU 9841-97
AGENCY DKT. NO. 336-9/97

KENNETH AND LOUISE COOK,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon his independent review of the record, the Commissioner concurs with the Administrative Law Judge's conclusion that the within petition should be dismissed as a result of petitioners' failure to comply with procedural rules requiring timely provision of answers to interrogatories propounded by the Board.

Accordingly, the initial decision of the OAL is affirmed. The within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

JUNE 15, 1998
DATE OF MAILING JUNE 15, 1998

262-98

C #262-98L
SB # 56-98

P.K., on behalf of R.K.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY, MANUEL E. DEUS, BOARD SECRETARY, JAMES McNASBY, SUPERINTENDENT AND BARRY SPETTER,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, June 17, 1998

For the Petitioner-Appellant, Jeffrey R. Grow, Esq.

For the Respondent-Respondent, Schenck, Price, Smith & King
(Sidney A. Sayovitz, Esq., of Counsel)

On June 17, 1998, the Commissioner of Education issued a letter decision in which he dismissed the petition filed by P.K. (hereinafter "appellant"), in which she contended that the Morris Hills Regional School District had unfairly banned her daughter R.K. from Project Graduation, a social event for seniors which was to take place after graduation ceremonies.

On June 19, 1998, appellant filed a notice of appeal with the State Board of Education. Appellant also requested a stay of the Commissioner's decision so as to enable R.K. to participate in Project Graduation. On June 22, the President of the State Board, acting pursuant to his authority under N.J.A.C. 6:2-3.3, denied appellant's

SEPT. 2, 1998

request for a stay. He also indicated that "following the completion of briefing by the parties...the full State Board of Education will render its decision in the underlying appeal in this matter."

Pursuant to N.J.A.C. 6:2-1.11(a), appellant's brief in support of her appeal was due on July 9, 1998, 20 days after she filed her notice of appeal. Appellant, however, failed to file a brief by that date. By letter dated July 15, 1998, the Director of the State Board Appeals Office notified the counsel for appellant of his failure to file a brief and informed him that this matter was being referred to the Legal Committee for consideration of appellant's failure to perfect the appeal.

Counsel for appellant has still failed to file a brief in support of the appeal, eight weeks after the deadline for such filing. Nor has he offered any explanation for his failure to file a brief or requested an extension of time for such filing. As a result, we dismiss the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a). See Paszamant v. Board of Education of the Borough of Highland Park, decided by the State Board, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993).

September 2, 1998

Date of mailing SEP 04 1998

263-98

RICHARD CHAMBERS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning music teacher alleged the Board wrongfully suspended him. The Board contended petitioner was ineligible for service within the meaning of *N.J.S.A.* 18A:16-4 and, thus, excluded him from his teaching duties, declined to grant him sick leave with compensation.

In light of 1994 psychiatric report and petitioner's refusal to submit to a reexamination, the ALJ determined that the Board had sufficient evidence of deviation from normal mental health such that its determination that petitioner was "ineligible for further service" was not arbitrary, capricious or unreasonable. ALJ saw no basis in law and/or in fact to compel the Board to pay petitioner during his period of ineligibility. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8498-97

AGENCY DKT. NO. 299-8/97

RICHARD CHAMBERS,

Petitioner,

v.

PLEASANTVILLE

BOARD OF EDUCATION,

Respondent.

Arnold Mellk, Esq., for petitioner (Wills, O'Neill & Mellk, attorneys)

Thomas W. Sumners, Jr., Esq., for respondent (Sumners, George & Dortch, attorneys)

Record Closed: May 1, 1998 Decided: May 1, 1998

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

The Pleasantville Board of Education (BOE), citing N.J.S.A. 18A:16-4, determined that Richard Chambers, a tenured teacher in its school system, was ineligible for service; excluded him from his teaching duties; and declined to grant him sick leave with compensation. Chambers, who

is not the subject of an indictment or tenure charge, citing N.J.S.A. 18A:6-8.3, -10, -11 and -14, claims that the BOE must continue to pay his salary, etc.

PROCEDURAL HISTORY

Chambers and the BOE were parties to Pleasantville City Board of Education v. Chambers, 95 N.J.A.R.2d (EDU) 291, 96 N.J.A.R.2d (EDU) 447, which is described further in the "Findings of Fact" section below.

On August 14, 1997, Chambers filed with the Commissioner of Education a petition claiming that, during the period of his ineligibility for service the BOE should be ordered to continue his pay, etc. (Chambers also made other claims, e.g., for intentional infliction of emotional distress, over which the Commissioner has no jurisdiction. See N.J.S.A. 18A:6-9.) The BOE, in answer to the petition, asserted that Chambers' petition was untimely and that, pursuant to N.J.S.A. 18A:16-4, it had lawfully declined to grant continued compensation. By letter dated September 22, 1997, the Commissioner notified the parties that he declined to enter a declaratory judgment in favor of Chambers and notified him that in this administrative adjudication there is no jurisdiction over his other noneducational claims, e.g., for intentional infliction of emotional distress. The matter was then transmitted to the Office of Administrative Law (OAL), where, on October 10, 1997, it was filed as this contested case. N.J.S.A. 52:14B-2(b). On November 21, 1997, Judge Masin entered an order denying emergent relief. On December 8, 1997, the case was assigned to me, and on December 10, 1997, I issued a prehearing order setting forth a schedule for discovery, hearing, etc. On December 19, 1997, the Commissioner issued a decision concluding that Chambers had not satisfied standards required for emergent relief. In March 1998 present counsel entered their appearances, and on March 26, 1998, the case was heard in the OAL, Trenton (Hamilton Township). After unsuccessful settlement negotiations, the parties requested that the record remain open until April 30, 1998 for submission of closing memoranda.

FINDINGS OF FACT

Mr. Chambers began employment as a teacher in the BOE's school system in 1989, and he is tenured.

Chambers testified as follows: He suffered "job stress" and he was examined by Timothy Axelbank, M.D., who diagnosed a "brief reactive psychosis." He received a six-month leave of absence. Janet Thornton, M.D., examined him and cleared him for return to teaching. On or about February 8, 1993, he returned to his teaching duties.

During a February 22, 1994 meeting, the BOE considered alleged incidents involving Chambers that occurred from December 7, 1993, through February 1994, and these include the following:

> December 7, 1993
> Taking high school students on a field trip, though you were scheduled to be at South Main Street School, then becoming upset with the Principal of South Main Street School when she would not sign a professional day for you for the field trip;
>
> Various
> Continuously leaving the buildings to which you have been assigned without permission from your supervisors, despite continuous warnings not to do so, evidencing a seeming inability to follow even the simplest, reasonable directives;
>
> January 24, 1994
> Became angry with P.I. teacher at South Main Street School and yelled at her in front of students when she questioned you regarding an incident in which her students were sent out of the school building to your car, without consulting or advising her;
>
> January 25, 1994
> Your angry and belligerent attitude toward custodians when a program held in the South Main Street School extended past the scheduled time and into the time allotted for your activity, requiring a board member to quell the incident;

January 25, 1994
Your abusive and disrespectful approach and manner toward the Principal of South Main Street School because you were angry at not having received a phone message immediately;

February 7, 1994
Your rude and obnoxious behavior in the Principal's office at South Main Street School on February 7, 1994, ostensibly because a phone message for you was left in your mail box instead of calling you to the office to take the message; later the same day, during lunch, you started an argument with a staff member in the cafeteria and Mr. Smith had to step between you and the staff member to quell the incident;

February 8, 1994
Your confrontational and disrespectful attitude and approach to a kindergarten teacher at South Main Street School on February 8, 1994, in front of her students, when she expressed concern about your having taken her kindergarten students out to play in the snow when you were supposed to be teaching them music; most of the students were not properly dressed and got wet; you laughed, in the presence of the parents of those students, when parents expressed concern about their children being out in the snow without hats and their coats not being properly fastened;

February, 1994
Your singing, whistling and talking across the room, inappropriately, during your assignment to duty in the In-School suspension at the high school during February, 1994;

January 31, 1994
Your generally disruptive, unprofessional and disrespectful actions and demeanor set forth in a memo to you dated January 31, 1994 from Norman King, Jr., Principal of the high school;

January 25, 1994
Matters set forth in a memo from Norman King to Skender Avrami, dated January 25, 1994;

January, 1994
During the first week of January, 1994 you made an obscene gesture to James Commander, a fellow teacher, in front of several of his students causing the students to become upset;

Various
Your frequent interruption of music classes being taught by Mr. Commander despite his requests that you not do so;

Your behavior on December 17, 1993 in Nancy Howe's class; including interrupting the class unnecessarily and acting in a manner in front of her class which caused concern for Mrs. Howe and her students;

January 13, 1994
Your demeanor, lack of responsiveness and argumentative attitude during a conference with Ben Mora on January 13, 1994; and your seeming inability to focus on issues being discussed during the conference;

January 5, 1994
On or about January 5, 1994 you played music by Madonna for Mrs. Lozada-Low's kindergarten class so loudly that teachers in neighboring classrooms had to request that you lower the volume so that they may teach their classes;

Various
You played inappropriate music (rap, pop and top 40) for Miss Fay's kindergarten class in a very loud manner, causing the children to become very wild during music class and making it difficult for the teacher to get the students back on task during the afternoon following your music class;

You continued to give candy to children in Miss Fay's kindergarten class despite being advised by her that some of the children are allergic to chocolate and may require hospital treatment if it is ingested by them;

At one of your music sessions with Miss Fay's students, all of the books on the shelves in her class were dumped on the floor and books were taken off her desk without permission; her students have been taught not to touch the books on her desk but were told by you that it was all right to do so;

The concern about your contact with her students has grown to the extent that she is not comfortable leaving her students or classroom alone under your supervision;

January 7, 1994
On or about January 7, 1994 when Ms. Kantren attempted to express her concern about the rock and rap music you played in a loud manner for her kindergarten class, during a musical chairs activity which was part of your music lesson, that day, you became hostile to her, turned the volume of the music up and allowed the children to become wild and unruly;

> The teacher also expressed concern about the fact that you talk to her kindergarten students about your personal matters that are inappropriate for children their age;
>
> Various
> You have been playing rap and dance music during musical chairs activities for Ms. Cohenson's kindergarten class. When she requested that you not play musical chairs using such music because it makes the children very wild, you refused to do so. You continued to play rap and dance music during your 40 minute sessions with her students though such music is not in line with the curriculum and is inappropriate for these students. When asked to lower the volume of the music because it was disturbing neighboring classes, you have become sarcastic and antagonistic toward staff members who requested that you do so.
>
> Throughout the school district, administrators, teaching staff and support staff, who have had contact with you, have expressed concern about your demeanor and the confrontational, argumentative manner in which you interact with them and professional staff have expressed concern about the nature of your association with students.
>
> The existence and nature of your prior psychiatric problems;
>
> Your behavior has left school district staff and students uncomfortable, concerned or afraid about daily interaction with you.
>
> [BOE-1.]

Given the above, the BOE passed a resolution requiring Chambers to submit to a psychiatric examination (to determine whether Chambers had a significant deviation from normal mental and/or physical health, affecting his ability to teach and associate with students). BOE-1.

By letters to Chambers dated February 23 and 24, 1994, the BOE's personnel administrator set forth the above-quoted incidents; notified Chambers of the BOE's determinations; notified him of the resolution; and notified him of his right to a hearing before the BOE. See Gish v. Paramus Bd. of Educ., 145 N.J. Super. 96 (App. Div. 1976), certif. denied, 74 N.J. 251, cert. denied, 434 U.S. 879, 54 L. Ed. 2d 160, 98 S. Ct. 233 (1977).

By letter dated March 22, 1994, the BOE's former attorney notified Chambers' former attorney of the following: Consistent with Gish, pursuant to his request, on March 29, 1994, the BOE would hold a hearing during which Chambers could present any statement, testimony or documentation in opposition to the BOE's determination that he should undergo a psychiatric examination. C-1; C-2. On March 29, 1994, the BOE held a hearing; Chambers and his former attorney appeared; and the BOE voted to affirm its determinations, including the requirement that Chambers submit to the psychiatric examination. By letter dated April 6, 1994, the BOE notified Chambers of its vote and, citing N.J.S.A. 18A:16-2, the BOE notified him that he should submit to the examination. Pleasantville City Board of Education v. Chambers, supra, 95 N.J.A.R.2d (EDU) at 292.

By letter dated June 13, 1994, the BOE notified Chambers that he was suspended from school functions until he had completed the examination by the BOE's "appointed psychiatrist," etc. C-4.

Chambers refused to submit to an examination by the psychiatrist proposed by the BOE and the BOE petitioned the Commissioner of Education for an order to compel his submission and to discontinue his pay. This resulted in Pleasantville City Board of Education v. Chambers, supra, 95 N.J.A.R.2d (EDU) 291, 96 N.J.A.R. 2d (EDU) 447. In that case, Chambers did not challenge the BOE's determinations made during the March 29, 1994 hearing, except that he opposed the suspension without pay and the requirement that he submit to examination by the psychiatrist proposed by the BOE.

Relative to Chambers' demand for continuation of his pay, the Commissioner wrote:

> [A board of education] is authorized to suspend an employee under the statutory provisions found in Title 18A Education Law. As the court observed and stated in [Slater v. Board of Educ., 237 N.J. Super. 424, 426 (App. Div. 1989)], a board of education may suspend a tenured employee without pay only if that employee is under indictment (N.J.S.A. 18A:6-8.3) or the board has preferred and certified tenure charges against the employee to the Commissioner (N.J.S.A. 18A:6-16). Neither of those elements are extant here. Respondent [Chambers] is not under indictment nor has the [board of education] preferred and

> certified tenure charges against respondent [Chambers] to the Commissioner. The [board of education's] arguments in equity are inappropriate and may not be considered in making a determination concerning the law which dictates the operation of our State's public schools.
>
> Accordingly, I CONCLUDE that under the facts and circumstances of this matter, there is no authority granted to the [board of education] to suspend Respondent's [Chambers'] pay pending a physical and psychiatric examination. Therefore, the [board of education's] application to suspend Respondent's [Chambers'] pay pending the physical and psychiatric evaluation is hereby DISMISSED.
>
> [Pleasantville City Board of Education v. Chambers, supra, 95 N.J.A.R.2d (EDU) at 295.]

Relative to Chambers' submission to the psychiatric examination, the Commissioner, citing N.J.S.A. 18A:16-2 and -3 and Gish, supra, 145 N.J. Super. at 105, ordered that Chambers submit to examination by a psychiatrist chosen by the BOE. The State Board of Education considered the case and rejected Chambers' contention that the BOE unreasonably required him to submit to a psychiatric examination; but, reversing the Commissioner's order, the State Board ordered that Chambers propose a psychiatrist for his examination and ordered that the BOE not unreasonably withhold its approval of such psychiatrist. Pleasantville City Board of Education v. Chambers, supra, 96 N.J.A.R.2d (EDU) at 448.

By letter dated December 27, 1995, Chambers' former attorney notified him of the above-described State Board of Education decision and encouraged him to expeditiously choose a psychiatrist for an examination. C-7.

By letter dated February 26, 1996, Chambers' former attorney notified the BOE's former attorney that Chambers had chosen Geetha Kumar, M D , of New Jersey's University of the Health Sciences to conduct the psychiatric examination. C-8. By letter dated March 11, 1996, the BOE's former attorney notified Chambers' former attorney that on March 5, 1996, the BOE had approved Dr. Kumar. C-9.

On April 30 and June 4, 1996, Dr. Kumar examined Chambers and she reported the following:

> Mr. Chambers presents with Paranoid and Narcissistic Personality traits with obsessive qualities. These traits, under stress, can interfere with his ability to judge a situation and distort things which can lead to inappropriate interactions. Based on this evaluation, I have concerns that without adequate treatment, his emotional reactions and personality traits would have a negative impact on his job situation.
>
> [BOE-2.]

Dr. Kumar diagnosed Chambers as suffering from adjustment disorder with mixed emotional features and paranoid personality trait. She strongly recommended in-depth psychological testing, and recommended individual therapy. BOE-2.

During the BOE's August 6, 1996 meeting, it took the following actions: It reviewed Dr. Kumar's report. Citing N.J.S.A. 18A:16-4, it determined that Chambers was ineligible for further teaching service as a teaching staff member "until proof of recovery" was furnished. It determined that, during the period of ineligibility, he would receive no salary, compensation or sick leave. And, by letters dated August 9 and 28, 1996, the BOE's former attorney notified Chambers and his former attorney of the BOE's actions. C-10a; C-11.

By letter dated December 9, 1996, Chambers' former attorney notified the New Jersey Education Association (NJEA) and Chambers of the following: Dr. Kumar could not give the opinion that Chambers' condition was "work-related," so a workers' compensation claim would not be filed. If Chambers obtained the treatment recommended by Dr. Kumar and, if after examination, Dr. Kumar finds that he is fit to teach, then he could apply for reinstatement. C-11a.

By letter dated March 24, 1997, Chambers wrote to Dennis Testa, president of the NJEA, confirming that in September 1996 the BOE discontinued payment of his salary and asking what the NJEA had done and what it would be doing. C-12.

By letter dated April 11, 1997, Dr. Kumar notified Chambers' former attorney that she would be unable to re-evaluate him and recommended that he seek another psychiatrist for that purpose. BOE-3.

By letter dated May 7, 1997, Chambers' former attorney acknowledged that Chambers had been placed on sick leave without compensation and notified the BOE's former attorney that Dr. Kumar was unable to perform the re-evaluation. He requested that the BOE choose a psychiatrist for the re-evaluation. BOE-4.

By letter dated May 29, 1997, Nancy Rubin, LCSW, of the Middlesex County Mental Health Clinic, reported that between October 1, 1996, and May 22, 1997, Chambers regularly saw professionals there. BOE-5.

By letter dated June 6, 1997, Chambers' former attorney wrote to the BOE's former attorney. He enclosed copies of the above-described letters from Ms. Rubin and Dr. Kumar and again requested that the BOE "choose a psychiatrist for re-evaluation." A copy of that letter was sent to Chambers. BOE-6.

By letter dated August 12, 1997, the BOE's former attorney notified Chambers' former attorney that, pursuant to Chambers' request, the BOE had chosen Dr. Timothy J. Michals to examine and re-evaluate Chambers and that Chambers should execute releases so medical records could be forward to Dr. Michals. BOE-7. By letter dated August 22, 1997, Chambers forwarded to his former attorney the signed release forms for Dr. Michals and also asked that his "teaching files" be submitted to Dr. Michals. BOE-8. By letter dated October 17, 1997, the BOE's former attorney notified Chambers that a November 3, 1997 examination had been scheduled for him. BOE-9. By letter dated October 23, 1997, Chambers' former attorney reiterated to the BOE's former attorney that Chambers wished his teaching files submitted to Dr. Michals. BOE-10. By letter dated October 30, 1997, Chambers wrote to the BOE's former attorney, Dr. Michals and others that "incorrect" information had been sent to Dr. Michals, so he would not submit to the examination. BOE-11. By letter dated November 4, 1997, the BOE's former attorney wrote to

Chambers, confirming that the appointment with Dr. Michals had been rescheduled for November 20, 1997. BOE-12.

Chambers testified as follows: He received copies of the above-described letters, so he knew that an examination by Dr. Michals had been scheduled (at his former attorney's behest), but he never consented to the examination and he did not appear for the scheduled examination. Further, he refuses to submit to an examination, even by a psychiatrist of his own choosing.

As detailed in the "Procedural History" above, on August 14, 1997, Chambers filed the petition demanding that the BOE pay his salary, etc.

Chambers has submitted no expert evidence relative to his mental health. That is, he has not submitted, e.g., a psychiatrist's opinion that he is of "normal . . . mental health" and appropriate for teaching service. N.J.S.A. 18A:16-2.

CONCLUSIONS OF LAW

The BOE's actions were based upon the following statutes:

> a. Every board of education may require its employees and shall require any candidate for employment, who has received a conditional offer of employment to undergo a physical examination. The board may require individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health.
>
> [N.J.S.A. 18A:16-2 (emphasis added).]

> If the result of any such examination [by a physician] indicates mental abnormality . . . , the employee shall be ineligible for further service until proof of recovery, satisfactory to the board, is furnished, but if the employee is under contract or has tenure, he may be granted sick leave with compensation as provided by law and shall, upon satisfactory recovery, be permitted to complete the term of his contract, if he is under contract, or be reemployed with the same tenure as he possessed at the time his services were

> discontinued, if he has tenure, unless his absence shall exceed a period of two years.
>
> [N.J.S.A. 18A:16-4 (emphasis added).]

Procedurally, in August 1996, the BOE notified Chambers of its determination that, because of his mental condition, he was ineligible for further teaching service and that it declined to exercise the discretion allowed by N.J.S.A. 18A:16-4 to pay him while he was "ineligible." In August 1997, Chambers filed his petition to claim pay during his ineligibility. N.J.A.C. 6:24-1.2(c) states that a person wishing to initiate a contested case before the Commissioner "shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education," so Chambers' petition appears to have been filed well beyond that time.

Substantively, Chambers' petition does not challenge the BOE's determination that he was ineligible; but claims that he should be paid during his ineligibility.

In N.J.S.A. 18A:16-2 the Legislature granted authority to boards of education to determine that employees are "ineligible for further service." Where a public employee is "ineligible for further service," ordinarily, it would appear to be ultra vires to use public funds to pay him. However, in N.J.S.A. 18A:16-2 the Legislature allowed discretion to boards of education, so that, in such circumstances, they "may" grant "sick leave with compensation." Emphasis added. This is in contrast to circumstances where a board of education is in receipt of "proof of satisfactory recovery" where in N.J.S.A. 18A:16-2 the Legislature requires that the employee "shall be permitted to complete the term of his contract, if he is under contract, or be reemployed with the same tenure as he possessed at the time his services were discontinued, if he has tenure." Emphasis added. (In this way, a board of education can avoid bringing charges, e.g., for "incapacity" to allow the employee time to recover. N.J.S.A. 18A:6-10.) Here, the BOE has declined to pay Chambers and Chambers has offered no evidence of recovery.

Middletown Township Board of Education v. Robert Leo, 1990 S.L.D. 436, has been cited in support of the proposition that the BOE may suspend an ineligible teacher without pay.

In Leo, the Commissioner explained that "the cost of [the employee's] absence could, at the Board's discretion, have accrued to [the employee] rather than the district."

Chambers has cited N.J.S.A. 18A:6-8.3 in support of his claim for pay:

> Any employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in [N.J.S.A. 18A:6-1 to -74].
>
> [Emphasis added.]

However, the BOE cited N.J.S.A. 18A:16-4 in determining that Chambers is "ineligible for further service." The BOE has not certified a tenure charge, e.g., "incapacity," against Chambers, so this case is not governed by N.J.S.A. 18A:6-8.3.

N.J.S.A. 18A:16-2 was construed and applied in Kochman v. Keansburg Bd. of Educ., 124 N.J. Super. 203 (Ch. Div. 1973), wherein Judge Lane wrote:

> The [phrase] "deviation from normal . . . mental health" as used in N.J.S.A. 18A:16-2 is construed to mean "harmful, significant deviation from mental health affecting the teacher's ability to teach, discipline or associate with children of the age of the children subject to the teacher's control in the school district."
>
> The legislature has delegated to boards of education the authority to determine whether a teacher is fit to teach in general terms. These general terms were held in Laba v. Newark Board of Education, [23 N.J. 364 (1957)], to provide sufficient standards for application. In N.J.S.A. 18A:16-2 the legislature has delegated to boards of education the power to request a teacher who shows evidence of harmful, significant deviation from normal mental health affecting the teacher's ability to teach, discipline or associate with children of the age of the children subject to the teacher's control in the school district to submit to a psychiatric examination. As this court has construed the statute, it has delineated in as

narrow terms as possible another area of unfitness which a teacher may evidence by his behavior. The legislature has, however, recognized that although a board of education may observe signs of what it considers a harmful, significant deviation, it does not have the expertise to question the teacher on the matter itself but must rely on the expertise of a psychiatrist. The grant of power to a board of education to require such an examination is viewed merely as an extension of the board's authority to require a teacher to answer questions at a hearing on general unfitness, held proper in Laba v. Newark Board of Education, supra, 23 N.J. 364. The legislature is concerned with protecting school children from the influence of unfit teachers. Protection of school children from teachers who have shown evidence of harmful, significant deviation from normal mental health is without question not only a valid legislative concern but one classifiable as a compelling state interest. This being so, the fact that the statute may intrude upon a teacher's rights of association, expression and privacy does not render it unconstitutional. As interpreted by this court, the statute contains sufficient standards to guide the board's action and also offers individual teachers a sufficient indication of what behavior may result in board action.

Plaintiffs have implied that the statute deprives them of due process because it contains no right to a hearing before an examination is ordered. A directive dated February 2, 1972 from the Assistant Commissioner of Education to all County Superintendents states:

> N.J.S.A. 18A:16-2 permits a board of education to require individual psychiatric or physical examination of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal physical (communicable disease) or mental health.
>
> It is important that boards be advised, when necessary, that this statute is construed to mean that any individual of whom such an examination is required should be given the reason or reasons therefore by the board and also the right to be heard by the board before the statute is applied.

Before a teacher is ordered to submit to a psychiatric examination, he is entitled to a statement of the reasons for such examination, cf., Monks v. N. J. State Parole Board, 58 N.J. 238, 249-250 (1971), and to a hearing, if requested, cf., Williams v. Sills, 55 N.J. 178, 186 (1970); R. R. v. Bd. of Ed., Shore Reg. H. S., 109

> N.J. Super. 337, 347-348 (Ch. Div. 1970). The procedure prescribed in the directive if followed would provide adequate due process to teachers. However, the directive is precatory and not mandatory in its terms. The requirement of a statement of reasons and a hearing, if requested, is constitutionally mandated.
>
> N.J.S.A. 18A:16-2 is constitutional. However, when a board of education intends to resort to it and requires a psychiatric examination, it must give to the teacher a statement of its reasons and must afford the teacher a hearing, if requested. It is conceded by the Commissioner that a teacher would have a right to appeal to him from an order for a psychiatric examination under N.J.S.A. 18A:6-9 and thereafter to appeal from an adverse decision by him to the State Board of Education under N.J.S.A. 18A:6-27. With such procedural safeguards the application of N.J.S.A. 18A:16-2 will not violate due process.
>
> [124 N.J. Super. at 211-14 (emphasis added).]

Gish, supra, 145 N.J. Super. 96, also considered N.J.S.A. 18A:16-2 and concluded that it was constitutional as interpreted by Judge Lane.

Mr. Chambers denies that the BOE provided him with a statement of reasons on which it based the direction to submit to a psychiatric examination. However, the BOE's February 24, 1994 letter sets forth numerous incidents, summarized as follows: Chambers left school buildings to which he was assigned without permission and despite warnings not to do so. He yelled at another teacher in front of students. When assigned to teach, he took kindergarten students who were not warmly dressed out to play in the snow and, when parents expressed concern, he laughed. He sang, whistled and talked in a classroom. He made an obscene gesture at another teacher in front of students. He interrupted other teachers' classes. After being notified not to do so, he gave candy to kindergarten students. See BOE-1.

Given the above, Chambers had a "statement of reasons," i.e., reasonable notice of the basis, for the direction that he submit to the psychiatric examination and for the BOE's consideration of whether he was "ineligible for further service until proof of recovery." N.J.S.A. 18A:16-4.

Also, Dr. Kumar's opinion was not framed in terms of reasonable medical certainty or probability and she did not write, e.g., that, with reasonable medical probability, there was "harmful, significant deviation from normal mental health affecting [Chamber's] ability to teach, discipline or associate with children of the age of the children subject to the teacher's control in the school district." N.J.R.E. 702(1); Johnesee v. Stop & Shop Cos., Inc., 174 N.J. Super. 426, 431 (App. Div. 1980); Kochman, supra, 124 N.J. Super. at 212. However, Dr. Kumar did diagnose "Paranoid and Narcissistic Personality traits with obsessive qualities"; she expressed "concerns [that] without adequate treatment, [Chambers'] emotional reactions and personality traits would have a negative impact on his job situation"; and she strongly recommended in-depth psychological testing and individual therapy. BOE-2. Further, Chambers has not denied that he engaged in the conduct described in the February 24, 1994 letter and the letter, together with Dr. Kumar's opinion, although not framed as described above, present sufficient "evidence of harmful, significant deviation from normal mental health affecting the teacher's ability to teach, discipline or associate with children of the age of the children subject to the teacher's control in the school district." Kochman, supra, 124 N.J. Super. at 212. Compare State v. Risden, 56 N.J. 27, 40 (1970) (a non-expert who has observed an individual's conduct may testify, describing such conduct and giving the opinion that the individual was of unsound mind). That is to say, the BOE had good cause for its 1994 and 1997 requests that Chambers submit to a psychiatric examination as provided in N.J.S.A. 18A:16-2. He has unreasonably refused to submit to the latest scheduled examination, and he has presented no proof of recovery. Further, the BOE had sufficient "evidence of harmful, significant deviation from normal mental health affecting the teacher's ability to teach, discipline or associate with children of the age of the children subject to the teacher's control in the school district" such that its determination that Chambers was "ineligible for further service" was not arbitrary, unreasonable or capricious. Kochman, supra, 124 N.J. Super. at 212-213.

In summary, I see no basis in law and/or in fact to compel the BOE to pay Chambers during his ineligibility.

ORDER

I **ORDER** Mr. Chambers' claim **DISMISSED WITH PREJUDICE**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P. O. Box 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 1, 1998
DATE

John R. Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

5/5/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 6 1998
DATE

Barbara A. Kerner
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

Chambers' exhibits:

C-1	Letter of Chambers' former attorney, March 21, 1994
C-2	Letter of BOE's former attorney, March 22, 1994
C-3	Letter of BOE's personnel administrator, February 23, 1994
C-4	Letter of BOE's personnel administrator, June 13, 1994
C-5	Letter of Chambers' former attorney, May 23, 1995
C-6	Letter of Chambers' former attorney, June 21, 1995
C-7	Letter of Chambers' former attorney, December 27, 1995
C-8	Letter of Chambers' former attorney, February 26, 1996
C-9	Letter of BOE's former attorney, March 11, 1996
C-10	Letter of Chambers' former attorney, April 8, 1996
C-10a	Letter of BOE's former attorney, August 28, 1996
C-11	Letter of Chambers' former attorney, August 9, 1996
C-11a	Letter of BOE's former attorney, December 9, 1996
C-12	Letter of Chambers, March 24, 1997

BOE's exhibits:

BOE-1	Letter of BOE's personnel administrator, February 24, 1994
BOE-2	Report of Geetha Kumar, M.D., April 30 and June 4, 1996
BOE-3	Letter of Geetha Kumar, M.D., April 11, 1997
BOE-4	Letter of Chambers' former attorney, May 7, 1997
BOE-5	Letter of Middlesex County Mental Health Clinic, May 29, 1997
BOE-6	Letter of Chambers' former attorney, June 6, 1997
BOE-7	Letter of BOE's former attorney, August 12, 1997
BOE-8	Letter of Chambers, August 22, 1997
BOE-9	Letter BOE's former attorney, October 17, 1997
BOE-10	Letter of Chambers' former attorney, October 23, 1997

BOE-11 Letter of Chambers, October 30, 1997

BOE-12 Letter of BOE's former attorney, November 4, 1997

OAL DKT. NO. EDU 8498-97
AGENCY DKT. NO. 299-8/97

RICHARD CHAMBERS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.[1]

In his exceptions, petitioner asserts that the ALJ erred in concluding that he was ineligible for further service, within the meaning of *N.J.S.A.* 18A:16-4. Citing *Kochman v. Keansburg Bd. of Education.*, 124 *N.J. Super.* 203, 211-212 (Ch. Div. 1973), petitioner argues that such ineligibility, must follow "***a formal finding that [he] exhibits 'harmful, significant deviation from normal mental health affecting [his] ability to teach, discipline or associate with children of the age [of the children subject to his] control in the school district.'" (Petitioner's Exceptions at p. 1) Petitioner reasons that there has never been such an assessment, and he

[1] On May 22, 1998, petitioner filed additional exceptions. Even assuming the exceptions were timely filed in accordance with *N.J.A.C.* 1:1-18.4, which they were not, petitioner may not make submissions to the record on his own behalf, having already elected to be represented by counsel, *N.J.A.C.* 1:1-5.1. All submissions in this matter should be accomplished by and through such legal counsel, absent notification to the Bureau of Controversies and

cannot, therefore, be declared ineligible to teach. Petitioner further contends that there are no facts which support the ALJ's finding that he is disabled within the meaning of *N.J.S.A.* 18A:16-2. (*Id.* at p. 2) Here again, petitioner asserts that there must be a formal psychiatric finding as a predicate to his suspension.

Petitioner next argues that the ALJ erred in finding that he, rather than the Board, carries the burden of proof in this matter, insisting that the Board must show that he is not able to teach. (*Id.* at p. 3) Finally, petitioner avers that, contrary to the ALJ's conclusion, his Petition of Appeal adequately raised a challenge to the Board's finding of ineligibility. (*Id.* at p. 4)

In reply, the Board maintains that the ALJ properly found that petitioner was ineligible for service in accordance with the appropriate legal standards, and correctly recognized the psychiatric evaluation performed by Dr. Kumar. (Board's Reply at p. 2) Moreover, the Board argues that there is a reasonable factual basis for the ALJ's conclusion, given Dr. Kumar's report, and contends that "***Dr. Kumar's opinion, which was not challenged, is consistent with the *Kochman* and *Gish* standards as the ALJ determined.***" (*Id.* at p. 3) Thus, the Board concludes that petitioner is not eligible to teach, and it is not obligated to pay him during his period of ineligibility. (*Id.*)

Further, the Board argues that, contrary to petitioner's assertion, the ALJ made no determination that petitioner was required to submit a psychiatrist's opinion that he is of normal mental health and eligible to teach. Rather, the ALJ found that the Board correctly determined that it had good cause for requiring petitioner to submit to Dr. Kumar's 1994 examination and, more recently, to submit to a reexamination. "The fact that [petitioner] refused, without reason,

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Disputes that petitioner is no longer represented by an attorney. Therefore, the exceptions filed on May 22, 1998 were not considered by the Commissioner in rendering his decision.

to submit to the latest scheduled examination demonstrates that the Board can not return him to service in light of his deviation from normal mental health." (*Id.* at p. 4)

Finally, the Board concurs with the ALJ's view that the within Petition of Appeal did not challenge the Board's determination that he was ineligible for employment, but merely claims that petitioner should be paid during his ineligibility. (*Id.* at p. 5)

Upon careful and independent review of the record in this matter, the Commissioner finds petitioner's exceptions to be without merit, and he concurs with the findings of fact and conclusions of law rendered by the ALJ. Assuming, *arguendo*, that the within Petition of Appeal properly challenged the Board's determination of ineligibility, the Commissioner, like the ALJ, finds the assessment rendered by Dr. Kumar to be a significant and appropriate basis for such finding, pursuant to *N.J.S.A.* 18A:16-4. Further, the Commissioner concurs with the ALJ that petitioner has not demonstrated that he is entitled to be paid during his period of ineligibility.

Accordingly, the initial decision of the ALJ dismissing the within Petition of Appeal is adopted for the reasons expressed therein.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

JUNE 18, 1998
DATE OF MAILING JUNE 18, 1998

263-98

EDU #8498-97
C # 263-98
SB # 70-98

RICHARD CHAMBERS,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, June 18, 1998

For the Petitioner-Appellant, Wills, O'Neill & Mellk (Arnold M. Mellk, Esq., of Counsel)

For the Respondent-Respondent, Sumners, Council, George & Dortch (Thomas W. Sumners, Jr., Esq., of Counsel)

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

November 4, 1998

NOV 06 1998

Date of mailing _____

264-98

264-98

T.B.W., on behalf of minor child, A.W.,	:	
PETITIONER,	:	
V.	:	COMMISSSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning parent sought reversal of residency determination by respondent Board in regard to her daughter, A.W. Respondent Board counterclaimed for tuition reimbursement for the alleged period of ineligible attendance.

In light of testimony of witnesses and documents in evidence, the ALJ concluded that petitioner failed to prove by a preponderance of credible evidence that A.W. was domiciled in Belleville as petitioner did not intend to change her domicile to Belleville or to abandon her old domicile in East Orange. ALJ ordered A.W. removed from the Belleville schools and to pay respondent $31,023.93 in tuition plus an amount calculated at a rate of $44.46 per school day for additional ineligible attendance.

Commissioner adopted initial decision as his own and directed payment of the tuition assessment. Commissioner noted that absent the submission of transcripts, he relied on the credibility determinations of the ALJ. Moreover, the Commissioner noted the scarcity of documents brought to the record by petitioner evidencing that she intended to make Belleville her true, fixed and permanent home, as opposed to a residence which may be temporary in nature.

JUNE 18, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5959-96
AGENCY DKT. NO. 159-5/96

T.B.W. on Behalf of Minor Child, A.W.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,
Respondent.

Renata Wooden, Esq., for petitioner

Frank Pomaco, Esq., and Kelly Ann Guariglia, Esq., for respondent
(Gaccione, Pomaco & Beck, attorneys)

Record Closed March 18, 1998 Decided: April 30, 1998

BEFORE **RICHARD McGILL**, ALJ:

T.B.W. filed a petition with the Commissioner of Education seeking reversal of a residency determination by the Board of Education of the Township of Belleville (respondent) in regard to her daughter, A.W. Respondent counterclaims for tuition reimbursement for the alleged period of non-eligible attendance.

PROCEDURAL HISTORY

The petition in this matter was filed on May 1, 1996, pursuant to the Commissioner's authority to hear and determine controversies concerning the school laws under *N.J.S.A.* 18A:6-9. Respondent filed an answer on May 23, 1996, and the matter was transmitted to the Office of Administrative Law on June 18, 1996, for determination as a contested case. On October 15, 1996, respondent filed a counterclaim for reimbursement of tuition costs, and T.B.W. filed an answer to the counterclaim on October 30, 1996.

After an adjournment at the request of T.B.W. pending completion of a related court proceeding, a hearing was conducted on February 2 and 3, 1998, at the Office of Administrative Law in Newark, New Jersey, and the record closed on March 18, 1998, upon receipt of T.B.W.'s brief.

ISSUE

The issue in this proceeding is whether A.W. is domiciled in the Township of Belleville and therefore eligible to attend respondent's public schools free of charge in accordance with *N.J.S.A.* 18A:38-1.

STIPULATIONS OF FACT

The parties stipulated to the following facts:

1. Petitioner's minor child, A.W., was a pupil in the Belleville school system from September of 1993 to the present. During that time, she attended the Middle School (7th and 8th grade) and the High School (9th, 10th and 11th grade). She is currently in the 11th grade.

2. After its April 8, [1996] meeting and residency hearing, the Board forwarded to the W. family a disenrollment letter, advising them of their right to appeal. They did so, and on May 1, a Petition of Appeal to the Commissioner of Education was perfected. Petitioner's minor child has remained in the district schools for the pendency of this matter.

3. This matter was also the subject of a proceeding in Belleville municipal court. That matter was disposed of via Petitioner's plea to a municipal ordinance violation relative to her submission of a fraudulent document to a public official, *i.e.,* submitting the lease to the Board of Education.

SUMMARY OF EVIDENCE

T.B.W. testified on her own behalf, and she called as witnesses her cousin, F.B., A.W., and Kathleen Myers, who is the parent of another student. Respondent's witnesses included Joseph Ciccone, who is the assistant superintendent, Joseph Petrillo, who is the principal of Belleville High School, Mario Pitteneo, Jr., who is a crossing guard, and Frank Montagna, who is a member of the Belleville Board of Education. The witnesses testified as follows.

a. F.B.

F.B. lives at 114 C. Street in Belleville, and T.B.W. is her cousin. T.B.W. and her daughter, A.W., have lived with F.B. since August 1993, when T.B.W. left her husband due to marital problems. The husband continues to live at 69 F. Road in East Orange. F.B. took T.B.W. and A.W. into her home because they are family.

T.B.W. has given F.B. money to help with various bills and household expenses. T.B.W. always gave F.B. cash. There was never a check or a receipt.

In August 1993, T.B.W. attempted to enroll A.W. in the Belleville school system. A vice principal told T.B.W. that she would need proof of residency. As a result of this conversation, F.B. prepared a lease agreement between herself and T.B.W. The lease provided for a monthly rent of $320 and a security deposit of $480. Both T.B.W. and F.B. signed the lease, and T.B.W. submitted it to respondent as proof of residency for A.W. F.B. admits that T.B.W. never paid rent or security and that they never intended that the document would constitute a valid agreement between them. Rather, it was completed for submission to respondent as proof of residency.

F.B. later completed a notarized letter dated August 23, 1995, attesting that T.B.W. and A.W. live at 114 C. Street in Belleville. This letter was also submitted to respondent. F.B. thought that the letter was adequate proof of residency.

In March 1996, the Construction Official, Robert Dominick, contacted F.B. at the request of respondent to check on A.W.'s residence. On March 28, 1996, the building inspector visited the premises and reported that the house has a basement, a first level and a second level. The first level has a kitchen, a dining room and a living room. F.B. sleeps on a pullout bed in the living room. The second level has three bedrooms. F.B.'s father sleeps in one bedroom, F.B.'s children sleep in twin beds in the second bedroom and T.B.W. and her daughter sleep in the third bed room. A prior visit was conducted in 1995.

In April 1996, F.B. appeared with T.B.W. for a hearing before respondent in regard to A.W.'s residency. The board members wanted proof of residency. T.B.W. produced a driver's license showing her address in Belleville. F.B. did not provide any information at that hearing.

In April 1997, T.B.W. received a letter from Assistant Superintendent of Schools Joseph Ciccone, requesting proof of residency. For renters, the letter requests a notarized affidavit from the landlord and, if available, a currently effective lease including the names of the children. The letter states in bold face: "No other proofs will be accepted."

F.B. went to the Belleville Municipal Court with T.B.W. T.B.W. pled guilty to a violation of an ordinance for providing false information.

b. Kathleen Myers

Kathleen Myers has known A.W. since 1993. Myers' daughter and A.W. were friendly while in the middle school and more so in high school, where they played basketball together. The basketball season ran from November to February. There were three games per week and practice every other day, including Saturdays. Myers picked up her daughter and A.W. after the game or practice. Myers always drove A.W. to 114 C. Street and never took her to East Orange. Myers lives about one mile from 114 C. Street. Myers has little contact with A.W. outside basketball season.

c. T.B.W.

T.B.W. testified that she has resided at 114 C. Street in Belleville with her cousin F.B., since August 1993. T.B.W. and A.W. have one room in the seven-room residence and share the other rooms. F.B. and her two teenagers also live in the residence.

Prior to 1993, T.B.W. lived with her husband whom she married in 1991 and A.W. at 69 F. Road in East Orange for a period of two years. T.B.W. paid $5,000 toward the down payment on the single-family house, which is owned by T.B.W. and her husband. T.B.W.'s husband is A.W.'s father. T.B.W. did not change her name when she married.

T.B.W. separated amicably from her husband in early 1993 with no official action. There was no divorce, and there were no court orders in regard to support or custody of A.W. T.B.W.'s husband sends her money to support A.W., but T.B.W.

receives no support for herself. T.B.W. does not pay the mortgage on the house in East Orange. T.B.W. expects to get her money back when the house is sold.

T.B.W. did not change her address for any purpose after moving to Belleville. She continued to use her address in East Orange on her driver's license, car insurance and tax returns. She did not report a change of address to her employer or to the Post Office. Her driver's license continued to show her name as "T.B." as well as the address in East Orange. Since the separation was amicable, T.B.W. continued to receive her mail at the address in East Orange.

T.B.W. previously lived at another address in East Orange and prior thereto in Irvington. T.B.W. changed her address at the time of both of those moves.

T.B.W. enrolled A.W. in the Belleville school system in September 1993. T.B.W. was required to submit three items from a list of six as proof of residency. One item on the list was a lease. One of respondent's representatives told T.B.W. that if two families live together, there must be payment of rent. As a result, T.B.W. and F.B. signed the lease which was to constitute proof of residency. The amounts for the rent and security deposit were not accurate, but T.B.W. did provide a comparable amount of money to help with bills and other expenses. T.B.W. still does not pay a fixed amount of rent. In January 1998, T.B.W. gave F.B. $600 in cash.

In 1995, T.B.W. received a form from the school district requiring proof of residency. T.B.W. provided the notarized letter dated August 23, 1995, from F.B. as proof of residency.

Zoning officials visited the premises in 1995 and in 1996. T.B.W. works during the daytime and was not at home at the time of the visits. F.B.'s father was at home at the time of the visit in 1995. The official walked through the house and checked the closets. T.B.W. spoke with Robert Dominick at his office about the visit, but she never saw any report. F.B. was at home at the time of the visit in 1996. T.B.W. was never informed that there was anything illegal about the residence.

Respondent scheduled a hearing from April 8, 1996, and advised T.B.W. to provide documentation of her residency. At the hearing, T.B.W. provided a driver's license, which was issued on April 2, 1996, to T.B.W., who was using the name T.L.B. The address was 114 C. Street in Belleville. T.B.W. acknowledged that she submitted the change of address on her driver's license in order to create proof of residency for the hearing. She would not otherwise have submitted the change of address.

Later, T.B.W. had a telephone installed in order to create proof of residency. T.B.W. submitted a bill dated January 16, 1997, in the name of T.W. at 114 C. Street in Belleville. A telephone bill was another of the items on the list provided by respondent. F.B. had another telephone in the residence.

T.B.W. states that all of her mail now is delivered to 114 C. Street in Belleville. T.B.W. further states that she changed everything in 1996.

T.B.W. has a full-time job and uses her funds to support her daughter. T.B.W. travels on business two or three times per year for periods of three to five days. During these trips, A.W. stays with her father. A.W. also spends every weekend with her father. As a result, it is not unusual for A.W. to travel to her father's home. After respondent's representative followed A.W. at her father's home one day, T.B.W. explained to Principal Joseph Petrillo that A.W. was visiting her father.

T.B.W. appeared in Belleville Municipal Court in regard to the lease which she submitted to respondent. T.B.W. pled guilty to a charge that she provided false information about the lease.

d. A.W.

A.W. testified that she has lived with her mother and cousins at 114 C. Street in Belleville since the summer of 1993. A.W. and her mother share a bedroom. Her